



8-22-2013

# Pregnancy Crimes: New Worries to Expect When You're Expecting

Kira Proehl

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Kira Proehl, Comment, *Pregnancy Crimes: New Worries to Expect When You're Expecting*, 53 SANTA CLARA L. REV. 661 (2013).  
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## **PREGNANCY CRIMES: NEW WORRIES TO EXPECT WHEN YOU'RE EXPECTING**

**Kira Proehl\***

### TABLE OF CONTENTS

Introduction.....	662
I. Categories of Pregnancy Crimes .....	664
A. Drug-Dependent Women: Regina McKnight and South Carolina .....	664
B. Prosecution for Defying Medical Orders.....	668
1. Refusing Cesarean Surgery: Melissa Rowland and Criminal Prosecution.....	668
2. Refusing Cesarean Surgery: Jessie Mae Jefferson and Civil Orders .....	669
3. Failing to Follow Doctor's Orders: Pamela Rae Stewart.....	670
C. Prosecution for Harm to Self: Bei Bei Shuai .....	671
D. Pregnancy Crimes: A Powerful Tool .....	673
II. Pregnancy Crimes as Violations of Fundamental Rights.....	673
A. Due Process and the Requirement of Fair Notice.....	673
B. Privacy in the Private Realm of the Family .....	676
C. Equal Protection.....	678
D. Are States Willing to Risk Serious Violations of Fundamental Rights?.....	680
III. Pregnancy Crimes Reflect Bad Policy .....	680
A. Slippery Slope: How to Properly Define "Good" and "Bad" Maternal Behavior.....	681
B. Difficulties in Determining "Unique Harm:" Panicked Science .....	684
C. Criminal Liability Creates Perverse Incentives...	687

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\* J.D. Candidate, Santa Clara School of Law, 2013. I would like to thank the Volume 53 Editorial Board of the Santa Clara Law Review for their countless hours of hard work; Professor Michelle Oberman for her help in making this comment come to life; Lynn Paltrow, Farah Diaz-Tello, and Emma Ketteringham at the National Advocates for Pregnant Women for introducing me to the realities facing pregnant women; and Lynn Mumby, Tom Proehl, and Janna Proehl for their never ending love and support.

D. Pregnancy Crimes and Policy: Conclusion .....	690
Conclusion .....	690

#### INTRODUCTION

In 1984, Heidi Murkoff authored the first edition of *What to Expect When You're Expecting*.<sup>1</sup> Since then, she has penned four more fantastically successful editions, which have sold over thirty-four million copies in the United States alone.<sup>2</sup> The book has become one of the quintessential sources for information about pregnancy throughout the world.<sup>3</sup> In 2012, it received the consummate American honor: a movie deal.<sup>4</sup> Lionsgate turned it into a movie with Jennifer Lopez, Cameron Diaz, and Dennis Quade nestled amongst a star-studded ensemble cast.<sup>5</sup> The enduring popularity of the franchise is in part due to its exploration of a very basic human impulse: a mother's desire to birth and raise healthy babies.

A pregnant woman and her fetus are inextricably linked during pregnancy.<sup>6</sup> This knowledge drives women's desire to understand the process and, consequently, the sales of Ms. Murkoff's book. Everything from what a woman eats, what she breathes, and where she goes can influence the way a fetus grows.<sup>7</sup> Though many authors have weighed in on how a woman should act during pregnancy, historically the ultimate decisions about how to behave have been left to the mother. Recently, however, states have begun to regulate the behavior of pregnant women through criminal statutes.

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1. *About Heidi*, WHAT TO EXPECT, <http://www.whattoexpect.com/home/about-the-author.aspx> (last visited Oct. 7, 2012); ARLENE EISENBERG ET AL., *WHAT TO EXPECT WHEN YOU'RE EXPECTING* (2d ed. 1991).

2. *Id.*

3. *See id.*

4. *What to Expect When You're Expecting*, IMDB, <http://www.imdb.com/title/tt1586265/> (last visited Oct. 7, 2012).

5. *What to Expect When You're Expecting—the Movie!*, WHAT TO EXPECT, <http://www.whattoexpect.com/what-to-expect-the-movie.aspx> (last visited Oct. 7, 2012); *What to Expect When You're Expecting*, *supra* note 4.

6. *See* JERROLD S. GREENBERG, CLINT E. BRUESS & SARAH C. CONKLIN, *EXPLORING THE DIMENSIONS OF HUMAN SEXUALITY* 299 (4th ed. 2011).

7. *See infra* Part III.A.

In 2005, there were an estimated six million pregnancies in the United States.<sup>8</sup> These pregnancies resulted in over four million live births and just over one million fetal losses.<sup>9</sup> Twenty-six thousand of the fetal losses each year are due to stillbirths, defined as a loss of a fetus after twenty weeks of gestation.<sup>10</sup> Traditionally, stillbirths have been periods of private mourning for a family. States across the political spectrum, from South Carolina to California, however, have started toying with the idea that these personal tragedies are matters of state concern. Utah, for example, enacted a law in 2010 that criminalizes (via homicide) any pregnant woman who “intentionally, [and] knowingly . . . causes the death of . . . an unborn child at any stage of its development” except in the context of a legal abortion.<sup>11</sup> Every miscarriage and stillbirth in the state can potentially be subjected to a criminal investigation under this statute.<sup>12</sup> When followed to its logical conclusion, such a law raises the question: to what extent can the state regulate and control a pregnant woman’s behavior in the effort to prevent stillbirths.

This Comment will introduce these “pregnancy crimes,” which are really a new form of status crime aimed at pregnant women. In other words, the crimes can only apply to a very small, particular subset of the population. Part I will introduce various categories of pregnancy crimes that prosecutors have already brought.<sup>13</sup> It will focus on the prosecutions of drug-dependent women, women who defy doctors’ orders, and women who attempt self harm.<sup>14</sup> Part II will discuss the laws behind pregnancy crimes and look at how these laws interact with the Due Process Clause, privacy concerns, and the Equal Protection Clause.<sup>15</sup> If states are

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8. Stephanie J. Ventura et al., *Estimated Pregnancy Rates for the United States, 1990–2005: An Update*, NAT’L VITAL STATISTICS REPORTS, Oct. 14, 2009, at 1.

9. *Id.*

10. Katherine Harmon, *U.S. Stillbirths Still Prevalent, Often Unexplained*, SCIENTIFIC AMERICAN (Dec. 13, 2011), <http://www.scientificamerican.com/article.cfm?id=stillbirth-risk-factors>.

11. UTAH CODE ANN. § 76-5-201 (West 2010).

12. NAT’L ADVOCATES FOR PREGNANT WOMEN, SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW 3 (2010).

13. *See infra* Part I.

14. *See infra* Part I.

15. *See infra* Part II.

permitted to use existing murder and feticide laws to regulate a woman's behavior during pregnancy, the rights of pregnant women will be severely impaired.<sup>16</sup> Pregnancy crimes fail not only under a constitutional analysis, but are also poorly reasoned from a policy angle. Part III delves into the policy reasons behind pregnancy crimes.<sup>17</sup> I find that holding women criminally liable for the outcomes of their pregnancies will actually serve to undermine the overarching state goal of birthing and raising healthy babies, particularly in high-risk populations, like drug-dependent women.<sup>18</sup> Ultimately, if pregnancy crimes are permitted to stand, pregnant women will become a new form of second-class citizen, with their rights and liberties severely curtailed.

### I. CATEGORIES OF PREGNANCY CRIMES

Pregnancy crimes do not represent an academic idea, but an actual reality.<sup>19</sup> Women have already been prosecuted throughout the country for actions taken during pregnancy. It is estimated that at least two hundred women in more than thirty states have been arrested and criminally charged for actions taken while they were pregnant.<sup>20</sup> This section will introduce a number of these prosecutions, separated into three major categories: actions against drug-dependent women, prosecutions for failing to follow doctors' orders, and prosecutions for self harm.

#### A. *Drug-Dependent Women: Regina McKnight and South Carolina*

Drug dependency is a problem that afflicts people no matter where they fall in the socioeconomic spectrum.<sup>21</sup>

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16. See *infra* Part II.D.

17. See *infra* Part III.

18. See *infra* Part III.D.

19. 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=1](http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?_r=1).

20. CTR. FOR REPROD. RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN'S HEALTH AND CHILDREN'S INTEREST 2 (2000) [hereinafter PUNISHING WOMEN], available at <http://reproductiverights.org/en/document/punishing-women-for-their-behavior-during-pregnancy-an-approach-that-undermines-womens-heal>.

21. See Peter Kerr, *Rich vs. Poor: Drug Patterns are Diverging*, N.Y. TIMES, Aug. 30, 1987, <http://www.nytimes.com/1987/08/30/us/rich-vs-poor-drug->

However, only in the context of pregnant women has dependency itself, as opposed to the possession or sale of illicit substances, been subject to civil and criminal sanctions. States most often punish drug-dependent pregnant women with civil sanctions either by terminating parental rights or through child abuse statutes.<sup>22</sup> However, in recent decades, criminal charges levied against women who take drugs during pregnancy have been cropping up around the country.<sup>23</sup> South Carolina, in particular, has taken a strong stance on the issue.

More than five hundred women endure stillbirths in South Carolina each year,<sup>24</sup> which is consistent with the national average of around twenty-six thousand per year.<sup>25</sup> Many risk factors have been isolated, but often the root cause of a stillbirth is difficult to pinpoint.<sup>26</sup> Historically, it has been considered a personal tragedy, with families grieving in private.<sup>27</sup> In 2001, however, a jury in South Carolina changed the way stillbirths are viewed by the state when they occur in the presence of drug dependency.<sup>28</sup> The shift began with the prosecution of Regina McKnight, a developmentally disabled black woman who lived in South Carolina, with her mother and three children.<sup>29</sup> After her mother was killed in a hit and run accident in 1998, Regina began to use drugs to cope with

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patterns-are-diverging.html?pagewanted=all&src=pm.

22. See Monica K. Miller, *Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act?*, 15 HEALTH MATRIX 383, 393 (2005).

23. See generally PUNISHING WOMEN, *supra* note 20.

24. David Guard, *Press Release: South Carolina Supreme Court Reverses 20-Year Homicide Conviction of Regina McKnight*, STOPTHEDRUGWAR.ORG (May 13, 2008, 12:55 PM), [http://stopthedrugwar.org/trenches/2008/may/13/press\\_release\\_south\\_carolina\\_sup](http://stopthedrugwar.org/trenches/2008/may/13/press_release_south_carolina_sup).

25. Harmon, *supra* note 10.

26. *Loss and Grief*, MARCH OF DIMES (Feb. 2010), [http://www.marchofdimes.com/baby/loss\\_stillbirth.html](http://www.marchofdimes.com/baby/loss_stillbirth.html).

27. See *id.*

28. See Dana Page, Note, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 HOW. L.J. 363, 363 (2003).

29. Anne Gearan, *Supreme Court Refuses to Hear Case Involving Stillbirth*, THE SEATTLE TIMES, Oct. 7 2003, <http://community.seattletimes.nwsources.com/archive/?date=20031007&slug=scotus07>; Sandy Banks, *Crime and the Myth of the Perfect Mother*, L.A. TIMES, May 27, 2001, at E1, E4; see also Bob Herbert, Op-Ed, *Stillborn Justice*, N.Y. TIMES, May 24, 2001, at A29 (saying people who knew her believed she functioned at a level much lower than expected of someone with an I.Q. of seventy-two).

her pain.<sup>30</sup> A year later she was twenty-two years old, dependent on drugs, homeless, and pregnant.<sup>31</sup>

When Regina McKnight went to Conway Hospital to deliver, a second tragedy struck, and she suffered a stillbirth.<sup>32</sup> She named the stillborn baby girl Mercedes<sup>33</sup> and began to mourn her loss. This would typically be the end of a mother's public ordeal, but five months later, Regina was arrested on charges of homicide by child abuse—a crime unique to South Carolina. Unwittingly, Regina became a victim in the expansion of state laws to include fetuses as children with rights.

South Carolina began targeting drug-addicted women for prosecution at the end of the 1980s.<sup>34</sup> The State required “mandatory arrest of any woman who tested positive for drugs after delivering a baby.”<sup>35</sup> When this policy was first implemented, the Medical University of South Carolina tested women without their consent and disclosed any positive results to the police, an arrangement ultimately found to be unconstitutional.<sup>36</sup> Black women in particular felt the burden of this system.<sup>37</sup>

Policy makers and hospitals were not the only groups in South Carolina working to implement fetal rights. Over the past thirty years, South Carolina courts entered the fray and included viable fetuses within the definition of a human being.<sup>38</sup> In 1997, the state's supreme court decided the case of *Whitner v. State*,<sup>39</sup> which constituted a giant step towards establishing independent rights of a fetus.<sup>40</sup> In *Whitner*, a

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30. Gearan, *supra* note 29.

31. *Petition Filed Today Seeking U.S. Supreme Court Review of Unprecedented South Carolina Decision Treating a Woman Who Suffered a Stillbirth as a Murderer*, NAT'L ADVOCATES FOR PREGNANT WOMEN (May 27, 2003), <http://advocatesforpregnantwomen.org/issues/prmcknight.htm> [hereinafter *Petition*]; Page, *supra* note 28, at 365.

32. *Petition*, *supra* note 31.

33. Shalini Bhargava, Note, *Challenging Punishment and Privatization: A Response to the Conviction of Regina McKnight*, 39 HARV. C.R.-C.L. L. REV. 513, 516 (2004).

34. *See id.* at 517.

35. *Id.* at 517–18.

36. Page, *supra* note 28, at 376–77.

37. *See id.* at 378.

38. *Id.* at 382–91.

39. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

40. Bhargava, *supra* note 33, at 518.

woman gave birth to a healthy newborn baby that tested positive for cocaine.<sup>41</sup> The court held that “the plain meaning of ‘child’” in its child abuse and endangerment statute “includes a viable fetus.”<sup>42</sup> The dissent forcefully argued that the court was invading “the sole province of the legislative branch,”<sup>43</sup> and that the very language of the law precludes the inclusion of fetus in the definition of a child.<sup>44</sup> Despite the dissent’s scorching criticism, women in South Carolina have been liable under civil statutes for their behavior during their pregnancies since *Whitner*.

This expansive definition of “child” has allowed South Carolina to bring the birthing process under scrutiny. South Carolina Code Section 16-3-85(A)(1) holds that if a person causes the death of a child “while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life,” that person is guilty of homicide by child abuse.<sup>45</sup> Regina was charged under this statute.<sup>46</sup> After a mistrial, she became the first woman in the United States to be convicted of homicide by child abuse for suffering a stillbirth.<sup>47</sup> At twenty-four years old, she was given a twenty-year sentence, which was later reduced to twelve years in prison.<sup>48</sup>

On appeal in 2003, the Supreme Court of South Carolina, in a split opinion, held that a pregnant woman who heightens the risk of a stillbirth, even unintentionally, could be found

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41. *Whitner*, 492 S.E.2d at 778.

42. *Id.* at 785.

43. *Id.* at 787 (Moore, J., dissenting).

44. *Id.* at 788 (“Contrary to the majority’s strained analysis in this case, one need look no further than the language of § 20–7–50 to clearly discern legislative intent that the statute apply only to children in being. ‘Legal custody’ is not a qualification applicable to a viable fetus. I simply disagree the legislature intended a statute entitled ‘Unlawful neglect of child or helpless person by legal custodian’ to render a pregnant woman criminally liable for any type of conduct potentially harmful to the unborn fetus.”).

45. S.C. CODE ANN. § 16-3-85(A)(1) (2003); *State v. McKnight*, 576 S.E.2d 168, 172–73 (S.C. 2003).

46. *See McKnight*, 576 S.E.2d at 172.

47. Bhargava, *supra* note 33, at 513; *see also Regina McKnight—Victory at Long Last*, NAT’L ADVOCATES FOR PREGNANT WOMEN (May 12, 2008, 3:14 PM), [http://advocatesforpregnantwomen.org/blog/2008/05/regina\\_mcknight\\_victory\\_at\\_lon.php](http://advocatesforpregnantwomen.org/blog/2008/05/regina_mcknight_victory_at_lon.php).

48. Bhargava, *supra* note 33, at 513; *McKnight*, 576 S.E.2d at 171.

guilty of “extreme indifference to human life.”<sup>49</sup> This broad decision allows for any woman who engages in an activity “public[ly] know[n]” to be “potentially fatal” to a fetus to be held civilly and criminally liable.<sup>50</sup> Regina appealed her case and in 2008, the Supreme Court of South Carolina found that McKnight had been offered ineffective assistance from her appointed counsel.<sup>51</sup> The court also acknowledged that there was a reasonable probability that the jury relied on the “adverse and apparently outdated scientific studies propounded by the State[] . . . that cocaine caused the death of the fetus.”<sup>52</sup> Regina’s sentence was suspended, but criminal liability for pregnancy remains on the books in South Carolina.

### *B. Prosecution for Defying Medical Orders*

Drug dependency is not the only situation leading to a mother’s liability for actions taken during pregnancy. Many states have attempted to prosecute women for defying their doctors’ orders. This section will outline two frequent instances when women have chosen paths deviating from their physician’s suggestions, and which, as a result, have led to legal troubles. The first two sections will discuss refusals of cesarean surgeries and the third will delve into failing to follow doctors’ orders while at home.

#### *1. Refusing Cesarean Surgery: Melissa Rowland and Criminal Prosecution*

Melissa Rowland was sent to a mental hospital when she was twelve years old.<sup>53</sup> She had been suicidal at several points in her life.<sup>54</sup> At age fourteen, she gave birth to her first set of twins.<sup>55</sup> She later became pregnant with her second set

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49. See *McKnight*, 576 S.E.2d at 172–73.

50. See *id.* at 173.

51. *McKnight v. State*, 661 S.E.2d 354, 359 (S.C. 2008).

52. *Id.* at 360–61.

53. Alexandria Sage, *Utah C-Section Mom Gets Probation*, CBSNEWS (May 7, 2009, 1:34 PM), <http://www.cbsnews.com/stories/2004/03/12/national/main605537.shtml>.

54. See Katha Pollitt, *Pregnant and Dangerous*, THE NATION (Apr. 8 2004), <http://www.thenation.com/article/pregnant-and-dangerous>.

55. *Id.*

of twins and her boyfriend abandoned her.<sup>56</sup> When she went to the hospital in Salt Lake City for delivery, she initially declined a recommended cesarean surgery.<sup>57</sup> She eventually changed her mind and submitted to the operation on January 13, 2004.<sup>58</sup> One twin, her daughter Hannah, survived, but the twin boy did not.<sup>59</sup> Hannah tested positive for cocaine.<sup>60</sup> With no time to mourn her loss, Melissa was charged with first-degree murder for the death of her stillborn son, taken away from her children, and sent to jail.

This was the first reported case of a criminal prosecution brought against a mother, in part, for refusing to undergo cesarean surgery.<sup>61</sup> The proceedings were soon engulfed in controversy and a national dialogue broke out concerning the merits of forcing a woman into surgery against her will.<sup>62</sup> Cesarean surgery is a major event that can cause lasting complications for the mother.<sup>63</sup> Groups began debating the high rate of cesarean surgery in the United States and the balance of rights between a mother and her fetus.<sup>64</sup> After three months behind bars, the prosecution relented and Melissa accepted a plea to two counts of child endangerment for using drugs during pregnancy.<sup>65</sup> The murder charge related to the refusal of the cesarean section was dropped.<sup>66</sup>

## 2. *Refusing Cesarean Surgery: Jessie Mae Jefferson and Civil Orders*

Drug-dependent women are not the only subset of the population threatened with legal action for refusing to submit to cesarean surgery. In the case of Jessie Mae Jefferson, it was the patient's religious convictions that Georgia chose to override. When Jessie was due to deliver her child, she was

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56. *Id.*

57. See Miller, *supra* note 22, at 383.

58. Lisa Collier Cool, *Could You Be Forced to Have a C-Section?*, NAT'L ADVOCATES FOR PREGNANT WOMEN (May 2005), [http://advocatesforpregnantwomen.org/articles/forced\\_c-section.htm](http://advocatesforpregnantwomen.org/articles/forced_c-section.htm).

59. *Id.*

60. Pollitt, *supra* note 54.

61. Miller, *supra* note 22, at 384.

62. See Pollitt, *supra* note 54.

63. Miller, *supra* note 22, at 385.

64. See Cool, *supra* note 58.

65. *Id.*

66. *Id.*

diagnosed with a complete placenta previa.<sup>67</sup> This left her child with a ninety-nine percent chance of dying in a normal birth and placed the odds of her own survival at only fifty percent.<sup>68</sup> Doctors informed her that she and her child were virtually guaranteed to survive a cesarean surgery.<sup>69</sup> Despite these odds, Jessie and her husband followed their religious beliefs and insisted on continuing with a natural birth.<sup>70</sup>

Griffin Spalding County Hospital responded by seeking an order from the Butts County Superior Court that would require Jessie to deliver her child through cesarean surgery and accept any necessary blood transfusions.<sup>71</sup> The order was granted<sup>72</sup> and the court gave temporary custody of the fetus—still inside of Jessie's body—to the Georgia Department of Human Resources.<sup>73</sup> The state supreme court refused to stay the motion, and plans were made to compel Jessie to undergo an unwanted surgery.<sup>74</sup> At the last moment, this drastic measure proved unnecessary. Jessie's placenta shifted and she was able to give birth without intervention.<sup>75</sup> Precedent at the hospital and in the courts, however, was set.

### 3. *Failing to Follow Doctor's Orders: Pamela Rae Stewart*

Caesarean surgeries are not the only points of contention between pregnant women and their doctors. There have been cases of women being criminally charged for failing to follow other doctor-recommended treatment. One such dispute took place in California. Pamela Rae Stewart was the mother of two children.<sup>76</sup> She and her husband frequently moved from

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67. *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981). Placenta previa is “[a] placenta which is attached to the lower part of the interior of the uterus . . . so that it partly covers the outlet of the uterus.” J.E. SCHMIDT, *SCHMIDT'S ATT'YS DICTIONARY OF MED.* 205 (1991).

68. *Jefferson*, 274 S.E.2d at 458.

69. See Brent T. Stanyer, *Court-Ordered Cesarean Sections: An Example of the Dangers of Judicial Involvement in Medical Decision Making*, 28 GONZ. L. REV. 121, 123 (1992).

70. *Jefferson*, 274 S.E.2d at 459; Stanyer, *supra* note 69, at 123.

71. Stanyer, *supra* note 69, at 122.

72. *Jefferson*, 274 S.E.2d at 460.

73. Stanyer, *supra* note 69, at 123.

74. *Id.* at 123–24.

75. *Id.* at 124.

76. Lee A. Schott, *The Pamela Rae Stewart Case and Fetal Harm: Prosecution or Prevention?*, 11 HARV. WOMEN'S L.J. 227, 227 (1988).

job to job in an attempt to support their family.<sup>77</sup> In 1985 she became pregnant with her third child.<sup>78</sup> Eight months later, she, too, was diagnosed with placenta previa.<sup>79</sup> The doctors sent Pamela home with strict instructions to stay off her feet and avoid sexual intercourse.<sup>80</sup> On November 23, she had sex with her husband and soon began to bleed, sending her to the hospital.<sup>81</sup> Doctors later concluded that the bleeding caused her son, Thomas Monson, Jr., to be brain dead at birth.<sup>82</sup> He died five weeks later.<sup>83</sup>

Nine months after her son's death, Pamela was arrested and charged under California Penal Code Section 270, a criminal child neglect statute that expressly covers fetuses.<sup>84</sup> The charge was based on her alleged use of drugs, her engagement in intercourse, and her alleged failure to promptly go to a hospital when the bleeding started.<sup>85</sup> On February 26, 1987, the San Diego Municipal Court Judge sustained a demurrer from the defense finding that Section 270 "was not intended to apply to this situation and does not impose a duty upon the pregnant woman."<sup>86</sup> He left open the chance that a more narrowly tailored law could apply.<sup>87</sup>

### C. *Prosecution for Harm to Self: Bei Bei Shuai*

In no state is suicide a statutory crime.<sup>88</sup> However, an Indiana court is currently deciding a case that presents the novel question of whether a pregnant woman who attempts suicide should be criminally accountable for the subsequent harm to her fetus. At the time of the incident, Bei Bei Shuai

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77. *See id.*

78. *Id.*

79. *Id.* at 228.

80. *Id.*

81. *Id.*

82. *Id.* at 229.

83. *See id.*

84. *Id.*

85. *See Miller, supra* note 22, at 395.

86. Schott, *supra* note 76, at 230.

87. *See id.*

88. *See Is Suicide a Crime?*, SUICIDE: FINDING HOPE, [http://www.suicidefindinghope.com/content/is\\_suicide\\_a\\_crime](http://www.suicidefindinghope.com/content/is_suicide_a_crime) (last visited Oct. 9, 2012) [hereinafter *Suicide*]; *see also* Wackwitz v. Roy, 418 S.E.2d 861, 864 (Va. 1992).

was thirty-four years old and living in Indiana.<sup>89</sup> She and her boyfriend had opened a Chinese restaurant together and the two soon conceived a child.<sup>90</sup> When Bei Bei was in her third trimester, her boyfriend informed her that he was actually married to another woman and was ending the relationship with Bei Bei.<sup>91</sup> He left Bei Bei crying on her knees in a parking lot.<sup>92</sup> Traumatized and alone, she decided to end her life by ingesting rat poison (which, incidentally, is one of the slowest and most excruciating ways to die).<sup>93</sup> When the pills did not immediately take effect, she drove to a gas station where she encountered a friend.<sup>94</sup> He brought her home to his wife and in their effort to determine the nature of Bei Bei's illness, the couple eventually learned about the poison.<sup>95</sup> They immediately took Bei Bei to a hospital where she was treated and survived.<sup>96</sup>

Several days later Bei Bei's daughter, Angel, was born through a cesarean surgery.<sup>97</sup> The baby survived birth, but died days later in the arms of her distraught mother.<sup>98</sup> After a few months, Bei Bei was charged with murder and feticide and put in jail.<sup>99</sup> The trial court denied Bei Bei's motion for bail on June 6, 2011, although the Appellate Court later overruled the motion.<sup>100</sup> However, the same Appellate Court ruled that Indiana's murder and feticide statute could be applied to these circumstances.<sup>101</sup> At the time of this writing,

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89. Jennifer Block, *Jailed for a Suicide Attempt*, THE DAILY BEAST (Apr. 12, 2011, 10:32 PM), <http://www.thedailybeast.com/articles/2011/04/13/jennifer-block-on-bei-bei-shuais-feticide-ordeal.html>.

90. *Id.*

91. *Bei Bei Shuai v. State*, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

92. Block, *supra* note 89.

93. Lynn M. Paltrow, *Is Locking Up Pregnant Women the New Cure for State Financial Woes and Mental Health Problems?*, THE HUFFINGTON POST (Mar. 30, 2011, 6:12 PM), [http://www.huffingtonpost.com/lynn-m-paltrow/pregnant-women-suicide-bei-bei-shuai\\_b\\_842753.html](http://www.huffingtonpost.com/lynn-m-paltrow/pregnant-women-suicide-bei-bei-shuai_b_842753.html) [hereinafter Paltrow].

94. Block, *supra* note 89.

95. *See id.*

96. Paltrow, *supra* note 93.

97. Block, *supra* note 89.

98. *Id.*

99. *See* Paltrow, *supra* note 93.

100. *Bei Bei Shuai v. State*, 966 N.E.2d 619, 632 (Ind. Ct. App. 2012).

101. *Id.* at 629 ("The State alleged the existence of facts that could satisfy the elements of murder: Shuai is a 'person,' the State alleged she intended to kill A.S. by virtue of Shuai's mention of the fetus in the suicide note, and the victim

2013]

*PREGNANCY CRIMES*

673

the case is currently pending trial.

*D. Pregnancy Crimes: A Powerful Tool*

These cases illustrate the potential for a sharp disparity between the wishes of the mother and the state and the means each party has to exert their will. States throughout the country have resorted to criminal law to gain enough leverage to force women to adhere to their doctors' orders. This Article divides pregnancy crimes into three separate categories, but in reality, the lines are much more blurred. The resounding theme in these cases is that poor women with little resources are being threatened with and sent to prison because of actions they take during their pregnancies. Their prosecution leads not only to bad laws, but also to bad policies. The next part of this Comment will critique the legal analysis underlying these diverse cases.

## II. PREGNANCY CRIMES AS VIOLATIONS OF FUNDAMENTAL RIGHTS

Pregnancy crimes are based on a misguided interpretation of the law. Expanding the reach of murder, feticide, and criminal child endangerment statutes to reach the relationship between a woman and her fetus encroaches on many of the woman's rights. This section will specifically focus on issues born of the failure to provide fair notice required by the Due Process Clause, privacy concerns, and equal protection.

*A. Due Process and the Requirement of Fair Notice*

The United States Supreme Court has ruled that a law "fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits."<sup>102</sup> A law is impermissibly vague when it fails to establish sufficient law enforcement standards that protect against an arbitrary

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was an entity protected under the murder statute, be it a 'viable fetus' or 'human being,' died. Nor can we find the feticide statute ambiguous as applied here, as it is undisputed Shuai's pregnancy was terminated when A.S. was born, and the State seems prepared to argue it was Shuai's intent to end her pregnancy when she ingested rat poison.").

102. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

deprivation of a liberty interest.<sup>103</sup> In the case of already existing statutes, the Due Process Clause prohibits prosecutors and courts from interpreting or applying an existing law in an unforeseen or unintended manner.<sup>104</sup> Many of the statutes being used to target pregnant women, particularly murder and feticide statutes, were not initially created to cover the relationship between a pregnant woman and her fetus.<sup>105</sup> Applying these statutes in this novel way gives rise to two major problems: first, ordinary women will not understand exactly what conduct is prohibited during a pregnancy, and second, the vague nature of the laws will encourage arbitrary and discriminatory enforcement.<sup>106</sup>

First, applying murder and feticide statutes to pregnant women in relation to their fetus fails to provide enough notice to ordinary citizens about precisely what conduct is prohibited. Applying traditional murder and feticide statutes to a pregnant woman fails to illuminate a dividing line between “good” and “bad” maternal behavior.<sup>107</sup> The purpose of the fair notice requirement in the Due Process Clause is to “enable the ordinary citizen to conform his or her conduct to the law.”<sup>108</sup> Regina McKnight was charged with homicide by child abuse based on her use of cocaine,<sup>109</sup> but the range of substances that affect a fetus runs from baby aspirin to illicit drugs. No statutes outline the exact type of drug use during pregnancy that will result in homicide charges. One can easily imagine a case of a woman taking legal prescription drugs and suffering a stillbirth.<sup>110</sup> Would the charge of homicide still be applicable in that instance?

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103. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

104. PUNISHING WOMEN, *supra* note 20, at 3.

105. See *id.* at 2. This is excluding the minority of states, like Utah, that have enacted statutes that specifically relate to pregnant women. See UTAH CODE ANN. § 76-5-201 (2011).

106. See *Kolender*, 461 U.S. at 358.

107. See *infra* Part III.A.

108. *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999).

109. *State v. McKnight*, 576 S.E.2d 168, 172–73 (S.C. 2003).

110. See Lisa M. Pastore, Irva Hertz-Piccioletto & James J. Beaumont, *Risk of Stillbirth from Medications, Illnesses and Medical Procedures*, 13 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 421, 421 (1999) (“Prescription pain medication, when taken in the first 2 gestational months, was strongly associated with stillbirths due to congenital anomalies . . .”).

In the case of following doctor's orders, would a pregnant woman have to do absolutely everything her doctor prescribed? Melissa Rowland refused cesarean surgery and as a result faced murder charges.<sup>111</sup> This procedure, however, is not the only one that could be required of a pregnant woman. Doctors could insist that a woman have ultrasounds, take certain medications, and accept the administration of Pitocin, epidurals, and other drugs during delivery.<sup>112</sup> Would a woman have the right to refuse these and other doctor-recommended treatments if the state determined that they were beneficial to the fetus? Part III of this Comment discusses at length the difficulties of pinpointing the dividing line between good and bad maternal behavior.<sup>113</sup> With no clear demarcation between what behavior is acceptable and what is not, the threat of homicide and feticide laws will leave women entirely at the mercy of their doctors and prosecutors.

Courts have long wrestled with the issue of vagueness when applying statutes to a pregnant woman that were not created with pregnancy in mind. Though some disagree, many courts have found that the words "child" or "person" are not intended to include a fetus.<sup>114</sup> The courts reason that by applying these statutes to prenatal conduct, the government violates due process because pregnant women do not have the required notice that such laws apply to them.<sup>115</sup> The United States Supreme Court has specifically held that judicial construction of a statute that is new and unforeseen violates the Due Process Clause in much the same way that an *ex post facto* application of a new statute would.<sup>116</sup> If an individual does not know how a court or prosecutor will apply a law, the government violates the Due Process Clause. Melissa Rowland and Bei Bei Shuai were prosecuted for murder based

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111. Miller, *supra* note 22, at 383–84.

112. See generally Beth Azar, *The Postpartum Cuddles: Inspired by Hormones?*, 33 AM. PSYCHOLOGICAL ASS'N, 54 (2002), available at <http://www.apa.org/monitor/oct02/postpartum.aspx>.

113. See *infra* Part III.A.

114. See *Reyes v. Superior Court*, 141 Cal. Rptr. 912, 914 (Cal. Ct. App. 1977); *People v. Morabito*, 580 N.Y.S.2d 843, 846–47 (N.Y. City Ct. 1992); *Reinesto v. Superior Court*, 894 P.2d 733, 735–36 (Ariz. Ct. App. 1995); *Roe v. Wade*, 410 U.S. 113, 158 (1973).

115. See *Morabito*, 580 N.Y.S.2d at 846–47.

116. *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964).

on actions that in no way mirror traditional actions covered by murder statutes.<sup>117</sup> Applying these statutes in such a broad way fails to provide appropriate notice of what actions are unacceptable, thereby giving rise to due process concerns.

Second, because of the tenuous, undetermined state of precisely what actions constitute murder or abuse of a fetus, the laws will encourage arbitrary and discriminatory enforcement. Legislatures are required to establish minimal guidelines to govern law enforcement.<sup>118</sup> If the determination of what maternal behavior reaches the status of murder, homicide, or criminal child neglect remains with law enforcement personnel, it will be extremely unlikely that the laws will be upheld in a consistent manner. Officers from county to county will be free to target the communities and behavior that they personally find offensive. The possibility of arbitrary enforcement, paired with the vagueness of applying existing statutes to a pregnant woman raise serious concerns under the Due Process Clause.

### *B. Privacy in the Private Realm of the Family*

There is no right to privacy mentioned in the United States Constitution.<sup>119</sup> The Supreme Court, however, has long recognized a substantive right to privacy under the Due Process Clause of the Fourteenth Amendment.<sup>120</sup> The full scope of the right to privacy has not been defined, but it clearly extends to the marital relationship,<sup>121</sup> contraception,<sup>122</sup> procreation,<sup>123</sup> child-rearing,<sup>124</sup> and intimate choices.<sup>125</sup> Under this right, the state is not permitted to enter the “private realm of family life” without surviving the strictest of

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117. See Miller, *supra* note 22, at 383–84; Bei Bei Shuai v. State, 966 N.E.2d 619, 623 (Ind. Ct. App. 2012).

118. Kolender v. Lawson, 461 U.S. 352, 358 (1983).

119. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1100 (2002) (outlining the history of the right to privacy, starting with “the right to be let alone”).

120. Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977).

121. See Loving v. Virginia, 388 U.S. 1, 12 (1967).

122. See Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972).

123. See Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942).

124. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 834 (1992); Pierce v. Soc'y of the Sisters, 268 U.S. 510, 534–35 (1925).

125. See Lawrence v. Texas, 539 U.S. 558, 578 (2003).

scrutiny.<sup>126</sup>

Supreme Court precedent is crucial in determining if a right to privacy exists regarding actions taken during pregnancy. It is well established by the Court that the Constitution places limits on a state's right to interfere with a person's decisions about family and parenthood.<sup>127</sup> The Court, in *Planned Parenthood v. Casey*, stated that:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>128</sup>

The Court goes on to mention that, "[t]hough abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake . . . ."<sup>129</sup> The Court clearly states that regulating the behavior of a woman during pregnancy, though within a state's regulatory role, is not permissible if a woman's liberty is impinged.<sup>130</sup> Procreation is one of a woman's fundamental liberties,<sup>131</sup> as is a mother's ability to "direct the upbringing and education of children under [her] control."<sup>132</sup> Children are "not the mere creature[s] of the state,"<sup>133</sup> but rather belong to the private sphere of the family. Allowing the state to reach into the private realm and attempt to regulate a woman's behavior during pregnancy—a vital moment in the procreation and child-rearing process—seriously threatens a woman's privacy rights.<sup>134</sup>

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126. *Prince v. Mass.*, 321 U.S. 158, 166 (1944).

127. *Planned Parenthood*, 505 U.S. at 849.

128. *Id.* at 851.

129. *Id.* at 852.

130. *See id.* at 874.

131. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

132. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925).

133. *Id.* at 535.

134. PUNISHING WOMEN, *supra* note 20, at 3.

### C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment may also present a problem for the states. Applying murder and feticide statutes to pregnant women for behavior that would otherwise be acceptable discriminates on the physiological condition of being pregnant. Bei Bei Shuai's case provides an example.<sup>135</sup> Bei Bei is currently being accused of murder because she attempted to commit suicide, which is not a crime in Indiana.<sup>136</sup> The only reason her actions have fallen under the jurisdiction of the criminal justice system is because she happened to be pregnant. The prosecutors are attempting to create a new crime that can only apply to a pregnant woman.

The key question is whether discrimination on the basis of pregnancy receives heightened scrutiny.<sup>137</sup> If not, courts are only looking for a rational basis between a law and its purported purpose—a bar easily met.<sup>138</sup> Gender discrimination has historically received a heightened intermediate scrutiny.<sup>139</sup> For a gender-based classification in a law to be upheld, the state must establish that the challenged law serves important governmental objectives and that the means employed are substantially related to those objectives.<sup>140</sup> Pregnancy, however, has not been looked at through the same lens as other gender-based classifications.<sup>141</sup> In 1976, the Supreme Court found that pregnancy discrimination was not sex discrimination and therefore did not deserve a heightened form of scrutiny.<sup>142</sup> Congress responded by passing the Pregnancy Discrimination

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135. See generally *Bei Bei Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012).

136. *Id.* at 630; see also *Suicide*, *supra* note 88.

137. See generally Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591 (2000) (discussing the various standards in an equal protection analysis).

138. See *id.* at 603 (“[Rational basis review] has come to embody the notion that most legislation is entitled to a strong presumption of constitutionality and that, all things considered, the judicial invalidation of social and economic legislation should be an exceptional event.”).

139. See generally *United States v. Virginia*, 518 U.S. 515 (1996).

140. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 60 (2001).

141. See generally *id.* at 58–73 (applying a more deferential review because the bearing of children is the real difference between men and women).

142. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976).

Act (PDA) in 1978, which clearly stated that discrimination on the basis of pregnancy violated the Civil Rights Act.<sup>143</sup> The PDA focused specifically on discrimination against a woman in the employment context,<sup>144</sup> but served to heighten the level of scrutiny applied to cases regarding pregnancy. As far as pregnancy discrimination under a criminal statute, it is likely that the current Court will continue to apply minimal scrutiny.

Pregnancy crimes could be found unconstitutional under an equal protection analysis based on the type of woman being prosecuted. The majority of women prosecuted for actions during pregnancy, especially in the context of drug use, are poor, black women.<sup>145</sup> States rely on hospitals for information about prenatal drug exposure, and hospitals serving poor communities do the most testing.<sup>146</sup> Affluent women are simply not being checked as frequently.<sup>147</sup> Testing is usually done at the discretion of hospital staff, allowing hospitals to target specific communities.<sup>148</sup> Moreover, use of crack cocaine, which is most prevalent in inner city black communities, has received far more attention by prosecutors than use of other drugs, such as marijuana.<sup>149</sup> Classifications based on race receive a strict scrutiny analysis,<sup>150</sup> as do laws that are intended to discriminate. A serious argument could be made that applying murder, feticide, and child abuse statutes to poor, black women in much larger numbers than their white counterparts, illustrates the core discriminatory intent of the laws, thereby making them unconstitutional.

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143. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978); see generally Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1 (2009).

144. See Pedriana, *supra* note 143, at 1.

145. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432 (1991).

146. See *id.* at 1433.

147. See *id.*

148. *Id.*

149. *Id.* at 1434–35; see also Sara Stewart, *Smokin' Pot Mamas!*, N.Y. POST (June 22, 2011, 10:47 PM) [http://www.nypost.com/p/entertainment/smokin\\_pot\\_mamas\\_NTrYFvHxjdhj3WeWHQkXFI](http://www.nypost.com/p/entertainment/smokin_pot_mamas_NTrYFvHxjdhj3WeWHQkXFI).

150. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007) (discussing strict scrutiny analysis).

*D. Are States Willing to Risk Serious Violations of Fundamental Rights?*

Pregnancy crimes result from an improper application of existing laws and particularly face challenges under the Due Process Clause.<sup>151</sup> Attempting to regulate pregnant women under existing murder and feticide statutes, without specifically delineating the behavior deemed inappropriate, leads to issues of unconstitutional vagueness. The exact actions prohibited during pregnancy remain a mystery, and women are not given fair notice of what the state expects of them.<sup>152</sup> Pregnancy crimes also encroach on a woman's substantive right to privacy under the Fourteenth Amendment, hindering her right to procreate and control the rearing of her children.<sup>153</sup> Equal protection, however, will remain a more difficult argument until the Supreme Court revisits its view of pregnancy discrimination.<sup>154</sup> This section strives to illustrate some of the deep constitutional problems created by defining a new set of crimes that only apply to pregnant women. These laws are also based on extremely bad policy, which is the focus of the following section.

### III. PREGNANCY CRIMES REFLECT BAD POLICY

Holding mothers criminally responsible for the outcomes of their pregnancies is the result of bad policy decisions and will actually serve to undermine the ultimate state goal of birthing and raising healthy babies. This section will begin by analyzing where the line should be drawn, if it can exist at all, between "good" and "bad" maternal behavior and the dangerous slippery slope for prosecutors. It goes on to discuss the science backing up claims of fetal harm and how "junk science" has weakened the foundation of state claims. The section will end by analyzing how prosecutions may lead to indirect and undesirable public health consequences: namely, the creation of disincentives when disclosing relevant information to doctors or even to obtaining prenatal care.

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151. *See supra* Part II.A.

152. *See supra* Part II.A.

153. *See supra* Part II.B.

154. *See supra* Part II.C.

A. *Slippery Slope: How to Properly Define “Good” and “Bad” Maternal Behavior*

Virtually every action a pregnant woman takes can have an impact on her fetus.<sup>155</sup> If states choose to hold women criminally liable for the outcomes of their pregnancies, where should society draw the line between acceptable and unacceptable behavior? The difficulty underlying this determination has historically led courts to be reluctant to prosecute women for harm to their fetuses resulting from certain acts or omissions.<sup>156</sup> If states are serious about prosecuting pregnancy crimes, how should the law define “good” versus “bad” maternal behavior?

States could start from the premise that the criminal system should punish pregnant women who are engaging in activity already classified as illegal. At first glance this seems like a reasonable assumption, especially for cases regarding maternal consumption of illegal substances.<sup>157</sup> Drug-using mothers are already indulging in an activity that society considers unsavory.<sup>158</sup> Extending their liability to fetal damage would seem to be in line with society’s morals. However, Pamela Rae Stewart was criminally charged for failing to adhere to bed rest and for engaging in sexual activity.<sup>159</sup> Melissa Rowland was charged with murder when she refused to undergo surgery,<sup>160</sup> and Bei Bei Shuai is being criminally tried for attempting to commit suicide.<sup>161</sup> Clearly states are not interested in merely holding pregnant women accountable for activity that is already illegal—they are interested in something more. States have decided that, because these women are pregnant, their otherwise legal actions are sufficient grounds for prosecution.

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155. See Harmon, *supra* note 10.

156. See *Reinesto v. Superior Court*, 894 P.2d 733, 736–37 (Ariz. Ct. App. 1995); *Kilmon v. State*, 905 A.2d 306, 315 (Md. 2006); *State v. Wade*, 232 S.W.3d 663, 665–66 (Mo. Ct. App. 2007); *State v. Deborah J.Z.*, 596 N.W.2d 490, 494–95 (Wis. Ct. App. 1999).

157. See *Whitner v. State*, 492 S.E.2d 777, 778–79 (S.C. 1997).

158. See *Drugs: Shatter the Myths*, NAT’L INST. ON DRUG ABUSE (Apr. 2011), available at <http://www.drugabuse.gov/publications/drugs-shatter-myths>.

159. Schott, *supra* note 76, at 228–29.

160. Miller, *supra* note 22, at 383–84.

161. *Bei Bei Shuai v. State*, 966 N.E.2d 619, 620 (Ind. Ct. App. 2012).

Where states are choosing to draw the line between “good” and “bad” behavior appears to be rather arbitrary. If states are truly worried about what pregnant women are doing to affect fetal health, should not women be prevented from participating in any activity that is known to have a negative impact? In *What to Expect When You’re Expecting*,<sup>162</sup> the authors warn women to avoid activities like changing a cat’s litter box, eating unpasteurized cheese, sushi or deli meats, gardening without gloves, handling household cleaning products, and drinking coffee—all of which can impact a fetus.<sup>163</sup> Under South Carolina law, a woman is guilty of homicide by child abuse if she causes death “while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.”<sup>164</sup> If a woman knows that garden chemicals are bad for her developing fetus, yet decides to work in a garden without wearing appropriate gloves, this could easily be seen as a “conscious failure to exercise due care” regarding the safety of her fetus.<sup>165</sup> Under existing law, she could be found criminally liable for her actions if something during her pregnancy brings her case to the attention of state prosecutors.

A policy prohibiting pregnant women from gardening without gloves would be a challenge for police to enforce, but the logic can be applied to a more easily regulated example: prescription drugs. It is well known that prescription drugs can affect fetuses.<sup>166</sup> It is also equally well known that pregnancy does not prevent women from getting sick.<sup>167</sup> Should states forbid doctors from prescribing pregnant

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162. ARLENE EISENBERG ET AL., *WHAT TO EXPECT WHEN YOU’RE EXPECTING* (2d ed. 1991).

163. *See id.* at 60–70.

164. S.C. CODE ANN. § 16-3-85 (2003).

165. *State v. McKnight*, 576 S.E.2d 168, 173 (S.C. 2003).

166. *See, e.g.*, THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1859, 1861 (Robert Berkow et al. eds., 16th ed. 1992) (detailing the danger of aspirin, thyroid medication and antihypertensive drugs); KENNETH LYONS JONES, SMITH’S RECOGNIZABLE PATTERNS OF HUMAN MALFORMATION 495, 504 (J. Fletcher 5th ed. 1997) (anticonvulsants and anticoagulants); PHYSICIANS’ DESK REFERENCE 3391 (57th ed. 2003) (antibacterials).

167. *See generally* Gil Mor & Ingrid Cardenas, *The Immune System in Pregnancy: A Unique Complexity*, 63 AM. J. REPROD. IMMUNOLOGY 425, 425–31 (2010).

women prescription drugs that can be just as harmful as illicit substances, if not more so?<sup>168</sup> For many years, courts have struggled with the logic of creating a crime for prenatal drug use “to the exclusion of . . . other behaviors” which may equally harm the fetus.<sup>169</sup> Different drugs affect fetuses in different ways. How potentially dangerous does a drug have to be for states to ban its presence in a pregnant woman’s blood stream?

The problem of classifying the appropriateness of maternal behavior can be viewed through the lens of assisted reproductive technologies like *in vitro* fertilization (IVF). IVF involves harvesting ova from a woman, mixing the ova with sperm, waiting three to five days for embryos to develop, and then transferring one or more of the embryos into a womb.<sup>170</sup> The chance of achieving a pregnancy is greater when around four to six embryos are placed in utero.<sup>171</sup> Implanting so many embryos tends to result in multiple pregnancies—women are likely to carry twins, triplets, quadruplets or more.<sup>172</sup> These multiple pregnancies can lead to the risk of spontaneous fetal loss and extremely premature births, where the babies face severe health risks including brain damage and neonatal death.<sup>173</sup> These potential risks are well-known consequences of the IVF process.<sup>174</sup> If states are keen on regulating situations that lead to fetal harm and death, IVF and other assisted reproductive technologies are prime candidates for state intervention.

Many of a mother’s pre-existing conditions have been linked to negative fetal consequences as well. Advanced

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168. For example, Accutane, a prescription a medicine for acne, was found to cause serious birth defects when used while pregnant. See Tatiana Morales, *Acne Drug Not for Pregnant Women*, CBSNEWS (Feb. 11, 2009, 8:42 PM) [http://www.cbsnews.com/2100-500166\\_162-552308.html](http://www.cbsnews.com/2100-500166_162-552308.html).

169. *Commonwealth v. Kemp*, 18 Pa. D. & C. 4th 53, 63 (Pa. Com. Pl. 1992), available at [http://www.leagle.com/xmlResult.aspx?xmlDoc=19927118PaDampC4th53\\_166.xml&docbase=CSLWAR2-1986-2006](http://www.leagle.com/xmlResult.aspx?xmlDoc=19927118PaDampC4th53_166.xml&docbase=CSLWAR2-1986-2006), *aff’d*, 643 A.2d 705 (Pa. Super. Ct. 1994).

170. Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 510 (2005).

171. B.M. Dickens & R.J. Cook, *Some Ethical and Legal Issues in Assisted Reproductive Technology*, 66 INT’L J. GYNECOLOGY & OBSTETRICS 55, 58 (1999).

172. *See id.*

173. *Id.*

174. *See id.*

maternal age<sup>175</sup> and maternal diseases such as syphilis, hepatitis, sickle cell, or Tay-Sachs can impact the life and development of a fetus.<sup>176</sup> Are states willing to intervene in these cases and hold women liable for becoming pregnant while knowingly suffering from one of these conditions? Conceivably, getting pregnant at an advanced age would constitute a “conscious failure to exercise due care” and result in harm to a fetus.<sup>177</sup> South Carolina could very easily expand their prosecutions to include these mothers as well.

Once prosecutors start down the path of holding women criminally liable for the outcome of their pregnancies, states must confront the problem of defining the scope of the law. Determining what actions and behaviors should and should not be condoned presents a very tricky issue. If states follow the path too far they risk turning pregnant women into second-class citizens, with a variety of privileges and actions curtailed for the supposed safety of their fetus. In determining what behavior is “bad,” it is essential to understand how a certain action will actually affect the fetus, an endeavor fraught with difficulties. The next section delves further into these complications.

#### *B. Difficulties in Determining “Unique Harm:” Panicked Science*

One of the biggest problems with pregnancy crimes involves the extent to which the law has operated on shaky, or even mistaken, scientific premises. When determining what actions to regulate, the state must first understand whether a certain activity actually impacts a fetus in a unique way. Without establishing a link to actual fetal harm, a state would merely be regulating the pregnant woman for regulation’s sake. Ferreting out a direct link between a specific action and a unique harm is a daunting task, illustrating the folly in states’ attempts to hold women liable for their specific actions during pregnancy.

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175. See Ruth C. Fretts et al., *Increased Maternal Age and the Risk of Fetal Death*, 333 NEW ENG. J. MED. 953, 956 (1995).

176. See Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 846–47 (2009).

177. *State v. McKnight*, 576 S.E.2d 168, 173 (S.C. 2003).

In the case of drug-dependency, many factors converge upon a woman and impact her fetus at the same time.<sup>178</sup> Demographic factors like young maternal age, being African American, a lack of education, and low socioeconomic status already carry increased risk of adverse pregnancy outcomes.<sup>179</sup> Many women who take drugs during pregnancy do not do so in isolation. Often drugs, licit and illicit, are mixed throughout the pregnancy, and it is incredibly hard to determine what specific effects each one has on the fetus. The American College of Gynecologists has stated, “[t]he effects of maternal methamphetamine use can not [*sic*] be separated from other factors.”<sup>180</sup> The organization recognizes that drug users rarely use just one drug—alcohol, cigarettes and other drugs are often used together.<sup>181</sup> When all the factors at play in a pregnant, drug-dependent woman are looked at in totality, it becomes increasingly difficult to determine what unique harm, if any, a particular action or omission has on the developing fetus.

What is now known to be panicky, junk science has played a very prominent role in determining how pregnant women have been treated by the criminal justice system. For example, in the eighties and nineties the national media latched on to what was then considered to be a crack epidemic.<sup>182</sup> The reporting consisted of inaccurate and exaggerated information concerning the effects of in utero cocaine exposure.<sup>183</sup> People thought that prenatal exposure to crack cocaine was going to result in a generation of damaged children.<sup>184</sup> Since then, however, researchers have found that

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178. See *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008) (stating that “recent studies show[] that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.”).

179. See Shai Linn et al., *The Association of Marijuana Use with Outcome of Pregnancy*, 73 AM. J. PUB. HEALTH 1161, 1162 (1983).

180. INFORMATION ABOUT METHAMPHETAMINE USE IN PREGNANCY, AM. C. OF OBSTETRICS & GYNECOLOGY (2006), available at <http://www.rhrealitycheck.org/emailphotos/ACOGmethtalkingpoints.pdf>.

181. See *id.*

182. Lynn Paltrow & Katherine Jack, *Pregnant Women, Junk Science, and Zealous Defense*, THE CHAMPION, May 2010, at 31 [hereinafter *Junk Science*].

183. See *id.*

184. Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES, Jan. 26, 2009, <http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=all>.

fears were largely overblown and the differences between crack-exposed and nonexposed children are relatively small.<sup>185</sup> In 1992, the Journal of the American Medical Association published an article stating, “available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development.”<sup>186</sup> In 2004, thirty leading doctors and researchers of prenatal drug exposure signed an open letter contradicting the medical myth.<sup>187</sup> They plainly state that, based on their research, no “crack baby” disorder exists, undermining the fears that drove how the legal community and society at large dealt with drug-dependent pregnant women.<sup>188</sup> A similar letter has been released from ninety leading medical doctors, scientists, and psychologists regarding exposure to methamphetamines, warning that the “meth baby” myth lacks medical validity as well.<sup>189</sup>

The scientific data about prenatal cocaine exposure has been so faulty that even South Carolina’s Supreme Court reassessed its position. In 2008, the court found “recent studies show[] that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.”<sup>190</sup> Similarly, the U.S. Sentencing Commission has concluded that “the negative effects from prenatal exposure to cocaine . . . are significantly less severe than previously believed.”<sup>191</sup> These conclusions, in part, led to the court to overturn Regina McKnight’s conviction.<sup>192</sup> It is extremely difficult for a court

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185. *Id.*

186. Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 J. AM. MED. ASS’N 406, 406 (1992).

187. *Junk Science*, *supra* note 182, at 31 (“Throughout almost 20 years of research, none of us has identified a recognizable condition, syndrome or disorder that should be termed ‘crack baby.’ Some of our published research finds subtle effects of prenatal cocaine exposure in selected developmental domains, while other of our research publications do not.”).

188. *See id.*

189. *Id.*

190. *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

191. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 68 (2007), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

192. *See McKnight*, 661 S.E.2d at 366.

to charge an individual with homicide when the causation between the action and the purported result is based on faulty science.

While taking drugs during pregnancy is certainly not advised, the negative impact on fetal development is largely undetermined. There is currently no scientific or legal basis “for concluding that exposure to these substances will inevitably cause harm.”<sup>193</sup> States are basing their prosecutions of pregnant women on shaky scientific data, which casts serious doubt on their validity. Not only have states failed to fully flesh out the contours of “bad” maternal behavior, but the activities they have maligned may not be as unfortunate as states would lead us to believe. Creating laws based on this shaky foundation has and will continue to lead to serious public policy concerns.

### C. Criminal Liability Creates Perverse Incentives

Holding women criminally liable for the outcomes of their pregnancies may actually serve to undermine a state’s public policy goal to raise healthy babies. Threatening women with punishment severely minimizes their incentives to seek prenatal care,<sup>194</sup> be truthful with their doctors,<sup>195</sup> or even to keep pregnancies to term. This phenomenon is already being seen around the country. The United States General Accounting Office has found that “[w]omen are reluctant to seek treatment if there is a possibility of punishment.”<sup>196</sup> This holds especially true for women who have already taken an action that may be deemed inappropriate in the eyes of the law, which is particularly unfortunate considering the importance of prenatal care to the improvement of birth outcomes.<sup>197</sup>

In the case of drug use, many women already avoid prenatal care to escape stigmatization by the health care system, being identified as a user, and the potential loss of

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193. *Junk Science*, *supra* note 182, at 32.

194. See Brief of Amici Curiae at 9, *Ankrom v. State*, 2011 WL 3781258 (Ala. Crim. App. 2011) (hereinafter *Amici Curiae Brief*).

195. See generally *Jaffee v. Redmond*, 518 U.S. 1 (1996).

196. U.S. GEN. ACCOUNTING OFFICE, *DRUG-EXPOSED INFANTS, A GENERATION AT RISK* 9 (1990).

197. Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 *OBSTETRICS & GYNECOLOGY* 1285, 1290 (2009).

custody.<sup>198</sup> If women also risk elevated criminal charges, like murder and feticide, the incentives to get prenatal care for the developing fetus will be even further skewed against the state's goals.<sup>199</sup> Fear of these disincentives led the Florida Supreme Court to state that prosecuting women for 'delivering drugs' to their children while in utero will simply lead drug-dependent women to "avoid prenatal or medical care for fear of being detected."<sup>200</sup> The court reached this conclusion by looking to the statements of leading medical professional associations.<sup>201</sup> These groups have repeatedly voiced their resounding opinions against punishing pregnant women for adverse pregnancy outcomes.<sup>202</sup> In the 1990s, during the height of the "crack baby" hysteria, the American Medical Association Board of Trustees specifically decided to absolutely reject punitive sanctions against pregnant women for fetal harm.<sup>203</sup> The organization stated, "[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment."<sup>204</sup> The American College of Obstetricians and Gynecologists Committee on Ethics has followed suit and held that drug addiction is a medical problem that should not be prosecutable.<sup>205</sup> The American Academy of Pediatrics states that "[p]unitive measures taken toward pregnant women . . . have no proven benefits for infant health,"<sup>206</sup> and the American Psychological Association maintains that "no punitive actions should be taken against women" based on

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198. Margaret H. Kearney, *Damned if You Do, Damned if You Don't: Crack Cocaine Users and Prenatal Care*, 22 CONTEMP. DRUG PROBS. 639, 654 (1995).

199. See generally Amici Curiae Brief, *supra* note 194 (arguing that judicial expansion of the chemical endangerment law to pregnancy will undermine maternal, fetal, and child health).

200. *Johnson v. State*, 602 So.2d 1288, 1296 (Fla. 1992).

201. See *id.*

202. See *id.*

203. See Am. Med. Ass'n Bd. of Trs., *Legal Interventions During Pregnancy*, 264 J. AM. MED. ASS'N 2663, 2670 (1990).

204. *Id.* at 2667.

205. See Am. C. of Obstetricians and Gynecologists Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, 106 OBSTETRICS & GYNECOLOGY 1127, 1135 (2005).

206. Am. Acad. of Pediatrics, *Drug-Exposed Infants*, 86 PEDIATRICS 639, 641 (1990).

their behaviors with respect to a developing fetus.<sup>207</sup> The American Nurses Association<sup>208</sup> and the American Psychiatric Association have similar stances.<sup>209</sup> Quality, consistent prenatal care is one of the most important safeguards against fetal and infant death, even amongst drug-using women.<sup>210</sup> Any impediment to prenatal care would lead to worse fetal outcomes. Even if women do seek care, the threat of criminal sanctions may prevent them from being open and honest with their doctors.<sup>211</sup> Confidentiality and trust are fundamental cornerstones in the patient-doctor relationship.<sup>212</sup> Courts have long recognized this fact.<sup>213</sup> Allowing laws to interfere with a woman's incentive to seek out prenatal care and be truthful with her doctor ultimately undermines the state's interests.

Criminal liability for actions taken during pregnancy will also create an incentive not to carry pregnancies to term to avoid running the risk of prosecution.<sup>214</sup> As outlined by the Supreme Court of Florida, the “[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.”<sup>215</sup> There has already been a documented case of this occurring.<sup>216</sup> In *State v. Greywind*, a pregnant woman avoided an accusation of child endangerment by getting an abortion.<sup>217</sup> For a state like South Carolina that focuses on implementing policies that are “designed to discourage [women] from having an abortion,” this result seems

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207. AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON SUBSTANCE ABUSE BY PREGNANT WOMEN 59 (1991).

208. Am. Nurses' Ass'n, *Position Statement on Opposition to Criminal Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age*, 3 ADDICTIONS NURSING NETWORK 62, 63 (1991) (“The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment . . .”).

209. AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON CARE OF PREGNANT AND NEWLY DELIVERED WOMEN ADDICTS 1 (2001).

210. Amici Curiae Brief, *supra* note 194, at 10.

211. *See id.* at 9.

212. *See Jaffee v. Redmond*, 518 U.S. 1 (1996).

213. *See id.*

214. *See* Amici Curiae Brief, *supra* note 194, at 6.

215. *Johnson v. State*, 602 So.2d 1288, 1296 (Fla. 1992).

216. *See* Amici Curiae Brief, *supra* note 194, at 8 n.13.

217. *Id.*

completely contrary to the state's goal.<sup>218</sup>

*D. Pregnancy Crimes and Policy: Conclusion*

Pregnancy crimes are born of, and lead to, bad policy decisions. Regulating pregnancy through the criminal system will lead states down a slippery slope, which could end with women becoming second-class citizens, their actions severely curtailed. Currently, there is no strict separation between actions that are “good” and “bad” for a fetus. If states are truly worried about the health of a fetus, it is entirely possible that a multitude of behaviors ranging from using prescription drugs to having a child at an advanced age will come under the scope of criminal liability.<sup>219</sup> Moreover, the actions that have been identified as “bad”—namely using illicit drugs—have been based on junk science.<sup>220</sup> Any causation between the substances and fetal harm has been difficult to prove.<sup>221</sup> Possibly the most dangerous results, however, are the perverse incentives created by criminal sanctions. Women, particularly high-risk women, will have less incentive to seek out prenatal care and may withhold crucial information from their doctors.<sup>222</sup> The threat of criminal sanctions also creates a strong incentive against carrying a pregnancy to term.<sup>223</sup> A state's goal of raising healthy babies is seriously undermined by resorting to the criminal system to regulate pregnancy.

CONCLUSION

Holding mothers legally liable for the outcomes of their pregnancies and criminally punishing them for suffering a stillbirth is both unconstitutional<sup>224</sup> and a product of bad policy.<sup>225</sup> For thousands of years, women have been left to gestate and birth without any state intervention. Levying

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218. *State Facts About Abortion: South Carolina*, GUTTMACHER INSTITUTE, [http://www.guttmacher.org/pubs/sfaa/south\\_carolina.html](http://www.guttmacher.org/pubs/sfaa/south_carolina.html) (last visited Oct. 14, 2012).

219. *See supra* Part III.A.

220. *See supra* Part III.B.

221. *See supra* Part III.B.

222. *See supra* Part III.C.

223. *See supra* Part III.C.

224. *See supra* Part II.

225. *See supra* Part III.

2013]

*PREGNANCY CRIMES*

691

new laws and incriminating women will not necessarily lead to better birth outcomes—stillbirths will still occur.<sup>226</sup> High-risk women will simply be more fearful of the state and their doctors, to the ultimate detriment of the fetuses they carry. If states are truly worried about protecting fetuses, they should devote their energy to policy programs that will help women receive prenatal care instead of turning pregnant women into a regulated, monitored, and arbitrarily punished class of citizens.

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226. *See generally* Harmon, *supra* note 10 (stating that the cause of all stillbirths is not conclusively known).