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Whitner v. State: Expanding Child Abuse and Endangerment Laws to Protect Viable Fetuses from Prenatal Substance Abuse

Stephanie Hainer Ojeda
West Virginia University College of Law

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I. INTRODUCTION

Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.¹

Should a woman who abuses drugs while pregnant be punished under criminal child abuse laws for endangering the life of her fetus? Most courts, including four state high courts, have refused to allow the prosecution of a mother

for prenatal drug use.\(^2\) On July 15, 1996, the Supreme Court of South Carolina became the first state high court in the nation to determine that a woman can be criminally liable for conduct during pregnancy that endangers the life of her fetus.\(^3\)

The recent decision by the Supreme Court of South Carolina in *Whitner v. State*\(^4\) marks the first time that a state has defined the term “child,” as used in a child abuse and endangerment statute, to include viable fetuses.\(^5\) The majority opinion expands upon South Carolina’s established law which recognizes the viable fetus as a person for the purposes of homicide laws and wrongful death statutes.\(^6\) With the *Whitner* decision, the Supreme Court of South Carolina has made an unprecedented determination that a mother may be held criminally liable for endangering her child’s life through prenatal drug use.\(^7\)

This Case Comment will examine the controversial decision of the Supreme Court of South Carolina in *Whitner v. State*. It will also discuss the possible implications of the majority’s holding as more women are prosecuted for threatening

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\(^3\) *Whitner*, 1996 WL 393164, at *1.

\(^4\) Id.

\(^5\) Id. at *1.

\(^6\) Id. at *3.

\(^7\) Id. at *1. Although South Carolina is the first state to uphold the prosecution of a mother for prenatal drug use under a child endangerment law, Wisconsin recently decided to prosecute a mother under an attempted homicide statute for similar conduct. *See Status of Fetus at Issue in Court: Woman Who Delivered Drunk Baby Protests Attempted Homicide Charge, Wts. St. J., Sept. 6, 1996*, at 3B. On September 18, 1996, in the Circuit Court of Racine County, Racine, Wisconsin, Judge Dennis Barry declared that 35-year-old Deborah Zimmerman would be tried for the attempted homicide of her newborn child. *See Rivera Live: Wisconsin Woman Charged with Attempted Murder After Trying To Kill Her Baby by Becoming Dangerously Drunk in Her Ninth Month of Pregnancy* (CNBC news broadcast, Sept. 18, 1996) [hereinafter *Rivera Live*]. Zimmerman drank alcohol throughout her pregnancy and reportedly told a nurse that she wanted to kill her baby. *See Mom Wants Reunion with Baby Born Drunk, Wts. St. J., Sept. 6, 1996*, at 7A. Zimmerman’s child was born with a blood-alcohol level of 0.199, which is nearly twice the legal limit. *Id.* This is the first prosecution of a woman for attempting to kill her fetus by binge drinking. *Rivera Live, supra.*
the lives of their children by engaging in prenatal drug use.8

II. STATEMENT OF THE CASE

On April 20, 1992, Cornelia Whitner pled guilty to criminal child neglect for causing her baby boy to be born with cocaine metabolites in his system by reason of Whitner's ingestion of crack cocaine during the third trimester of her pregnancy.9 The circuit court judge sentenced Whitner to eight years in prison for violating South Carolina's child abuse and endangerment statute.10 Whitner did not appeal her conviction.11

Following her conviction and after serving almost two years in jail, Whitner filed a petition for Post Conviction Relief (PCR), pursuant to title 17, chapter 27, section 20 of the South Carolina Code, alleging that the circuit court lacked subject matter jurisdiction to accept her guilty plea.12 Additionally, Whitner claimed ineffective assistance of counsel based upon her lawyer's failure to advise her that the child endangerment statute might not apply to prenatal drug use.13 Circuit Court Judge Larry R. Patterson granted Whitner's petition on both grounds and the state appealed.14

On appeal, the Supreme Court of South Carolina held that the word "child" as used in the child abuse and endangerment statute includes viable fetuses; therefore, the sentencing court had subject matter jurisdiction to accept Whitner's


13 Whitner, 1996 WL 393164, at *1; Respondent's Brief at 1, Whitner (No. 24468).

plea because criminal child neglect includes an expectant mother’s use of crack cocaine after the fetus is viable. The South Carolina court further held that Whitner’s lawyer’s failure to advise her of the statute’s inapplicability was not ineffective assistance of counsel.

III. BACKGROUND OF THE LAW

The Whitner opinion discussed the scope of South Carolina’s child abuse and endangerment statute contained in title 20, chapter 7, section 50 of the South Carolina Code. In pertinent part, this section states that:

[i]t is unlawful for a person who has the legal custody of a child or helpless person, without lawful excuse, to refuse or neglect to provide the proper care and attention, as defined in Section 20-7-490, for the child or helpless person, so that the life, health, or comfort of the child or helpless person is endangered or is likely to be endangered.

This section further provides that a person who violates its provisions “is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.”

The Whitner opinion did not discuss South Carolina case law interpreting the child abuse and endangerment statute. Instead, the court focused on its prior holdings regarding the rights held by viable fetuses. Three decisions guided the majority: Hall v. Murphy, Fowler v. Woodward, and State v. Horne. In Hall,
the Supreme Court of South Carolina was asked to determine whether the State’s wrongful death statute would apply in an action brought on behalf of an infant who died shortly after birth as a result of injuries sustained prenatally when the child was viable. The action in Hall grew out of a collision between an automobile and a bus. A passenger riding in the automobile prematurely gave birth to a child that lived only four hours because of injuries sustained in the collision. The parents of the child brought an action against the driver of the bus for the pain and suffering and wrongful death of the child. Because a fetus was thought to have no separate being apart from the mother, the driver in Hall argued that a viable fetus was not a “person” within the meaning of South Carolina’s survival and wrongful death statutes.

After the Hall court reviewed case law from other states concerning the applicability of wrongful death statutes to viable fetuses, the majority determined that “the reasons assigned by the courts for holding that a child after birth may not maintain an action for prenatal injuries were unsound, illogical and unjust.” Thus,

24 Hall, 113 S.E.2d at 791. One of the actions the parents brought in Hall was under South Carolina’s 1952 wrongful death statute. S.C. CODE ANN. § 10-1951 (Law. Co-op. 1952) (current version at S.C. CODE ANN. § 15-51-10 (Law. Co-op. Supp. 1995). Today, the wrongful death statute states in pertinent part that:

\[
\text{whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.}
\]


25 Hall, 113 S.E.2d at 791.

26 Id.

27 Id. The action for “pain and agony” was brought under South Carolina’s survival statute to recover damages for the alleged pain suffered by the child in the four hours she lived. See S.C. CODE ANN. § 10-209 (Law. Co-op. 1952).

28 Hall, 113 S.E.2d at 791. (citing S.C. CODE ANN. § 10-209 (Law. Co-op. 1952); S.C. CODE ANN. § 10-1951 (Law. Co-op. 1952)).

29 Id. at 793. See, e.g., Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884) (holding that a cause of action could not be maintained for an unborn child’s wrongful death). Dietrich appears to be the first case in the United States to determine the right of an unborn child to recover damages for a tort. See also Amann v. Faidy, 114 N.E.2d 412, 415 (Ill. 1953) (summarizing the reasons behind the divergent views regarding the applicability of wrongful death statutes to viable fetuses). Some of the reasons assigned by courts in refusing to allow a child to maintain an action for prenatal injuries
the majority found "no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person." 30

Four years later in Fowler v. Woodward, 31 the Supreme Court of South Carolina interpreted Hall as supporting a finding that a viable fetus injured while in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus. 32 Fowler involved an action brought for the wrongful death of an unborn, viable infant who perished with its mother in an automobile collision and ensuing fire. 33 Because the complaint failed to allege that the infant was born alive and died thereafter as a result of the injuries complained of, the court was asked to determine whether the complaint stated a cause of action for recovery under the wrongful death statute. 34

The Fowler court repeated Hall's finding that the unborn child, after viability, is a distinct being capable of sustaining a legal wrong. 35 The Fowler court accepted Hall's reasoning and held that

\[ \text{Since a viable child is a person before separation from the body of its mother and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an } \text{‘act, neglect or default’ by the defendant, to the injury of the child, as would have entitled the child ‘to maintain an action and recover damages in respect thereof . . . if death had not ensued.’}\] 36

Moreover, although the injurious consequences of a prenatal injury may not become

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30 Hall, 113 S.E.2d at 793.
33 Fowler, 138 S.E.2d at 42.
34 Id. at 42-43 (citing S.C. CODE ANN. § 10-1951 (Law. Co-op. 1962)).
35 Id. at 43.
36 Id. at 44.
apparent until long after birth, the *Fowler* court found no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury. 37 Thus, the *Fowler* decision expanded the rights of viable fetuses even further by finding that an injured infant need not be born alive for another to maintain a wrongful death action for the loss of that child. 38 The *Whitner* majority emphasized that the *Fowler* decision made it clear that *Hall* was based on the concept of the viable fetus as a person with vested legal rights. 39 This conclusion, that a viable fetus has legal rights independent of its mother, would eventually influence the *Whitner* majority’s own finding.

Next, in 1984, the Supreme Court of South Carolina was again asked to examine the rights of viable fetuses; this time, however, the court had to decide whether criminal liability applied to the killing of a viable human being. 40 In *State v. Horne*, the defendant stabbed his wife, who was nine months pregnant, in the neck, arms, and abdomen. 41 Although the mother survived the attack, the child was dead when removed from the mother’s womb. 42 Later, an autopsy indicated that the child had experienced normal development and had died as a result of suffocation caused by the mother’s loss of blood. 43

Although no South Carolina decision had held that the killing of a viable human being in utero could constitute criminal homicide, the court had previously addressed the crime of infanticide, which required proof that the infant was born alive. 44 The *Horne* court found that, although the child was an unintended victim of the defendant, the defendant was criminally liable for the child’s death under the doctrine of “transferred intent.” 45 Citing *Fowler*, the court determined that “[i]t would be grossly inconsistent for us to construe a viable fetus as a ‘person’ for the

37 *Id.*

38 *Fowler*, 138 S.E.2d at 44.


41 *Id.* at 704.

42 *Id.*

43 *Id.*

44 *Id.* at 704 (citing *State v. Collington*, 192 S.E.2d 856 (S.C. 1972); *State v. O’Neall*, 60 S.E. 1121 (S.C. 1908)).

45 *Horne*, 319 S.E.2d at 704.
purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." Thus, in a unanimous decision, the court held that an action for homicide could be maintained in the future when the state could prove beyond a reasonable doubt the fetus involved was viable.

IV. THE DECISION

In reviewing the PCR court’s finding that the circuit court did not have subject matter jurisdiction to accept Whitner’s guilty plea, the Supreme Court of South Carolina was forced to consider the scope of the child abuse and endangerment statute. In doing so, the Whitner court briefly examined the legal rights and privileges held by viable fetuses, ultimately deciding that those rights could be further expanded. Specifically, the court held that the word “child” as used in the abuse and endangerment statute would include viable fetuses. Therefore, Whitner was not convicted of a non-existent crime, as she had argued, and the circuit court had jurisdiction to accept her guilty plea. Consequently, the court found that Whitner’s lawyer’s failure to advise Whitner of the statute’s inapplicability did not constitute ineffective assistance of counsel. Finally, because Whitner failed to present her constitutional arguments to the PCR court below, the majority held that Whitner could not raise them for the first time on appeal.

South Carolina Associate Justice Toal wrote the majority opinion, joined by Justices Waller and Burnett. Chief Justice Finney and Associate Justice Moore each

46 Id. (citing Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964)).

47 Id.


49 Id. at *1-3.

50 Id. at *3.

51 Id. at *2-3.

52 Id. at *7. Whitner based her ineffective assistance of counsel claim on her lawyer’s failure to inform Whitner that section 20-7-50 did not apply to prenatal drug use. Whitner, 1996 WL 393164, at *7. Whitner contended that she would not have pled guilty to criminal child neglect had she been given such advice. Id. Because the majority believed that section 20-7-50 would apply to maternal drug use after the fetus is viable, the court could not find that Whitner’s lawyer’s failure to advise her of the statute’s inapplicability constituted deficient performance. Id. The majority believed the lawyer’s advice was justified. Id.

53 Id. at *7.
wrote separate, dissenting opinions challenging the majority’s unprecedented decision and expressing reservations about the majority’s lack of judicial restraint. The conflicting opinions reflect the difficulty courts face when asked to determine the applicability of child endangerment laws to cases of prenatal substance abuse.

A. The Majority Opinion

In Whitner v. State, the Supreme Court of South Carolina determined the scope of the state child abuse and endangerment statute as it applied to a baby born with injuries resulting from the mother’s ingestion of crack cocaine during the third trimester of her pregnancy. The majority opinion analyzed the subject matter jurisdiction issue in the following manner: First, the court considered the language of the child abuse and endangerment statute, as well as the purpose for the legislation. Next, the court discussed controlling South Carolina case law that set forth certain legal rights and privileges held by viable fetuses. Finally, the majority addressed Whitner’s arguments against defining “child” so broadly and challenged the dissents’ contention that the majority’s finding was inconsistent with prior case law and with statutory construction.

1. Subject Matter Jurisdiction

The majority first addressed the PCR court’s finding that the sentencing court lacked subject matter jurisdiction to accept Whitner’s guilty plea. According to South Carolina law, a circuit court lacks subject matter jurisdiction to accept a guilty plea to a non-existent offense. Thus, in order for the sentencing court to have jurisdiction to accept Whitner’s guilty plea, a mother’s prenatal use of crack cocaine after the fetus is viable would have to be included as criminal child

54 *Whitner*, 1996 WL 393164, at *7-10 (Finney & Moore, JJ., dissenting).

55 *Id.* at *1.

56 *Id.* at *1.

57 *Id.* at *2-3.

58 *Id.* at *3-5.


60 *Id.* at *1.

neglect under section 20-7-50. As the court explained, all other issues would be ancillary to the jurisdictional question.

a. Statutory Interpretation

In deciding whether criminal child neglect would include an expectant mother’s use of crack cocaine after the fetus has reached viability, the majority looked to the precise language used in section 20-7-50. Because the state was contending that section 20-7-50 encompassed maternal acts that endangered or were “likely to endanger the life, comfort, or health of a viable fetus,” the *Whitner* majority was faced with deciding whether a viable fetus constituted a “person” for the purpose of the South Carolina Children’s Code.

The majority began its statutory interpretation by noting that the court’s primary function was first to ascertain the intent of the legislature. The court explained that where a statute is complete, plain, and unambiguous, legislative intent can be determined from the language used in the statute itself. The majority further remarked that it must consider the language of section 20-7-50 in conjunction with the purpose of the whole statute and the policy of the law. Additionally, there is a basic presumption that the legislature knows of prior legislation and of judicial decisions construing that legislation when subsequent statutes are enacted concerning related subjects.

b. Controlling South Carolina Case Law

After examining the language of the child endangerment statute, the

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63 *Id.* at *2.

64 *Id.* at *1; *see also* S.C. CODE ANN. § 20-7-50.

65 *Whitner*, 1996 WL 393164, at *1; *see also* S.C. CODE ANN. § 20-7-30(1) (Law. Co-op. 1985) (defining “[c]hild” as a person under the age of eighteen).


67 *Id.* (citing State v. Blackmon, 403 S.E.2d 660 (S.C. 1991)).

68 *Id.* at *1. (citing South Carolina Coastal Council v. South Carolina State Ethics Comm’n, 410 S.E.2d 245 (S.C. 1991)).

69 *Id.* (citing Berkebile v. Outen, 426 S.E.2d 760 (S.C. 1993); 82 C.J.S. *Statutes* § 316 (1953)).
majority continued its analysis with a summary of legal rights and privileges that South Carolina recognizes as being held by viable fetuses.\(^70\) Specifically, South Carolina has acknowledged a viable fetus to be a "person" for the purposes of wrongful death\(^71\) and homicide statutes.\(^72\) The majority looked to its prior decisions in *Hall*, *Fowler*, and *Home* for guidance.\(^73\)

Against this backdrop of South Carolina case law, the *Whitner* majority determined that there was no rational basis for finding that a viable fetus is not a person in the context of the child abuse and endangerment statute.\(^74\) Particularly, the majority reasoned that "it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."\(^75\) In addition, citing to its decision in *Hall*, the majority noted that the plain and ordinary meaning of the word "person" has not changed in any way that would now deny viable fetuses status as persons.\(^76\)

The *Whitner* majority further pointed out that the policies enunciated in South Carolina Children’s Code also support its "plain meaning" interpretation of the word "person" as it appears in section 20-7-50.\(^77\) South Carolina’s policies concerning children are set forth in title 20, chapter 7, section 20(C) of the South Carolina Code, which expressly states that "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."\(^78\)

Noting that the abuse or neglect of a child at any time during childhood can exact a profound toll on both the child and society as a whole, the *Whitner* majority explained that the consequences of abuse which take place after birth "often pale in

\(^{70}\) *Id.* at *2-3.


\(^{73}\) See discussion supra part III.

\(^{74}\) *Whitner*, 1996 WL 393164, at *3.

\(^{75}\) *Id.*


\(^{77}\) *Id.*

\(^{78}\) Id. (citing S.C. CODE ANN. § 20-7-20(C) (Law. Co-op. 1985)).
comparison to those resulting from abuse suffered by the viable fetus before birth.\textsuperscript{79} Thus, the Whitner majority decided that the code's policy of prevention would support a reading of the word "person" to include viable fetuses.\textsuperscript{80} Furthermore, because title 20, chapter 7, section 20(B) of the code expressly states that its policies apply "to all children who have need of services," the majority insisted that the scope of the Children's Code is quite broad.\textsuperscript{81} The court felt that, together with the comprehensive remedial purposes of the code, this language would support the inference that the legislature intended to include viable fetuses within the scope of the code's protection.\textsuperscript{82}

\textbf{c. Response to Respondent's Arguments}

Upon finding that the word "child" would include a viable fetus, the Whitner majority continued its analysis by addressing each of Whitner's major arguments against defining "child" so broadly. First, the court discussed Whitner's argument concerning the introduction of several bills in the South Carolina General Assembly which had addressed substance addiction by pregnant women.\textsuperscript{83} Whitner suggested that the introduction of bills whose passage would have criminalized substance abuse by pregnant women evinces a belief by legislators that prior legislation had not addressed the issue.\textsuperscript{84} Specifically, Whitner argued that the introduction of such bills proves that section 20-7-50 was not intended to encompass

\textsuperscript{79} Id.

\textsuperscript{80} Id. at *3.

\textsuperscript{81} Id.; see also S.C. CODE ANN. § 20-7-20(B) (Law. Co-op. 1985).

\textsuperscript{82} Whitner, 1996 WL 393164, at *3.

\textsuperscript{83} Id. Whitner argued that the South Carolina legislature has considered and explicitly rejected the interpretation of section 20-7-50 to include viable fetuses. Id. Whitner noted that several bills had been introduced which would have mandated reporting a woman's prenatal drug use and redefined an "abused child" to include newborns exposed prenatally to drugs. Id. Specifically, Whitner noted that one bill, S. 4023 (1993), would have made it a crime for a pregnant woman to ingest a controlled substance and House Bill 4486 (1994) would have amended section 20-7-50 to include "a woman who is pregnant" and "fetus[es]." Id. However, as Whitner argued, none of these bills had passed. See Respondent's Brief at 18-19, Whitner (No. 24468).

\textsuperscript{84} Respondent's Brief at 18-19, Whitner (No. 24468).
abuse or neglect of a viable fetus.\textsuperscript{85}

The majority dismissed Whitner’s emphasis on prior proposed legislation and explained that, generally, the legislature’s subsequent acts “cast no light on the intent of the legislature which enacted the statute being construed.”\textsuperscript{86} Rather, the majority felt its best guide to discerning legislative intent was to first look to the language of the statute.\textsuperscript{87} Because the majority believed that the statute’s meaning was evident from the language, it saw no reason to look beyond the words of section 20-7-50.\textsuperscript{88} Moreover, the majority insisted that South Carolina’s existing case law supported its conclusion about the meaning of the statute.\textsuperscript{89}

The majority went on to discuss Whitner’s contention that an interpretation of the statute to include viable fetuses would lead to absurd results not intended by the legislature.\textsuperscript{90} Whitner argued that if the court interpreted “child” to include viable fetuses, every action by an expectant mother that endangers or is likely to endanger a fetus, whether the action is legal or not, would constitute unlawful neglect under the statute.\textsuperscript{91} For instance, Whitner claimed that a woman could ultimately be prosecuted for smoking or drinking during pregnancy because these behaviors have been known to endanger fetuses.\textsuperscript{92} Whitner argued that the legislature never intended such “absurd” results, and therefore the statute should not

\textsuperscript{85} Id. The State argued that although the legislature was aware that the court had construed “person” to include a viable fetus in both the civil and criminal context, and although the legislature recently considered making changes to the statute to reflect new law, the legislature had taken no steps to exclude a viable fetus from the definition of “person” used in section 20-7-50. Id. Thus, the state presumed that the legislature intended that its definition of “person” remain consistent with the existing law of the state — that the term “person” encompasses viable fetuses. See Reply Brief of Petitioner, at 2, \textit{Whitner} (No. 24468).


\textsuperscript{87} Id.

\textsuperscript{88} Id.


\textsuperscript{90} \textit{Whitner}, 1996 WL 393164, at *4.

\textsuperscript{91} Id.

\textsuperscript{92} Id.
be construed to include viable fetuses.93

The majority disagreed with Whitner, citing two specific reasons in opposition. First, the majority determined that the same arguments against the statute could be made whether or not the child were born.94 The majority noted that after the birth of a child, a parent can be prosecuted under section 20-7-50 for an action that is likely to endanger the child whether or not the action itself is illegal.95 The majority explained that, under certain circumstances, a parent who drinks excessively could be guilty of child neglect or endangerment even though the act of consuming alcoholic beverages is itself legal.96 The majority believed that the legislature clearly did not think it "absurd" to allow prosecution of parents for otherwise legal acts when the acts actually or potentially endanger the "life, health or comfort" of the parents' born children; thus, the majority reasoned that such a result should not be rendered absurd by the mere fact that the child at issue is a viable fetus.97

In addition, Justice Toal felt that the majority need not address the potential "parade of horribles" set forth by Whitner.98 Because Whitner admitted to having ingested crack cocaine during the third trimester of her pregnancy, causing her child to be born with cocaine in its system, the majority decided that, in the case at hand, certain facts were clear.99 Conceding that the precise effects of maternal crack use during pregnancy are somewhat unclear, the majority asserted that it is well documented and within the realm of public knowledge that such drug use can cause

93 Id. at *4.

94 Id.


96 Id.

97 Id.

98 Id. Whitner argued that if the state's interpretation of section 20-7-50 were correct, "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." Id. For instance, any pregnant woman who drinks alcohol could be charged for harming the fetus she is carrying due to fetal alcohol syndrome. Whitner, 1996 WL 393164, at *4. A pregnant woman could also be arrested for smoking cigarettes. Id. Also, a woman could be arrested for failing to take proper medication or to follow her doctor's instructions, potentially causing harm to the fetus. See Respondent's Brief at 20, Whitner (No. 24468) (citing Tolliver v. State, No. 90-CP-23-5178 (S.C.C.P. Greenville County, Aug. 10, 1992)).

serious harm to a viable fetus.\textsuperscript{100} Therefore, the majority determined that there could be no question that Whitner endangered the life, health, and comfort of her child.\textsuperscript{101}

The Whitner majority dismissed Whitner's arguments which addressed holdings from other states that were in conflict with the majority's decision. First, the majority acknowledged the many decisions from other states holding that maternal conduct before the birth of the child would not give rise to criminal prosecution under child abuse and endangerment statutes.\textsuperscript{102} Although no state has held that a mother is criminally liable for maternal conduct that endangers the life of a fetus, many of the cases cited by the Whitner court were prosecuted under state statutes forbidding delivery or distribution of illicit substances to minors, rather than under child endangerment statutes.\textsuperscript{103} Thus, because the prosecutions in such cases depended upon the statutory construction of the terms "delivery" and "distribution," the Whitner majority believed that such cases were inapplicable to the present situation.\textsuperscript{104}

Additionally, the majority believed that the cases concerning state child endangerment statutes or construing the terms "child" and "person" were also distinguishable because those states had entirely different bodies of case law than South Carolina.\textsuperscript{105} For instance, the majority noted Commonwealth v. Welch,\textsuperscript{106} in


\textsuperscript{101} Whitner, 1996 WL 393164, at *4.


\textsuperscript{103} Id.; see, e.g., Johnson v. State, 602 So. 2d 1288 (Fla. 1992); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992).

\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} 864 S.W.2d 280 (Ky. 1993).
which the Supreme Court of Kentucky specifically stated that Kentucky law had not construed the word “person” in the context of the criminal homicide statute to include a fetus.\textsuperscript{107} Furthermore, in \textit{Reyes v. Superior Court},\textsuperscript{108} the California Court of Appeals noted that, under California law, a fetus was not recognized as a “human being” within the purview of its murder and manslaughter statutes; therefore, it would be improper to determine the fetus was a “child” for the purposes of the felonious child endangerment statute.\textsuperscript{109}

The \textit{Whitner} opinion continued to dismiss the holdings from other states with an analysis of \textit{Commonwealth v. Pellegrini},\textsuperscript{110} a Massachusetts Superior Court decision which held that a mother pregnant with a viable fetus could not be criminally liable for transmitting cocaine to the fetus.\textsuperscript{111} The \textit{Whitner} majority devoted a good part of its opinion to distinguishing the \textit{Pellegrini} decision from its own because Massachusetts has a body of case law that is “substantially similar” to that of South Carolina.\textsuperscript{112} Justice Toal’s opinion noted specifically that, as in South Carolina, Massachusetts law allows wrongful death actions on behalf of viable fetuses injured \textit{in utero} who are not subsequently born alive.\textsuperscript{113} Also, Massachusetts permits homicide prosecutions of third parties who kill viable fetuses.\textsuperscript{114}

In \textit{Pellegrini}, the Massachusetts Superior Court found that the state’s drug distribution statute did not apply to the distribution of an illegal substance to a viable

\textsuperscript{107} \textit{Whitner}, 1996 WL 393164, at *4 (citing Commonwealth v. Welch, 864 S.W.2d 280, at 281 (Ky. 1993)).

\textsuperscript{108} 141 Cal. Rptr. 912 ( Ct. App. 1977).

\textsuperscript{109} \textit{Whitner}, 1996 WL 393164 at *4 (citing Reyes v. Superior Court, 141 Cal. Rptr. 912 (Ct. App. 1977)).


\textsuperscript{111} \textit{Id}.

\textsuperscript{112} \textit{Whitner}, 1996 WL 393164, at *5.

\textsuperscript{113} \textit{Id}. (citing Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975)).

\textsuperscript{114} \textit{Id.}; see Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) (holding that a viable fetus is a person for the purposes of a vehicular homicide statute and that the infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide); Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (following \textit{Cass} and holding that a viable fetus is a human being for the purposes of the common-law crime of murder).
fetus. The statute at issue in Pellegrini proscribed the distribution of cocaine to persons under the age of eighteen. The court in Pellegrini determined that a viable fetus was not a “person under the age of eighteen” for the purposes of the statute. Because of this finding, the Massachusetts Superior Court had to distinguish Massachusetts case law which had held viable fetuses were “persons” for the purposes of state criminal laws.

The court in Pellegrini distinguished its decision from prior Massachusetts holdings by explaining that Cass and Lawrence grant “legal rights to the unborn only where the mother’s or parents’ interest in the potentiality of life, not the state’s interest, are sought to be vindicated.” The Whitner majority reasoned that this interpretation meant that in Massachusetts, a viable fetus should only be accorded the rights of a person for the sake of its mother or both its parents; thus, under this rationale, the viable fetus lacks rights of its own. While Whitner would have liked the Supreme Court of South Carolina to construe its decisions in Hall, Fowler, and Horne in a manner that would only accord rights to the viable fetus when doing so would protect the special parent-child relationship, the Whitner majority refused to interpret the South Carolina decisions so narrowly.

The majority concluded its analysis of Pellegrini by explaining that if the Massachusetts Superior Court decision accurately characterizes the rationale

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115 Commonwealth v. Pellegrini, No. 87970, slip op. at 13-14 (Mass. Super. Ct. Plymouth County Oct. 15, 1990) (holding that the interpretation of the state drug distribution statute to include the in utero transfer of cocaine from a mother to her fetus is an inappropriate exercise of judicial power and that due process principles prevent the court from applying the statute to cases of prenatal drug use).

116 Id. at 3, n.1. Massachusetts law states that: An any person who knowingly or intentionally manufactures, distributes, dispenses or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B [sic] of section thirty-one to a person under the age of eighteen years shall be punished by a term of imprisonment in the state prison for not less than five nor more than fifteen years. MASS. GEN. L. ch. 94C, § 32F(b) (1995).

117 Pellegrini, No. 87970, slip. op. at 10.

118 Id. at 10-13.

119 Id. at 11 (emphasis added). The Pellegrini court determined that the Massachusetts cases were limited to vindicating a mother’s or parents’ interest against third-party wrongdoing and did not attribute legal rights to the fetus as against its mother. Id.

120 Whitner, 1996 WL 393164, at *5.

121 Id.
underlying Mone, Lawrence, and Cass, then the reasoning of those cases is substantially different from the reasoning behind similar South Carolina cases.\footnote{Id.} Primarily, the Whitner majority noted that similar South Carolina cases were decided on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on the policy of protecting the mother-child relationship.\footnote{Id.} Particularly, the Horne decision, which involved a homicide statute, rested on the State's interest in vindicating the life of the viable fetus, not on the mother's interest.\footnote{Id.; see also discussion supra part III.} Also, the majority emphasized that the United States Supreme Court has repeatedly held that states have a compelling interest in the life of a viable fetus.\footnote{Whitner, 1996 WL 393164, at *5; see, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming the State's power to restrict abortions after fetal viability); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (holding that a State testing requirement to determine the viability of a fetus before performing an abortion after the twentieth week of pregnancy was constitutional where the requirement was reasonably designed to ensure that abortions were not performed after the fetus is viable); Roe v. Wade, 410 U.S. 113 (1973) (finding that the State has a compelling interest in protecting the potentiality of human life once a fetus has reached viability).} The majority further reasoned that if it were to read Horne only as a vindication of the mother's interest in the life of her unborn child, then there would be no basis for prosecuting a mother who kills her viable fetus by stabbing or shooting it, yet a third party could be prosecuted for the same acts.\footnote{Whitner, 1996 WL 393164, at *5.} The majority refused to follow the Pellegrini decision and declined to construe Horne in a way that would insulate a mother from all culpability for harming her viable child.\footnote{Id.}

2. Constitutional Issues

The Whitner majority concluded its decision with a brief reference to Whitner's constitutional arguments. Specifically, Whitner argued that the application of the child endangerment statute to her situation would violate her
constitutionally-protected rights of privacy and due process. The majority quickly dismissed Whitner's contentions by noting that none of these constitutional arguments were raised to the PCR court. All the arguments before the PCR court involved the scope of section 20-7-50. Thus, because Whitner failed to raise the constitutional issues below, Whitner could not raise them before the appellate court for the first time.

Ultimately, the majority's analysis led it to conclude that the child abuse and endangerment statute encompasses viable fetuses and that Whitner had in fact endangered her child's life by ingesting crack-cocaine in her third trimester of pregnancy. Accordingly, the majority reversed the decision of the PCR court.

B. The Dissenting Opinions

In separate dissents, Chief Justice Finney and Justice Moore respectfully

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128 See Respondent's Brief at 27-42, Whitner (No. 24468). In particular, Whitner argued that the new definition of "child" cannot be applied retroactively because criminal statutes must give fair notice of the conduct proscribed. Id. at 27-29. Additionally, Whitner argued that according to the constitution, privacy rights protect women from being forced to terminate wanted pregnancies and from measures penalizing them for carrying such pregnancies to term. Id. at 30. Whitner asserted that the court's interpretation of section 20-7-50 would intrude into pregnant women's lives by attempting to reach and deter behavior during pregnancy. Id. at 31. Also, Whitner contended that such an interpretation implicates a woman's right to bodily integrity and her right to be let alone. Id. Because Whitner failed to raise these arguments to the PCR court below, the majority refused to rule on their substance. Whitner, 1996 WL 393164, at *7.

129 Whitner, 1996 WL 393164, at *5. The PCR judge's Final Order makes no mention of these constitutional arguments, and the record did not reflect any motion under Rule 59(e) of the South Carolina Rules of Civil Procedure, to amend or alter the judgment. Id.

130 Id. at *7, *10 n.6. The majority stated that it was able to find only one instance in which counsel even arguably raised the constitutional issues now before the court. Id. at *10 n.6. The court noted that Whitner's counsel vaguely commented on the right of privacy; however, Whitner's lawyer did not get into the argument. Id. The majority refused to hear the constitutional arguments because it did not feel Whitner's counsel's passing statement was enough to raise the issues. Whitner, 1996 WL 393164, at *10 n.6. Furthermore, the PCR court's Final Order made no mention of constitutional issues and Whitner's counsel failed to preserve them for the record. Id.

131 Id. at *7; see Plyler v. State, 424 S.E.2d 477 (S.C. 1992) (holding that an issue not raised before PCR court will not be considered on appeal).


133 Id.
disagreed with the majority’s result and raised doubts about its reasoning.\textsuperscript{134} Specifically, Finney’s dissent expressed concern at the majority’s failure to define “child” in the context of the entire statute, as well as its failure to consider the statute’s intended purpose.\textsuperscript{135} Moreover, Finney challenged the majority’s reliance on civil wrongful death and common law feticide decisions, arguing that the majority should have referred to decisions under the Children’s Code or to the statutory language and applicable rules of statutory construction.\textsuperscript{136}

Additionally, Justice Moore’s dissent focused on the legislature’s failure to pass proposed bills addressing the problem of drug use during pregnancy; Moore believed that this failure indicates that the child endangerment statute is not intended to apply to cases like Whitner’s.\textsuperscript{137} Describing the majority’s analysis as “strained” and their construction of the statute as “overinclusive,” Justice Moore’s dissent argued against the majority’s failure to exercise judicial restraint.\textsuperscript{138}

1. Chief Justice Finney’s Dissent

Chief Justice Finney began his dissent by noting that section 20-7-50 applies to a “person having legal custody of any child or helpless person” who unlawfully neglects that child or helpless person.\textsuperscript{139} Finney also stated that because this is a penal statute, it is strictly construed against the state, in favor of the respondent.\textsuperscript{140}

The dissent continued its opinion with a look at title 20, chapter 7, section 30(1), which defines “child” as a “person under the age of eighteen.”\textsuperscript{141} The dissent contended that the Whitner holding is inconsistent with the Supreme Court of South Carolina’s holding in Doe v. Clark.\textsuperscript{142} The dissent believed that the court’s decision in Clark, construing another provision of the Children’s Code, stands for the

\begin{itemize}
  \item \textsuperscript{134} Id. at *7-10 (Finney & Moore, JJ., dissenting).
  \item \textsuperscript{135} Id. at *8 (Finney, C.J., dissenting).
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Whitner, 1996 WL 393164, at *9 (Moore, J., dissenting).
  \item \textsuperscript{138} Id. at *9-10.
  \item \textsuperscript{139} Id. at *7 (Finney, C.J., dissenting).
  \item \textsuperscript{140} Id. (citing State v. Blackmon, 403 S.E.2d 660 (S.C. 1991)).
  \item \textsuperscript{141} Id. (citing S.C. CODE ANN. § 20-7-30(1) (Law. Co-op. 1985)).
  \item \textsuperscript{142} 457 S.E.2d 336 (S.C. 1995).
\end{itemize}
proposition that "child," within the context of section 20-7-50, means a "child in being and not a fetus." However, the Whitner majority stated that rather than interpreting section 20-7-50, Clark turned on the specific language in the consent provisions of the Adoption Act, codified in title 22, chapter 7, sections 1690 and 1700 of the South Carolina Code.

Clark involved a mother who, while pregnant, signed a consent form allowing the Does to adopt the child upon birth; however, after the child was born, the mother wanted to keep the baby and argued that the consent she executed was void because it did not comply with statutory requirements. A trial court found that the consent was valid and the mother appealed. On appeal, the Supreme Court of South Carolina reversed the trial court, holding that under the adoption statutes, the natural mother’s consent to the adoption must be given after the birth of the child.

In response to Finney’s claim, Justice Toal asserted that the finding in Clark was not based on defining "child" as including only born children. Rather, the Whitner majority reasoned that the court had defined "child" in such a way because section 20-7-1700(A)(3) requires the consent form to contain the date of birth of the adoptee, and the date of birth requirement obviously could not be fulfilled until after the child’s birth. Also, section 20-7-1690 provides that consent is required of "the mother of a child born when the mother was not married." In view of these code sections and of the definition of "child" set forth in the Children’s Code, the Clark court concluded that a natural mother could not consent to adoption until after the

144 Id. (citing S.C. CODE ANN. §§ 20-7-1690, -1700 (Law. Co-op. Supp. 1995)).
145 Id.
146 Clark, 457 S.E.2d at 336.
147 Id. at 337 (citing S.C. CODE ANN. § 20-7-1690(A)(3) (Law. Co-op. Supp. 1995)).
149 Id.; see also S.C. CODE ANN. § 20-7-1700(A)(3) (Law. Co-op. Supp. 1995) (stating that “[c]onsent or relinquishment for the purpose of adoption, pursuant to § 20-7-1690, must be made by a sworn document, signed by the person or the head of the agency giving consent or relinquishment, and shall specify the following: . . . (3) the date of birth, race, and sex of the adoptee and any names by which the adoptee has been known.”).
150 Whitner, 1996 WL 393164, at *6; see also S.C. CODE ANN. § 20-7-1690(A)(3) (Law. Co-op. Supp. 1995) (stating that “[c]onsent or relinquishment for the purpose of adoption is required of the following persons: . . . (3) the mother of a child born when the mother was not married.”).
birth of her child.\textsuperscript{151} The \textit{Whitner} majority further emphasized that its decision in \textit{Clark} did not find that the term "child" excludes viable fetuses.\textsuperscript{152} Despite the majority's view, however, the dissent believed that the court ignored \textit{Clark}'s limited holding.\textsuperscript{153}

Finney further argued that the majority was mistaken in failing to review the statute in its entirety and to consider the statute's intended purpose.\textsuperscript{154} Finney contended that section 20-7-50 does not impose criminal liability on every person who neglects a child, but only on a "person having legal custody" of that child.\textsuperscript{155} Finney believed the concept of legal custody to be inapplicable to a fetus; thus, the legislature could not have contemplated section 20-7-50's application to maternal conduct during pregnancy.\textsuperscript{156}

Moreover, Finney argued that section 20-7-50's reference to title 20, chapter 7, section 490 for the definition of neglect further implies that the legislature could not have meant the child endangers statute to apply to the situation at hand.\textsuperscript{157} Under section 20-7-490, the vast majority of acts which constitute neglect may only be directed against a child, not towards a fetus.\textsuperscript{158} Therefore, Finney claimed that the reliance upon section 20-7-490 in section 20-7-50 is further evidence that the

\textsuperscript{151} Doe v. Clark, 457 S.E.2d 336, 337 (S.C. 1995).

\textsuperscript{152} \textit{Whitner}, 1996 WL 393164, at *6.

\textsuperscript{153} \textit{Id}.

\textsuperscript{154} \textit{Id} at *8 (Finney, C.J., dissenting) (citing Jackson v. Charleston County Sch. Dist., 447 S.E.2d 859 (S.C. 1994) (holding that when construing a statute, the court does not view its terms in isolation, but rather in the context of the entire statute and its intended purpose)).

\textsuperscript{155} \textit{Id}.

\textsuperscript{156} \textit{Id} (citing Stone v. State, 443 S.E.2d 544 (S.C. 1994) (holding that statutes are construed so as to avoid absurd results)).

\textsuperscript{157} \textit{Whitner}, 1996 WL 393164, at *8.

\textsuperscript{158} \textit{Id} (Finney, C.J., dissenting); see S.C. Code Ann. § 20-7-490(B) (Law. Co-op. 1985) (stating that an "[a]bused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm, as defined by items (C) and (D) of this section, by the acts or omissions of his parent, guardian or other person responsible for his welfare.\textquotedblright); S.C. Code Ann. § 20-7-490(C)-(D) (Law. Co-op. 1985) (describing "harm" as being when a parent, guardian or other person responsible for the child's welfare (1) inflicts physical or mental injury upon the child; (2) commits a sexual offense against the child; (3) fails to supply the child with adequate food, clothing, shelter or education; (4) abandons the child; or (5) encourages or approves of the commission of delinquent acts by the child).
term "child" as used in the child endangerment statute does not encompass a fetus. 159
Chief Justice Finney completed his dissent by explaining that the majority's holding only suggests that the term "child" is ambiguous. 160 Finney warned, that such an ambiguity must be resolved in respondent's favor. 161

The majority directly addressed Justice Finney's implication that the court ignored South Carolina's rule of lenity requiring the court to resolve any ambiguities in a criminal statute in favor of the defendant. 162 The Whitner majority believed that the dissent was mistaken in its understanding of the holding. 163 First, the majority stated that it did not believe the rule of lenity applied because the statute was not ambiguous. 164 The majority further defended its ruling by explaining that its interpretation of the statute was based "primarily on the plain meaning of the word 'person' as contained in the statute," rather than on unrelated prior case law. 165 The court had reviewed its rationale in Hall, Fowler, and Horne to support its reading of the statute. 166 Although the Whitner majority concluded its analysis of the subject matter jurisdiction issue by stating that "both statutory language and case law compel the conclusion" it reached, Chief Justice Finney vehemently disagreed. 167

2. Justice Moore's Dissent

Justice Moore also disagreed with the majority's finding and wrote separately to express specific concerns about the decision. 168 Particularly, Moore's dissent focussed on the legislature's failure to pass proposed bills which would have


160 Id.

161 Id.

162 Id. at *6; see also State v. Blackmon, 403 S.E.2d 660 (S.C. 1991).


164 Id.

165 Id.

166 Id.

167 Id. at *8.

addressed the problem of maternal drug use during pregnancy. Moore suggested that the failure of such legislation to pass shows that the child endangerment statute is not intended to apply to prenatal drug use. At the very least, the “legislature’s failed attempts to enact a statute regulating a pregnant woman’s conduct indicate the complexity of the issue.” In addition, Moore cautioned that the court should not invade what is the sole province of the legislative branch; Moore believed that the majority not only ignored legislative intent, but had embarked on a course rejected by every other court that has addressed the issue.

Moore explained that the majority should not have looked further than the language of section 20-7-50 to discern legislative intent and reiterated Finney’s argument that “legal custody” is not a qualification which applies to a viable fetus. Moore contended that the majority rendered the statute vague by construing it to include conduct not contemplated by the legislature and placed itself in the position of determining what conduct is unlawful under section 20-7-50. Justice Moore further explained that although the majority dismissed the issue as not before it, it was unrealistic to ignore the “down-the-road” consequences because of the import of the decision — a decision that could potentially render a pregnant woman criminally liable for “myriad acts which the legislature has not seen fit to criminalize.”

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169 Id.
170 Id.
171 Id.
172 Id. The PCR court decision, issued by Judge Larry R. Patterson, also held that:
[i]t is not for this court to decide whether taking illegal drugs during pregnancy should make a mother liable for child abuse. Whether including fetuses within our child abuse laws would deter pregnant women from seeking medical treatment or would, on the contrary, deter them from taking illegal drugs in the first place is an important question. But it is just the type of question that the Legislature must decide.

Whitner v. State, No. 93-CP-39-347 (S.C.C.P. Pickens County Nov. 22, 1993) (order granting post-conviction relief); see also supra note 102 (discussing courts that have addressed the issue of prosecuting women for conduct during pregnancy).

174 Id. Moore’s dissent also reflected Whitner’s “parade of horribles” argument when the justice asked whether a pregnant woman’s failure to obtain prenatal care, failure to take vitamins and eat properly, or failure to quit smoking or drinking would constitute unlawful conduct under the court’s interpretation of section 20-7-50. Id.; see also Respondent’s Brief at 20, Whitner (No. 24468).
Describing the majority’s construction of the child endangerment statute as “overinclusive,” Moore stated that the only law specifically regulating the conduct of a mother toward her fetus in South Carolina is the abortion statute.\(^{176}\) Moore also explained that if section 20-7-50 applies only when a fetus is “viable,” a pregnant woman could use cocaine for the entire first twenty-four weeks of her pregnancy, yet could be immune from prosecution if she stops using drugs once the fetus reaches viability.\(^{177}\) Moore argued that now a pregnant woman may be sentenced up to ten years in prison for ingesting drugs during pregnancy, whereas she can have an illegal abortion and receive only a two-year sentence for killing her viable fetus.\(^{178}\) Moore concluded that such an inconsistency cannot be justified under the law.\(^{179}\)

V. THE IMPLICATIONS OF WHITNER

The effects of the Whitner decision will likely be significant. In South Carolina, the decision has set precedent and has opened the door for the state to prosecute women who abuse drugs during pregnancy. Also, South Carolina courts must now determine what types of substances abused by pregnant women will result in criminal penalties under section 20-7-50. Other states may choose to follow South Carolina’s lead and find that similar child endangerment laws encompass viable fetuses. As litigation continues, states will ultimately be asked to determine the due process and right to privacy issues involved in this controversy. However, courts may simply choose to ignore the Whitner ruling, and leave this important issue for state legislatures to decide. In sum, the implications of the Whitner decision will depend upon how other states address the many arguments that surround this controversy.

The arguments on either side of this controversy are persuasive. For instance, arguments in support of the prosecution of women for prenatal substance abuse often center around a state’s compelling interest in protecting the life and

\(^{176}\) Id.; see also S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 1985) (stating that a woman may legally abort a viable fetus if necessary to preserve her health, while she may not justify the death of a child in being on this ground).

\(^{177}\) Whitner, 1996 WL 393164, at *9 (Moore, J., dissenting).

\(^{178}\) Id.

\(^{179}\) Id.
health of its unborn children. Additionally, some advocates may assert that unlike the fundamental right to have an abortion, a woman does not have a fundamental right to abuse drugs during pregnancy. States that try to prosecute women for prenatal drug abuse may believe that by charging pregnant women with child endangerment, women will be deterred from unlawful drug use and will be encouraged to seek treatment for their drug-addiction. Other courts could uphold the prosecution of women for prenatal substance abuse simply out of a belief that a child has a legal right to begin life without the burden of injuries inflicted prior to birth. Moreover, some may contend that a mother has an affirmative duty of care to ensure that her child is born free from injuries.

The arguments against prosecuting women for prenatal drug abuse are equally compelling. For instance, many courts have refused to uphold such prosecutions citing a lack of legislative intent. Such prosecutions would also

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180 See Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476, 482 (1983) (holding that one limiting interest on a woman’s right to have an abortion is the state’s compelling interest in the life and health of the viable unborn child).

181 See, e.g., State v. Gray, 584 N.E.2d 710, 714 (Ohio 1992) (Wright, J., dissenting). Wright’s dissent in Gray focuses on the fact that a woman does not have a fundamental right to abuse cocaine. Id. In Justice Wright’s opinion, the act of using cocaine is not an act relating to a right connected with marriage, procreation, contraception, family relations, or child bearing. Id. Moreover, Wright argued that no special protection is afforded the cocaine abuser just because she is pregnant. Id. Instead, Wright felt that in such cases the court must balance a woman’s desire to use illegal drugs, while she happens to be pregnant, with the health and welfare of her child. Id. The Gray dissent stated that such cases are not about a woman’s choice to conceive or carry a child. Gray, 584 N.E.2d at 714 (Wright, J., dissenting). They are about the right of a child to be born healthy. Id.

182 See, e.g., Sheriff, Washoe County, Nev. v. Encoe, 885 P.2d 596, 599 (Nev. 1994) (rejecting State’s argument that charging women with child endangerment for the transmission of illegal substances through the umbilical cord provides a strong deterrent against unlawful drug use by pregnant women and encourages them to seek drug treatment); see also Noller, supra note 100, at 387 (arguing that if more women believed ingesting hazardous substances while pregnant would result in imprisonment, more would discontinue drug use).

183 Noller, supra note 100, at 387 (citing John A. Robertson, Procreative Liberty and the Control of Contraception, Pregnancy, and Childbirth, 69 VA. L. REV. 405, 437 (1983)).

184 See, e.g., Gray, 584 N.E.2d at 713 (Wright, J., dissenting). Wright stated, “I am satisfied that a woman who knowingly abuses cocaine while pregnant violates a duty of care to her unborn child and thus endangers that child when this action results in a substantial risk to the health and safety of that child following birth.” Id.

185 See, e.g., Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992) (“We find that the legislative history does not show a manifest intent to use the word ‘delivery’ in the context of criminally prosecuting mothers for delivery of a controlled substance to a minor by way of the umbilical cord.”).
establish an indefinite number of new crimes, creating uncertainty in the law.186 Additionally, expanding child abuse laws to encompass viable fetuses would violate due process rights because the laws would not give women fair notice of their reach.187 Furthermore, some courts that have refused to extend child abuse or drug distribution statutes to mothers who abuse drugs while pregnant have felt that to do so would likely discourage substance-addicted women from seeking the prenatal care and the substance abuse treatment necessary to deliver a healthy child.188 Some could argue that prosecuting a woman for prenatal drug abuse places the mother and child against one another as adversaries, affecting the inherent bond between a mother and her child.189 Finally, it can be argued that the criminal prosecution of women for prenatal drug use does not promote healthy births because such prosecutions typically occur after pregnancy.190

Because the preceding arguments are so compelling and because the Whitner court addressed only a few of them on their merits, the Whitner decision appears to be premature. In addition, South Carolina must eventually decide the constitutional issues inherent to this controversy. Although the implications of this landmark ruling remain to be seen, one may argue that the Whitner court approved what amounts to the governmental “policing” of a pregnant woman’s conduct. One may also predict that such governmental intrusion will not withstand a

186 See, e.g., Enco, 885 P.2d at 598 (citing Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (finding that if child endangerment statutes were applied to women during pregnancy, such statutes would be unlimited in scope and would create an indefinite number of new crimes. Such an interpretation might lead to a “slippery slope” whereby the law could be construed to cover the full range of a pregnant woman’s behavior. This would be a plainly unconstitutional result that would, among other things, render the statutes void for vagueness)).

187 See, e.g., Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (holding that if child abuse statutes were construed to apply to cases of prenatal drug abuse, such statutes would lack fair notice and violate constitutional due process limits against statutory vagueness).

188 See, e.g., id. at 284 (quoting the legislative intent found in the Maternal Health Act of 1992). Kentucky’s General Assembly felt that education and treatment were essential strategies in preventing prenatal exposure to drugs. Id. Punitive actions taken against pregnant substance abusers would create additional problems, such as discouraging these women from seeking the essential prenatal care and substance abuse treatment necessary to healthy childbearing. Id.


190 See Linden, supra note 189, at 120 (explaining that post-birth legal responses do not prevent harm to a child caused by prenatal substance abuse).
constitutional inquiry. For now, however, South Carolina’s child abuse and endangerment statute encompasses viable fetuses. Accordingly, substance-addicted pregnant women in South Carolina may now be prosecuted for child endangerment.

VI. CONCLUSION

With the Whitner decision, the Supreme Court of South Carolina has taken an unprecedented step and expanded child abuse and endangerment laws to encompass viable fetuses who are injured as a result of prenatal substance abuse. Now, a woman in South Carolina may be prosecuted under criminal child neglect laws for abusing drugs during pregnancy if her fetus has reached viability. However, it is unlikely that a pregnant woman’s self-abuse will change as a result of the Whitner court’s holding.

Children born with drug addictions or with drug-related injuries make a sad statement about our society as a whole. Despite the Whitner court’s decision, imposing criminal sanctions on the mothers of these children is not the answer. The only effective way to reach a woman’s behavior during pregnancy is through education, drug treatment, and prenatal care — not through criminal prosecution.

*Stephanie L. Hainer Ojeda*

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