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FETAL ABUSE PROSECUTIONS: THE TRIUMPH OF REACTION OVER REASON

Michelle D. Mills

INTRODUCTION

The use and abuse of increasingly dangerous illicit drugs¹ has risen dramatically in recent years, creating a nationwide “war on drugs.”² Pregnant women are not immune to the allure of these substances; approximately eleven percent of pregnant women ingest some type of illegal drug during their pregnancies.³ Although studies do not agree on a figure, as many as 100,000 to 375,000 infants each year are born after being exposed to some type of drug in the womb.⁴ This trend

1. The term “illicit drugs” includes all manner of statutorily-defined controlled substances. See, e.g., 21 U.S.C.A. §§ 801-12 (West 1981 & Supp. 1997).

2. Stephen R. Kandall & Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L.J. 615, 615 (1992).

3. Derk B.K. VanRaalte IV, Note, *Punitive Policies: Constitutional Hazards of Non-Consensual Testing of Women for Prenatal Drug Use*, 5 HEALTH MATRIX 443, 443-44 (1995) (citing a 1990 survey of public and private hospitals performed by the American Academy of Pediatrics, which found that 11% of new mothers used controlled substances during their pregnancies).

4. Nancy J. Bennett, *Drug Exposed Newborns: Alternatives to Punitive Sanction of the Mother—A Coordinated Response*, 24 J. HEALTH & HOSP. L. 182, 185 (1991). The 1989 National Drug Control Strategy estimates that there are 100,000 cocaine-exposed newborns each year, and the National Association for Perinatal Addiction Research and Education (“NAPARE”) claims 375,000 infants are born drug-exposed. *Id.* A survey of hospital discharges performed by the National Center for Health Statistics found that less than 14,000 drug-exposed infants are born each year. *Id.* The discrepancies result from the sample used in the survey and whether the hospitals tested for multiple substances; higher numbers generally result when women and newborns are universally tested for exposure to many different drugs. *Id.* The Center for Health Statistics survey, for example, was conducted in hospitals that did not routinely test all women and infants. *Id.*; see also Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 647 (1992) (indicating that the 100,000 figure did not include prenatal exposure to heroin, methamphetamine, or phencyclidine (PCP)); Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER & L. 105, 107 (1995) (citing a study claiming as many as 739,000 drug-exposed infants are born each year). *But see* Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 948-49 (1997). Roberts criticized the media after an examination of articles citing the NAPARE figures revealed that most had exaggerated or misinterpreted the statistics. *Id.* The study’s numbers included any amount of exposure to any drug for any length of time, but many articles extrapolated the statistics to mean that all 375,000 infants were actually harmed and/or exposed to cocaine. *Id.* In fact, the study did not indicate that all 375,000 suffered any injury and revealed that only 50,000 to 100,000 infants were specifically cocaine-exposed. *Id.*

shows no signs of slowing down. One commentator has estimated that by the year 2000, well beyond 500,000 cocaine-exposed infants will be born each year in this country alone.⁵

Public outrage at the problem has been fueled by dramatic descriptions of "crack babies" that have been widely reported in the media.⁶ Drug-exposed infants are believed to be prone to a wide variety of severe health problems.⁷ The nation's anger at this problem has both moral and economic components. From a moral standpoint, it seems outrageous that a mother would force a newborn to become a drug addict from its first moments on earth. Once an innocent child is affected, drug abuse is no longer a "victimless crime."⁸ Purely economic issues have also added to the public outcry. Many drug-exposed children are from poor families,⁹ so the health and learning problems they may face in the future will be funded in large part by taxpayers.¹⁰

The government's response to this crisis has been nearly identical to its answer to other drug-related problems: increased prosecutions under current laws and a call for new legislation.¹¹ Since the early 1980s, more than 200 women in over 30 jurisdictions have been prose-

5. Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393, 394 (1993) (claiming that the number of cocaine-exposed newborns each year may be anywhere between 500,000 and 4,000,000).

6. See Rick DeVecchio, *Child Victims of Crack—An S.F. Crisis*, S.F. CHRON., Oct. 16, 1989, at A11, available in LEXIS, News Library, Sfchrn File; Barbara Kantrowitz, *The Crack Children*, NEWSWEEK, Feb. 12, 1990, at 62; Anastasia Toufexis, *Innocent Victims*, TIME, May 13, 1991, at 56.

7. See *infra* Part I.B.1 for a discussion of the effects of prenatal cocaine exposure.

8. Drug use, like gambling and prostitution, is often defined as a "victimless crime." See *Measuring Crime: A Shadow on Society*, ECONOMIST, Oct. 15, 1994, at 21.

9. Ira Chasoff 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). Although drug use is relatively equal across economic and racial lines, poor and minority women are more likely to use cocaine, the drug most frequently tested and reported. *Id.*; see also *infra* Part III.B (discussing how this discrepancy may violate equal protection).

10. Spencer, *supra* note 5, at 401. In 1990, the cost of medical care for cocaine-exposed infants was estimated at over \$500 million as a result of delivery complications and long stays in intensive care. *Id.* Because many of these children are uninsured, the government pays most of these costs. *Id.* at 401-02. Furthermore, these children may require special education, which can cost an additional \$8000 per year per student. Linden, *supra* note 4, at 108. In Senator Pete Wilson of California's proposed Child Abuse During Pregnancy Prevention Act of 1989, he estimated that the cost of caring for these infants is over \$13 billion annually, a figure which is not corroborated by any empirical studies. Child Abuse During Pregnancy Prevention Act of 1989, S. 1444, 101st Cong., § 3(b) (1989).

11. See Nancy K. Schiff, *Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197 (1991). States that have proposed legislation making it a felony to give birth to a drug-addicted child include Colorado, Georgia, Louisiana, and Ohio. *Id.* An act that would give federal grants to states for treatment programs was proposed in the United States Senate but was not enacted. See Child Abuse During Pregnancy Prevention Act of 1989, S. 1444.

cuted for ingesting drugs while pregnant.¹² States have charged these women under very broad interpretations of current child abuse and drug trafficking statutes.¹³ Nearly all of these proceedings failed to end in convictions¹⁴ because most courts have refused to include a fetus as a "child" under the statutes.¹⁵ A possible result of this failure is the slightly more moderate stance states have adopted since 1990.¹⁶ Currently, the majority of states do not automatically consider a newborn with drugs in his or her system an abused child for the purposes of criminal prosecution.¹⁷ Nevertheless, attempted prosecutions have not vanished and may in fact be on the upswing.¹⁸

The problem of drug-exposed infants is clearly tragic and overwhelming. The desire of prosecutors, judges, and legislators to act upon it is understandable and commendable. Prosecuting women criminally for this behavior, however, is a knee-jerk reaction to a problem that instead requires intense reason. In its rush to punish these women, the judiciary has overlooked obvious and fatal flaws inherent in this course of action. Criminal prosecution for fetal abuse under current child abuse statutes is clearly unconstitutional and contrary to legislative intent. Moreover, even laws specifically tailored to fetal abuse are susceptible to constitutional challenges and serious logical failings.

12. See Kandall & Chavkin, *supra* note 2, at 639 (claiming about 50 prosecutions through 1991); Louise Marlene Chan, *S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 *FORDHAM URB. L.J.* 199, 201-02 (1993) (citing over 160 criminal proceedings through the end of 1992); Spencer, *supra* note 5, at 394 (indicating approximately 180 arrests through 1993); Lynn Smith, *Punish or Protect?*, *L.A. TIMES*, Sept. 3, 1996, at E1 (reporting that more than 200 women in over 30 states have been arrested and charged).

13. Charges have included drug possession, drug distribution, delivery of a controlled substance to a minor, criminal child abuse, and criminal child neglect. See Spencer, *supra* note 5, at 394; VanRaalte, *supra* note 3, at 451; *infra* Part I.A.

14. By the late 1980s, 167 women had been convicted of some type of fetal abuse; 21 of them appealed and all their convictions were successfully overturned. Veronique Mistiaen, *Legal Haze: Is Drug Use During Pregnancy Child Abuse?*, *CHI. TRIB.*, Oct. 11, 1992, (Womanews), at 1. To date, the only prosecution under an existing child abuse statute to withstand state supreme court scrutiny is *Whitner v. State*, discussed in detail in Part II, *infra*.

15. See, e.g., *People v. Morabito*, 580 N.Y.S.2d 843, 846 (City Ct. 1992) ("[W]hen our Legislature enacts laws concerning unborn children, it says so explicitly . . . The statute herein [Endangering the Welfare of a Child] restricts its application to children in being.").

16. See Marilena Lenczewicz, *Don't Crack the Cradle: Minnesota's Effective Solution for the Prevention of Prenatal Substance Abuse—Analysis of Minnesota Statute Section 626.5561*, 63 *REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO* 599, 605 (1994) (noting that prosecutions had decreased and no new legislation had been passed since 1992).

17. Memorandum from the Women's Rights Project of the ACLU, Update of State Legislation Regarding Drug/Alcohol Abuse During Pregnancy (Aug. 10, 1994) (on file with the *DePaul Law Review*).

18. *Infra* Parts I.A.2 and II.

Part I of this Comment gives an overview of the legal background of fetal abuse prosecutions and the science of fetal harm. Part II examines the important case of *Whitner v. State*,¹⁹ in which the Supreme Court of South Carolina upheld a fetal abuse prosecution. Part III explores some of the constitutional implications of prosecution, including the difficulty of reconciling fetal abuse laws with the right of reproductive freedom as well as equal protection concerns. Part IV discusses the impact of allowing fetal abuse prosecutions to continue.

I. BACKGROUND

A. *The Development of Fetal Abuse Prosecutions*

1. *The Evolution of Fetal Rights*

Under the common law, fetuses had no rights, so injury or death caused by third parties could not be vindicated in tort.²⁰ In the middle of the century, however, courts determined that third-party injury to a viable fetus implicated an interest that may be actionable, and every jurisdiction allowed such an action by 1972.²¹ A few years after the rights of a viable fetus were recognized, courts began expanding the doctrine by concluding that fetuses have rights even before viability.²² States have also enacted legislation holding third parties criminally liable for causing injury to fetuses.²³ Recently, fetal rights have been acknowledged in domestic courts.²⁴ This expansion of fetal rights vis-

19. 492 S.E.2d 777 (S.C. 1997).

20. See *Allaire v. St. Luke's Hosp.*, 56 N.E. 638, 640 (Ill. 1900); *Newman v. City of Detroit*, 274 N.W. 710, 711 (Mich. 1937); *Drobner v. Peters*, 133 N.E. 567, 568 (N.Y. 1921).

21. See Renee I. Solomon, Note and Comment, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 412 (1991) (noting also that *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), was the first case to allow an action for negligence resulting in prenatal injury); see also Stacey L. Best, Comment, *Fetal Equality? The Equality State's Response to the Challenge of Protecting Unborn Children*, 32 LAND & WATER L. REV. 193, 198-200 (1997) (discussing the courts' increasing acknowledgment of fetal rights).

22. See Best, *supra* note 21, at 198-201 (citing *Sinkler v. Kneale*, 164 A.2d 93 (Pa. 1960); *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966)). The point at which a wrongful death action may be maintained varies by state. For example, in Georgia, fetuses have rights at quickening (fetal movement), which occurs at approximately the fourth month of pregnancy; in Missouri, however, "the life of each human being begins at conception" and parents "have protectable interests in the life, health and well-being of their unborn child." Aaron Epstein, *Do Fetuses Have Rights?*, TAMPA TRIB., Aug. 4, 1996, (Nation/World), at 12, available in LEXIS, News Library, Tamtrb File. In South Dakota, a woman was allowed to sue for her miscarriage seven weeks into her pregnancy due to salmonella poisoning. *Id.* The court reasoned that the state legislature "clearly intended to encompass nonviable children in the term 'unborn children' [in the wrongful death statute]." *Id.*

23. See, e.g., 720 ILL. COMP. STAT. 5/12-4.4 (West 1997) (making aggravated battery of a fetus a Class 2 felony); see also Solomon, *supra* note 21, at 413 & n.6 (listing 18 state feticide statutes).

24. Solomon, *supra* note 21, at 413. For example, one court found that a "fetus is a person for the purpose of issuing a protective order." *Id.* (citing *Gloria C. v. William C.*, 476 N.Y.S.2d 991

à-vis third parties has had an interesting result: third parties have monitored mothers' behavior out of fear of liability.²⁵

In tort law, jurisdictions are split regarding the rights of a fetus against its mother. One line of cases has refused to recognize a fetus as a separate being whose mother has a concrete legal duty to ensure the best possible prenatal environment for her child.²⁶ These decisions expressed the fear that recognizing a cause of action by a fetus against its mother may expose her to liability for "any act or omission on her part"²⁷ which may negatively impact her child. Courts in this line are also unwilling to accept the consequences of creating a legally adversarial relationship between mother and child from the moment of conception.²⁸

Other courts have expanded upon the right of recovery by a newborn or its parents against third parties who inflict prenatal injuries upon the fetus.²⁹ These cases allow children to bring a negligence action against their mothers, just as they may against any other negligent third party, concluding that "a child has a legal right to begin life with a sound mind and body."³⁰ This argument has also been used to justify forcing pregnant women to undergo medical treatment, such as caesarean sections and cervical surgery, to prevent obstetrical complications and fetal injury.³¹ Several courts and prosecutors have used this type of analysis to again expand a mother's liability, this time in the criminal arena.³²

(Fam. Ct. 1984)). The court further stated that the decision "in no way conflicts with [the woman's] privacy right to freely decide what to do with her pregnancy." *Id.*

25. See Robb London, *Two Waiters Lose Jobs for Liquor Warning to Woman*, N.Y. TIMES, Mar. 30, 1991, § 1, at 7. One woman, for example, was refused an alcoholic drink at a restaurant because she was pregnant; the waiters who would not serve the woman were fired. *Id.* A woman's health club revoked her membership when the club found out she was ten weeks pregnant. Solomon, *supra* note 21, at 420. The revocation implied that the club was fearful of liability, but the club claimed it was concerned for the fetus, even though the woman, an experienced bodybuilder, regularly consulted her obstetrician. *Id.*

26. See, e.g., Stallman v. Youngquist, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a cause of action by an infant against her mother for prenatal injuries sustained in an auto accident); Cullotta v. Cullotta, 678 N.E.2d 717, 718 (Ill. App. Ct. 1997) (holding that an infant does not have a cause of action against his deceased mother for injuries suffered in utero).

27. Stallman, 531 N.E.2d at 359.

28. *Id.*

29. See, e.g., *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971) (recognizing a child's right to bring suit against one who negligently inflicts prenatal injuries).

30. *Grodin v. Grodin*, 301 N.W.2d 869, 870 (Mich. Ct. App. 1980) (holding that a fetus has a cause of action against its mother for negligently taking tetracycline during pregnancy, resulting in discoloration of the child's teeth); see *Bonte v. Bonte*, 616 A.2d 464, 466 (N.H. 1992) (finding a mother liable to her child for negligently crossing the street, causing prenatal injuries).

31. See Solomon, *supra* note 21, at 413-15 ("Forced medical treatment has paved the way for shocking numbers of prosecutions of pregnant women.").

32. See *infra* Part I.A.2.

2. *The Growth of Fetal Abuse Prosecutions*

One of the earliest prosecutions of a pregnant woman for ingesting drugs occurred in *Reyes v. Superior Court*,³³ where a pregnant heroin user was charged with felony child endangerment.³⁴ The defendant was warned by a nurse of the dangers of continued use of heroin and failure to seek prenatal care, but she ignored the advice.³⁵ Her twin sons were born addicted to heroin and suffered withdrawal symptoms.³⁶ Nevertheless, the proceedings were dismissed by the appellate court, which refused to find that the endangerment statute protected a fetus.³⁷ The court reasoned that the statute's use of the word "child" excluded unborn children from its application, and that the law was clearly intended to ensure that parents care for their children, not their fetuses.³⁸

Subsequent prosecutions under child abuse and endangerment statutes were also unsuccessful for several reasons.³⁹ First, courts concluded that a fetus does "not become a 'child' within the contemplation of the [child endangerment] statute until she [is] born."⁴⁰ Second, the application of the statute in the fetal abuse context was inconsistent, which led to problems of proper notice.⁴¹ The broad wording of child abuse and endangerment statutes also alarmed courts, because "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."⁴² Finally, courts overturning fetal abuse convictions found that legislatures did not intend to protect fetuses under child abuse stat-

33. 75 Cal. App. 3d 214 (Ct. App. 1977).

34. *Id.* at 216.

35. *Id.*

36. *Id.*

37. *Id.* at 219.

38. *Id.* at 217-19.

39. *See, e.g., State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (finding it against the state's public policy to consider a fetus a child for the purposes of the aggravated child abuse statute); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (holding that if the criminal abuse statute were to include injury to fetuses, it would be impermissibly vague); *Sheriff v. Encoe*, 885 P.2d 596, 599 (Nev. 1994) (holding that the child endangerment statute does not apply to the transmission of controlled substances through the umbilical cord after delivery); *State v. Gray*, 584 N.E.2d 710, 711-12 (Ohio 1992) (holding that the criminal child endangerment statute was not meant to apply to fetuses).

40. *Gray*, 584 N.E.2d at 711.

41. *Welch*, 864 S.W.2d at 283 ("The 'case-by-case' approach suggested by the Commonwealth is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; they lack fair notice . . .").

42. *Id.* (quoting *Commonwealth v. Kemp*, No. 2707 C 1991, slip op. at 12 (Ct. C.P. Westmoreland Co., Pa. Crim. Div. 1991)).

utes.⁴³ These decisions seemed to warn prosecutors that such statutes should not be used to prosecute pregnant women for drug use without the requisite legislative intent.⁴⁴

Because all prior attempts at prosecution under child abuse laws were unsuccessful, an extremely clever legal fiction was advanced to charge pregnant abusers with delivery of a controlled substance to a minor.⁴⁵ These women were charged with delivering the drug from their bodies to the infant through the umbilical cord for the few seconds after birth before the cord was cut.⁴⁶ Although these prosecutions allowed states to avoid defining a fetus as a child, they have also been unsuccessful.⁴⁷ Courts have determined that prosecutions using drug delivery statutes provide insufficient notice and are contrary to legislative intent.⁴⁸ First, no woman who ingests drugs while pregnant could realistically expect to be charged with this crime.⁴⁹ A state must give notice that an act is prohibited before it may enforce a criminal law,⁵⁰ and courts are unwilling to expand a law where notice is not clear.⁵¹

Second, the legislative history of these laws indicates that lawmakers did not reasonably expect the statutory definition of "delivery" to include such a brief, involuntary act.⁵² One court found that

43. *Id.* at 282 (citing the opinion of the court of appeals) ("The courts cannot presume a legislative intent to expand the class of persons treatable as victims of criminal activity."); *Encoe*, 885 P.2d at 599 ("We conclude that the legislature's examination of this issue and its subsequent silence indicates that prenatal drug use [should] not be criminally prosecuted."); *Gethers*, 585 So. 2d at 1141-42 (finding that the legislature's choice of words in the statute "avoids any unintended granting of legal status to the unborn").

44. See Chan, *supra* note 12, at 211.

45. See, e.g., FLA. STAT. ch. 893.13 (1989) (making it a first degree felony for one over 18 years of age "to deliver any controlled substance to a person under the age of 18 years").

46. See *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992); *People v. Hardy*, 469 N.W.2d 50, 51-52 (Mich. Ct. App. 1991). Another case did not use the "post-delivery" theory and charged the defendant for drug delivery during pregnancy. *State v. Luster*, 419 S.E.2d 32, 33 (Ga. Ct. App. 1992).

47. See, e.g., *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991).

48. See *infra* notes 52-55 and accompanying text.

49. See, e.g., *Luster*, 419 S.E.2d at 33 (holding that the defendant could not have anticipated being prosecuted for delivering cocaine to her unborn child by ingesting it, which conflicts with the statutory "fair warning" mandate).

50. See *Hardy*, 469 N.W.2d at 52 ("[A] penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties.") (citation omitted).

51. See *Luster*, 419 S.E.2d at 34-35 ("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." (quoting *Waldroup v. State*, 30 S.E.2d 896 (Ga. 1944))).

52. *Johnson*, 602 So. 2d at 1290; see also Chan, *supra* note 12, at 212 (explaining the inappropriateness of prosecuting women under such "pure use" statutes).

the legislature's consideration and rejection of criminal penalties for prenatal substance exposure was persuasive evidence that the drug delivery law was not meant to apply in these situations.⁵³ The lack of legislative intent supporting a broad reading of the drug delivery laws was critical, because this area of law has been traditionally within the competence of the legislature.⁵⁴ Courts are generally averse to expanding a criminal statute without legislative backing.⁵⁵

Other cases that were dismissed before a conviction was obtained demonstrate prosecutors' willingness to stretch the reach of legislation not intended to apply to fetuses. Pamela Stewart-Monson's drug use during her pregnancy led to a potentially life-threatening condition for her unborn child; the woman was advised to rest and get immediate medical attention if she began to hemorrhage.⁵⁶ She disregarded the doctor's advice and her child was born with massive brain damage, dying less than six weeks later.⁵⁷ The mother was charged with "neglecting the infant after its birth, with using drugs on the delivery day and with failing to rest and seek help for her hemorrhaging."⁵⁸ The charges were later dropped.⁵⁹

In 1990, Diane Pfannenstiel was charged with felony child abuse for drinking while she was four and one-half months pregnant.⁶⁰ This was a landmark case because "it was the first time that a woman was charged with child abuse, rather than fetal abuse, before there was a live child and for engaging in a legal activity."⁶¹ The prosecutor felt

53. *Johnson*, 602 So. 2d at 1293-94.

54. *See Hardy*, 469 N.W.2d at 53 ("A court should not place a tenuous construction on this statute to address a problem to which legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation.") (quoting *People v. Gilbert*, 324 N.W.2d 834 (Mich. 1982)).

55. *Id.* at 52 ("It is well settled that penal statutes are strictly construed, absent a legislative statement to the contrary.") (citation omitted).

56. Solomon, *supra* note 21, at 415; *see also* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 505-06 (1992) (describing Pamela Stewart-Monson's case).

57. Solomon, *supra* note 21, at 415.

58. *Id.*; *see also* Oberman, *supra* note 56, at 505-09 (discussing the emotional reaction this case engenders and why that emotion should not control the state's response).

59. Solomon, *supra* note 21, at 415.

60. *Id.* at 416.

61. *Id.* In 1996, Deborah Zimmerman was charged with attempted murder for drinking while pregnant. Don Terry, *In Wisconsin, A Rarity of a Fetal-Harm Case*, N.Y. TIMES, Aug. 17, 1996, at A6. Although her child was born with severe fetal alcohol syndrome, Zimmerman was primarily charged as a result of a statement she made to the hospital staff during her labor: "I'm just going to go home and keep drinking and drink myself to death, and I'm going to kill this thing because I don't want it anyways [sic]." *Id.*; *see also* Nancy Grace, *Is the Prosecution of "Fetal Endangerment" Illegitimate?*, 82 A.B.A. J., Dec. 1996, at 72, 73 (arguing that Zimmerman's statement distinguishes her case from those of other mothers who abuse alcohol).

the charge was necessary because "prosecutors should not have to wait until a child is born with defects to act to protect it."⁶² The prosecutor was apparently not motivated by the same logic to charge the woman's husband with child abuse. Pfannenstiel had gone to the hospital, where her blood-alcohol level was measured, to seek treatment after being beaten by her spouse.⁶³ Charges against Pfannenstiel were later dismissed by a judge who determined that the State could not show probable cause that her fetus was harmed by her behavior.⁶⁴

3. *Other Responses to Prenatal Drug Use*

Many states have legislation concerning drug use during pregnancy, but most of these statutes are aimed at identifying those in need of welfare intervention, not criminal sanctions.⁶⁵ Another way states have tried to combat the problem of prenatal drug use is to give the pregnant drug user a type of prosecutorial immunity if she agrees to enter treatment. Minnesota, for example, has implemented legislation that allows local welfare agencies to intervene if any woman is reported to be pregnant and using controlled substances.⁶⁶ The statute authorizes civil commitment for any woman who "refuses recommended voluntary services or fails recommended treatment."⁶⁷ A similar program in the city of Charleston, South Carolina, has been diligent in its mission to identify pregnant drug users.⁶⁸ Guidelines were written for all doctors to obtain consent to drug test pregnant patients whom the doctors suspected were using drugs.⁶⁹ Positive results were reported to the authorities, who prosecuted women that refused free treatment.⁷⁰

62. *Pregnant Woman is Charged with Child Abuse for Drinking*, N.Y. TIMES, Jan. 22, 1990, at B8.

63. Best, *supra* note 21, at 207-08 (citation omitted).

64. *Case Against Pregnant Woman is Dismissed*, N.Y. TIMES, Feb. 3, 1990, § 1, at 10.

65. See, e.g., Best, *supra* note 21, at 207 & n.100 (listing several state statutes authorizing welfare investigation of pregnant drug users).

66. See MINN. STAT. ANN. § 626.5561 (West 1997); see generally Lencewicz, *supra* note 16 (describing the Minnesota statute).

67. MINN. STAT. ANN. § 626.5561. Even this intermediate course of action is essentially a state determination that a fetus has cognizable rights under the law. See MINN. STAT. ANN. § 253B.02, subd. 13 (West 1989) ("Civil commitment is sought only if . . . [there is a] substantial likelihood of . . . harm to self or others as demonstrated by . . . an attempt or threat . . . of harm to self or others . . ."); see also Lencewicz, *supra* note 16, at 624 ("The individual must present a substantial threat to him/herself or to another in order to justify involuntary civil commitment by the state." (citing *Humphrey v. Cady*, 405 U.S. 504, 509 (1972))).

68. Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13.

69. *Id.*

70. *Id.*; see also Roberts, *supra* note 4, at 941-44 (describing the Charleston experiment).

As one court that overturned a fetal abuse conviction noted, “[public health] experts unanimously oppose prosecution for prenatal abuse.”⁷¹ Health experts instead conclude that a “coordinated multidisciplinary approach in the development of a plan without criminal sanctions has the best chance of helping children and families.”⁷² This approach includes prevention education, early intervention, and available, effective treatment programs.⁷³ Despite the universal call for such programs, no state has implemented a treatment scheme that does not also allow for civil commitment or criminal sanctions, even though the recommended programs may work better.⁷⁴ At least one local municipality, however, seems to be more sensitive to the need for a different approach. In Albuquerque, New Mexico, a neonatologist and the district attorney developed an alternative sentencing plan for women arrested for drug charges and then found to be pregnant.⁷⁵ This program allows these women to forego criminal sanctions for the drug offense and instead enter “a drug treatment program that is

71. *Commonwealth v. Welch*, 864 S.W.2d 280, 284 (Ky. 1993). Many major public health organizations have publicly denounced criminal sanctions for prenatal drug use. See Committee on Substance Abuse, *Drug-Exposed Infants*, 86 PEDIATRICS 639, 640 (1990); Law & Medicine/Board of Trustees Representative, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2670 (1990); Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406, 408 (1992); American Nurses Association, Position Statement on Opposition to Criminal Prosecution of Women for Use of Drugs While Pregnant & Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age (1991) (on file with the *DePaul Law Review*); American Public Health Association, *Illicit Drug Use by Pregnant Women*, Public Policy Statement Adopted at its 118th Annual Meeting (1990) (on file with the *DePaul Law Review*) [hereinafter APHA Report]; American Society of Addiction Medicine, Inc., Public Policy Statement on Chemically Dependent Women and Pregnancy, at 47 (Sept. 25, 1989) (on file with the *DePaul Law Review*); National Association of Public Child Welfare Administrators, *Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response 1* (Jan. 1991) (on file with the *DePaul Law Review*) [hereinafter APWA Report].

72. Committee on Substance Abuse, *supra* note 71, at 640.

73. See American Society of Addiction Medicine, Inc., *supra* note 71, at 47; see also APHA Report, *supra* note 71 (recommending further that treatment facilities develop outreach programs); Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 JAMA 1556, 1560 (1991) (noting that treatment facilities should be readily available and appear welcoming and useful to clients). Another commentator has stressed that multiple services must be made available in a single location, “because keeping appointments in different sites is difficult for all mothers with young babies, and especially those using drugs.” Mayes et al., *supra* note 71, at 408.

74. “Research has focused only on the effect of drugs and alcohol on the fetus, rather than on preventing and treating drug and alcohol abuse before a woman becomes pregnant. This approach ignores the causes and focuses only on the result, which does nothing to stop harm to future fetuses.” Best, *supra* note 21, at 197.

75. Wendy Chavkin & Vicki Breitbart, *Reproductive Health and Blurred Professional Boundaries*, 6 WOMEN'S HEALTH ISSUES 89, 94 (1996).

geared to families with young children and run by the [hospital's] pediatrics department."⁷⁶

B. *The Science of Prenatal Harm*

An examination of the scientific evidence of prenatal harm is necessary because "[g]ood science is needed to make sound clinical and public policy decisions."⁷⁷ Conclusive evidence of cocaine's effects is not available, yet many states have already presumed that "crack babies" are permanently damaged and have implemented prosecutorial policies based on incomplete science.⁷⁸

1. *Prenatal Exposure to Cocaine*

Medical problems associated with prenatal exposure to cocaine are not well defined, but are said to include tremulousness, irritability, low birth weight, and stiff motor movement.⁷⁹ Other dangers may include small strokes and deficient limb development and kidney structure.⁸⁰ Delivery complications are also associated with cocaine use, including *abruptio placentae* (premature detachment of the placenta) and an increased risk of premature labor and delivery.⁸¹ Children born exposed to cocaine may also be more prone to behavioral problems in early childhood.⁸² Studies investigating the existence of cocaine-induced harms, however, are not conclusive for several reasons.

For example, despite the media's immediate acceptance of the fact that drug-using mothers inevitably give birth to "crack babies," very little documentation shows that cocaine exposure necessarily results in trauma to the newborn.⁸³ The amount of scientific evidence is limited,

76. *Id.*

77. Mayes et al., *supra* note 71, at 408.

78. *See id.*

[W]e recommend a suspension of judgment about the developmental outcome of cocaine-exposed babies until solid scientific data are available. Whatever the damage from prenatal exposure to cocaine may prove to be, outcome will not be improved by an attitude that assumes that exposed children cannot be helped or that they are different from other children.

Id.

79. *See* Bennett, *supra* note 4, at 183; Committee on Substance Abuse, *supra* note 71, at 639-40 (noting that these infants do not exhibit clear withdrawal symptoms, but may show irritability, lethargy, and "an inability to respond appropriately to stimulation").

80. Howard, *supra* note 4, at 654.

81. *See* VanRaalte, *supra* note 3, at 445; Committee on Substance Abuse, *supra* note 71, at 639.

82. Smith, *supra* note 12, at E1 (quoting Dr. Ira Chasnoff, a noted prenatal addiction researcher).

83. *See* Committee on Substance Abuse, *supra* note 71, at 640 ("Many [cocaine-exposed infants], however, seem to have no specific clinical manifestations in the early neonatal period.").

and the studies that exist may be methodologically unsound.⁸⁴ Moreover, "cocaine-using women often experience an uncomplicated labor and delivery."⁸⁵ The worst-case scenario studies are more well-known because research showing negative effects of prenatal drug exposure is more likely to be accepted for presentation and publication than studies showing no impairment, "even though the rejected papers with negative findings tended to be methodologically more rigorous."⁸⁶

The occasional poor outcomes of drug-exposed children may be caused by a number of other factors accompanying cocaine use, including sexually transmitted diseases, drinking, smoking, use of other drugs, and limited prenatal care.⁸⁷ Environmental factors also negatively impact these children's development. Drug-exposed infants' irritability makes the mother-child bonding period difficult, which could lead to later behavioral problems.⁸⁸ Children raised in drug-addicted families may endure emotional neglect and suffer from poor nutrition.⁸⁹ Furthermore, a Columbia University study found that mothers receiving welfare are three times more likely to be drug addicted than are mothers not receiving welfare.⁹⁰ While the actual numbers of drug-exposed children living in poverty are elusive, the effects of poverty, a key factor in unhealthy pregnancies and infants, are seen in the

84. Mayes et al., *supra* note 71, at 406.

[A]vailable evidence from the newborn period is far too slim and fragmented to allow any clear predictions about . . . the course and outcome of child growth and development. Most studies involve only small numbers of subjects and either do not control or incompletely control for confounding variables such as other drugs and/or biological and sociodemographic cofactors known to contribute to poor outcomes in such children.

Id.; see generally *id.* at 406-07 (discussing five critical issues that taint drug-exposure studies' methodology).

85. Committee on Substance Abuse, *supra* note 71, at 639 (noting that this is an unexpected outcome based on the number of risk factors involved in these cases). In an interesting twist, one of the cases cited anecdotally as evidence of the epidemic of fetal abuse may actually show the problem is overstated. Barbara Harris is a California woman who has adopted four of eight children of a crack addict and is a vocal lobbyist for fetal abuse legislation. Smith, *supra* note 12, at E1. Her children are now quite healthy and "have shown few of the dire medical and behavioral problems once predicted for drug babies." *Id.* One of the children in fact has an IQ of 138. *Id.*

86. Mayes et al., *supra* note 71, at 407 (citation omitted).

87. Committee on Substance Abuse, *supra* note 71, at 639-40; see also Roberts, *supra* note 4, at 953 (citing a Northwestern University study that found "comprehensive prenatal care may improve [the] outcome in pregnancies complicated by cocaine abuse") (citation omitted).

88. See Richard Q. Bell, *Minor Physical Anomalies: Relation to Later Achievement*, in RESEARCH IN INFANT ASSESSMENT 25 (Natalie W. Paul ed., 1989); Bennett, *supra* note 4, at 183.

89. Howard, *supra* note 4, at 655.

90. William Claiborne, *Substance Abuse Among Welfare's Young Mothers*, WASH. POST, June 28, 1994, at A3 (noting also that this study has been criticized by the Department of Health & Human Services for including occasional users in the number of addicts).

lives of many drug-exposed infants.⁹¹ The media's labeling of the children as "irremediably damaged" can also lead to poor outcomes for two reasons.⁹² First, society's assumption that these children are impaired makes it difficult to place them in foster care or in permanent adoptive families, so they may languish in state facilities.⁹³ Second, services aimed at helping the drug-exposed children "may be geared to caretake rather than challenge children's capacities or to remediate effectively."⁹⁴

2. Prenatal Exposure to Legal Substances

Many licit substances have been proven to be toxic to a fetus and definitive predictors of poor infant health. Alcohol exposure is well documented as the cause of a multitude of defects, and the problem is widespread. A study published in the *Journal of the American Medical Association* found that twenty percent of pregnant women had drunk alcohol in the previous month.⁹⁵ Fetal alcohol syndrome ("FAS") affects one out of every 750 births in the United States;⁹⁶ only seven percent of women who drink heavily (approximately six ounces of absolute alcohol per day) can expect to have a normal baby.⁹⁷ FAS is "the leading cause of mental retardation in the Western World, exceeding Down's syndrome and cerebral palsy."⁹⁸ Other physical problems associated with prenatal alcohol exposure include growth deficiency, microcephaly, delayed motor and language development, and hyperactivity.⁹⁹ Ninety percent of FAS sufferers experience ophthalmologic abnormalities.¹⁰⁰ Maternal drinking during

91. See Oberman, *supra* note 56, at 532-33; see also Lencewicz, *supra* note 16, at 610 (adding that boarder nurseries and foster care can also negatively impact the children's long-term outcome).

92. Mayes et al., *supra* note 71, at 407.

93. *Id.*

94. *Id.*

95. *More Education Needed on Liquor's Harm to Unborn*, CHI. TRIB., Dec. 22, 1993, (evening edition), at A7.

96. Roberts, *supra* note 4, at 953-54. Children of low-income families have a much greater risk of being afflicted with FAS than those from upper incomes, even controlling for alcohol intake. *Id.* The differential is believed to be a result of the added effect of poor nutrition in the lower-income group. *Id.*

97. Susan R. Weinberg, *A Maternal Duty to Protect Fetal Health?*, 58 IND. L.J. 531, 534 (1983); see also Jane Adams, *Prenatal Exposure to Teratogenic Agents & Neurodevelopmental Outcome*, in RESEARCH IN INFANT ASSESSMENT 63, 65 (Natalie W. Paul ed., 1989) (noting that only 10-15% of alcohol-exposed children are affected at birth; 30-40% are affected in childhood).

98. Bennett, *supra* note 4, at 183 (citing a 1989 American Medical Association study).

99. *Id.*

100. Kerstin Stromland & Ann Hellstrom, *Fetal Alcohol Syndrome—An Ophthalmological and Socioeducational Prospective Study*, 97 PEDIATRICS 845, 845 (1996).

pregnancy is also linked to a higher incidence of acute myeloid leukemia in infants.¹⁰¹

Cigarette smoking during pregnancy increases the risks of spontaneous abortion and prematurity¹⁰² and is the leading cause of low birth weight in the United States.¹⁰³ Smoking also is linked to an increase in the occurrence of idiopathic mental retardation.¹⁰⁴ Approximately one-third of cases of idiopathic mental retardation in children of smokers are attributable solely to the mothers' smoking.¹⁰⁵ Prenatal exposure to cigarette smoke is also associated with sudden infant death syndrome and can result in a depressed immune system later in life.¹⁰⁶

Prescription medication can also cause medical problems in fetuses and infants.¹⁰⁷ Prozac, for example, causes temporary jitteriness and breathing problems in newborns.¹⁰⁸ Lithium taken during pregnancy increases the risk of fetal cardiac abnormalities five-fold and can cause a greater risk of malformations and infant death.¹⁰⁹ Little is known about the effects of medications on fetuses due to the ethical issues involved in testing drugs on pregnant women.¹¹⁰ Animal tests do not sufficiently detect dangers; thalidomide, the drug that caused severe birth defects in the 1950s, produced no anomalies in lab animals.¹¹¹

Over-the-counter medicines are also worrisome, perhaps even more so than other medications, because their easy availability leads women to presume they are safe.¹¹² But maternal ingestion of aspirin and

101. Xiao-Ou Shu et al., *Parental Alcohol Consumption, Cigarette Smoking, and Risk of Infant Leukemia: A Childrens Cancer Group Study*, 88 J. NAT'L CANCER INST. 24, 24 (1996).

102. BARBARA LUKE, PREVENTING PREMATURE BIRTH 98 (1995) ("Spontaneous abortion . . . occurs 20 to 80 percent more frequently among smokers.") (citation omitted); Weinberg, *supra* note 97, at 534.

103. Lucille Renwick, *Critical Care*, L.A. TIMES, Mar. 13, 1994, at 14.

104. Carolyn D. Drews et al., *The Relationship Between Idiopathic Mental Retardation and Maternal Smoking During Pregnancy*, 97 PEDIATRICS 547, 550 (1996).

105. *Id.*

106. SMOKING & REPRODUCTION: A COMPREHENSIVE BIBLIOGRAPHY xiv-xv (Ernest L. Abel ed., 1982) [hereinafter SMOKING & REPRODUCTION].

107. A United States survey found that during pregnancy, "45% of women may use at least one drug on prescription, and many more use drugs bought over the counter." Martin J. Whittle & Kevin P. Hanretty, *Identifying Abnormalities*, in PRESCRIBING IN PREGNANCY 8, 8 (Peter C. Rubin ed., 1987); see generally RICHARD S. ABRAMS, HANDBOOK OF MEDICAL PROBLEMS DURING PREGNANCY (1989) (discussing numerous medications and their effects on fetal health).

108. Shari Roan, *The Other Drug Moms; Since Testing Just Isn't Done on Pregnant Women, It's Tough to Figure Out Which Medications Are Safe*, L.A. TIMES, Nov. 13, 1996, at E4.

109. J.B. Loudon, *Psychotropic Drugs*, in PRESCRIBING IN PREGNANCY 49, 52 (Peter C. Rubin ed., 1987).

110. Roan, *supra* note 108, at E4.

111. *Id.*

112. *Id.*

other nonsteroidal anti-inflammatory drugs may increase the risk of persistent pulmonary hypertension of the newborn.¹¹³ Even baby aspirin taken by a pregnant mother is contraindicated because it may cause fetal bleeding.¹¹⁴

A pregnant woman who has a chronic medical condition may also be endangering her unborn child's life. Epileptic seizures and uncontrolled asthma may cause fetal injury due to oxygen deprivation.¹¹⁵ A diabetic woman has a three times greater risk of giving birth to a child with congenital abnormalities, even if her diabetes is controlled.¹¹⁶ The mortality rate of a child born to a mother with renal disease is fifteen percent, and the condition increases the danger of prematurity and growth retardation.¹¹⁷

Pregnant women have other affirmative and negative obligations, the disregard of which can have devastating health effects on a fetus. For example, there is an undisputed correlation between obtaining prenatal care and having a healthier baby.¹¹⁸ Other acts and conditions are also significant factors in the relative health of a child. A child is in danger of serious health risks at the moment of conception if the mother does not get the proper nutrition,¹¹⁹ is too old,¹²⁰ too

113. Linda J. Van Marter et al., *Persistent Pulmonary Hypertension of the Newborn and Smoking and Aspirin and Nonsteroidal Antiinflammatory Drug Consumption During Pregnancy*, 97 PEDIATRICS 658, 659 (1996).

114. Roan, *supra* note 108, at E1; see also JENNIFER R. NIEBYL, DRUG USE IN PREGNANCY 26-27 (1982) (noting that aspirin is not recommended during pregnancy due to bleeding and inability to clot).

115. Anthony Hopkins, *Epilepsy and Anticonvulsant Drugs*, in PRESCRIBING IN PREGNANCY 96, 103 (Peter C. Rubin ed., 1987); K. Fan Chung & Peter J. Barnes, *Treatment of Asthma*, in PRESCRIBING IN PREGNANCY 41, 41 (Peter C. Rubin ed., 1987).

116. N.J.A. Vaughan, *Treatment of Diabetes*, in PRESCRIBING IN PREGNANCY 111, 112 (Peter C. Rubin ed., 1987).

117. ABRAMS, *supra* note 107, at 71-72.

118. VanRaalte, *supra* note 3, at 457. Studies suggest that prenatal care has even more of an impact on fetal health than maternal drug use. *Id.* The health care costs of treating an addict who obtains prenatal care average \$7000, which includes the costs of prenatal care and delivery. Oberman, *supra* note 56, at 514-15. Without prenatal care, the additional costs of neonatal intensive care bring the average price of delivery up to \$31,000. *Id.* at 515.

119. Poor nutrition in utero increases the child's risk of cardiovascular problems later in life. Dino A. Giussani, *Evidence for Link Between Prenatal and Adult Health Grows*, 348 LANCET 535, 535 (1996). Vitamins such as folic acid should be taken well before pregnancy to best reduce the risk of birth defects. Deborah Mann Lake, *Before Conception is the Time to Reduce Risk of Birth Defects, Says March of Dimes*, HOUS. POST, Jan. 31, 1995, at D1, available in LEXIS, News Library, Houpsst File.

120. A study published in the New England Journal of Medicine found that women over 35 are more likely than younger women to have a stillborn child. *Pregnant Women over Age 35 Face Higher Risk of Stillbirth, Study Says*, ROCKY MTN. NEWS, Oct. 12, 1995, at 50A, available in LEXIS, News Library, Rmtnew File. The stillbirth rate among women over 40 is twice that of women under 30. *Id.*

young,¹²¹ or if any genetic disorders run in either side of the family tree.¹²² A mother who exercises too much¹²³ or cleans the cat litter box¹²⁴ may endanger her child. A pregnant woman whose work exposes her to toxic substances,¹²⁵ high stress,¹²⁶ heavy lifting,¹²⁷ or long hours¹²⁸ may injure her child by remaining employed during her pregnancy. A mother's postpartum activities can also threaten the health of her child. Any legal or illegal substances a mother ingests while she is breast-feeding are passed on to the child.¹²⁹ Secondhand smoke is dangerous for young children, who may suffer a number of health problems caused by exposure.¹³⁰

121. Complications caused by teenage pregnancy include low birth weight, increased risk of death in the first year, and developmental problems. *Vital Statistics*, WASH. POST., July 2, 1996, (Health), at 5. Another study found that young maternal age (average age 16.1, range of age 12-18 years) increased the risk of negative effects from prenatal tobacco and marijuana exposure. Marie D. Cornelius et al., *Prenatal Tobacco and Marijuana Use Among Adolescents: Effects on Offspring Gestational Age, Growth, and Morphology*, 95 PEDIATRICS 738, 738 (1995). The children of young mothers exhibited more pronounced effects even though they had lower exposure to harmful substances than the children of adult mothers in the study. *Id.*

122. Deadly hereditary diseases include the blood disorders Sickle-Cell Anemia and Thalassemia, and Tay-Sachs Disease, a fatal brain disease. Lake, *supra* note 119, at D1.

123. While moderate exercise is beneficial to both mother and baby, certain activities and overexertion can harm a fetus. Sally Squires, *Pregnant Women Get Green Light to Exercise: New Guidelines Stress the Benefits for Most Mothers-to-Be*, WASH. POST., Jan. 18, 1994, (Health), at 7.

124. The toxoplasmosis bacteria can be transmitted to a pregnant mother through infected cat feces and to her fetus through transplacental infection. *Newborn Screening Fact Sheets*, 98 PEDIATRICS 473, 493 (1996). Most exposed infants are asymptomatic at birth, but by age 20, as many as 85% will be afflicted with blindness and retardation. *Id.*

125. Any amount of fetal exposure to radiation increases a child's risk of leukemia; embryos are even more sensitive to radiation's harmful effects. Weinberg, *supra* note 97, at 541. Even though exposure to lead causes fetal injury, the United States Supreme Court struck down the "fetal protection" policies of a battery manufacturer as violative of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act. *UAW v. Johnson Controls*, 499 U.S. 187, 211 (1991). The manufacturer barred fertile women from working in certain jobs that were hazardous due to the amount of lead exposure. *Id.* at 192.

126. Women who work in stressful jobs can expect "higher rates of premature labor, preterm birth, and low birthweight." LUKE, *supra* note 102, at 80.

127. *Id.* at 52 ("Repetitive lifting is worse than intermittent, and heavy lifting is worse than light.")

128. *Long Hours at Work Can Triple Miscarriage Risk*, CHI. TRIB., Aug. 17, 1997, § 13, at 10 (discussing a University of California at Davis study indicating that a pregnant mother who works more than 45 hours per week has a three times greater risk of miscarriage in the first trimester than a mother who works less than 35 hours, even accounting for smoking and drinking).

129. There have been cases of nicotine poisoning of infants who were breastfed by heavy smokers. SMOKING AND REPRODUCTION, *supra* note 106, at xii. Moderate smoking (ten cigarettes per day) also causes lower breast milk volume and lower fat concentrations in the milk, which makes it less healthy for babies. John L. Ey et al., *Passive Smoke Exposure and Otitis Media in the First Year of Life*, 95 PEDIATRICS 670, 675 (1995).

130. Passive smoke inhalation increases the number of respiratory illnesses suffered by children, especially in those under two years of age. Michael A. Wall et al., *Pediatric Office-Based Smoking Intervention: Impact on Maternal Smoking and Relapse*, 96 PEDIATRICS 622, 623 (1995).

The father's lifestyle also affects the health of the fetus. Before conception, the father's exposure to toxic chemicals,¹³¹ smoking,¹³² and drinking alcohol¹³³ may lead to fetal defects. Even during pregnancy, the father may affect fetal health. Some toxic substances "absorbed by the exposed male may contaminate the seminal fluid and cross the placental barrier through intercourse."¹³⁴ A man who batters his pregnant spouse may harm the fetus indirectly as well as directly.¹³⁵ A battered woman may be less likely to seek prenatal care because her abuser may prevent her from seeing a doctor regularly.¹³⁶

II. *WHITNER V. STATE*: DRAMATIC EXPANSION OF FETAL RIGHTS

As previously discussed, many states have attempted to prosecute pregnant women for drug use under child abuse and drug delivery statutes.¹³⁷ Courts rejected these attempts as unconstitutional and contrary to legislative intent.¹³⁸ In the summer of 1996, however, the Supreme Court of South Carolina upheld a conviction for child endangerment based on the mother's use of cocaine in the days before her baby was delivered.¹³⁹ *Whitner v. State*¹⁴⁰ indicates that past judicial deference to legislative authority in the area of fetal rights may be at an end. The *Whitner* majority's broad reasoning could easily be employed by other courts in states with similar statutes and bodies of law, assuming the case is not overturned by the United States Supreme Court.¹⁴¹

Heavy maternal smoking is also a significant factor in the development of middle ear infections in the child's first year of life. Ey et al., *supra* note 129, at 670. Infants exposed to smoke had two times the risk of contracting infections when controlling for other risk factors; infants who had had a low birth weight were three times more likely to contract infections. *Id.*

131. Lake, *supra* note 119, at D1.

132. The children of fathers who smoke within one month prior to conception have an elevated risk of contracting acute lymphoid leukemia. Shu et al., *supra* note 101, at 24.

133. Best, *supra* note 21, at 213 & n.137 (discussing animal studies that show "fathers who drink heavily before their mates' pregnancy can be as responsible for damage to their offspring as alcoholic mothers'" (quoting GARY MCCUEN, BORN HOOKED 15 (1991))).

134. REGINA KENEN, REPRODUCTIVE HAZARDS IN THE WORKPLACE: MENDING JOBS, MANAGING PREGNANCIES 37 (1993).

135. Best, *supra* note 21, at 213 (citation omitted).

136. *Id.*

137. See *supra* Part I.A.

138. See *supra* Part I.A.

139. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

140. 492 S.E.2d 777 (S.C. 1997).

141. At the time of this writing, certiorari had not been granted in this case.

A. Facts and Procedural History

South Carolina has been in the forefront of states that hold women criminally liable for using drugs during pregnancy.¹⁴² The city of Charleston's resolve to identify and prosecute pregnant drug users is seemingly unparalleled.¹⁴³ One commentator illustrated the depth of Charleston's commitment to ensuring that pregnant women stay drug-free: "Three weeks after her arrest, [Lori Griffin] went into labor and was taken, still in handcuffs and shackles, to M.U.S.C., [the public hospital]. Once at the hospital, Ms. Griffin was kept handcuffed to her bed during the entire delivery."¹⁴⁴

It was in the state of South Carolina that Cornelia Whitner gave birth to a son who had been exposed to cocaine from her late-term use of the drug.¹⁴⁵ She chose to plead guilty to the charge of criminal child neglect, hoping that she would be admitted to a residential treatment program.¹⁴⁶ At the time of her plea, Whitner was already in counseling, she was drug-free, and her baby son was healthy.¹⁴⁷ The judge who accepted the plea was not receptive to Whitner's desire for treatment and simply stated, "I think I'll let her go to jail," sentencing her to eight years in prison.¹⁴⁸

Whitner did not initially appeal her conviction but later filed for Post Conviction Relief on two grounds, both of which related to the fact that a fetus is not a child under the child neglect statute.¹⁴⁹ First, she claimed that the circuit court lacked subject matter jurisdiction to accept her plea because the offense of abusing a fetus did not exist.¹⁵⁰ Second, Whitner argued that her counsel at the plea hearing was ineffective by not advising her that the neglect statute might not apply to her case.¹⁵¹ Whitner won her appeal, so the State then appealed to the Supreme Court of South Carolina.¹⁵²

142. See Roberts, *supra* note 4, at 941 ("[South Carolina] bears the dubious distinction of having prosecuted the largest number of women for maternal drug use.").

143. See *supra* notes 68-70 and accompanying text.

144. Roberts, *supra* note 4, at 943.

145. Whitner, 492 S.E.2d at 778-79.

146. Roberts, *supra* note 4, at 944.

147. *Id.*

148. *Id.*

149. Whitner, 492 S.E.2d at 779.

150. *Id.*

151. *Id.*

152. *Id.*

B. *The Majority Opinion*

The *Whitner* court began the opinion by explaining its plan to find the legislature's intent in enacting the child endangerment statute.¹⁵³ The majority initially restated the primary canon of statutory construction: statutory language controls interpretation "where a statute is complete, plain, and unambiguous."¹⁵⁴ Without discussing whether this particular statute was unambiguous, the court then proclaimed that it must also consider "the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law."¹⁵⁵ *Whitner's* examination of intent also included the presumption that the legislature, when enacting a statute, is aware of earlier laws and how the courts have construed them.¹⁵⁶ With its theory of statutory construction in mind, the court then set about to divine the intended meaning of the word "child" in the child endangerment statute.¹⁵⁷

The *Whitner* court first recognized that under South Carolina law, viable fetuses have often been considered persons with certain legal rights.¹⁵⁸ In 1960, the Supreme Court of South Carolina allowed the application of the wrongful death statute to the death of a newborn who had suffered injury in utero, by reasoning that a viable fetus did have a life separable from that of its mother.¹⁵⁹ The court later expanded this doctrine to fetuses that were not born alive; because the fetus has a separable life once it is viable, a later birth is irrelevant to the determination.¹⁶⁰ In 1984, this rationale was finally applied to a South Carolina criminal statute.¹⁶¹ The court upheld a conviction for voluntary manslaughter of a fetus, even though there was no state law against feticide.¹⁶² The court found no reason to define a fetus as a person under civil law but not in the criminal context.¹⁶³ Following

153. *Id.* The South Carolina child abuse and endangerment statute provides:

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

S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985).

154. *Whitner*, 492 S.E.2d at 779.

155. *Id.* (citation omitted).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 779-80 (citing *Hall v. Murphy*, 113 S.E.2d 790, 793 (S.C. 1960)).

160. *Id.* at 780 (citing *Fowler v. Woodward*, 138 S.E.2d 42, 44 (S.C. 1964)).

161. See S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976).

162. *Whitner*, 492 S.E.2d at 780 (citing *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984)).

163. *Id.* (citing *Horne*, 319 S.E.2d at 704) (finding the civil/criminal distinction "'grossly inconsistent'" and judicially creating the crime of feticide).

the logic of earlier decisions recognizing fetal rights, the *Whitner* court noted: "[I]t 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."¹⁶⁴

Having elucidated the "plain meaning" of the word "child," the *Whitner* court then concluded that the state's broad policy of protecting children leads to the same interpretation.¹⁶⁵ The court reasoned that because the effects of abuse occurring after birth "often pale in comparison to those resulting from abuse suffered by the viable fetus before birth,"¹⁶⁶ the state's policy of child protection is best served by the court's liberal reading of the statute.¹⁶⁷

After concluding that a fetus is indeed a child, the majority then countered *Whitner's* arguments against the validity of her prosecution.¹⁶⁸ *Whitner* first claimed that because eight bills dealing with prenatal drug exposure had recently been introduced in the legislature, lawmakers themselves did not believe that the child endangerment law applied to the problem.¹⁶⁹ The court countered by citing case law for the proposition that later acts by a legislature "cast no light on the intent of the legislature which enacted the statute being construed."¹⁷⁰ Instead, the court held, the statutory language alone should control interpretation.¹⁷¹

Whitner next argued that the majority's interpretation would lead to "absurd results," because "every action by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, would constitute unlawful neglect under the statute."¹⁷² The court dispensed with the "parade of horrors" first by purporting to show that a number of legal actions may become illegal if they endan-

164. *Id.* (concluding that the *Hall* decision "rested primarily on the plain meaning of the word 'person' in light of existing medical knowledge concerning fetal development").

165. *Id.* at 780-81 (citing S.C. CODE ANN. § 20-7-20(C) (Law. Co-op. 1985)) ("It shall be the policy of this State to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented on behalf of children and their families.").

166. *Id.* at 780.

167. *Id.* at 780-81.

168. *Id.* at 781.

169. *Id.*

170. *Id.* (quoting *Home Health Servs., Inc. v. South Carolina Dept. of Health & Environmental Control*, 379 S.E.2d 734, 736 n.1 (S.C. Ct. App. 1989)); *cf. In re Valerie D.*, 613 A.2d 748, 764 (Conn. 1992) (considering the legislature's rejection of bills with strong penalties for prenatal drug use as evidence of a legislative intent against reading a harsh penalty for drug use into the termination of parental rights statute).

171. *Whitner*, 492 S.E.2d at 781. The court gave no explanation for why, if language alone is controlling, it looked to prior expansions of fetal rights and general state policy to come to its conclusion.

172. *Id.* (emphasis omitted).

ger a child.¹⁷³ By way of example, the court claimed that a parent who drinks too much might be liable for neglect even though the act of drinking is legal.¹⁷⁴ *Whitner's* majority also saw this entire argument as specious, since Cornelia Whitner was not convicted for ingesting a legal substance, and "this case . . . is the only case we are called upon to decide here."¹⁷⁵ Another factor the court cited to counter Whitner's argument is that she must have known she was endangering her fetus since "it is well documented and within the realm of public knowledge that such use [of crack cocaine during pregnancy] can cause serious harm to the viable unborn child."¹⁷⁶

Next, the court stated that it was unmoved by the many decisions in other states that declined to hold a fetus is a child under child abuse or endangerment statutes.¹⁷⁷ The majority believed other states' decisions were inapplicable since they had "entirely different bodies of case law from South Carolina."¹⁷⁸ The only state that *Whitner* felt was relevant to the discussion was Massachusetts, which recognizes rights of fetuses in civil and criminal homicide contexts.¹⁷⁹ Nevertheless, the majority distinguished a Massachusetts court's refusal to expand a statute prohibiting delivery of cocaine to a minor to cover prenatal drug use.¹⁸⁰ The *Whitner* court determined that Massachusetts's prior expansion of the definition of a child to include a fetus was to vindicate the parents' interest, not the right of the fetus per se.¹⁸¹ Conversely, South Carolina's earlier recognition of fetal rights was based upon "the meaning of 'person' as understood in the light of existing

173. *Id.* at 781-82.

174. *Id.* at 782.

175. *Id.* The court was apparently unconcerned that, as the state's supreme court, its holdings are binding in future lower court decisions.

176. *Id.* (citations omitted). Significantly, the court did acknowledge that "the precise effects of maternal crack use during pregnancy are somewhat unclear." *Id.* The majority did not explore whether the same "public knowledge" could be imputed to women who smoke and drink, because warning labels are affixed to cigarette packs and bottles of alcohol. One of the warnings that must be affixed to cigarette packages is: "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight." 15 U.S.C. § 1333(a)(1) (1994). Beginning in 1989, alcoholic beverages were required to include a warning on their labels reading, in pertinent part: "According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects." *Alcoholic Beverages to Get Danger Label*, N.Y. TIMES, Feb. 19, 1989, § 1, at 38.

177. *Whitner*, 492 S.E.2d at 782.

178. *Id.* (citing Kentucky and California as examples of states which have not considered a fetus as a "person" or "human being" for the purposes of homicide statutes).

179. *Id.* at 782-83; see *supra* notes 158-63 (discussing pre-*Whitner* fetal rights in South Carolina).

180. *Whitner*, 492 S.E.2d at 783.

181. *Id.* (citing *Commonwealth v. Pellegrini*, No. 87970, slip op. at 11 (Mass. Super. Ct. Oct. 15, 1990)).

medical knowledge, rather than based on any policy of protecting the relationship between mother and child."¹⁸² Moreover, the majority indicated that the decision in *State v. Horne*,¹⁸³ recognizing the crime of feticide, "also rested on the State's—not the mother's—interest in vindicating the life of the viable fetus."¹⁸⁴ The State's interest was important to the *Whitner* court, because if only the mother's interest mattered, "there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same acts."¹⁸⁵

The majority then discussed *Whitner's* assertion that this ruling was inconsistent with *Doe v. Clark*,¹⁸⁶ which held that a "child" for the purposes of the Adoption Act¹⁸⁷ is a "child in being and not a fetus,"¹⁸⁸ meaning that women cannot give consent to an adoption while they are pregnant.¹⁸⁹ The birth mother in *Doe* changed her mind about giving up her child for adoption and sought to have her earlier consent nullified.¹⁹⁰ In voiding the adoption agreement, the Supreme Court of South Carolina determined that "the Adoption Act implicitly contemplates that consent apply to a child in being."¹⁹¹ This implicit definition was discovered by "viewing the statutory language as a whole," which made a contrary reading impracticable.¹⁹²

182. *Id.* But see *Roe v. Wade*, 410 U.S. 113, 162 (1973) (noting that fetal rights under wrongful death statutes "vindicate the parents' interest and [are] thus consistent with the view that the fetus, at most, represents only the potentiality of life" and that "the unborn have never been recognized in the law as persons in the whole sense").

183. 319 S.E.2d 703 (S.C. 1984).

184. *Whitner*, 492 S.E.2d at 783 (emphasis added). The court did not indicate why this supports the argument that South Carolina's law is distinguishable from the law in Massachusetts, because as the court noted earlier, Massachusetts also recognized the crime of feticide. *Id.* at 782.

185. *Id.* at 783. *Whitner* did not explore the experiences of other states, where legislation makes such an outcome possible. See, e.g., 720 ILL. COMP. STAT. 5/9-1.2 (West 1997) (Intentional homicide of an unborn child) ("[A] person' [who can be charged with this crime] shall not include the pregnant woman whose unborn child is killed."). Presumably, states like Illinois have not had significant problems with women shooting or stabbing themselves in the abdomen in response to this immunity from prosecution.

186. 457 S.E.2d 336 (S.C. 1995).

187. S.C. CODE ANN. §§ 20-7-1690, 20-7-1700 (Law. Co-op. Supp. 1997).

188. *Whitner*, 492 S.E.2d at 783 (citing *Doe*, 457 S.E.2d at 337); see also Adoption Act, S.C. CODE ANN. §§ 20-7-1690, 20-7-1700.

189. *Whitner*, 492 S.E.2d at 738.

190. *Doe*, 457 S.E.2d at 336-37.

191. *Id.* at 337 (citing S.C. CODE ANN. § 20-7-1690).

192. *Id.* The relevant provisions included: the relinquishment form's requirements that the date of birth, race, sex, and name of the adoptee be given; the mandate that consent be given by "the mother of a child born when the mother was not married;" and the definition of a "child" as "any person under 18 years of age." *Id.*; see also *Whitner*, 492 S.E.2d at 784.

Finally, *Whitner* addressed the defendant's claim that the majority's reading of the child abuse and endangerment statute was unconstitutional because it provided no notice and violated her right of reproductive privacy.¹⁹³ The court imputed notice to *Whitner* for two reasons: (1) the statute's "plain meaning" includes a fetus in the definition of a child;¹⁹⁴ and (2) "it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child."¹⁹⁵

The majority then discussed the holding's burden on *Whitner*'s right of reproductive privacy.¹⁹⁶ *Whitner* maintained that the United States Supreme Court, in *Cleveland Board of Education v. LaFleur*,¹⁹⁷ held that "the Constitution protects women from measures penalizing them for choosing to carry their pregnancies to term."¹⁹⁸ In *LaFleur*, a school system had a policy of requiring teachers to take maternity leave four or five months before their due dates and not to return to work until the beginning of the semester after their babies were three months old.¹⁹⁹ The Supreme Court held that "overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms."²⁰⁰ *Whitner* asserted that the possibility of serving time in prison for giving birth to her child was even more of a burden on her right of reproductive freedom than the teachers faced in *LaFleur*.²⁰¹ After examining the respective interests of the government and the burdened individuals in the two cases, however, the majority concluded that *LaFleur* was wholly distinguishable.²⁰² First, relying on the Supreme Court's holdings in abortion cases, the *Whitner* court determined that the state has a compelling interest in the life and health of a fetus.²⁰³ The court did not define the level of

193. *Whitner*, 492 S.E.2d at 784-85.

194. *Id.* at 785.

195. *Id.* (commenting that such notice is "all the notice the Constitution requires"). The court did not indicate how the "plain meaning" was easily determinable when no appellate court in any state had so held; all similar definitions in South Carolina related to third-party liability; and two members of the Supreme Court of South Carolina in this case also did not see the "plain meaning." See *People v. Hardy*, 469 N.W.2d 50, 52 (Mich. Ct. App. 1991) (citing *People v. Dempster*, 242 N.W.2d 381 (Mich. 1976)) ("A person is not required, at peril of life, liberty, or property, to speculate concerning the meaning of criminal statutes.").

196. *Whitner*, 492 S.E.2d at 785.

197. 414 U.S. 632 (1974).

198. *Whitner*, 492 S.E.2d at 785.

199. *Id.* (citing *LaFleur*, 414 U.S. at 634-35).

200. *Id.* (citing *LaFleur*, 414 U.S. at 640).

201. *Whitner*, 492 S.E.2d at 785.

202. *Id.* at 785-86.

203. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

state interest in *LaFleur*, but presumably it was not similarly compelling.

Second, the court analyzed the different interests claimed by Whitner and the plaintiffs in *LaFleur*.²⁰⁴ The majority concluded that the only right Whitner could possibly claim is the right to use crack cocaine while pregnant, which is plainly not a constitutionally protected freedom.²⁰⁵ Because the right of privacy does not protect drug use, the court saw no reason that an additional penalty may not attach to an already illegal act due to its effect on a fetus.²⁰⁶ Moreover, the teachers in *LaFleur* were prevented from “exercising a freedom they would have enjoyed but for their pregnancies.”²⁰⁷ Whitner, on the other hand, never had a right to use cocaine in the first place, so the statute as applied to her did not “restrict [her] freedom in any way that it was not already restricted.”²⁰⁸ As a result, the state was free to enact any penalties it wished to prevent an already illegal act from endangering the life and health of another.²⁰⁹

C. Dissenting Opinions

1. Finney Dissent

Chief Justice Finney, joined by Justice Moore, dissented, primarily on the basis of strict statutory construction.²¹⁰ The dissent recognized that in interpreting a penal statute, the rule of lenity requires that the statute be “strictly construed against the State and in favor of respondent.”²¹¹ The majority found no reason to apply this rule because it had concluded that the statute was not ambiguous.²¹² The dissent, however, was persuaded that because a fetus is not considered a child

204. *Id.* at 786.

205. *Id.*

206. *Id.* *But see* Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (“However, it is inflicting intentional or wanton injury upon the child that makes the conduct criminal under the child abuse statutes, not the criminality of the conduct *per se.*”) (emphasis in original).

207. *Whitner*, 492 S.E.2d at 786.

208. *Id.*

209. *Id.*

210. *Id.* at 786-87 (Finney, C.J., dissenting).

211. *Id.* at 786 (citing *State v. Blackmon*, 403 S.E.2d 660 (S.C. 1991)); *see also* *Keeler v. Superior Court*, 470 P.2d 617, 625 (Cal. 1970) (“[I]t is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or deleting words, or by giving the terms used false or unusual meanings.”).

212. *Whitner*, 492 S.E.2d at 784.

in another part of the Children's Code,²¹³ there exists sufficient ambiguity to apply the rule of lenity.²¹⁴

In reading the whole child abuse and endangerment statute, the dissent found that the statute was not meant to protect a fetus.²¹⁵ First, the inclusion of the term "legal custody" in the statute necessarily implies that the section refers to children in being, "because the concept of legal custody is simply inapplicable to a fetus."²¹⁶ Second, the types of activities that the statute lists as examples of abuse or neglect cannot be directed toward a fetus.²¹⁷

The dissent further explained that the majority mistakenly relied on earlier cases defining a fetus as a child.²¹⁸ The cases cited by the majority were in "two different fields of the law, civil wrongful death and common law feticide."²¹⁹ *Whitner*, however, was convicted under the Children's Code, and the only two cases construing the word "child" under the Code found that it meant a child in being.²²⁰ Chief Justice Finney's dissent concluded that even if the prior construction of the Children's Code did not definitively resolve the question, the earlier decisions pointed out an ambiguity, and "it is axiomatic that the ambiguity must be resolved in [*Whitner's*] favor."²²¹

2. *Moore Dissent*

Justice Moore, who concurred with Chief Justice Finney's dissent, wrote separately to address several other issues.²²² First, this dissent indicated that the legislature's introduction and rejection of bills specifically aimed at the problem of prenatal drug exposure "is evidence the child abuse and neglect statute is not intended to apply in this instance."²²³ According to Justice Moore, the difficulty of enacting

213. *Id.* at 786; see *Doe v. Clark*, 457 S.E.2d 336, 337 (S.C. 1995); *supra* notes 186-92 (discussing the majority's reading of the *Doe* case).

214. *Whitner*, 492 S.E.2d at 786 (Finney, C.J., dissenting) ("It would be incongruous at best to hold the definition of 'child' in the civil context of *Doe* is more restrictive than it is in the criminal context we consider today.").

215. *Id.*

216. *Id.* at 787; see S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985).

217. *Whitner*, 492 S.E.2d at 787 & n.2 ("Examples include condoning delinquency, using excessive corporal punishment, committing sexual offenses against the child, and depriving her of adequate food, clothing, shelter or education.").

218. *Id.* at 787.

219. *Id.*

220. *Id.* (citing *State v. Montgomery*, 144 S.E.2d 797 (S.C. 1965) (holding that the statute criminalizing non-support applies only to children already born); *Doe v. Clark*, 457 S.E.2d 336, 337 (S.C. 1995) (holding that the Adoption Act only applies to children in being)).

221. *Whitner*, 492 S.E.2d at 787 (citation omitted).

222. *Id.* (Moore, J., dissenting).

223. *Id.*

specific legislation shows that the issue is very complicated and should remain in the hands of the legislature, not the courts.²²⁴ Moore further agreed with Chief Justice Finney's dissent that the child abuse statute is at least ambiguous and sarcastically rejected the majority's claim that the "plain meaning" of the word "child" in the statute includes a fetus.²²⁵

Justice Moore was also concerned that the majority's reasoning approved an unworkably vague statute and would result in litigation to decide what behavior is prohibited: "Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to quit smoking or drinking? . . . [T]he impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the Legislature has not seen fit to criminalize."²²⁶

This dissent next took issue with the majority's conclusion that a parent who engages in an otherwise legal activity, such as drinking, may be guilty of child neglect on that basis alone.²²⁷ The majority's analysis did not mention that under the law prior to *Whitner* the parent must also have committed an affirmative act of neglect or abuse to be guilty of a crime; the parent's drinking was not in itself considered abusive behavior.²²⁸

Finally, Justice Moore noted the majority's failure to examine the state's abortion statute, "[t]he only law . . . that specifically regulates the conduct of a mother toward her unborn child."²²⁹ According to the dissent, this analytical omission undermined the majority's goal of "equal treatment of viable fetuses and children"²³⁰ for two reasons. First, fetal health is not promoted by a law that does not hold a woman criminally liable for drug use during the first six months of her pregnancy, "the most dangerous period for the fetus."²³¹ Second, the discrepancy in sentencing under the abortion and child neglect statutes is astonishing: "[A] pregnant woman now faces up to ten years in prison for ingesting drugs during pregnancy but can have an illegal abortion and receive only a two-year sentence for killing her viable fetus."²³²

224. *Id.*

225. *Id.* at 787-88 ("If that is the case, then why is the majority compelled to go to such great lengths to ascertain that a 'viable fetus' is a 'child?'").

226. *Id.* at 788.

227. *Id.*

228. *Id.*

229. *Id.* (citation omitted).

230. *Id.*

231. *Id.*

232. *Id.* (citation omitted).

D. *The Potential Expansion of Whitner*

Whitner did not rest on a unique statutory or factual structure.²³³ Cornelia *Whitner* was charged under a standard child endangerment law that did not specifically include fetuses as potential victims.²³⁴ Moreover, as *Whitner's* dissents rightly noted, it was at best ambiguous whether the legislative intent supported the majority's ruling.²³⁵ Therefore, *Whitner's* reasoning could spread to states that have prosecutorial objectives and statutes like South Carolina's. This section will use Illinois as an example of a state whose statutes and legislative history may allow an activist court to follow *Whitner's* lead if the state legislature does not clarify existing laws.

1. *Illinois Prosecutions*

Early fetal abuse prosecutions in Illinois met with little success,²³⁶ but prosecutors, emboldened by the *Whitner* decision, have continued to charge women for prenatal drug use.²³⁷ Recently, Kane County State's Attorney David Akemann charged Cynthia Smith with involuntary manslaughter for delivering a stillborn baby girl because both the baby and Smith had microscopic traces of cocaine in their bodies.²³⁸ The coroner ruled the death was a homicide caused by Cynthia Smith even though there were no deformities of the placenta or fetus, and there were other possible causes of the child's death.²³⁹ In spite of this favorable ruling, the prosecutor decided not to gamble on finding a court that would define a fetus as a person and amended the charge to drug possession.²⁴⁰ That charge, while somewhat less controversial, was still unprecedented; Smith's case was the first time anyone had been prosecuted in Illinois for possession based solely on a blood test, without any hard evidence.²⁴¹ Drug laws are not written to

233. *Whitner* was charged with child endangerment for late-term cocaine ingestion. *Id.* at 778-79. Many other pregnant women have been charged for cocaine use under child abuse laws. See *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (aggravated child abuse); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (criminal child abuse); *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994) (child endangerment); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992) (child endangerment).

234. *Whitner*, 492 S.E.2d at 779; see *supra* note 153.

235. See *supra* notes 211-17, 225 and accompanying text.

236. See *infra* notes 244-48 and accompanying text.

237. See *infra* notes 238-41 and accompanying text.

238. Lindsey Tanner, *Laws Hazy on Pregnant Women Who Abuse Drugs*, PEORIA J. STAR, Aug. 17, 1997, at A4, available in 1997 WL 7673037.

239. *Id.* (indicating the death may have been caused or exacerbated by the fact that Smith was 40 years of age and had received no prenatal care at all during her pregnancy).

240. *Id.*

241. Janan Hanna, *Prosecutors Aim to Halt Epidemic of Cocaine Babies*, CHI. TRIB., May 5, 1997, at 1.

criminalize the *use* of drugs; instead, they prohibit delivery or possession.²⁴² Akemann explained, however, that it is logical to presume possession through evidence of use by analogizing the evidence in this case to blood-alcohol tests in drunken driving prosecutions.²⁴³ This case has yet to go to trial, and its chances of succeeding are slim, but it shows that the *Whitner* decision has rejuvenated prosecutorial efforts.

Before the *Smith* case, there were several publicized cases in Illinois where the *inability* to prosecute raised public concerns. In 1989, Melanie Green was the first pregnant woman in the nation charged with manslaughter due to drug use when her two-day old baby died after being exposed to cocaine in utero.²⁴⁴ The grand jury refused to indict, and the prosecutor complained that if such children are born alive, the courts have the power to order treatment and/or take custody of the children, but if the babies die, no statutory recourse is available.²⁴⁵ Similar cases in later years also failed to result in convictions. A coroner's jury in 1992 recommended charges when a stillborn infant was born with cocaine and opiates in its system, but the state's attorney could find no law to apply in the case.²⁴⁶ In 1993, a Waukegan newborn died after prenatal drug exposure, but his mother escaped criminal charges since no law addressed the problem.²⁴⁷ In two companion cases in the fall of 1996, a coroner's jury, unable to indict two drug using mothers for delivering stillborn babies, recommended that Illinois laws be changed to allow for prosecution.²⁴⁸

2. *Illinois Statutes*

Despite the poor rate of success of prosecutions in Illinois, state prosecutors have made it clear that this course of action will continue.²⁴⁹ In the future, a fetal abuse prosecution could be successful if Illinois charges a woman under a statute that is conducive to a broad reading by an activist court. As this section demonstrates, gaps in Illi-

242. Tanner, *supra* note 238, at A17; *see also* Hanna, *supra* note 241, at 13 ("It is not a crime in Illinois or anywhere else in the country for a woman to abuse her body while pregnant.").

243. Hanna, *supra* note 241, at 13.

244. *See* Patrick Reardon, *Drugs and Pregnancy Debate Far from Resolved*, CHI. TRIB., May 28, 1989, § 2, at 1.

245. Hanna, *supra* note 241, at 13.

246. Mark Butzow, *Jury Links Stillbirth to Mom's Drug Habit*, PEORIA J. STAR, Jan. 9, 1992, at B1, available in 1992 WL 3576356.

247. Christi Parsons, *When Drug Addicted Babies Die, Is It Murder?*, CHI. TRIB., Jan. 24, 1993, at C1.

248. Christopher R. Williams, *Jury: Illinois Needs Laws to Punish Abusive Mothers-to-Be*, PEORIA J. STAR, Oct. 24, 1996, at A1, available in 1996 WL 6981861.

249. *See supra* notes 238-48.

nois statutory construction and ambiguous legislative intent may leave the door open to such a result.

a. Fetal Injury

In 1981, Illinois created the offense of feticide, which was defined as “causing the death of a viable fetus without lawful justification.”²⁵⁰ This law was repealed in 1986, upon the creation of the separate crimes of intentional homicide of an unborn child, voluntary manslaughter of an unborn child, battery of an unborn child, and aggravated battery of an unborn child.²⁵¹ The 1986 laws expanded the feticide statute in two ways: first, injury short of the fetus’s death was criminalized; second, the law applied throughout pregnancy, not just upon viability.²⁵² The debates over the enactment of these laws centered on the constitutionality of applying the statutes before viability and the potential use of these laws against the mother.²⁵³

As to the constitutionality of protecting a fetus, one representative opined that the legislature was “going directly against the Supreme Court decisions in this area” and that the statute would be found unconstitutional upon passage.²⁵⁴ A supporter of the bill did not directly respond to this potential problem, but merely stated: “I don’t think that whether our Supreme Court makes a decision that’s wrong should preempt us from . . . passing a law here in Illinois that we think is right.”²⁵⁵ The representative added: “I think we’re seeing some changes in the structure of our Supreme Court and subsequently, we’ll see some more intelligent decisions.”²⁵⁶ These comments seem to indicate a lack of concern with the constitutionality of state interference in the first three months of pregnancy.

Other statements made during the House debates also left open the question of whether the mother could be criminally liable for harm to her fetus. The primary backer of the bill indicated in no uncertain terms that the bill “does not apply to the mother involved” and that it is aimed at third parties who knowingly attack pregnant women,

250. ILL. REV. STAT. ch. 38, para 9-1.1 (1985) (repealed 1986).

251. 720 ILL. COMP. STAT. 5/12-3.1 (West 1993 & Supp. 1997) (Battery of an unborn child); *id.* 5/12-4.4 (Aggravated battery of an unborn child). The other offenses were incorporated into the preexisting murder statute. *Id.* 5/9-1.

252. *See, e.g., id.* 5/12-3.1 (“[U]nborn child’ shall mean any individual of the human species from fertilization until birth . . .”); *id.* 5/12-4.4 (Intentional homicide of an unborn child); *id.* 5/9-2.1 (Voluntary manslaughter of an unborn child).

253. *See infra* notes 254-62.

254. 84 H.R. TRANSCRIPTION DEB. 83 (Ill. June 23, 1986) (statement of Rep. Young).

255. *Id.* (statement of Rep. Stephens).

256. *Id.* at 84.

harming their fetuses.²⁵⁷ This intent may not be completely protective of a pregnant drug user, however, when it is examined in context. First, the statements protecting the mother from prosecution were all made in answer to the question of the bill's applicability to women who obtain abortions.²⁵⁸ Second, the bill was not seen as conflicting with abortion rights, "because what we're talking about is criminal acts [causing harm to the fetus]."²⁵⁹ Therefore, the statute is arguably inapplicable to a pregnant woman only if she obtains a legal abortion or otherwise engages in legal behavior. This specific intent is especially important with regard to the crime of Aggravated Battery of an Unborn Child. Unlike the crime of Battery of an Unborn Child, Aggravated Battery does not explicitly state that the mother of the fetus may not be charged.²⁶⁰

Another statement in the legislative history indicates that a *Whitner*-like interpretation is possible. The sponsor pointed out that this bill was merely an extension of the rights a fetus maintains under tort law.²⁶¹ The Supreme Court of South Carolina used a similar reasoning to show the logical progression of fetal rights: the right to action in tort; the right not to be harmed by a third party; and the *Whitner* creation of the right not to be harmed by the mother.²⁶² While the Illinois law has not yet been used to prosecute any pregnant women for fetal abuse, the possibility exists as it is currently written.

b. Bodily Harm, Child Abuse, and Child Endangerment

Illinois has a number of different statutes that criminalize the infliction of various forms of bodily harm.²⁶³ With the exception of the statutes discussed in the previous section, these laws are not specifically aimed at harm to fetuses, as opposed to living persons. Two of these harm statutes are written broadly enough, however, that an activist court could use them to apply to fetal abuse. First, Illinois's law against Drug Induced Infliction of Great Bodily Harm makes it a Class 1 felony if one unlawfully delivers a controlled substance to an

257. *Id.* at 81 (statement of Rep. Pullen).

258. *Id.*

259. *Id.* at 84.

260. Compare 720 ILL. COMP. STAT. 5/12-3.1 (West 1993) (Battery of an unborn child) (The "'person' [who commits battery of an unborn child] shall not include the pregnant woman whose child is harmed."), with *id.* 5/12-4.4 (Aggravated battery of an unborn child) (lacking any preclusion of the mother's prosecution). It is unclear whether this anomaly is intentional or is the result of sloppy statutory drafting.

261. 84 S. TRANSCRIPTION DEB. 76 (Ill. May 13, 1986) (statement of Sen. Lemke); see also 740 ILL. COMP. STAT. 180/2.2 (West 1993) (allowing a cause of action for wrongful death of a fetus).

262. See *supra* notes 158-64 and accompanying text.

263. See generally 720 ILL. COMP. STAT. § 5/12 (Bodily Harm).

other and the other person experiences great bodily harm as a result.²⁶⁴ This law is quite similar to the Delivery of a Controlled Substance to a Minor statutes that have been used in other states as the basis for fetal abuse prosecutions.²⁶⁵ Using the same rationale, the Illinois law could apply to the involuntary delivery of drugs from the mother to the infant during the moments after birth before the umbilical cord has been severed. While the law has not been used in this way, nothing in the statute precludes such a reading.

The Reckless Conduct statute²⁶⁶ is another law that could be used to apply to fetal abuse under an expansive interpretation. The law makes one liable if her reckless acts "cause[] bodily harm to or endanger[] the bodily safety of an individual by any means."²⁶⁷ If a court defined a fetus as an individual for this statute's purposes, a pregnant woman could be prosecuted for reckless conduct if she ingested any drug, even if her acts did not actually harm her child.

Illinois laws against child abuse and endangerment, as currently written, could also be read to include fetal abuse. Under the Abused and Neglected Child Reporting Act,²⁶⁸ the definition of "neglected child" includes a newborn who has tested positive for controlled substances.²⁶⁹ While this statute was intended to give the Department of Children and Family Services the power to remove such children from their mothers' custody,²⁷⁰ no provision in the statute prevents the department from sharing its information regarding neglected children with prosecutorial authorities.

The Illinois child endangerment statute is nearly identical to the South Carolina statute used to prosecute Cornelia Whitner.²⁷¹ The statute very broadly prohibits a person from causing the life or health of a child to be endangered.²⁷² Therefore, if an Illinois court defines a fetus as a child for the purposes of the statute, a pregnant woman could be prosecuted for drug use as well as any other activity that could endanger her child's health.

264. *Id.* 5/12-4.7.

265. *See supra* notes 45-55 and accompanying text.

266. 720 ILL. COMP. STAT. 5/12-5.

267. *Id.* (emphasis added).

268. 325 ILL. COMP. STAT. 5/3 (West 1993 & Supp. 1997).

269. *Id.*

270. The bill was suggested by the DuPage County State's Attorney as a way for the Department of Children and Family Services ("DCFS") to provide assistance. *See* 86 S. TRANSCRIPTION DEB. 178 (Ill. June 23, 1989) (statement of Sen. Topinka). There was no explanation of why the state's attorney would have such an interest in DCFS's activities or whether the state's attorney had any personal interest in the amended definition.

271. 720 ILL. COMP. STAT. 5/12-21.6; *see also* S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985).

272. 720 ILL. COMP. STAT. 5/12-21.6.

III. CONSTITUTIONALITY OF FETAL ABUSE PROSECUTIONS

Most courts faced with fetal abuse prosecutions have recognized the constitutional problems of notice and vagueness when a woman is charged under child abuse or drug delivery statutes.²⁷³ These courts determined that a plain reading of the statutory language shows that they were not intended to apply to fetal abuse, so no reasonable woman would be aware that her behavior would subject her to criminal charges.²⁷⁴ Because previous cases were decided on statutory interpretation alone,²⁷⁵ and no legislation specifically addressing fetal abuse has been challenged to date, courts have avoided more lengthy analysis of the constitutionality of fetal abuse prosecutions in general.

Several constitutional issues are implicated when a woman is charged with abusing her fetus under any type of statute. *Whitner*,²⁷⁶ the only appellate-level court to uphold a conviction for fetal abuse, very quickly dismissed the constitutional arguments made by the defendant.²⁷⁷ The constitutionality of the crime of fetal abuse, however, deserves a much more detailed and thoughtful consideration than that court was willing to give. This Part will give an overview of some of the constitutional problems that should be examined before allowing prosecutions to continue.²⁷⁸

A. *Reconciling Fetal Abuse Prosecutions with the Right of Reproductive Privacy*

Any law that punishes a pregnant woman for behavior that affects her fetus must be examined in light of the United States Supreme Court's rulings in abortion cases.²⁷⁹ These decisions are the Court's only statements about a pregnant woman's obligations to her unborn child and the government's interest in the fetus's life and health. Furthermore, all laws purporting to vindicate the interests of a fetus involve the same conflict between the mother's and the fetus's rights.²⁸⁰

273. See *supra* notes 41-42 and 49-51 and accompanying text.

274. See *supra* notes 41-42 and 49-51 and accompanying text.

275. Roberts, *supra* note 4, at 940.

276. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); see *supra* Part II.

277. See *Whitner*, 492 S.E.2d at 784-86.

278. But see Solomon, *supra* note 21, at 424-27 (arguing that constitutional law will not guarantee a pregnant woman's rights due to: the unpredictable and inconsistent application of the law; the constantly changing face of the law; and the misconceptualization of the issue into separate fetal and maternal interests to be balanced).

279. These cases include *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

280. See Ann Treneman, *Just Imagine if James Kelly Had Won . . .*, INDEPENDENT (LONDON), June 1, 1997, (Features), at 1, available in LEXIS, News Library, Indpnt File ("The power of the idea of foetal [sic] rights is that it is at the heart of the abortion issue but is also much wider. It

Fetal abuse prosecutions must, therefore, be examined in light of: (1) the constitutional privacy interest;²⁸¹ (2) the relative strength of the woman's and the state's interests in each trimester;²⁸² and (3) the undue burden test recently promulgated by the Court.²⁸³

1. *The Right of Privacy*

The constitutional right of procreation was first pronounced by the Court in *Skinner v. Oklahoma*.²⁸⁴ The case involved a challenge to the practice of mandatory sterilization of persons convicted three times of felonies showing "moral turpitude."²⁸⁵ The Court held the practice to be unconstitutional, stating: "Marriage and procreation are fundamental to the very existence and survival of the race."²⁸⁶ It is significant that the challengers here were felons, not society's ideal potential parents, yet the Court chose this case to acknowledge a universal right of procreation. *Skinner* was a dramatic change from the Court's earlier stance, which upheld forced sterilization of "mental defectives" because, in the inimitable words of Justice Holmes: "Three generations of imbeciles are enough."²⁸⁷

Basing its decision partly on the rule in *Skinner*, the Supreme Court announced in *Griswold v. Connecticut*²⁸⁸ that a "penumbra" of rights, including the rights to marry and procreate, imply a constitutional right of privacy that extends to reproductive decisions.²⁸⁹ The challengers in *Griswold* had been convicted of giving advice to married couples about birth control, in violation of state law prohibiting contraception.²⁹⁰ A much more difficult set of facts was presented in *Eisenstadt v. Baird*,²⁹¹ where the challenger to a birth control law

encompasses everything from a woman's behaviour during pregnancy to her decisions surrounding the birth (whether to have a Caesarean, for example), surrogacy, infertility treatments, foetal [sic] surgery and much more."); see also KRISTEN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 194 (1984) (arguing that the abortion debate is not truly about fetal rights but instead is "actually about the meanings of women's lives").

281. *Roe*, 410 U.S. at 153.

282. *Id.* at 162-64.

283. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (developing the undue burden test).

284. 316 U.S. 535 (1942).

285. *Id.* at 536.

286. *Id.* at 541.

287. *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

288. 381 U.S. 479 (1965).

289. *Id.* at 483-86.

290. *Id.* at 480.

291. 405 U.S. 438 (1972).

distributed contraceptives to an *unmarried* woman.²⁹² The Court held that the general right of privacy in reproductive decisions must be equally applicable to the married and unmarried.²⁹³ In *Roe v. Wade*,²⁹⁴ the Court held that this right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²⁹⁵ The *Roe* decision was based, in part, on the Court's concern with the psychological trauma that may accompany an unwanted pregnancy.²⁹⁶

While it has never been explicitly stated by the Court, it logically follows that if a woman's reproductive privacy right extends to her decisions about contraception and abortion, that right should also encompass privacy surrounding her health during the pregnancy as well as the fact of pregnancy itself. Moreover, a woman should be able to maintain some insulation from governmental interference if her pregnancy is spontaneously terminated.²⁹⁷ Mandatory reporting laws, however, may contravene the privacy right. These statutes allow a physician to administer drug tests to women he or she suspects of substance use,²⁹⁸ and the statutes require reporting of positive tests to governmental authorities.²⁹⁹ Thus, a woman may be subjected to public exposure of her pregnancy if her physician reports his or her findings or suspicions. Such publicity may not be troublesome for all women; some, however, may have important reasons to keep their pregnancies secret.³⁰⁰ Moreover, the underlying condition that ex-

292. *Id.* at 440 & n.1.

293. *Id.* at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

294. 410 U.S. 113 (1973).

295. *Id.* at 153.

296. *Id.* (noting "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether" includes "a distressful life and future," "[p]sychological harm," and "continuing stigma").

297. See Lynn Paltrow, "*Fetal Abuse*": *Should We Recognize it as a Crime?*, 75 A.B.A. J., Aug. 1989, at 39 (noting that every woman who has a miscarriage or stillbirth could be called to defend her prenatal practices, which would be an invasion of privacy at an emotionally devastating time).

298. See, e.g., MINN. STAT. ANN. § 626.5562 (West 1982 & Supp. 1998) (requiring that physicians test all women in their care who are pregnant or have given birth within eight hours, and who exhibit "obstetrical complications" that indicate possible use of a controlled substance).

299. See, e.g., MINN. STAT. ANN. § 626.5561 (mandating that physicians immediately report to the local welfare agency any pregnant woman they "know[] or ha[ve] reason to believe" has used a controlled substance).

300. For example, domestic abuse may begin or become more violent if the woman is pregnant. Possible reasons for the increased violence include the financial strain of a new child, the father suspects the child is not his, or he is angry at the woman for not taking care of herself. Shari Roan, *A Dirty Secret: Society Would Like to Think That All Expectant Moms are Cher-*

poses women to criminal charges, drug addiction, is not itself criminal behavior but a disease that is generally held to be confidential under the doctor-patient privilege.³⁰¹

2. *Fetal Rights and the Viability Line*

Roe established that the competing interests of the state and the mother must be carefully balanced in the area of reproductive freedom.³⁰² The Court determined that the strength of the relative interests of the mother and the state vary with the trimester of the pregnancy.³⁰³ During the first three months, the mother's interest in privacy outweighs the state's interest in the mother's and the potential child's life and health, thus rendering governmental interference in the abortion decision impermissible.³⁰⁴ In the second trimester, the heightened risk of the abortion procedure increases the government's interest in the mother's health; therefore, medical regulation of the procedure is permissible.³⁰⁵ The government does not yet have an interest in the potential life of the fetus, however, so abortion during the second trimester presumably may not be outlawed.³⁰⁶ In the final trimester of pregnancy, when a fetus is medically viable, the government

ished, But Pregnancy May Start—or Increase—Domestic Violence, L.A. TIMES, Dec. 5, 1995, at E1.

301. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (citing *Linder v. United States*, 268 U.S. 5, 18 (1925)) (holding that drug addiction is an illness, not a crime); see also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS IV 175-272 (1994) (categorizing drug addiction as a disease). Alcohol and drug abuse confidentiality statutes were rewritten in 1986 to allow disclosures of patient records in conjunction with state child abuse or neglect laws. Renee M. Popovits, *Criminalization of Pregnant Substance Abusers: A Health Care Perspective*, 24 J. HEALTH & HOSP. L. 169, 176 (1991).

302. *Roe v. Wade*, 410 U.S. 113, 162-64 (1973). But see Lencewicz, *supra* note 16, at 604 (arguing that the categorization of the debate into "maternal rights" and "fetal rights" camps is too narrow and that the interdependence of the relationship calls for a solution that merges both medical and legal rights and perspectives).

303. *Roe*, 410 U.S. at 163-64. The Court's reliance on a trimester framework was primarily due to the state of medical technology at the time the case was decided. *Id.* Fetal viability was generally fixed at the end of the sixth month of pregnancy. *Id.* The Court thus established that month as the beginning of the government's "compelling" interest in the future life of the fetus. *Id.* The actual date of viability is variable, depending upon technological advances and the circumstances of the individual case. See Weinberg, *supra* note 97, at 540 n.96. A plurality of the Court subsequently rejected the trimester framework, claiming that the government has a compelling interest throughout pregnancy. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992). The *Casey* court did agree, however, that the government may not block the right to choose abortion until viability. *Id.* Therefore, for the purposes of this discussion, the first two trimesters under *Roe* will be considered equivalent to the pre-viability stage under *Casey*.

304. *Roe*, 410 U.S. at 163.

305. *Id.* (holding that any state regulation at this point must relate solely to the health of the mother, not that of the unborn child).

306. *Id.*

finally has a sufficient interest in the child's well being and can strictly regulate abortions, even allowing only those abortions which are medically necessary for the mother's life and health.³⁰⁷

The relative weight given to the interests of the pregnant woman, the fetus, and the state, before and after viability, is problematic for those who wish to prosecute pregnant women for child abuse. Some commentators have argued that although a woman can abort during the first two trimesters, once she has decided to keep the baby, the goal of the child's health should outweigh her interests, and the mother has a "legal and moral duty to bring the child into the world as healthy as is reasonably possible."³⁰⁸ This argument, however morally compelling, does not resolve the issue. Although a woman may make an early decision to keep her child, and though using drugs during the first two trimesters can do significant damage,³⁰⁹ the state cannot establish an interest sufficient to prosecute the pregnant woman during this period of time. It would be incongruous if the state had no power to prosecute a woman for terminating her pregnancy but could charge her with fetal abuse if she does not abort. Thus, drug use should never be considered fetal abuse until the third trimester of pregnancy.³¹⁰

Three important issues are implicated by this fact. First, if drug use during the third trimester is automatically considered fetal abuse, a state should be able to prosecute the mother at that time, before the child is born. The government's interests during this period, however, are primarily in the potential life and health of the unborn child.³¹¹ Thus, the state interest in intervention is necessarily restricted if the mother's activities do not harm her child. Current medical technology, however, cannot detect a child's injury due to drug exposure

307. *Id.* at 163-64.

308. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 438 (1983). "Conflicts over management of the pregnancy arise only after she has decided to become or remain pregnant. Once she decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus." *Id.* at 437 (citations omitted); see generally Grace, *supra* note 61 (arguing that a woman who chooses to proceed with a pregnancy is obligated to act reasonably regarding the child's health and tacitly agrees to state intervention if she does not do so).

309. Medical evidence suggests that the majority of neurological injury inflicted upon a fetus occurs during the third through eighth week of pregnancy, before many women are even aware that they are pregnant. Ira J. Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741, 1742 (1989).

310. See Popovits, *supra* note 301, at 177; cf. Best, *supra* note 21, at 210-11 ("It is simply unnecessary, under the existing state of constitutional analysis, to decide whether or not a fetus is a person or even to utilize a viability standard to determine when a state may intervene to protect a fetus. *Casey* clearly held that a state has a legitimate interest in the protection of a fetus from the outset of pregnancy."); *infra* Part III.A.3.

311. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992); *Roe*, 410 U.S. at 163-65.

before the child is born.³¹² As a result, women may be prosecuted for abuse before the stated crime can be proven.³¹³

Second, there are practical difficulties in prosecuting for third-trimester abuse. Because the precise amount of third-trimester harm will be nearly impossible to determine,³¹⁴ statutes will necessarily have to presume abuse from the mother's third-trimester drug use or a newborn's positive toxicology test rather than any actual harm to the child. Therefore, these statutes seem designed to punish women for drug use rather than for child abuse.³¹⁵ Such laws also run a tremendous risk of overinclusiveness, since a woman could be charged with child abuse whether or not her child is actually harmed.³¹⁶ Finally, these laws, which are intended to protect the fetus, may actually encourage women to obtain abortions. A pregnant drug user may decide to have a first trimester abortion to avoid future prosecution.³¹⁷ Even subtle governmental pressure to end a pregnancy would run afoul of the fundamental right of reproductive freedom.³¹⁸

3. *The Undue Burden Test*

Prosecuting women for fetal abuse is also inconsistent with *Planned Parenthood v. Casey*,³¹⁹ where the Supreme Court narrowed its *Roe v.*

312. See *supra* notes 79-85 for the potential effects of cocaine exposure on newborns. None of these symptoms can be diagnosed in utero. See also *supra* notes 60-64 for a discussion of a case where a woman was charged with child abuse for drinking while pregnant, but the charges were dropped because the state could not prove injury.

313. Ironically, if the prosecutorial goal is achieved, women will remain drug-free by being forced into treatment or prison for the remainder of their pregnancies, lessening the chance of permanent harm to their children. A prosecution may be a complete success if a woman is punished for abusing a perfectly healthy newborn.

314. Adams, *supra* note 97, at 64. The greatest risk of long-term damage occurs during the early stages of pregnancy, when defective cells are able to rapidly divide. *Id.* "[T]he period of peak susceptibility to structural abnormality lasts from days 20-55 in human pregnancy. This is the period in which structural differentiation of major organ systems occurs, and in which target organ formation is most susceptible to disruption." *Id.*

315. Drug addiction itself is not a crime. See *supra* note 301 and accompanying text; see also Oberman, *supra* note 56, at 538 (noting that because these laws disregard the injurious effects of poverty, child protection does not seem to be their true purpose).

316. See *infra* notes 390-98 (discussing overinclusiveness of fetal abuse prosecutions).

317. This possibility was noted by two courts that declined to uphold prosecutions for prenatal child abuse or endangerment. See *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991); *Sheriff v. Encoe*, 885 P.2d 596, 599 (Nev. 1994); see also Weinberg, *supra* note 97, at 540.

318. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (warning that reproductive control could be used to "cause races or types which are inimical to the dominant group to wither and disappear"). This admonition is especially pertinent in the context of fetal abuse laws, which are primarily aimed at cocaine use. See *infra* Part III.B for a discussion of the possible discriminatory motivations of these prosecutions.

319. 505 U.S. 833 (1992).

Wade holding.³²⁰ *Casey* recognized that the government has some interest in the health of the fetus throughout pregnancy, not merely in the final trimester.³²¹ Accordingly, the *Casey* Court held that a state may put restrictions upon obtaining an abortion during the first two trimesters as long as those restrictions did not place an undue burden upon the woman's decision whether to abort.³²² The effect of the Court's new definition of governmental interests in pregnancy is unclear. One commentator has posited:

Given that *Casey* has eliminated the rigid line of viability, it is arguable that the compelling state interest in prenatal substance abuse could be sustained at any time during a pregnancy. This argument is not rebutted by the holdings of *Roe* and *Casey*, which preserve a woman's right to terminate her pregnancy prior to viability, since state intervention governing prenatal substance abuse neither controls nor infringes upon the substance abuser's right to an abortion. Rather, it regulates the woman's conduct during pregnancy after she has decided to have her child.³²³

It is not disputed that the decision to prosecute for fetal abuse does not create an undue burden on the right to obtain a legal abortion. It may be argued, however, that prosecution implicates the converse principle, with which the *Casey* Court would undoubtedly agree: The State should not place an undue burden on a mother's choice to give birth to her child.³²⁴ Threatened prosecution constitutes an undue burden on the decision faced by a pregnant drug user who wishes to keep her baby. States may argue that the only burden placed on these pregnant women is the burden to stop using drugs. The actual burden, however, is far more intrusive into the choices these women need to make.

First, in a state with mandatory reporting statutes and a policy of prosecution, a drug-addicted mother is faced with the following options: (1) to go to the doctor and risk criminal charges; (2) to shun the

320. *Id.* at 879. The Court did reaffirm all three parts of *Roe v. Wade's* central holding: (1) the woman's right to choose to have an abortion before viability; (2) the power of the state to regulate abortions after viability; and (3) the recognition that the state has interests in the life and health of the mother and fetus throughout the pregnancy. *Id.*

321. *Id.* at 878. The plurality opinion in *Casey* rejected *Roe's* rigid trimester framework and allowed states to promulgate rules promoting fetal life before viability. *Id.*

322. *Id.* "An undue burden exists . . . if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability." *Id.*

323. Lencewicz, *supra* note 16, at 616.

324. The plurality made it clear that bringing the fetus to term is a valid, even the preferred, objective. *Casey*, 505 U.S. at 878. "[M]easures designed to advance this interest [in the fetus's potential life] will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion." *Id.*

doctor and risk the fetus's health by not getting prenatal care;³²⁵ or (3) to terminate her pregnancy.³²⁶ Thus, fear of prosecution not only regulates, but unduly burdens, a woman's decision whether to keep her baby, which the *Casey* court determined is an impermissible restriction.³²⁷ Second, a mandatory reporting requirement unduly burdens women who do not want their pregnancies to be revealed. *Casey* explicitly acknowledged that a woman may have a significant interest in privacy surrounding her pregnancy.³²⁸ In striking down Pennsylvania's spousal notification law as an undue burden on the abortion decision, the Court recognized that some women have powerful and legitimate interests in keeping their pregnancies secret.³²⁹ Moreover, the Court stated that this burden is significant even if only a small number of women would be distressed by the privacy invasion:

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.³³⁰

The third burden on a woman's decision is the broad wording of some of the statutes used to prosecute. The child neglect statute in *Whitner*,³³¹ for example, made it a crime to commit any act that endangers *or is likely to endanger* the life, health, or comfort of a child.³³² This statute and others like it could be interpreted to require mothers to refrain from all activities that are even potentially harmful to their children. Cases indicate that this is not a mere hypothetical; states are willing to criminally charge women for engaging in a legal activity while pregnant.³³³ It would be an undue burden to require a mother, under the penalty of imprisonment, to have the healthiest

325. See *infra* notes 403-09 and accompanying text.

326. See *supra* note 317 and accompanying text.

327. *Casey*, 505 U.S. at 878 (holding that a governmental restriction which is unduly burdensome is invalid).

328. *Id.* at 892-94.

329. *Id.* (“[A] significant number of women . . . are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”).

330. *Id.* at 894.

331. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

332. S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985) (amended 1993 and 1996). “Any person having the legal custody of any child . . . who shall . . . neglect to provide . . . the proper care and attention for such child . . . , so that the life, health or comfort of such child . . . is endangered or is likely to be endangered, shall be guilty of a misdemeanor” *Id.*

333. See *supra* notes 60-64 and accompanying text.

child possible.³³⁴ Prosecuting pregnant women for ingesting illicit drugs necessarily implicates the Supreme Court's abortion decisions. Since the rights at issue are so fundamental, it is vitally important that a thoughtful legislature carefully reconcile all statutes used to prosecute with the right of reproductive privacy and freedom.

B. Fetal Abuse Prosecutions and the Equal Protection Clause

Another constitutional criticism of fetal abuse prosecutions is that they may violate the Fourteenth Amendment guarantee of equal protection.³³⁵ The Equal Protection Clause provides generally that those who are similarly situated will be treated similarly, and those who are not similarly situated will not be treated similarly.³³⁶ This Part examines arguments that fetal abuse prosecutions discriminate on the basis of gender and race and that they are unjustifiably over- and underinclusive.

I. Gender Discrimination

If a statute discriminates on the basis of gender, the Supreme Court applies an intermediate level of scrutiny to determine whether the law is constitutional.³³⁷ As described by the Court in *Craig v. Boren*,³³⁸ "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."³³⁹ Fetal abuse prosecutions are obviously aimed only at women, but that fact alone does not mean the laws discriminate on the basis of gender, and intermediate scrutiny may not apply. The Court has held that a classification based on biological factors, such as pregnancy, does not discriminate on the basis of sex, so the State must only show that the means are rationally related to achieving a legitimate objective.³⁴⁰ In *Geduldig v. Aiello*,³⁴¹ the Court held that a state's policy not to extend insurance benefits for pregnancy merely created the classifications of "pregnant women and nonpregnant persons," and

334. Many of a pregnant woman's actions may affect the health of her fetus. See *supra* notes 95-130 and accompanying text.

335. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

336. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 16-1, at 1438 (2nd ed. 1988).

337. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

338. 429 U.S. 190 (1976).

339. *Id.* at 197.

340. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

341. 417 U.S. 484 (1974).

therefore did not discriminate based on sex.³⁴² This determination was upheld two years later in another insurance coverage case, which also found that discrimination based on physical characteristics is not violative of equal protection and therefore does not demand more than a deferential standard of review.³⁴³

A summary examination of these cases seems to indicate that prosecuting only women for fetal abuse does not discriminate on the basis of sex. Nevertheless, the question is not so easily resolved. The insurance coverage cases do not squarely present the same problem as fetal abuse prosecutions do. First, the Court has historically been very deferential to social legislation that allocates a state's limited financial resources.³⁴⁴ Laws aimed at incarcerating pregnant women, however, cut to the very heart of one's personal liberty. As a result, the Court could take a closer look at the actual goal of these prosecutions and apply a somewhat higher standard of review than mere rationality.

Second, the Court's simplistic understanding of the categories of "pregnant women and nonpregnant persons" is not possible with fetal abuse laws. The Court in *Geduldig* justified its reading of the categorization by noting: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."³⁴⁵ The same cannot be said for fetal abuse prosecutions. Pregnant women are prosecuted based on their ability to harm a fetus in utero. As explained above, studies indicate that the father's behavior before and during pregnancy can adversely affect the fetus's health.³⁴⁶ Therefore, fetal abuse laws aimed only at the mother do not merely differentiate between those whose actions can harm a fetus and those whose behavior has no effect. Clearly, there exists a "risk from which men are protected and women are not,"³⁴⁷ so *Geduldig's* rationale is misplaced in this context.

Moreover, the Court might not accept *Geduldig's* use of the mere rationality test today.³⁴⁸ In *UAW v. Johnson Controls*,³⁴⁹ the Court

342. *Id.* at 496-97 & n.20 (stating that even though only women can become pregnant, "it does not follow that every legislative classification concerning pregnancy is a sex-based classification").

343. *General Electric v. Gilbert*, 429 U.S. 125 (1976).

344. *See Geduldig*, 417 U.S. at 493-95 (analyzing the cost to the state of providing additional benefits to pregnant women); *see also Harris v. McRae*, 448 U.S. 297 (1980) (holding that there is no requirement that the government subsidize the exercise of fundamental rights).

345. *Geduldig*, 417 U.S. at 496-97.

346. *See supra* notes 131-36 and accompanying text.

347. *Geduldig*, 417 U.S. at 496-97.

348. *See Oberman, supra* note 56, at 526-28 (asserting that a future challenge like *Geduldig* may be evaluated with intermediate scrutiny).

349. 499 U.S. 187 (1991).

struck down a policy that prevented women of childbearing age from working in jobs that could expose them to substances that could harm a fetus.³⁵⁰ Because fertility and the potential for fetal harm are common to both sexes, the law discriminated on the basis of gender, requiring an intermediate level of review.³⁵¹

Assuming that prosecuting only women for fetal abuse does constitute gender discrimination, the next question is whether prosecutions would nevertheless be upheld under the intermediate level of review. The health of newborn babies is indeed an important governmental objective. The means that the states are using to achieve that objective, however, are not substantially related to meeting the goal. While a perfect fit between means and ends is not required under this test, it can be argued that criminal prosecutions do not substantially relate to the objective of fetal health. First, as will be examined below, fetal abuse prosecutions are alarmingly overinclusive because women are prosecuted even though there may be no actual injury to their unborn children.³⁵² Second, fathers' behavior also affects the health of newborns. As *Craig* implied, a statute that is overinclusive of its targeted group yet underinclusive of members of the other gender may not survive intermediate scrutiny.³⁵³

2. Racial Discrimination

No statute used to prosecute pregnant women for substance abuse is racially discriminatory on its face; they are all written to apply to all women who engage in the prohibited behavior.³⁵⁴ Nevertheless, a race-neutral statute will still be subject to strict scrutiny by the Supreme Court "if it is discriminatory in both impact and purpose,"³⁵⁵ which may be true of fetal abuse laws. This subpart first shows the disproportionate impact that fetal abuse prosecutions have on protected minorities and the possible reasons for this inequality. The subpart next explores the constitutionality of these prosecutions.

a. Discriminatory Effect and Purpose

The vast majority of fetal abuse prosecutions have been aimed at poor minority women. One report discovered that of women who

350. *Id.* at 190-91.

351. *Id.* at 198-99.

352. See *infra* notes 390-98 and accompanying text.

353. *Craig v. Boren*, 429 U.S. 190, 201-03 (1976).

354. See, e.g., S.C. STAT. ANN. §20-7-50 (Law. Co-op. 1985) (stating that "[a]ny person" may be guilty of child neglect) (emphasis added).

355. *TRIBE, supra* note 336, § 16-20, at 1502 (emphasis omitted).

were prosecuted, “[e]ighty percent . . . were black, Hispanic, or members of other minorities.”³⁵⁶ In Charleston, South Carolina, where officials implemented a novel experiment to target pregnant drug users,³⁵⁷ the only women who were prosecuted were poor members of minority groups.³⁵⁸ This clearly unequal impact is the result of administrative choices made at every stage of prosecution, choices that unfairly target minority women as fetal abusers.

First, these laws are directed primarily at pregnant users of cocaine, who are more likely to be poor minority women than middle-class whites.³⁵⁹ Poor members of minority groups, however, are not more likely to use *drugs* than anyone else is: the most widely cited study of prenatal drug exposure found that drug use did not vary widely with race or income.³⁶⁰ Those who justify fetal abuse prosecutions in the name of fetal health have not explained the reason for targeting one drug above all others.

The second level of discriminatory administration of fetal abuse laws is at the next stage, where minority women are significantly more likely to be tested for substance abuse than white women are. Statutes recommending testing of pregnant women or newborns do not require doctors to test all their patients, only those they have reason to suspect have ingested or been exposed to a controlled substance.³⁶¹ Therefore, a doctor’s biases necessarily infect the process at its earliest stages. For example, one factor that leads doctors to test newborns for drug exposure is a lack of prenatal care, which “correlates strongly with race and income.”³⁶² Furthermore, testing more often occurs in public hospitals that serve poor minorities than in private facilities.³⁶³

Once a minority woman or her newborn has tested positive for a controlled substance, the results of her test are much more likely to be reported to governmental authorities. In fact, African-American women are reported to the authorities almost ten times more often

356. Kolata, *supra* note 68, at A13; *see also* Solomon, *supra* note 21, at 418 (claiming that “[s]ince 1987, 70% of those arrested for drug-related fetal abuse have been African-American”).

357. *See supra* notes 68-70, 142-44 (discussing Charleston’s policy and procedure).

358. *See* Kolata, *supra* note 68, at A13.

359. Chasnoff et al., *supra* note 9, at 1204 (finding that 7.5% of black women tested positive for cocaine versus 1.8% of whites).

360. *Id.* at 1203-04 (noting also that 14.4% of white women tested positive for marijuana, compared with 6.0% of black women); *see also* Roberts, *supra* note 4, at 947-48 (discussing the Pinellas County study).

361. *See, e.g.*, MINN. STAT. ANN. § 626.5562 (West 1997) (giving doctors discretion in initial testing).

362. Roberts, *supra* note 4, at 947.

363. *Id.* at 946; Kolata, *supra* note 68, at A13.

than white women are reported.³⁶⁴ Again, this discrepancy may be explained by the fact that public hospitals are "more likely than private hospitals to report women whose tests show drug use."³⁶⁵ Charleston's experience is telling: even though all doctors were given guidelines to screen pregnant drug users and report any positive results, only poor minority women were prosecuted because "the only doctors reporting drug use to him [the prosecutor] were from the Medical University of South Carolina, Charleston's public hospital."³⁶⁶

b. Constitutionality

Over one hundred years ago, the Supreme Court established the principle that a facially neutral law may still show purposeful discrimination if it is administered in a prejudicial way.³⁶⁷ In *Yick Wo v. Hopkins*,³⁶⁸ the Court struck down a discretionary licensing ordinance under which all 200 Chinese applicants for a laundry license had been denied, while all but one of the 80 non-Chinese applicants were granted licenses.³⁶⁹ The Court found the ordinance's discriminatory purpose was apparent: "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."³⁷⁰

While their discriminatory application is not as mathematically compelling as that in *Yick Wo*, fetal abuse laws may be similarly unjustifiable. First, the focus on cocaine exposure is not warranted in the face of scientific evidence questioning the true effects of the drug and showing that other substances are definitively harmful.³⁷¹ Second, the incredible discrepancies in the rates of testing, reporting, and prosecution may serve to show an institutional bias against poor women of color. Third, although white women are in fact prosecuted for fetal abuse, one commentator has suggested that their cases are pursued in

364. Chasnoff et al., *supra* note 9, at 1204.

365. Kolata, *supra* note 68, at A13.

366. *Id.*

367. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

368. 118 U.S. 356 (1886).

369. *Id.* at 359, 374.

370. *Id.* at 374.

371. *See supra* notes 83-130.

order to counter the implication of prejudicial administration of the laws.³⁷²

Assuming these prosecutions are found to be discriminatory,³⁷³ it is unlikely that they could withstand strict scrutiny.³⁷⁴ While fetal health is certainly a compelling governmental objective, it is clear that states do not use the least discriminatory means available. The means are especially unjustifiable because a less discriminatory alternative, such as universal testing or random testing of all women, would allow states to attain the goal at least as well or better than the current practice.³⁷⁵ Furthermore, states could not use administrative convenience as an excuse to test only certain women (poor minorities) for only certain substances (cocaine).³⁷⁶

3. *Overinclusiveness and Underinclusiveness*

Another equal protection objection to fetal abuse prosecutions is that they are both over- and underinclusive. An inclusiveness problem occurs when the number of individuals bearing the "trait" a law uses for classification purposes is more or less than the number of people who are creating the "mischief" the law is intended to cure.³⁷⁷ An underinclusive law's classification scheme includes some people who are proper targets of a law while leaving others who create the same harm legally unaffected.³⁷⁸ An overinclusive law affects both those who are causing the harm as well as some who should not rightly be included in its application.³⁷⁹

372. Roberts, *supra* note 4, at 957 (claiming that a white attorney in Michigan was charged after bias allegations were aimed at the prosecutor) (citing CYNTHIA DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 134-35 (1993)).

373. This outcome is highly doubtful. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (accepting a city's claimed neutral motive for a policy that was discriminatory in practice); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that discriminatory effect alone is insufficient to show the necessary discriminatory purpose).

374. See *TRIBE*, *supra* note 336, § 16-6, at 1451-54.

375. A potential bias in testing was noted by the National Association of Public Child Welfare Administrators, who recommended that if testing is mandated, "such testing must be universal (i.e., testing would be conducted on all pregnant women and newborns at all medical facilities and not targeted at specific populations.)" APWA Report, *supra* note 71.

376. See *Wengler v. Druggist's Mutual Ins. Co.*, 446 U.S. 142 (1980) (holding that administrative convenience does not justify discriminatory application).

377. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 609-11 (12th ed. 1991) (describing Tussman & tenBroek's "trait" v. "mischief" analysis) (citing Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-63 (1949)).

378. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-63 (1949).

379. *Id.*

Fetal abuse laws are underinclusive because they are not directed at all people who may be responsible for the harm of fetal injury.³⁸⁰ First, as discussed above, fathers' behavior and ingestion of substances can adversely affect the fetus's health,³⁸¹ but men have been immune to prosecution. Second, these laws have been primarily used against women who have ingested cocaine and generally do not affect women who engage in other voluntary, harmful activities.³⁸² Finally, only late-term drug use is prosecuted,³⁸³ but early exposure creates the most serious risk of fetal injury.³⁸⁴ Therefore, many who have committed "fetal abuse" are not held liable for their actions.

The fact that these laws are underinclusive, however, does not mean the Supreme Court will invalidate them. Underinclusive laws are almost always upheld as long as there is some rational basis for promulgating the classification scheme.³⁸⁵ The Court is very deferential to a state's decision to cure a problem "one step at a time"³⁸⁶ and allows a state to target only some individuals who are responsible for the harm the law was intended to prevent.³⁸⁷ Nevertheless, an argument can be made that fetal abuse classifications are impermissibly underinclusive by focusing solely on drug users, a disenfranchised group.³⁸⁸ As Justice Jackson explained: "[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribu-

380. VanRaalte, *supra* note 3, at 459.

381. *See supra* notes 131-35 and accompanying text.

382. *See supra* notes 95-130 and accompanying text; *see also* VanRaalte, *supra* note 3, at 459 (claiming that a law intended to promote fetal health that prohibits only the use of cocaine or other controlled substances may be unconstitutionally underinclusive).

383. If a woman uses drugs early in pregnancy, tests of the mother or baby at the time of delivery will definitely be negative. Committee on Substance Abuse, *supra* note 71, at 640. Even very late-term use can go undetected; blood tests may be negative even if the woman has taken drugs within forty-eight hours of delivery. *Id.*

384. From conception to day 17 or 18, cells are "very sensitive to the effects of harmful substances," and exposure may result in miscarriage. LARRY H. GOLDBERG & JOANN LEAHY, *THE DOCTORS' GUIDE TO MEDICATION DURING PREGNANCY AND LACTATION* 14 (1984). During the next phase, from 18 to 55 days' gestation, the "growing fetus is extremely sensitive to a drug's ability to cause birth defects." *Id.* In the "period of growth and maturation," which occurs in the second and third trimesters, a "growing fetus is relatively resistant to the birth-defect-causing properties of drugs, although birth defects may still occasionally occur." *Id.* at 15.

385. *See* TRIBE, *supra* note 336, § 16-2, at 1440.

386. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

387. *See* Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").

388. *See* Smith, *supra* note 12, at E1 ("It seems politically safer to go after this population.") (quoting neonatologist Dr. Stephen Kandall).

tion that might be visited upon them if larger numbers were affected."³⁸⁹

Because these laws are overinclusive as well as underinclusive, they may be more vulnerable to constitutional attack.³⁹⁰ The Court gives overinclusive legislation moderately strict review, on the theory that the law should not burden citizens without sufficient cause.³⁹¹ Fetal abuse prosecutions are overinclusive because they prosecute women with the "trait" of prenatal drug use who have not caused the "mischief" of fetal injury. The degree of fetal injury, and whether any injury occurs at all, is the product of a number of factors and cannot be determined solely on the basis of the mother's ingestion of a controlled substance. As explained above, a drug-exposed newborn's prognosis varies greatly, depending on the mother's general health and nutrition; whether the mother uses any other substances, such as alcohol and cigarettes; the level of prenatal care she receives;³⁹² and the timing of the fetus's drug exposure.³⁹³ Women who are held liable while they are pregnant are prosecuted well before any discernible harm is known.³⁹⁴ Moreover, even women who have given birth to "crack babies" exhibiting symptoms of drug withdrawal may be prematurely charged, because a child who is brought into the world with drugs in his or her system does not necessarily face any injury beyond irritability and tremulousness at birth.³⁹⁵ Studies have shown that the long-term outlook of drug-exposed children is significantly affected by environmental factors not directly related to their mothers' behavior during pregnancy.³⁹⁶ Therefore, at least some women who are in-

389. *Railway Express*, 336 U.S. at 112-13 (Jackson, J., dissenting).

390. "The sustaining of this classification, therefore requires both the finding of sufficient emergency to justify the imposition of a burden upon a larger class than is believed tainted with the Mischief and the establishment of 'fair reasons' for failure to extend the operation of the law to a wider class of potential [targets]." GUNTHER, *supra* note 377, at 611 (quoting Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 360 (1949)).

391. Overinclusive laws "reach out to the innocent bystander, the hapless victim of circumstance or association." *Id.* at 611-12.

392. *See supra* note 87 and accompanying text.

393. *See supra* note 384 and accompanying text.

394. *See, e.g.*, MINN. STAT. ANN. § 626.5561 (West 1997) (allowing state intervention during pregnancy).

395. *See supra* notes 83-86 and accompanying text. Some might argue that the child's discomfort at this time is sufficiently traumatic to be considered abuse. It would, however, be unrealistic at best to include "causing a child to be irritable" in the definition of child abuse.

396. *See supra* notes 88-94 and accompanying text (listing important factors such as poor nutrition and emotional neglect). Of course, a parent whose drug use during pregnancy continues throughout the child's life has a greater chance of providing an unhealthy environment for the child. Nevertheless, any such correlation is irrelevant to the present issue. Women are prosecuted for harming their fetuses through prenatal drug use, not for being potentially bad parents in the future.

cluded in a law's definition of a fetal abuser have not, in fact, harmed their children. The defendant in *Whitner*,³⁹⁷ for example, went to jail when her son was a healthy eight-year old.³⁹⁸

IV. IMPACT

Prosecuting pregnant women for not going to the doctor, for being too old, or for smoking cigarettes may seem improbable. If *Whitner* is read broadly, however, this scenario is not only possible but likely. First, the plain wording of the statute used to convict *Whitner* would criminalize those activities. Second, the Supreme Court of South Carolina's decision, in dicta, supported prosecuting women for legal behaviors that adversely affect fetuses.³⁹⁹ The court was aware of the far-reaching implications of this decision and simply stated that even though an activity is legal, it can become illegal once it potentially harms a fetus.⁴⁰⁰

Even a narrow interpretation of *Whitner*, one that would allow prosecution only for use of controlled substances, will have negative consequences. First, the decision allows judicial expansion into an area that should rightly be retained by the legislature.⁴⁰¹ The *Whitner* decision eliminates state legislatures' incentive to investigate this issue and tailor legislation that can accomplish the objective of better fetal health without treading on constitutional ground. For example, under *Whitner*, states have no reason to invest the money and effort necessary to create the kinds of comprehensive programs that are recommended by many major medical and child welfare groups.⁴⁰² Furthermore, the continued use of criminal sanctions is more than constitutionally and morally unwise. Prosecutions may in fact exacerbate the problem they intend to solve.

397. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); see *supra* Part II.

398. See S.C. Court: *Fetus Abuse a Crime/Mothers Can Be Prosecuted*, *NEWSDAY*, July 17, 1996, at A18.

399. *Whitner*, 492 S.E.2d at 781-82; see also Robertson, *supra* note 308, at 442 (arguing that laws prohibiting pregnant women from ingesting nicotine and alcohol would be constitutional because there is no fundamental right to use those substances). Other supporters of fetal abuse prosecutions claim that there will not be a "pregnancy police" monitoring everything a woman does while she is pregnant. See Patricia Bast Lyman, *Rivera Live* (CNBC television broadcast, July 16, 1996), available in LEXIS, News Library, Cnbcnw File (claiming that "the references to a woman smoking a cigarette being arrested are really ridiculous").

400. *Whitner*, 492 S.E.2d at 781-82.

401. See *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) ("The Legislature is an appropriate forum to discuss public policy, as well as the complexity of prenatal drug use, its effect upon an infant, and its criminalization.").

402. See *supra* notes 71-73 and accompanying text.

First, mandatory reporting requirements will negatively impact the effectiveness of prenatal care. These laws make a woman's own physician a police informant against her, lessening the chance that she will be forthcoming with information regarding her history of drug use.⁴⁰³ Successful prenatal treatment requires that the patient trusts her doctor implicitly and reveals any conditions, including drug use, that need to be addressed early.⁴⁰⁴ An environment of mistrust in the physician-patient relationship which makes the patient withhold information will necessarily decrease the effectiveness of care.⁴⁰⁵ As one court observed: "[M]odern public policy, not the archaic whims of the common law, demands that doctors obey their implied promise of secrecy."⁴⁰⁶

Mandatory reporting will have even more grievous consequences than merely ineffective care. A pregnant user who is aware that her doctor is obligated to report her condition to the authorities for criminal sanctions may be discouraged from obtaining prenatal care at all.⁴⁰⁷ Such a result would be counterproductive to the asserted goal of fetal health, because the importance of prenatal care for pregnant drug users cannot be overstated.⁴⁰⁸ A woman who is using drugs or other harmful substances has an inherently high-risk pregnancy and requires more careful monitoring than a non-using mother.⁴⁰⁹ A law in the interest of fetal health which serves as a barrier to women seeking prenatal care is therefore ineffective at best, antagonistic to its stated objectives at worst.

Furthermore, using incarceration as a method of punishing drug-addicted mothers does not improve the fetus's health. Any amount of prison time imposed upon pregnant drug users is contrary to the interests of the affected child, both before and after birth. First, a state wishing to protect an unborn fetus from the unhealthy environment of drug exposure does not improve the child's well being by sending her

403. See VanRaalte, *supra* note 3, at 454.

404. Untruthful medical screenings and an interviewer's biases caused by his or her dual role may lead to faulty diagnoses. See Bennett, *supra* note 4, at 185.

405. Prosecution is also counterproductive because pregnant drug users will not receive treatment for their chemical dependencies. American Society of Addiction Medicine, Inc., *supra* note 71, at 47.

406. *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 796 (N.D. Ohio 1965).

407. Women are discouraged from obtaining prenatal care both out of fear of punishment as well as guilt and shame. Guilt and shame are factors that make addicted women less likely than non-addicted women to obtain prenatal care under current laws. VanRaalte, *supra* note 3, at 456; see also Committee on Substance Abuse, *supra* note 71, at 641 (arguing that even the threat of civil sanctions "may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment").

408. See *supra* note 87 and accompanying text.

409. See Bennett, *supra* note 4, at 183.

mother to prison or jail. The conditions in prison are physically hazardous to both mother and baby.⁴¹⁰ Second, if the child, once born, is automatically considered abused or neglected based only on the evidence of the mother's drug use, the child will be forced into the state welfare system unnecessarily.⁴¹¹ Most state welfare systems are overburdened already,⁴¹² and fetal abuse prosecutions will force a number of children into that system⁴¹³ who would not otherwise have entered it.⁴¹⁴

The negative impact of fetal abuse prosecutions is particularly alarming since they simply do not work as a deterrent.⁴¹⁵ Women who are addicted to drugs, those at the greatest risk of harming their children, are the least likely to be deterred by additional punishments.⁴¹⁶ Thus, the only possible deterrent effect of these prosecutions is spe-

410. Health risks in prison include poor nutrition, lack of sanitary conditions, and mediocre health care facilities. See VanRaalte, *supra* note 3, at 457. Women and their infants are also put in jeopardy by overcrowding, exposure to disease, and a lack of fresh air and exercise. Oberman, *supra* note 56, at 535; see also Best, *supra* note 21, at 214-15 ("[F]ourteen out of twenty-six prisons in one survey made no special provisions for providing pregnant inmates with special diets or supplementary vitamins. Only a few prisons have medical care available for female prisoners twenty-four hours a day and some do not even have contingency plans for medical needs during the night.") (citations omitted); Law & Medicine/Board of Trustees Representative, *supra* note 71, at 2667 (noting that prisons are "shockingly deficient" in providing health care to pregnant inmates).

411. A drug-addicted mother is not necessarily an unfit mother. See Oberman, *supra* note 56, at 537-39; see also APWA Report, *supra* note 71, at 1 ("[S]ubstance abuse or the addiction of the parent to . . . drugs in itself does not constitute abuse or neglect of the child."). Moreover, even if drug addiction automatically implies a parent is unsuitable, then fathers should also be tested for drugs. See Oberman, *supra* note 56, at 538.

412. Nationwide statistics on foster care are unavailable, but it is clear that most major jurisdictions lack sufficient foster families to meet the demand. See, e.g., APWA Report, *supra* note 71, at 1 (describing a 403% increase in "substance affected infants" in Illinois between 1986 and 1988, which threatens the ability of the child welfare system to provide care); Committee on Substance Abuse, *supra* note 71, at 640 ("Many of these [child protection] agencies are overburdened and unprepared to deal appropriately with the potential flood of babies born to substance-abusing mothers."). The overtaxed child welfare system is one reason that drug-exposed infants have longer hospital stays. See Bennett, *supra* note 4, at 183.

413. The vast numbers of drug-exposed infants are not the only ones who will be unleashed onto the system if these mothers are incarcerated; any older children in the family may go into the child welfare system as well.

414. These children may not be leaving the best home environments, but nothing suggests that being warehoused in a state welfare system is any more beneficial to a child. Many placement shelters are grossly overcrowded and are havens for crime. See Oberman, *supra* note 56, at 527. Moreover, drug-exposed children are more difficult to place with foster or adoptive families due to the unproven "label" that they are impaired. Mayes et al., *supra* note 71, at 407.

415. See Committee on Substance Abuse, *supra* note 71, at 641 ("There is no evidence that these latter [criminal] sanctions prevent in utero drug exposure or help drug-exposed children after birth. Without strong evidence . . . [that criminal involvement has any benefit] . . . such intervention is unjustifiable.").

416. See Oberman, *supra* note 56, at 535.

cific deterrence. The goal of specific deterrence has a certain appeal, particularly in the face of anecdotal evidence of women who serially give birth to addicted children.⁴¹⁷ At least while the mother is behind bars, she may be unable to repeat her harmful behavior. However, the length of specific deterrence will be limited to the length of the prison sentence only. Without knowing how to access programs and services that will help them overcome their patterns of behavior, these women will likely return to their old habits upon release from prison.⁴¹⁸ Increasing punishment may in fact serve its goal of decreasing the numbers of children born drug-exposed, but not in the way prosecutors intended. As courts and commentators have noted, criminal sanctions may achieve this objective by giving women more incentive to abort before they are arrested.⁴¹⁹

Voluntary enrollment in treatment programs has the highest chance of success in getting women out of the cycle of substance abuse.⁴²⁰ Effective treatment would be a better specific deterrent than incarceration, by working on the problem itself rather than just making it impossible to have children for a specified period of time. The number of suitable treatment facilities, however, is insufficient to meet the current demand of voluntary admissions.⁴²¹ Therefore, even mandatory treatment legislation will be ineffective unless more treatment beds become available.⁴²²

417. See, e.g., Child Abuse During Pregnancy Prevention Act of 1989, S. 1444, 101st Cong., § 3(b) (1989).

418. See Oberman, *supra* note 56, at 539; see also Smith, *supra* note 12, at E6 (citing Dr. Ira Chasnoff, President of the Nat'l Ass'n for Families and Addiction Research and Educ.) ("Studies have shown that when you automatically take babies away from [an addicted woman], she is much more likely to get pregnant again, faster, with a replacement baby.")

419. See *State v. Gethers*, 585 So. 2d 1140, 1143 (Dist. Ct. App. Fla. 1991) (citing Comment, *A Response to "Cocaine Babies"—Amendment of Florida Child Abuse & Neglect Laws to Encompass Infants Born Drug Dependant*, 15 FLA. S. U. L. REV. 865, 881 (1987)); *Sheriff v. Encoe*, 885 P.2d 596, 599 (Nev. 1994); Best, *supra* note 21, at 217 & n.167 ("Some addicted women who recognize that they will not be able to obtain adequate prenatal care or drug treatment will be forced to turn to abortion to avoid prosecution.") (quoting Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 299 (1990)).

420. See Bennett, *supra* note 4, at 185.

421. Those seeking treatment usually cannot get help. "In 1989, a survey of New York City drug treatment facilities found that 54% refuse to accept pregnant women, 67% refuse to accept pregnant women on Medicaid, and 87% refuse to accept pregnant crack users on Medicaid." Solomon, *supra* note 21, at 418 (citation omitted); see also Oberman, *supra* note 56, at 517 (revealing a similarly unaccommodating atmosphere in Chicago treatment facilities). The lack of agencies providing assistance is a significant problem for women who wish to help themselves. Jennifer Johnson was prosecuted for delivery of a controlled substance to a minor after she "tried to get treatment and was turned away." Tamar Lewin, *Drug Use in Pregnancy: New Issue for the Courts*, N.Y. TIMES, Feb. 5, 1990, at A14; see *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992).

422. The problem results from more than just states' unwillingness to part with the money required to open up more facilities. Another obstacle is the paucity of research into the best

V. CONCLUSION

Prenatal drug exposure is a problem of sufficient magnitude that some degree of state inquiry and intervention is obviously warranted. The use of the criminal justice system to accomplish the task of reducing drug-exposed births, however, is misguided and wrong. Several factors caution against a rash determination that criminal sanctions against the mother are an appropriate response. Fetal abuse prosecutions at least implicate, and perhaps violate, constitutionally-protected rights of reproductive privacy and equal protection. Therefore, states must tread lightly and ensure that any response to the problem is justifiable and narrowly tailored to achieving the goal of fetal health. States that pursue criminal prosecutions against pregnant drug users have not given the problem of prenatal exposure the level of study it requires and deserves.

Before deciding the correct course of action, state legislatures should be mindful that scientific research does not support the theory that pregnant drug addicts are per se fetal abusers. When fashioning a remedy, a state should be aware that experts in the fields of addiction medicine and child welfare warn that criminal penalties will exacerbate, not eliminate, the problem.⁴²³ Prenatal drug exposure is an emotional and highly complex issue. Therefore, it must be addressed by the legislature, after careful research and thoughtful analysis, not by an activist judiciary.

approaches to treating pregnant drug users. Committee on Substance Abuse, *supra* note 71, at 641. Anecdotal evidence of effective treatments exist, but no reliable data shows "whether and which interventions within these programs actually work." *Id.*

423. See *supra* note 71 and accompanying text.