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Comment


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I. INTRODUCTION

There is no doubt that America's increasing drug problem now affects the unborn.1 An estimated 750,000 fetuses are exposed to a vari-

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ety of illegal substances each year. This represents an enormous increase from 5,000 in 1977. Some individual cities have experienced almost a three thousand percent increase in the number of infants exposed to drugs over the past several years. Overall, between ten and fifteen percent of all newborns in the United States have some type of illegal substance in their bodies at birth.

As a result of these staggering numbers, authorities across the country are struggling to find ways to deal with this problem. Many jurisdictions have attempted to use child endangerment statutes to impose criminal sanctions on women for ingesting illegal substances while they are pregnant. In fact, prosecutors have brought hundreds of criminal proceedings against women under these statutes since the early 1990s. These prosecutions have spawned a number of emotionally charged debates concerning complex issues. These issues include whether existing statutes give proper notice to a pregnant woman that she can be prosecuted for harming her fetus; whether prosecuting a pregnant woman violates her right to privacy; and whether criminal sanctions actually promote the interests of the unborn or in fact create more harm. To date, Whitner v. State is the only case in which a court has upheld the imposition of criminal sanc-

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4. See Louise Marlane Chan, S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy, 21 FORDHAM URB. L.J. 199, 199 (1993)(stating that in New York City alone more than 15,000 babies will be born with illegal drugs in their systems, which represents a 3000% increase over the last 6 years).


7. See Kary Moss, Substance Abuse During Pregnancy, 13 HARV. WOMEN'S L.J. 278 (1990).


tions on a woman under child endangerment statutes for the damage caused to her fetus as a result of ingesting an illegal drug during her pregnancy.

This Comment argues that the criminal sanctions imposed by the South Carolina Supreme Court in Whitner do not really protect the potential life of the fetus from damage caused by its mother's drug abuse. First, this Comment discusses the harm caused to the fetus when a pregnant woman ingests an illegal substance.10 Second, it sets forth the background regarding the rights that the common law has afforded the unborn with respect to harm to the fetus by someone other than the mother.11 Third, it provides an overview of the key cases from various jurisdictions that have decided whether or not to impose criminal sanctions on women for prenatal substance abuse.12 Fourth, an analysis of the reasoning in Whitner is provided.13 The first two sections of analysis focus on the method of statutory interpretation employed by the Whitner court with respect to possible violations of the doctrine of separation of powers and the right to due process.14 The third section of analysis addresses the implications of a woman's right to privacy.15 This Comment concludes that, even if constitutional, imposing criminal sanctions in these cases is not the best policy option.16

II. EFFECTS OF DRUG ABUSE ON A FETUS

The damage caused to the fetus by its mother's illegal substance abuse is truly devastating. When a pregnant woman ingests a drug, it disrupts the flow of blood through the placenta and causes numerous problems.17 Once the drug passes into the fetus's system, the drug remains there and does not recirculate into the mother's system.18 Because the fetus is so small and undeveloped, it cannot discard the drug as quickly as an adult. As a result, the ill effects of the drug are magnified many times over, and the fetus becomes much more addicted than its mother.19 As the drug circulates through the fetus, the

10. See infra Part II.
11. See infra Part III.
12. See infra Part IV.
13. See infra Parts V and VI.
14. See infra sections VI.A and VI.B.
15. See infra section VI.C.
16. See infra Part VII.
19. Emmalee S. Bandstra, Medical Issues for Mothers and Infants Arising from Perinatal Use of Cocaine, in Drug Exposed Infants and Their Families: Coordi-
fetus's blood pressure rises while the fetus's ability to receive oxygen from its mother decreases. As a result, the fetus often hemorrhages and is born prematurely. At birth, the child may encounter agonizing convulsions, deformities, mental retardation, and neurological problems. Further, the frequency of crib death increases dramatically for babies exposed to drugs while in their mother's womb.

Fetuses exposed to drugs experience a very difficult time interacting with their parents and other children later in their lives. In addition, these children often require specialized attention from teachers trained to instruct the developmentally challenged. Most of the time such attention is too costly and unavailable. In short, in a large number of cases, the harmful effects of the mother's drug abuse invades the womb and continues to haunt the child throughout his lifetime.

### III. FETAL RIGHTS CONCERNING ACTS COMMITTED BY THIRD PARTIES

Although not identical, the application of tort and criminal laws to third persons committing acts against a fetus are related and are discussed by the courts in prosecutions against the mother who harms her fetus. Therefore, a brief background of these areas of law is helpful. The development of fetal rights has been a complex process. In tort law cases, courts in the United States traditionally did not allow recovery for prenatal injuries because a child en ventre sa mere was not a person and had no existence under law.

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22. Id.
27. See Agota Peterfy, Fetal Viability as a Threshold to Personhood, 16 J. LEGAL MED. 607, 621-27 (1995).
The creation of at least two theories of fetal rights, however, modified early tort law. The first theory required that the child be born alive to recover for prenatal injuries, while the second theory allowed recovery for any injuries inflicted after the fetus reached viability. The "born alive" theory failed to distinguish between viability and nonviability. This theory allowed the fetus to maintain a tort action for injuries sustained while in the womb so long as the fetus subsequently was born alive. The "viability" theory, on the other hand, granted the fetus an independent existence at viability, and an action in tort could be maintained for injuries inflicted after viability even if the fetus subsequently was not born alive. Currently, "the trend in most states has been to do away with the born alive rule altogether" and instead employ the viability theory.

In criminal law, the historical approach to acts committed against the fetus by third parties has been the cause of some controversy. For example, in Keeler v. Superior Court, the majority and dissenting opinions disagreed on what the common law actually held with respect to acts committed against a fetus by third parties. Keeler involved a case in which a man intentionally shoved his knee into the abdomen of a woman who he knew was pregnant and thereby terminated the potential life of the fetus. The man was charged with murder under a statute that defined murder as "the unlawful killing of a human being." The majority in Keeler held that the legislative intent and existing case law did not allow the words "human being" in the statute to include a viable fetus. The majority concluded that the statute could not be read to include a fetus without violating the man's due process rights. The dissent disagreed, however, holding that its reading of the common law did provide adequate notice that the term "human being" included a fetus.

It should be noted that after Keeler, the California Legislature amended the homicide statute at issue to state that "[m]urder is the unlawful killing of a human being, or a fetus." It can be argued that this subsequent legislative act casts doubt on the majority's analysis concerning the legislature's intent in passing the original murder stat-

30. See Amann v. Faidy, 114 N.E.2d 412 (Ill. 1953)(discussing both theories).
36. Id. at 618.
37. Id. at 619 (citing CAL. PENAL CODE § 187 (1969)).
38. Id. at 625-26.
ute. That is, by amending the statute to expressly include fetus immediately after *Keeler* was decided, the legislature had intended a fetus to fall within the scope of the homicide statute prior to *Keeler* and the legislature simply was reacting to the court’s holding. On the other hand, it just as easily can be argued that the legislature agreed with the majority in *Keeler* in that the common law did not define a “human being” to include a fetus and decided to change the common law by a legislative act. This argument is supported by the actual language of the statute because the legislature did not amend the statute to state that “human being” includes a fetus. Rather, the amended version states that “murder” is “the unlawful killing of a human being, or a fetus.”

Both the majority and the dissent in *Keeler* relied upon the well-known commentators Coke and Blackstone. The majority cited these authors in support of its conclusion that the early common law of England and the United States did not hold that a fetus was a human being for criminal purposes.40 “If a woman be quick41 with childe and . . . a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is . . . no murder . . . for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.”42 The *Keeler* majority concluded that “it was thus ‘well settled’ in American case law that the killing of an unborn child was not a homicide.”43

The dissent in *Keeler*, however, opined that the common law did support a current finding that “human being” included a fetus. The dissent based this conclusion on Blackstone’s and Coke’s statements that killing a quickened fetus was “a great misprision.”44 The dissent acknowledged that the term “great misprision” did not mean the same thing as murder.45 Nevertheless, the dissent argued that the phrase described a crime and therefore served to give notice that such action was criminal in nature.46 Furthermore, the dissent noted that “although the common law did not apply the [label of ‘murder’] to the killing of a quickened fetus, it appears that this ‘great misprision’ was severely punished.”47 The dissent provided other authority to support

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41. *Id.* at 620 n.5 (stating that quickening is said to occur when the fetus first “stirs in the womb,” ordinarily between the 16th and 18th week of pregnancy).
42. *Id.* at 620 (citing 3 *Coke, Institutes* 58 (1648)). Coke’s “born alive” requirement was expanded by both Blackstone and Hale. *Id.*
43. *Id.* at 621.
44. *Id.* at 630.
45. *Id.* at 631.
46. *Id.* (citing the majority opinion which stated that “great misprision” was the equivalent of a misdemeanor).
47. *Id.* The dissent stated that “[a]s late as 1837, the wilful aborting of a woman quick with child was punishable by death in England.” *Id.* (citing Lord Lansdowne’s Act of 1828, 9 Geo. 4, ch. 31 (Eng.)).
its conclusion that the common law defined the term "human being" to include a fetus. Therefore, as illustrated by Keeler, controversy surrounds the exact historical common law position with respect to the acts committed by third parties against the fetus.

Currently, however, the positions of the courts regarding this issue has evoked less controversy. Without considering legislative actions, only three jurisdictions have held that a third party can be convicted of criminal homicide for killing a fetus. It should be noted that these cases have all dealt with fetuses that have reached viability rather than the earlier stage of quickening. These cases will be discussed in more detail in Part VI of this Comment.

IV. CASES DISCUSSING WHETHER TO CRIMINALIZE MATERNAL SUBSTANCE ABUSE

Many states have prosecuted pregnant women for harming their fetuses by using illegal drugs during their pregnancies. The only state to uphold a conviction on such a charge is South Carolina in the case of Whitner v. State. Prosecutors have tried a number of novel approaches in an attempt to convict women for drug use in this context. The two most prevalent theories involve prosecuting a woman under state "child" endangerment statutes or charging a woman

48. Id. (citing Cyril C. Means, Jr., The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411, 504 (1968)("The common law itself prohibited... hanging a pregnant felon... because the life of [the fetus] would thereby be taken, although it did not call the offense murder or manslaughter").

49. A number of legislatures have created statutes making it a felony to commit feticide, which is "the killing of an unborn fetus." See GA. CODE ANN. § 16-5-80 (1995); IND. CODE ANN. § 35-42-1-6 (West 1996); IOWA CODE ANN. § 707.7 (West 1996); LA. REV. STAT. ANN. § 14-32.5 (West 1996).

50. Massachusetts, Ohio, and South Carolina are the only 3 judicial jurisdictions to allow a third party to be convicted of criminal homicide for killing a fetus. See Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989); Williams v. Marion Rapid Transit, 87 N.E.2d 334 (Ohio 1949); State v. Horne, 319 S.E.2d 703 (S.C. 1984).

Cases in which a third party was not allowed to be convicted of criminal homicide include: Meadows v. State, 722 S.W.2d 584 (Ark. 1987); Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970); In re A.W.S., 440 A.2d 1144 (N.J. 1981); State v. Beale, 376 S.E.2d 1 (N.C. 1989); State v. Amaro, 448 A.2d 1257 (R.I. 1982); State ex rel. Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984).

51. Viability has been defined as the point when the fetus can exist apart from its mother, roughly around the beginning of the third trimester. See generally Greater Southeast Community Hosp. v. Williams, 482 A.2d 394 (D.C. 1984).

52. See infra notes 54-55.


with the "delivery" of a controlled substance to a "child" via the umbilical cord while in the womb or a few moments after birth. Under both approaches, the issue usually has boiled down to whether the fetus or the newborn was a "child" within the legislative intent and protection of the statute. Usually the woman was prosecuted under a statute very similar to that in Whitner. For example, in State v. Gray, a woman was charged with child endangerment because she ingested cocaine several times after the fetus had reached viability. The child was born addicted to cocaine. The case centered around the interpretation of whether a fetus was a "child" within the protection of the statute. The statute made it a crime for a person "having custody or control . . . of a child under the age of eighteen . . . [to] create a substantial risk to the health or safety of the child." The Ohio Supreme Court noted that the language of the statute did not specifically reference a fetus, but that "the [Ohio] legislature [was] undertaking the thorough investigation necessary to resolve this important and troubling social problem." The court stated that a "court should not place a tenuous construction on [a] statute to address a problem to which the legislative attention is already directed." Furthermore, the legislature, rather than the courts, must impose a legally cognizable duty of care on pregnant women to their developing fetuses. Therefore, the Gray court concluded that the statute in question did not reach a pregnant woman's act of ingesting a controlled substance while pregnant.

In State v. Gethers, a Florida woman was charged with child abuse because of her substance abuse during the last months of her pregnancy. The court noted that it was clear from legislative history that the legislature considered and rejected a specific statutory provision authorizing criminal penalties against mothers ingesting drugs

56. The statute in Whitner made it a crime for "[any] person who has the legal custody of [any] child . . . without lawful excuse, to refuse or neglect to provide . . . proper care and attention . . . for [such] child." S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1993).
57. 584 N.E.2d 710 (Ohio 1992).
58. OHIO REV. CODE ANN. § 2919.22(A) (Baldwin 1989).
60. Id. (quoting People v. Gilbert, 324 N.W.2d 894 (Mich. 1982)).
61. Id.
63. Gethers was charged with "willfully or by culpable negligence . . . permitting physical or mental injury to [a] child." FLA. STAT. ANN. § 827.04(1) (West 1987), amended by FLA. STAT. ch. 96-322 (1996).
during pregnancy. Furthermore, criminally prosecuting mothers who give birth to drug dependent babies "conflicts with public policy underlying Florida's child welfare laws." The court stated that "criminal prosecution would needlessly destroy the family by possibly incarcerating the child's mother when alternative measures could both protect the child and stabilize the family." As a result, the court held that "child" did not encompass a fetus for the purposes of the statute in question.

In *State v. Collins*, a Texas woman was charged with "recklessly injuring a child" because she ingested cocaine during the last trimester of her pregnancy. The newborn suffered a variety of withdrawal symptoms. The woman argued that including a fetus in the interpretation of "child" would violate the long-standing rule that "due process ... forbid[s] penal laws that do not give reasonably clear notice to the public ... of what behavior is being criminalized." The State argued that such an interpretation would not be void for vagueness because the woman could have reasonably foreseen the results of smoking cocaine during her pregnancy. The court found the State's argument unpersuasive because the issue was not whether the woman knew that her acts may harm the fetus, but whether she could be reasonably presumed to know that her conduct violated a criminal law. The court noted that no legislation existing in Texas at the time of the woman's actions mentioned the rights of the unborn in any context other than abortion. In addition, the case law in Texas had limited the application of drug related and penal code crimes to conduct committed after the child was born. The court held that the woman had inadequate notice that her actions were criminally proscribed, and therefore interpreting "child" to mean a fetus in this context would violate notions of due process.

In New York, a person is guilty of endangering the welfare of a child when he or she "knowingly act[s] in a manner likely to be injurious to the physical, mental, or moral welfare of a child less than sev-

65. *Id.* at 1143 (stating that Florida's main concern is "to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care").
68. *Id.* at 895.
69. *Id.* at 897 (citing Kolender v. Lawson, 461 U.S. 352 (1983)).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 898.
In State v. Morabito, the State charged a woman under this criminal statute when she ingested cocaine days before she delivered the child. The woman's use of cocaine was alleged to have induced early labor and caused the newborn to suffer from severe withdrawal symptoms. The woman argued the statute was vague and failed to provide the requisite notice of exactly what actions were criminal. In addition, she argued that the interests of a fetus were not furthered by interpreting "child" to include fetus in this context.

The Morabito court acknowledged the long-standing rule requiring strict construction of criminal statutes and resolving any ambiguities in favor of the individual. The court held that the application of the word "child" in this context created an ambiguity that failed to inform "the reasonable man . . . a sufficiently accurate concept of what [was] forbidden." Furthermore, the court noted that whenever the legislature in New York passed legislation concerning the unborn, it had done so expressly. In this case, the statute had been recently amended three times and the New York Legislature did not expressly include a fetus or the unborn within the ambit of the statute. Moreover, "whether or not the State should intervene on the activities of pregnant women, when it should intervene, . . . [and] how it should intervene . . . are complex legal and social questions that can only be debated and fully considered by the legislature." Allowing this type of prosecution would blur lines defining other criminal acts and therefore render the statute vague. As a result, the court did not interpret "child" to mean a fetus within the purview of the statute.

In State v. Reinesto, an Arizona woman was prosecuted for ingesting heroin, which caused her to give birth to a heroin-addicted child. The woman was charged with violating a child endangerment statute that prohibited a person from "causing [any] child . . . to suffer physical injury." "Child" was defined as "an individual who is under eighteen years of age." The court first held that if the word "child" in the statute was ambiguous and susceptible to more than one interpre-

77. Id. at 844.
78. Id. at 845.
79. Id.
80. Id. at 846.
81. Id.
82. Id.
83. Id. at 845 (quoting In re State v. Tina Andrews, No. 89.9078 (Ohio Fam. Ct. 1990).
84. Id. at 847.
87. Id. § 13-3623.A(2).
tation, "the rule of lenity requires us to resolve any ambiguity in favor of the defendant." The court, however, did not find the term ambiguous. Rather, the plain language of the statute was held on its face to proscribe acts directed only at children in being and not fetuses. The court found it highly persuasive that when the legislature had intended to address an issue regarding the unborn, it had done so expressly. Because the statute in this case did not expressly reference "child" to include a fetus, the court held that the woman could not reasonably have known she could be prosecuted for her prenatal conduct.

In addition, the court discussed the many other types of prenatal conduct, both legal and illegal, that could result in more harm to the fetus than that which occurred in *Reinesto*. Allowing prosecution for child endangerment under the statute would render it vague and would not be "consistent with the dictates of due process." Finally, the court noted that the Arizona legislature proposed a bill that would have expanded the child endangerment statute to include injuries caused to a fetus resulting from a pregnant woman's use of illegal drugs or alcohol during pregnancy. The legislature, however, did not pass the bill, thus demonstrating the legislature's intent to not include fetus in the statutory definition of "child." As a result, the court dismissed the charges against the woman.

In *Commonwealth v. Pellegrini*, a Massachusetts woman was charged with endangering the life of a "person under the age of eighteen" because she ingested cocaine after the fetus reached viability. Tests performed immediately after the birth of the child showed cocaine in the newborn's system. The court recited its previous case law defining a viable fetus as a "person" for purposes of criminal pros-

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89. *Id.*
90. For example, the manslaughter statute was amended to prohibit "knowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child . . . ." Ariz. Rev. Stat. Ann. § 13-1103.A(5) (West 1993).
92. For example, the court stated that studies have shown that consuming alcohol can cause mental retardation and is the leading cause of low birth weight, which is a major factor in infant mortality. Also, a woman's failure to obtain proper prenatal care or maintain a proper nutritional balance can have disastrous consequences. The court reasoned that allowing a state to define the crime of child abuse according to the health of the newborn would subject mothers to criminal liability for engaging in all sorts of legal and illegal activities during pregnancy. *Id.* at 737.
93. *Id.*
97. *Id.* at 2.
ecutions involving acts committed by third parties.\textsuperscript{98} The court noted, however, that neither the statute nor any other criminal statute had ever been applied against a mother in the special mother-fetus relationship.\textsuperscript{99} Furthermore, "the specific language of the statute does not encompass the circumstances presented in this case."\textsuperscript{100} Also, nothing in the statutory history of the statute would permit "this strained construction."\textsuperscript{101} Therefore, the court in \textit{Pellegrini} did "not permit the destruction of this relationship by the prosecution."\textsuperscript{102}

The cases charging a woman with "delivering" a controlled substance to a fetus have been dismissed for similar reasons. For example, the Nevada Supreme Court decided the issue of whether a statute criminalizing child endangerment applies to a mother's prenatal substance abuse that results in the transmission of an illegal substance to her child through the umbilical cord after the birth of the child.\textsuperscript{103} The court in \textit{Sheriff, Washoe County, Nevada v. Encoe}\textsuperscript{104} noted that penal statutes should be "so clear as to leave no room for doubt as to the intention of the legislature."\textsuperscript{105} Furthermore, where a reasonable doubt exists as to whether the person charged with a violation of its provisions is within the statute, that doubt must be resolved in favor of the individual.\textsuperscript{106} Applying these rules of construction, the \textit{Encoe} court held that prosecuting a mother for the delivery of a controlled substance to her child through her umbilical cord would violate notions of due process because it would be "a strained and unforeseen application of [the statute]."\textsuperscript{107} Therefore, the court dismissed the charge.

The last two cases addressed herein involve charges brought under a similar statute to that in \textit{Encoe}. \textit{Johnson v. State}\textsuperscript{108} and \textit{State v. Hardy}\textsuperscript{109} involved pregnant women who had ingested crack cocaine on the morning they were in labor and the night before. The trials dealt with extensive medical testimony concerning whether cocaine was actually delivered to the baby from the time it was born to the time the umbilical cord was cut. Yet the courts did not focus on the

\begin{itemize}
\item\textsuperscript{98} \textit{Id.} at 10.
\item\textsuperscript{99} \textit{Id.} at 10, 16.
\item\textsuperscript{100} \textit{Id.} at 10.
\item\textsuperscript{101} \textit{Id.}
\item\textsuperscript{102} \textit{Id.} at 16.
\item\textsuperscript{103} \textit{Sheriff, Washoe County, Nev. v. Encoe}, 885 P.2d 596 (Nev. 1994). Encoe was charged with "delivering" drugs to her fetus and thereby "willfully caus[ing] a child who is less than 18 years of age to suffer . . . abuse or neglect." \textit{Nev. Rev. Stat.} § 200.508(1) (1992).
\item\textsuperscript{104} 885 P.2d 596 (Nev. 1994).
\item\textsuperscript{105} \textit{Id.} at 598.
\item\textsuperscript{106} \textit{Id.}
\item\textsuperscript{107} \textit{Id.}
\item\textsuperscript{108} 602 So. 2d 1288 (Fla. 1992).
\item\textsuperscript{109} 469 N.W.2d 50 (Mich. Ct. App. 1991).
\end{itemize}
burden of proving actual delivery. Rather, in Johnson, for example, the court held that the legislature simply did not intend the statute to cover this situation and the current statute on its face did not provide adequate notice to the defendant. Both cases also discussed the harmful social ramifications of this type of prosecution. Therefore, the charges were dismissed in both cases.

V. THE FACTS AND HOLDING OF WHITNER

In early 1992, Cornelia Whitner was charged with criminal child neglect for causing her baby to be born with cocaine in its system. Whitner ingested cocaine several days before giving birth to her child. The South Carolina child neglect statute, section 20-7-50, stated that it was a crime for "[a]ny person having the legal custody of any child . . . without lawful excuse, to refuse or neglect to provide . . . proper care and attention for such child . . . ." The South Carolina legislature defined "child" as a "person under the age of eighteen." The issue in Whitner was "whether a viable fetus is a 'child' for purposes of the [child neglect statute]." While two judges dissented, the majority in Whitner held that a viable fetus was a child within the statute and upheld Whitner's sentence of eight years in prison.

In analyzing whether a viable fetus was a "child," the court noted that "in interpreting a statute, this court's primary function is to ascertain the intent of the legislature." If the language of the statute is clear, the legislative intent must be determined from the language itself. The statute must be viewed in conjunction with the purpose of the entire statutory scheme rather than as an isolated clause. Further, the court recognized the long-standing rule that criminal

110. The Johnson court paid special notice to a bill that would have broadened the definition of "harm" to include physical dependency of a newborn infant upon certain controlled drugs, but was amended to delete such language. The bill passed as amended, demonstrating to the court that the legislature did not intend for the statute to cover this type of action. Johnson v. State, 602 So. 2d 1288, 1293 (Fla. 1992).

111. For example, the Johnson court noted the trial court's reasoning that pregnant women would be deterred from using drugs and would be prompted to obtain drug treatment if criminal sanctions were imposed for drug use. The supreme court disagreed, however, reasoning instead "that prosecution of these women would likely have the opposite effect." Id. at 1294.

113. Id. § 20-7-30(1).
115. Id. at *7.
116. Id. at *1.
117. Id.
118. Id.
statutes must be strictly construed and wherever ambiguous, the statute must be interpreted in favor of the individual.119

The court then discussed South Carolina's case law dealing with the rights of a fetus. First, the court cited a case in which a fetus was held to be a person within the scope of South Carolina's wrongful death statute.120 Next, the court reasoned that the word "person" as used in the criminal code had been held to include a viable fetus with respect to acts committed against the fetus by someone other than the mother.121 Although the dissent disagreed, the majority in Whitner held that it would be incorrect "to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for child abuse."122 In addition, the majority stated that the policy of South Carolina is "to concentrate on the prevention of children's problems as [its] most important strategy."123 This "policy of prevention" supported the majority's position that the legislature intended the word "child" to include viable fetuses.124

Whitner argued that such an interpretation would allow pregnant women to be prosecuted for an indeterminate number of acts, both legal and illegal.125 The court disagreed, reasoning that a parent could be charged with endangering the life of a child in being without regard to whether the act is illegal in itself.126 The court held that there was no reason why the law should apply any differently to a viable fetus than to a child in being.127 The court noted, however, that "we need not address this potential parade of horribles advanced by Cornelia Whitner" because "this... is the only case we are called upon to decide here."128

The court acknowledged the many decisions from other states holding that maternal conduct before the birth of the child does not give rise to criminal prosecution under similar statutes.129 Yet, in the

119. Id. at *6.
120. Id. at *2 (citing Fowler v. Woodard, 138 S.E.2d 42 (S.C. 1964)).
121. Id. (citing State v. Home, 319 S.E.2d 703 (S.C. 1984)). Horne dealt with a defendant who stabbed his pregnant wife in the neck, arms, and abdomen. As a result, the fetus was killed while still inside the womb. The defendant was convicted of voluntary manslaughter. It should be noted that Massachusetts and Ohio are the only other jurisdictions that have actually convicted a defendant for killing a fetus under a criminal statute. See supra note 50.
123. Id.
124. Id. (citing S.C. CODE ANN. § 20-7-20(C) (Law. Co-op. 1985)).
125. Id. at *4.
126. Id. For example, "a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act—consuming alcoholic beverages—is itself legal." Id.
127. Id.
128. Id.
129. Id. at *5.
opinion of the *Whitner* court, the cases dealing with the issue of "delivery" were unpersuasive.\(^{130}\) Furthermore, cases construing the term "child" were distinguishable "because those cases were decided in states having different bodies of case law."\(^ {131}\) The only case the court actually distinguished, however, was *Commonwealth v. Pellegrini*.\(^ {132}\) The court recognized that Massachusetts had similar case law in that a viable fetus was held to be a "person" for tort claims and homicide prosecutions.\(^ {133}\) Although the case law was similar, the *Whitner* court held that "the rationale underlying our body of law—protection of the viable fetus—is radically different from that underlying the law of Massachusetts."\(^ {134}\) Therefore, the court found the holding in *Pellegrini* unpersuasive.

The court further reasoned that its holding did not violate the rule of lenity requiring ambiguities to be interpreted in favor of the individual. According to the court, the statute and more specifically the word "person" was unambiguous.\(^ {135}\) As a result, the court held that "the rule of lenity does not apply."\(^ {136}\)

**VI. ANALYSIS**

**A. Violations of Legislative Intent and the Doctrine of Separation of Powers**

The *Whitner* court accurately stated that "the court's function is to ascertain the intent of [the] legislature" when interpreting a statute.\(^ {137}\) Unfortunately, the court's inquiry as to legislative intent regarding South Carolina's child neglect statute was wholly inadequate. As set forth by the dissent, it appears that the majority insufficiently weighed the eleven different occasions prior to *Whitner* when the South Carolina Legislature proposed bills that would have amended this statute to expressly create a separate crime for a pregnant woman to ingest an illegal substance while she was pregnant.\(^ {138}\) On each oc-

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130. *Id.*

131. *Id.*


135. *Id.* at *6.*

136. *Id.*

137. *Id.* at *1.*

138. *Id.* at *9* (Moore, J., dissenting).
occasion the legislature rejected such a proposal. The court could not have asked for more assistance in performing its function to ascertain the intent of the legislature than these eleven rejected proposals. Nevertheless, the majority in *Whitner* ignored the proposed bills based on the concept that the present acts of the legislature do not cast a definitive light on the legislature that enacted the statute in question.

In other words, the majority implied that even though the current legislature obviously did not intend for the statute to apply to the case at hand, it did not mean that the legislature that enacted the original statute also had that same intention.

To dismiss the clear intent of the current legislature on such a premise is inappropriate for at least two reasons. First, when the early forms of the statute were drafted, it is unlikely that the legislature even considered the application of the statute to the facts of *Whitner*. When the statute was first introduced decades ago, prenatal substance abuse was not the focus of national attention, as it is today.

Second, the South Carolina Supreme Court had itself previously used bills proposed and rejected by the current legislature as a determining factor concerning the scope of a statute. Other states, in

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139. See, e.g., *Enquist v. General Datacom*, 587 A.2d 1029, 1040 (Conn. 1991)(Peters, C.J., concurring)("[T]he rejection of an amendment indicates that the legislature does not intend the statute to include the provisions embodied in the rejected amendment."). *See also* *Perlow v. Clerk of the Circuit Court for Baltimore County*, No. Misc. 788 (1-11), 1993 WL 226240 (Md. Tax Ct. Feb. 11, 1993)(concluding that the legislature's rejection of an amendment to broaden the definition of a statute's term indicates legislative intent that the statute does not include the terms of the amendment); * Hatheway v. Gannett Satellite Info. Network*, 459 N.W.2d 873 (Wis. 1990)(concluding that the legislature's rejection of an amendment to broaden the definition of a statute's term indicates that the original definition should be used); *William N. Eskridge, Jr., Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 84-89 (1988)(discussing courts' justified reliance upon the current legislature's rejection of a bill as an indication of legislative intent).


141. *See supra* note 3. In 1977, only approximately 5,000 cases of newborns were exposed to illegal substances in the United States.

142. *State v. Blackmon*, 403 S.E.2d 660, 662 (S.C. 1991). *Blackmon* involved the interpretation of a gambling statute. The statute restricted the use of gambling machines to "nonpayout machines." Rather than require patrons to actually insert coins in the machine, the defendant personally received and paid money to people who played the machine. The defendant argued that his conduct did not violate the statute because "the machines themselves do not disperse money to the player, but rather, a person does" and therefore fell within the exception for "nonpayout machines." *Id.* The court found persuasive the legislature's proposal and rejection of bills that would have expressly made the defendant's conduct illegal. *Id.*
similar circumstances, have recognized that bills proposed and rejected by the current legislature is a crucial and determining factor in construing the breadth of a statute.143 Furthermore, in these states the legislatures had proposed and rejected such bills on only a few occasions, as opposed to the numerous bills proposed and rejected in South Carolina. Therefore, by dismissing the action of South Carolina's current legislature, the court in Whitner failed to discharge its duty to ascertain the true legislative intent of the statute.

As a result, the court likely violated the doctrine of the separation of powers by ignoring this long-standing rule recognized by every other court in a similar situation. "[A] court should not place a tenuous construction on a statute to address a problem to which the legislative attention is readily directed . . . ."144 This action violates the separation of powers by invading what is the sole province of the legislature.145 The decision to prosecute mothers for drug use during their pregnancies concerns "special complex legal and social questions that can only be debated and fully considered by the legislature."146 The law recognizes a "unique relationship between a pregnant woman and the developing fetus" that requires distinct statutes, separate from criminal statutes already in place.147 Moreover, the South Carolina Supreme Court has previously held that "[i]t is for the legislature and not this court" to rule on matters currently being argued by the legislature.148 As noted by the California court in Keeler, "[f]or a court to simply declare . . . that the time has now come to prosecute" a person for a new crime that never before has been brought under a long-standing statute is "to rewrite the statute under the guise of constru-

143. See, e.g., State v. Gethers, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991)(stating that "it is clear that the Legislature considered and rejected a specific statutory provision authorizing criminal penalties against mothers" for ingesting illegal drugs during their pregnancies); Sheriff, Washoe County, Nev. v. Encoe, 885 P.2d 596, 599 (Nev. 1994)(finding it relevant that the Nevada legislature proposed and rejected a bill that would have expressly made the ingesting of an illegal drug a criminal act).


146. See State v. Morabito, 580 N.Y.S.2d 843, 845 (Geneva City Ct. 1992). See also Spitzer, supra note 66 (discussing possible ways to protect unborn and newborn children from their parent's drug use).


148. Lazerson v. Hilton Head Hosp., 439 S.E.2d 836 (S.C. 1994). Lazerson dealt with a case in which the court was faced with interpreting "charitable organization" for purposes of a statute. The court noted that it should not decide a matter properly within the domain of legislative debate and held that "we defer to the legislature." Id. at 838.
ing it.” Such an act clearly violates the doctrine of separation of powers. As a result, the majority’s decision in *Whitner* to ignore this special relationship and instead independently manufacture a new crime without deferring to the legislature violated the separation of powers by invading what was the sole province of the legislature.

## B. Possible Violations of Due Process Rights

*Whitner* argued that interpreting “child” to include a fetus would violate her rights to due process because she did not have notice that her conduct was criminal. Although all cases (except *Whitner*) would agree with this position, it does not appear as though the United States Supreme Court would reach a similar conclusion upon review of the facts in *Whitner*.

Due process encompasses the basic principle that a criminal statute must provide warning of the conduct that it criminalizes. The test for due process is whether the criminal statute fails to provide a person of ordinary intelligence adequate notice that her contemplated conduct is forbidden. Acts committed by the defendant must clearly fall within the language of the statute for the defendant to have received the required notice. This notice requirement is reflected in the constitutional prohibition against the enactment of ex post facto laws.

When analyzing whether the criminal statute provided *Whitner* fair notice that her conduct was criminal, a court must first examine the statute itself, along with the accompanying statutory scheme. Then the court must examine the relevant case law. As the court in *Whitner* recognized, the meaning and intent of a statute must first be ascertained from the plain meaning of the statute’s language. But, when the language is ambiguous and susceptible to differing constructions, the long-standing rule of lenity requires that the court interpret the language in a light most favorable to the defendant to avoid due process violations.

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150. *Id.* at 626.
153. *Id.*
154. *Id.*
The child neglect statute in *Whitner* stated that it was a crime for any person "having the legal custody of any child . . . to refuse or neglect to provide . . . proper care and attention for such child . . . ."\(^{159}\) Although improbable, it is worth arguing that this statute is similar to that in the case of *Lanzetta v. New Jersey*.\(^{160}\) The statute in *Lanzetta* made it an offense "to be a gangster, defined as any one not engaged in any lawful occupations, known to be a member of a gang consisting of two or more persons."\(^{161}\) The defendant in *Lanzetta* argued that his conviction violated his due process rights because the meaning of the word "gang" as used in the statute failed to provide him an adequate description of the type of prohibited involvement.\(^{162}\) Citing several dictionary definitions,\(^{163}\) the *Lanzetta* Court reasoned that "the purposes of those constituting some 'gangs' may be commendable, as for example, groups of workers engaged under leadership in any lawful undertaking."\(^{164}\) Furthermore, the Court noted that "the statute fails to indicate what constitutes membership or how one may join a 'gang.'"\(^{165}\) Therefore, *Lanzetta* held that the term "gang" and "the terms [the statute] employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."\(^{166}\)

Similarly, it can be argued that interpreting the term "child" to mean a fetus also violates the Due Process Clause. On its face, the statute in *Whitner* does not define a fetus as a child. Further, when looking at the plain meaning of the word in most dictionaries, a method of construction employed in *Lanzetta*, "child" does not by definition include a fetus.\(^{167}\) These common dictionary definitions, some of which expressly state that "child" means "from birth" and none of which include any reference to prenatal periods, arguably fail to provide a reasonably intelligent person fair warning that "child" means a fetus.

The requirement of fair warning, however, "does not invalidate every statute which a reviewing court believes could have been

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\(^{159}\) S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1995).

\(^{160}\) 306 U.S. 451 (1939).

\(^{161}\) Id. at 452.

\(^{162}\) Id.

\(^{163}\) Id. at 455 (citing the *Oxford English Dictionary* definition of "gang" as "[a] number of workmen or laborers of any kind engaged on any piece of work under supervision of one person; a squad; shift of men; a set of laborers working the same hours").

\(^{164}\) Id. at 457.

\(^{165}\) Id. at 458.

\(^{166}\) Id.

\(^{167}\) See, e.g., *The Scribner-Bantam English Dictionary* 156 (rev. ed. 1991)(stating that "child" means "offspring; young boy or girl"). Very few dictionary definitions include any reference to prenatal periods.
drafted with greater precision.”168 Most statutes will contain some inherent vagueness, and regardless of the words used in these statutes, uncertainties will surface.169 Applying this logic, the Supreme Court has held that a statute prohibiting “crimes against nature” is sufficient to give the defendant fair warning that forcing a female to allow the defendant to perform cunnilingus on her was a “crime against nature.”170 Following this line of reasoning, it seems likely that the Supreme Court may allow the word “child” to include a fetus.

In Bouie v. City of Columbia,171 the Supreme Court held that a statute prohibiting trespass onto the lands of another after receiving notice of the prohibited entry violated the due process rights of the defendants. At first blush, Bouie may seem to support a finding that Whitner's rights to due process were violated. Yet, a thorough examination of the case reveals a different conclusion. In Bouie, two African-American college students took seats in a booth in a restaurant and waited to be served. After they were seated, an employee of the restaurant put up a chain with a “no trespassing” sign attached to it. The restaurant manager called the police and reported that the two students had breached the peace. The police officers arrested the students and charged them with violating a statute forbidding “entry on lands of another after notice prohibiting the same.”172 The United States Supreme Court noted that the South Carolina Supreme Court had construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave.173 The United States Supreme Court held that this construction amounted to an unforeseeable judicial enlargement of the statute that violated the due process rights of the defendants.174

More importantly to the case of Whitner, however, the Bouie Court also stated that it would hesitate to apply this rule when a defendant's conduct was “improper or immoral.”175 In other words, “applying the rule against vagueness or overbroadness of a statute should depend on the moral quality of [the defendant's] conduct.”176 “In order not to chill conduct within the protection of the Constitution and having genuine social utility, it may be necessary to throw the mantle of protec-

169. Id. at 50.
170. Id.
172. Id.
173. Id.
174. Id. at 353.
175. Id. at 362.
176. Id.
tion beyond the constitutional periphery, where the statute does not make the boundary clear.\footnote{177}{Id. (emphasis added).}

The Court noted that there was nothing improper about the defendants entering a restaurant to eat dinner in the properly designated area. Contrarily, the Court likely would consider Whitner's drug abuse "improper or immoral" and therefore would conclude it was without "genuine social utility" and falls outside the protection of the constitution. As a result, the Court probably would be much less inclined to find a due process violation in \textit{Whitner} than in \textit{Bouie}.

On the other hand, other facts may strengthen Whitner's due process argument. For example, the remaining language in South Carolina's child neglect statute, along with the entire statutory scheme, seems to support a finding that "child" does not include a fetus. For instance, as noted by Chief Justice Finney in his dissent, criminal liability is not aimed at every person who refuses to provide attention to a child; rather, only legal custodians are targeted. This requirement of legal custody suggests that "child" excludes a fetus because "legal custody" is inapplicable to a fetus and interpreting it as such violates South Carolina's own rules of statutory interpretation.\footnote{178}{See \textit{Whitner v. State}, No. 24468, 1996 WL 393164, at *8 (S.C. July 15, 1996)(Finney, C.J., dissenting)(citing \textit{Stone v. State}, 443 S.E.2d 544 (S.C. 1994)(stating that statutes must be interpreted so as to avoid illogical and absurd results)).}

In addition, as the court in \textit{Whitner} itself pointed out, statutes must be interpreted in conjunction with other statutes in the entire statutory scheme.\footnote{179}{See id. at *2.} The South Carolina child neglect statute refers to section 20-7-490, which defines a neglected child as one "harmed or threatened with harm." Section 20-7-490(C)(3) expressly defines "harm."\footnote{180}{For example, "harm" is understood as failing to provide clothing and shelter.} As Chief Justice Finney noted in his dissent, these harms can be visited only on a "child" in being and not a fetus. Therefore, when reading the child endangerment statute in its entirety and in context with its statutory scheme, it can be argued that Whitner did not have notice that her conduct was illegal.

South Carolina case law also plays a vital role in determining whether Whitner had notice that "child" included a fetus within the scope of the statute. This body of law provides arguments both for and against finding a violation of due process. First, examples of South Carolina cases do not include a fetus in the definition of "child" when interpreting South Carolina's Children's Code. For example, in \textit{Doe v. Clark},\footnote{181}{\textit{Doe v. Clark}, 457 S.E.2d 336 (S.C. 1995).} the court interpreted the word "child" for purposes of adoption under two sections of the Code. \textit{Clark} involved a couple who wanted to adopt a pregnant woman's child. One section of the Code...
required "the mother of the child" to sign a consent form before the adoptive parents could take the child. Clark signed the requisite consent form five days before she gave birth.182 After Clark gave birth to the child, she changed her mind and wanted to keep the newborn child. The issue before the court was how to define "child" for the purpose of this statute. In short, the question was whether consent was valid only if the child was in being or whether consent was valid once the consent form was signed, even if before the birth of the child.183 In a very brief opinion, the court defined consent as the "informed and voluntary release in writing of all parental rights with respect to a child by a parent."184 As to the term "child," the court stated that "a child is defined as any person under 18 years of age."185 Without any further analysis, the court held that "[i]n viewing the statutory language as a whole, we conclude the legislature intended to require consent after . . . birth."186 Therefore, the court invalidated the consent form and Clark was allowed to keep her child.

The language the court relied upon in Clark to define a "child" was the same language relied upon in Whitner, although it originated from a different section in the code.187 Clark does not appear to provide Whitner with notice that her conduct was criminal. Rather, it seems to suggest that South Carolina's Children's Code requires that a "child" be a person in being, not a fetus.188

Two other South Carolina cases support a finding that Whitner had sufficient notice that "child" includes a fetus. In Fowler v. Woodward,189 the court held that a viable fetus was a "person" for purposes of the civil wrongful death statute, and in State v. Horne,190 the court held that a viable fetus was a "person" for purposes of the homicide statute. The court in Whitner opined that these two cases provided Whitner requisite notice that her conduct was criminal.191 It can be argued that these cases are more relevant than Clark, which did not deal with a law designed to protect the fetus. Yet all courts that have

182. Id. at 336.
183. Id.
184. Id. (citing S.C. Code Ann. § 20-7-1650(f) (Law Co-op. 1985)).
185. Id. (citing S.C. Code Ann. § 20-7-1650(d) (Law Co-op. 1985)).
186. See id.
187. That is, both cases interpreted the same language: "a child is a person less than eighteen years old." See Whitner v. State, No. 24468, 1996 WL 393164 (S.C. July 15, 1996); Doe v. Clark, 457 S.E.2d 336 (S.C. 1995).
188. See State v. Montgomery, 144 S.E.2d 797 (S.C. 1965). This case also dealt with the South Carolina Children's Code. In Montgomery, the court held that a defendant's indictment for nonsupport of his child was fatally deficient because it did not contain the child's date of birth. The court required the child to be in being, not a fetus.
held contrary to Whitner also have previously held that “child” included “fetus” within the wrongful death statute of their state. In addition, some of these courts likewise had held that “child” included fetus within their state criminal law, but concluded that the pregnant woman was denied the requisite notice that her conduct regarding her fetus was criminal. The unique quality of the mother-fetus relationship justified the conclusion. To apply existing criminal statutes, such as the one in Whitner, to this special relationship would be impractical, “a radical incursion upon existing law,” and would judicially manufacture a new crime in violation of the woman’s due process rights. These courts reached this conclusion despite holding that “child” included a fetus in previous civil and criminal cases.

Overall, resolving the issue of due process in Whitner is problemat. It appears that it may be difficult to overcome the language in Bouie regarding the utility of the actions of the party alleging a due process violation. Nevertheless, it remains arguable that the language of the statutory scheme and relevant case law failed to provide Whitner the required notice that her conduct, as it related to her fetus, was criminal.

C. Right of Privacy Issues Not Discussed in Whitner

The South Carolina Supreme Court acknowledged that Whitner raised constitutional issues involving privacy rights. The supreme court skirted these issues because “the Final Order [of the lower court] makes no mention” of them. The Court acknowledged that

192. See, e.g., Werling v. Sandy, 476 N.E.2d 1053 (Ohio 1985)(holding that a cause of action arises on behalf of a viable fetus when the viable fetus is negligently injured in the womb and subsequently stillborn); Mone v. Greyhound Lines Inc., 331 N.E.2d 916 (Mass. 1975); White v. Yup, 458 P.2d 617 (Nev. 1965).

193. See Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984)(holding that a viable fetus was a “person” for purposes of a vehicular homicide statute where a man ran over a woman who was 8½ months pregnant and killed her fetus). See also Williams v. Marion Rapid Transit, Inc., 87 N.E.2d 334, 337 (Ohio 1949)(stating that “[b]y the criminal law, such being the solicitude of the state to protect life before birth, it is a great crime to kill the child after it is able to stir in the mother’s womb by any injury inflicted upon the person of the mother”).

194. See State v. Gray, 584 N.E.2d 710 (Ohio 1992)(holding that “the unique relationship between a pregnant woman and the developing fetus requires a separate careful look at what activities [should] be deemed criminal and at what point in the pregnancy”). See also Commonwealth v. Pellegrini, No. 87970, slip. op. at 16 (Mass. Super. Ct. Oct. 15, 1990)(holding that “there is no bond more intimate or more fundamental than that between the mother and the fetus she carries in her womb”). See generally Wilkins, supra note 18.


Whitner's counsel commented to the lower court that its decision "violates the right of privacy." Yet the supreme court held that "[w]e do not think this passing statement raises the constitutional issues." In light of the decision's magnitude, it is unfortunate for Whitner and all women of South Carolina that the court chose not to discuss these constitutional privacy rights issues. They will be addressed in this Comment, however.

1. Should Strict Scrutiny Apply?

Although all of the courts analyzing the constitutional standard of review in cases like Whitner have applied strict scrutiny without much analysis, it is unclear whether the United States Supreme Court would follow suit. For strict scrutiny to apply, the right that the state seeks to infringe upon must be a "fundamental" right. The right to privacy is the fundamental right implicated when a pregnant woman is held criminally liable for neglecting her fetus.

The fundamental right to privacy was first recognized by the United States Supreme Court in Griswold v. Connecticut. In Griswold, the Court held that a statute that prohibited married couples from using contraceptives was unconstitutional because it interfered with the right to privacy. The Supreme Court reinforced Griswold in Eisenstadt v. Baird by voiding a Massachusetts statute that prohibited the sale or distribution of contraceptives to unwed individuals. In Eisenstadt, the Court stated that "[i]f 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."

One year after Eisenstadt, the Court decided Roe v. Wade. In Roe, the Court held that the fundamental right to privacy guaranteed by the Constitution, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." As a result, the

197. Id.
198. Id. at 7 n.6.
203. Id. at 485-86.
204. 405 U.S. 438 (1972).
205. Id. at 453.
207. Id. at 153.
Court also declared that restrictions on women's actions as they relate to these child bearing decisions must be subjected to the "strict scrutiny" standard of judicial review. The Court repeatedly has held that this standard requires the government to show that the challenged action is both "necessary to serve a compelling interest" and the "least restrictive" means to achieve that interest. In Roe, the Court noted that the state established important interests in preserving and protecting the health of the pregnant woman and the potential human life represented by the fetus. These interests, however, were not compelling until after the fetus had become viable, roughly at the end of the second trimester. Once the fetus reached viability, the state could then proscribe abortion, except when the procedure was necessary to preserve the life or health of the mother. 

Courts have justified strict scrutiny application in cases like Whitner by reading Roe to require strict scrutiny whenever the state seeks to protect the potential life represented by the fetus. This is appropriate, the courts reason, because if a law protects the rights of the fetus in this context, it must necessarily implicate the mother's right to privacy. This interpretation may read Roe too broadly, however. That is, Roe, Griswold, and Eisenstadt all involve the right to privacy in making decisions regarding intimate family planning questions. Whitner, on the other hand, arguably involves a woman's "right" to ingest illegal substances—a right that does not exist.

In this respect, Whitner more closely matches the facts of Bowers v. Hardwick. Bowers involved a defendant who was charged with engaging in sodomy with another man. The defendant argued that the statute must be subjected to strict scrutiny because he had "a fundamental right to engage in homosexual sodomy." The Supreme Court relied on Griswold, Eisenstadt, and Roe, noting that they involved rights concerning either family, marriage, or procreation. The Court found that these rights were fundamental rights because they were "deeply rooted in this Nation's history and tradition." "Accepting the decisions in these cases ... we think it evident that none of the rights announced in those cases bears any

208. Id. at 155.
211. Id. at 164-65.
213. Id.
215. Id. at 188 n.1 (citing Ga. Code Ann. § 16-6-2 (1982), which defined sodomy as "submitting to any sexual act involving the sex organs of one person and the mouth or anus of another").
216. Id. at 191.
217. Id. at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)(Powell, J.)).
resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . ."218 The Court concluded that there is "[n]o connection between family, marriage, or procreation . . . and homosexual activity. . . ."219 The right to perform sodomy, on the other hand, is not "deeply rooted" in our society. Rather, "[p]roscriptions against sodomy have ancient roots."220 Therefore, the Court did not subject the sodomy statute to strict scrutiny because the statute did not implicate a fundamental right.

Similarly, Whitner falls outside the category of those cases involving the right of privacy in the context of family, marriage, or procreation. The fact that Whitner was pregnant was merely incidental to her drug use and not the focal issue as in cases like Roe. In some cases, the woman using illegal substances may not have known she was pregnant at the time of ingestion.221 Furthermore, ingesting drugs, like performing sodomy, certainly is not a right "deeply rooted in our society." In light of these distinguishing facts, the propriety of applying strict scrutiny is less clear than the courts to this point have made it. If the Supreme Court had employed a lower standard of review, it is likely that laws criminalizing a mother's substance abuse for harming her fetus would survive a constitutional challenge.222

2. If Strict Scrutiny Is Applied?

If the Supreme Court eventually finds that a fundamental right to privacy is implicated in cases like Whitner and applies strict scrutiny, it is questionable whether laws criminalizing a woman's prenatal drug use would survive. Strict scrutiny requires that the state's interest be "compelling" and that the means employed to serve that interest be the "least restrictive" available.223 As established in Roe, which dealt with an abortion statute, a state has an interest in "protecting the

218. Id. at 190-91.
219. Id. at 191.
220. Id. at 192.
221. See Victoria J. Swenson, Pregnant Substance Abusers: A Problem That Won't Go Away, 25 St. Mary's L.J. 623, 699 (1994)(stating that many drug-addicted women do not realize they are pregnant until well into their third trimester).
222. See United States v. Virginia, 116 S. Ct. 2264 (1996); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994). These cases analyzed the 3 levels of scrutiny used to assess the constitutionality of a governmental regulation. The lowest level of scrutiny is the rational basis test, which inquires whether the government has demonstrated a legitimate interest in that which is regulated and whether the regulation itself is rationally related to serving the government's interest. The intermediate level of scrutiny inquires whether the stated government interest is significant and whether the regulation is substantially related to serving that interest. The highest level of scrutiny, or strict scrutiny, is discussed supra subsection VI.C.1.
potentiality of human life" represented by a fetus.224 In the context of the abortion statute, that interest became compelling only at the time of viability.225 Since the state established a compelling interest at the time of viability in Roe, the state's interest in Whitner must also be compelling. That is, Roe involved protecting the fetus through abortion restrictions and Whitner involved a pregnant woman using drugs, both of which may result in the death of the fetus or permanent mental retardation and gross physical deformities should the fetus come "into being."226

The state also has the burden of showing that the means employed to serve this compelling interest are the least restrictive available. To employ the least restrictive means, the state must not "stifle fundamental personal liberties [of the woman] when the end can be more readily achieved."227 A good argument can be made that the state can serve its interest in protecting the fetus in a less restrictive manner than criminal prosecution.

The first step in drafting the "least restrictive" means is to identify the true problem. Imposing criminal sanctions ignores that continued drug abuse impairs the capacity of pregnant women to make rational decisions.228 It also "ignores the underlying problem of addiction and the compulsive behavior it generates."229 In the vast majority of cases, the pregnant woman does not intend to harm the fetus by ingesting drugs.230 As a result, imposing criminal sanctions simply is not the answer. Rather, the state should "develop more effective alternative means,"231 such as means that "do not interfere with a woman's right to privacy or destroy the fundamental relationship between the mother and her fetus."232 Other examples include education, accessible medical care, and drug treatment centers for pregnant women.233

225. Id. at 163.
226. See supra Part II.
229. Id.
230. Id. This also implies problems with mens rea requirements, which fall outside of the scope of this Comment.
While "education and treatment is the only desirable remedy to this problem," much work must be done to make this remedy effective for pregnant women. For example, one study shows that of the seventy-eight existing drug treatment centers in New York City, only half allow pregnant women in the door. Several treatment centers fear their actions will harm the fetus and thus subject them to legal liability. One solution might be to grant to these treatment centers immunity from some types of malpractice claims. Even several of the programs that accept pregnant women are improperly equipped to meet these women's special physical and emotional needs.

A few programs are specifically designed to deal with cases like Whitner's. For instance, one program allows a pregnant woman to voluntarily choose to enter the program. Before the treatment begins, a thorough evaluation of the patient is performed. Then, based on the evaluation, the woman is admitted on either an in-patient or out-patient basis. The in-patient program treats complications and withdrawal symptoms. The program also integrates education concerning the effects of drugs and provides psychotherapy in the context of pregnancy and parenthood. An attempt is also made to include the woman's family if possible. After delivery, parenting and child development classes are offered.

The results of this program have been very positive. Overall, approximately seventy percent of the hundreds of mothers in the program have delivered newborns without any signs of drug addiction. It is estimated that half of the women who participate in the in-patient program permanently remain drug-free. Furthermore, approximately eighty percent of the women in the program who return to the center for a one-year evaluation show no signs of continued drug use. In addition, the costs of this program are often less than the costs of imposing criminal sanctions on these women.

235. Rippey, supra note 234, at 89.
236. Wilkins, supra note 18, at 1437.
237. Id.
238. See Hass, supra note 232, at 1035.
240. Id.
241. Id.
242. Id.
243. Id.
Houston, Texas is the home of another "model" program. This program is established as a residential drug treatment center ("Center"). The Center serves approximately 4,000 drug-using women every year. The first phase of the program is designed to provide women with eleven days in a medical detoxification program. During this period, a physician visits with the women two or three times a day. The second phase of the program, depending on the stage of the pregnancy, is an intensive sixty-day period during which drug counselors teach the women about the effects their drug abuse has on the fetus. After the fetus is delivered and released from the hospital, the mothers and their infants enter the "New Life" stage of treatment. During this stage, counselors work with the mothers to equip them with tools necessary to exist independently from the Center. For example, the Center places the women in housing, assists in job placement, and provides educational services. While this program may appear to involve significant costs, the average cost is only $3,500 to treat one woman for the sixty-day second phase of the program. The costs of imposing criminal sanctions and providing treatment for one drug-addicted infant usually exceeds $3,500. These programs capably demonstrate more efficient and less restrictive means of dealing with the problem of prenatal drug abuse.

D. Policy Considerations

Even if the various state statutes pass constitutional muster, a variety of policy considerations require a conclusion against the imposition of criminal sanctions in these types of cases. One consideration is that potential prosecution will discourage these women from obtaining proper medical care. Enforcing a statute that punishes pregnant women for drug use would necessarily require the participation of the medical community. Presently, if a woman's conduct is classified as abusive to the child, legal obligations arise for the medical staff. In fact, all states require physicians to report what they sus-

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244. See Swenson, supra note 221, at 668 (discussing the "Model Treatment Program" existing in Texas).

245. Id.

246. Id.


248. See Legal Interventions, supra note 247, at 2667.
pect is abusive behavior, and some states even hold medical personnel liable for failing to report such activity.\footnote{249} In light of this, it is logical to assume that pregnant women would shy away from medical treatment for fear of prosecution. This fear is not unfounded. For example, in one case, "uniformed police officers wearing guns entered [the medical facility] . . . to investigate new mothers suspected of cocaine abuse."\footnote{250} This police action resulted in the arrest of a pregnant woman who sought medical attention because she ingested an illegal substance. The woman was charged with criminal child abuse, although the charges were later dropped. Such police actions certainly cause pregnant women to escape detection by avoiding necessary medical attention.\footnote{251} One comprehensive study indicates that "the increasing fear of incarceration and other criminal sanctions is discouraging pregnant women from seeking care. Women are reluctant to seek treatment because of the possibility of punishment. They also fear that their children will be placed in foster care and they will never get them back."\footnote{252} Furthermore, avoiding medical attention is especially harmful in the case of pregnant substance abusers because these women typically have more health problems during their pregnancies than nonusers.\footnote{254} In some cases, despite these serious problems, pregnant women have even chosen to avoid medical attention during the time of delivery.\footnote{255}

In addition, police actions create an adversarial relationship between the pregnant woman and her physician,\footnote{256} requiring doctors to

\begin{footnotes}
\footnote{249}{Id.}
\footnote{250}{Hass, supra note 232, at 1034 n.203 (citing Drugs During Pregnancy: Tragic, but Not Criminal, N.J. L.J., May 31, 1990, at 9).}
\footnote{251}{See, e.g., Johnson v. State, 602 So. 2d 1288 (Fla. 1992); State v. Gethers, 585 So. 2d 1140 (Fla. 1991).}
\footnote{252}{Dawn Johnsen, Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty, 43 Hastings L.J. 569, 603 (1992)(citing U.S. GEN. ACCOUNTING OFFICE, DRUG-EXPOSED INFANTS: A GENERATION AT RISK 9 (1990)). See also Legal Interventions, supra note 247, at 2667 (stating that “[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians’ knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment”).}
\footnote{253}{See Legal Interventions, supra note 247, at 2667.}
\footnote{254}{Wilkins, supra note 18, at 1402.}
\footnote{255}{See State v. Gethers, 585 So. 2d 1140, 1143 (Fla. 1991). See also Hass, supra note 232, at 1034 (stating that prosecuting women in these cases “lead[s] to an escalation in home deliveries”).}
\footnote{256}{Janna C. Merrick, Symposium on Maternal Substance Abuse During Pregnancy, Policy Implications in the United States, 14 J. LEGAL MED. 57, 69 (1993).}
\end{footnotes}
become agents of the criminal justice system. This deconstruction of the doctor-patient relationship is critical because doctors depend on patients' truthfulness concerning all aspects of their pregnancies. If the truth is unknown to the doctor, disastrous consequences often result.

Another policy concern against the imposition of criminal sanctions is that upon arrest, a pregnant woman is often subjected to environmental conditions that are very hazardous to her health and to the already fragile health of her fetus. Moreover, punishing a woman after she gives birth inevitably undermines the state's interest of keeping a family intact. In most cases, criminal sanctions would separate the mother from the child. This separation would be justified if it resulted in the eventual reunion of the child with a healthy mother. Criminal sanctions, however, neither cure drug dependency nor prevent future use. Therefore, not only is the mother separated from her child, but this separation often becomes permanent and can lead to increased deterioration to the mother's health.

A concern that pregnant substance abusers may have more abortions to avoid prosecutions raises additional policy considerations. Based on the state's interest in protecting the fetus, many state legislatures specifically cite this problem as a basis for rejecting bills that would criminalize women in these cases. Several courts also recognize this as a significant problem militating against the imposition of criminal sanctions. In addition, both the legislatures and courts acknowledge that criminal sanctions in this context serve little if any deterrence because harsh sanctions already exist for the use of an illegal substance.

258. See Hass, supra note 232, at 1034 n.203. See also Stoval, supra note 247, at 1278.
259. See Johnson v. State, 602 So. 2d 1288, 1296 (Fla. 1992) (prosecuting a woman in these situations "is counterproductive to the public interest as it may discourage [her] from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination. This failure to seek proper care or to withhold vital information concerning her health could increase the risks to herself and her baby.").
260. See Legal Interventions, supra note 247, at 2667 (stating that women in jail for long or short periods of time are subjected to generally filthy and unsanitary environments, poor diets, and no access to exercise or fresh air).
262. See Legal Interventions, supra note 247, at 2667.
263. Id.
264. See, e.g., Hass, supra note 232, at 1035.
265. See id. (discussing this issue in reference to the Illinois Legislature).
One final policy concern is that criminal sanctions against pregnant substance abusers "may open the floodgates" to prosecution of pregnant women for an unlimited number of new "crimes." The majority in Whitner did not address this argument, choosing instead to make future determinations on a case-by-case basis. Nonetheless, the court failed to send pregnant women in South Carolina a clear message as to what other acts may be criminal. For example, will the court limit future prosecutions to only those cases in which the woman has ingested illegal substances? How will the court respond when pregnant women ingest legal substances, if legal substances damage a fetus more than illegal ones? To what extent can a woman smoke or consume alcohol before her actions become criminal?

The majority's response, that "the same arguments can be made against the statute whether or not the child has been born," is inadequate because it ignores the obvious biological differences between a fetus and an infant. That is, the fetus ingests whatever the mother ingests, whereas after the child is born, the only effects these substances will have on the child are indirect. For example, when a mother ingests cocaine or consumes alcohol, a child already in being may not receive adequate food and shelter. However, it will not sustain brain damage or mental retardation directly from the drug use. Furthermore, a mother who has a child in being occasionally can consume even excessive amounts of alcohol or smoke a pack of cigarettes a day and still perform her functions as a mother in fine fashion. In contrast, this use will likely have serious effects on the fetus if conducted while the woman is pregnant. In this respect, Whitner provides little guidance to the women of South Carolina concerning what conduct is in fact criminal.


268. See Johnson v. State, 602 So. 2d 1288, 1294 (Fla. 1992); Sheriff, Washoe County, Nev. v. Enloe, 885 P.2d 596, 598 (Nev. 1994); People v. Morabito, 580 N.Y.S.2d 843, 845 (Geneva City Ct. 1992). These cases held that prosecuting women for illegal drug use during their pregnancies under statutes similar to Whitner would fail to provide the women with notice of what other activities could be prosecuted under the statute. Prosecuting under these statutes could necessarily create a new crime with every new case as new facts are presented in each case.


270. See, e.g., Claire Infante-Rivard et al., Fetal Loss Associated with Caffeine Intake Before Pregnancy, 270 JAMA 2940 (1993)(discussing the severity the harm caused to a fetus by the consumption of alcohol, caffeine, and nicotine, and how it is often worse than the effects of illegal substance abuse).

The problem of women subjecting their fetuses to the dangers of illegal drugs continues to expand in the United States. Using a child neglect statute to impose criminal sanctions on one of these women, the court in *Whitner* likely violated the separation of powers doctrine by creating a new crime under the guise of interpreting a criminal statute. The court failed to sufficiently weigh the clear intention of the legislature, which itself declined to pass eleven bills that would have criminalized Whitner’s conduct. While Whitner’s claim of due process violations would likely meet substantial resistance by the Supreme Court because of the character of her drug usage, other factors might influence the Court to find in her favor. If the Court grants certiorari, it remains uncertain as to what constitutional standard of review it would apply. Regardless of whether laws like the one in *Whitner* pass constitutional muster, imposing criminal sanctions on these women fails to benefit the fetus, the mother, or society as a whole.

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