Recent Developments

Pregnant Drug Addicts as Child Abusers:
A South Carolina Ruling

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On May 26, 1998, the United States Supreme Court refused to hear the appeals of Cornelia Whitner and Malissa Ann Crawley, two women who were convicted of child abuse for using cocaine during pregnancy.¹ These convictions were affirmed in an unusual ruling of the South Carolina Supreme Court, which held that South Carolina's child abuse statute protects a viable fetus as a child.² The South Carolina Supreme Court’s holding poses a challenge to women’s privacy interests in controlling their reproductive decisions.³ Also, the ruling is in contradiction with the outcomes of prosecutorial attempts to criminalize prenatal drug usage by the mother under child abuse, child endangerment, and drug trafficking laws in approximately thirty other states.⁴ The Supreme Courts of Kentucky,⁵ Nevada,⁶ and Ohio⁷ have all decided cases similar to the South Carolina case conversely. The South Carolina Supreme Court ruling vio-

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². See id. at 778.
³. A woman's privacy interest in her reproductive decisions has been established by Supreme Court case law. See Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing right of “marital privacy” to include access to birth control free of state interference); Roe v. Wade, 410 U.S. 113 (1973) (recognizing that the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (reaffirming that a woman’s right to privacy includes the decision to have an abortion without state interference up to the point of viability).
⁴. See Arlene Levinson, Crack Mom Pins Hope on Supreme Court - South Carolina Jails Women Who Use Drugs During Their Pregnancy, ROCKY MNT. NEWS (Colo.), Mar. 22, 1998, at 8A.
⁵. See Commonwealth v. Welch, 864 S.W.2d 280, 284 (Ky. 1993) (holding that a mother could not be convicted of child abuse for using drugs while pregnant).
⁶. See Sheriff, Washoe County, Nev. v. Encoe, 885 P.2d 596, 597 (Nev. 1994) (holding that a mother could not be convicted of child endangerment for using illegal drugs and then transmitting the drugs to the child through the umbilical cord after birth).
⁷. See State v. Gray, 584 N.E.2d 710, 713 (Ohio 1992) (holding that mother could not be convicted of child endangerment for using drugs while pregnant).
lated rules of statutory construction, transgressed constitutionally-protected rights, and ignored public policy concerns. Before attending to these issues, however, it is necessary to examine the results produced by this unprecedented expansion of a child abuse statute as applied in the Malissa Ann Crawley case.

THE CRAWLEY CASE

Malissa Ann Crawley was drug-free, gainfully employed, and a good mother to her three children when she lost custody of them in March, 1998.8 She was convicted of child abuse for smoking crack cocaine while pregnant with her son, now a healthy six-year-old, despite the fact that he suffered no actual harm from her drug use.9 According to C. Rauch Wise, one of Crawley’s attorneys, “more harm is being done to those children by her being in jail than was ever even remotely done to the 6-year-old by her cocaine use.”10 Nevertheless, a judge informed one of Crawley’s lawyers that he was “sick and tired of the girls having these bastard babies on crack cocaine, and until they change the law . . . it said I could put them in jail.”11 Crawley’s children will live with relatives while she serves out her five year prison sentence.12

STATUTORY CONSTRUCTION ISSUES

In the Whitner case, the South Carolina Supreme Court interpreted the word “child” in section 20-7-50 of the Children’s Code13 to include a viable fetus.14 The court cited its prior decisions which construed a viable fetus as a person in cases of tortious injury and voluntary manslaughter.15 Further, the Court concluded that its interpretation of the plain meaning of the word “person” to include a fetus was consistent with the legislature’s intended purpose of the child abuse statute.16 The Court noted that South Carolina’s Children’s Code section 20-7-20(C) stated that it was “the policy of this State to concentrate on the prevention of children’s

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8. See Bob Herbert, In America; Pregnancy and Addiction, N.Y. Times, June 11, 1998, at 31A.
9. See id.
10. Id.
11. Id.
12. See id.
13. S.C. CODE ANN. § 20-7-50 (Law Co-op. 1985), amended by S.C. CODE ANN. § 20-7-50 (Supp. 1994). §20-7-50 provides that “[a]ny person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide ... the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished with the discretion of the circuit court.”
14. See Whitner, 492 S.E.2d at 778.
15. See id. at 784.
16. See id. at 780-81.
problems as the most important strategy which can be planned and im-
plemented on behalf of children and their families.''

The Court, however, overlooked past case law and legislative history
in making its decision. The Court had previously construed the word
"child" to include a fetus in cases dealing with tortious injury and volun-
tary manslaughter. The dissent noted that in a child support case—which
the dissent considered more analogous to the current child abuse case—the
Court had construed another criminal section of the Children's Code to
mean "child in being," thus excluding fetuses in the context of a child
support case. The dissent reasoned that the case created at least enough
conflict to warrant a finding of ambiguity as to the meaning of "child." 
Finally, the dissent concluded that since the penal statute was ambiguous,
the rule of lenity required that it be construed strictly in favor of the de-
fendant.

The majority's analysis of the legislative intent behind the child
abuse statute is also problematic. The statute requires that the defendant
have legal custody of the abused child to be found guilty. However, the
incongruence of the custody requirement with the extension of the stat-
ute's scope to include a fetus persuaded the dissent to find a conflict be-
tween the language of the statute and interpreting "child" to include a
fetus. Further, the majority acknowledged that it presumed the legisla-
ture's awareness of prior legislation, and the judicial construction thereof,
when creating subsequent topically related laws. Later in the decision,
however, the Court contradicted itself and refused to consider that several
bills concerned with the criminalization, "mandatory reporting, treat-
ment, or intervention by social service agencies" in cases of prenatal sub-
stance abuse had failed to be passed by the legislature, demonstrating that
the legislature did not find section 20-7-50 to apply to fetuses. Instead,
"to discern legislative intent," the Court saw "no reason to look beyond
the statutory language.

Lastly, the majority's broad construction of "child" in the child
abuse statute may lead to the prosecution of any woman engaging in any
behavior—legal or illegal—likely to harm her fetus. The Court defended
itself against the defendant's "parade of horribles" argument by focusing

17. Id.
18. See id.
19. See id. at 787 (Finney, J., dissenting).
20. See id. at 786 (Finney, J., dissenting) (citing State v. Blackmon, 403 S.E.2d 660, 662 (S.C. 1991)).
21. See id. at 787 (Finney, J. dissenting).
22. See id. at 788 (Finney, J. dissenting).
23. See id. at 779 (citing Berkebile v. Outen, 426 S.E.2d 760 (S.C. 1993)).
24. See id. at 781.
25. Id.
26. See id. at 788 (Moore, J. dissenting).
specifically on Whitner’s actions.\textsuperscript{27} The Court found that because it was “well documented and within the realm of public knowledge that [crack cocaine use] can cause serious harm to the viable unborn child,”\textsuperscript{28} there could “be no question [that] Whitner endangered the life, health, and comfort of her child.”\textsuperscript{29} The court failed to consider, however, the less egregious cases located further down the slippery slope upon which it embarked with this decision, cases in which the risks of the behavior are also well known, but less deserving of moral contempt. It is possible that a pregnant woman might be charged under section 20-7-50 in accordance with the Court’s reasoning for failing to follow her doctor’s nutritional recommendations, being obese, traveling by plane, or cleaning her cat’s litter box,\textsuperscript{30} results probably unintended by the legislature. An example of this line of reasoning is the California case of Pamela Rae Stewart, who was charged with child neglect for actions which included “failing to follow her doctor’s advice to stay off her feet during pregnancy, to refrain from sexual intercourse . . . and to seek immediate medical attention if she experienced difficulties with the pregnancy.”\textsuperscript{31}

**CONSTITUTIONALITY ISSUES**

The South Carolina Supreme Court’s interpretation of section 20-7-50 violates the Eighth and Fourteenth Amendments, as well as constitutionally-based protections of privacy. The Eighth Amendment prohibits state imposition of cruel and unusual punishment, which has been interpreted to include punishment for status, as opposed to conduct.\textsuperscript{32} If Whitner and Crawley were being punished for their behavior, however, they would have been prosecuted for a traditional drug offense such as possession. Further, if they were not pregnant, they would not have been charged with a crime other than possession. As Lynn M. Paltrow argues, “these prosecutions are brought to punish the woman’s dual status as a pregnant woman and an addict.”\textsuperscript{33}

The broad construction of the child abuse statute to include a fetus also deprives defendants of their right to fair notice as guaranteed by the

\textsuperscript{27} See id. at 781-82.
\textsuperscript{28} Id. at 782.
\textsuperscript{29} Id.
\textsuperscript{33} Paltrow, supra note 30, at 89.
Due Process Clause of the Fourteenth Amendment. A statute must clearly define its prohibitions at a level of specificity that allows a person of average intelligence a reasonable opportunity to comply with the law. Accordingly, due process mandates that the government not construe or apply existing laws in a manner contrary to what was intended by the legislature or unforeseeable to the public. Again, this would not be a concern were these women being tried for traditional drug crimes. The issue is whether they were aware that their illegal drug use amounted to child abuse or endangerment. That the convictions were based on novel and unforeseeable judicial interpretations of laws not intended to apply to pregnancy helps show that "these women could not have known" of the statutory proscription against their behavior.

The South Carolina Supreme Court's application of section 20-7-50 may also violate defendants' privacy rights. While the Supreme Court has recognized that a state has a compelling interest in protecting a fetus beginning at the point of viability, the Court has refused to allow a state to place any "undue burdens" on a woman's decision whether to abort a fetus prior to the fetus' viability. By conditioning prosecution of a woman who takes drugs while pregnant on a positive toxicology test obtained after the birth of a child—the basis of the indictment in Whitner was the detection of cocaine in the infant's urine—the state effectively penalizes drug addicted women for choosing to carry their pregnancies to term. As the threat of imprisonment may strongly encourage women addicts to have abortions early in the pregnancy—when the state does not have a right to impose undue burdens on the woman's choice—the ruling impedes the constitutionally-protected free exercise of their right to choose to have children. Accordingly, the Whitner decision has earned the disapproval of pro-life organizations such as the National Right to Life Committee despite the challenge it poses to Roe v. Wade.

PUBLIC POLICY CONCERNS

At least two compelling policy concerns emerge from the Whitner ruling. The first issue is that of selective enforcement. South Carolina

34. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (stating that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined").
35. See id.
37. See McGinnis, supra note 32, at 514-516.
40. See Whitmer, 492 S.E.2d at 779 n.2.
41. See Levinson, supra note 4.
health care workers are required to report to the authorities women suspected of or testing positive for the use of a controlled substance. However, reporting may be inconsistent or tend to target certain racial minorities. An empirical study published in the *New England Journal of Medicine* found similar rates of positive drug tests among black and white pregnant women in Pinellas County, Florida. Nevertheless, the authors found that public and private health care workers reported the prenatal substance abuse of black women to public health authorities approximately ten times as often as that of white women.

Such empirical findings support the contention that the South Carolina Supreme Court’s interpretation of section 20-7-50 may result in selective enforcement primarily against poor black women. Further support for this contention may be derived from the fact that the vast majority of the women arrested under section 20-7-50 have been black welfare recipients, including twenty-two of the first twenty-three women arrested.

The second public policy issue that *Whitner* poses arises in response to the majority’s assertion that the broad construction of section 20-7-50 is consistent with the state’s intention to prioritize the prevention of children’s problems. As relates specifically to the problem of prenatal substance abuse, this preventive effect is supposed to occur by forcing pregnant drug addicts to choose between civil commitment to a treatment program or criminal prosecution, or by generally deterring their criminal behavior. More frequently and realistically, however, the ruling may deter drug addicts from seeking prenatal care or encourage them to conceal their drug addiction from their doctors—information that is essential to

42. See S.C. Code Ann. § 20-7-510 (requiring a physician and nurse to report to the county department of social services or to a law enforcement agency when she has received “information which gives the person reason to believe that a child’s physical or mental health or welfare has been or may be adversely affected by abuse or neglect”); S.C. Code Ann. § 20-7-736 (stating that a child is presumed abused or neglected if the child is diagnosed with fetal alcohol syndrome or the child or mother tests positive for a controlled substance at child’s birth).


44. See id.


47. See Whitner, 492 S.E.2d at 780-81.

48. See Herbert, *supra* note 8 (stating that “[l]aw enforcement officials in South Carolina who favor the prosecutorial approach say their goal is to protect the fetus and, by holding out the threat of imprisonment, to encourage the mothers to seek drug treatment”); see also Bragg, *supra* note (referring to South Carolina Attorney General Charles Condon’s position that “if a woman chooses, she can get drug treatment and generally avoid prosecution”).

49. Deterrence is a traditional justification and aim of criminal penalties.

the effective treatment of both the women and their fetuses. Finally, pregnant drug addicts may be deterred from seeking medical care at the time of birth, significantly increasing the health risks to the woman and the child. The degree to which these results contradict the state's purported preventive focus is apparent in the post-delivery hospital costs for the children of pregnant addicts who failed to seek prenatal care, which may be as much as ten times greater than costs incurred for the treatment of children of addicts who did receive prenatal medical care.

While protecting a child's life against the effects of drug abuse is important, two far-reaching and negative impacts go hand-in-hand with South Carolina's new policies and the *Whitner* decision. The result is both a large fear of racial discrimination and women avoiding prenatal care to escape criminal prosecution.

**CONCLUSION**

The consequence of the South Carolina Supreme Court ruling in *Whitner* is that it forces the interests of drug addicted mothers and their fetuses into direct conflict. The criminalization of prenatal substance abuse interferes with family cohesion, pitting the mother's interests against the fetus. The criminalization of pregnant women who take drugs may encourage pregnant addicts to abort or avoid prenatal care for their fetuses. The inescapable contest of maternal and fetal rights also deters pregnant addicts from seeking the prenatal care and drug rehabilitation so direly needed by themselves and their fetuses. Furthermore, this antagonism discourages women from revealing their drug use to their prenatal medical care providers, depriving doctors of the opportunity to mitigate some of the possible effects of prenatal drug exposure. These barriers to prenatal care and open communication with health care providers work counter to South Carolina's stated goal of preventing "children's problems." South Carolina's goal is also not furthered by the abortions coerced by fear of imprisonment which, while intolerable impositions on the woman's right to choose, at least leave behind no sick or motherless children. Finally, the incarceration of these women harms the

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54. See id.
55. See Wilkins, supra note 51, at 1435 (providing the example of the opportunity of safe detoxification during the period from the 14th through 32nd week of pregnancy).
56. Linden, supra note 53, at 115.
child by separating the child from his or her mother. As one commentator notes:

[F]oster care is sometimes necessary, [but] it should be used only as a last resort. When a mother is able to care for her baby, the baby should not be deprived of that care . . . . Separation from the mother will hurt the baby; even a “guilty” mother’s love is better than none.57

If prevention of children’s problems is a political priority, the corresponding goal should be to decrease the sum total of children born who have been exposed to drugs in utero. As the criminalization of prenatal drug use only impacts any individual situation after a child is born, and then only through punishment, it falls far short of being useful toward the fulfillment of this aim.58 Further, the lack of availability of rehabilitation choices for pregnant women makes the prevention of prenatal substance abuse difficult for many women. Many drug treatment programs refuse to accept pregnant addicts,59 other programs fail to deal with the myriad of collateral issues these women present (e.g., care for their other children),60 and there are few spaces at the few well-equipped facilities providing comprehensive drug treatment to pregnant women.61 To truly effectuate the goal of preventing children’s problems, targeted and effective drug rehabilitation must be made available upon demand to pregnant addicts.

57. Wilkins, supra note 51, at 1435-36.
58. See Linden, supra note 53, at 120-21; see also Wilkins, supra note 51, at 1434 (commenting that “[p]unishing the mothers will not help the addicted baby; [but] funding a treatment program for the mother and child would help”).
59. See Linden, supra note 53, at 131-32 (noting that a “survey of New York treatment centers found that 54% of all state funded programs refuse to accept pregnant women, 67% do not accept pregnant women who are Medicaid eligible, and only 13% treat pregnant women who are crack dependent”) (citing David F. Chavkin, Drug Addiction and Pregnancy: Policy Crossroads, 80 Am. J. Pub. Health 483, 485 (1990)).
60. See Linden, supra note 53, at 132; Paltrow, supra note 30, at 85; Wilkins, supra note 51, at 1436.
61. See Wilkins, supra note 51, at 1436.