Punishing Mothers

by Alexander Morgan Capron

What should society do when a woman, in producing children, exposes them to avoidable risks? That recurring question—which plunges one quickly and deeply into the murky waters of child protection, women's rights, and the far reaches of medical science—has been back on the front pages recently. Two very different stories illustrate how context affects our answer.

Multiple Births

This fall the international media cast the bright, warm glow of an approving spotlight on Carlisle, Iowa, the home of Kenny and Bobbi McCaughey, who gave birth to four boys and three girls on 20 November. The babies, who were born two months premature and ranged from 2.5 to 3.4 pounds, seem to be doing well, making them the first surviving septuplets in the world. With the use of fertility drugs and in vitro fertilization, multiple births are becoming more frequent; for example, fifty-seven quintuplets were born in the United States in 1995. A few months before the McCaugheys' babies, septuplets were born in Saudi Arabia but six died, and in May 1985 an American woman carrying seven fetuses gave birth to six (the seventh was stillborn) but lost three within nineteen days.

Most media coverage was supportive of the McCaugheys, as were friends and neighbors in their small town, the governor of Iowa, and numerous business enterprises, which promised a new house (to replace the two bedroom home the couple had shared with their two-year-old daughter Mikayla), an extra-large van, and life-time supplies of such items as disposable diapers. While parents who had experienced the heavy demands of multiple births warned of everything from sleepless nights to bankruptcy, the general sentiment was summed up by the septuplets' maternal grandfather Robert Hepworth, who termed their births "a miracle."

Still, a few objections were voiced by physicians as well as ethicists. Fertility specialists in Britain, where artificial reproduction (but not the use of fertility drugs) is closely regulated, raised "serious questions about whether such a multiple pregnancy should have been allowed to happen," viewing it less as a triumph of medicine than as a "medical disaster."[1]

Though most critics did not go so far as to argue that the McCaugheys should not have used fertility drugs unless they were willing to undergo "selective reduction" early in the pregnancy (in which the number of fetuses would have been reduced from seven to at most two or three), Gregory Pence did suggest they had made an unethical choice. Rather than claiming it was "God's will," the McCaugheys should take responsibility for the choice they made. "They took bad odds and hoped that all seven would be healthy, and in so doing, they took the risk of having seven disabled or dead babies."[2]

More frequently, the criticism focused instead on the physicians involved. Through ultrasound scans and other means of monitoring, fertility specialists can tell when their interventions will lead to the release of a dangerously high number of eggs, so the woman can avoid conceiving that month or can undergo egg harvesting and in vitro fertilization, with only a few of the resulting embryos being transferred to the uterus and the rest frozen for later use if needed. Peter Brinsden, medical director at Bourn Hall in Cambridge where Louise Brown, the first test-tube baby, was born in 1978, chided physicians who do not use their medical powers responsibly. "The aim of fertility treatment should be to give couples one or two children at most."

Besides the stress that multiple births place on parents (and on their marriage) after the children are born, the general experience with such pregnancies is that they are very dangerous for mother and fetuses alike. Overstimulation of the ovaries can lead in rare cases to heart failure, and carrying many fetuses is associated with potentially fatal blood clots and miscarriages.

Even when such fetuses survive their crowded uterine environment, they will almost certainly be born many weeks early and very small, conditions that give rise to a litany of medical and developmental risks, such as chronic lung disease, mental retardation, and blindness. If, like the McCaughey babies, they succeed in weathering the risks of pregnancy, prematurity, and low birth weight, and emerge relatively intact from weeks of vigorous and very expensive care in a neonatal intensive care unit (NICU), such children still face an elevated risk of child abuse.

Addicted Babies

Direct charges of child neglect lay at the heart of another recent motherhood story, as recounted in a decision handed down by the Supreme Court of South Carolina less than a month before the McCaughey septuplets' birth.[3] The spotlight of public attention that shone on Cornelia Whitner after she gave birth in Pickens County several years ago was certainly less intense but also much less warm than that which greeted the birth of the McCaughey septuplets in Des Moines.

Ms. Whitner's baby was born with cocaine metabolites in his system, and she admitted using crack cocaine during the third trimester of her pregnancy. Charged with criminal child neglect under S.C. Code §20-7-50, Ms. Whit-

ner pled guilty and was sentenced to eight years in prison.

Rather than appealing her conviction, Ms. Whitner filed a petition for Post Conviction Relief, arguing that §20-7-50 covered children but not fetuses. Thus, she claimed, she had received ineffective assistance of her trial counsel, who failed to advise her that the statute might not apply to prenatal drug abuse, and the trial court lacked jurisdiction to accept a guilty plea to a nonexistent offense. After her petition was granted on both grounds, the state appealed to the Supreme Court of South Carolina.

The South Carolina Children's Code provides that "Any person having the legal custody of any child . . . who shall, without lawful excuse, refuse or neglect to provide . . . the proper care and attention for such child . . . so that the life, health or comfort of such child . . . is endangered or is likely to be endangered, shall be guilty of a misdemeanor." Another provision of the code defines "child" as "a person under the age of eighteen."

Is a fetus a "person" for the purposes of the children's code? Looking to the language of the statute (in light of comparable language in other contexts) as well as to the policy behind the law, the state supreme court answered "yes." It thus reached a different conclusion from other courts in similar prosecutions over the past dozen years around the country.

As the abuse of illegal drugs—particularly but not exclusively crack cocaine—swelled in the late 1980s to epidemic levels, physicians became concerned about the growing number of babies who had been exposed to these drugs prenatally. Though early medical reports—magnified through the lens of the popular media into a picture of NICUs filled with the Charles Mansons of the future—probably overstated the physical and behavioral consequences of prenatal drug exposure, studies have by now established that many babies whose mothers used cocaine and other drugs during pregnancy will have been harmed, in ways that are not always remediable.

Thus, it is hardly surprising that public officials took steps to deter maternal drug abuse and to punish women whose use of drugs exposed their children to harm before birth. Prosecutions took two forms. In some cases, women were charged under statutes forbidding delivery or distribution of illicit substances, in other cases, under statutes that punish child endangerment. Yet in decision after decision in the early 1990s, state courts rejected these prosecutions and held the statutes inapplicable to pregnant women's drug use insofar as the harm alleged occurred before a child's birth.

The *Whitner* Decision

The South Carolina Supreme Court reached a different conclusion in the *Whitner* case. Since the case involved only a child endangerment provision, the court did not need to deal with the issue of how "delivery" of a drug would be established under a statute forbidding drug distribution. And the court found "no question" that "Whitner endangered the life, health, and comfort of her child" when she ingested crack cocaine in the third trimester of the pregnancy.

Nor did the court have much difficulty in interpreting its statute to include a fetus within the meaning of "child" because, unlike most of the other states that had rejected prosecutions for prenatal drug abuse, South Carolina had substantial case law construing "person" to include a viable fetus.

The earlier cases dealt with two situations. Going back to 1960, South Carolina's courts have allowed wrongful death actions arising from injuries sustained prenatally by a viable fetus, whether born alive or (after a 1964 decision) stillborn. The second context first arose in a homicide prosecution of a man who stabbed his nine-months-pregnant wife in the neck, arms, and abdomen. Despite an attempted caesarean delivery, the child died while still in utero, and the defendant was convicted of voluntary manslaughter.[4] Proclaiming a desire to be consistent with its holdings in the civil cases, the state supreme court upheld the conviction and recognized the crime of feticide, at least as to fetuses who were capable of surviving outside the womb.

In light of these earlier holdings, the *Whitner* court felt there was no "rational basis for finding a viable fetus is not a 'person' in the . . . context" of the child endangerment statute. In this ruling, it departed from the conclusion reached by a Massachusetts court that refused to recognize criminal liability of a pregnant woman for transmitting cocaine to her viable fetus, even though that state, like South Carolina, allows wrongful death actions for viable fetuses injured in utero and homicide prosecutions of third parties who kill viable fetuses. While the Massachusetts court had read its precedents as limited to cases in which the "mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated,"[5] the South Carolina court held that the state may protect the interests of a viable fetus even from its mother.

Maternal Liability

Since South Carolina is not unusual in vindicating the interests of children for prenatal injuries in torts cases, adoption of the *Whitner* court's reasoning by other courts would have profound implications for state regulation of the behavior of expectant mothers.

First, the implication of the decision—though nowhere directly addressed—is that it is acceptable for the state to monitor the status of pregnant women and of their babies, such as by doing tests for illicit drugs without consent. If toxicology screening requires informed consent, then women who know that such tests will label them child abusers will refuse permission.

Conversely, if such screening is seen as acceptable without consent, under some general public health doctrine, then pregnant addicts may avoid routine prenatal care so as not to be arrested and incarcerated, and they may even seek to deliver their children outside usual medical settings—all to the detriment of their health and that of their child-to-be. Further, some pregnant

addicts might seek late-term abortions, rather than deliver a baby with telltale signs of drug usage.[6]

It is also hard to believe that the court's holding in *Whitner* will stay confined to viable fetuses. While the courts may feel constrained to limit feticide prosecutions to cases where the victim is viable, civil damages are awarded for injuries that occur not just before viability but even before conception and are then manifested after birth. A similar reading of the child endangerment statute can be expected, especially in light of the medical evidence that the developing fetus is probably at greater risk of injury from maternal drug abuse in the first few months of gestation than in the final months.

While the *Whitner* court repeatedly emphasized that it was only addressing the situation before it—a pregnant woman's abuse of an illegal substance—there is nothing in the child protection law that limits the range of acts for which prosecution is possible. The focus of §20-7-30 is on preventing action or inaction that endangers a child's "life, health or comfort." While the statute excepts acts done with "lawful excuse," it is not clear that anything short of necessity would provide such an excuse—certainly not the mere comfort or convenience of an expectant mother.

The conduct that would therefore be most likely to lead to prosecution would be maternal drinking, since the link between fetal harm and prenatal exposure to alcohol is, if anything, even better documented than the link to prenatal exposure to illegal drugs. Alcoholic beverages carry warnings of this risk, and obstetricians routinely warn their patients to refrain from drinking even before their pregnancies are confirmed. Failure to follow such advice, or medical advice either to take or to refrain from taking prescription drugs or following other medical regimes, could thus lay the basis for a child endangerment prosecution if shown to have led to serious harm to a child.

Indeed, in the words of the South Carolina court, there does not appear to be "any rational basis" for limiting the wrongful acts that could form the basis for a prosecution, whether the conduct occurred pre-viability or was otherwise legal for a woman who was not pregnant. And, to return to the Iowa septuplets, application of the *Whitner* doctrine would appear to expose to prosecution any woman who decided to initiate a pregnancy following fertility treatment if she was informed about the great risks of multiple births.

Of course, future Bobbi McCaugheys are unlikely to give much thought to such matters, and for good reason, as society regards the decision to proceed with a multiple pregnancy very differently from the abuse of illegal drugs. Yet both are situations in which children are exposed to the risk of death or severe handicaps, and both are situations in which the medical profession needs to do much more to help women (and their partners) to adjust their behavior in ways that offer their children a better start in life.

References

1. Chris Mihill and Sarah Boseley, "Multiple Births: When the Shine Wears Off a Miracle," *The Guardian* (London), 21 November 1997, p. 17.

2. Gregory Pence, "McCaughey Septuplets: God's Will or Human Choice?" *Birmingham Sunday News,* 30 November 1997, p. C1.

3. Whitner v. State, 1997 W.L. 680091 (S.C.), filed 15 July 1997 and amended and refilled on grant of rehearing 27 October 1997.

4. State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984).

5. Commonwealth v. Pellegrini, No. 87970 (Mass. Super. Ct., 15 October 1990), slip op. at 11.

6. The *Whitner* court rejected the argument that the pressure to take this step amounted to a penalty on the decision to carry a pregnancy to term in violation of the woman's right of privacy recognized in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).