

Criminalizing Substance Abuse and Undermining Roe v. Wade: The Tension Between Abortion Doctrine and the Criminalization of Prenatal Substance Abuse

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CRIMINALIZING SUBSTANCE ABUSE AND UNDERMINING
ROE V. WADE: THE TENSION BETWEEN ABORTION
DOCTRINE AND THE CRIMINALIZATION OF PRENATAL
SUBSTANCE ABUSE

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This Article argues that prosecuting a woman carrying a fetus that has not reached viability for prenatal substance abuse infringes on that woman's constitutional right to have an abortion. Although other scholars have criticized prenatal substance abuse prosecutions based on various constitutional and public policy arguments, the tension between prenatal substance abuse prosecutions and the Supreme Court's abortion doctrine has not been adequately examined. I argue that prosecuting women for the crime of prenatal substance abuse punishes women for not exercising their right to an abortion and could even incentivize some women to obtain abortions in order to avoid criminal prosecution. I also examine the science underlying abortion doctrine, fetal health, and substance abuse which reveals that (1) the right to abort the fetus is the most unfettered when the possibility of harm to the fetus is also the greatest, which is during the first trimester and (2) although the fetus is vulnerable to harm from both illegal and legal substances, especially during the first trimester, a causative link between prenatal substance abuse and fetal or infant harm is often difficult to establish.

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INTRODUCTION

In the summer of 2015, an Alabama woman was arrested for prenatal substance abuse under the state's chemical endangerment statute.¹ This woman, referred to in federal court documents as "Jane Doe," was in her first trimester of pregnancy and sought an abortion during her pre-trial detention.² The county sheriff asserted that Doe needed a court order in order to obtain an abortion while in jail.³ As a result, Doe sued the sheriff in federal court for infringing on her constitutional right to an abortion.⁴ Later, the district attorney explained in a media interview that local officials opposed her abortion request because they were "morally" opposed abortion and because Doe's action could be an attempt to evade responsibility for the crime.⁵ If Jane Doe was able to obtain an abortion, then there would be no prenatal substance abuse to prosecute.

1. Nina Martin, *Alabama's Meth Lab Law, Abortion Rights and the Strange Case of Jane Doe*, PROPUBLICA (July 31, 2015, 1:00 PM), <http://www.propublica.org/article/alabamas-meth-lab-law-abortion-rights-and-the-strange-case-of-jane-doe> [http://perma.cc/4HVS8REJ].

2. Compl. at 2, *Doe v. Singleton*, No. 3:15-cv-01215 (N.D. Ala. July 20, 2015).

3. *Id.* at 4.

4. *Id.* at 1.

5. Notice of Filing Suppl. Evid. at 1, *Doe v. Singleton*, No. 3:15-cv-01215-AKK (N.D. Ala. July 29, 2015) (including a newspaper article that quoted the Lauderdale County District Attorney who stated, "[N]ot only do we oppose [the abortion request] morally, but based on the nature of the charge she is facing, which is chemical endangerment of a child It is the policy of the state of Alabama to protect all life—born or unborn.").

This case invites a new approach to a question that legal scholars have struggled with in recent years: should women who violate laws prohibiting the use of illicit substances face additional criminal charges because they are pregnant? Most states answer this question in the negative by not prosecuting women for prenatal substance abuse.⁶ However, Alabama, South Carolina, and, until recently, Tennessee prosecute women for prenatal substance abuse using child abuse, child endangerment, and assault statutes.⁷ Many scholars

6. Judy Peres, *A Setback For Fetal Rights In Wisconsin Alcohol Case: Pregnant Woman Who Drank Too Much Can't Be Prosecuted*, CHICAGO TRIBUNE (May 27, 1999), http://articles.chicagotribune.com/1999-05-27/news/9905270079_1_deborah-zimmerman-cornelia-whitner-appellate-court [<http://perma.cc/8NDYE2ME>]. At least 10 states have prosecuted women for prenatal substance abuse, ultimately to have those convictions overturned by the highest appellate court in the state. See *State v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991); see also *N.J. Dep't of Children & Families v. A.L.*, 59 A.3d 576, 580–81 (2013); see also C. Antoinette Clarke, *FINS, PINS, CHIPS, & CHINS: A Reasoned Approach to the Problem of Drug Use During Pregnancy*, 29 SETON HALL L. REV. 634, 653–54 (1998) (discussing *State v. Morabito*, 580 N.Y.S.2d 843 (N.Y. Civ. Ct. 1992)); see also *id.* at 652–53 (discussing *State v. Luster*, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992)); see also Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is not the Answer—A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389, 407–08 (2009) (discussing prosecutions for prenatal substance abuse in Wyoming and Maryland); see also Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 808 (2014) (discussing Rennie Gibbs' prosecution and noting, "Gibbs's prosecution, which began in 2006, continued until early April 2014 when a judge dismissed the case. Mississippi prosecutors threaten to retry the case. If convicted of depraved heart murder for birthing a stillborn baby [after using cocaine during her pregnancy], Rennie Gibbs will face a mandatory life sentence."); see also Matthew Derringer, Note, *If Addiction is a Mental Disease, Let's Start Treating It Like One: An Additional Recommendation for the Indiana General Assembly's Prenatal Substance Abuse Commission*, 8 IND. HEALTH L. REV. 141, 144 (2011) (discussing the 2005 case of Tayshea Aiwahi whose conviction for manslaughter "partly due to her admission to smoking crystal methamphetamine for four days up to and including the day she gave birth to [her child]" was overturned by the Supreme Court of Hawaii which held that "a fetus is not within the statutory definition of 'person' for the purposes of a manslaughter charge in Hawai'i."); see also Grace Lykins, Note, *Prohibition During Pregnancy: Supporting Mandatory Outpatient Rehabilitation for Women Who Give Birth to Babies With Fetal Alcohol Syndrome*, 21 J. L. & POLY 155, 165–66 (2012) (explaining that "[i]n 2009, the Supreme Court of North Dakota held that an unborn child is not defined as a 'child' under state statutes pertaining to the crime of endangerment of a child."); see also Peres, *supra* (stating that "[i]n a legal battle that pitted the rights of pregnant women against those of their unborn children, a Wisconsin appellate court ruled Wednesday that a woman who drank herself into a stupor in her ninth month of pregnancy cannot be charged with attempted murder of her fetus.").

7. See discussion of Alabama, Tennessee, and South Carolina statutes criminalizing prenatal substance abuse *infra* Part I. See also COMMISSIONER BILL GIBBONS, TENNESSEE DEP'T OF SAFETY & HOMELAND SEC., SUMMARY REPORT: SURVEY OF DISTRICT ATTORNEYS GENERAL ON PUBLIC CHAPTER 820, 2 (Apr. 10, 2015), <https://www.documentcloud.org/documents/1873320-survey-of-district-attorneys-general.html> (reporting that, in Tennessee, at least 28 women have been prosecuted for prenatal substance abuse under a new law enacted in April 2014); see also *How We Identified Alabama Pregnancy Prosecutions*, PROPUBLICA (Sept. 23, 2015, 5:00 AM), <https://www.propublica.org/article/how-we-identified>

have argued that women should not face additional charges for the use of illegal substances during their pregnancies.⁸ In this Article, I offer a different angle of critique: the conflict between a woman's constitutional right to have an abortion and prosecutions of women for prenatal substance abuse. Based on Supreme Court precedent in *Roe v. Wade* and *Planned Parenthood v. Casey*, this Article differentiates between prosecuting a prenatal substance abuser (1) when she is pregnant but the fetus is not viable; (2) when she is pregnant and the fetus is viable; and (3) after she gives birth to a child. While scenarios (2) and (3) may be questioned as a matter of public policy, under abortion doctrine, they are not constitutionally impermissible.⁹ But scenario (1), the prosecution of a woman for harm to a fetus when she is constitutionally entitled to abort the fetus, should be held to violate that woman's constitutional right to have an abortion.

This Article proceeds as follows. Part I discusses the different approaches that Alabama, Tennessee, and South Carolina have recently used to prosecute prenatal substance abuse. Alabama prosecutes women for prenatal substance abuse regardless of whether the fetus is viable; South Carolina prosecutes women for prenatal substance abuse after the fetus is viable; and from 2014 to 2016, Tennessee prosecuted women for prenatal substance abuse only after a child was born.¹⁰ Part II focuses on relevant Supreme Court

-alabama-pregnancy-prosecutions [http://perma.cc/6H4SHSXE] (observing that, in Alabama, at least 479 women have been prosecuted for prenatal substance abuse between 2006 and 2015); see also NAT'L ADVOCATES FOR PREGNANT WOMEN, *South Carolina: Leading the Nation in the Prosecution and Punishment of Pregnant Women* (July 17, 2006), http://advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/south_carolina_leading_the_nation_in_the_prosecution_punishment.php [http://perma.cc/35H8R8S5] (noting that in South Carolina, between 1989 and 2006, at least 80 women were arrested for prenatal substance abuse).

8. The legal literature on prenatal substance abuse prosecutions tends to fall within three categories: equal protection claims, due process and privacy claims (without differentiating between the timing of the prosecution), and cruel and unusual punishment claims related to the criminalization of addiction. For an overview of the approaches to analyzing prenatal substance abuse prosecutions, see, e.g., George Bundy Smith & Gloria M. Dabiri, *Prenatal Drug Exposure: The Constitutional Implications of Three Governmental Approaches*, 2 SETON HALL CONST. L.J. 53, 59 (1991). See also Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 508 (1990). For a discussion of Equal Protection claims, see, e.g., Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1450–55 (1991). For a discussion of due process claims, privacy claims, and equal protection issues, see, e.g., Goodwin, *supra* note 6, at 856–58. For a discussion of Eighth Amendment issues, see, e.g., Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 253–54 (2011).

9. See *infra* Part II.A (regarding the constitutional right to abortion before viability, *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

10. See *infra* Part I.

abortion precedent and explains why prosecutions for prenatal substance abuse before a fetus is viable are unconstitutional.¹¹ Part II also provides more information on the Article's opening vignette, which shows that prosecuting women for prenatal substance abuse can be a part of governmental efforts to stymie a woman's attempts to obtain an abortion. Part III draws on medical and legal literature to present the latest scientific information on fetal harm, fetal development, addiction, pregnancy, and viability. The scientific literature indicates that the fetus is most vulnerable to the harmful effects of exposure to alcohol or illegal drugs such as physical, emotional, and developmental problems during the first trimester, which is also when a woman's right to an abortion is the strongest.¹² This literature also indicates that a predictable, causal link between prenatal substance abuse and post-viability fetal harm is often missing.

I. CONTEMPORARY STATE PROSECUTIONS FOR PRENATAL SUBSTANCE ABUSE

Tennessee, Alabama, and South Carolina have most recently prosecuted women for prenatal substance abuse—unlike most states.¹³ Historically, states have not enacted laws that directly criminalize a mother's prenatal substance abuse.¹⁴ Instead, prosecutors have historically applied criminal laws such as those addressing child endangerment, child abuse, child neglect, drug distribution and delivery, and assaultive offenses including homicide.¹⁵ In the same

11. See *Robinson v. California*, 370 U.S. 660, 666–68 (1962) (holding a California statute unconstitutional for punishing one's status as a drug user); see also *Roe v. Wade*, 410 U.S. 113, 163 (1973), *overruled in part* by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

12. See *infra* Part III.A.1 (discussing first trimester substance abuse); see also *infra* Part II (discussing *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

13. See Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES (Apr. 25, 2012), http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?_r=0 [<http://perma.cc/RJ68JY2M>] (discussing Alabama's prosecution for prenatal substance abuse while most states consider it a matter for child protective services); see also Stephanie Chen, *Pregnant and addicted, mothers in South Carolina find hope*, CNN (Oct. 27, 2009, 11:18 AM), <http://www.cnn.com/2009/LIVING/10/23/south.carolina.pregnant.addicts/index.html?iref=nextin> [<http://perma.cc/5TM5ZSKQ>] (stating that the South Carolina Supreme Court has upheld the state's decision to prosecute pregnant women for prenatal substance abuse); see also Nina Liss-Schultz, *Tennessee's War on Women is Sending New Mothers to Jail*, MOTHER JONES (Mar. 14, 2016, 6:00 AM), <http://www.motherjones.com/politics/2016/03/tennessee-drug-use-pregnancy-fetal-assault-murder-jail-prison-prosecution> [<http://perma.cc/A9AFCQH4>].

14. Mohapatra, *supra* note 8, at 248.

15. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 351–52 (2014); see Joanne E. Brosh & Monica K. Miller, *Regulating Pregnancy Behaviors: How the Constitutional Rights of Minority Women Are*

way, Alabama uses a “chemical endangerment” statute to prosecute prenatal substance abuse, South Carolina uses the state’s child abuse statute to prosecute prenatal substance abuse, and Tennessee used an amendment to the state’s assault statute to prosecute prenatal substance abuse from 2014 to 2016.¹⁶

While the issue of the legal treatment of prenatal substance abuse has drawn more media and academic attention recently due to the large number of prosecutions, the issue is not new.¹⁷ Additionally, contemporary prosecutions, with the exception of three cases in Alabama and three in South Carolina, generally do not result in U.S. Supreme Court decisions or any sort of state appellate record.¹⁸ Most of these cases are resolved through guilty pleas, which reduces the availability of judicial records or insights into the factors that influenced judges’ decisions to sentence women to often substantial prison terms.¹⁹

From July 1, 2014, until July 1, 2016, when the statute expired, Tennessee prosecuted women for prenatal substance abuse through an amendment to the state’s criminal assault statute which encompassed

Disproportionately Compromised, 16 AM. U. J. GENDER SOC. POLY & L. 437, 441–42 (2008); see also CHILD WELFARE INFORMATION GATEWAY, *Parental Drug Abuse as Child Abuse*, U.S. DEP’T OF HEALTH & HUM. SERV. 2, 4–5 (2016), https://www.childwelfare.gov/pubPDFs/drug_exposed.pdf (reviewing state statutes in order to identify and quote state statutes addressing parental drug use as child abuse, including state statutes that specifically identify prenatal substance abuse as evidence of child abuse, child endangerment, or neglect depending on the legal term used in the state).

16. See CHILD WELFARE INFORMATION GATEWAY, *supra* note 15, at 2, 4, 26; see also Ari Shapiro, *Tenn. Law Targets Pregnant Women Who are Drug Addicts*, NPR (Nov. 18, 2015, 5:32 AM), <http://www.npr.org/2015/11/18/456459420/tenn-law-targets-pregnant-women-who-are-drug-addicts> [<http://perma.cc/48EBSN4J>].

17. See *infra* Part II (discussing *Ferguson v. City of Charleston*, 532 U.S. 67 (2000)); see also *State v. Hardy*, 469 N.W.2d 50, 55–56 (Mich. Ct. App. 1991); see also N.J. Dep’t of Children & Families v. A.L., 59 A.3d 576, 587–88 (2013); see also Clarke, *supra* note 6, at 636; see also Fentiman, *supra* note 6, at 398–99; see also Goodwin, *supra* note 6, at 784–85; see also Derringer, *supra* note 6, at 147–48; see also Lykins, *supra* note 6, at 165–66; see also Peres, *supra* note 6.

18. See *ex parte Hicks*, 153 So.3d 53, 54 (Ala. 2014) (showing that the Alabama Supreme Court ruled that the state’s chemical-endangerment statute applied to all children, including fetuses); see also *ex parte Ankrom*, 152 So.3d 397, 404 (Ala. 2013) (holding that the chemical-endangerment statute applied to unborn children); see also NAT’L ADVOCATES FOR PREGNANT WOMEN, *Whitner v. South Carolina Fact Sheet*, <http://advocatesforpregnantwomen.org/issues/whitner.htm> [<http://perma.cc/3DVE7832>] (indicating that the South Carolina Supreme Court is willing to uphold convictions of pregnant women that harm viable fetuses through prenatal substance abuse); see also Peres, *supra* note 6 (stating that the United States Supreme Court has yet to rule on issues involving prenatal substance abuse).

19. *State v. McKnight*, 576 S.E.2d 168, 171 (Ala. 2003) (stating that “[a]t the second trial [adjudicating the legality of her cocaine ingestion during pregnancy] held May 14–16, 2001, the jury returned a guilty verdict. McKnight was sentenced to twenty years, suspended to service of twelve years.”); see *infra* Parts I.A–I.C.

harm to a newborn child who was prenatally exposed to narcotics.²⁰ In Tennessee, the statute addressing prenatal substance abuse was limited to illegal narcotic usage whereas Alabama's chemical endangerment statute applies, as established through case law, to prenatal substance abuse of all illicit substances.²¹ In the same way, South Carolina uses its child abuse and endangerment statute to prosecute the use of illegal substances after the fetus is viable.²²

A. Alabama

Alabama prosecutes women for prenatal substance abuse regardless of whether a fetus is viable.²³ Alabama was recently labeled as the “national capital for prosecuting women on behalf of their newborn children.”²⁴ This description stemmed from the number of women that Alabama has prosecuted for prenatal substance abuse between 2006 and late July of 2015: at least 479.²⁵ Of those prosecutions, 24% of cases involved marijuana, 22% involved cocaine, 18% of cases methamphetamine, 14% opiates, 8% amphetamine, 6% benzodiazepine, 3% methadone, and 5% “all other” drugs.²⁶ The prosecution is so zealous that, in one instance, the district attorney had to drop a prosecution for prenatal substance abuse after it was confirmed that the defendant was not even pregnant.²⁷

Alabama prosecutes women for prenatal substance abuse using its “chemical-endangerment statute.”²⁸ The original intent of the

20. Joel Ebert, *Tennessee law that punishes mothers of drug-dependent babies to end*, THE TENNESSEAN (Mar. 23, 2016, 12:40 PM), <http://www.tennessean.com/story/news/politics/2016/03/22/tennessee-law-punishes-mothers-drug-dependent-babies-end/82141832> [<http://perma.cc/PQ58NGQE>]; Tony Gonzalez, *Tennessee will criminalize moms who use drugs while pregnant*, THE TENNESSEAN (Apr. 30, 2014, 11:34 AM), <http://www.tennessean.com/story/news/politics/2014/04/29/tn-will-criminalize-moms-using-drugs-pregnant/8473333> [<http://perma.cc/2D2SQA4L>].

21. See *infra* Parts I.A, I.B.

22. See *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997) (“This case concerns the scope of the child abuse and endangerment statute in the South Carolina Children’s Code (the Code), S.C. Code Ann. § 20-7-50 (1985). We hold the word ‘child’ as used in that statute includes viable fetuses.”).

23. Goodwin, *supra* note 6, at 788.

24. Calhoun, *supra* note 13.

25. See also *How We Identified Alabama Pregnancy Prosecutions*, *supra* note 7.

26. *Id.*

27. Nina Martin & Amy Yurkanin, *Special Report: Alabama Leads the Nation in Turning Pregnant Women into Felons*, AL.COM (Sept. 23, 2015, 5:00 AM), http://www.al.com/news/index.ssf/2015/09/when_the_womb_is_a_crime_scene.html [<http://perma.cc/7JCANQDU>].

28. See ALA. CODE § 26-15-3.2 (Westlaw through 2016 Legis. Sess.). The statute’s title is “Chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed;” however, the Alabama Supreme Court refers

2006 statute, according to many commentators and lawyers, was to protect children from harmful environments such as methamphetamine labs.²⁹ The statute reads, in relevant part,

- (a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:
 - (1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260. A violation under this subdivision is a Class C felony.
 - (2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.
 - (3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.³⁰

While the chemical endangerment statute does not mention pregnant women, fetuses, or wombs, it is used to prosecute prenatal substance abuse.³¹ In Alabama, women are charged with crimes of varying felony classifications based on the extent to which the fetus was harmed (e.g., Class A, Class B, Class C); however, harm ranges from any exposure (as would be evidenced by a positive drug test and a Class C Felony) to death as a result of prenatal substance abuse (Class A).³²

to it as the “chemical endangerment statute.” See *Ex Parte Ankrom*, 152 So.3d 397, 401 (Ala. 2013).

29. Calhoun, *supra* note 13. While some refer to the “intent” of the statute, the state of Alabama does not have legislative history material available in the same way as the United States Congress, for example. See also Alabama Court of Criminal Appeals, Tape #561, CR-09-1148, June 21, 2011, Recording of Oral Argument in *Ex parte Ankrom*.

30. ALA. CODE § 26-15-3.2 (Westlaw through 2016 Legis. Sess.); see, e.g., Martin, *supra* note 1 (stating that “[t]he statute took effect at the height of the methamphetamine panic of the mid-2000s. The intent was to protect children living in homes that had become dangerous drug factories, state Rep. Patricia Todd, a Democrat from Birmingham, noted in an amicus brief in 2012.”).

31. See *infra* Part II.B (discussing *Ex parte Ankrom*, 152 So. 3d 397, 403 (Ala. 2013)).

32. See ALA. CODE § 26-15-3.2 (Westlaw through 2016 Legis. Sess.); see also *infra* Part II.B (discussing prosecution of Amanda Kimbrough whose child died shortly after birth) (explaining that, while Kimbrough was originally charged with a Class B Felony, an autopsy after the death of her child showed that his death resulted from acute methamphetamine intoxication, and Kimbrough pled guilty to Class A Chemical Endangerment).

Although prenatal substance abuse prosecutions using the chemical endangerment statute have been occurring since 2006, it was not until 2013 that the Alabama Supreme Court affirmed that the chemical endangerment statute applied to “unborn children.”³³ There are only three identified cases in which pregnant women charged with chemical endangerment of a child for prenatal substance abuse have gone to trial; the remaining chemical endangerment cases have been resolved through guilty pleas or dismissals.³⁴

In May of 2016, the Alabama General Assembly amended the chemical endangerment statute to include an affirmative defense to prosecution.³⁵ The chemical endangerment statute now has an additional provision:

- (c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.³⁶

Thus, women were prosecuted under the statute for approximately ten years, without access to an affirmative defense.

B. Tennessee

From July 1, 2014 until July 1, 2016, Tennessee also prosecuted women for prenatal substance abuse as assault although the prosecutions in Tennessee only targeted women who used narcotics while

33. See *infra* Part II.B (discussing *Ex Parte Ankrom*, 152 So. 3d 397, 403 (Ala. 2013)).

34. See Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA/AL.COM (Sept. 23, 2015), <http://www.propublica.org/article/when-the-womb-is-a-crime-scene> [<http://perma.cc/XE7ABB6F>]; see also Nina Martin, *This Law is Supposed to Protect Babies: But It's Putting Their Moms Behind Bars*, MOTHER JONES (Sept. 23, 2015, 6:00 AM), <http://www.motherjones.com/politics/2015/09/alabama-chemical-endangerment-drug-war> [<http://perma.cc/T76PTTL5>]. The three identified defendants' cases were also appealed multiple times and ultimately resolved by the Alabama Supreme Court. See *Ex parte Hicks*, 153 So.3d 53 (Ala. 2014); see also *Ex parte Ankrom*, 152 So. 3d at 404 (addressing Amanda Kimbrough and Hope Ankrom). The word “identified” is used because, in Alabama, chemical endangerment cases are sealed under Rule 52 as they involve “a victim of child abuse.” See Ala. R. App. Proc., Rule 52. A state brief in a fourth case, *State v. Ward*, was used in *Ex parte Ankrom* as an Exhibit by the State of Alabama; however, the whole history of the case is not available on Westlaw.

35. See Nina Martin, *Alabama Lawmakers Limit Drug Prosecutions in Pregnancy*, PROPUBLICA (May 4, 2016, 1:02 PM), <https://www.propublica.org/article/alabama-law-makers-limit-drug-prosecutions-in-pregnancy> [<http://perma.cc/BB262RDF>]; see also ALA. CODE § 26-15-3.2 (Westlaw through 2016 Legis. Sess.).

36. See ALA. CODE § 26-15-3.2 (Westlaw through 2016 Legis. Sess.).

pregnant.³⁷ The two-year duration of the state's prosecutions of women for prenatal substance abuse as assault existed because the law used for these prosecutions was enacted in 2014 and had a sunset provision of July 1, 2016.³⁸ Because of its targeted approach to the public health issue underlying prenatal substance abuse prosecutions, neonatal abstinence syndrome, Tennessee has been labeled as a "forward-leaning state."³⁹ Neonatal abstinence syndrome can adversely impact babies born to drug-addicted mothers.⁴⁰ The Tennessee Department of Health observed "a nearly ten-fold rise in the incidence of babies born with [neonatal abstinence syndrome] in Tennessee" from 2004 to 2014.⁴¹

In 2014, Tennessee enacted legislation, commonly referred to as "Public Chapter 820," to make it clear that the state's law on assault applied to prenatal substance abuse.⁴² According to the Governor of Tennessee, "[t]he intent of [the legislation] was to give law enforcement and district attorneys a tool to address illicit drug use among pregnant women through treatment programs."⁴³ Specifically, the 2014 legislation added provisions (c)(2) and (c)(3) to the section of Tennessee law explaining who can be a victim under Tennessee criminal law.⁴⁴ The new legislation stated:

(c)(1) Nothing in subsection (a) shall apply to any lawful act or lawful omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant, or to any lawful medical or surgical procedure to which a pregnant woman consents, performed by a health care professional who is licensed to perform such procedure.

37. See Ebert, *supra* note 20; see also Gonzalez, *supra* note 20.

38. Ebert, *supra* note 20; Gonzalez, *supra* note 20.

39. Tony Gonzalez & Shelley DuBois, *Tennessee Faces Epidemic of Drug-Dependent Babies*, THE TENNESSEAN (June 13, 2014), <http://www.tennessean.com/story/news/investigations/2014/06/13/drug-dependent-babies-challenge-doctors-politicians/10112813> [<http://perma.cc/E6KXJU7N>] ("When you talk about forward-leaning states that are looking at NAS, you always hear Tennessee, Tennessee, Tennessee," Botticelli said.) Michael Botticelli is the Director of the National Drug Control Policy at the White House.)

40. *Neonatal Abstinence Syndrome*, TENN. DEP'T OF HEALTH, <http://tn.gov/health/topic/nas#sthash.JwTKk9AW.dpuf> [<http://perma.cc/X2GXVM8Z>].

41. *Id.*

42. S. 1391, Gen. Assemb. (Tenn. 2014), <http://www.tn.gov/sos/acts/108/pub/pc0820.pdf>; see, e.g., *Neonatal Abstinence Syndrome (NAS): Frequently Asked Questions*, TENN. DEP'T OF HEALTH, http://tn.gov/assets/entities/health/attachments/NAS_FAQ.pdf.

43. Gonzalez, *supra* note 20.

44. Compare TENN. CODE ANN. § 39-13-107 (Westlaw through 2016 Legis. Sess.), with TENN. CODE ANN. § 39-13-214 (Westlaw through 2016 Legis. Sess.). See also accompanying notes from the Tennessee Sentencing Commission on Annotated West Version of § 39-13-107 ("This section represents a major change in Tennessee law. See [Tenn. Code Ann.] § 39-13-214.").

(2) Notwithstanding subdivision (c)(1), nothing in this section shall preclude prosecution of a woman for assault under § 39-13-101 for the illegal use of a narcotic drug, as defined in § 39-17-402, while pregnant, if her child is born addicted to or harmed by the narcotic drug and the addiction or harm is a result of her illegal use of a narcotic drug taken while pregnant.

(3) It is an affirmative defense to a prosecution permitted by subdivision (c)(2) that the woman actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program, regardless of whether the child was born addicted to or harmed by the narcotic drug.⁴⁵

Public Chapter 820 is newer than the Alabama chemical endangerment statute.⁴⁶ It was facially apparent that the Tennessee statute applied to pregnant women who were illegally using narcotics whereas the Alabama “chemical endangerment” statute does not clearly apply to prenatal substance abuse, an issue that defense attorneys have raised unsuccessfully before the Alabama Supreme Court.⁴⁷ Additionally, the Tennessee statute contained an affirmative defense when the statute was enacted as opposed to the Alabama statute, which was not amended until ten years after its initial enactment to include an affirmative defense.⁴⁸

In Tennessee, the plain language of the statute indicated that “addiction” or “harm” was required, although the word “harm” was not defined.⁴⁹ Additionally, prosecutions in Tennessee for prenatal substance abuse could only occur after the birth of a child: if no child was born, then the statute could not apply, unlike in Alabama where the

45. TENN. CODE ANN. § 39-13-107.

46. Compare S. 1391, Gen. Assemb. (Tenn. 2014), <http://www.tn.gov/sos/acts/108/pub/pc0820.pdf> (stating that the bill passed April 9, 2014), with ALA. CODE § 26-15-3.2 (Westlaw through 2016 Legis. Sess.) (indicating that the law was enacted in 2006).

47. TENN. CODE ANN. § 39-13-107 (Westlaw through 2016 Legis. Sess.) (indicating that pregnant women can be prosecuted for illegal drug use if the child becomes addicted to or harmed by the drug use). See *Ex parte Ankrom*, 152 So. 3d 397, 411 (Ala. 2013) (holding that the chemical endangerment statute applied to fetuses even though the statute didn't expressly say so); see also Tony Gonzalez, *Remedies Differ on Dealing with Addicted Babies*, THE TENNESSEAN (Mar. 11, 2013), 2013 WLNR 6286732 (“During the debate, some lawmakers questioned why Yager’s bill targets only prescription drugs. He responded that he wanted to begin by targeting a small population. A law that is too broad, he said, could make so many pregnant mothers eligible that preventive treatment costs would sink the effort altogether. ‘We’ve got to give people an incentive to get cleaned up,’ Yager said later. ‘The pain pill epidemic in this state is so widespread, there’s no one simple solution to it.’”).

48. TENN. CODE ANN. § 39-13-107 (Westlaw through 2016 Legis. Sess.) (creating an affirmative defense against prosecution); see Martin, *supra* note 35 (stating that if passed, the bill would create a defense 10 years after the law’s initial passage).

49. TENN. CODE ANN. § 39-13-107.

chemical endangerment statute applied to all pregnant women with no regard for their constitutional rights before a fetus was viable.⁵⁰

In addition to only applying to children *ex utero*, Tennessee's approach to addressing prenatal substance abuse with criminalization was accompanied by an examination of the efficacy of such an approach. Unlike other states, when signing the bill into law, Tennessee's governor specifically expressed a desire for more information on the effectiveness of the law as it related to substance abuse treatment for pregnant women.⁵¹ This effectiveness inquiry corresponded with a two year "sunset provision."⁵² In January 2015, the Tennessee Department of Safety and Homeland Security sent a survey related to Public Chapter 820 to all thirty-one of the attorneys general in the state.⁵³ Twenty-seven of the thirty-one state attorneys general responded to the survey.⁵⁴ When asked "Do you think Public Chapter 820 is helpful in preventing more babies from being born with drug dependency issues (Neonatal Abstinence Syndrome)?" seventeen of the twenty-seven responding attorneys general replied "Yes," seven replied "No," and three did not respond to the question.⁵⁵ The results of the survey revealed that only ten of the thirty-one Tennessee judicial districts used the law in the survey period of April 24, 2014 to December 31, 2014 to prosecute prenatal substance abusers.⁵⁶ This resulted in a total of between twenty-eight and thirty cases which were initiated for prosecution as of December 31, 2014.⁵⁷ Comparatively, even if Tennessee had continued to prosecute women at this rate for ten years, fewer women would have been prosecuted under the Tennessee statute than the Alabama chemical endangerment statute.⁵⁸

C. South Carolina

South Carolina specifically targets prenatal substance abuse affecting viable fetuses through its child abuse and endangerment

50. Compare Liss-Shultz, *supra* note 13, with Goodwin, *supra* note 6, at 788.

51. See Gibbons, *supra* note 7, at 2 (cited to and discussed by Tony Gonzalez, *Prosecutor Surveys Critique Pregnancy Criminalization*, THE TENNESSEAN (Apr. 19, 2015, 1:06 PM), <http://www.tennessean.com/story/news/crime/2015/04/19/prosecutor-surveys-critique-pregnancy-criminalization/26013395> [<http://perma.cc/G8KESYNW>]).

52. Gonzalez, *supra* note 20; accord S. 1391 Gen. Assemb. (Tenn. 2014), <http://www.tn.gov/sos/acts/108/pub/pc0820.pdf>.

53. See Gibbons, *supra* note 7, at 2.

54. *Id.*

55. *Id.* at 4.

56. *Id.* at 2.

57. *Id.* (The response states, "Twenty-eight cases had been initiated for prosecutions as of December 31, 2014 (plus two additional 2015 cases).")

58. See Martin & Yurkanin, *supra* note 27 (citing 479 prosecutions in Alabama from 2005–2015).

statute.⁵⁹ Between 1989 and 2006, at least eighty women were arrested for prenatal substance abuse in South Carolina.⁶⁰ Media coverage documenting interviews with prosecutors and health care providers indicates that, while South Carolina still prosecutes women for prenatal substance abuse, the prevalence of those prosecutions has decreased significantly from the 1990s.⁶¹ A Charleston County Hospital's scheme for identifying prenatal substance abusers and then providing this evidence to law enforcement was rejected by the U.S. Supreme Court in *Ferguson v. City of Charleston*; this case combined with a number of state criminal cases gives South Carolina the most comprehensive legal history of the states analyzed in this Article.⁶² A number of the prosecutions of women for prenatal substance abuse that are commonly analyzed in the legal literature, namely those at issue in *Ferguson v. City of Charleston*, *Whitner v. South Carolina*, and *State v. McKnight*, occurred in South Carolina.⁶³

Unlike the aforementioned statutes used by Tennessee and Alabama to prosecute prenatal substance abuse, the statute used by South Carolina does not mention narcotics or controlled substances:

- (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
 - (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
 - (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
 - (3) willfully abandon the child.

59. See *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997) ("This case concerns the scope of the child abuse and endangerment statute in the South Carolina Children's Code (the Code), S.C. Code Ann. § 20-7-50 (1985). We hold the word 'child' as used in that statute includes viable fetuses." (citation omitted)).

60. See NAT'L ADVOCATES FOR PREGNANT WOMEN, *supra* note 7.

61. See Chen, *supra* note 13 (explaining that since 1989 other states are less likely to bring charges and most courts are eager to dismiss the cases); see also U.S. DEP'T OF HEALTH & HUM. SERV., *Substance Exposed Infants: State Responses to the Problem*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. 1, 34 (2009), <https://www.ncsacw.samhsa.gov/files/Substance-Exposed-Infants.pdf> (stating that South Carolina has sentenced ten women under the infant exposure laws and none of those were recent).

62. *Ferguson v. City of Charleston*, 532 U.S. 67, 76–78 (2001).

63. See, e.g., Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DEPAUL J. HEALTH CARE L. 369, 390 (2005) (referring to *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)).

- (B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.⁶⁴

Similar to the resolutions of prenatal substance abuse prosecutions in Alabama and Tennessee, most of the cases in South Carolina are resolved through pleas.⁶⁵

II. APPLYING SUPREME COURT PRECEDENT TO PRENATAL SUBSTANCE ABUSE PROSECUTIONS: *ROE V. WADE*, *PLANNED PARENTHOOD V. CASEY*, AND VIABILITY

This Article argues that the timing of prenatal substance abuse prosecutions as it relates to the viability or non-viability of a fetus is critical to determining whether a prenatal substance abuse prosecution is constitutional. Prenatal substance abuse prosecutions are often categorized as “attacks on reproductive liberty” regardless of the gestational age of the fetus when the illegal substance was ingested.⁶⁶ Laws criminalizing prenatal substance abuse are classified as “fetal protection laws,” which are laws that are part of a larger effort to establish fetuses as “legal” persons and to overturn *Roe v. Wade*.⁶⁷ This Article adds to the scholarship on fetal protection laws by focusing on three case studies and the tension between abortion law and the application of fetal protection laws.

A. *The Viability Framework and Prenatal Substance Abuse Prosecutions*

The constitutional right to an abortion exists before a fetus is viable, therefore, prosecutions of women for prenatal substance abuse

64. S.C. CODE ANN. § 63-5-70 (Westlaw through 2016 Legis. Sess.)

65. A Westlaw search for prosecutions of pregnant women under South Carolina statute, S.C. CODE ANN. § 63-5-70 (2015), reveals one case other than *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) which was a family court case and not a criminal case. News accounts indicate that prenatal substance abusers continue to plead guilty. See, e.g., ASSOCIATED PRESS, *Crack-Using Woman Admits Guilt in the Death of Her Fetus*, N.Y. TIMES (Dec. 3, 1997), <http://www.nytimes.com/1997/12/03/us/crack-using-woman-admits-guilt-in-the-death-of-her-fetus.html> [<http://perma.cc/JE8YZEDT>]; Chen, *supra* note 13 (“Others made a plea bargain with the courts, allowing them one last chance at treatment to avoid prison.”).

66. See Goodwin, *supra* note 6, at 784–85, 788, 856 (citing to Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991), Anita Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987), and Michelle Oberman, *Mothers and Doctors’ Orders: Unmasking the Doctor’s Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 453, 454 (1999–2000)).

67. See *id.* at 787.

before the fetus is viable violate that constitutional right. In 1973, the U.S. Supreme Court held in *Roe v. Wade* that women have a constitutional right to abortion.⁶⁸ In *Roe*, the Supreme Court “conclude[d] that the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation.”⁶⁹ The Court recognized:

[A]n important and legitimate [state] interest in preserving and protecting the health of the pregnant woman . . . and . . . *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each [of these state interests] grows in substantiality as the woman approaches term and . . . becomes “compelling” [when the fetus is viable].⁷⁰

The U.S. Supreme Court explained that a fetus is “viable” when it is “potentially able to live outside the mother’s womb, albeit with artificial aid.”⁷¹ The Court then discussed viability which, at that time, was “usually placed at about seven months (28 weeks) but [could] occur earlier, even at 24 weeks.”⁷² Later, the Court summarized its decision by explaining that the abortion right existed within the Due Process Clause of the Fourteenth Amendment and by asserting the well-known trimester framework:

68. *Roe v. Wade*, 410 U.S. 113, 166 (1973), *overruled in part* by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

69. *Id.* at 154.

70. *Id.* at 162–63.

71. *Id.* at 160.

72. *Id.* In 1992, the Court noted that the point at which viability occurred had changed but that this did not affect the central holding of *Roe*. See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992) (“We have seen how time has overtaken some of *Roe*’s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see *Akron I*, *supra*, 462 U.S., at 429, n. 11 . . . and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe*, 410 U.S., at 160 . . . with *Webster*, *supra*, 492 U.S., at 515–16 . . . (opinion of REHNQUIST, C.J.); see *Akron I*, 462 U.S. at 457, and n. 5 . . . (O’CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*’s central holding, that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*’s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.”).

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.⁷³

The trimester framework of *Roe* was also ultimately rejected by the Court in *Planned Parenthood v. Casey*, after much debate and litigation related to the right to abortion.⁷⁴ In spite of the abandonment of the trimester framework, the Supreme Court reaffirmed the central holding of *Roe*: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."⁷⁵ Therefore, following that rule of law, a woman's right to terminate her pregnancy before viability means that she should not be punished for *not* exercising that right and terminating her pregnancy before viability. Prosecuting prenatal substance abusers for abuse that occurs before the fetus is viable undermines the Supreme Court's abortion precedent. To prosecute women for prenatal substance abuse before the fetus is viable, which is when their right to terminate the pregnancy is the most unfettered, punishes these women for not exercising their right to an abortion.

Even though the state's interest in "potential life," which is the fetus that ultimately becomes a child, can be severely damaged pre-viability, especially during the first trimester, the state's interest in potential life does not become "compelling" until the point of viability. Thus, while prenatal substance abuse before the fetus is viable, especially during the first trimester, potentially has the greatest adverse impacts on an infant, as indicated *infra* in Part III, the state's compelling interest in potential life is not an interest that allows the state to regulate women in order to produce the health or quality of life that the state desires for future potential life. "Under

73. *Roe*, 410 U.S. at 164–65.

74. *Planned Parenthood of Se. Pennsylvania*, 505 U.S. at 873 (emphasis added).

75. *Id.* at 871.

Roe [and *Casey*], non-viable fetuses have no rights superior to the women who carry them.”⁷⁶ Thus, while prenatal substance abuse may adversely impact the health of a future viable fetus or infant, the state cannot specifically subject pregnant women to criminal penalties due to their status as pregnant women in order to present a desired outcome. To do so would render a fetus’s rights superior to those of the women who carry them. Instead, applying the viability framework to prenatal substance abuse, the State can only legislate (and prosecute) to protect fetal rights during the time period in which its interests become “compelling:” post-viability. Doing so ensures the *status quo* in which fetal rights remain “inferior” to the rights of the women who carry them even though the exercise of those rights could affect the fetus’s quality of life after viability.

The state of Alabama has argued that women do not have a “right” to use illicit substances while pregnant which is accurate.⁷⁷ But, while abortion precedent does not provide women with the right to undertake any actions that they desire during pregnancy, regardless of the fetus’s viability, women should not become defendants by virtue of their actions while pregnant with a non-viable fetus. Otherwise, “[i]f the state is permitted to detain and confine pregnant women for the benefit of fetal health, women are reduced to nothing more than fetal containers whose rights and liberties are dependent upon their acquiescence to mothering rules dictated by the state.”⁷⁸ Prosecuting women for their actions while pregnant with a non-viable fetus also has the effect of incentivizing abortions before the fetus is viable, which was a criticism levied at Tennessee’s fetal assault bill before it expired in 2016.⁷⁹

76. Lorraine Schmall, *Addicted Pregnancy As A Sex Crime*, 13 N. ILL. U. L. REV. 263, 270 (1993).

77. State Response to Ankrom’s Motion to Dismiss the Indictment in the Circuit Court of Coffee County, Alabama, Enterprise Division. State’s Response to Defendant’s Motion to Dismiss Indictment, *Alabama v. Ankrom*, No. CC-09-395 (Oct. 9, 2009). Exhibit A to the State’s Response was the State’s Brief in another case involving the prosecution of a woman for prenatal substance abuse, *State v. Ward*. *Id.* at 3. (“The State of Alabama adopts all of the arguments made in the briefs attached to the instant brief, without reservation.”). *Id.* at Exhibit A, p. 36–37, Answer and Br. of Resp’t State of Alabama, *Ward v. Alabama* (Ala. Ct. Crim. App. 2008) (“She is being prosecuted for exposing her child to a controlled substance. The statute applies to any ‘responsible person,’ male or female The statute does not single out a child’s mother for prosecution while exempting other responsible persons who do the same Ward enjoyed the same right to use cocaine during her pregnancy that she enjoyed before her pregnancy and that she enjoys now: absolutely none. Thus . . . the statute does not impose any limitation on any privacy right that she or anyone else in this state, pregnant or not, possesses.”).

78. April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 196 (2007).

79. Ebert, *supra* note 20 (“Rep. Mike Stewart said he worried the unintended consequences of the law have resulted in people being discouraged from seeking drug

B. *The State of Alabama and Viability*

While constitutional jurisprudence focuses on the viability of fetuses, the Alabama Supreme Court ignores the viability framework in the context of prenatal substance abuse prosecutions. In 2013, the Alabama Supreme Court held that the term “child” in the text of the child endangerment statute applied to unborn children, without any distinction between viable and non-viable fetuses.⁸⁰ The Alabama Supreme Court cited the reasoning expressed by the Alabama Court of Criminal Appeals in *Ex parte Ankrom*, the preceding appellate case, and explained that “the plain meaning of the word ‘child’ is broad enough to encompass all children—born and unborn—including Ankrom’s and Kimbrough’s unborn children in the cases before us.”⁸¹ When deciding the “plain meaning” of the word “child,” the Alabama Supreme Court looked at past cases where it had distinguished between a viable and non-viable fetus and the South Carolina Supreme Court’s decision in *Whitner*.⁸²

When ruling that the word “child” included viable and non-viable fetuses, the Alabama Supreme Court categorized past reliance upon *Roe v. Wade* outside of the abortion context as “misplaced.”⁸³ In other words, the Alabama Supreme Court’s position on *Roe v. Wade* changed from one of deference to *Roe* before September 9, 2011, the date on which *Mack v. Carmack* was decided, to a position that avoided applying *Roe* whenever possible. Instead of differentiating between pre-viability and post-viability fetuses, the Alabama Supreme Court now uses the language of the Brody Act, which “defines the term ‘person’ as ‘a human being, including an unborn child in utero at any stage of development, regardless of viability.’”⁸⁴

treatment. He said the law has even caused some women to seek an abortion.”); PBS NEWSHOUR, *Tennessee Discontinues Controversial Fetal Assault Law*, PBS (Mar. 27, 2016, 12:40 PM), <http://www.pbs.org/newshour/bb/tennessee-discontinues-controversial-fetal-assault-law> [http://perma.cc/R4GUTETG] (“Doctors testified that the threat of arrest kept many addicted pregnant women from seeking treatment and medical care. Other critics say addicts were choosing abortion over being found out and prosecuted.”).

80. *Ex parte Ankrom*, 152 So. 3d 397, 419 (Ala. 2013).

81. *Id.* at 411.

82. *Id.* at 419 (“Thus, although *Whitner* is persuasive on the issue whether an unborn child is a person and thus a ‘child,’ we find *Whitner*’s adoption of the viability distinction to be inconsistent with the plain meaning of the word ‘child’ and with the laws of this State. Furthermore, to the extent that the Court of Criminal Appeals limited the applicability of the chemical-endangerment statute to *viable* unborn children in *Ankrom*, this Court expressly rejects that distinction as inconsistent with the plain meaning of the word ‘child’ and with the laws of this State. Because we reject the Court of Criminal Appeals’ application of a viability distinction, the petitioners’ arguments on the issue are moot.”).

83. *Id.*

84. *Mack v. Carmack*, 79 So. 3d 597, 600 (Ala. 2011) (emphasis omitted).

According to the Alabama Supreme Court, in the past, “parents could not bring a wrongful-death action for the death of an unborn child before viability . . . at least in part, because of a misplaced deference to *Roe v. Wade*,” but after the *Mack* decision, the Alabama Supreme Court overruled that position and allowed for the “recovery of damages for the wrongful death of any unborn child, regardless of viability.”⁸⁵ Yet many states, including those that do not prosecute women for prenatal substance abuse, have statutes that recognize harm to a non-viable fetus in the criminal or civil context.⁸⁶ In spite of this, according to the Alabama Supreme Court, “outside the right to abortion created in *Roe* and upheld in *Planned Parenthood*, the viability distinction has no place in the laws of this State.”⁸⁷ However, a deference to *Roe v. Wade* is not misplaced, and the viability distinction has a place in any state law that prosecutes a mother when the exercise of her constitutional right to an abortion could preclude prosecution. There is no conflict between allowing civil recovery for damage to a non-viable fetus or the recognition of a fetus as a victim in a homicide statute and abortion precedent because abortion precedent is about a woman’s right to abort a fetus not another individual’s right to terminate a fetus.

Amanda Kimbrough, one of the defendants whose criminal case was adjudicated in *Ex parte Ankrom*,⁸⁸ could have avoided her prosecution for prenatal substance abuse if she had exercised her right to an abortion. During a prenatal visit, Kimbrough was informed that her son would likely have Down Syndrome and that she could abort the fetus.⁸⁹ However, Kimbrough declined to have an abortion because she and her husband “oppose abortion on moral grounds.”⁹⁰ On April 29, 2008, Amanda Kimbrough’s son was born prematurely, at twenty-five weeks, weighting two pounds one ounce.⁹¹ Kimbrough’s child died nineteen minutes after birth.⁹² An autopsy revealed that “Timmy had died from ‘acute methamphetamine intoxication’” and Amanda Kimbrough was indicted for causing the exposure of Timmy Kimbrough to methamphetamine which, according to the indictment, resulted in his death.⁹³ On December 9, 2009, Amanda Kimbrough

85. *Ex parte Ankrom*, 152 So.3d at 419.

86. See, e.g., Margaret Kelly, Note, *Increasing Victimization Through Fetal Abuse Redefinition*, 20 WM. & MARY J. WOMEN & L. 685, 690–91 (2014).

87. *Ex parte Ankrom*, 152 So.3d at 419.

88. *Id.* at 400.

89. Calhoun, *supra* note 13.

90. *Id.*

91. *Id.*

92. *Id.*

93. Ala. Ct. of Crim. Appeals, Unpublished Mem. at 4, CR-09-0485 (Sep. 23, 2011);

pled guilty to Class A Chemical Endangerment of a Child, a Felony permitting “[not] less than 10 . . . years and not more than life or ninety-nine . . . years imprisonment in the state penitentiary, and [possibly] a fine not to exceed \$20,000.”⁹⁴

The other defendant in *Ex parte Ankrom*, Hope E. Ankrom, had a “documented” substance abuse problem.⁹⁵ During her pregnancy, Ms. Ankrom tested positive for both marijuana and cocaine on more than one occasion.⁹⁶ Ankrom was admitted to the hospital in labor at thirty-four weeks on January 31, 2009.⁹⁷ At birth, both Ms. Ankrom and her son tested positive for cocaine.⁹⁸ She was charged with a Class C Felony for chemical endangerment of a child.⁹⁹ Because both of the defendants in *Ex parte Ankrom*, Amanda Kimbrough and Hope Ankrom, used illegal drugs in their third trimester of pregnancy when the fetus would be viable, their prosecutions for prenatal substance abuse would not be unconstitutional under this Article’s application of abortion doctrine.

C. Jane Doe v. Rick Singleton: The Conflict Between First Trimester Prenatal Substance Abuse Prosecutions and Supreme Court Abortion Precedent

As noted in the Introduction, the federal court filings of a woman charged under the chemical endangerment statute reveal not only that prosecutions for prenatal substance abuse can occur before a fetus is viable but also that law enforcement may use arrest and pre-trial detention to deliberately sabotage a woman’s attempts to

Indictment of Amanda Helaine Borden Kimbrough, *State v. Kimbrough*, No. CC-08-381 (2008).

94. See Explanation of Rights and Plea of Guilty, *State v. Kimbrough*, No. CC-08-381 (2009); see also Plea Agreement, *State v. Kimbrough*, No. CC-08-381 (issues reserved for appeal are handwritten on the last page of the Plea Agreement under the necessary signatures); see also Ala. Court of Crim. Appeals Unpublished Mem., CR-09-0485, at 3 (2011).

95. State Response to Ankrom’s Motion to Dismiss the Indictment in the Circuit Court of Coffee County, Alabama, Enterprise Division; State’s Resp. to Def.’s Mot. to Dismiss Indictment, *Alabama v. Ankrom*, No. CC-09-395 (Oct. 9, 2009). The State’s motion did not indicate *when* during her pregnancy Ms. Ankrom tested positive for marijuana and cocaine. See Medical Center Enterprise, Enterprise, Alabama, History and Physical, *State v. Ankrom*, CR-09-1148.

96. See Medical Center Enterprise, Enterprise, Alabama, History and Physical, *supra* note 95.

97. See *id.* Another document within the docket, the “Operative Report,” stated that Ankrom presented with a “39-week gestation in labor with breech presentation” and that a “viable, newborn male, 4 pounds 12 ounces” resulted from the cesarean section.” *Id.*

98. Mot. to Dismiss Indictment at 1, *State v. Ankrom*, No. CC-09-395 (2009).

99. See Warrant Number WR 2009 000163.00, *State v. Ankrom*, CR-09-1148 (Feb. 24, 2009).

obtain an abortion before the fetus is viable. In July 2015, Jane Doe was arrested and charged under Alabama’s chemical endangerment statute.¹⁰⁰ Jane Doe was pregnant at the time of her arrest and sued the Sheriff of Lauderdale County, Alabama in federal court in order to obtain an abortion while in jail.¹⁰¹ Jane Doe noted in her initial complaint that she was in “her first trimester of pregnancy” and that the Defendant, the Sheriff of Lauderdale County, had denied her request for “medical furlough or supervised transport to obtain an abortion, directing her instead to seek a court order.”¹⁰² The plaintiff also pleaded that she had tried to obtain an abortion before she was confined.¹⁰³ The complaint also noted that the Lauderdale County district attorney “has stated that he opposes Plaintiff’s request for an abortion.”¹⁰⁴

Supplemental evidence filed by Jane Doe revealed that Alabama government officials use the chemical endangerment statute to undermine the exercise of the constitutional right to abortion. On July 29, 2015, Jane Doe filed supplemental evidence, including a newspaper article in which the District Attorney stated “[n]ot only do we oppose this [abortion request] morally, but based on the nature of the charge she is facing, which is chemical endangerment of a child’ . . . ‘It is the policy of the state of Alabama to protect all life—born or unborn.’”¹⁰⁵ The news story also revealed that the District Attorney “filed a motion in state court to terminate the parental rights . . . of Jane Doe with regard to the fetus and [the District Attorney confirmed] that a guardian *ad litem* ha[d] been appointed to represent the fetus in that proceeding.”¹⁰⁶ The District Attorney’s reason for appointing a guardian *ad litem* for the fetus was very similar to that espoused by individuals who agree with fetal personhood movements: “Our position, if the termination for parental rights is granted, is that (the mother) would not have the standing to obtain the abortion.”¹⁰⁷ This action shows how prenatal substance abuse prosecutions often

100. Martin, *supra* note 1.

101. Compl., *supra* note 2, at 2. The plaintiff’s legal name was not Jane Doe; however, this was the name used in the court filings.

102. *Id.*

103. *Id.* at 3.

104. *Id.* at 4.

105. Notice of Filing Suppl. Evid., *supra* note 5, at 1.

106. *Id.*

107. *Id.* at 2. For more on fetal personhood and fetal protection laws, see, e.g., Goodwin, *supra* note 6, at 790. For the perspective of supporters of fetal personhood movements, see, e.g., Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children*, 19 WM. & MARY J. WOMEN & L. 511, 530, 542 (2013).

fit within the goals of fetal protection movements and aim to hinder the exercise of a woman's constitutional right to an abortion.

Not only does the plight of Jane Doe represent a larger prosecutorial attempt to restrict a woman's right to an abortion but, Jane Doe's case indicates the tension between the Fourteenth Amendment and the prosecution of women for prenatal substance abuse before the fetus is viable. While the trimester framework was abandoned by *Casey*, it is clear that a woman has the right to an abortion in the first trimester of her pregnancy as the fetus is not viable before that time period.¹⁰⁸ Since the decision of whether to continue the pregnancy is within the ambit of the pregnant woman, to prosecute a woman for prenatal substance abuse in the first trimester, when she could indeed abort the fetus, is premature. Second, to prosecute someone for prospective harms to a fetus in the first trimester is incompatible with Supreme Court jurisprudence on women's autonomy. Women should not be prosecuted for prospective harms to a fetus that they could legally abort.

While the proceeding in *Jane Doe v. Rick Singleton* ended after Jane Doe filed an affidavit stating that she decided that she no longer wanted an abortion and "intend[ed] to carry the unborn child to full term and birth," one could imagine a less litigious defendant whose exercise of her abortion right could be seriously curtailed by law enforcement action similar to that in *Jane Doe v. Rick Singleton*.¹⁰⁹ A less litigious defendant with a non-viable fetus, for example, could be overwhelmed by the legal process surrounding her arrest or represented by a less zealous attorney who is uninterested in suing in federal court; this defendant's exercise of her constitutional right could be abrogated by a chemical endangerment prosecution and law enforcement's active opposition to her attempts to obtain an abortion. Thus, chemical endangerment statutes can serve as undue burdens on women's abortion rights when they are initiated before a fetus is viable.¹¹⁰

108. *See supra* Part III.A.

109. Affidavit of [Name Omitted] at 1, *Doe v. Singleton*, No. 3:15-cv-01215 (N.D. Al. July 29, 2015). Because Jane Doe was not identified in court documents nor was the docket number of her then pending state case, it is not possible to conclusively connect her to a specific prosecution. Litigation in this case ended after a federal judge held a hearing in response to Jane Doe's filing of an Affidavit on July 29, 2015, which stated that "[a]fter much consideration and counsel, I, [name omitted in court records] have decided that I no longer desire to pursue an abortion procedure and intend to carry the unborn child to full term and birth." *Id.* at 1; *see also* Steve Doyle, *Jailed Alabama Woman Drops Abortion Lawsuit, Says She Wants to be a Mother*, AL.COM (July 29, 2015, 5:53 PM), http://www.al.com/news/huntsville/index.ssf/2015/07/alabama_inmate_drops_abortion.html [<http://perma.cc/4A4PL7U3>].

110. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 837 (1992).

D. The State of Tennessee and Viability

A discussion of the Tennessee statute allowing prenatal substance abuse prosecutions and the viability framework is very short. This brevity stems from the limited scope of the Tennessee statute which only allowed for a prosecution after a child is born. Thus, the Tennessee assault statute did not punish women for not exercising their right to abortion and was structured and applied in accordance with Supreme Court abortion precedent.

E. The State of South Carolina and Viability

In *Whitner v. South Carolina*, the South Carolina Supreme Court held that the child abuse and neglect statute could be used to prosecute women for prenatal substance abuse after the fetus was viable.¹¹¹ Similar to Alabama law, “[u]nder South Carolina law, a viable fetus has historically been regarded as a person; in 1995, the South Carolina Supreme Court held that the ingestion of cocaine during the third trimester of pregnancy constitutes criminal child neglect.”¹¹² Cornelia Whitner pled guilty to criminal child neglect after her baby was “born with cocaine metabolites in its system” as a result of Whitner’s use of crack cocaine during the last trimester of her pregnancy.¹¹³

In addition to analyzing criminal procedural issues surrounding Ms. Whitner’s guilty plea, the Supreme Court of South Carolina’s analysis in *Whitner* focused on whether the word “child” in South Carolina’s child abuse and neglect statute included viable fetuses.¹¹⁴ The Supreme Court of South Carolina held that the word “child” did include viable fetuses in an analysis that emphasized several times that Ms. Whitner’s child neglect stemmed from her consumption of cocaine in the *third trimester*.¹¹⁵ Similarly, the *Whitner* decision focused on the rights of viable fetuses, unlike the sweeping Alabama prosecutions that prosecute prenatal substance abuse whether that abuse is pre-viability or post-viability.¹¹⁶ Although at least eighty

111. See U.S. DEPT OF HEALTH & HUM. SERV., *supra* note 61, at 34.

112. *Ferguson v. City of Charleston*, 532 U.S. 67, 70 n.2 (2001) (citing to *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 532 U.S. 1145 (1998)).

113. *Whitner v. State*, 492 S.E.2d 777, 778–79 (S.C. 1997). The case proceeded to the South Carolina Supreme Court after Whitner pled guilty but subsequently successfully petitioned at the intermediate state appellate level for post-conviction relief for several reasons including that her attorney failed to inform her that the criminal child neglect statute might not apply to prenatal substance abuse.

114. *Id.* at 779.

115. *Id.* at 782.

116. See *id.* at 783.

women are estimated to have been arrested for prenatal substance abuse in South Carolina, the U.S. Department of Health and Human Services in 2005 estimated that no more than ten women had been prosecuted for prenatal substance abuse under the South Carolina child abuse and neglect statute, and “none [of those prosecutions have occurred] in recent years.”¹¹⁷

South Carolina law also permits the prosecution of women whose fetuses are delivered stillborn as a result of the mother’s consumption of an illegal substance after the fetus was viable. In 2003, the Supreme Court of South Carolina ruled in *State v. McKnight*, that the homicide by child abuse statute applied to the delivery of a stillborn baby as a result of the mother’s cocaine use.¹¹⁸ In *State v. McKnight*, the Supreme Court of South Carolina upheld the directed verdict against Ms. McKnight based on the State’s evidence that the reason for Regina McKnight’s delivery of a stillborn, five-pound baby girl was “intrauterine fetal demise,” as caused by Ms. McKnight’s cocaine consumption and two other conditions.¹¹⁹ McKnight was sentenced to twenty years in prison, with twelve of those years suspended.¹²⁰ Regina McKnight served eight years in prison before being released due to “a finding of inadequate counsel and inappropriate jury instruction, but no violation of the Equal Protection Clause.”¹²¹

III. THE SCIENCE OF PREGNANCY: FETAL DEVELOPMENT, SUBSTANCE ABUSE, AND ADDICTION

Moreover, reproductive rights are being attacked using statutes that are based on questionable science. Nationally, the U.S. Department of Health and Human Services reports that annually, “an estimated 400,000-440,000 infants (10–11% of all births) are affected by prenatal alcohol or illicit drug exposure.”¹²² A combined examination of the constitutionality of prenatal substance abuse

117. U.S. DEP’T OF HEALTH & HUM. SERV., *supra* note 61, at 34; *see* Chen, *supra* note 13 (reporting that at least 126 women were arrested for prenatal substance abuse).

118. *State v. McKnight*, 576 S.E.2d 168, 175 (S.C. 2003).

119. *Id.* at 171 (“Dr. Proctor testified that the baby died one to three days prior to delivery. Dr. Proctor determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis and cocaine consumption. He ruled the death a homicide. McKnight was indicted for homicide by child abuse. A first trial held Jan. 8–12, 2002 resulted in a mistrial. At the second trial held May 14–16, 2001, the jury returned a guilty verdict. McKnight was sentenced to twenty years, suspended to service of twelve years.”) (citation omitted).

120. *Id.*

121. *See* Erin D. Kampschmidt, Note, *Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and the Affordable Care Act Should Step Up*, 25 HEALTH MATRIX: J.L.Med. 487, 489 n.9 (2015).

122. U.S. DEP’T OF HEALTH & HUM. SERV., *supra* note 61, at 9.

prosecutions and the scientific literature analyzing fetal development, pregnancy, and substance abuse leads to a more informed view of the competing interests involved with substance abuse prosecutions. The three main conclusions of this analysis are that (1) a woman's right to an abortion is strongest when substance abuse is likely to cause the most harm to the fetus, (2) analyses focused on the public health aspects of addiction do not comprehensively address the issue of prenatal substance abuse prosecutions because many pregnant drug users are not addicts, and (3) a predictable, causal link between prenatal substance abuse and post-viability fetal or developmental harm is often missing.

A. Fetal Development and Substance Abuse

Using illegal drugs, prescription drugs, or regulated substances such as tobacco and alcohol can all harm a fetus or a newborn.¹²³ That harm can manifest through physical harm, developmental difficulties, or emotional problems.¹²⁴

1. First Trimester Substance Abuse

The fetus is “most susceptible to damage from . . . alcohol [and] drugs” during the first trimester of the pregnancy.¹²⁵ Most birth defects also arise during the first trimester.¹²⁶ The fetus develops essential organs, especially the brain, during the first trimester, and “[h]uman growth and development rates are highest during the first trimester of pregnancy.”¹²⁷

Alcohol use during pregnancy is harmful to the fetus at any time; however, alcohol use during the first trimester of pregnancy is especially harmful as it results in the “structural defects (i.e., facial changes) characteristic of [fetal alcohol syndrome]”¹²⁸ In

123. *Id.*

124. *Id.*

125. See *Pregnancy: The First Trimester*, JOHNS HOPKINS MEDICINE, http://www.hopkinsmedicine.org/healthlibrary/conditions/pregnancy_and_childbirth/first_trimester_85,P01218 [<http://perma.cc/7ULA7ZGN>].

126. *Pregnancy, Key Findings: How Much Do We Know About the Most Common Medicines Used During Pregnancy?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 16, 2014), <http://www.cdc.gov/pregnancy/features/key-findings-meds-pregnancy72013.html> [<http://perma.cc/2ZSKA2NL>].

127. Dennis O. Mook-Kanamori et al., *Risk Factors and Outcomes Associated With First-Trimester Fetal Growth Restriction*, 303 J. OF AMER. MED. ASSOC. 527, 527 (2010); see Barry Zuckerman, *Drug-Exposed Infants: Understanding the Medical Risk*, 1 THE FUTURE OF CHILDREN 26, 27 (1991).

128. OFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SERVICES, *Frequently Asked Questions (FAQs)*, <https://www.oasas.ny.gov/fasd/faq.cfm> [<http://perma.cc/AR4D2UBM>].

the United States, a recent study showed that “[m]ost alcohol use by pregnant women occurred during the first trimester.”¹²⁹ The American Medical Association’s amicus brief in *Ferguson v. Charleston* explained that “[f]etal alcohol syndrome is now the leading known cause of mental retardation in the Western World, exceeding both Down syndrome and cerebral palsy.”¹³⁰ Fetal alcohol syndrome is one of several fetal alcohol spectrum disorders.¹³¹ These fetal alcohol spectrum disorders can also result in learning disabilities, behavioral problems, and “problems with the heart, kidneys . . . bones or . . . hearing.”¹³² The “growth and [central nervous system] disturbances” that result from alcohol use can result regardless of the trimester in which the mother uses alcohol.¹³³

Similarly, the riskiest time for “detoxing” from opiate use is during the first and third trimesters, thus, punishing women for prenatal substance abuse during these periods discounts the risk to the fetus of ending substance abuse during these critical times.¹³⁴ Because of the risk, physicians recommend avoiding detoxification in the first trimester, prefer detoxification in the second trimester, and recommend that it occur “with caution” in the third trimester.¹³⁵

2. Adverse Impacts of Illegal and Legal Substances on Fetuses and Infants

Prenatal substance abuse does not automatically result in harm to an infant: while some children born to prenatal substance abusers suffer from developmental difficulties or physical health defects, others do not.¹³⁶ The words “may,” “often,” “is associated with” and

129. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *18 Percent of Pregnant Women Drink Alcohol During Early Pregnancy* (Sept. 9, 2013), <http://www.samhsa.gov/data/sites/default/files/spot123-pregnancy-alcohol-2013/spot123-pregnancy-alcohol-2013.pdf>.

130. See Mot. for Leave to File Br. as Amicus Curiae and Br. Amicus Curiae of the American Medical Association in Support of Neither Party at 15, *Ferguson v. City of Charleston*, 532 U.S. 67 (2000) (No. 99-936), 2000 WL 1506967 at 15.

131. *Fetal Alcohol Spectrum Disorders (FASDs)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 16, 2015), <http://www.cdc.gov/ncbddd/fasd/facts.html> [http://perma.cc/ULB4TUT9].

132. *Id.*

133. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 129.

134. Anne Lingford-Hughes et al., *BAP Updated Guidelines: Evidence-Based Guidelines for the Pharmacological Management of Substance Abuse, Harmful Use, Addiction and Comorbidity: Recommendations from BAP*, 26 J. OF PSYCHOPHARMACOLOGY 899, 926 (2012).

135. *Id.*

136. See Mohapatra, *supra* note 8, at 256; see also Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 629 (1994) (indicating that some drug impaired children struggle with socialization and overwhelming environments).

“correlate” are often used to describe the causal aspect of relationships between prenatal substance abuse and the health of children whose mothers abused substances while they were *in utero*.¹³⁷ Nationally, marijuana is the most commonly used illegal drug and while it does not cause withdrawal symptoms, it “may have subtle effects on long-term neurobehavioral outcomes.”¹³⁸ Other studies indicate that marijuana has “[no] fetal growth effects” and does not result in physical abnormalities after birth.¹³⁹ While methamphetamine’s use has increased in the United States recently, currently, “[m]ethamphetamine use . . . does not appear to increase the frequency of congenital” abnormalities.¹⁴⁰ Similarly, the literature addressing the impacts of prenatal cocaine exposure has been categorized as “inconsistent,” and much of the science related to the impacts of cocaine use on fetal and child development is unsettled and has changed over time.¹⁴¹ For example, in spite of concerns about so-called “crack bab[ies]” and the perceived extreme harm suffered by those children as indicated by media coverage, a 2002 U.S. Sentencing Commission report noted that “[t]he negative effects of prenatal cocaine exposure are significantly less severe than previous believed’ and those negative effects ‘do not differ from the effects of prenatal exposure to other drugs, both legal and illegal.’”¹⁴²

As a matter of harm, “[m]any legal drugs such as nicotine and alcohol can produce more severe [deficiencies in] brain development than some illicit drugs such as cocaine,” yet women are not prosecuted for using these legal, but harmful, substances during their pregnancies.¹⁴³ For example, the medical literature indicates that

137. See, e.g., Valerie S. Knopik et al., *The Epigenetics of Maternal Cigarette Smoking During Pregnancy and Effects on Child Development* 1, 3 (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3581096/pdf/nihms44Gh7.pdf> (also available at 24.4 DEV. & PSYCHOPATHOLOGY 1377–90 (2012)) (“Previous work has suggested that maternal cigarette smoking during pregnancy is associated with increased risk for spontaneous abortion, preterm delivery, respiratory disease, immune system difficulties such as asthma and allergies, and cancer later in life. Findings also suggest that there are a variety of placental complications linked to prenatal exposure to cigarette smoke, including alterations to the development and function of the placenta.”) (citations omitted).

138. See Mark L. Hudak & Rosemarie C. Tan, *Neonatal Drug Withdrawal*, 129 PEDIATRICS 540, 540 (2012).

139. Sonia Minnes et al., *Prenatal Tobacco, Marijuana, Stimulant, and Opiate Exposure: Outcomes and Practice Implications*, ADDICTION SCI. & CLINICAL PRAC. 57, 60–61 (2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3188826/pdf/ascp-06-1-57.pdf>.

140. F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 327 (23d ed. 2009).

141. See Gale A. Richardson et al., *Prenatal Cocaine Exposure: Effects on Mother-and Teacher-Rated Behavior Problems and Growth in School-Age Children*, 33 NEUROTOXICOLOGY & TERATOLOGY 69, 69 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3026056/pdf/nihms245537.pdf>.

142. See Bach, *supra* note 15, at 347 (2014).

143. Barbara L. Thompson et al., *Prenatal Exposure to Drugs: Effects on Brain Development and Implications for Policy and Education*, 10 NATURE REV. NEUROSCI. 303, 303

individuals whose mothers smoked during pregnancy are at a higher risk for “respiratory disease, immune system difficulties such as asthma and allergies, and cancer later in life.”¹⁴⁴ However, women do not face criminal charges for tobacco use during pregnancy.

Causation is also unclear when drug abuse is combined with other medical problems that can harm the fetus.¹⁴⁵ For example, later studies revealed that the concern for “crack babies” was misplaced: the studies that led to the conclusions that “[crack babies were] emotionally disrupted [and] cognitively impaired . . . were confounded by . . . small sample sizes, [use of multiple drugs], nutritional status and other psychosocial problems.”¹⁴⁶ Such studies were also affected by the possibility that the cause of adverse outcomes can be a result of not just illegal drug use, but poor maternal health.¹⁴⁷ Also, it is sometimes difficult to isolate the adverse outcomes caused by specific illegal drugs as pregnant drug users are more likely to use multiple substances that could adversely impact fetal and newborn health.¹⁴⁸ One commentator offers the following example:

[S]uppose an obese woman ingests cocaine during her pregnancy and endures a miscarriage. Like substance abuse, maternal obesity can increase the risk of pregnancy loss . . . If obesity caused the miscarriage and not the substance abuse, this woman is wrongfully imprisoned. Should states now press charges for fetal homicide arising out of obesity?¹⁴⁹

3. Neonatal Abstinence Syndrome

In addition to developmental problems, newborns who were exposed to harmful substances while *in utero* can develop neonatal

(2009); Mohapatra, *supra* note 8, at 254, 258 (citing to Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 J. AM. MED. ASS'N 1613, 1621–24 (2001)); see Marylou Behnke & Vincent C. Smith, *Technical Report—Prenatal Substance Abuse: Short- and Long-term Effects on the Exposed Fetus*, 131 PEDIATRICS 1009, 1012 (2013), <http://pediatrics.aappublications.org/content/131/3/e1009.full.pdf+html> (“Nicotine also has been shown to have significant deleterious effects on brain development. . .”).

144. See Knopick et al., *supra* note 137 (citations omitted).

145. Kathryn A. Kellett, Note, *Miscarriage of Justice: Prenatal Substance Abusers Need Treatment, Not Confinement Under Chemical Endangerment Laws*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 471 (2014).

146. See Thompson et. al, *supra* note 143, at 304 (citations omitted); see also Zuckerman et al., *supra* note 127, at 31 (providing correspondence related to the impacts of the use of multiple drugs on fetal growth).

147. See F. GARY CUNNINGHAM ET AL., *supra* note 140, at 328.

148. Joseph J. Volpe, *Effect of Cocaine Use on the Fetus*, 327 N. ENG. J. OF MED. 399, 400 (1992); see Richardson et. al., *supra* note 141, at 72 (“Frequent first trimester cocaine users also used more alcohol, cigarettes, marijuana, and other illicit drugs than did first trimester non-cocaine users.”).

149. Kellett, *supra* note 145, at 471.

abstinence syndrome.¹⁵⁰ Both legal and illegal harmful (or “teratogenic”) substances such as opioids, benzodiazepenes, and cocaine can result in neonatal abstinence syndrome.¹⁵¹ Prenatal alcohol use can also result in seizures and withdrawal symptoms.¹⁵² Comparatively, “[p]renatal opiate exposure has greater adverse impact than prenatal cocaine exposure on the infant [central nervous system] and autonomic nervous system.”¹⁵³

The number of children born with neonatal abstinence syndrome has increased in recent years.¹⁵⁴ Neonatal abstinence syndrome manifests in newborns through symptoms such as “seizures, difficulty feeding, respiratory complications . . . low birth weights,”¹⁵⁵ “loud, high-pitched crying, sweating, . . . and gastrointestinal disturbances.”¹⁵⁶ Notably, “[t]he region including Alabama, Mississippi, Tennessee and Kentucky has the highest rate [of neonatal abstinence syndrome], with 16.2 cases per 1,000 [births].”¹⁵⁷

4. Viability

As explored *supra*, in Part II, the concept of viability is the key to understanding and applying the U.S. Supreme Court’s abortion precedent.¹⁵⁸ The U.S. Supreme Court explained that a fetus is “viable” when it is “potentially able to live outside the mother’s womb, albeit with artificial aid.”¹⁵⁹ As medical advances continue, the time at which “viability” occurs becomes earlier and earlier in the pregnancy. In 1973, when *Roe v. Wade* was decided, the point of viability

150. Anne Greenough & Zainab Kassim, *Effects of substance abuse during pregnancy*, 125 J. OF ROYAL SOC. FOR THE PROMOTION OF HEALTH 212, 212 (2005).

151. *Neonatal Abstinence Syndrome*, *supra* note 40; see *Teratogens*, CHILDREN’S HOSP. OF WISCONSIN (2015), <http://www.chw.org/medical-care/genetics-and-genomics-program/medical-genetics/teratogens> [<http://perma.cc/MGX85VH4>] (“A teratogen is an agent, which can cause a birth defect. It is usually something in the environment that the mother may be exposed to during her pregnancy. It could be a prescribed medication, a street drug, alcohol use, or a disease present in the mother which could increase the chance for the baby to be born with a birth defect.”).

152. Hudak & Tan, *supra* note 138, at 542.

153. Minnes et al., *supra* note 139, at 65.

154. Veeral N. Tolia et al., *Increasing Incidence of the Neonatal Abstinence Syndrome in U.S. Neonatal ICUs*, 372 NEW ENG. J. MED. 2118, 2119 (2015) (citation omitted).

155. Ashley Culver, *Care for Newborns with Drug Withdrawal Uneven: Study*, VANDERBILT UNIV. (July 17, 2014, 9:12 AM), <http://news.vanderbilt.edu/2014/07/care-for-newborns-with-drug-withdrawal-uneven> [<http://perma.cc/HH67XQZ5>].

156. *Neonatal Abstinence Syndrome*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0024264> [<http://perma.cc/7FENE4TL>]; see Hendrée E. Jones et al., *Neonatal Abstinence Syndrome After Methadone or Buprenorphine Exposure*, 363 NEW ENG. J. MED. 2320, 2321 (2010).

157. Martin & Yurkanin, *supra* note 27.

158. See *supra* Part II; *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992).

159. *Roe v. Wade*, 410 U.S. 113, 160 (1973).

“usually placed at about seven months (28 weeks) but [could] occur earlier, even at 24 weeks.”¹⁶⁰ Currently, viability is usually placed at twenty-four weeks but can occur earlier, even at twenty-two weeks.¹⁶¹

As emphasized in *Casey*, the State may restrict abortions after the fetus has become viable, as long as there are exceptions for pregnancies that endanger the health or life of the mother.¹⁶² Practically, not including exceptions such as those for the health or life of the mother or rape or incest, forty-three states restrict abortions based on viability or gestational age of the fetus.¹⁶³ Some states set those time-based restrictions at twenty weeks, which is actually before the generally accepted “point” at which fetuses become viable.¹⁶⁴ Alabama requires “viability testing” for any abortion after nineteen weeks of pregnancy, unless the abortion is during a medical emergency.¹⁶⁵ South Carolina permits abortions in the first and second trimesters of pregnancy; abortions in the third trimester are permitted only to “preserve the life or health of the woman.”¹⁶⁶ Tennessee permits abortion “[a]fter three (3) months, but before viability of the

160. *See id.* at 160. In 1992, the Court noted that the point at which viability occurred had changed but that this did not affect the central holding of *Roe*. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992) (“We have seen how time has overtaken some of *Roe*’s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, *see Akron I, supra*, 462 U.S., at 429, n. 11 . . . and advances in neonatal care have advanced viability to a point somewhat earlier. *Compare Roe*, 410 U.S., at 160 . . . with *Webster, supra*, 492 U.S., at 515–516 . . . (opinion of REHNQUIST, C.J.); *see Akron I*, 462 U.S., at 457, and n. 5, 103 S. Ct., at 2489, and n. 5 (O’CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*’s central holding, that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*’s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.”).

161. Pam Belluck, *Premature Babies May Survive at 22 Weeks if Treated, Study Finds*, N.Y. TIMES (May 6, 2015), http://www.nytimes.com/2015/05/07/health/premature-babies-22-weeks-viability-study.html?_r=0 [<http://perma.cc/29WLHMKH>] (discussing Matthew A. Rysavy et. al, *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 N. ENG. J. MED. 1801 (2015)).

162. *Planned Parenthood of Se. Pennsylvania*, 505 U.S. at 846.

163. *See State Policies on Later Abortions*, GUTTMACHER INST. (2016), <https://www.guttmacher.org/print/state-policy/explore/state-policies-later-abortions> [<http://perma.cc/447KT8QD>] (stating that forty-three states restrict abortions based upon fetus viability).

164. *See* Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187, 187 (2016).

165. *See* ALA. CODE § 26-22-4 (Westlaw through 2016 Legis. Sess.).

166. *See* S.C. CODE § 44-41-20 (Westlaw through 2016 Legis. Sess.).

fetus”; abortions “during viability of the fetus” are permitted “to preserve the life or health of the mother.”¹⁶⁷

B. Addiction

Examining the scientific literature on addiction reveals that scholarly criticisms of prenatal substance abuse prosecutions as “criminalizing addiction” do not address the whole spectrum of prenatal substance abuse prosecutions as many prenatal substance abuse defendants are not actually drug addicts. Recent scholarship has focused on public health concerns and the thesis that prosecuting women for prenatal substance abuse violates the Eighth Amendment prohibition on cruel and unusual punishment by prosecuting pregnant drug addicts for a condition, rather than an act.¹⁶⁸ However, not all prenatal substance abusers are addicts, which is a fact that much of the addiction-based scholarship does not adequately address.¹⁶⁹ Much of the legal literature mentions the concept of “addiction” without defining the term or distinguishing between drug *addicts* and drug *users*. Medically, the word “addiction” is

[a] term used to indicate the most severe, chronic stage of substance-use disorder, in which there is a substantial loss of

167. TENN. CODE ANN. § 39-15-201 (Westlaw through 2016 Legis. Sess.).

168. Smith & Dabiri, *supra* note 8, at 59 (identifying various constitutional issues that arise with prenatal substance abuse prosecutions: “‘cruel and unusual punishment’ in violation of the eighth amendment to the United States Constitution . . . whether the due process clause of the fourteenth amendment is violated by the lack of notice to the defendants that their conduct is criminal . . . whether the due process clause is violated absent a showing by the state that the legislature had intended to make criminal the conduct of the drug-addicted mother who passes on controlled substances to a fetus or a newborn child . . . the use of admissions made by a defendant to her doctor and her children’s doctor in her conviction . . . the due process issue of the quantum of proof necessary to convict a person for allegedly passing cocaine through the umbilical cord to a newborn child . . . the discriminatory impact of criminal prosecution since the majority of the defendants in these cases are black women.” (footnotes omitted)).

169. See Nora Volkow et al., *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 NEW ENG. J. MED. 363, 367 (2016) (stating that only a minority of drug users become addicts); see also Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 475–76 (2005) (“Some women who use drugs during pregnancy are not addicted and may, like some people who drink alcohol or smoke cigarettes, use drugs only on an occasional basis. Other women, however, may be addicted. As the United States Supreme Court and the health community have long recognized, drug addiction is an illness that generally cannot be overcome without treatment. The American Medical Association has unequivocally stated: ‘. . . it is clear that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome.’”). See, e.g., Martin, *supra* note 34 (telling the story of Casey Shehi who was charged with chemical endangerment of a child after taking half of a valium tablet in the last trimester of her pregnancy).

self-control, as indicated by compulsive drug taking despite the desire to stop taking the drug. In the DSM-5 [*Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition], the term *addiction* is synonymous with the classification of severe substance-use disorder.¹⁷⁰

Only a “minority” of drug users become drug addicts, “just as not everyone is equally at risk for the development of other chronic diseases.”¹⁷¹ While the distinction between the “chronic” nature of drug addiction and “acute” uses of drugs was noted by the U.S. Supreme Court in *Robinson v. California*, the distinction between a chronic condition and an acute one is often overlooked by the literature.¹⁷² Thus, by focusing only on addiction, only a small subset of prosecutions, regardless of the viability of the fetus, would be unconstitutional. The difference between a chronic condition and an acute use is why this Article does not focus on the criminalization of addiction and instead focuses on the other scientific aspect of prenatal substance abuse—fetal health and viability.

CONCLUSION

This Article has addressed the prosecution of women for prenatal substance abuse with two explanations. The first explanation focused on abortion doctrine and the concept that, under *Roe v. Wade* and *Planned Parenthood v. Casey*, the law in the United States is that a woman has a right to abort her fetus before the fetus is viable. Accordingly, prenatal substance abuse prosecutions are unconstitutional when a woman is pregnant and the fetus has not reached the point of viability, which is, according to the medical literature, around twenty-four weeks.¹⁷³ On the other hand, under an abortion doctrine focused analysis, prenatal substance abuse prosecutions in the time period after the fetus is viable, including after a child is born, are not unconstitutional.

Second, this Article has used science to examine both the constitutionality of prenatal substance abuse prosecutions and the public policy concerns underlying those prenatal substance abuse prosecutions. Comparing the Tennessee statute addressing prenatal substance abuse to those in Alabama and South Carolina, mothers who wanted to pursue substance abuse treatment in Tennessee had an

170. Volkow et al., *supra* note 169, at 364.

171. *Id.* at 367.

172. See *Robinson v. California*, 370 U.S. 660, 662–63 (1962) (describing the differences between chronic and acute drug use).

173. See Beck, *supra* note 164, at 202.

advantage over mothers in Alabama and South Carolina due to the inclusion of a statutory affirmative defense of substance abuse treatment to an assault charge for prenatal substance abuse.

While many articles address the possibility that prenatal substance abuse prosecutions criminalize addiction, a review of the science of addiction reveals that that perspective is incomprehensive. By looking at both the science of addiction and the science of fetal harm, this Article makes four observations based on the medical and legal literature: (1) an argument that prenatal substance abuse criminalizes addiction does not apply to many women who use illicit substances while pregnant as not all users of illicit substances are addicts, (2) not all fetuses are harmed by prenatal substance abuse, (3) legal substances like alcohol and tobacco can cause more harm to a fetus or infant than illicit substances, and women “are almost 20 times more likely to drink alcohol or smoke cigarettes than to use cocaine during pregnancy,”¹⁷⁴ and (4) the right to abort a fetus is the most unfettered when the possibility of harm to the fetus is also the greatest. Nevertheless, the rule of law in the United States is that a woman has a right to an abortion before the fetus is viable, and prosecutions of women for implicitly not exercising that right should be unconstitutional before the fetus is viable.

174. See Goodwin, *supra* note 6, at 850.

