

strict abortion have come from legislative initiatives to restrict or outlaw abortion and from violent attacks against women who seek health care from reproductive health clinics and on the health-care providers who help them.³ An ongoing and concomitant part of the anti-choice strategy, however, has been to establish fetal rights under the law.⁴ If fetuses are recognized as full legal persons, then their right to life must, as a matter of constitutional law, be protected—and all abortions outlawed.⁵ As a result, anti-choice activists have sought to reverse *Roe* by having fetuses recognized as full persons under the law. To that end, they have sponsored amendments to the Constitution and federal legislation that would declare that the “unborn are constitutional persons.”⁶ They have also engaged in ongoing efforts to insinuate the concept of fetal personhood into any and every statute, ordinance, and proclamation they could penetrate.⁷

ally-protected rights to life and liberty); *infra* notes 3, 21-22 and accompanying text (discussing efforts to overturn *Roe v. Wade*).

³ See, e.g., *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.) (striking down a Guam law which effectively banned all abortions), *cert. denied*, 506 U.S. 1011 (1992); *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992) (finding Louisiana law banning virtually all abortions and some common forms of birth control unconstitutional), *cert. denied*, 507 U.S. 972 (1993); *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1 (Okla. 1992) (finding that a proposed ballot initiative which banned abortion would, if passed, violate the ruling in *Casey*, and struck the measure from the ballot), *cert. denied*, 506 U.S. 1071 (1993); see also Jennifer Gonnerman, *The Terrorist Campaign Against Abortion*, VILLAGE VOICE, Nov. 10, 1998, at 36 (detailing acts of violence against clinics and doctors who perform abortions); National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers* (visited Mar. 6, 1999) <<http://www.prochoice.org/violence/98vd.html>> (charting the number of incidents of violence, disruption, and blockades at abortion clinics from 1977 to 1998).

⁴ See *infra* notes 6-7 and accompanying text (noting examples of legislation and proclamations that have attempted to establish legal and constitutional rights for fetuses).

⁵ See LAWRENCE J. NELSON & MARY FAITH MARSHALL, *ETHICAL AND LEGAL ANALYSES OF THREE COERCIVE POLICIES AIMED AT SUBSTANCE ABUSE BY PREGNANT WOMAN* 39-42 (1998).

⁶ See, e.g., S.J. Res. 17, 97th Cong. (1981); H.R.J. Res. 62, 97th Cong. (1981) (“With respect to the right to life, the word ‘person,’ as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States applies to all human beings . . . including their unborn offspring at every stage of their biological development.”); S. 158, 97th Cong. (1981); H.R. 900, 97th Cong. (1981) (“The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception. The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.”); see also Rhonda Copelon, *Testimony on Constitutional Amendments to Negate Roe v. Wade Given Before the Subcommittee on the Constitution of the Senate Judiciary Committee, March 7, 1983*, 8 WOMEN’S RIGHTS L. REP. 179-83 (1985) (reproducing the testimony of the author before Congress in opposition to proposed legislation that would overturn *Roe v. Wade*).

⁷ See, e.g., Lynn D. Wardle, *Restricting Abortion Through Legislation*, in *TO RESCUE THE FUTURE* 101, 108 (Dave Andrusko ed., 1983) (describing how state legislatures can contribute to overturning *Roe v. Wade*, identifying one method as enacting legislation “to extend the

Regardless of which approach they have taken, anti-choice activists have had some of their greatest successes with strategies that linked anti-abortion sentiment with another unpopular cause or politically disempowered group. Thus, significant anti-abortion victories occurred when the legislation limited low-income women's and young women's access to abortion.⁸ Legislation seeking to ban so-called "partial birth" abortions received the greatest support while it was portrayed as limiting highly unpopular "late-term" abortions of healthy fetuses obtained by women who selfishly delayed having an abortion until the last minute.⁹ This prohibitive

maximum permissible protection for the unborn"); Mark S. Kende, *Michigan's Proposed Prenatal Protection Act: Undermining a Women's Right to an Abortion*, 5 AM. U. GENDER & L. 247, 249 (1996) (describing a bill that would treat fetuses as persons, and punish a third party who injures a fetus, as having "received great support from 'Right to Life' groups"); Emily Figdor & Lisa Kaeser, *Concerns Mount over Punitive Approaches to Substance Abuse Among Pregnant Women*, THE ALAN GUTTMACHER REPORT ON PUBLIC POLICY (visited Mar. 6, 1999) <<http://206.215.210.5/pubs/journals/gr010503.html>> (noting that a 1998 Wisconsin law amending the entire civil child welfare code to include unborn children from the moment of fertilization "was strongly supported by antiabortion activists in the state"); see also *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444 (1983) (striking down an Akron city ordinance restricting access to abortion services, including a provision requiring physicians to inform women seeking abortions that "the unborn child is a human life from the moment of conception"); Proclamation No. 5761, 53 Fed. Reg. 1464-65 (1988) (documenting President Reagan's demand "that the personhood of the unborn be declared and defended throughout our land"). President Reagan annually declared a National Sanctity of Human Life Day to be observed on the anniversary of *Roe v. Wade*. See *id.*; Proclamation No. 5599, 52 Fed. Reg. 2213-14 (1987); Proclamation No. 5430, 51 Fed. Reg. 2469-70 (1986); Proclamation No. 5292, 50 Fed. Reg. 2536-37 (1985); Proclamation No. 5147, 49 Fed. Reg. 1975 (1984).

⁸ See, e.g., The Alan Guttmacher Institute, *The Status of Major Abortion-Related Laws and Policies in the States* (visited Apr. 1, 1999) <http://www.agi-usa.org/pubs/abort_law_status.html> (noting that 29 states have parental involvement statutes in effect and 34 states have restrictions on state Medicaid funding of abortions in effect); see also *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Reagan administration regulations prohibiting Title X Family Planning Clinics that provide contraceptive services to low income women from informing patients of the availability or even medical propriety of seeking a legal abortion); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding certain parental involvement requirements before young women may obtain an abortion); *H.L. v. Matheson*, 450 U.S. 398 (1981) (holding that the state's parental notification statute was consistent with the Constitution and served the state's important interests); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which denies Medicaid coverage for abortion services to low-income women whose health care costs would otherwise be covered by government programs); *Bellotti v. Baird*, 443 U.S. 622, 648 (1979) (invalidating Massachusetts's parental notification statute as unduly burdensome on the right to seek an abortion but concluding that parental notice would be constitutional if the state provided a judicial bypass procedure); *Maher v. Roe*, 432 U.S. 464 (1977) (rejecting an equal protection challenge to a regulation of the Connecticut Welfare Department that limited Medicaid funding for first trimester abortions to those that were medically necessary).

⁹ The Partial-Birth Abortion Act of 1995 passed both the House and Senate in late 1995. See H.R. 1833, 104th Cong. (1995); S. 939, 104th Cong. (1995) (providing for a fine and/or two years imprisonment for any person who performs a partial-birth abortion, and permitting a

abortion law is finally being beaten back in the courts, where it has been successfully revealed as a strategy to outlaw *all* abortions—including those for middle class women who “responsibly” seek early abortions.¹⁰ Anti-choice arguments, however, are once again gaining significant but largely unnoticed legal victories by combining abortion-based arguments with other unpopular issues and groups.¹¹

In the name of fetal rights, over 200 pregnant women or new mothers in approximately twenty states have been arrested.¹² Most of the women arrested have been low-income women of color with untreated drug addictions.¹³ Thus, the arrests focus on those people and issues that are hardest to defend in the court of public opinion. Wrongly prejudged as irresponsible and uncaring,¹⁴ the

civil action by the mother or father of the fetus for treble damages). The statutory definition of partial-birth abortion is “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the infant and completing the delivery.” Partial Birth Abortion Act, H.R. 929, 105th Cong. § 1531(c)(1) (1997). The Bill was passed by the House on November 1, 1995, and by the Senate on December 7, 1995, but was vetoed by President Clinton on April 10, 1996. See Status of House Bills, [1995-1996 Transfer Binder] Cong. Index (CCH) ¶ 35,037 (Nov. 22, 1996). In 1995, the National Council of Catholic Bishops had taken out a full page advertisement in the *Washington Post* mocking women for having abortions just short of the delivery room for “reasons” like “hates being fat,” “can’t afford a baby and a new car,” and “can’t fit into prom dress.” Angela Bonavoglia, *Separating Fact from Fiction*, Ms., May-June 1997, at 54, 56-57.

¹⁰ See Susan A. Cohen & Rebekah Saul, *The Campaign Against ‘Partial-Birth’ Abortion: Status and Fallout*, in THE GUTTMACHER REPORT ON PUBLIC POLICY (1998) (explaining that when challenged, virtually all of the new state restrictions have been struck down because they are so broad and vague as to effectively outlaw a range of abortion methods throughout pregnancy); The Center for Reproductive Law and Policy, *The “Partial-Birth Abortion” Ban—Deceptive, Unconstitutional, Extreme* (visited Apr. 1, 1999) <<http://www.clrp.org>> (summariz-

ing the initial success of partial-birth abortion legislation by reporting that 28 states have adopted such laws since 1995, but noting that laws in 17 states had been blocked in state and federal courts, and only 9 were currently in effect).

¹¹ See *infra* notes 155-329 and accompanying text (discussing *Whitner v. State* and its aftermath).

¹² See Loren Siegel, *The Pregnancy Police Fight the War on Drugs*, in CRACK IN AMERICA 249 (Craig Reinerman & Harry G. Levine eds., 1997) (“During the late 1980s, as the specter of ‘crack babies’ haunted American political rhetoric, more than two hundred criminal prosecutions were initiated against women in almost twenty states.”); see also LYNN PALTROW, REPRODUCTIVE FREEDOM PROJECT, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (1992) (documenting 167 arrests nationwide as of 1992).

¹³ See DOROTHY ROBERTS, KILLING THE BLACK BODY 172-76 (1997); Renee I. Solomon, Note, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 418 (1991) (noting that “70% of those arrested for drug-related fetal abuse have been African-American” because “[r]ace and poverty biases make it easy to blame the victim”).

¹⁴ See Marsha Rosenbaum, *Women: Research and Policy*, in SUBSTANCE ABUSE 654-65 (1997) (“Motherhood is at the core of many drug-using women’s identities. They love and care

public has expressed little support for them.¹⁵ These prosecutions, however, are by no means limited either in theory or in future application to this particularly despised and unsupported group of women. Women who drink alcohol and fail to get bed rest during pregnancy have already been arrested on the same legal theories, making clear that it is pregnancy and not the illegality of the substance that makes women vulnerable to state control and punishment.¹⁶

very much about their children, who often provide the impetus for harm reduction through exiting 'the life' or instituting safer behaviors.").

¹⁵ See LAURA E. GÓMEZ, MISCONCEIVING MOTHERS 26 (1997) ("Eighty-two percent of Americans agreed with a 1989 ABC polling statement that 'a pregnant woman who uses crack-cocaine and addicts her unborn child should be put in jail for child abuse.' In other surveys where crack cocaine was not specifically mentioned, closer to half those surveyed believed that pregnant drug users should be criminally punished for harming their fetuses."); Solomon, *supra* note 13, at 411 ("A 1991 poll of 800 Americans revealed that more than half believe that a woman should be prosecuted if her child is born impaired due to her drug use during pregnancy."); Mark Curriden, *Holding Mom Accountable*, A.B.A. J., Mar. 1990, at 50, 51-53 ("A survey of 15 southern states by the *Atlanta Constitution* found that 71 percent of the 1,500 people polled favored criminal penalties for pregnant women whose illegal drug use injures their babies. Another 45 percent favored prosecuting women whose use of alcohol and cigarettes during pregnancy harms their offspring.").

¹⁶ See, e.g., *State v. Zimmerman*, No. 96-CF-525, 1996 WL 858598 (Wis. Ct. App. Sept. 18, 1996) (denying motion to dismiss first degree intentional homicide and reckless conduct charges brought against a woman who was pregnant and an alcoholic); Katharine Collins, *Prenatal Child Abuse Charged*, CASPER STAR TRIBUNE (Wyoming), July 2, 1998, at A1, A10 (discussing *State v. Pfannenstiel*, a 1989 case in which child abuse charges, brought against a pregnant woman accused of excessive drinking during pregnancy, were ultimately dismissed); Brian Maffly, *'Fetal Abuse' Charges Give Rise to Debate; Mothers-to-be Need Help, Not Fear*, *Critics Say*, THE SALT LAKE TRIBUNE, Dec. 1, 1997 (describing felony child abuse charges brought against Julie Garner, 26, who used alcohol during her pregnancy). In 1985, Pamela Rae Stewart was charged under a criminal child support statute after her infant son died allegedly as a result of her behavior during pregnancy. See Mike Konon, *Data Access in Fetus Case Put on Hold*, SAN DIEGO UNION-TRIB., Oct. 24, 1986, at B1 (discussing the charges against Pamela Rae Stewart). Although initial charges alleged that she had taken street drugs, prosecutors later admitted that "drugs played only a minor role in the Stewart case" making the focus of her prosecution her failure to "follow her doctor's advice to stay off her feet, refrain from sexual intercourse, . . . and seek immediate medical attention if she experienced difficulties with the pregnancy." Jim Schachter, *Help Is Hard to Find for Addict Mothers*, L.A. TIMES, Dec. 12, 1986, at 1; Konon, *supra*; see Angela Bonavoglia, *The Ordeal of Pamela Rae Stewart*, MS., July-Aug. 1987, at 92. Fetal rights claims have also been used to justify many other restrictions on women's lives and freedom. See CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLICIES OF FETAL RIGHTS* 2-3 (1993) (discussing the prosecution of drug-addicted pregnant women). In her book, Daniels notes that in addition to criminal prosecutions:

Hospital authorities in twenty-four states have sought court orders to force pregnant women to undergo medical procedures such as cesarean sections, maternal blood transfusions, or fetal surgery or transfusions. In all but three cases, those court orders were granted, and in two states court orders were granted for the hospital detention of pregnant women. During the 1980s, hundreds of companies instituted fetal protection policies in the workplace, which excluded women entirely from certain forms of work un-

For many years, defense attorneys were able to have the charges dismissed or the convictions overturned.¹⁷ But, by using the legal arguments of the anti-choice movement, the popularity of the war on drugs, and by focusing their attacks on low-income women of color, anti-choice activists obtained an unprecedented and ominous

less they could prove that they had been surgically sterilized or were infertile, or which required women to make regular reports of their "fertility status" to their employers.
Id. (citations omitted).

¹⁷ *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing child abuse charges against pregnant woman who allegedly used heroin, finding that expansion of the statute to include fetuses would violate legislative intent, offend due process notions of notice, and render statute impermissibly vague); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Ct. App. 1977) (dismissing child abuse charges filed against a woman who was pregnant and addicted to heroin, finding that the statute was not intended to include a woman's alleged drug use during pregnancy, and to conclude otherwise would offend due process notions of fairness and render statute impermissibly vague); *Johnson v. State*, 602 So. 2d 1288, 1297 (Fla. 1992) (reversing conviction of a woman who used cocaine during pregnancy for "delivering drugs to a minor" finding that application of the statute to fetuses and pregnant women violated legislative intent); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for prenatal drug use on the grounds that such an application would be at odds with the public policy of the state regarding child abuse and neglect, including the intent to preserve the family life of parents and children whenever possible); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992) (holding that a statute proscribing distribution of cocaine from one person to another did not apply to pregnant women and fetuses and to interpret otherwise would deprive pregnant women of fair notice); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction of a pregnant woman who used illegal drugs, concluding that applying the statute would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague); *People v. Hardy*, 469 N.W.2d 50, 52-53 (Mich. Ct. App. 1991) (holding that the application of the state's drug delivery statute to a pregnant woman who "delivered" cocaine to her child through the umbilical cord violates legislative intent and the constitutional proscription that "a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties"); *Sheriff, Washoe County, Nevada v. Encoe*, 885 P.2d 596 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman who uses an illegal substance would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague); *People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. 1992) (dismissing child endangerment charges against woman who used cocaine while pregnant); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (holding that a child neglect statute could not be used to prosecute pregnant woman for substance addiction because neither the statutory language nor the legislative history indicated its applicability to such conduct); *Collins v. State*, 890 S.W.2d 893 (Tex. Ct. App. 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy, finding that applying statute to prenatal conduct violates due process); *State v. Dunn*, 916 P.2d 952 (Wash. Ct. App. 1996) (dismissing child mistreatment charges, finding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as person under eighteen years of age"); *State v. Osmus*, 276 P.2d 469, 475 (Wyo. 1954) (ruling that a woman whose newborn died as a result of her negligent failure to obtain proper prenatal care or medical care at birth could not be guilty of manslaughter). A complete list of published and unpublished opinions and orders in cases involving the criminal prosecution of pregnant women is available from the National Advocates for Pregnant Women.

victory. On October 27, 1997, in a case called *Whitner v. State*,¹⁸ the Supreme Court of South Carolina declared that viable fetuses are “persons,” and as a result, the state’s criminal child endangerment statute applied to a pregnant woman who used an illicit drug or engaged in any other behavior that might endanger the fetus.¹⁹ In so doing, the court took an unprecedented legal leap, apparently recognizing full legal personhood for viable fetuses.²⁰

Right-wing legal groups and opportunistic politicians seized upon *Whitner* and related cases as the long-awaited chance to overturn *Roe v. Wade*.²¹ Indeed, the *Whitner* opinion has provided grounds for the South Carolina Office of the Attorney General to assert that it has the legal authority to treat at least some abortions as murder and to put the women who have them, as well as the people who provide them, to death.²²

The prosecutions of pregnant women represent a significant threat to reproductive freedom, yet the response from the pro-choice and progressive communities has been disturbingly muted. Almost thirty years ago, activist Lucinda Cisler argued “the central rationale for making abortion available [is] justice for women.”²³ She warned that “[t]he choice is up to us: we must subject every proposal for change and every tactic to the clearest feminist scrutiny, demand only what is good for *all* women, and not let some of us be bought off at the expense of the rest.”²⁴ By failing to subject

¹⁸ 492 S.E.2d 777 (S.C. 1997), cert. denied, 118 S. Ct. 1857 (1998).

¹⁹ See *id.* at 779-80 (reinterpreting case law precedent in South Carolina as resting “on the concept of the viable fetus as a person vested with legal rights”).

²⁰ See *id.* at 779-84 (holding that a viable fetus is a “child” and expressly declining to follow the case law precedent of several other states holding otherwise).

²¹ See, e.g., Rick Bragg, *Defender of God, South and Unborn*, N.Y. TIMES, Jan. 13, 1998, at A10 (reporting on the pursuit of South Carolina Attorney General Charles M. Condon, who argued that a “fetus is a fellow South Carolinian” and succeeded in convincing the highest court in South Carolina that “a viable fetus is a person under the states child abuse laws,” and noting that “[s]ome fear that the prosecutions could be expanded so that a woman who aborted a fetus . . . could be charged in the death of a child”); George Will, *Fetuses as Carolinians*, NEWSWEEK, June 8, 1998, at 78 (criticizing the Supreme Court for not using *Whitner* as an opportunity to review *Roe v. Wade* and “the peculiar logic of the abortion policy that has been created by judicial fiat”); see also Lyle Denniston, *Supreme Court Shields Police from Lawsuits Related to Chases*, THE BALTIMORE SUN, May 27, 1998, at 3A (“The National Right to Life Committee, while satisfied with the Supreme Court’s order, said the justices should have used the case for a ruling that would have barred women from aborting fetuses.”).

²² See Audiotape of Oral Argument, *State v. Ard*, 505 S.E.2d 328 (S.C. 1998) (May 27, 1998) (cassette on file with author) [hereinafter *Ard Oral Argument*]; *infra* notes 219-37 and accompanying text (discussing *State v. Ard*).

²³ Lucinda Cisler, *Abortion Law Repeal (sort of): A Warning to Women*, in RADICAL FEMINISM 153 (Anne Koedt et al. eds., 1973).

²⁴ *Id.* at 152.

the prosecutions of pregnant drug users to careful scrutiny, and to challenge them vigorously, we risk losing both the rights recognized in *Roe* and the greater goal of reproductive justice and equality for all women.

I. THE PROSECUTION AND PUNISHMENT OF PREGNANT WOMEN

Since the late 1980s, legislatures have considered numerous bills concerning pregnant women who use drugs or alcohol.²⁵ Legislative proposals ranged from bills that would increase services and treatment to pregnant women and their children, to ones that would make it a crime for a pregnant woman with a substance abuse problem to give birth.²⁶ For most of the late 1980s and 1990s, legislatures rejected the most punitive approaches. For example, in 1990, thirty-four states debated bills relating to prenatal exposure to drugs.²⁷ Fourteen states passed bills designed to help pregnant women through prevention and education.²⁸ Six states established studies to determine the extent of the problem.²⁹ Eight states considered, but failed to pass, legislation that would make it a crime to be addicted and to give birth.³⁰

Many states, however, began to amend their civil child abuse laws to mandate reporting of pregnant women or newborns who tested positive for drugs. The result put women into the civil child welfare system as suspected child abusers, often resulting in temporary or permanent loss of custody based on nothing more than a single positive drug test.³¹ Today, twelve states require that evidence of a

²⁵ See, e.g., Carol S. Larson, *Overview of State Legislative and Judicial Responses*, THE FUTURE OF CHILDREN (Center for the Future of Children, Los Altos, CA), Spring 1991, at 72, 72-84 (reviewing actions by state legislatures and courts in response to the problem of drug exposed newborns); Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 292-93 (1990) (summarizing recent developments in state laws regarding pregnant substance abusing women); Alison B. Marshall, *Perinatal Addiction Research and Education Update* (Dec. 1993) (on file with author) (providing a state by state survey of legislation pertaining to perinatal substance use considered during 1993).

²⁶ See States Focus on: Pregnant Women Using Drugs, *The Nation's Health* (Sept. 1990) (on file with author).

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See Abigail English, *Prenatal Drug Exposure: Grounds for Mandatory Child Abuse Reports?*, YOUTH LAW NEWS, 1990, at 3-8 (arguing that this amounts to an "overly simplistic approach to a complex problem"); YOUTH LAW NEWS, July-Oct. 1995, at 1-40 (revising and reprinting the Special Issue from 1990); Cathy Singer, *The Pretty Good Mother*, LONG ISLAND MONTHLY, Jan. 1990, at 46 (reporting that a mother who had smoked marijuana to ease labor

woman's drug use during pregnancy be reported to child welfare agencies, and these, along with three other states, now require drug testing of newborns or pregnant women.³² In some other states women are reported as a matter of policy.³³ In addition, some states, even without legislation, have attempted to expand the scope of their civil child abuse laws to include a woman's conduct during pregnancy. Although a majority of lower state courts to consider the application of civil child neglect statutes to pregnant women who test positive for illegal drugs have upheld findings of neglect based at least in part on a pregnant woman's drug use, the only state supreme courts to rule on the subject have refused to treat women who used drugs while pregnant as presumptively neglectful.³⁴ As of 1997, one state had also amended its civil commit-

pain, lost custody of her baby even though the mother had acted responsibly throughout her entire pregnancy).

³² The twelve states that require reporting of a pregnant woman's drug use to child welfare agencies are Arizona, California, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Oklahoma, South Carolina, Utah, Virginia, and Wisconsin. The three that additionally mandate drug testing of newborns or pregnant women are Iowa, Minnesota, and Virginia. See ARIZ. REV. STAT. ANN. § 13-3620(B) (West 1998); CAL. PENAL CODE § 11165.13 (West 1998); 325 ILL. COMP. STAT. 5/7.3b (West 1998); IOWA CODE ANN. §§ 232.68(2)(f), 232.77(2) (West 1998); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1998); MICH. COMP. LAWS § 722.623a (1998); MINN. STAT. ANN. § 626.5561-5563 (West 1998); OKLA. STAT. ANN. tit. 10, § 7103(A)(2) (West 1998); S.C. CODE ANN. § 20-7-736 (Law Co-op. 1998); UTAH CODE ANN. § 62A-4-404 (1998); VA. CODE ANN. §§ 54.1-2403.1, 63.1-248.3(A1) (Michie 1998); WIS. STAT. ANN. § 146.0255 (West 1998). A 1998-1999 state-by-state overview of all state laws regarding substance abuse and pregnant women, prepared by Corinne Carey, is available from the National Advocates for Pregnant Women.

³³ See Wendy Chavkin et al., *National Survey of the States: Policies and Practices Regarding Drug-Using Pregnant Women*, AM. J. PUB. HEALTH, Jan. 1998, at 117-19 (reporting the results of a national survey of substance abuse centers with respect to "policies and practices regarding . . . criminal prosecutions, charges of child abuse, and treatment for pregnant drug-using women"); Figdor & Kaeser, *supra* note 7, at 1 (explaining that several states mandate reporting of substance abusing women to child abuse authorities).

³⁴ See *In re Valerie D.*, 613 A.2d 748 (Conn. 1992) (holding that plain language and legislative history do not support application of civil child abuse statute where child was born with positive toxicology and other symptoms after mother had injected cocaine several hours prior to giving birth and distinguishing numerous lower sister state court decisions reaching the opposite conclusion); *In re Nassau County Dep't of Soc. Servs.*, 661 N.E.2d 138 (N.Y. 1995) (noting that a finding of neglect as to a newborn and a newborn's older sibling may not be based solely on the newborn's positive toxicology for a controlled substance); see also *In re Appeal in Pima County Juvenile Severance Action No. S-120171*, 905 P.2d 555 (Ariz. 1995) (ruling that a finding of neglect as to a newborn and a newborn's older sibling may not be based solely on the newborn's positive toxicology for a controlled substance); *In re Adoption of Katherine*, 674 N.E.2d 256 (Mass. Ct. App. 1997) (refusing to permit adoption of children without the biological parent's consent, concluding that "[i]n the absence of a showing that a cocaine-using parent has been neglectful or abusive in the care of that parent's child, we do not think a cocaine habit, without more, translates automatically into legal unfitness to act as a parent"); *State ex. rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997) (refusing to al-

ment statutes to make special provision for drug addicted pregnant women.³⁵

Despite the fact that no state passed a law criminalizing pregnancy and drug addiction, an estimated 200 women have been prosecuted around the country on theories of fetal abuse.³⁶ Police and prosecutors attempted to expand the reach of existing criminal laws to punish pregnant women, relying on child abuse, drug delivery, manslaughter, homicide and assault-with-a-deadly-weapon statutes.³⁷ Until 1997, no high court which considered the legality of prosecuting a pregnant woman upheld such a prosecution. Courts unanimously rejected the attempt to expand existing criminal statutes, finding that their applications to fetuses and pregnant women were beyond the intent of the laws. In some cases the prosecutions were also found to be in violation of the Constitution's guarantee of due process and of the right to privacy.³⁸ Some courts also acknowledged the overwhelming opposition of medical and health groups as a consideration in dismissing charges or overturning trial court convictions.³⁹ But in 1997, the tide began to

low detention of pregnant woman under statute allowing state to take protective custody of a "child" because legislature did not intend to include fetus within the definition of child).

³⁵ See Sandra Anderson Garcia & Ingo Keilitz, *Involuntary Civil Commitment of Drug-Dependent Persons With Special Reference to Pregnant Women*, 15 MENTAL PHYSICAL DISABILITIES L. REP. 418, 419 (1991) (noting that except for Minnesota, no state policy articulated the specific goal of involuntarily committing pregnant drug users based solely on a state's interest in protecting the fetus).

³⁶ See PALTROW, *supra* note 12.

³⁷ See Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, in DRUG ADDICTION RESEARCH AND THE HEALTH OF WOMEN 467-501 (1998). In California, prosecutors continue to arrest pregnant drug users despite the fact that the legislature not only explicitly rejected criminal approaches, but specifically adopted a comprehensive remedial approach as an alternative. See GÓMEZ, *supra* note 15, at 50-59, 75-91 (discussing legislative attempts to deal with drug-addicted pregnant women and the treatment these women receive from prosecutors).

³⁸ See *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (ruling that if the state's child endangerment statute were construed to permit the prosecution of pregnant women because they endangered the health of the fetus, it would "lack fair notice and violate constitutional due process limits against statutory vagueness"); *Sheriff, Washoe County, Nevada v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that the application of child endangerment statute to a pregnant woman who uses an illegal substance would deprive the woman of due process); *Commonwealth v. Pelligrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990) (holding that the rights to reproductive privacy and personal autonomy, as well as due process, do not permit the application of a drug delivery statute to women who use drugs while pregnant).

³⁹ See, e.g., *State v. Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (viewing addiction during pregnancy as a disease and addressing the problem through treatment rather than prosecution as the approach "overwhelmingly in accord with the opinions of local and national medical experts"); *Johnson v. State*, 602 So. 2d 1288, 1297 (Fla. 1992) (noting the opposition of medical groups to the prosecution of pregnant women under a drug delivery statute and

turn. Once thought of as legal oddities or as a collection of isolated incidents, prosecutions and punitive legislation now represent an increasing trend toward the recognition of fetal rights and women's subordination.

A. *Roe v. Wade and Fetal Personhood*

In *Roe v. Wade*, the United States Supreme Court held that at no stage of development are fetuses persons under the law.⁴⁰ As members of the Court have pointed out, not even the dissenters in *Roe* argued that fetuses are persons under the Fourteenth Amendment.⁴¹ In *Planned Parenthood v. Casey*,⁴² the Supreme Court reaffirmed *Roe's* essential holding. Thus, as Justice Stevens noted in his concurring opinion in *Casey*, "as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.' This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy."⁴³ As many authors have persuasively argued, according constitutional rights to fetuses would not only jeopardize women's lives and health by denying them access to legal abortion, but would also undermine substantially their status as constitutional persons including their ability to participate as full and equal citizens in our society.⁴⁴ In *Casey*, Justice Stevens also articulated this concern in his opinion. Quoting Ronald Dworkin, he observed that

concluding that "[t]he Court declines the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread").

⁴⁰ See *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("[T]he word 'person', as used in the Fourteenth Amendment, does not include the unborn.").

⁴¹ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 913 (1992) (reiterating that because the word person only has application postnatally, the unborn does not have a "right to life"); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring) ("No Member of this Court has ever suggested that a fetus is a person within the meaning of the Fourteenth Amendment.").

⁴² 505 U.S. 833, 879 (1992) (plurality opinion) (affirming the central holding of *Roe v. Wade* and asserting that the adoption of the "undue burden" test does not disturb *Roe's* holding); *Id.* at 912-13 (Stevens, J., concurring in relevant part) (declaring *Roe's* affirmation as preventing enormous societal costs and noting the holding as "a correct understanding of both the concept of liberty and the basic equality of men and women"); *Id.* at 924 (Blackmun, J., concurring in relevant part) (deciding that "[t]he Court's reaffirmation of *Roe's* central holding is . . . based on . . . *stare decisis*").

⁴³ *Id.* at 913-14 (Stevens, J., concurring).

⁴⁴ See, e.g., DANIELS, *supra* note 16, at 2 ("As the fetus is animated and personified in public culture, the power of the state to regulate the behavior of women—both pregnant and potentially pregnant—is strengthened. Women's rights as citizens are potentially made contingent by fetal rights. They can be revoked or qualified by the state's higher interest in the

“The suggestion that states are free to declare a fetus a person . . . assumes that a state can curtail some persons’ constitutional rights by adding new persons to the constitutional population. . . . If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.”⁴⁵

In a number of cases, the Court has, however, also recognized that the State has an “important and legitimate interest in prenatal life.”⁴⁶ The Court has even let stand the preamble to a Missouri state statute declaring that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life, health, and well-being.”⁴⁷ But the Court has nevertheless rejected the idea that embryos and fetuses—even after viability—possess the same legal value or status as live-born persons.⁴⁸ First, the Court has consistently made clear that a woman’s life and health must always be paramount, because she, unlike the fetus, is a constitutional person.⁴⁹ Thus, even when states may prohibit abortion after viability, a woman must still be allowed to obtain an

fetus.”); NELSON & MARSHALL, *supra* note 5, at 39-48; Martha Field, *Controlling the Woman to Protect the Fetus*, 17 LAW MED. HEALTH CARE 114 (1989); Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women’s Lives After Webster*, 138 U. PA. L. REV. 179 (1989); see also Stallman v. Youngquist, 531 N.E.2d 355, 359-61 (Ill. 1988) (refusing to recognize the tort of maternal prenatal negligence, holding that granting fetuses legal rights in this manner “would involve an unprecedented intrusion into the privacy and autonomy of the [state’s female] citizens”); Janet Gallagher, *Prenatal Invasions & Interventions: What’s Wrong with Fetal Rights*, 10 HARV. WOMEN’S L.J. 9 (1987); BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 233 (1979) (noting that during the Court’s deliberation on *Roe*, Justice Stewart insisted that the Court rule explicitly on the question of fetal personhood recognizing that creating a competition between the fetus and women and “[w]eighing two sets of rights would be dangerous”).

⁴⁵ *Casey*, 505 U.S. at 913 n.2 (Stevens, J., concurring in part and dissenting in part) (quoting Ronald Dworkin, *Unremunerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 400-01 (1992)).

⁴⁶ *Id.* at 853, 873; see *id.* at 846 (holding that “the State has legitimate interest from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child”).

⁴⁷ *Webster v. Reproductive Health Servs., Inc.*, 492 U.S. 490, 504-07 (1989) (upholding the Missouri statute as constitutional on its face, and leaving open for later review the question whether the statute has been unconstitutionally interpreted or applied).

⁴⁸ See NELSON & MARSHALL, *supra* note 5, at 39-48 (noting that under *Roe* and its progeny, “prenatal humans” are not “persons” for constitutional purposes); Gallagher, *supra* note 44, at 9 (exploring the argument fetal rights proponents assert to override the fundamental rights of women and finding no basis in their argument).

⁴⁹ See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

abortion if necessary to preserve her life and health.⁵⁰ Second, the Supreme Court has indicated strongly that whatever the nature of the State's interest in potential life, it could never be used to deprive pregnant women of their rights to liberty, privacy, and equality through a state-sanctioned "pregnancy police."⁵¹

In invalidating a provision of Pennsylvania's law mandating that women notify their husbands prior to terminating a pregnancy, the *Casey* plurality ruled that however strong the husband's interest in the fetus might be, it "does not permit the State to empower him with this troubling degree of authority over his wife."⁵² The plurality specifically rejected the state regulation of pregnant women that could occur if fetuses were recognized as legal persons:

Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking.⁵³

Similarly, the U.S. Supreme Court upheld the constitutionality of Missouri's preamble only after determining that the preamble was "precatory" and had no specific legal effect.⁵⁴ The preamble, by its own terms, not only ruled out any application that would unconstitutionally infringe upon a woman's right to choose abortion but also any sanction against a pregnant woman for harm she may have caused to the fetus: "Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care."⁵⁵

⁵⁰ See *id.*; *Casey*, 505 U.S. at 879.

⁵¹ See *Casey*, 505 U.S. at 895-98 (invalidating the spousal notification requirement because it violates a woman's privacy and liberty interests).

⁵² *Id.* at 898; see *id.* at 922 (Stevens, J., concurring in relevant part) (concluding that mandatory waiting periods and counseling provisions are invalid because they unduly burden a woman's constitutional liberty); *id.* at 925 n.1 (Blackmun, J., concurring in relevant part) (agreeing with the plurality that the spousal notification requirements infringe on a woman's constitutional rights).

⁵³ *Id.* at 898.

⁵⁴ *Webster v. Reproductive Health Servs., Inc.*, 492 U.S. 490, 505 (1989). *Webster* noted that this "Court [has] emphasized that *Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion,'" and that the Missouri preamble "does not by its terms regulate abortion" and "can be read simply to express that sort of value judgment." See *id.* at 506 (citations omitted).

⁵⁵ *Id.* at 505 n.4.

Despite the Supreme Court's clear and repeated rejections of claims of fetal rights and fetal personhood, these concepts appear to be gaining legal and public credibility.⁵⁶ Although arguments for fetal rights have existed for over one hundred years, and have long been part of the arsenal used by those seeking to outlaw abortion and to undermine women's freedom, recent decisions suggest the unrecognized power and vitality of these claims.⁵⁷

The anti-choice movement has persistently promoted the image and idea of the fetus as a fully developed child as a centerpiece of its efforts to overturn *Roe*.⁵⁸ They have sought to have the Constitution amended or legislation passed, declaring the constitutional rights of the "unborn."⁵⁹ They have sponsored, sometimes successfully, state legislation declaring the rights of the "unborn."⁶⁰ In addition, a growing number of states have passed so called "partial-birth abortion" bans that are designed, at least in part, to create a legal basis for equating fetuses with persons.⁶¹ Some partial birth abortion ban bills specifically defined "the terms 'fetus' and 'infant' [as] interchangeable."⁶² Moreover, a federal district court judge in

⁵⁶ See DANIELS, *supra* note 16, at 2; Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); *infra* notes 155-329 and accompanying text (discussing *Whitner v. State* and its aftermath).

⁵⁷ See, e.g., Reva Segal, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 287-92 (1992).

⁵⁸ See DANIELS, *supra* note 16, at 9 (stating that a "powerful anti-abortion movement waged a major media war by presenting the visual image of the fetus as a fully formed 'preborn baby'"); ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 326-56 (1984) (discussing the anti-choice concept of personhood and noting the "[v]arious techniques [that] are used to convey the idea that the fetus is literally a baby from the moment of conception").

⁵⁹ See *supra* notes 6-7 and accompanying text (discussing anti-choice sponsored federal legislation and amendments to the Constitution that would declare the rights of the "unborn").

⁶⁰ See, e.g., MO. ANN. STAT. § 1.205 (West Supp. 1999); 18 PA. CONS. STAT. ANN. § 3203 (West Supp. 1998).

⁶¹ See Cohen & Saul, *supra* note 10 (noting that numerous courts had found that the term "partial-birth abortion" did not describe any medically recognized abortion procedure and that reproductive rights opponents have attempted to use the "partial-birth" issue as a "public relations strategy to shift the focus of the abortion debate away from women to a 'personalized' fetus by focusing on abortions 'late' in pregnancy").

⁶² Partial Birth Abortion Act, H.R. 929, 105th Cong. § 1531(c)(2) (1997) (stating that its purpose is "[t]o amend title 18, United States Code, to ban partial birth abortions"). Although somewhat less explicit, the House Committee report accompanying the proposed federal ban of 1995, House Report 1833, begins with the premise that the "Court has never decided that human beings in the process of being born are not 'persons.'" H.R. REP. NO. 104-267, at 3 (1995). States defending their bans argued that the ban statutes prohibited the killing of "infant[s]" not fetuses. See, e.g., Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction at 1, *Planned Parenthood v. Grant Woods*, No. 97-385 (D. Ariz. 1997).

*U.S. v. Lynch*⁶³ explicitly recognized the fetal rights implications of such statutes.⁶⁴ In *Lynch*, abortion clinic blockaders who were violating an injunction asserted that they were entitled to the justification defense. Because they were taking steps to save the lives of “persons,” they were justified in violating the law.⁶⁵ The judge ruled against them on this ground because there was not sufficient evidence that New York viewed fetuses as legal persons. Nevertheless, Judge Sprizzo explicitly found that passage of a law banning so called “partial-birth” abortion would be an indication that the state intended to treat fetuses as persons under the law, making the justification defense available to people who commit crimes against women and doctors at reproductive health centers.⁶⁶

A majority of states allow fetuses to be covered as “persons” for purposes of civil wrongful death statutes.⁶⁷ Many states also have feticide or homicide laws that permit prosecution when a third party attacks a pregnant woman and she loses that pregnancy.⁶⁸ Numerous other states have laws that formally or informally recognize fetal rights, including pregnancy exclusions from living will statutes⁶⁹ and mandatory newborn HIV testing.⁷⁰ As Dawn Johnsen

⁶³ 952 F. Supp. 167 (S.D.N.Y. 1997), *appeal dismissed*, 162 F.3d 732 (2nd Cir. 1998).

⁶⁴ *See id.* at 168-72.

⁶⁵ *See id.* at 170 (noting the passage of a bill in the New York State Senate that would ban partial birth abortions, and predicting that such a law would enlarge the parameters of the justification defense).

⁶⁶ *See id.* at 170 n.3 (comparing abortion protestors who believe that a fetus is a human to those individuals who violated the *Dred Scott* laws by assisting runaway slaves because they believed that a slave was a human person).

⁶⁷ *See* Michael P. Penick, *Wrongful Death of Fetus*, 19 AM. JUR. PROOF OF FACTS 3D 107, 116 (1993) (noting that “[t]he majority jurisdictions . . . hold that a *viable* unborn child is a ‘person’ or ‘individual’ within the meaning of their wrongful death statutes”); Johnsen, *supra* note 56, at 602 (“A majority of states now consider fetuses that have died *in utero* to be ‘persons’ under wrongful death statutes.”).

⁶⁸ *See* Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 461-68 (1998) (describing differences among state statutes criminalizing fetal homicide).

⁶⁹ *See* DANIELS, *supra* note 16, at 34 (“[T]hirty-five of the forty-six states that currently have living-will laws restrict women’s right to die when they are both severely ill and pregnant. In twenty states, pregnant women are disqualified *without exception* from the right to die as soon as they become pregnant, even in cases where they have fully executed living wills.”).

⁷⁰ *See, e.g.*, N.Y. PUB. HEALTH LAW § 2500-f (McKinney Supp. 1999) (requiring mandatory HIV testing of newborns); *see also* Suzanne Sangree, *Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Legal Policies*, 41 BUFF. L. REV. 309 (1993) (discussing the constitutionality of various legal and public health proposals to address the perinatal transmission of the HIV virus); Kevin J. Curnin, Note, *Newborn HIV Screening and New York Assembly Bill No. 6747-B: Privacy and Equal Protection of Pregnant Women*, 21 FORDHAM URB. L.J. 857, 860 (1994) (arguing that New York’s proposed law requiring HIV

observes, some of these provisions were not intended to provide a legal basis for recognizing full fetal personhood or for undermining women's rights.⁷¹ Some, however, were actively supported by anti-choice lobbyists who understood their potential as a tool for ultimately overturning *Roe v. Wade*. And, regardless of intent, these decisions create an environment in which prosecutions of pregnant women seem reasonable and the right to abortion does not.

In fact, prosecutors across the country have relied on the claimed existence of fetal rights as a basis for justifying the arrest and imprisonment of pregnant women and new mothers.⁷² Prosecutors routinely cite the wrongful death cases and fetal homicide cases as a basis for treating fetuses as persons and treating the pregnant women who even risk harm to them as criminals.⁷³ Borrowing wholesale from the anti-choice arguments and rhetoric, they assert that fetuses are legal persons with constitutionally protected rights. South Carolina Attorney General Charles Condon argues that the fetus is a "fellow South Carolinian."⁷⁴ California Deputy District Attorney Henry Elias argued that "Fetuses are people too," and that the fetus has a "right to life," when he brought criminal charges against Pamela Rae Stewart, alleging that her conduct during pregnancy caused the death of her newborn son.⁷⁵ Prosecutors have also deliberately misinterpreted *Roe's* holding—seeking to trans-

testing of newborn, which has since passed, is "an unconstitutional manipulation of pregnancy as an occasion for invidious, unconstitutional government intervention").

⁷¹ See Johnsen, *supra* note 56, at 600-04 (noting that the earliest recognition of fetal rights in the law was conditional upon subsequent live birth, and discussing the recent expansion of these rights to sometimes protect the fetuses where there is no live birth).

⁷² See, e.g., *Commonwealth v. Welch*, 864 S.W.2d 280, 282 (Ky. 1993) (rejecting the Commonwealth's argument that the decision in *Jones v. Commonwealth*, 830 S.W.2d 877 (Ky. 1992), in which the court held that a drunk driver could be convicted of second degree manslaughter for causing a motor vehicle collision injuring a pregnant woman whose baby then died, was precedent for prosecuting a pregnant substance abusing woman for child endangerment); *State v. Gray*, 584 N.E.2d 710, 714 n.5 (Ohio 1992) (Wright, J., dissenting) (finding support for application of a child abuse statute to a woman who was both pregnant and a drug user in the state's decisions permitting wrongful death actions when a fetus is negligently injured, and criminal liability when a fetus is injured and subsequently born alive); *State v. Dunn*, 916 P.2d 952, 955 (Wash. Ct. App. 1996) (rejecting the state's argument that because a fetus was considered a "minor child" for the purposes of the state's wrongful death statute, the legislature also intended the fetus to be treated as a child in the state's criminal statutes).

⁷³ See cases cited *supra* note 72.

⁷⁴ Bragg, *supra* note 21, at A14 ("The child comes from God. We think we're in line with how most people feel in this country. We recognize the fetus as a fellow South Carolinian. And the right to privacy does not overcome the right to life.")

⁷⁵ Points and Authorities in Opposition to Defendant's Demurrer and Motion to Dismiss at 26-30, *People v. Stewart*, No. M508197 (San Diego, Cal. Mun. Ct. Feb. 13, 1987).

form the court's recognition of a compelling state *interest* in potential life to a declaration of fetal rights *superior* to those of a born person—the pregnant woman.⁷⁶

As Arthur Caplan, noted expert in Biomedical Ethics observed, “It is foolish to think these suits aren't related to the abortion issue They spring from the same concern that drives the anti-abortion position—that is to say, assigning a more elevated moral and legal status to the fetus, granting it personhood separate from the woman carrying it.”⁷⁷

As discussed next, the arguments for fetal rights are enhanced, while at the same time, their significant implications for reproductive freedom and health are concealed when linked to America's highly popular war on drugs.

B. *The War On Drugs*

“For the past 25 years, the United States has pursued a drug policy based on prohibition and the vigorous application of criminal sanctions for the use and sale of illicit drugs.”⁷⁸ This policy reflects a “zero-tolerance” approach with “ever-harsher penalties and more militant (and more expensive) enforcement tactics.”⁷⁹ Today, nearly 1 of every 150 people in this country is in prison or jail.⁸⁰ As Justice Department figures confirm:

A big reason is that so many of the new inmates are drug offenders. In the Federal system, nearly 60 percent of all people behind bars are doing time for drug violations; in state prisons and local jails, the figure is 22 percent. These numbers are triple the rate of 15 years ago.⁸¹

As a recent *New York Times* article explained:

⁷⁶ See, e.g., Paul A. Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, 9 CRIM. JUST. ETHICS 23, 26 (1990) (citing *Roe's* recognition of a state interest in protecting prenatal life after viability as grounds for allowing “the criminalization of acts which if committed by a pregnant woman can damage . . . a viable fetus”); Brief of Petitioner at 9, *Whitner v. State* (S.C. Mar. 15, 1994). Some judges even accept this point of view. For example, the dissenting judge in *State ex rel. Angela M.W. v. Kruzicki* stated: “Thus, as determined by the United States Supreme Court, the state's interest in protecting the life and health of an unborn child becomes compelling and *dominant* once the fetus reaches viability.” 561 N.W.2d 729, 747 (Wis. 1997) (Crooks, J., dissenting) (emphasis added).

⁷⁷ *Rise in Fetal-Abuse Charges Worries Pro-Choicers*, THE RECORD (N.J.), Oct. 5, 1989, at A12.

⁷⁸ Ernest Drucker, *Drug Prohibition and Public Health, 25 Years of Evidence*, 114 PUB. HEALTH REP., Jan./Feb. 1999, at 14.

⁷⁹ *Id.* at 16.

⁸⁰ Timothy Egan, *Less Crime, More Criminals*, N.Y. TIMES, Mar. 7, 1999, § 4, at 1.

⁸¹ *Id.*

Americans do not use more drugs, on average, than people in other nations; but the United States, virtually alone among Western democracies, has chosen a path of incarceration for drug offenders. More than 400,000 people are behind bars for drug crimes—and nearly a third of them are locked up for simply possessing an illicit drug.

“America’s internal gulag,” is what Gen. Barry McCaffrey, the nation’s drug czar, calls the expanding mass of drug inmates. Many of those have committed any number of crimes. But a growing number of them have broken no laws other than the ones on drug use.

In the 1980’s, Congress and states passed drug laws that required judges to put people in prison—even first-time offenders, or those caught with small amounts of an illicit substance. Mandatory minimum sentences, as they are called, leave no room for a judge to consider special circumstance, or options such as treatment instead of jail.

....

Another dividend was supposed to be a drop in drug use, but that has not happened.⁸²

The zero-tolerance, drug war approach is in sharp contrast to the alternative “harm reduction” or public health approach.⁸³ Proponents of harm reduction recognize:

[O]vercoming drug addiction is usually a difficult and gradual process. [Harm reductionists] seek to turn public policy away from punitive criminal justice approaches and toward providing drug abusers with information and assistance that can help them reduce consumption and minimize the risks associated with their continuing drug use. Harm reductionists favor drug treatment over imprisonment and favor broadening drug treatment to include non-abstinence-based models.⁸⁴

⁸² *Id.*; see *The Drug War Backfires*, N.Y. TIMES, Mar. 13, 1999, at A14 (“Surveys now show . . . that the use of crack, by about 600,000 people annually, has not changed in 10 years. Nor has the general level of illegal drug use.”).

⁸³ Drucker, *supra* note 78, at 16, 28 (noting that in the United States, “the very use of the term harm reduction is still banned from the Federal policy lexicon and denied funding because it is seen as ‘condoning drug use’”).

⁸⁴ See SHEIGLA MURPHY & MARSHA ROSENBAUM, PREGNANT WOMEN ON DRUGS: COMBATING STEREOTYPE AND STIGMA 100 (1999).

in conflict with the rights of women.¹⁰³ Pregnant drug-using women, portrayed as depraved, inner-city African-American women who voluntarily ingested crack to poison their children,¹⁰⁴ were not likely to receive much support from a public that had been convinced by sensational news reports that crack use during pregnancy inevitably caused significant and irreparable damage to the developing fetus.¹⁰⁵

While a majority of people support legal abortion, at least in many circumstances,¹⁰⁶ there is a countervailing and larger majority of people who support punitive responses to the problems of substance abuse.¹⁰⁷ An analysis of more than 100 national opinion surveys concerning the public's views on the war on drugs found that most Americans rely on the mass media for information about the scope of the drug abuse problem.¹⁰⁸ As a result, most Americans support severe penalties for the possession and sale of drugs.¹⁰⁹ Concomitantly, there is little support for increased funding for drug treatment,¹¹⁰ despite evidence of both the treatment's success and its cost-effectiveness.¹¹¹

¹⁰³ See, e.g., DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* (1996); MIKE GREY, *DRUG CRAZY* (1998); Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, *SCIENCE*, Sept. 1, 1989, at 939 (discussing various drug legalization and discrimination plans); Anthony Lewis, *Abroad at Home: Futility of the Drug War*, *N.Y. TIMES*, Feb. 5, 1996, at A15 ("80 years of prohibition have been a disastrous failure").

¹⁰⁴ See Drew Humphries, *Crack Mothers at 6: Prime Time News, Crack/Cocaine, and Women*, *VIOLENCE AGAINST WOMEN*, Feb. 1998, at 45 ("Socially constructed as Black and urban, the media demonized crack mothers as the threatening symbols for everything that was wrong with America.").

¹⁰⁵ See *supra* notes 85-100 and accompanying text.

¹⁰⁶ A recent *New York Times/CBS* news poll found that 61% of adults support the right to abortion during the first trimester, and more than three-quarters oppose a constitutional amendment outlawing abortion. Susan A. Cohen, *Issues and Implications 25 Years After Roe: New Technological Parameters for an Old Debate*, 1 *THE GUTTMACHER REPORT* 1 (Feb. 1998). According to the General Social Survey conducted by the National Opinion Research Center at the University of Chicago, 80% of the respondents agree that a woman should be able to obtain an abortion if her health is endangered, if the fetus has a serious defect or if the pregnancy resulted from rape. Depending on the year of the poll, between 34% and 43% agree that a woman should be able to obtain an abortion for any reason. See Larry L. Bumpass, *The Measurement of Public Opinion on Abortion: The Effects of Survey Design*, 29 *FAM. PLAN. PERSP.* 177 (1997) (finding that percentages of those who agree that a woman should be able to obtain an abortion for any reason changes depending on the wording and sequence of the survey questions).

¹⁰⁷ See, e.g., Robert J. Blendon et al., *The Public War on Illicit Drugs*, 279 *JAMA* 827 (1998).

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 830.

¹¹⁰ See *id.*

¹¹¹ See Charles Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 *JAMA* 1149 (1998). Research by the Physician Leadership on Na-

With the popularity of the war on drugs, declarations of fetal rights that might not succeed in the straight abortion context could succeed when camouflaged as drug control measures.¹¹² Although the prosecutions of pregnant women with drug problems ultimately rest on fetal rights arguments, prosecutors focus on the highly charged drug issues, attempting to increase drastically the rights of fetuses. For example, the Ohio Prosecuting Attorney's Association argued in one amicus brief:

There is no fundamental right to abuse cocaine. The act of using cocaine is not an act relating to a right connected with marriage, procreation, contraception, family relations, or child bearing. . . . No special protection is afforded the cocaine abuser just because she is pregnant. She is not spared the consequences of her illegal cocaine use because she is pregnant.¹¹³

This argument appeals to a public that has been primed to fear drug use and support its punishment. It is, in other words, effective propaganda. But it is not good legal reasoning. For example, this argument falsely suggests that drug use alone is a crime. Virtually no state, however, punishes drug use per se.¹¹⁴ As a result, the prosecutors are in fact seeking to have the judiciary create a new crime of drug use, and then only for one group of people—pregnant

tional Drug Policy reviewing more than 600 peer-reviewed research articles found that addiction to illicit drugs can be treated with as much success as other chronic illnesses like diabetes, asthma, and hypertension. See *id.* Moreover, "treatment costs ranged from \$1800 per patient for outpatient treatment to \$6800 for long-term residential care," which is far less expensive than keeping one person in prison, costing \$25,900 per year. *Id.*

¹¹² As one commentator observed, "The thought of incarcerating the mother to combat the rising problem of drug addicted babies provides a more immediate gratification than does the option of increasing counseling and rehabilitation centers. The public perceives incarceration as a punishment, whereas treatment programs for unwilling participants are viewed as futile and costly." Donna L. Castro, Comment, *Whitner v. South Carolina: Prosecutions for Child Abuse Extends into the Womb*, 48 S.C. L. REV. 657, 661 (1997).

¹¹³ *State v. Grey*, 584 N.E.2d 710, 714 (1992) (Wright, J., dissenting) (quoting the Ohio Prosecuting Attorney's Association amicus brief); see *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. Ct. 1857 (1998).

¹¹⁴ Most courts have concluded that evidence of use alone cannot be the basis for prosecution of drug possession—a crime that is distinguished by the presence of the substance rather than the status of being an addict. See, e.g., *Commonwealth v. Pelligrini*, 608 N.E.2d 717, 721 n.7 (Mass. 1993) (refusing to dismiss possession charges against a woman who used drugs while pregnant, without deciding whether evidence of cocaine metabolites in a newborn's urine is enough evidence to support a conviction of possession and noting that the majority rule is that a controlled substance in a person's body will not constitute possession); see also *State v. Padgett*, Nos. CC-94-2650, CC-94-2651, slip op. at 6 (Ala. Cir. Ct. Montgomery County Aug. 14, 1995) (concluding that a positive drug screen on a newborn provides "absolutely no evidence, direct or circumstantial, to support the possession count").

women. Moreover, while the prosecutors are correct that there is no constitutional right to use drugs, the Supreme Court has held that it is nevertheless unconstitutional to punish people for having the status of drug user.¹¹⁵

In 1962, the United States Supreme Court overturned a California statute which treated drug addiction as a misdemeanor punishable by imprisonment.¹¹⁶ The statute criminalized any person who had the status of a drug addict.¹¹⁷ The Court held that criminalizing drug addiction was cruel and unusual punishment in violation of the Eighth Amendment. In overturning the statute, the Court cited *Linder v. United States*,¹¹⁸ in which the Court recognized that narcotic addiction as an illness in need of medical treatment.¹¹⁹ The Court compared punishing someone for drug addiction to punishing someone "for the 'crime' of having a common cold."¹²⁰ Although a person may be punished constitutionally for an "act" stemming from a person's addiction,¹²¹ the act in question here is becoming pregnant and carrying that pregnancy to term. Pregnancy, however, may not be punished either.¹²²

The focus on drugs conceals the fetal rights implications of these prosecutions. It is not the illegality of the drugs that is at issue however, but their harm or potential harm to the fetus that justifies application of child abuse and similar statutes to pregnant women who use drugs. As the Supreme Court of Kentucky noted in refusing to apply the state's child endangerment statute to a woman who used drugs while pregnant: "[I]t is inflicting intentional or wanton injury upon the child that makes the conduct criminal under the child abuse statutes, not the criminality of the conduct per se."¹²³

¹¹⁵ See *Robinson v. California*, 370 U.S. 660 (1962).

¹¹⁶ See *id.* Interestingly, the Court in this case noted and was aware of the issue of pregnant women's drug use. See *id.* at 667 n.9.

¹¹⁷ See *id.* at 666.

¹¹⁸ 268 U.S. 5 (1925). The Court in *Linder* reversed the conviction of a physician for distributing narcotics to a woman. See *id.*

¹¹⁹ See *id.* at 18.

¹²⁰ *Robinson*, 370 U.S. at 666.

¹²¹ See *Powell v. Texas*, 392 U.S. 514 (1968) (affirming the conviction of an alcoholic for public drunkenness).

¹²² See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (noting that *Roe v. Wade* had "been sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant and carry to term).

¹²³ *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993). The court in *Welch* further noted:

The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse

As discussed below, the strategy of dressing the war on abortion in the guise of the war on drugs eventually succeeded in the *Whitner* case. By linking the two arguments, prosecutors provided the anti-choice movement with a long sought-after victory.¹²⁴

C. The Focus on Low-Income Women of Color and Their Children

Like the Medicaid funding cases, the prosecutions of pregnant women focus on low-income women of color, who even without an association with drugs have little public support.¹²⁵ Although the problem of substance abuse crosses all race and class lines, African-American women have been particularly targeted for harsh and punitive prosecutorial responses and account for a disproportionate majority of women arrested and reported to civil authorities.¹²⁶

by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence.

Id.

¹²⁴ See Alexander Morgan Capron, *Punishing Mothers at Law*, 28 HASTINGS CTR REP., Jan. 31, 1998, at 31 (noting the possible irony in the fact that there is support for punishing women who put their pregnancies at risk by using illegal drugs but not for punishing women who voluntarily take fertility drugs that create great risks of multiple births with accompanying risks of death or severe disabilities to the fetuses likely to be born extremely prematurely).

¹²⁵ See Banks et al., *Maternal Drug Abuse and Infant Health: A Proposal for a Multi-level Model*, in AFRICAN-AMERICAN AND THE PUBLIC AGENDA: THE PARADOXES OF PUBLIC POLICY 55 (Sedrick Herring ed., 1997) (noting that “the status of African American women was politicized as early as 1976 with Ronald Reagan’s repeated and distorted references to an alleged ‘welfare queen’ as a centerpiece of his presidential campaign” and that “[o]ver time, a portrait of Black women as undisciplined, undeserving dependents siphoning off scarce public funds became a powerful subtext in a conservative, profamily agenda formulated as a ‘moral ideal and a political project’”); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436 (1991) (arguing that American society will more easily accept prosecution of African American women than white women).

¹²⁶ See ROBERTS, *supra* note 13, at 172-83 (noting that drug use can be found among pregnant women of all socioeconomic, racial, and ethnic backgrounds and discussing reasons for the disproportionate prosecution of African American women); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991) (examining whether race-based prosecutions reflect a lack of “democratic controls over prosecutorial discretion”). A study of the availability of substance abuse treatment for pregnant women in southern states found that

Newspaper reports in the 1980s sensationalized the use of crack cocaine and created a new picture of the “typical” female addict: young, poor, black, urban, on welfare, the mother of many children, and addicted to crack. In interviewing nearly 200 women for this study, a very different picture of the “typical” chemically dependent woman emerges. She is most likely white, divorced or never married, age 31, a high school graduate, on public assistance, the mother of two or three children, and addicted to alcohol and one other drug. It is clear from the women we interviewed that substance

While this disproportionality has been true nationwide,¹²⁷ no where is it more apparent than in South Carolina.¹²⁸ In Charleston, South Carolina, the Medical University Hospital instituted a policy of reporting and facilitating the arrest of pregnant, overwhelmingly African-American patients who tested positive for cocaine.¹²⁹

Over a period of four years, many African-American women were dragged out of this predominantly black hospital in chains and shackles, evoking sharp modern images of black women in slavery.¹³⁰ The medical staff, working in collaboration with the prosecutor and police, in effect conducted an experiment to see if threats of arrest and actual arrest would be effective tools in reducing pregnant women's drug use.¹³¹ The subjects of this experiment were poor black women.¹³² All but one of the thirty women

abuse among women is not a problem confined to those who are poor, black, or urban, but crosses racial, class, economic and geographic boundaries.

SHELLY GEHSAN, A STEP TOWARD RECOVERY 1 (Southern Reg. Proj. on Infant Mortality 1993).

¹²⁷ See, e.g., PALTROW, *supra* note 12; GÓMEZ, *supra* note 15, at 94-98 (discussing "Exceptionalism in the Prosecuting Counties"). Gomez found that the greatest number of prosecutions

of pregnant drug users in California took place in counties with several common characteristics.

See id. One of these was "heavy population growth in recent decades and an increasing proportion of racial minorities (African-Americans, Latinos, and Asian-

Americans)." *Id.* at 94. "Thus, edge county district attorneys are in the eye of the storm, making them more likely than their counterparts in other counties to take an activist role in establishing and maintaining social norms." *Id.* at 98.

arrested pursuant to the policy were African-American.¹³³ The white nurse who implemented and ran the program admitted that she believed that mixing of the races was against God's will.¹³⁴ She noted in the medical records of the one white woman arrested that she lived "with her boyfriend who is a Negro."¹³⁵ Despite claims to the contrary, most were never offered any drug treatment before being taken off to jail.¹³⁶

A prosecutor in upstate South Carolina was also arresting African-American women who sought health care at public hospitals. There, judges revealed their evident racial bias and their unsupported assumptions about the effects of cocaine. As Judge Eppes admonished at a sentencing hearing of a woman who admitted to using cocaine while pregnant:

You know, we've got enough trouble with normal children. Now this little baby's born with crack. When he is seven years old, they have an attention span that long. [Holding his thumb and index finger an inch apart]. They can't run. They just run around in class like a little rat. Not just black ones. White ones too.¹³⁷

Pregnant addicted women, portrayed as insensitive, selfish, and uncaring, in fact face extraordinary barriers in their efforts to take care of themselves and their families. Numerous law review arti-

Criminal Prosecution of Substance-Abusing Pregnant Women, 2 *BioLaw S*:17, S:18 (1995). Because NIH found that the hospital had failed to obtain prior approval from an Institutional Review Board for the research, NIH did not have to reach the other legal and ethical questions including lack of consent by the patients to participate in this experiment. *See id.*; *see also Jos, supra* note 129, at 120.

¹³³ *See Shirley Brown Testimony, Ferguson v. City of Charleston*, No. 97-2512 (D. S.C. Dec. 10, 1996) (No. 2:93-2624-2); Martin Shapiro Testimony, *Ferguson* (No. 97-2512); *see also Parker, supra* note 128, at E1 (reporting that "[t]he women's claim of racial discrimination has been backed up even by hospital personnel who expressed concern that poor, black women were being singled out").

¹³⁴ *See Brown Testimony at A-677, Ferguson* (No. 97-2512).

¹³⁵ Plaintiffs' Exhibit 119, *Ferguson* (No. 97-2512).

¹³⁶ *See Brown Testimony at A-590 to -93, Ferguson* (No. 97-2512) (providing testimony of nurse coordinator admitting that many women did not receive referrals for treatment); *see also, e.g., Griffin Testimony at A-178, -191, -197, -201 to -202; Singleton Testimony at A-224 to -225, -243, -246; Powell Testimony at A-325* ("And I asked, please, what could I do to stop this or could you help me, I mean, because, you know, what is going on? And [Nurse Brown] just said you will be locked up."); Parker, *supra* note 128, at E1 ("Griffin said she didn't receive any information about drug treatment programs. She was simply arrested."); Nicole Balin, *Extreme Measures*, *THE SOURCE*, Nov. 1998, at 52, 53 ("They arrested me in my hospital gown right after I delivered my baby," says Powell, who remembers being led out to the police car with a sheet over her head. "I begged the nurse to let me go into treatment, but she said no.").

¹³⁷ Transcript of Record at 3, *State v. Collins*, No. 93-CP-39-859 (S.C. Ct. Gen. Sess. Pickens County Dec. 18, 1991).

that abortion services are unavailable or unfunded, or that they cannot access prenatal care services without risking loss of custody of their children.¹⁴⁵ Despite all of the obstacles, studies find, pregnant drug users do all that they can to take responsibility for their drug use and life circumstances, making efforts, for example, to stop or reduce their drug use and to improve their own health for the sake of the pregnancy.¹⁴⁶

Scapegoating low-income women of color who take drugs provides useful political cover for larger social issues.¹⁴⁷ The outcry over cocaine, damaged children, and the rights of fetuses to be protected from their mothers, occurred at the end of eight years of Reagan-era budget cuts, many of them in social programs for poor women and children.¹⁴⁸ As researchers Banks and Zerai noted, between 1977 and 1984, maternal and child health block grants were reduced by one-third. As a result, federally-mandated comprehensive health clinics, including well-baby, prenatal, and immunization clinics were eliminated. For example, Community and Migrant Health Centers budgets were cut by one-third, and the National Health Service Corps budget was reduced by 64% between 1981-1991.¹⁴⁹ The WIC program did not sustain budget cuts, but by 1989 it still only served one-half of those eligible.¹⁵⁰ Of course, the focus on fetal health in general creates an illusion of concern for actual

Spring 1998, at 7-9 (discussing the reasons why the development of services for battered, substance-abusing women is limited).

¹⁴⁵ See Chavkin, *supra* note 138, at 1559 (explaining that the risks involved in seeking treatment deter addicted mothers from getting the help they need); see also *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (dismissing homicide charges against a woman who shot herself in the stomach after discovering that Medicaid would not cover the expense of an abortion); Shelly Gehshan, *Missed Opportunities for Intervening in the Lives of Pregnant Women Addicted to Alcohol or Other Drugs*, 50 J. AM. MED. WOMEN'S ASS'N 165, 166 (1995) (discussing a study of 181 addicted pregnant women in the South and finding that "45% did not have a regular source for family planning services").

¹⁴⁶ See MURPHY & ROSENBAUM, *supra* note 84; Chavkin, *supra* note 138, at 1560 (stating that an addicted woman's concern for her child often motivates her to seek drug treatment); Rosenbaum, *supra* note 14, at 654-65; see also Margaret H. Kearney et al., *Mothering on Crack Cocaine: A Grounded Theory Analysis*, 38 SOC. SCI. MED. 351-61 (1994) (employing a qualitative analysis to investigate "cocaine users' perspectives on mothering . . . [and] how they actually endeavor to care for their children").

¹⁴⁷ See Rosenbaum, *supra* note 14, at 657 ("Crack mothers were being scapegoated, diverting attention from (a) the realities of the failed, post-Reagan social experiment with cutbacks of needed social problems and (b) complex social conditions that would require major political change.").

¹⁴⁸ See, e.g., BAUM, *supra* note 103, at 144-45 (discussing specific measures taken by the Reagan administration to cut essential social and drug treatment programs).

¹⁴⁹ See Banks et al., *supra* note 125, at 53-67.

¹⁵⁰ See *id.*

As will be discussed, targeting low-income pregnant women of color with drug problems as the vehicle for advancing fetal rights would turn out to be an effective anti-choice strategy.

II. THE *WHITNER* DECISION AND THE THREAT TO *ROE v. WADE*

By using the legal arguments of the anti-choice movement, the popularity of the war on drugs, and by focusing their attacks on low-income women of color, prosecutors obtained an unprecedented victory for anti-choice activists in a child abuse case brought against a woman named Cornelia Whitner.

A. *Cornelia Whitner and the Charges Against Her*

On April 7, 1992, Cornelia Whitner was indicted for violating South Carolina's criminal child neglect statute for her alleged unlawful neglect of a "child."¹⁵⁵ Ms. Whitner's indictment was not based on an accusation that she abused or endangered any child in being. Rather, it was based on the new interpretation of the statute promoted by several state solicitors, who argued that this statute also criminalized a woman's failure "to provide proper medical care for her unborn child."¹⁵⁶

Ms. Whitner is an African-American woman who was born and raised in South Carolina. The youngest of six children, she barely knew her father and was raised by her mother, Margaret Whitner, who worked as a chambermaid.¹⁵⁷ At the age of fourteen, Cornelia's mother suddenly dropped dead.¹⁵⁸ According to interviews with Ms. Whitner, "Cornelia ran next door to call an ambulance, but help came too late. Margaret Whitner was dead at 42 of a worn-out heart."¹⁵⁹ Ms. Whitner explained, "That was the worst thing that ever happened to me. I felt like I had nobody."¹⁶⁰ "That's

¹⁵⁵ See S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985) ("Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide . . . the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.").

¹⁵⁶ Affidavit in Support of Arrest Warrant D-038033 (Feb. 5, 1992), *State v. Whitner*, No. 92-GS-39-670 (S.C. Ct. Gen. Sess. Pickens County 1992).

¹⁵⁷ See Arlene Levinson, *S.C. Law on Crack Moms May be Heard in High Court*, THE ROCK HERALD (S.C.), Mar. 15, 1998, at 1A.

¹⁵⁸ See *id.* (describing how Cornelia and her siblings witnessed their mother's death one morning, and that they "heard a thump [as] their mother fell out of bed").

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

when I started smoking weed and drinking beer and stuff. Ain't nobody like your mom."¹⁶¹ After her mother died, she dropped out of school in the tenth grade¹⁶² and by fifteen, was pregnant with her first child.¹⁶³ Ms. Whitner eventually had three children.¹⁶⁴ Her youngest, Tevin, born on February 2, 1992, was the basis for the criminal child abuse charge.¹⁶⁵ A test indicated that he had been exposed prenatally to cocaine.¹⁶⁶ Although he was born in good health, Ms. Whitner was arrested on charges of child abuse.¹⁶⁷ Ms. Whitner was never counseled about her substance abuse problem and never offered treatment as a way of avoiding arrest.¹⁶⁸ When she was indicted in 1992, there was not a single in-patient residential drug treatment program in the entire state designed to treat pregnant drug users.¹⁶⁹

Like virtually all women prosecuted, Ms. Whitner could not afford private counsel. She was represented by a court-appointed counsel who did not meet with her until the day of her scheduled court hearing.¹⁷⁰ Ms. Whitner's defense attorney had just left the prosecutor's office, where she had prosecuted pregnant addicted women like Ms. Whitner.¹⁷¹ At no point in either job did she do any independent legal research on the issue of prosecuting pregnant women for using drugs.¹⁷² She testified that in discussing the charges with Ms. Whitner, "I don't think I ever pulled the book out."¹⁷³ She did not seek to obtain nor did she review Ms. Whitner's hospital records.¹⁷⁴ When asked about how the evidence was obtained and

¹⁶¹ *Id.*

¹⁶² See Record at 8, Whitner v. State, No. 93-CP-39-347 (S.C. Ct. C.P. Pickens County Nov. 1, 1993).

¹⁶³ See Levinson, *supra* note 157, at 1A.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See Record at 5, State v. Whitner, No. 92-GS-39-670 (S.C. Ct. Gen. Sess. Pickens County Apr. 20, 1992).

¹⁶⁸ See Levinson, *supra* note 157, at 1A (noting that within a day of giving birth, the police arrested Ms. Whitner at the hospital).

¹⁶⁹ See Affidavit of Louise Haynes at 5, Ferguson v. State, No. 92-GS-10-7304 (S.C. Ct. Gen. Sess. Charleston County Apr. 27, 1993) (supporting affidavit for motion to dismiss criminal child abuse charges brought against Crystal Ferguson).

¹⁷⁰ See Record at 9, 14-15, Whitner v. State, No. 93-CP-39-347 (S.C. Ct. C.P. Pickens County Nov. 1, 1993).

¹⁷¹ See *id.* at 21, 24, 32-33.

¹⁷² See *id.* at 21, 29, 32-33.

¹⁷³ *Id.* at 20-21 ("I was familiar with the statute; so, I think I went over with her my recollection of what the elements are. And I had known of no challenge at that point to our statute.").

¹⁷⁴ See *id.* at 23.

whether it might have been obtained illegally, Ms. Whitner's lawyer admitted, "[m]aybe I was prejudiced a little bit by my experience in prosecution."¹⁷⁵

The public defender nevertheless told her client that she "would do everything that [she] could to help [Ms. Whitner] try and get into a treatment facility so that she could at one point be reunited with her children."¹⁷⁶ The attorney however, knew of no recommendation for treatment from the solicitor,¹⁷⁷ and when asked whether she had informed Ms. Whitner that the solicitor was "unwilling to negotiate anything," she replied: "I don't know if I went that far. I told her that zero to 10 was her possible sentence."¹⁷⁸ The lawyer also admitted that she knew of no drug treatment programs for pregnant women with substance abuse problems.¹⁷⁹

Ms. Whitner plead guilty to the charge of child abuse.¹⁸⁰ At her guilty plea and sentencing hearing, Ms. Whitner admitted that she was chemically dependent and requested assistance with this medical problem from the court, in part stating "I need some help Your Honor."¹⁸¹ Although Ms. Whitner and her attorney emphasized both the need and Ms. Whitner's desire for in-patient treatment, the court responded, "I think I'll just let her go to jail."¹⁸² The court then sentenced Ms. Whitner to eight years in prison.¹⁸³

After serving more than a year of her eight-year sentence, Ms. Whitner filed an application for post-conviction relief arguing that she had been convicted of a nonexistent crime—since only child neglect and not fetal neglect had been made criminal in the state.¹⁸⁴ The post-conviction court of relief issued an order granting Ms. Whitner's application and vacating her sentence.¹⁸⁵ This court ruled, as numerous other courts in South Carolina would, that the "plain, ordinary and popular meaning of 'a person under the age of

¹⁷⁵ *Id.* at 26.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at 26.

¹⁷⁸ *Id.* at 27.

¹⁷⁹ *See id.* at 30-31.

¹⁸⁰ *See* Record at 2, *State v. Whitner*, No. 92-GS-39-670 (S.C. Ct. Gen. Sess. Pickens County Apr. 20, 1992).

¹⁸¹ *Id.*

¹⁸² *Id.* at 5.

¹⁸³ *See id.*

¹⁸⁴ *See Whitner v. State*, 93-CP-39-347 (S.C. Ct. C.P. Pickens County Nov. 22, 1993) (order vacating sentence and dismissing case for lack of jurisdiction). In addition, the post-conviction relief court found that Ms. Whitner "had not received effective assistance of counsel at the time she pled guilty." *Id.*

¹⁸⁵ *See id.*

nevertheless justified its decision and camouflaged its significance by resorting to the language of the war on drugs. The court intoned: "Use of crack cocaine is illegal, period. . . . We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right."²⁰⁴

The majority opinion drew sharp dissents from two of the justices.²⁰⁵ One, Justice Moore, argued that the majority had "rendered the statute vague" by making it applicable to all conduct by pregnant women that risks harm, and warned that "the impact of today's decision is to render a pregnant women potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize."²⁰⁶

Cornelia Whitner sought review of the decision from the United States Supreme Court, but on May 26, 1998, the Court declined to review the case.²⁰⁷ The Attorney General of South Carolina, Charles Condon, took the denial of review as confirmation of the personhood and citizenship of the "unborn."²⁰⁸ Shortly after the Supreme Court's denial of certiorari, Attorney General Condon testified before a Congressional committee promoting his policy of the arrest of pregnant women.²⁰⁹ He explained that he was speaking "on behalf of the citizens of South Carolina—both born and unborn."²¹⁰ He elaborated noting that, "the U.S. Supreme Court let stand our State Supreme Court's ruling that a viable fetus is a fellow South Carolinian and therefore entitled to protection under the law."²¹¹

Now, apparently having won recognition of fetal rights and personhood, the Attorney General made clear that he would use the decision as a basis for limiting abortion.²¹² In a written opinion ad-

²⁰⁴ *Whitner*, 492 S.E.2d at 786.

²⁰⁵ See *id.* at 786-87 (Finney, J., dissenting); *id.* at 787-88 (Moore, J., dissenting).

²⁰⁶ *Id.* at 788 (Moore, J., dissenting).

²⁰⁷ See *Whitner v. South Carolina*, 118 S. Ct. 1857 (1998) (denying certiorari).

²⁰⁸ See *infra* notes 209-213 and accompanying text (discussing Attorney General Condon's responses to the decision in *Whitner*).

²⁰⁹ Charles M. Condon, *Attorney General of South Carolina, Before the House Committee on Government Reform and Oversight Subcommittee on National Security, International Affairs and Criminal Justice Federal Information Systems Corporation*, FED. NEWS SERV., July 23, 1998, at 1.

²¹⁰ *Id.*

²¹¹ *Id.*; see Office of the South Carolina Attorney General: Press Releases, *Supreme Court Ruling a Victory for South Carolina's Children* (visited Apr. 2, 1999) <<http://www.scattorney-general.com>> (quoting Condon: "[t]he Supreme Court ruling is a big, big victory for the babies of South Carolina").

²¹² See Charles M. Condon, *Office for the Attorney General of the State of South Carolina*, available in 1997 S.C. AG LEXIS 3, at *4 (Jan. 10, 1997) (responding to a legislator's

In 1986, the South Carolina General Assembly amended its death penalty statute to provide that the death penalty could be imposed where there are certain statutorily designated aggravating circumstances.²²³ One instance is where “[t]wo or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.”²²⁴ Another alternative aggravating circumstance that can result in the death penalty according to this statute is when there has been a murder “of a child eleven years of age or under.”²²⁵ As the court noted in *Ard*, “[n]either ‘person’ nor ‘child’ are defined in the statute.”²²⁶ Relying on *State v. Horne*²²⁷ and *Whitner*,²²⁸ the court concluded that “the legislature intended to include viable fetuses as ‘persons’ within the statutory aggravating circumstance[s] of [the death penalty statute].”²²⁹ The court however refused to engage in any specific analysis of the legislative history of the death penalty statute and instead seemed to accept the state’s premise that such a particularized analysis was unnecessary because the legislature had used the fetus encompassing terms “person” and “child.”²³⁰

During oral argument, defense counsel argued vigorously that accepting the state’s argument would mean that every statute and action covered by state law using the terms person or child or relating to them, would have to be presumed applicable to viable fetuses.²³¹ Specifically, defense counsel argued that this interpretation would be applied to abortion, stating, “under the state’s theory here a third trimester abortion is a capital offense, there is no drawing the line.”²³²

²²³ See S.C. CODE ANN. § 16-3-20(C)(a) (Law Co-op. 1976 & West Supp. 1998) (detailing the statutorily defined aggravating circumstances).

²²⁴ § 16-3-20(C)(a)(9).

²²⁵ § 16-3-20(C)(a)(10).

²²⁶ *Ard*, 505 S.E.2d at 331.

²²⁷ 319 S.E.2d 703 (S.C. 1984).

²²⁸ *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), cert. denied, 118 S. Ct. 1857 (1998).

²²⁹ *Ard*, 505 S.E.2d at 331.

²³⁰ See *id.* (attributing to the legislature knowledge of the *Horne* and *Whitner* decisions and intent to incorporate their holdings by use of the terms person and child). Justice Moore, concurring in result only, noted that it is the legislature that defines which crimes will be punished as capital offenses and that the rule of strict statutory construction in criminal cases mandates deference to specific legislative intent and interpretation in favor of the defendant when the intent is ambiguous. See *id.* at 337.

²³¹ See *Ard* Oral Argument, *supra* note 22 (stating that this would “add a category of victim to every single crime, the armed robbery of a pregnant woman becomes two armed robberies, the kidnapping of a pregnant woman becomes two kidnappings”).

²³² *Id.*

Far from denying such implications, the state replied unequivocally:

[Y]es . . . if as we submit a viable fetus is a person and if there is a showing of evidence beyond a reasonable doubt to show malice aforethought on the part of the actor, yes we submit that that crime [abortion] would be murder, yes we submit that that crime [abortion] could be subject to a statutory aggravating factor [for the death penalty] as determined by the general assembly.²³³

When questioned further, the state clarified that the doctor who performed an abortion with malice aforethought, and the father who urged the woman to have the abortion, could also be subject to prosecution for murder and subject to the death penalty.²³⁴ The Assistant Attorney General explained:

[W]e have interpreted within the office, the law of accessory before the fact to include the entire panoply of punishment in the murder statute, and if that situation [where a father urged the mother to get an abortion] occurred and he had malice aforethought, yes [he could be subject to the death penalty].²³⁵

Thus, at nearly the same time that Dr. Barnett Slepian was murdered in cold blood by an anti-abortion activist,²³⁶ the South Carolina Attorney General's Office was asserting that it had a legal basis for accomplishing the same result.²³⁷

²³³ *Id.* At least one Justice seemed to suggest that such a result could be avoided by presuming that the legislature preferred the lesser offense of a illegal abortion punishable by five years imprisonment. Both the defense attorney and the Assistant Attorney General agreed, however, that this was not a question of legislative intent, but rather prosecutorial discretion. Where a person may be charged with one or more applicable offenses, the prosecutor has the discretion to choose among the possible charges. See, e.g., *State v. Thrift*, 440 S.E.2d 341, 346 (S.C. 1994) ("Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands.") (footnotes omitted). As a result, a South Carolina prosecutor would be free to choose to charge a woman who had an abortion after the fetus was considered viable with homicide rather than illegal abortion. *Id.* at 346-47 (noting that a prosecutor may "plea bargain . . . to a lesser offense").

²³⁴ See *Ard* Oral Argument, *supra* note 22. The state contended that "it would be up to a prosecutor to make an election as to how he wanted to choose to make that charging decision." See *id.*

²³⁵ *Id.* Justice Moore, concurring in result only, specifically addressed the state's position in its oral argument "that a woman who aborts a viable fetus could be sentenced to death under the rule adopted by the majority in this case," by noting that it was a legislative decision and not "for this Court to determine." *Ard*, 505 S.E.2d at 337.

²³⁶ See Jim Yardley, *Doctor Who Gave Abortions Slain*, TIMES UNION (Albany, N.Y.), Oct. 25, 1998 (reporting that Dr. Slepian was killed on October 23, 1998 by an anti-abortionist).

²³⁷ See *Ard* Oral Argument, *supra* note 22 (detailing situations where the death penalty might be administered).

D. Whitner's Effects on Women, Children, and the Law

The apparent declaration of fetal personhood in the *Whitner* decision clearly violates *Roe v. Wade* and its progeny.²³⁸ The decision also went far beyond the plain meaning of the child endangerment statute and its clear legislative intent.²³⁹ As defense counsel in *Whitner* and others have argued, the decision also violates the Constitution's guarantees of privacy and due process; in addition, the decision may also violate the equal protection clause's prohibition on discrimination on the basis of race and sex and the Eighth Amendment's prohibition of cruel and unusual punishment.²⁴⁰ The decision also violates a common sense public health approach to the problem of substance abuse and pregnancy.²⁴¹ Nonetheless, the *Whitner* decision went into effect, allowing the state to pursue its policy of arresting and imprisoning mothers.²⁴²

²³⁸ See NELSON & MARSHALL, *supra* note 5, *passim*; *supra* notes 38-55 and accompanying text (discussing the cases following *Roe* and their consistent refusal to treat fetuses as legal persons).

²³⁹ See Knutson, *supra* note 190, at 233-34 (criticizing the majority's expansion of the South Carolina criminal neglect statute to protect fetuses from the prenatal drug use of mothers).

²⁴⁰ See *Whitner*, 492 S.E.2d at 784-86 (discussing privacy and due process claims); Ariela R. Dubler, *Monitoring Motherhood*, 106 YALE L.J. 935 (1996) (arguing that the *Whitner* decision signifies the end of a constitutional liberty interest to make personal behavioral choices); Castro, *supra* note 112, at 662-67 (raising constitutional issues); Carolyn Coffey, Note, *Whitner v. State: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. CONTEMP HEALTH L. & POL'Y 211, 246 (1997) (arguing that rulings like *Whitner* threaten the right to privacy and more specifically the "right to be let alone" and discussing the equal protection implications) (footnote omitted); Kordus, *supra* note 98, at 319 (discussing possible constitutional violations); see also, e.g., Cheri Hass, *State v. Gray: De-Criminalization of Maternal Drug Abuse or a Momentary Reprieve?*, 25 U. TOL. L. REV. 1013 (1995) (discussing how prosecutions of pregnant women violate the right to privacy and bodily integrity, create an unconstitutional status crime and discriminate on the basis of race); Michelle Oberman, *Sex, Drugs, Pregnancy and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 526-45 (1992) (detailing issues involved in pregnancy based discrimination); Coffey, *supra*, at 242 (discussing the equal protection implications of statutes criminalizing prenatal substance abuse); Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 508-21 (1990) (noting that prosecution harshly penalizes women who choose childbirth over abortion, and that it unconstitutionally burdens their fundamental right to carry a pregnancy to term); Tiffany M. Romney, Comment, *Prosecuting Mothers of Drug Exposed Babies: The State's Interest in Protecting the Rights of a Fetus Versus the Mother's Constitutional Rights to Due Process, Privacy and Equal Protection*, 17 J. CONTEMP. L. 325, 330 (1991).

²⁴¹ See Coffey, *supra* note 240, at 250 (arguing that maternal substance abuse is a "public health problem, not a legal one"); see also sources cited *supra* note 138.

²⁴² A habeas corpus petition, however, has been filed on behalf of Cornelia Whitner. See Order, *Whitner v. Moore*, C/A No. 2:98-3564-23AJ (D.S.C. Dec. 11, 1998) (acknowledging that the petition for writ of habeas corpus had been submitted, and authorizing service of the pe-

Immediately affected by the *Whitner* decision was one woman whose experience illustrates the extremely punitive and harsh effect of the ruling. In 1991, an African-American woman, gave birth to a healthy 5-pound, 12-ounce baby boy who tested positive for cocaine.²⁴³ She was indicted for violating the state's child endangerment statute.²⁴⁴ On the advice of her court-appointed attorney, she pled guilty.²⁴⁵ She was sentenced to five years in jail, but was given a suspended sentence and placed on probation.²⁴⁶ In 1994, however, both she and her boyfriend were arrested for the crime of domestic violence.²⁴⁷ She was not represented by counsel nor did she understand the ramifications of a guilty plea.²⁴⁸ As a result, she pled guilty to the charge which carried a maximum punishment of 30 days imprisonment.²⁴⁹ However, this conviction constituted a violation of her probation on the child endangerment charge, and she was ordered to begin serving her previously suspended five-year sentence.²⁵⁰

This woman then filed a state habeas corpus petition.²⁵¹ The court granted her petition, finding that the state's child neglect

tion upon the respondents and setting the time for a return or other response to the petition); see also *Crack Mom Seeks Release from Prison*, THE HERALD (Rock Hill, S.C.), Dec. 11, 1998, at 6A (noting that this federal district court petition followed the U.S. Supreme Court's denial of certiorari).

²⁴³ See Record at 6, *State v. Crawley*, 92-GS-04-01 (S.C. Ct. Gen. Sess. Anderson County Jan. 6, 1992) (noting that Ms. Crawley and her baby tested positive for cocaine after the child-birth); see also Michelle R. Davis, *Mom's Past Haunts Her Future*, THE STATE (Columbia, S.C.), Feb. 22, 1998, at B1 (reporting the baby was born with "crack cocaine in his bloodstream").

²⁴⁴ See Record at 2, *State v. Crawley*, 92-GS-04-01 (S.C. Ct. Gen. Sess. Anderson County Jan. 6, 1992) (detailing guilty plea of Ms. Crawley, who was "charged in the indictment with unlawful neglect of a child").

²⁴⁵ See *id.* at 2-3 (noting that her attorney and the judge advised her of her rights).

²⁴⁶ See *id.* at 8 (sentencing Crawley to five years imprisonment suspended by five years on probation).

²⁴⁷ See Davis, *supra* note 243, at B1 (reporting that Ms. Crawley and her boyfriend pleaded guilty to criminal domestic violence charges); see also Michelle R. Davis, *Crawley Begins 5-Year Sentence: Attorneys for Mom Who Used Cocaine Say They'll Appeal*, THE STATE (Columbia, S.C.), Mar. 3, 1998, at B3.

²⁴⁸ See Davis, *supra* note 247, at B3 (indicating that Ms. Crawley was unaware that by pleading guilty, she could face five years in prison). But see Record at 3, *State v. Crawley*, No. 92-GS-04-01 (S.C. Ct. Gen. Sess. Anderson County Jan. 6, 1992) (noting that at Ms. Crawley's sentencing in her unlawful neglect case, she was warned that a probation violation would reactivate the five year sentence).

²⁴⁹ See Davis, *supra* note 243, at B1 (stating that the conviction only carried a thirty day sentence).

²⁵⁰ See Davis, *supra* note 247, at B3 (reporting that Crawley began serving a five-year sentence after she was found to be in violation of her probation).

²⁵¹ See Davis, *supra* note 243, at B1 (stating that Crawley was out of prison on a writ of habeas corpus).

According to news accounts, South Carolina's Attorney General, Charlie Condon, "agree[d] that sending [her] to prison isn't an ideal solution."²⁶² Condon even considered exempting the woman from prison because she was doing well, "[b]ut other factors forced him to put that notion aside."²⁶³ Condon explained that under South Carolina state law, "once a sentence is imposed, it can't be modified."²⁶⁴ The Attorney General then reportedly said that, "[This woman's] situation made a sympathetic case . . . [b]ut who am I to change the law."²⁶⁵ Shortly after making this comment however, Attorney General Condon was able to "change the law" and reduced the sentence of a white former law professor, Randal Chastain, who took \$5,000 from a man for a lawsuit he never filed.²⁶⁶

In some respects, this mother's experience is not remarkable. She joins the burgeoning ranks of women in prison—two thirds of whom are mothers in jail.²⁶⁷ In other respects, though, her case represents the dawn of a new and frightening era of imprisonment of women for being pregnant despite a drug or other health problem.²⁶⁸

Tunstall (Jan. 22, 1998) (on file with author) (stating that Ms. Crawley's petition to remain on bond was denied).

²⁶¹ See Davis, *supra* note 243, at B1.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* But see Davis, *supra* note 243, at B1 (reporting that Condon is not sympathetic and stated that "[s]he got probation the first time, and she violated the probation").

²⁶⁶ See Condon's 'Double Standard' Decried, POST & COURIER (CHARLESTON, S.C.), Mar. 23, 1998, at 3-B (noting that as a result of the sentence reduction, Mr. Chastain will be eligible for parole eight months earlier than scheduled).

²⁶⁷ As a recent report from *Amnesty International* summarized:

On 30 June 1997, there were about 138,000 women in jails and prisons in the USA, more than three times as many as the number of women incarcerated in 1985; . . . The main type of crime that has resulted in the incarceration of women in recent years is violation of laws prohibiting the possession or sale of specified drugs; . . . More than 80,000 of women in prisons and jails are mothers of children under 18; they have approximately 200,000 children under 18.

"Not part of My Sentence": *Violations of the Human Rights of Women in Custody*, AMNESTY INTERNATIONAL 15 (Mar. 15, 1999). "Many women enter jail and prison pregnant. In 1997-98, more than 2,200 pregnant women were imprisoned and more than 1,300 babies were born in prisons." *Id.* at 22; see CATHERINE CONLY, U.S. DEP'T OF JUSTICE, THE WOMEN'S PRISON ASSOCIATION: SUPPORTING WOMEN OFFENDERS AND THEIR FAMILIES 3 (1999) (detailing the dramatic rise in the number of women imprisoned in federal and state prisons on drug offenses and noting that in 1991, 6% of women were pregnant when entering prison).

²⁶⁸ See sources cited *supra* note 16.

Indeed, the effect of *Whitner* was to turn virtually all pregnant women into potential criminals.²⁶⁹ On the same day the United States Supreme Court denied certiorari in the *Whitner* case,²⁷⁰ a South Carolina woman was arrested after her newborn daughter tested positive for marijuana.²⁷¹ As the local papers reported “no longer are just ‘crack moms’ being arrested for abusing their unborn fetuses.”²⁷² Within six months of the decision, a pregnant woman in South Carolina was arrested for drinking alcohol, making clear that it is *pregnancy* and not the illegality of the substance that makes women vulnerable to state control and punishment.²⁷³ Women who test positive for cocaine continue to be arrested, and some have been charged with manslaughter as well as child endangerment.²⁷⁴ Because South Carolina has a mandatory child abuse re-

²⁶⁹ See, e.g., *Whitner v. State*, 492 S.E.2d 777, 788 (S.C. 1997) (Moore, J., dissenting) (fearing that the majority’s decision will “render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize”), *cert. denied*, 118 S. Ct. 1857 (1998); *Reinesto v. Superior Court*, 894 P.2d 733, 737 (Ariz. Ct. App. 1995) (dismissing child endangerment charges against a woman who used heroin while pregnant and detailing everything from cigarettes to caffeine that can cause harm to a fetus, and noting that to allow “the state to define the crime of child abuse according to the health or condition of [a] newborn child would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy”); *Stallman v. Youngquist*, 531 N.E.2d 355, 359-60 (Ill. 1988) (rejecting the creation of a tort for maternal prenatal negligence, noting that if such a tort was recognized, “[a]ny action which negatively impacted on fetal development would be a breach of the pregnant woman’s duty to her developing fetus,” and that “it is the mother’s every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus”); see also Clif LeBlanc, *A Big, Big Victory for Babies: U.S. Supreme Court Lets Stand S.C.’s Jailing of Drug Moms*, THE STATE (Columbia, S.C.), May 27, 1998, at A1 (reporting that “medical professionals face questions about when they should treat women or turn them in”).

²⁷⁰ See *Whitner*, 118 S. Ct. at 1857.

²⁷¹ See ‘Pot Mom’ Charge Prompts 2nd Look at ‘Crack Mom’ Law, NEWS & COURIER (Columbia, S.C.), May 30, 1998.

²⁷² *Id.* (emphasis added).

²⁷³ See Melissa Manware, *Infant Born Drunk: Intoxicated Mom is Facing Charges*, THE STATE (Columbia, S.C.), Sept. 24, 1998, at A1 (reporting that the woman was charged with unlawful conduct toward a child after going into labor drunk and giving birth to an intoxicated baby).

²⁷⁴ See, e.g., *State v. Garrick*, No. 95-GS-40-08467 (S.C. Ct. Gen. Sess. Richland County Dec. 2, 1997) (Ms. Garrick’s “unborn” child died allegedly as a result of her cocaine use, and she was charged with involuntary manslaughter). As one news article noted, no trial had occurred that would establish the fetus died as a result of Ms. Garrick’s drug addiction, and Ms. Garrick had a history of premature delivery, and previously had an operation to remove lesions left by a cesarean section. See *Drug Plea Gets Mother Probation*, STATE-RECORD (Columbia, S.C.), Dec. 3, 1997, at A11; see also *Indictments for Unlawful Conduct Towards A Child, Violation Sec. 20-7-50, State v. Peppers* (S.C. Gen. Sess. Laurens County July 13, 1998) (alleging that Ms. Peppers “place[d] her unborn child at unreasonable risk of harm affecting the child’s physical or mental health or safety and caused to be done unlawfully bodily harm to the child” by virtue of her drug use during pregnancy); *Woman Charged After Newborn’s*

porting law, the *Whitner* decision also had the effect of turning all of the state's health care and social service providers into mandated child abuse reporters when they learn that a pregnant patient uses drugs or engages in any behavior that may endanger the fetus.²⁷⁵ This could also include people providing pregnant women with food supplements through the federal WIC program, since that program requires inquiry to determine if pregnant applicants have substance abuse problems.²⁷⁶ The result has been to drive pregnant women in South Carolina out of the health and social service systems, thus endangering their health and that of their future children.²⁷⁷ After the highly publicized prosecution of Cornelia Whitner, and the South Carolina Supreme Court's original decision upholding her conviction in 1996, at least two drug treatment programs in the Columbia, South Carolina, area that give priority to pregnant women reported precipitous drops in admissions of pregnant women.²⁷⁸ Brendan Dawkins, who runs a treatment program at the Keystone Substance Abuse Services Center in Rock Hill, South Carolina, also reported that

Her center usually has about 20 pregnant women addicted to drugs, usually crack. Now there are only 10. She believes others are passing up counseling and prenatal care because they are afraid of being arrested.

"I think they're going over the state line to North Carolina to have their babies."²⁷⁹

Numerous medical and public health groups have opposed the prosecutions of pregnant women in part because of the expectation that it would deter women from obtaining health care and thus cause harm to both maternal and fetal health. These organization

Death, POST & COURIER (Charleston, S.C.), Dec. 24, 1998, at 3B (reporting that Ms. Fleming, age 35, was charged with child neglect when her infant, who had tested positive for cocaine, died shortly after a three-month premature birth).

²⁷⁵ See Abrahamson, *supra* note 95, at 139; LeBlanc, *supra* note 269, at A1.

²⁷⁶ See 7 C.F.R. § 246.7 (1999) (detailing the certification requirements for pregnant women).

²⁷⁷ See LeBlanc, *supra* note 269, at A1 (stating that "expectant mothers will resist prenatal checkups, putting their babies in greater jeopardy").

²⁷⁸ See Abrahamson et al., *supra* note 95, at 140-41 ("The records of the Women's Community Residence, a halfway house for women substance abusers, show that admissions of pregnant women fell 80% (from 10% to 2% of the total number of women treated at the facility) between July 1, 1996 and June 30, 1997."). "At the Women's Intensive Outpatient program, an intensive day program which provides child care, admissions of pregnant women declined 54% (from 13% to 6% of the total number of women treated at the facility) during roughly the same period." *Id.*

²⁷⁹ Bragg, *supra* note 21, at A10.

include the American Medical Association,²⁸⁰ the American Academy of Pediatrics,²⁸¹ the American Public Health Association,²⁸² the American Nurses Association,²⁸³ the American Society on Addiction Medicine,²⁸⁴ and the March of Dimes.²⁸⁵ Their concerns may have been borne out by statewide infant mortality figures finding that in 1997, the “percentage of babies who died in South Carolina increased for the first time this decade.”²⁸⁶

In addition, the Attorney General’s statewide “model plan regarding the state intervention in cases when a child is born with an illegal drug in its system” is now being distributed.²⁸⁷ This plan, touted as a guarantee that women will be offered treatment before jail, actually sets up the mechanism for searching pregnant women

²⁸⁰ “Pregnant 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.” Report of American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990).

²⁸¹ “The American Academy of Pediatrics is concerned that [arresting drug addicted women who become pregnant] may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.” American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 PEDIATRICS 639, 641 (1990).

²⁸² A policy statement issued by the American Public Health Association found: Recognizing that pregnant drug-dependent women have been the object of criminal prosecution in several states, and that women who might want medical care for themselves and their babies may not feel free to seek treatment because of fear of criminal prosecution related to illicit drug use . . . [the Association] recommends that no punitive measures be taken against pregnant women who are users of illicit drugs when no other illegal acts, including drug-related offenses, have been committed. Am. Pub. Health Ass’n, *Public Policy Statement No. 9020, Illicit Drug Use by Pregnant Women*, 8 AM. J. PUB. HEALTH 240 (1990).

²⁸³ “[The American Nurses Association] recognizes alcohol and other drug problems as treatable illnesses. The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.” American Nurses Association, *Position Statement on Opposition to Criminal Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age* (Apr. 5, 1991) (on file with author).

²⁸⁴ “Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing, harm to children and to society as a whole.” American Society of Addiction Medicine, Inc., *Public Policy Statement on Chemically Dependent Women and Pregnancy* 47 (Sept. 25, 1989) (on file with author).

²⁸⁵ “The March of Dimes believes that targeting substance-abusing pregnant women for criminal prosecution is inappropriate and will drive women away from treatment.” March of Dimes, *Statement on Maternal Drug Abuse* (Nov. 1990) (on file with author).

²⁸⁶ *Infant Mortality on Rise in '97*, POST & COURIER (Charleston, S.C.), Feb. 19, 1999, at B1.

²⁸⁷ Attorney General Charles M. Condon, *Intervention Protocol for Drug-Impaired Infants*, Draft, Office of the Attorney General of South Carolina (Jan. 26, 1998).

for evidence of illegal drug use and for falsely counseling them about their risks of arrest and of removal of their children.²⁸⁸

The *Whitner* decision has also had an impact beyond South Carolina even though the decision, by its own terms, purports to rely on law unique to South Carolina. In *Wisconsin ex rel. Angela M.W. v. Kruzicki*,²⁸⁹ the Wisconsin Supreme Court decided whether Wisconsin could force a pregnant woman into drug treatment by taking her fetus into protective custody through a CHIPS (child alleged to be in need of protection or services) proceeding.²⁹⁰ The court ultimately ruled that it could not.²⁹¹ Nevertheless, as part of its decision, the court had to determine the meaning of the word "child" in the statute.

For many years, courts across the country rejected the application of child abuse and related statutes to fetuses because they concluded that the word "child" unambiguously meant children and not fetuses.²⁹² But in *Angela M.W.*, the court found that the meaning of the word "child" was "ambiguous," and cited *Whitner* as "[p]erhaps [the] most compelling" reason for this conclusion.²⁹³ Although the court ultimately ruled that the juvenile code could not be used as a vehicle for taking custody of pregnant women's bodies,²⁹⁴ the conclusion that the word "child" no longer plainly applies only to born persons, suggests another incremental victory for the

²⁸⁸ See NELSON & MARSHALL, *supra* note 5, at 56-62; Susan K. Dunn, *The Defense of Women Arrested for Use of Illegal Drugs During Pregnancy* (Sept. 1998) (on file with author); see also SOUTH CAROLINA NURSES ASSOCIATION, RESOLUTION 1, IMPLICATIONS OF *WHITNER* RULING (1997) VIS A VIS THE CHILD PROTECTION REFORM ACT OF 1996 FOR INTEGRITY OF NURSING PRACTICE 2 (1998) (strongly opposing the protocol and "any program or legislation which requires the mandatory reporting by nurses of any and all criminal activity, thus forcing health professionals to act as agents of the state").

²⁸⁹ 561 N.W.2d 729 (Wis. 1997).

²⁹⁰ See *id.* at 731 (describing Angela M.W.'s contention that the CHIPS statute did not confer jurisdiction over her or her viable fetus, and in the alternative, that if such jurisdiction was conferred, the statute violated "her equal protection and due process rights").

²⁹¹ See *id.* at 740 (stating the court's refusal to exercise CHIPS jurisdiction over a fetus where the legislature did not specifically include the fetus within the definition of the word "child").

²⁹² See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (dismissing child abuse charges filed against a pregnant woman addicted to heroin and holding that the ordinary meaning of the word "child" did not include "activity that affects a fetus and thereby ultimately harms the resulting child"); *State v. Gray*, 584 N.E.2d 710, 711, 713 (Ohio 1992) (finding that a review of the terms "parent" and "child" within their common usage supports the conclusion that Ohio's child endangerment statute "does not apply where a mother abuses drugs during her pregnancy."); *State v. Dunn*, 916 P.2d 952, 955 (Wash. Ct. App. 1996) (finding "no ambiguity" in Washington's criminal mistreatment of a child statute).

²⁹³ *Angela M.W.*, 561 N.W.2d at 734; see *id.* at 749 (Crooks, J., dissenting) (stating that "the legislature intended to include a viable fetus within the definition of 'child'").

²⁹⁴ See *id.* at 740.

anti-choice movement in its efforts to erode the legal differences between fetuses and persons.

Prosecutors and legislators in other states are looking to South Carolina's experience in particular. After the *Whitner* decision, Wisconsin and South Dakota significantly expanded civil statutes to permit extraordinary control over pregnant women's bodies and lives.²⁹⁵ The legislation passed despite the strong opposition of leading medical groups,²⁹⁶ which in the past have helped to defeat similarly proposed statutes through their strong and undivided opposition.²⁹⁷ The experiences in Wisconsin and South Dakota raise the question of whether in the post-*Whitner* world, politicians and policymakers will now view fetal rights legislation as a no-loss political strategy regardless of the harm it does to women and children's health.²⁹⁸

Following the Wisconsin Supreme Court's decision in *Angela M.W.*, the Wisconsin legislature substantially revised its Children's Code²⁹⁹ to create a new category of "unborn child" abuse.³⁰⁰ The purpose of the revised code is to "recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential,"³⁰¹ and accordingly permits the state to intervene to protect an "unborn child" from:

²⁹⁵ See generally S.D. CODIFIED LAWS § 34-20A-63 (Michie Supp. 1998) (permitting "emergency commitment" of pregnant women who abuse alcohol or drugs); WIS. STAT. ANN. §§ 48.135-.981 (West 1997 & Supp. 1998) (amending the Children's Code to extend regulatory control over the behavior of pregnant women).

²⁹⁶ See, e.g., Steven Walters, 'Coke Mom' Bill Passed in Assembly, MILWAUKEE J. SENTINEL, Nov. 20, 1997, at 1, 1-2 (noting that opponents of the bill "cited opposition by treatment professionals and public health officials" and quoting one state representative as saying, "[t]his is the worst form of lawmaking we can engage in . . . We are refusing to listen to the people who are experts in this area . . . I don't know why we think we know better").

²⁹⁷ See GÓMEZ, *supra* note 15, at 41-42, 47, 49-50 (describing role of medical groups in defeating punitive legislation in California); Sarah Letitia Kowalski, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255, 1255-56 (1998) (stating that until *Whitner*, "no state supreme court had upheld a conviction for prenatal abuse based on a child abuse statute," and discussing why the American Medical Association opposes statutes criminalizing prenatal child abuse).

²⁹⁸ For example, in Wisconsin, the legislation contains no funding for drug treatment programs. See WIS. STAT. ANN. § 48.193 (West 1997); see also Walters, *supra* note 296, at 2 (noting that a Milwaukee facility (Meta House) treating addicted pregnant women had its state subsidy cut despite a long waiting list, and that the bill included no additional money to pay for treatment programs); Richard P. Jones, *Cocaine Mom, Feticide Bills OK'd Debate Turns Emotional Over Measures Aimed At Protecting Fetuses*, MILWAUKEE J. SENTINEL, May 2, 1998, at 1 (reporting that Sen. Gwen Moore (D-Milwaukee) tried "several times to include funding for treatment," saying, "Ain't a dime in this bill, not one dime to make this happen").

²⁹⁹ See WIS. STAT. ANN. §§ 48.01-.988 (West 1997 & Supp. 1998).

³⁰⁰ See WIS. STAT. ANN. §§ 48.01(1)(2), 48.02(1)(a) (West 1997 & Supp. 1998).

³⁰¹ § 48.01(am).

[S]erious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.³⁰²

The Wisconsin statute defines an “unborn child” as a “human being from the time of fertilization to the time of birth.”³⁰³ The law permits the state to take jurisdiction over pregnant women in a variety of circumstances. For example, a law enforcement officer can take a pregnant woman into custody if he or she believes that the woman’s use of alcohol is posing a substantial risk to the physical health of the child.³⁰⁴ Thus, a pregnant woman observed drinking cocktails at a party could be taken into immediate custody by a police officer who believed that her drinking posed a severe harm to her fetus.³⁰⁵

The revised Wisconsin code also permits counties to appoint juvenile court commissioners to oversee cases and conduct hearings applicable to unborn children, but only allows lawyers with “a demonstrated interest in the welfare of . . . unborn children” to be eligible for appointment to such positions.³⁰⁶ Additionally, pursuant to the Code, guardians ad litem may be appointed “for any unborn child alleged or found to be in need of protection or services.”³⁰⁷ Because unborn children are defined to exist from the moment of fertilization, a guardian could be appointed even for pre-embryos.³⁰⁸ The guardian is required to advocate for the “best interests” of the unborn child.³⁰⁹ Consequently, if a woman decided to have an abortion during the pendency of her case, the guardian would undoubt-

³⁰² § 48.02(1)(am).

³⁰³ § 48.02(19).

³⁰⁴ § 48.193(1)(d)(2).

³⁰⁵ See WIS. STAT. ANN. § 48.193(2). Indeed, the legislation went into effect without any guidelines or standards as to how to interpret or apply the law. See LINDA HISGEN, STATE OF WIS. DEP’T OF HEALTH AND FAM. SERV’S, 1997 WISCONSIN ACT 292, at 1-2 (Memorandum, July 23, 1998). “Act 292 creates a new area of responsibility for child welfare, and, as such, there are no existing protocols, policies, assessment tools or guidelines that define child welfare’s role.” *Id.* Similarly, the state notes that determining under the statute whether the woman’s drug use poses serious physical harm “would have to be done on speculation, since fetal impact research is not conclusive.” *Id.*; see *Whitner v. State*, 492 S.E.2d 777, 788 (S.C. 1998) (Moore, J., dissenting).

³⁰⁶ WIS. STAT. ANN. § 48.065(1).

³⁰⁷ § 48.235(f).

³⁰⁸ See *Davis v. Davis*, 842 S.W.2d 588, 593-94 (Tenn. 1992) (scientifically defining pre-embryos, consisting of four to eight cells, by growth stage relative to conception).

³⁰⁹ See § 48.235(3) (discussing the duties and responsibilities of guardians ad litem).

and new mothers in the guise of drug control measures are permeating throughout the nation, and new arrests and cases seeking to terminate parental rights of pregnant women have been brought at least in part on reliance of the *Whitner* opinion.³¹⁸

The *Whitner* decision and its apparent recognition of fetal personhood has significant legal and public health ramifications. If a fetus is a person, then there is no limit on the state's power to police and punish pregnant women. This includes permitting husbands, putative fathers and even complete strangers to interfere with a woman's freedom.³¹⁹ Not merely the predictions of fanciful law review authors, individual instances of interference with women's lives and health in the name of fetal rights have already transpired across the country for years.³²⁰ These seemingly aberrant cases may become the norm in states such as South Carolina where fetuses are now apparently recognized as full persons under all laws.

Not only may women be arrested for a range of behavior that arguably could risk harm to the fetus,³²¹ but also other intrusions and violations of their liberty could result. For example, a state department of social services could seek to have a pregnant woman with terminal cancer declared neglectful and unfit for choosing her own life over her fetus'.³²² Likewise, courts might order pregnant women to undergo cesarean sections for the benefit of the fetus' life, even when such surgery could cause her death.³²³ Unfortu-

³¹⁸ See, e.g., *State v. Farrell*, No. CR-98-75, slip op. at 2 (Wyo. Oct. 2, 1998) (Ryckman, J.). In *Farrell*, criminal child abuse charges were filed against Kelly Farrell, who admitted to using marijuana and tobacco during her pregnancy, which resulted in the premature birth of her child, who tested positive for amphetamines. Distinguishing *Whitner*, the court held that it could not expand the scope of Wisconsin's criminal laws without violating Ms. Farrell's constitutional right to fair notice. See Petitioner-Appellee's Supplemental Brief at 1-3, *People in the Interest of N.M.M. A Child, and Concerning N.W. (Mother)*, No. 97-CA-1185 (Colo. Ct. App. Mar. 2, 1998) (citing *Whitner* as primary authority for the argument that the statutory term "child" includes unborn children, and that a lower trial court decision granting state custody of a "child" before its birth should be affirmed); see also statutes cited *supra* note 32.

³¹⁹ See *infra* notes 321-29 and accompanying text.

³²⁰ See *Johnsen*, *supra* note 56, at 604-05 (citing a 1980 case where a Michigan court held that a child could sue his mother for taking the drug tetracycline during her pregnancy).

³²¹ See *Whitner v. State*, 492 S.E.2d 777, 788 (S.C. 1998) (Moore, J., dissenting) (fearing that the majority's decision will "render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize").

³²² See Janet Gallagher, *The Fetus and the Law—Whose Life Is It Anyway?*, Ms., Sept. 1984.

³²³ See *In re A.C.*, 573 A.2d 1235, 1253 (D.C. 1990) (en banc) (vacating a court-ordered cesarean section that was listed as a contributing factor to the mother's death on her death certificate); *In re Fetus Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (overturning a court-ordered blood transfusion of a pregnant woman in which doctors "yelled at and forcibly restrained, overpowered and sedated" the woman in order to carry out the order); *In re Baby Boy Doe*, 632

nately, these scenarios have already occurred as well.³²⁴ Other intrusions are not only likely, but have already been attempted.³²⁵ For example, one husband sought a court order for visitation of his "child" to keep his estranged pregnant wife from leaving town.³²⁶ In another instance, a juvenile court took custody of the drug-exposed fetus and ordered "it" into drug treatment.³²⁷ In Colorado, state officials sought to terminate a woman's parental rights to a child, before it was even born, citing the "[m]other's unfitness during the critical prenatal care stages of her pregnancy."³²⁸ In South Carolina, while federal law would protect a pregnant woman being fired from her job to protect the fetus from work-place health hazards,³²⁹ she could, nevertheless, under *Whitner's* rationale, be prosecuted for child abuse for exposing the fetus to workplace health hazards.

CONCLUSION: *ROE* v. *WADE* AND THE UNFINISHED REVOLUTION

The holding in *Whitner* goes to the heart of today's abortion debate, lending support to the anti-abortion position that fetuses have rights and that the pregnant woman's health and freedom may be

N.E.2d 326 (Ill. App. Ct. 1994) (holding that courts may not balance whatever rights a fetus may have against the rights of a competent woman, whose choice to refuse medical treatment as invasive as a cesarean section must be honored even if the choice may be harmful to the fetus).

³²⁴ See *In re A.C.*, 573 A.2d at 1253 (recognizing that the cesarean section had already been performed and that any determination would have no practical effect on the woman); Veronica E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1195 (1987) (discussing the serious ethical and medical implications of cases of forced, unconsented to cesarean sections, hospital detention and forced transfusions of pregnant women).

³²⁵ See *infra* notes 326-27 and accompanying text (discussing specific instances where intrusion and violation of a pregnant women was justified under the premise of protecting the fetus).

³²⁶ See, e.g., *In re Wilner*, 601 N.Y.S.2d 518, 521 (Sup. Ct. 1993) (denying a husband's attempt to obtain a writ of *habeas corpus* to enjoin his pregnant wife from leaving New York County until she gives birth); see also *In re Marriage of Tonnessen*, 941 P.2d 237, 239 (Ariz. Ct. App. 1997) (holding that the "in utero time" of a child could not be counted in determining that child's domicile or home state for the purpose of conferring jurisdiction under the Uniform Child Custody Jurisdiction Act).

³²⁷ See *State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482 (Wis. 1995), *rev'd*, 561 N.W.2d 729, 732 (Wis. 1997) (justifying the forced commitment of a pregnant woman into drug treatment in the name of preventing physical harm to the unborn child).

³²⁸ Answer Brief of Petitioner-Appellee at 3, *People in the Interest of: N.M.M., a Child, and Concerning N.W. (Mother)*, No. 97-CA-1185 (Colo. Ct. App. Mar. 2, 1998).

³²⁹ *International Union UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (holding that a corporate "fetal protection" policy violated Title VII's prohibition on sex discrimination).

Together they discourage and punish motherhood by “unfit” mothers—poor black women and drug users—but establish precedent for making abortion for “fit” white women illegal or unavailable.³³⁷

The *Whitner* decision makes clear that those committed to reproductive justice must be willing to defend the rights of all women including women of color; including women who use drugs. The decision also clarifies that a commitment to reproductive justice requires challenges not only the sexism but also to the racism and drug war hysteria that fuels prosecutions and cloaks their impact on reproductive freedom and family integrity.

In terms of human history, the struggle for women’s equality and reproductive freedom are in their infancy.³³⁸ The modern struggle for reproductive freedom had barely begun when a confluence of forces resulted in what seemed at the time a definitive victory—*Roe v. Wade*.³³⁹ But in fact, *Roe* was just a beginning, and we should not be surprised that we have not yet fully or completely won our struggle for justice for women.

In fact, we often lose sight of the fact that women, particularly pregnant women, have not yet been recognized under our laws as

ganda centers, started a national birth drive, and supported sterilization of population groups the Nazis considered undesirable.”

Recounting Pastor Martin Neimoller’s “much-quoted statement”:

First they came for the communists, and I didn’t speak up because I wasn’t a communist. Then they came for the Jews, and I didn’t speak up because I wasn’t a Jew. . . . Then they came for the Catholics, and I didn’t speak up because I was a Protestant. Then they came for me, and by that time there was no one left to speak up.

Dickenson concluded, “A present-day Pastor Neimoller might say, ‘When they came for the poor black women addicted to cocaine, I didn’t speak up because I’m not a poor black woman and I don’t use cocaine.’” *TIMES HERALD*, May 28, 1998.

³³⁷ Not coincidentally, the prosecutions occurred at the same time welfare reform proposals went into effect imposing a stringent one-child per family cap on welfare benefits and as proposals for sterilizing or forcing contraception on welfare mothers were being made. See generally Susan L. Thomas, *Race, Gender and Welfare Reform, the Antinatalist Response*, 28 *J. BLACK STUDIES* 419, 435 (1998) (discussing coercive reform measures in historical context and citing S.C. H 3207, which would have mandated “that all welfare mothers ‘must consent to and have a birth control device surgically implanted’”).

³³⁸ See, e.g., Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: “Compelling Each to Live as Seems Good to the Rest,”* 37 *HASTINGS L.J.* 703, 748-49 (1986) (discussing the conflicts between a woman’s right to make her own choices about medical services and the advice of her physician).

³³⁹ See, e.g., NINA BAEHR, *ABORTION WITHOUT APOLOGY: A RADICAL HISTORY FOR THE 1990’S* (1990); ARLENE CARMEN & HOWARD MOODY, *ABORTION COUNSELING AND SOCIAL CHANGE* (1973); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (University of Cal. Press 1998) (1994) (discussing the origin of abortion law); LAWRENCE LADER, *ABORTION II: MAKING THE REVOLUTION* (1973); LANA PHELAN & PAT MAGINNIS, *THE ABORTION HANDBOOK* (1969); DIANE SCHULDER & FLORYNCE KENNEDY, *ABORTION RAP* (1971).

full and equal citizens.³⁴⁰ Thus, while we are fighting against efforts to have fetuses recognized as legal persons, we have not in fact yet succeeded in having women recognized as full legal persons.

Individual cases in which pregnant women have been forced to endure surgery over their explicit objections and refusal illustrate the confusion and doubt about whether women have the same rights as other citizens regarding medical decisionmaking, bodily integrity and personal autonomy.³⁴¹

While the Supreme Court has repeatedly recognized the right to procreate,³⁴² seemingly for both men and women, the Court's decision in *Buck v. Bell*,³⁴³ upholding a state's sterilization law when challenged by Carrie Buck, a woman, has never been overturned.³⁴⁴ Indeed, it remains not only on the books, but a source of valid precedent in Supreme Court decisions.³⁴⁵ Discrimination

³⁴⁰ See PETCHESKY, *supra* note 58, at 300-31 (noting that the "concept of [woman's] personhood remains unfulfilled, even in a formal sense; witness the defeat of the Equal Rights Amendment in 1982. Groups such as blacks and women, who were presumably 'emancipated' by the Thirteenth, Fourteenth, and Nineteenth Amendments, remain economically, socially, and politically less than full persons in American society"); *infra* notes 346-49 and accompanying text (providing examples of the social inequalities that still exist).

³⁴¹ See, e.g., *In re A.C.*, 573 A.2d 1235, 1252 (D.C. 1990) (vacating and remanding a case in which a woman was forced to undergo a cesarean delivery); Kolder et al., *supra* note 324, at 1192, 1195; Nelson et al., *supra* note 338, at 749; Lawrence J. Nelson & Nancy Milliken, *Compelled Medical Treatment of Pregnant Women: Life, Liberty and Law in Conflict*, 259 JAMA 1060, 1065 (1988) (noting the "troublesome questions" that surround court-ordered obstetric procedures for the benefit of fetuses and discouraging the recognition of "fetal rights that would create an adversarial relationship between a pregnant woman and her fetus"); Terry E. Thornton & Lynn Paltrow, *The Rights of Pregnant Patients: Carder Case Brings Bold Policy Initiatives*, HEALTHSPAN, May 1991, at 10-16 (describing the tragic compelled-treatment case of Angela Carder and urging the implementation of hospital policies to avoid the need for court orders and to restore decisionmaking power to "the patient in consultation with her loved ones and treating physicians").

³⁴² See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a law mandating the sterilization of certain habitual criminals and concluding that "[m]arriage and procreation are fundamental to the very existence and survival of the race").

³⁴³ 274 U.S. 200, 207 (1927) (upholding a Virginia statute providing for sterilization of women, since "[t]hree generations of imbeciles are enough"); STEPHEN JAY GOULD, *THE FLAMINGO'S SMILE* 306-18 (1985) (revealing the truth about Carrie Buck and her daughter in a moving philosophical essay).

³⁴⁴ See Jana Leslie-Miller, *From Bell to Bell: Responsible Reproduction in the Twentieth Century*, 8 MD. J. CONTEMP. LEGAL ISSUES 123, 124 (1997) (stating that the seventy-year old case "has never been overruled").

³⁴⁵ See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Buck v. Bell* as an example of permissible state regulation limiting the right to privacy); see also *In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976) (citing *Buck v. Bell* as an example of permissible state regulation). The Supreme Court, however, did explicitly strike down the sterilization law at issue in *Skinner v. Oklahoma*, where the statute was to be applied to a man who had been convicted of robbery but would not have required sterilization if he had been convicted of the embezzlement.

against women in employment and education is recognized under the Constitution, but the Court applies only an intermediate standard of scrutiny.³⁴⁶ The Supreme Court does not recognize discrimination on the basis of pregnancy as sex discrimination under the Constitution's equal protection clause and thus applies only a minimum rationality test with respect to pregnancy-based classifications.³⁴⁷ Although women have now received important protection from pregnancy-related discrimination in the workplace, that protection rests on a federal statute, not the Constitution itself.³⁴⁸ And our social welfare programs have never sought to provide poor women with the economic independence they need to raise and support their families.³⁴⁹

³⁴⁶ Indeed, the Supreme Court's decision in *Casey*, lowering the standard of review in abortion cases from strict scrutiny to an "undue burden" test, could be understood as an effort to bring cases involving questions of women's rights into conformity under a more minimal standard of review. See CENTER FOR REPROD. LAW AND POLICY, REPRODUCTIVE FREEDOM IN FOCUS, AN ANALYSIS OF *PLANNED PARENTHOOD v. CASEY* 6 ("The new standard shifts the burden of proof to doctors and women challenging restrictive laws.").

³⁴⁷ See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-72 (1993) (distinguishing the disapproval of certain conduct from discrimination against a group that engages in that conduct and concluding that the disfavoring of abortion is therefore not invidious discrimination against women as a class protected under the civil rights statutes); *General Electric Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (upholding *Geduldig* in finding that General Electric's "disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities"); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (holding that California's disability insurance system, which excludes pregnant women, does not violate the Equal Protection Clause of the Fourteenth Amendment); see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 379 (1985) (referring to *Geduldig* and other disability cases where the Court held that the classifications did not have any sexually discriminatory effect and observing that Congress "prospectively overruled the Court in 1978" with the passage of Title VII, but also noting that the congressional language "is not controlling in constitutional adjudication"); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PENN. L. REV. 955, 983-86 (1984) (arguing that laws governing reproduction implicate women's equality and personhood and proposing alternative standard for judicial scrutiny of such laws to ensure that (1) the law has no significant impact on perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has that impact, it is justified as the best means of serving a compelling state purpose).

³⁴⁸ See Johnsen, *supra* note 56, at 620-22 (discussing the passage of the Pregnancy Discrimination Act).

³⁴⁹ See generally LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994) (discussing the inadequacy of redistributive government-sponsored financial aid to women with children); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (discussing how the rhetoric of welfare reform and many of its programs "divert attention from the structural problems of our society and . . . focus instead on the so-called deviance of the poor").

It took 200 years to abolish slavery in America, and we still are living daily with its lasting effects.³⁵⁰ It took more than 70 years for women to win the right to vote.³⁵¹ Elizabeth Cady Stanton spent most of her life fighting for women's suffrage³⁵²; she died before the Nineteenth Amendment was passed.³⁵³ Her work, and that of abolitionists and other feminists however made a significant difference for future generations.

The struggle for justice and equality occurs over lifetimes—not over weeks or months or even decades. Those who celebrate *Roe v. Wade* today should commit to a lifetime of struggle so that women might someday be recognized as full persons under the law.

³⁵⁰ See DWIGHT LOWELL DUMOND, *ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA* 4-5, 364-72 (1961) (noting that “[a]bolition of slavery was a long, slow, agonizing process”); see also Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *YALE J.L. & FEMINISM* 31, 34-35 (1996) (discussing the lynching of black men in the South, and how the nation's failure to stop it still haunts America today).

³⁵¹ See generally Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 *VAND. L. REV.* 657 (1996) (discussing women's struggle to win the constitutional right to vote).

³⁵² See generally ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* (1984) (chronicling the life and times of “the best known and most conspicuous advocate of women's rights in the nineteenth century”).

³⁵³ See Carolyn S. Bratt, Introduction, *The Sesquicentennial of the 1848 Seneca Falls Women's Rights Convention: American Women's Unfinished Quest for Legal, Economic, Political, and Social Equality*, 84 *KY. L.J.* 715, 716 (1995-1996) (noting that “[i]t took seventy-two years to secure the vote for women, and only one woman who attended the Seneca Falls Convention lived to vote under the nineteenth amendment”).