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## Putting the Fetus First – Legal Regulation, Motherhood, and Pregnancy

Emma Milne  
*University of Plymouth*

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PUTTING THE FETUS FIRST – LEGAL  
REGULATION, MOTHERHOOD, AND  
PREGNANCY

*Emma Milne\**

ABSTRACT

*The fetus-first mentality advocates that pregnant women and women who could become pregnant should put the needs and well-being of their fetuses before their own. As this Article will illustrate, this popular public perception has pervaded criminal law, impacting responses to women deemed to be the “irresponsible” pregnant woman and so the “bad” mother. The Article considers cases from Alabama and Indiana in the United States and from England in the United Kingdom, providing clear evidence that concerns about the behavior of pregnant women now hang heavily over criminal justice responses to women who experience a negative pregnancy outcome or who are perceived to have behaved in a way that could result in a negative outcome. This Article provides a new approach by bringing together a critical assessment of fetal protection laws with theories of motherhood ideologies and analyzing how such ideologies have resulted in legal developments not only in the US, where the fetus has been granted legal recognition in most states, but also in England and Wales, where the fetus continues to have no legal personality. The Article will conclude that the application of the fetus-first mentality within criminal law has resulted in dangerous legal developments that challenge women’s rights, while doing little to protect fetuses.*

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\* Lecturer in Criminology, University of Plymouth. My thanks go to the John W. Kluge Center at the Library of Congress, the Arts and Humanities Research Council, and the Consortium for the Humanities and the Arts South-East England, who funded and supported this research. I would also like to thank Dr. Karen Brennan, Professor Jackie Turton, and Professor Pete Fussey for feedback and comments on previous drafts of this Article.

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## I. INTRODUCTION

Concern over the rights and well-being of the fetus<sup>1</sup> has arguably become a normal aspect of the modern world. For example, the mortality rates of both pregnant women and their fetuses/newborn infants continues to be a focus of national and international health agencies,<sup>2</sup> there are numerous advice guides for the period of pregnancy,<sup>3</sup> and there are continuous revisions to public health messages for pregnant women.<sup>4</sup> This focus on health has resulted in scrutiny of the behavior of pregnant women, and, more recently, women who may become pregnant,<sup>5</sup> in relation to the impact their behavior may have upon the health of their fetus. Women's consumption of certain foods,<sup>6</sup> alcohol,<sup>7</sup> cigarettes,<sup>8</sup> and illegal substances,<sup>9</sup> and their rates of obesity,<sup>10</sup>

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1. Fetus is not the technically correct term for all periods of gestational development. Different terms are associated with different periods of development: zygote (at fertilization), blastocyst (at implantation, six to ten days after ovulation), embryo (at about two weeks), and fetus (from eight weeks until birth). Stephanie Dionne Sherk, *Prenatal Development*, in GALE ENCYCLOPEDIA OF CHILDREN'S HEALTH 1507, 1507–09 (1st ed. 2006). I will use the term 'fetus' for ease, and, unless specifically stated otherwise, I am referring to a human developing in the womb from the point of conception until a separate existence from the pregnant woman has occurred.
  2. See, e.g., *Health Matters: Reproductive Health and Pregnancy Planning*, PUB. HEALTH ENG., <https://www.gov.uk/government/publications/health-matters-reproductive-health-and-pregnancy-planning/health-matters-reproductive-health-and-pregnancy-planning> (last visited May 27, 2019); *Maternal Health*, UNITED NATIONS POPULATION FUND, <https://www.unfpa.org/maternal-health> (last visited May 27, 2019); *Maternal, Newborn, Child and Adolescent Health*, WORLD HEALTH ORG., [https://www.who.int/maternal\\_child\\_adolescent/maternal/en/](https://www.who.int/maternal_child_adolescent/maternal/en/) (last visited May 27, 2019).
  3. See, e.g., *Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/pregnancy/index.html> (last visited May 27, 2019); *Your Pregnancy and Baby Guide*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/> (last visited May 27, 2019); *Pregnancy*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/pregnancy> (last visited May 27, 2019).
  4. For example, advice relating to alcohol consumption during pregnancy has changed substantially in the UK over the last twenty years, and the advice has not always conformed with the latest evidence about the impact of alcohol on the health of the fetus. See Betsy Thom et al., *Drinking in Pregnancy: Shifting Towards the "Precautionary Principle,"* in ALCOHOL, DRUGS AND RISK: FRAMING DANGEROUS CLASSES AND DANGEROUS SPACES: HISTORICAL AND CROSS-CULTURAL PERSPECTIVES 66 (Susanne MacGregor & Betsy Thom eds., 2020).
  5. See, e.g., *Planning for Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/preconception/planning.html> (last visited May 27, 2019); *Planning Your Pregnancy*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/planning-pregnancy/> (last visited May 27, 2019); *Preconception*

levels of stress,<sup>11</sup> certain pre-existing medical conditions,<sup>12</sup> how they wear a seat belt,<sup>13</sup> and the level of pollution in the air they breathe<sup>14</sup> are

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- Health*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/pregnancy/you-get-pregnant/preconception-health> (last visited May 27, 2019).
6. See, e.g., *Checklist of Foods to Avoid During Pregnancy*, FOODSAFETY.GOV, [https://www.foodsafety.gov/risk/pregnant/chklist\\_pregnancy.html](https://www.foodsafety.gov/risk/pregnant/chklist_pregnancy.html) (last visited May 27, 2019); *Food Safety for Pregnant Women*, FOODSAFETY.GOV, <https://www.foodsafety.gov/risk/pregnant/index.html> (last visited May 27, 2019); *Foods to Avoid in Pregnancy*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/foods-to-avoid-pregnant/> (last visited May 27, 2019); *Have a Healthy Diet in Pregnancy*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/healthy-pregnancy-diet/> (last visited May 27, 2019).
  7. See, e.g., *Alcohol Use in Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/fasd/alcohol-use.html> (last visited May 27, 2019); *Drinking Alcohol While Pregnant*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/alcohol-medicines-drugs-pregnant/> (last visited May 27, 2019).
  8. See, e.g., *Smoking During Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/tobacco/basic\\_information/health\\_effects/pregnancy/index.htm](https://www.cdc.gov/tobacco/basic_information/health_effects/pregnancy/index.htm) (last visited May 27, 2019); *Stop Smoking in Pregnancy*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/smoking-pregnant/> (last visited May 27, 2019).
  9. See, e.g., *Substance Use During Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/substance-abuse/substance-abuse-during-pregnancy.htm> (last visited May 27, 2019); *Illegal Drugs in Pregnancy*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/illegal-drugs-in-pregnancy/> (last visited May 27, 2019).
  10. See, e.g., *Overweight and Pregnant*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/overweight-pregnant/> (last visited 27 May 2019); *Weight, Fertility, and Pregnancy*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/healthy-weight/weight-fertility-and-pregnancy> (last visited May 27, 2019).
  11. See, e.g., Elizabeth R. Burns et al., *Stressful Life Events Experienced by Women in the Year Before Their Infants' Births – United States, 2000–2010*, 64 MORBIDITY & MORTALITY WKLY. REP. 247 (2015); *Healthy Beginnings: Applying All Our Health*, PUB. HEALTH ENG., <https://www.gov.uk/government/publications/healthy-beginnings-applying-all-our-health/healthy-beginnings-applying-all-our-health> (last visited May 27, 2019).
  12. See, e.g., *Pregnancy Complications*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html> (last visited May 27, 2019); *Pregnant Women and Zika*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/pregnancy/zika/protect-yourself.html> (last visited May 27, 2019); *Pregnancy and HIV, Viral Hepatitis, STD, & TB Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchstp/pregnancy/Default.htm> (last visited 27 May 2019); *Preconception Health*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/pregnancy/you-get-pregnant/preconception-health> (last visited May 27, 2019); *Thyroid Disease & Pregnancy*, NAT'L INST. DIABETES & DIGESTIVE & KIDNEY DISEASES, <https://www.niddk.nih.gov/health-information/endocrine-diseases/pregnancy->

just some examples of areas in which advice is given to women who either are pregnant or may become pregnant in order to ensure the health of their fetus. The scale and scope of guidance is such that for many women the advice and subsequent expectation result in the need to alter their lives completely for the period of pregnancy<sup>15</sup> and potentially a substantial period before becoming pregnant.<sup>16</sup> This expectation of modified behavior can be understood as a “fetus-first mentality”—the idea that it is perfectly normal and appropriate for a woman who is pregnant to put the needs and well-being of her fetus before her own needs and well-being. Such expectations have received criticism for creating a perspective whereby the life and well-being of a fetus is given preference and priority over the rights and needs of the pregnant woman and even a woman who is not yet pregnant.<sup>17</sup> Such concerns about women’s behavior while pregnant take on a new

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thyroid-disease (last visited May 27, 2019); *High Blood Pressure (Hypertension) and Pregnancy*, NAT’L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/hypertension-blood-pressure-pregnant/> (last visited May 27, 2019); *Epilepsy and Pregnancy*, NAT’L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/epilepsy-pregnant/> (last visited May 27, 2019); *Mental Health Problems and Pregnancy*, NAT’L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/mental-health-problems-pregnant/> (last visited May 27, 2019); *Diabetes and Pregnancy*, NAT’L HEALTH SERV., <https://www.nhs.uk/conditions/pregnancy-and-baby/diabetes-pregnant/> (last visited May 27, 2019).

13. Steve Ford, *Many Women Maybe Unaware of Correct Seatbelt Use While Pregnant*, NURSING TIMES (May 27, 2019), <https://www.nursingtimes.net/news/policies-and-guidance/many-women-maybe-unaware-of-correct-seatbelt-use-while-pregnant/7024459.article>; *Seat Belt Safety: Pregnancy*, CHILDREN’S HOSP. PHILA., <https://www.chop.edu/pages/seat-belt-safety-pregnancy> (last visited May 27, 2019).
14. Damian Carrington, *Air Pollution “As Bad as Smoking in Increasing Risk of Miscarriage,”* GUARDIAN (May 27, 2019, 2:00 PM), <https://www.theguardian.com/environment/2019/jan/11/air-pollution-as-bad-as-smoking-in-increasing-risk-of-miscarriage>.
15. See Anne Drapkin Lyerly et al., *Risk and the Pregnant Body*, 39 HASTINGS CTR. REP. 34 (2009) (arguing that advice for women in terms of their everyday behavior is not based entirely on evidence but is based on the mantra of “better safe than sorry,” even in cases where evidence does not support the advice being given); see also Thom et al., *supra* note 4.
16. Zoe Williams, *So Now Pregnancy Is a Prize for Women Who Lead a “Good Life,”* THE GUARDIAN (May 5, 2017, 2:00 PM), <https://www.theguardian.com/commentisfree/2016/may/30/pregnancy-women-public-health-babies>.
17. See, e.g., SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY 71–98 (2003); Wendy Chavkin, *Women and the Foetus: The Social Construction of Conflict*, in THE CRIMINALIZATION OF A WOMAN’S BODY 193, 194 (Clarice Feinman ed., 1992); Jeffrey P. Phelan, *The Maternal Abdominal Wall: A Fortress Against Fetal Health Care?*, 65 S. CAL. L. REV. 461, 481 (1991); Lealle Ruhl, *Liberal Governance and Prenatal Care: Risk and Regulation in Pregnancy*, 28 ECON. & SOC’Y 95, 1077–79 (1999).

dynamic when considering the implications that these concerns have for criminal law.

This Article focuses on concerns about the impact of behavior by pregnant women upon their fetuses and the influence these concerns have had on criminal law. The implications of societal expectations that women will put the fetus first are clearly outlined and critiqued by analyzing two types of cases: Killing the fetus and consuming controlled substances during pregnancy.

This Article will consider cases from Alabama and Indiana in the United States and England in the United Kingdom. Concerns about the behavior of pregnant women and women who could become pregnant have permeated criminal law and now hang heavily over criminal justice responses to women who experience a negative pregnancy outcome or who are perceived to have behaved in a way that *could* result in a negative outcome. In assessing cases from the UK and US, I will illustrate how perceptions of “good” maternal behavior, which encompasses the principle of putting the fetus first, have influenced the application of law. Analyzing cases from different jurisdictions clearly shows the influence of the fetus-first mentality on the creation and application of criminal law.

This Article provides a new approach by bringing together a critical assessment of fetal protection laws with theories of motherhood ideologies and analyzing how such ideologies have resulted in legal developments not only in the US, where we have seen a clear change of laws, with fetuses being granted legal recognition in most states, but also in England and Wales, where the law has been static for almost 100 years and the fetus continues to have no legal personality.

In England and Wales, a person must be born alive and be a “reasonable creature *in rerum natura*” in order to be a victim of a crime against a person or a homicide offense.<sup>18</sup> A consequence of the “born alive rule” is that a fetus does not have legal personality. Instead, it is

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18. *In rerum natura* means “in existence.” EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 50–51 (1680). To be considered a person “in existence,” the child must have an existence that is independent of its mother, meaning it must have been wholly expelled from its mother’s body and be alive. *R. v. Enoch* (1833) 172 Eng. Rep. 1089 (KB); *R. v. Poulton* (1832) 172 Eng. Rep. 997. The cord and afterbirth need not have been expelled from the mother’s body, nor do they need to be severed from the child. *R. v. Reeves* (1839) 173 Eng. Rep. 724 (KB). The test for independent existence is that the child has an independent circulation and has breathed after birth. See *R. v. Handley* (1874) 172 Eng. Rep. 1100 (KB); *R. v. Wright* (1841) 173 Eng. Rep. 1039 (KB); *R. v. Brain* (1834) 172 Eng. Rep. 1272 (KB).

conceptualized as a “unique organism,” that is “neither a distinct person separate from its mother nor merely an adjunct of the mother.”<sup>19</sup> Consequently, fetuses have few legal protections prior to the completion of birth that results in a live-born child.<sup>20</sup> Therefore, a pregnant woman or woman in labor who has acted in a way that resulted in the death of the fetus has not committed a criminal offense,<sup>21</sup> with two exceptions. The first exception occurs if it can be proven the woman intentionally acted to end her own pregnancy, in which case the offense of procuring a miscarriage has been committed.<sup>22</sup> The second exception is if she intentionally acted to prevent a viable fetus from living, in which case the offense of child destruction may apply.<sup>23</sup> Procuring a miscarriage criminalizes the ending of a pregnancy at any stage of gestation by any person, and child destruction makes it an offense to kill a child that is capable of being born alive, once the pregnancy has reached 28 gestational weeks. Outside of these two offenses, a woman is not legally obliged to protect her fetus from harm and does not owe the fetus a duty of care.<sup>24</sup>

In England and Wales there is one further pregnancy-related offense relevant to this Article: The offense of concealment of birth, which prohibits the concealment of the knowledge of a birth through the secret disposal of the body of a child.<sup>25</sup> It is a homicide-related

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19. Att’y Gen.’s Reference (No.3 of 1994) [19980] AC 245 (HL) (UK).

20. Signified by complete expulsion from the birth canal, independent circulation, and breathing after birth. *See supra* note 18.

21. Att’y Gen.’s Reference, [1998] AC 245 (HL); *R. v West* (1848) 175 Eng. Rep. 329 (KB).

22. Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 58 (Eng. & Wales).

23. Infant Life (Preservation) Act 1928, 19 & 20 Geo. 5 c. 34, § 1 (UK & Wales). The offense was first enacted in the 1920s in response to the belief that women were attempting to escape prosecution under the offenses of procuring a miscarriage or murder by waiting for natural labor to commence, the baby to be partially born, and then killing the child before its body was completely expelled from the birth canal. In such instances, no criminal offense had been committed. As such, child destruction was enacted to close this legal loophole. Donna Cooper Graves, “. . . *In a Frenzy While Raving Mad*”: *Physicians and Parliamentarians Define Infanticide in Victorian England*, in *KILLING INFANTS: STUDIES IN THE WORLDWIDE PRACTICE OF INFANTICIDE* 111 (Brigitte H. Bechtold & Donna Cooper Graves eds., 2006); D Seaborne Davies, *Child-Killing in English Law*, 1 MOD. L. REV. 203 (1937). Today, the offense is mostly used when third-parties (often the partner or ex-partner of the pregnant woman) attack a pregnant woman, resulting in the death of the fetus. Only one instance of a woman being prosecuted for the offense due to her actions to kill her own fetus has been recorded. Sally Sheldon, *The Decriminalisation of Abortion: An Argument for Modernisation*, 36 OXF. J. LEGAL STUD. 334, 340–42 (2016).

24. *CP (A Child) v First-Tier Tribunal (criminal injuries compensation)* [2014] QB 459, 479.

25. Offenses Against the Person Act 1861, 24 & 25 Vict. c.100, § 60 (Eng. & Wales).

offense but does not actually involve the homicide of the child, although it may be charged concurrently. The child need not be born alive, but if it is born alive, then it must be dead prior to the concealment of the body.<sup>26</sup> While the offense is punishable by up to two years in prison, an immediate custodial sentence is very rare.<sup>27</sup> Enacted in 1803, the offense was used to criminalize those women who were suspected of killing their newborn children, but who could not be proven to have done so due to the difficulties of proving live birth.<sup>28</sup> Today, the offense is rarely prosecuted with only four convictions between 2010 and 2014, mostly of women who have given birth to the child.<sup>29</sup> Recent analysis of the offense has concluded that it continues to be used today as it was historically—to punish women who are suspected of homicide but cannot be proven to have killed their child.<sup>30</sup> There is also evidence to suggest the offense is used to punish women who transgress traditional gender roles, specifically ideals of motherhood.<sup>31</sup>

The position of the fetus in English and Welsh law contrasts to most jurisdictions in the United States, despite the United States adhering to the common law principle of the born alive rule until the 1970s.<sup>32</sup> California was the first state to recognize the fetus as a potential victim of homicide.<sup>33</sup> In 1970 the state legislature amended their homicide law to include the fetus as a possible victim of unlawful killing.<sup>34</sup> This change in the penal code arose after the Superior Court of California ruled that Robert Keeler could not be convicted of murder for causing his pregnant ex-wife, Teresa, to give birth to a stillborn child after he kneed her in the abdomen while shouting, “I’m going to stamp it out of

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26. R. v. May (1867) 16 LT 362 (Eng. & Wales).

27. Emma Milne, *Concealment of Birth: Time to Repeal a 200-Year-Old “Convenient Stop-Gap”?*, 27 FEM. LEGAL STUD. 139, 140 (2019).

28. MARK JACKSON, *NEW-BORN CHILD MURDER: WOMEN, ILLEGITIMACY AND THE COURTS IN EIGHTEENTH-CENTURY ENGLAND 168–76* (1996); Davies, *supra* note 23, at 213–16 (1937); Ann R. Higginbotham, “*Sin of the Age*”: *Infanticide and Illegitimacy in Victorian London*, 32 VICTORIAN STUD. 319, 327 (1989).

29. Milne, *supra* note 27, at 140.

30. *Id.* at 148–51.

31. *Id.* at 152–58.

32. However, the fetus was recognized in law in specific circumstances, such as the ability to inherit if born alive after the death of its father. See Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

33. See Katharine B. Folger, *When Does Life Begin . . . or End? The California Supreme Court Redefines Fetal Murder in People v. Davis*, 29 U.S.F.L. REV. 237, 237 (1994) (discussing the development of the California Penal Code to include the fetus as a potential victim).

34. *Id.* at 238 n.7.

you.”<sup>35</sup> The law was changed so that a fetus that has passed the embryonic stage (approximately six to eight gestational weeks) could be a victim of unlawful killing.<sup>36</sup> The law now reads: “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.”<sup>37</sup>

At least 38 states now have laws protecting fetuses,<sup>38</sup> and at least 29 of these states apply their laws to the early stages of pregnancy, employing language such as “any state of gestation,” “conception,” “fertilization,” or “post-fertilization.”<sup>39</sup> Fetuses have been included in penal codes in a number of different ways across the states. In some states, such as California, the fetus or “unborn child” has been added as a potential victim of homicide.<sup>40</sup> In other states the fetus has been defined as a “person” or “human being” so that it is protected by existing laws.<sup>41</sup> Other states have made it a specific offense to injure or kill a fetus, or to commit “feticide.”<sup>42</sup> Massachusetts is unique in that it is the only state to recognize the fetus as a victim of homicide through case law alone.<sup>43</sup> Changes to federal law have also been made on this basis, with the Unborn Victims of Violence Act recognizing the fetus as a separate victim from the pregnant woman if it is killed or experiences bodily injury during the commission of a federal crime of violence.<sup>44</sup>

Despite the expansion of criminal law to protect the fetus, in 24 states and in federal law, statutes include “maternal exceptions,” where-

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35. *Keeler v. Superior Court*, 470 P.2d 617, 623 (Cal. 1970).

36. Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 878 (2014).

37. CAL. PENAL CODE § 8-187(a) (West 2019).

38. Within the literature, scholars often refer to “fetal homicide laws.” However, as argued here, protection of fetuses stretches beyond homicide offenses, and so I argue that “fetal protection laws” is a more appropriate term to capture the developments of law in US states from 1970 onward.

39. *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT’L CONF. OF ST. LEGISLATURES (May 1, 2018), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

40. Murphy, *supra* note 36, at 865.

41. For example, in Kansas, homicide and battery offenses apply to “persons,” which include the “unborn child,” defined as “a living individual organism of the species *homo sapiens, in utero*, at any stage of gestation from fertilization to birth.” KAN. STAT. ANN. §§ 21-5401, 21-5406, 21-5413, 21-5419, (2019).

42. For example, Louisiana specifies that the offense of feticide is the “killing of an unborn child by the act, procurement, or culpable omission of a person other than the mother of the unborn child.” LA. STAT. ANN. § 14:32.5 (2019).

43. *State Laws on Fetal Homicide and Penalty-Enhancement For Crimes Against Pregnant Women*, *supra* note 39; see also *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984).

44. 18 U.S.C. § 1841 (2019); 10 U.S.C. § 919a (2019).

by the law specifically excludes pregnant women from prosecution in relation to their own pregnancy.<sup>45</sup> For example, the Unborn Victim of Violence Act 2004 states, “Nothing in this section shall be construed to permit the prosecution . . . of any woman with respect to her unborn child.”<sup>46</sup> Similarly, in four states it would appear unlikely that a pregnant woman would be prosecuted for causing the death of her fetus due to the wording of the legislation.<sup>47</sup> However, other states are silent on whether or not a pregnant woman could be held liable. This leaves the possibility of criminal proceedings against women to individual prosecutors, who, evidence would suggest, have demonstrated willingness to advocate for a broad interpretation of such statutes.<sup>48</sup>

As a consequence of laws protecting fetuses, over 413 women were arrested, detained, and forced to have medical treatment between 1973 and 2005.<sup>49</sup> These arrests and detainments have resulted in forced Caesarean sections,<sup>50</sup> and the arrest and sometime imprisonment of women following the stillbirth or miscarriage of a baby,<sup>51</sup> or after they have not followed medical advice in relation to their pregnancy.<sup>52</sup> Similarly, women have faced criminal justice involvement in cases where the baby has been born alive and then died shortly after birth, and medical pro-

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45. Murphy, *supra* note 36, at 865.

46. 18 U.S.C. § 1841(c)(3). See Murphy, *supra* note 36, for further discussion of maternal exceptions in both federal and state laws.

47. Murphy, *supra* note 36, at 865–66.

48. *Id.* at 866.

49. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 299–300 (2013) [hereinafter Paltrow & Flavin, *Forced Interventions*]. An additional 300 cases were documented between 2005 and 2013. Lynn M. Paltrow & Jeanne Flavin, *Are Pregnant Women Persons After 20 Weeks’ Gestation?*, REWIRE NEWS (Nov. 15 2013), <http://rhrealitycheck.org/article/2013/11/15/are-pregnant-women-persons-after-20-weeks-gestation/>.

50. *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (Angela Carder was forced to undergo a life-threatening Caesarean section against her wishes, and the wishes of her family and doctor, in an unsuccessful attempt to save the life of her fetus).

51. Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands?*, CBS NEWS (Mar. 2, 2010), <http://www.cbsnews.com/news/did-christine-taylor-take-abortion-into-her-own-hands/>; Amie Newman, *Pregnant? Don’t Fall Down the Stairs*, REWIRE NEWS (Feb. 15, 2010), <https://rewire.news/article/2010/02/15/pregnant-dont-fall-down-stairs/>.

52. *Mother Charged in Caesarean Row*, BBC NEWS, <http://news.bbc.co.uk/1/hi/world/americas/3504720.stm> (last updated Mar. 12, 2004); Linda Thomson, *Mother is Charged in Stillbirth of a Twin*, DESERET NEWS (Mar. 12, 2004), <http://www.deseretnews.com/article/595048573/Mother-is-charged-in-stillbirth-of-a-twin.html?pg=all>.

fessionals and law enforcers have deemed that the actions of the birth-mother while pregnant were the cause of the death of the child.<sup>53</sup> Women have also been imprisoned following a live-born child testing positive for an illegal substance<sup>54</sup> and homicide convictions have been sought in instances where a pregnancy loss has been believed to be an illegal abortion.<sup>55</sup>

As analysis in this Article will illustrate, the differing legal status of fetuses across jurisdictions appears to have limited impact on the application of law to criminalize women for behavior deemed to harm or have potential to harm the fetus. Instead, the perception that a woman should put her fetus's needs and well-being before her own needs and desires—the fetus-first mentality—appears to be driving decisions to prosecute and apply criminal law. In Part II of this Article, I will outline the theory of the fetus-first mentality, analyzing what it is, and how it materializes. Part III will assess four cases in the context of the fetus-first mentality: Two relating to an illegal termination of a pregnancy, Purvi Patel in Indiana, US, and Hayley in England, UK, and two relating to consuming controlled substances in pregnancy, Amanda Kimbrough in Alabama, US, and Sally in England, UK.<sup>56</sup> In Part VI, I will discuss the implications on fetuses and women of the fetus-first mentality influencing the criminal law.

## II. FETUS-FIRST MENTALITY

The fetus-first mentality is pervasive in both the US and UK. The principle that the health and welfare of the fetus should be put before the mother's has a tangible impact on the behavior of pregnant wom-

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53. *People v. Jorgensen*, 41 N.E.3d 778, 779 (N.Y. 2015).

54. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); Laura Bassett, *Judge Tosses Murder Case Against Mississippi Mom With Stillborn Baby*, HUFFPOST (Apr. 3 2014), [http://www.huffingtonpost.com/2014/04/03/judge-tosses-mississippi-\\_n\\_5086215.html](http://www.huffingtonpost.com/2014/04/03/judge-tosses-mississippi-_n_5086215.html).

55. Liz Hunt, *Abortion Most Desperate*, INDEPENDENT (Mar. 21 1995), <http://www.independent.co.uk/life-style/abortion-most-desperate-1612131.html>; Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt that Killed Her Foetus*, THE GUARDIAN (May 30, 2012, 1:36 PM), <https://www.theguardian.com/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus>.

56. “Hayley” and “Sally” are not the defendants’ real names. While both cases were heard in open court, where their names were published, I have anonymized the cases in line with requirements imposed by the courts to view the cases. The anonymization is of the identities of the defendants and all other parties involved in the cases and includes withholding details such as class, exact age, ethnicity, geographical location, and the court in which the case was heard.

en,<sup>57</sup> with many women making decisions to modify their actions in order to safeguard the health of their unborn child.<sup>58</sup> However, pregnant women are not the only people who act in ways that prioritize the well-being of the fetus. As well as influencing social expectations of women's behavior while pregnant, the fetus-first mentality also has an effect on numerous institutions. In this Part I provide an introduction to the fetus-first mentality and then illustrate how it is linked to motherhood ideologies.

### A. *Introducing the Fetus-first Mentality*

Public health messages that relate to pregnancy are saturated with the fetus-first mentality in both the US and the UK. For example, in 2016, the Centers for Disease Control and Prevention (CDC) released guidance about drinking alcohol while pregnant that included the following message, "Sexually active women who stop using birth control should stop drinking alcohol, but most keep drinking . . . Alcohol can permanently harm a developing baby before a woman knows she is pregnant . . . The risk is real. Why take the chance?"<sup>59</sup> The guidance, advocating abstinence from alcohol due to the damage it may cause to the fetus, targeted not only pregnant women and those planning to conceive, but also women who are not pregnant, and even those who had no plans to become pregnant. Similarly, in the UK, the National Health Service of Greater Glasgow and Clyde, Scotland, published a report to support medical professionals working with women of childbearing age, advocating that at any time said group of women come into contact with medical professionals, the professional should ask if there is a reasonable chance the woman will start a pregnancy that year.<sup>60</sup> The guid-

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57. Deborah Lupton, "The Best Thing for the Baby": Mothers' Concepts and Experiences Related to Promoting their Infants' Health and Development, 13 HEALTH RISK & SOC. 637 (2011); Lyerly et al., *supra* note 15; Ruhl, *supra* note 17.

58. For example, avoiding certain food and drink or exposure to medication, substances and situations that may cause harm. S. R. Crozier et al., *Do Women Change Their Health Behaviours in Pregnancy? Findings from the Southampton Women's Survey*, 23 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 446, 446 (2009).

59. *More Than 3 Million US Women at Risk for Alcohol-Exposed Pregnancy*, CTNS. FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2016), <http://www.cdc.gov/media/releases/2016/p0202-alcohol-exposed-pregnancy.html>.

60. JONATHAN SHER, MISSED PERIOD: SCOTLAND'S OPPORTUNITIES FOR BETTER PREGNANCIES, HEALTHIER PARENTS AND THRIVING BABIES THE FIRST TIME . . . AND EVERY TIME 32 (2017), <http://www.nhsggc.org.uk/media/237840/misled-periods-j-sher-may-2016.pdf>.

ance advised that in instances where women answered “yes,” health professionals should encourage women to abstain from harmful substances, such as alcohol, smoking, and drugs; lose weight; leave violent and abusive partners; and avoid exposure to radiation and illnesses such as HIV, diabetes, rubella, and the Zika virus.<sup>61</sup>

The nature of the initial inquiry into pregnancy status needs to be examined, with particular attention to the term “reasonable chance.” As the report acknowledges, approximately fifty percent of pregnancies in the UK are unplanned; consequently, one reading of this guidance is that all women of childbearing age (excluding women who have evidence they are infertile) would need to heed the advice, as a woman’s engagement in sexual activity means there is a *reasonable* chance she will start a pregnancy.<sup>62</sup> Even women who choose to not engage in sexual activity still have a “reasonable chance” of becoming pregnant, with one in five women in England and Wales experiencing some type of sexual assault at least once in her lifetime,<sup>63</sup> and one in six American women being the victim of an attempted or completed rape in her lifetime.<sup>64</sup> However, it should be noted, that these statistics are likely to underestimate the true numbers of victims and survivors of sexual violence.<sup>65</sup>

If read in a more critical light, the guidance can be interpreted as arguing that pregnancy is a compelling reason for women to become “healthy” by conforming to the health suggestion, while the state ap-

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61. *Id.*

62. On the basis that even long acting reversible contraceptive methods cannot be said to be one-hundred percent effective, with a one percent chance of possibility of pregnancy. *How Effective is Contraception at Preventing Pregnancy?*, NAT’L HEALTH SERV. (June 30, 2017), <https://www.nhs.uk/conditions/contraception/how-effective-contraception/>.

63. *Sexual Offenses in England and Wales: Year Ending March 2017*, OFF. FOR NAT’L STAT. (Feb. 8, 2018), <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017>. It is estimated that one in six American women has been the victim of an attempted or completed rape in her lifetime (14.8 percent completed, 2.8 percent attempted). *Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/scope-problem> (last visited May 10, 2019). However, it should be noted, that these statistics are likely to underestimate the true numbers of victims and survivors of sexual violence. Katrin Hohl & Elisabeth A. Stanko, *Complaints of Rape and the Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales*, 12 EUR. J. CRIMINOLOGY 324 (2015); Kate B. Wolitzky-Taylor, et al., *Reporting Rape in a National Sample of College Women*, 59 J. AM. COLL. HEALTH 582 (2011).

64. 14.8 percent completed, 2.8 percent attempted. *Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/scope-problem> (last visited May 10, 2019).

65. Hohl & Stanko, *supra* note 63; Kate B. Wolitzky-Taylor et al., *Reporting Rape in a National Sample of College Women*, 59 J. AM. C. HEALTH 582 (2011).

pears to have fewer concerns about women's exposure to harms such as abusive partners or radiation outside of pregnancy. The author of the report makes positive reference to the increased use of long acting reversible contraception (LARC) by people in Scotland due to the methods being long-lasting and therefore not dependent upon the user remembering to use them.<sup>66</sup> One of the key messages from the report is that health professionals should be "[k]eeping preconception 'in sight and in mind' [as it] is the essential catalyst for effective action."<sup>67</sup> As such, an inherent suggestion within the report is that men and women of reproductive age are always in the preconception phase and that LARC methods are preferable to reduce the chances of unplanned pregnancy—and if the pregnancy is planned then the advice is to become pregnancy-ready by following the guidance outlined above.<sup>68</sup> As LARCs are only developed for women, the underlying suggestion is that women's reproduction needs to be controlled through LARCs to manage their risk of pregnancy and harm that will be done to the fetus due to the woman's lifestyle "choices."

The accepted view that women need to do all they can to be healthy while pregnant can be traced, in part, to the expectation that a pregnancy will end with the birth of a healthy, live-born child who will be mothered by the pregnant woman.<sup>69</sup> And yet, a positive outcome of a pregnancy is neither guaranteed nor predictable. Pregnancy is a highly medicalized and managed state, regulated and monitored by medical professionals and pregnant women.<sup>70</sup> The development of this medical

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66. SHER, *supra* note 60, at 8.

67. *Id.* at 10.

68. *Id.*

69. Such an expectation has been credited with the "shame" connected to abortion and miscarriage. *See generally*, Aalap Bommaraju et al., *Situating Stigma in Stratified Reproduction*, 10 *SEXUAL & REPROD. HEALTHCARE* 62 (2016) (arguing that stigma surrounding abortion and miscarriage act as barriers to reproductive healthcare); Lesley Hoggart, *Internalised Abortion Stigma: Young Women's Strategies of Resistance and Rejection*, 27 *FEMINISM & PSYCHOL.* 186 (2017) (exploring young women's strategies of resistance to the stigma surrounding abortion); Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 *CULTURE HEALTH & SEXUALITY* 625 (2009) (theorizing abortion stigma, identifying social and political processes that favor the emergence, perpetuation and normalization of abortion stigma).

70. For more information about the medicalization of pregnancy in the US and the UK, see generally BARBARA EHRENREICH & DEIRDRE ENGLISH, *WITCHES, MIDWIVES, & NURSES: A HISTORY OF WOMEN HEALERS* (2d ed. 2010); JUDITH WALZER LEAVITT, *BROUGHT TO BED* (1st ed. 1986); ANN OAKLEY, *THE CAPTURED WOMB* (1984); ANN OAKLEY, *ESSAYS ON WOMEN, MEDICINE AND HEALTH* (1993); RICHARD W. WERTZ & DOROTHY C. WERTZ, *LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA* (1977).

intervention and monitoring of pregnancy is, in part, in response to the uncertainty surrounding the outcomes of pregnancy.<sup>71</sup> During the past 150 years, medical knowledge of pregnancy and childbirth has accumulated, resulting in the construction of pregnancy in medical knowledge as a period where two patients are contained within one body.<sup>72</sup> Desire to protect maternal and fetal life has resulted in checklists of behaviors that may positively or negatively impact the health and well-being of the fetus.

Changing expectations of behavior during pregnancy have had consequences on the lives of pregnant women, who, feminists argue, are expected to self-manage their own risk of poor outcomes and the risk to their fetus.<sup>73</sup> The development of medical knowledge that constructs the fetus as a subject distinct from its mother, and responses to that knowledge, have led many feminists to critique modern obstetric care, arguing that the fetus has become the focus, the patient, while the pregnant woman is perceived as a fetal carrier, incubator, or container.<sup>74</sup> Further development of fetal imaging techniques<sup>75</sup> and fetal surgery to directly treat the fetus<sup>76</sup> have reinforced this critique. Feminists have argued that such technology and developments frame the fetus as an independent entity, consequently marginalizing the woman.<sup>77</sup> Furthermore, changing medical perspectives of pregnancy have led to the pregnant woman being constructed as a potential threat to the fetus, and the

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71. OAKLEY, *THE CAPTURED WOMB*, *supra* note 70, at 220–21.

72. WERTZ & WERTZ, *supra* note 70, at 241–43; *see also* ROBBIE DAVIS-FLOYD, *BIRTH AS AN AMERICAN RITE OF PASSAGE* (1st ed. 1992); CLARE HANSON, *A CULTURAL HISTORY OF PREGNANCY* (2004); LEAVITT, *supra* note 70; Ann Oakley, *The Sociology of Childbirth: An Autobiographical Journey Through Four Decades of Research*, 38 *SOC. HEALTH & ILLNESS* 689 (2016).

73. Ruhl, *supra* note 17, at 96.

74. BORDO, *supra* note 17, at 71–98; EMILY MARTIN, *THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION* 54 (1987); ROBYN LONGHURST, *BODIES: EXPLORING FLUID BOUNDARIES* 55 (2001); DEBORAH LUPTON, *Risk and the Ontology of Pregnant Embodiment*, in *RISK AND SOCIOCULTURAL THEORY: NEW DIRECTIONS AND PERSPECTIVES* 59–85 (Deborah Lupton ed. 1999); Wendy Chavkin, *Women and Fetus*, 3 *WOMEN & CRIM. JUST.* 71 (1992). *See generally*, IRIS MARION YOUNG, *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY* 160–72 (1990).

75. Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 *FEMINIST STUD.* 263, 265–271 (1987).

76. John C. Fletcher, *The Fetus as Patient*, 246 *JAMA* 772 (1981); Katherine A. Knopoff, *Can a Pregnant Woman Morally Refuse Fetal Surgery?*, 79 *CALIF. L. REV.* 499 (1991); Clare Williams, *Dilemmas in Fetal Medicine: Premature Application of Technology or Responding to Women's Choice?*, 28 *SOC. HEALTH & ILLNESS* 1 (2006).

77. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L. J.* 1281, 1309–12 (1991).

role of fetal protector has been assigned to healthcare professionals who may intercede on its behalf to ensure its well-being and security.<sup>78</sup> Nevertheless, as feminist sociologists Bonnie Fox and Diana Worts have argued, medicalization developed with the endorsement and encouragement of communities of women, many of whom take great comfort in the support provided by medical institutions during pregnancy, labor, and delivery.<sup>79</sup> However, women's desire for intervention should not be accepted without question. Fear of a bad outcome and belief in risk management strategies are pervasive and embody the everyday experiences of pregnancy and childbirth.<sup>80</sup>

Risk management is the process through which risks are identified, understood, and evaluated, and processes are enacted to attempt to alleviate, minimize or remove the identified risk. The success of the principles of risk management or risk alleviation rely on people "buying in" to fear and uncertainty.<sup>81</sup> As attempts are made to categorize risk the number of identifiable risks are highlighted and "discovered."<sup>82</sup> Therefore, risk identification is an unfulfilled process; no one can escape the fear of risk or its impact. While theories of risk management are not exclusive to pregnancy, pregnancy is one area of life where discourse of risk is particularly pervasive. Risk and risk management strategies are constructed and communicated through language, practice, and modes of knowledge.<sup>83</sup> While risk is often seen as value-free, using scientific knowledge that is presented as objective, it is actually value-laden and, specifically for this study, gendered.<sup>84</sup> Risk management works through the governing and regulation of individuals.<sup>85</sup> Within neoliberal society

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78. SAMANTHA HALLIDAY, AUTONOMY AND PREGNANCY: A COMPARATIVE ANALYSIS OF COMPELLED OBSTETRIC INTERVENTION 1–4 (2016); Phelan, *supra* note 17, at 483–85.

79. Bonnie Fox & Diana Worts, *Revisiting the Critique of Medicalized Childbirth*, 13 GENDER & SOC'Y 326 (1999).

80. MARSDEN WAGNER, BORN IN THE USA: HOW A BROKEN MATERNITY SYSTEM MUST BE FIXED TO PUT MOTHERS AND INFANTS FIRST 104–05, 146–47, 153 (2006).

81. ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY 1–8 (1992).

82. *See, e.g., id.* at 19–21, 39, 61, 93.

83. *Id.* at 45–71.

84. *See, e.g.,* Wendy Chan & George S. Rigakos, *Risk, Crime and Gender*, 42 BRIT. J. CRIMINOLOGY 743 (2002); Elisabeth A. Stanko, *Safety Talk: Conceptualizing Women's Risk Assessment as a "Technology of the Soul"*, 1 THEORETICAL CRIMINOLOGY 479 (1997); Sandra Walklate, *Risk And Criminal Victimization: A Modernist Dilemma?*, 37 BRIT. J. CRIMINOLOGY 35 (1997).

85. *See, e.g.,* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., 1991) (1977); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 2: THE USE OF PLEASURE (Robert Hurley trans., 1992) (1985); PAT O'MALLEY, RISK, UNCERTAINTY AND GOVERNMENT (2004) [hereinafter O'MALLEY, RISK]; Pat O'Malley, *Uncertain*

this state management of members of society is not primarily conducted through force and coercion; instead, it is encouraged through presentation of the character of the ideal neoliberal subject.<sup>86</sup> This idealized person is prudent and self-regulating, managing their own risk and absorbing the cost of that risk, as opposed to society being required to provide social support.<sup>87</sup> Self-regulation is conducted in line with guidance provided by “experts,” whose advice is supported through “scientific” evidence.<sup>88</sup> When an individual fails to manage their own risk, the state intervenes to control and regulate their behavior through official sanctions.<sup>89</sup>

One of the consequences of the development of risk management strategies in relation to pregnancy is that there is now no such thing as a no-risk pregnancy.<sup>90</sup> Undoubtedly a tension lies within the dynamic of pregnancy—two human subjects within one body, both potentially needing, and, in the case of the woman, *desiring* different and potentially oppositional treatment or behavior. And yet, as Lealle Ruhl, a feminist political and legal theorist, argues, risk management is not predominantly focused upon averting maternal risk.<sup>91</sup> Instead it is focused upon reducing possible risk to the fetus that may be caused by the actions of the pregnant woman.<sup>92</sup> The majority of the risk regulation is achieved through what Ruhl defines as the “liberal governance of pregnancy,” which enlists the cooperation of the “responsible” pregnant woman.<sup>93</sup>

*Subjects: Risks, Liberalism and Contract*, 29 *ECON. & SOC'Y* 460 (2000) [hereinafter O'Malley, *Uncertain Subjects*]; Nikolas Rose, *Government and Control*, 40 *BRIT. J. CRIMINOLOGY* 321 (2000); Nikolas Rose, *Government, Authority and Expertise in Advanced Liberalism*, 22 *ECON. & SOC'Y* 283 (1993) [hereinafter Rose, *Government, Authority, and Expertise*]; Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 *L. SOC. REV.* 771 (1988) (developing Foucault's theory of governmentality).

86. See O'Malley, *Uncertain Subjects*, *supra* note 85, at 465–66.

87. *Id.*

88. Rose, *Government, Authority and Expertise*, *supra* note 85, at 285.

89. This is done not only through criminal justice sanctions as outlined by criminological scholars such as O'Malley and evidenced in this Article in relation to pregnancy, but also through other social institutions such as child protection and removal of children from the care of their parents and mental health services. *Id.*; Harry Ferguson, *Protecting Children in New Times: Child Protection and the Risk Society*, 2 *CHILD & FAM. SOC. WORK* 221, 223–25 (1997); Nikolas Rose, *Governing Risky Individuals: The Role of Psychiatry in New Regimes of Control*, 5 *PSYCHIATRY, PSYCHOL. & L.* 177, 178–80 (1998).

90. WERTZ & WERTZ, *supra* note 70, at 244; Ruhl, *supra* note 17, at 102.

91. Ruhl, *supra* note 17, at 95–97.

92. *Id.*; see also WERTZ-WERTZ, *supra* note 70; Deborah Lupton, *Precious Cargo*, 22 *CRITICAL PUB. HEALTH* 329 (2012); Ilpo Helén, *Technics Over Life*, 33 *ECON. & SOC'Y* 28 (2004).

93. Ruhl, *supra* note 17, at 96.

Ruhl argues that within this context, responsibility is equated with rationality and the principle of the pregnant woman adopting behavior that will ensure the greatest benefit with the least risk to her unborn child.<sup>94</sup> Pregnancy risk discourse is thus also moralistic, as it is based upon judging women's actions against ideals of motherhood; risk and pregnancy cannot be understood outside of the ideal of the "good" mother and associated behavior and beliefs.

### B. *Myths of Motherhood*

The concept of the "good" mother is fed by what is commonly referred to in feminist literature as the "myths of motherhood."<sup>95</sup> A myth is defined as an uncontested and unconscious assumption that is so widely accepted that the cultural and historical origins are no longer remembered.<sup>96</sup> Thus, mothering is presented as "natural" and "instinctive," rather than cultural, political, economic, and historical.<sup>97</sup> The myths of motherhood maintain that to be a woman is to be a mother; motherhood and mothering is natural, universal, and unchanging for all women.<sup>98</sup> The myths draw on the perception that women are inherently caring, nurturing, and self-sacrificing and that such behaviors originate from biology and a woman's ability to birth children. As the feminist sociologist Ann Oakley argues, the myths are based on three beliefs, "that all women need to be mothers, that all mothers need their children, and that all children need their mothers."<sup>99</sup> Furthermore, the myths insist that, "no woman is truly complete or fulfilled unless she has kids, that women remain the best primary caretakers of children, and that to be a remotely decent mother, a woman has to devote her entire

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94. *Id.*

95. See, e.g., ANN DALLY, *INVENTING MOTHERHOOD* (1982); ANN OAKLEY, *BECOMING A MOTHER* (1986).

96. ROLAND BARTHES, *MYTHOLOGIES* 128–45 (Annette Lavers trans. 1993) (1972).

97. SARAH BLAFFER HRDY, *MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION* 363 (2000); Carol Smart, *Deconstructing Motherhood*, in *GOOD ENOUGH MOTHERING?: FEMINIST PERSPECTIVES ON LONE MOTHERHOOD* 37 (Elizabeth Bortolaia Silva ed. 1996); Deirdre D. Johnston & Debra H. Swanson, *Invisible Mothers: A Content Analysis of Motherhood Ideologies and Myths in Magazines*, 49 *SEX ROLES* 21, 21 (2003).

98. Smart, *supra* note 97, at 37–40; Paula Caplan, *Don't Blame Mother: Then and Now*, in *GENDER AND WOMEN'S STUDIES IN CANADA: CRITICAL TERRAIN*, 99–100 (Margaret Helen Hobbs & Carla Rice eds., 2013).

99. ANN OAKLEY, *WOMAN'S WORK: THE HOUSEWIFE, PAST AND PRESENT* 186 (1974).

physical, psychological, emotional, and intellectual being, 24/7, to her children.”<sup>100</sup>

The myths saturate society and social and cultural interaction, setting unachievable standards of perfection for women who are mothers while simultaneously constructing and maintaining popular beliefs that all women should want to be mothers and the true destiny of a woman is motherhood.<sup>101</sup> These myths hold merit due to the ideologies that shape popular thoughts and beliefs of mothering. The dominant ideology in a society represents that society’s dominant group: The dominant group in Anglo-American society is white, heterosexual, middle-class men. Thus, many feminists have identified the perpetuation of patriarchy as the underlying cause of these myths.<sup>102</sup>

The myths that motherhood is natural for women facilitate denying women identities and selfhood outside of mothering and biological reproduction;<sup>103</sup> for example, women’s abilities to access equal levels of employment as men due to the expectation that they will stay at home and care for their children. Thus, many feminists have identified the perpetuation of patriarchy as the underlying cause of the myths.<sup>104</sup> Clear evidence exists to contradict the myths that mothering is natural to women as not all women mother, and the nurture and care of children is not inevitably or exclusively completed by women.<sup>105</sup> Feminist analysis of motherhood does not lie in and of the fact that the female body

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100. SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED ALL WOMEN* 4 (2005).
101. DALLY, *supra* note 95; Johnston & Swanson, *supra* note 97; *see generally* JOHN R. GILLIS, *A WORLD OF THEIR OWN MAKING* 177–78 (1997); E. ANN KAPLAN, *MOTHERHOOD AND REPRESENTATION* (1992).
102. Evelyn Nakano Glenn, *Social Construction of Mothering: A Thematic Overview*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* 1, 9 (Evelyn Nakano Glenn et al. eds., 1994).
103. *See generally* SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 1–19 (1996); ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 22 (1986); Jane H. Aiken, *Motherhood as Misogyny*, *WOMEN & LAW* 19, 20–21 (2020).
104. *See generally* Barbara Katz Rothman, *Beyond Mothers and Fathers: Ideology in a Patriarchal Society*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* 139, 151–57 (Evelyn Nakano Glenn et al. eds., 1994).
105. NANCY J. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1999); NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* (1989); Linda Rennie Forcey, *Feminist Perspectives on Mothering and Peace*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* 335–76 (Evelyn Nakano Glenn et al. eds. 1994); SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1998); Adria Schwartz, *Taking the Nature Out of Mother*, in *REPRESENTATIONS OF MOTHERHOOD* 240–55 (Donna Bassin et al. eds. 1994); Rothman *supra* note 104, at 139–57.

has the capacity to conceive a child, gestate, give birth, and lactate, or that some women choose to partake in the nurturing and raising of children; instead, the issue for consideration is, “[h]ow these biological activities are culturally organized and given meaning.”<sup>106</sup>

The myths construct the notion of the “good” mother, someone who conforms to the myths, in comparison to the “bad” mother. Today the “good” mother is the intensive mother; defined as “child-centered, expert-guided, emotionally absorbing, labor-intensive, and financially expensive.”<sup>107</sup> In contrast, the “bad” mother is identified by her deviant caregiving practices and failure to conform to the ideal. The line between “good” and “bad” mothering is not fixed or stable, rather it is blurred and it shifts over time and space.<sup>108</sup> While the myths are presented as if from nowhere and no one, they are perceived to be applicable everywhere and to everyone. This is particularly problematic as the myths are not only gendered, but also rooted in class and race.<sup>109</sup> The ideal “good” mother is based upon the white, middle-class, married, able-bodied, heterosexual woman who has the exclusive responsibility for mothering her biological children, focusing her attention solely on their care and well-being.<sup>110</sup> Thus, the further a woman’s identity is situ-

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106. Terry Arendell, *Conceiving and Investigating Motherhood: The Decade’s Scholarship*, 62 J. MARRIAGE & FAM. 1192, 1193 (2000).

107. HAYS, *supra* note 103, at 8.

108. Smart, *supra* note 97, at 37–57; Shari Thurer, *Changing Conceptions of The Good Mother in Psychoanalysis*, 80 PSYCHOANALYTIC REV. 519 (1993).

109. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (2000) [hereinafter COLLINS, BLACK FEMINIST THOUGHT]; Anne-Marie Ambert, *An International Perspective on Parenting: Social Change and Social Constructs*, 56 J. MARRIAGE & FAM. 529 (1994); Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood*, in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 45–66 (Evelyn Nakano Glenn et al. eds. 1994) [hereinafter Collins, *Shifting the Center*]; Smart, *supra* note 97.

110. Glenn, *supra* note 102; Carol Sanger, *M is For the Many Things*, 1 S. CAL. REV. L. & WOMEN’S STUD. 15 (1992).

ated from the perceived ideal and the greater her vulnerabilities,<sup>111</sup> the harder it is for her to adhere to the myths.<sup>112</sup>

The construction of the good/bad binary has led scholars to theorize a particular form of gender oppression referred to as “mother-blame.”<sup>113</sup> Children with problems, or children as problems, are often linked to the social situations of their mothers (such as poor, unmarried, divorced, unemployed women) rather than to the social and economic forces that affect children and women’s lives.<sup>114</sup> Similarly, the feelings of unhappiness or dissatisfaction that women may feel as mothers are attributed to the ill health or failings of the individual mother, rather than the social, political, cultural, and economic systems;<sup>115</sup> a good mother is a happy mother. Perhaps unsurprisingly, individuals who are furthest from the white, middle-class mythical mother are more readily deemed to fail.<sup>116</sup> As argued in this Article, when women are deemed to fail, they may become subject to criminal justice responses. Consequently, poor women, single women, young women, and women of color are policed most aggressively and face greater sanctions for their appearance of fail-

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111. Martha Albertson Fineman, *Vulnerable Subject: Anchoring Equality in the Human Condition, The Essay*, 20 YALE J.L. & FEMINISM 1, 8 (2008). Fineman defines vulnerabilities as a “universal, inevitable, enduring aspect of the human condition.” However, as all human beings are positioned differently, our vulnerabilities range in terms of nature, magnitude, and potential. They are also experienced uniquely, and how we respond to them and are able to manage the negative consequences of our vulnerabilities is dependent upon the quality and quantity of resources that we possess, have access to, and can utilize.
112. Arline T. Geronimus, *Damned If You Do: Culture, Identity, Privilege, and Teenage Childbearing in the United States*, 57 SOC. SCI. & MED. 881 (2003); Rickie Solinger, *Race and “Value”: Black and White Illegitimate Babies, 1945–1965*, in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 287 (Evelyn Nakano Glenn et al. eds. 1994).
113. See generally Paula J. Caplan, *Mother-Blaming*, in “BAD” MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 127–44 (Molly Ladd-Taylor & Lauri Umansky eds. 1998); Paula J. Caplan & Ian Hall-McCorquodale, *Mother-Blaming in Major Clinical Journals*, 55 AM. J. ORTHOPSYCHIATRY 345 (1985); Anita Ilta Garey & Terry Arendell, *Children, Work, and Family: Some Thoughts on “Mother-Blame,”* in WORKING FAMILIES: THE TRANSFORMATION OF THE AMERICAN HOME 293 (Rosanna Hertz & Nancy L. Marshall eds. 2001); Debra Jackson & Judy Mannix, *Giving Voice to The Burden of Blame: A Feminist Study of Mothers’ Experiences of Mother Blaming*, 10 INT’L J. NURSING PRAC. 150 (2004).
114. ANITA ILTA GAREY, *WEAVING WORK AND MOTHERHOOD* (1999); DOROTHY E. SMITH, *THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY* (1988); Arendell, *supra* note 106.
115. VERTA A. TAYLOR, *ROCK-A-BY BABY: FEMINISM, SELF-HELP, AND POSTPARTUM DEPRESSION* 1–58 (1996); Johnston & Swanson, *supra* note 101, at 30–31.
116. Johnston & Swanson, *supra* note 97, at 29–30.

ure.<sup>117</sup> This point will become apparent in relation to criminal justice responses to pregnant women deemed to fail to protect their fetus.<sup>118</sup>

One of the specific impacts of the myths of motherhood is that they result in a conflation between “women” and “mothers,” making women appear as undifferentiated and unchanging, as opposed to men who appear with historic specificity in a variety of roles and contexts.<sup>119</sup> Consequently, the myths conflate actors and activities, recognizing only women or birth mothers as nurturers and caregivers. Furthermore, the myths conflate children and mothers, denying personhood and agency to both, and failing to acknowledge that mothers’ and children’s interests may conflict.<sup>120</sup> The “good” mother is assumed to not be in conflict with her child or fetus, as, according to the myths, it is in her nature to put her child or fetus’s needs and well-being above her own.<sup>121</sup>

Lack of distinction between mother and child constructed through myths of motherhood is specifically apparent when considering pregnancy. The pregnant woman and the fetus are constructed as intertwined subjects to an even greater extent than a mother and child who has been born. As noted above, medical developments have constructed the fetus as a patient distinct from the woman whose body it is within.<sup>122</sup> However, similar to the ideas promoted by the myths of motherhood, the responsible pregnant woman is expected to put the needs of her fetus before her own, while the pregnant woman who puts her own needs and desires first is deemed irresponsible.<sup>123</sup> Such judgments on pregnant women’s behavior go beyond perceptions of responsibility and connect specifically with the myths of motherhood. The responsible pregnant woman *is* the “good” mother; the pregnant woman who does not put the needs of the fetus before her own needs and desires is the “bad” mother.

The pressure on women to conform to dominant ideals presented in the discourse of maternal responsibility is inextricably linked to the idea of the “responsible mother” who puts the needs of her “child”

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117. See Smart, *supra* note 97.

118. See *infra* Part III.

119. Glenn, *supra* note 102, at 13.

120. *Id.*

121. RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 6 (2000).

122. *Id.*; BORDO, *supra* note 17, at 71–98; MARTIN, *supra* note 74, at 54–67; Chavkin, *supra* note 17, at 194; Phelan, *supra* note 17, at 481; Ruhl, *supra* note 17, at 107–09.

123. Ruhl, *supra* note 17, at 109–12.

first.<sup>124</sup> The myths of motherhood, as they operate on pregnant women as well as women who have had children, promote and legitimize the fetus-first mentality. The myths construct expectations of what it means to be a responsible pregnant woman and allow for, and arguably encourage, placing the fetus's welfare before the welfare and needs of the pregnant woman and women who have a chance of becoming pregnant. Women are deemed to have ultimate responsibility for the fetus and consequently for its health and development, and so putting the needs of the fetus before her own is expected. Furthermore, women's self-regulation and sacrifice are deemed symbols of love and their roles as "good" mothers.<sup>125</sup> In line with the myths of motherhood, few questions are raised as to whether a woman will sacrifice herself for her child and by extension her fetus. The construction of this expected maternal sacrifice legitimizes and normalizes the hierarchy of fetal and maternal health and well-being, and thus, the idea that the pregnant woman will act as the fetus's most ardent protector.<sup>126</sup> By extension, if she does not, then she is constructed as the "bad" mother, and consequently others can and must protect the fetus from her.<sup>127</sup> Thus, pregnant women have become public figures; their bodies have become a display for others to monitor, touch, and comment upon in ways that would not be appropriate for other adult bodies.<sup>128</sup>

To conclude this Part of the Article, there is no guarantee that a pregnancy will end with the birth of a healthy, live-born child, and yet this is the expectation of society, as well as of pregnant women (following the decision to not abort the fetus).<sup>129</sup> Awareness that a positive outcome to a pregnancy is not always the result<sup>130</sup> and it is impossible to guarantee, is coupled with the perception that the fetus is at risk from

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124. Lupton, *supra* note 57, at 649; *see also* ROBIN GREGG, PREGNANCY IN A HIGH-TECH AGE: PARADOXES OF CHOICE (1995); Emma Amanda Harper & Geneviève Rail, "Gaining the Right Amount for My Baby": Young Pregnant Women's Discursive Constructions of Health, 21 HEALTH SOC. REV. 69 (2012); Michelle R. H. van Mulken et al., *The Stigmatisation of Pregnancy: Societal Influences on Pregnant Women's Physical Activity Behaviour*, 18 CULTURE HEALTH & SEXUALITY 921 (2016).

125. Harper & Rail, *supra* note 124, at 74–75.

126. *See* Danielle Bessett, *Negotiating Normalization: The Perils of Producing Pregnancy Symptoms in Prenatal Care*, 71 SOC. SCI. & MED. 370 (2010).

127. HALLIDAY, *supra* note 78, at 168–69.

128. Lupton, *supra* note 92, at 332; *see also* Nathan Stormer, *Prenatal Space*, 26 SIGNS 109 (2000).

129. Lyerly et al., *supra* note 15.

130. At least one in four pregnancies end in a miscarriage. *Miscarriage Statistics*, TOMMY'S, <https://www.tommys.org/our-organisation/charity-research/pregnancy-statistics/miscarriage> (last visited Feb. 8, 2020).

external factors as well as from the pregnant woman's behavior. As such, perception that the fetus is always at risk is now a central aspect of monitoring and intervention in pregnancy; this monitoring and intervention is most visibly conducted by the medical community. In the UK and US, pregnant women are screened for their levels of cigarette smoking, drug use, and alcohol consumption, with the message clearly focused on doing what's best for the "baby."<sup>131</sup> However, it is not only the medical community who monitor and intervene when a pregnant woman is perceived to be an unacceptable risk to the fetus. Examples in both the UK and the US of doctors seeking court rulings to conduct a Caesarean section against the will of the pregnant woman illustrate that members of the legal community, in conjunction with or at the behest of members of the health community, are keen to do all that they can to protect the fetus.<sup>132</sup> At times such protection is given in spite of the damage it may cause the pregnant woman, both physically and mentally. However, as evidenced by the cases analyzed in this Article, the fetus-first mentality is rooted not only in the minds of medics and wider society, but also law enforcers—including the police, prosecutors, the judiciary, and lawmakers. As the cases examined below illustrate, the desire to protect the fetus has a strong influence on responses to women deemed to pose risks to the fetus and to embody the "bad" mother.

### III. FETUS-FIRST MENTALITY IN ACTION

As argued in the previous Part, the fetus-first mentality is entrenched in social and cultural life. In this Part, I will outline the extent to which the mentality is impacting criminal law. To illustrate this point, I draw on two examples of behavior—killing of the fetus (feticide) and consuming controlled substances while pregnant—which outline how the fetus-first mentality has influenced the development and application of laws in response to women's behavior. I provide cases from Alabama and Indiana in the US, and England in the UK. What becomes clear from these cases is that the desire to protect the fetus and to punish women who failed to put the fetus first has resulted in the development of new laws as well as old laws being stretched beyond the original intent of enacting legislators. Such adaption of law is not uncommon in criminal law and is arguably a natural development of law

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131. See *supra* notes 7–9.

132. See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc); *St. George's Healthcare N.H.S. Trust v. S.* [1999] Fam 26 (CA) (appeal taken from Eng.).

in common law jurisdictions. However, the influence of the fetus-first mentality on the development of law has numerous consequences for both women and their fetuses, as will be outlined in the Part V of this Article.

### A. Feticide

Killing a child is often seen as one of the most heinous crimes a person can commit.<sup>133</sup> The killing of a fetus, an unborn child, is seen by many to be an equally hideous crime. Moral and legal debates about abortion continue to rage over 45 years after *Roe v. Wade*<sup>134</sup> declared outright abortion bans by US states unconstitutional and the Abortion Act 1967<sup>135</sup> removed the criminal sanctions for abortion in England and Wales. A person's belief as to whether an abortion is the killing of a child will depend upon the position they take in terms of when life be-

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133. This is particularly the case when women kill their own children, as considerable research has noted that women can be judged extremely harshly when they commit filicide, due, in part, to the perception that the behavior is “unnatural” for women and mothers. Women are alternately presented as being “mad,” an explanation that is often given to support the use of criminal offenses such as infanticide in England and Wales, as well as other jurisdictions that have such criminal offenses. See generally MICHELLE OBERMAN & CHERYL L. MEYER, *WHEN MOTHERS KILL: INTERVIEWS FROM PRISON* (2008); Susan Ayres, “[N]ot a Story to Pass On”: *Constructing Mothers Who Kill*, 15 HASTINGS WOMENS L.J. 39 (2004); Karen Brennan, *Murdering Mothers and Gentle Judges: Paternalism, Patriarchy and Infanticide*, 30 YALE J.L. & FEMINISM 139 (2018); Arlie Loughnan, *The “Strange” Case of the Infanticide Doctrine*, 32 OXF. J. LEGAL STUD. 685 (2012); Emma Milne & Jackie Turton, *Understanding Violent Women*, in *WOMEN AND THE CRIMINAL JUSTICE SYSTEM: FAILING VICTIMS AND OFFENDERS?* 119 (Emma Milne et al. eds., 2018).

134. 410 U.S. 113 (1973).

135. Abortion Act 1967, c. 87, § 1 (Gr. Brit.). The Abortion Act provides exemption from prosecution under section 58 of the Offenses Against the Person Act if the abortion is performed by a registered medical practitioner in specific therapeutic circumstances, whereby two registered medical practitioners are of the opinion that “the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, or injury to the physical or mental health of the pregnant woman or any existing children of her family,” or “the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman,” or “continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated,” or “that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.”

gins and the morality of abortion,<sup>136</sup> a discussion which is beyond the scope of this Article. Nevertheless, public support for post-viability abortions is noted to be lower than for pre-viability terminations.<sup>137</sup> Consequently, abortions that take place in the later gestational stage of pregnancy are often deemed to be more morally dubious, and criminal laws prohibiting or restricting abortion in both the US and the UK are most often structured towards the post-viability stages.<sup>138</sup> Criminal law distinguishes between an abortion, the ending of a pregnancy, and feticide, the killing of a fetus. However, as will be outlined in the two cases

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136. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION AND EUTHANASIA* (1993); CLARICE FEINMAN, *THE CRIMINALIZATION OF A WOMAN'S BODY* (1992); BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* (2d ed. 2011); ANN FUREDI, *THE MORAL CASE FOR ABORTION* (2016); H. Tristram Engelhardt, *The Ontology of Abortion*, 84 *ETHICS* 217 (1974); John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 *PHIL. & PUB. AFF.* 117 (1973); Robert E. Joyce, *Personhood and the Conception Event*, 52 *NEW SCHOLASTICISM* 97 (1978); John Thomas Noonan, *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 1* (John Thomas Noonan ed., 1970); Rosamund Scott, *Choosing Between Possible Lives: Legal and Ethical Issues in Prenatal Screening and Preimplantation Genetic Diagnosis*, 26 *OXF. J. LEGAL STUD.* 153 (2006); Michael Tooley, *Abortion and Infanticide*, 2 *PHIL. & PUB. AFF.* 37 (1972); Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 *MONIST* 43 (1973).
137. A 2011 YouGov poll reported that seventy-six percent of Britons believe abortion should be legal in most or all circumstances, with only two percent believing abortion should always be legal. Hannah Thompson & Anthony Wells, *Abortion Row*, YOUGOV (Sept. 6, 2011, 3:58 PM), <https://yougov.co.uk/topics/politics/articles-reports/2011/09/06/abortion-row>. A further poll conducted in 2013 concluded that only six percent of people wanted to increase the gestation limit for abortion above 24 weeks, with forty percent agreeing to keep the limit at 24 weeks and twenty-eight percent wishing to reduce the limit to below 24 weeks. Andrew Farmer, *Opinions on Abortion*, YOUGO (Feb. 14, 2013, 6:49 AM), <https://yougov.co.uk/topics/politics/articles-reports/2013/02/14/opinions-abortion>. A Gallup poll in the US found that while sixty percent of Americans support legalized abortion in early pregnancy, only twenty-eight percent support abortion in the second trimester and thirteen percent in the third. Sarah McCammom, *Americans' Support For Abortion Rights Wanes As Pregnancy Progresses*, NPR (June 13, 2018, 3:08 AM), <https://www.npr.org/2018/06/13/619200865/americans-support-for-abortion-rights-wanes-as-pregnancy-progresses?t=1576933749800>.
138. Developments in the US since the election of Donald Trump to the presidency and changes in the leanings of the Supreme Court have resulted in a number of states making changes to their abortion laws, creating almost total bans, with the aims of a court challenge being initiated that will allow the case to progress up to the Supreme Court and potentially result in *Roe v. Wade* being overturned. See, e.g., H.B. 314, 2019 Leg., Reg. Sess. (Ala. 2019). For information about the impact of such laws, see *Abortion Laws in the US – 10 Things You Need To Know*, AMNESTY INT'L (June 11, 2019, 5:35 PM), <https://www.amnesty.org/en/latest/news/2019/06/abortion-laws-in-the-us-10-things-you-need-to-know/>.

presented, the move towards the fetus-first mentality has blurred the lines between the two offenses. The cases discussed are those of Hayley from England, UK, and Purvi Patel from Indiana, US. Both women purchased and took medication to end a pregnancy after the fetus had reached the point of viability.

### 1. Hayley—England, UK<sup>139</sup>

Hayley was convicted of procuring a miscarriage after she ordered misoprostol over the internet and consumed the substance in the late stages of her pregnancy. The drug is used to start labor and expel the fetus from the uterus.<sup>140</sup> Hayley pleaded guilty to a charge of procuring a miscarriage and was sentenced to eight years imprisonment. During the sentencing hearing, the prosecution contended that Hayley took the misoprostol at or close to the full-term of gestation of her pregnancy. As noted above, in England and Wales it is a criminal offense for anyone, including the pregnant woman, to end a woman's pregnancy at any stage of gestation unless conducted within the confines of the Abortion Act 1967.<sup>141</sup> Procuring a miscarriage criminalizes the ending of a pregnancy rather than the killing of the fetus.<sup>142</sup> Therefore, Hayley's conviction is not specifically for the behavior of or intention to kill the fetus, but rather her act of ending her pregnancy. Thus, she was convicted of an illegal abortion, not a crime against the fetus such as child destruction. In spite of Hayley's conviction for an illegal abortion, the judge in Hayley's case equated her actions to murder several times during her sentencing hearing. The judge argued that Hayley's behavior was between unintentional manslaughter and murder in terms of seriousness:

This is not charged as murder, and I would be wrong to treat it as such, as a matter of law. Equally it is not manslaughter,

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139. "Hayley" is not the defendant's real name. While the case was heard in open court, where her name was published, I have anonymized the case in line with requirements imposed by the court to view the case. The anonymization is of the identity of the defendant and all other parties involved in the case and includes withholding details such as class, exact age, ethnicity, geographical location, and the court in which the case was heard. As such no citations to the case are provided in this analysis.

140. Rebecca Allen & Barbara M. O'Brien, *Uses of Misoprostol in Obstetrics and Gynecology*, 2 REVS. OBSTETRICS & GYNECOLOGY 159, 159 (2009).

141. Abortion Act 1967, c. 87, § 1 (Gr. Brit.).

142. The offense will still be committed even if the fetus survives *in utero* or is expelled alive and survives post-birth. *R. v. Cramp* [1880] 5 QBD 307 (appeal taken from Eng. & Wales).

nor is it akin to it, because the termination here was deliberately caused with a view to terminating the life of an unborn child. It is not akin to causing death by dangerous driving either, with its maximum sentence of 14 years, but once again I have to bear in mind the nature of the calculated intentionality here. As matters stand in English law, none of those offenses could be committed in relation to an unborn child, but the seriousness of the criminality here is that, at whatever stage life can be said to begin, the child in the womb was so near to birth that in my judgment all right thinking people would consider this offense more serious than that of unintentional manslaughter or any offense on the calendar other than murder.

At several times during the hearing the judge refers to the fetus as a child, including stating that “[t]his is a child who, on the face of it, prospectively was capable of being born alive in the next few days . . .”, thus further equating Hayley’s actions to the killing of a live-born child. Moreover, Hayley was initially sentenced to 12 years imprisonment, which was reduced by the Court of Appeal, who judged that Hayley’s culpability lay in her “extinguishing of a life about to begin.”

The rhetoric from both hearings indicates that the focus was upon Hayley’s actions of ending the life of the fetus rather than on ending her pregnancy. The distinction is significant as Hayley took the misoprostol at full-term or very close to full term, which means it is possible that the child was born alive. Hayley refused to reveal the location of the infant’s body, and the inability to locate the dead body made it impossible to determine if the child was born alive. Without concrete evidence of live or stillbirth, alternative offenses were unable to be used to criminalize Hayley’s actions—homicide offenses (murder, manslaughter, or infanticide) and child destruction. As noted, homicide is reserved for humans with legal personality, so it would have been necessary for the prosecution to prove the child lived a separate existence and then died.<sup>143</sup> Child destruction requires the opposite, for a child to die before it has achieved a separate existence.<sup>144</sup> The judge in Hayley’s sentencing hearing questioned why child destruction had not been used, while noting it

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143. See *supra* text accompanying notes 18–24.

144. Infant Life (Preservation) Act 1929, 19 & 20 Geo. 5 c. 34 (Eng. & Wales).

has the same gravity as procuring a miscarriage.<sup>145</sup> During the sentencing hearing, the prosecution barrister advised that child destruction was not possible due to the inability to prove stillbirth. Thus, not having the child's body as evidence for the case limited the available offenses that the prosecutors could draw upon to convict Hayley of a crime. As a consequence, the prosecutors used procuring a miscarriage, an offense prohibiting the ending of a pregnancy.

While the distinction between ending a pregnancy and ending the life of a fetus may appear to be a matter of semantics, it has some very real consequences for the principle behind and application of the law. As noted above, the born-alive rule prevents a fetus from being a victim of homicide.<sup>146</sup> And yet, application of the offense of procuring a miscarriage in Hayley's case appears to be on the basis of criminalizing Hayley's behavior of killing her fetus rather than ending her pregnancy. As a consequence, procuring a miscarriage is being used as a proxy homicide offense, like feticide, capturing the killing of a human *in utero* or during labor and delivery. To appreciate the significance of using the offense in this manner, it is important to look at the historical background of the offense as well as the contemporary context of legal regulation of abortion.

Procuring a miscarriage first became a statutory offense in 1803.<sup>147</sup> However, there is debate within the historical scholarship as to whether a woman could be held criminally liable for ending her own pregnancy prior to the 1861 enactment of the Offenses Against the Person Act. The historian John Keown has argued that section 58 of the Act only clarified that the law could be applied to pregnant women who self-aborted, which had always been a common law offense.<sup>148</sup> Bernard Dickens, another historian, notes that it is not possible to confirm this argument due to the infrequency with which women were prosecuted for self-abortion.<sup>149</sup> Other scholars have argued that statutes regulating abortion enacted before 1861 were more concerned with criminalizing individuals who caused the death of a woman due to the performance of an abortion, rather than criminalizing the act of abortion itself. As historian Angus McLaren argues, the wording of the 1803 law related to

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145. Both offenses have a maximum sentence of life imprisonment. Offenses Against the Person Act 1861, 24 & 25 Vict. c.100, § 58 (Eng. & Wales); Infant Life (Preservation) Act 1928, 19 & 20 Geo. 5 c. 34, § 1 (Eng. & Wales).

146. *Supra* text accompanying note 18.

147. Malicious Shooting or Stabbing Act 1803, 43 Geo. 3 c. 58 (Eng., Wales, & Ire.).

148. JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 34 (1988).

149. BERNARD M. DICKENS, ABORTION AND THE LAW 20–28 (1966).

post-quickening abortion, “thereby to murder, or thereby to cause and procure the miscarriage of any woman,”<sup>150</sup> suggests that abortion was seen as another form of murder in which the woman, not the fetus, was the victim.<sup>151</sup> Limited parliamentary debate occurred with the passing of the Offenses Against the Person Act 1861,<sup>152</sup> so it is unclear why pregnant women were named as potential offenders under this law, which still operates today. Generally, the literature agrees that the historical purpose of the law was to prevent or condemn harm from coming to pregnant women and the intentional destruction of fetal life;<sup>153</sup> nevertheless, historian Glanville Williams argues that the former purpose was of most importance, as the concern was not for the unborn child, but for the injury done to women as a result of the actions of an unskilled abortion provider.<sup>154</sup>

Beyond the historic legacy of the offense of procuring a miscarriage, contemporary debate about legal regulation of abortion further draws into question the suitability of using the offense to punish Hayley’s behavior. The continued regulation of abortion within criminal law has come under political, academic, and public scrutiny in recent years, spearheaded by a campaign for decriminalization.<sup>155</sup> In March 2017, a Private Members Bill to repeal section 58 of the Offenses Against the Person Act 1861 passed the first reading in Parliament but failed to progress to a second reading due to the calling of the 2017 General Election.<sup>156</sup> In academic literature the case for removal of abortion from

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150. Malicious Shooting or Stabbing Act, 1803, 43 Geo. 3c. 58 (Eng., Wales, & Ire.).

151. ANGUS McLAREN, REPRODUCTIVE RITUALS: THE PERCEPTION OF FERTILITY IN ENGLAND FROM THE SIXTEENTH CENTURY TO THE NINETEENTH CENTURY 128–29 (1984). Quickening is the point at which a woman first feels the fetus move inside, typically 15–17 gestational weeks. *Id.* at 107–11.

152. MALCOLM POTTS ET AL., ABORTION 281–82 (1977).

153. *Id.*; DICKENS, *supra* note 149; KEOWN, *supra* note 148.

154. GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 146 (1957).

155. *The coalition*, WE TRUST WOMEN, <http://www.wetrustwomen.org.uk/the-coalition>. (last visited June 11, 2019). We Trust Women is a campaign to decriminalize abortion across the UK, led by the British Pregnancy Advisory Service and supported by a range of women’s rights groups, reproductive rights campaigners, and professional bodies, including the Royal College of Midwives, Women’s Aid, Fawcett Society, Maternity Action, the British Society of Abortion Care Providers, Birthrights, Lawyers for Choice, End Violence Against Women, Equality Now, IPPF European Network, Voice for Choice, Southall Black Sisters, Alliance for Choice NI, and Doctors for a Woman’s Choice on Abortion.

156. *MPs Approve an Early General Election*, PARLIAMENT.UK (Apr. 19, 2017), <https://www.parliament.uk/business/news/2017/april/mps-to-vote-on-an-early-general-election/>; *PMBs at End of a Session*, UK PARLIAMENT,

criminal law has most recently been made by Sally Sheldon, a feminist legal scholar, who argues that reading the Offenses Against the Person Act 1861 in conjunction with the Abortion Act 1967 does not result in the law expressing that abortion is a moral wrong at any stage of gestation.<sup>157</sup> Instead the law criminalizes the ending of a pregnancy (and likely the ending of the fetus's life) when that abortion is conducted outside of the Abortion Act 1967.<sup>158</sup> The law considers the termination of a pregnancy a serious wrong when not carried out under medical supervision "in line with the best medical practice of the 1960s" when abortion could only be conducted through medical procedure (rather than medication), and illegal abortions posed significant health risks to pregnant women.<sup>159</sup> Furthermore, the law requires two doctors to determine whether an abortion should go ahead and will not be legal if two doctors do not agree. This is significant as it means that a woman does not have a right to an abortion, instead she only has the right to ask two doctors if they will give her permission to have that abortion. Within this operational context, the Abortion Act provides "socially acceptable" reasons why a woman would be allowed to discontinue a pregnancy.<sup>160</sup> The message of the law is one of medical paternalism, as women are deemed to be relatively incapable of making a morally significant decision about pregnancy.<sup>161</sup> Sheldon has long argued that the law has always refused to recognize that women have a fundamental right to decide to terminate a pregnancy.<sup>162</sup> Instead the law advocates that doctors are the best people to determine if a woman should be allowed an abortion.<sup>163</sup> This legal regulation is out of step with women being autonomous people with the capacity and rights to make decisions about their bodies.<sup>164</sup>

While abortions obtained outside of the parameters of the Abortion Act 1967 are illegal, there have been very few prosecutions despite

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<https://guidetoprocedure.parliament.uk/articles/3Jzkl7n/pmb-s-at-end-of-a-session>  
(last visited Mar. 11, 2020).

157. See Sheldon, *supra* note 23.

158. Abortion Act 1967, c. 87, § 1 (Gr. Brit.); Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 58 (Eng. & Wales).

159. Sheldon, *supra* note 23, at 356.

160. *Id.*

161. *Id.*

162. Sally Sheldon, "Who Is the Mother to Make The Judgment?": *The Constructions of Woman in English Abortion Law*, 1 FEMINIST LEGAL STUD. 3 (1993).

163. See generally SALLY SHELDON, BEYOND CONTROL: MEDICAL POWER AND ABORTION LAW (1997) (reflecting that the Abortion Act recognizes an important role for doctors as gatekeepers to abortion services).

164. Sheldon, *supra* note 23, at 356–58.

indication that numerous women commit this offense every year.<sup>165</sup> Evidence of seizures of abortifacients being delivered by mail to women across the UK would suggest that numerous women are procuring their own miscarriages outside of medical guidance without facing criminal charges.<sup>166</sup> Similarly, in support of her Bill to decriminalize abortion, Member of Parliament Diana Johnson presented comments from women who illegally obtained and consumed abortifacients from the organization *Women on the Web*, none of whom have faced criminal prosecution.<sup>167</sup> There are numerous reasons why a prosecution may not go forward, including that the police may be unaware that the offense is being committed and that evidence may be limited. Nevertheless, the ability to track mail and internet searches would facilitate a prosecution for, at the very least, procuring an abortifacient,<sup>168</sup> if not for an illegal abortion. It appears, however, that there is little appetite to prosecute women seeking early medical abortions through illegal means. This is perhaps illustrated by the public outcry following the prosecution of a woman in Northern Ireland for purchasing abortion medication via the internet.<sup>169</sup> As Sheldon argues, prosecutions tend to be reserved for terminations of pregnancies in the very late stages of gestation and nonconsensual abortions (often involving a third party attacking a pregnant woman).<sup>170</sup> Lack of prosecutions of women who terminate non-viable pregnancies, which still kills a fetus, would suggest that the criminal law serves no purpose in regulating such action. As Sheldon concludes, criminal controls on abortion are outdated and out of step with modern medical science, serving to hinder clinical best practices.<sup>171</sup> Furthermore, Sheldon argues the law stigmatizes women who need abortions, imposing clinically unwarranted and bureaucratic restrictions on medical prac-

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165. See Sheldon, *supra* note 23, at 342–44, 349.

166. Jane Kirby, *Women Turning to Illegal Abortion Pills in Rising Numbers, Charity Warns*, INDEPENDENT (Feb. 15, 2017, 1:17 PM), <http://www.independent.co.uk/news/uk/home-news/abortion-pill-access-online-illegal-decriminalise-woman-british-pregnancy-advisory-service-danger-a7580566.html>.

167. 623 Parl Deb HC (6th Ser.) (2017) col. 26–28 (UK).

168. In England and Wales, procuring drugs to cause an abortion is a criminal offense. Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 59 (Eng. & Wales).

169. *Belfast Protest Against Prosecution of Northern Ireland Woman who Used Abortion Drugs Held Outside Public Prosecution Service*, BELFAST TELEGRAPH (Apr. 7, 2016, 4:00 PM), <https://www.belfasttelegraph.co.uk/news/northern-ireland/belfast-protest-against-prosecution-of-northern-ireland-woman-who-used-abortion-drugs-held-outside-public-prosecution-service-34607776.html>.

170. Sheldon, *supra* note 23, at 339–40.

171. *Id.* at 356.

tice with no evidence to suggest that it impacts the number of abortions that take place each year.

While there may be limited public and criminal justice appetite to prosecute women who illegally terminate pregnancies prior to viability, support for a woman's right to choose to terminate a pregnancy receives less public support when the fetus is capable of being born alive.<sup>172</sup> In Hayley's case, her pregnancy was so far-advanced that she could have naturally given birth to a living child. It is possible that following consumption of the misoprostol the child may well have been born alive, as the drug begins the process of labor rather than killing the fetus. If the body had been located and live birth had been proven, then Hayley may have faced a murder charge even if she had not intentionally committed an act or omission that resulted in the child's death once it was born alive—the action of taking the misoprostol may have been enough to indicate intent for murder and so result a homicide conviction.<sup>173</sup>

My aim in reviewing the history of the offense of abortion and the current context of women's procurement of miscarriages (legal and illegal) is to argue that application of this law in Hayley's case indicates the influence of the fetus-first mentality. In the strictest sense of the law and interpretation of the offense of procuring a miscarriage, Hayley did engage in the intentional termination of a pregnancy; she acted outside of the authorization for abortion provided by the Abortion Act 1967, and so taking misoprostol was illegal. However, this does not mean that we should understand and interpret Hayley's actions as an abortion, or that use of the offense of procuring a miscarriage is the correct means to criminalize her behavior, if indeed criminalization is appropriate. When we consider the characteristics of legal abortions that occur in England and Wales, this case is not comparable to "typical" abortions. Abortion is a common medical procedure that one in three women in the UK will experience at least once in her lifetime.<sup>174</sup> The vast majority of terminations, nine in ten, are carried out at 12 weeks of gestation or less, and

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172. See *supra* note 133 and accompanying text.

173. See Att'y Gen. Reference (No.3 of 1994) [1998] AC 245 (HL) (appeal taken from Eng.) (indicating that homicide offense may have been committed if a child is born alive and dies of injuries deliberately inflicted while *in utero*); EMMA CAVE, THE MOTHER OF ALL CRIMES: HUMAN RIGHTS, CRIMINALIZATION AND THE CHILD BORN ALIVE 72–74 (2004).

174. *Abortion*, NHS, <https://www.nhs.uk/conditions/abortion/> (last updated Aug. 17, 2016).

eighty percent are conducted before the tenth week.<sup>175</sup> Abortions that occurred at or after the twenty-fourth week of pregnancy (the point of viability) totaled 289 in 2018, 0.1 percent of the legal abortions that occurred.<sup>176</sup> As per the Abortion Act 1967, these abortions would have occurred to save the life of the pregnant woman, to prevent grave permanent mental or physical injury to the pregnant woman, or due to fetal abnormalities.

Due to the difference between Hayley's case and a "typical" abortion, Hayley's actions should not be seen as procuring a miscarriage but as an attempt to kill her child—either while it was *in utero* or following birth. As I have argued, homicide is precisely the offense the prosecution and judge at Hayley's trial appear to be aiming to achieve by using the offense of procuring a miscarriage, but the limits of the application of homicide in English law has prevented this. Consequently, prosecutors have drawn on the law of abortion to punish Hayley for behavior they believe she has committed but cannot prove; and to convict her despite the lack of legal doctrine to support such a conviction. The prosecution's decision to apply legislation prohibiting abortion reflects the fetus-first mentality. The desire to convict Hayley of an offense despite the inapplicability of existing homicide laws resulted in prosecutors drawing on other available offenses. While some may argue the creativity of prosecutors is admirable and precisely what the Crown Prosecution Service should be doing to ensure justice for the fetus that could have been born alive through natural birth, such application of law stretches the principles of homicide law in England and Wales and so reflects a clear movement towards a fetus-first mentality.

## 2. Purvi Patel—Indiana, US

In 2013, Purvi Patel purchased mifepristone and misoprostol<sup>177</sup> online and consumed the drugs to terminate her pregnancy at home.<sup>178</sup>

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175. U.K. DEP'T OF HEALTH & SOC. CARE, ABORTION STATISTICS, ENGLAND AND WALES: 2018 12 (2019), <https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2018>.

176. *Id.*

177. *See generally Mifepristone (Mifeprex)*, MEDLINEPLUS, <https://medlineplus.gov/druginfo/meds/a600042.html> (last updated May 15, 2016) (noting that mifepristone causes the placenta to separate from the endometrium and so effectively kills the fetus *in utero*); *supra* note 136 (misoprostol starts labor, expelling the fetus from the uterus).

178. *Patel v. State*, 60 N.E.3d. 1041, 1043 (Ind. Ct. App. 2016).

The gestational stage of her pregnancy was 25 to 30 weeks at the time.<sup>179</sup> Patel left the body of the aborted fetus in a dumpster near her family's restaurant.<sup>180</sup> After she experienced substantial bleeding, she went to a hospital emergency room for medical assistance.<sup>181</sup> She advised a doctor that she had been 10 to 12 weeks pregnant and had missed two periods.<sup>182</sup> However, based on the size of the umbilical cord still inside her body and a physical examination, the doctor estimated she had been at least 25 or 26 weeks pregnant.<sup>183</sup>

The doctors pressed Patel to tell them the location of the aborted fetus.<sup>184</sup> After she revealed the location, they notified law enforcement and left the hospital with the aim of saving its life.<sup>185</sup> The body was found by law enforcement officers. A doctor examined it onsite and concluded that prior to birth the fetus was viable, appeared normal and healthy, and had developed to approximately 30 gestational weeks.<sup>186</sup> When questioned by police, Patel stated that she did not perform CPR on the aborted fetus because it was not moving and did not cry.<sup>187</sup> The forensic pathologist concluded that prior to birth the fetus had reached approximately 25 gestational weeks and "more likely than not" was born alive and had breathed after birth.<sup>188</sup> However, it should be noted that the conclusion of live birth was made after performing a lung floating test which has been noted to be unreliable.<sup>189</sup> Forensic pathologist Dr. Joseph Prahlow concluded that "the possible mechanisms of death were 'extreme prematurity'" coupled with a lack of essential medical care, hypothermia or hyperthermia due to the aborted fetus's inability to regulate its body temperature, loss of blood due to the severed umbilical cord, or asphyxia from being placed in a plastic bag or from items inside the bag that could cover its mouth and nose."<sup>190</sup>

Patel was charged with the class A felony neglect of a dependent.<sup>191</sup> The prosecutors alleged that Patel failed to provide any medical care for her aborted fetus immediately after its birth and this failure resulted in

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179. *Patel*, 60 N.E.3d at 1043.

180. *Patel*, 60 N.E.3d at 1046.

181. *Patel*, 60 N.E.3d at 1046.

182. *Patel*, 60 N.E.3d at 1046.

183. *Patel*, 60 N.E.3d at 1046.

184. *Patel v. State*, 60 N.E.3d 1041, 1046 (Ind. Ct. App. 2016).

185. *Patel*, 60 N.E.3d at 1046.

186. *Patel*, 60 N.E.3d at 1046.

187. *Patel*, 60 N.E.3d at 1047.

188. *Patel*, 60 N.E.3d at 1047.

189. *Patel*, 60 N.E. 3d at 1047 n.6.

190. *Patel v. State*, 60 N.E.3d 1041, 1048 (Ind. Ct. App. 2016).

191. *Patel*, 60 N.E.3d at 1048.

death.<sup>192</sup> Later, she was also charged with feticide, a class B felony; the prosecutors alleged that Patel knowingly terminated her pregnancy with an intention other than to produce a live birth or to remove a dead fetus.<sup>193</sup> At trial, Patel was found guilty as charged; she was sentenced to imprisonment for thirty years for neglect of a dependent, with twenty years executed and ten years suspended.<sup>194</sup> She was also sentenced to a concurrent executed term of six years for feticide.<sup>195</sup> In 2016 she appealed both convictions.<sup>196</sup>

Patel appealed her neglect conviction by alleging that the State failed to provide sufficient evidence to prove the conviction beyond a reasonable doubt.<sup>197</sup> At the time of the events, an individual committed neglect if, “having the care of a dependent, whether assumed voluntarily or because of a legal obligation, [they] knowingly or intentionally . . . place the dependent in a situation that endangers the dependent’s life or health.”<sup>198</sup> If that neglect results in the death of the child, then the individual has committed a class A felony.<sup>199</sup> The basis of Patel’s neglect charge was that she knowingly placed the baby in danger by failing to provide any medical care immediately after birth.<sup>200</sup> Patel’s appeal centered on the causation element of the class A felony, which required proof beyond a reasonable doubt that her actions resulted in the death of the child.<sup>201</sup> The Court of Appeals agreed with Patel. It ruled that the State failed to “prove beyond a reasonable doubt that the baby’s death could not have occurred but for Patel’s failure to provide medical care immediately after its birth.”<sup>202</sup> While Patel’s acts of deliberately inducing labor and giving birth without medical assistance were deemed to put her fetus in a dangerous situation, the offense of neglect only applied to a child born alive.<sup>203</sup> The Court stated, “. . . the plain language of the neglect statute ‘contemplates only acts that place one who is a depend-

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192. *Patel*, 60 N.E.3d at 1048.

193. *Patel*, 60 N.E.3d at 1048.

194. *Patel*, 60 N.E.3d at 1048.

195. *Patel v. State*, 60 N.E.3d 1041, 1048 (Ind. Ct. App. 2016).

196. *Patel*, 60 N.E.3d at 1048.

197. *Patel*, 60 N.E.3d at 1048–55.

198. IND. CODE. § 35–46–1–4(a)(1) (2019).

199. *Id.* at § 4(b).

200. *Patel*, 60 N.E.3d at 1048. As *Patel* accepted that the aborted fetus was born alive I refer to the aborted fetus as a “baby” or “child” for the remainder of the case analysis. However, *Patel’s* case illustrates the challenges of determining language when fetuses die just prior, during, or shortly after birth.

201. *Patel v. State*, 60 N.E.3d 1041, 1048–55 (Ind. Ct. App. 2016).

202. *Patel*, 60 N.E.3d at 1052.

203. *Patel*, 60 N.E.3d at 1055.

ent at the time of the conduct at issue in a dangerous situation—not acts that place a future dependent in a dangerous situation.”<sup>204</sup> Consequently, it was only her postpartum behavior that could be considered neglectful. Testimony against Patel was only able to establish that there was a possibility, rather than a certainty, that Patel’s baby would have lived but for her failure to provide medical care immediately after birth. As such, Patel’s conviction for a class A felony of neglect of a dependent was vacated.<sup>205</sup> She was convicted of a class D felony of neglect instead, as the State had proven that she knowingly endangered her baby.<sup>206</sup> This felony was punishable by imprisonment for six months up to three years.<sup>207</sup>

Patel also appealed her feticide conviction on the basis that the statute did not apply to her conduct.<sup>208</sup> At the time of the termination of Patel’s pregnancy, the feticide offense read: “A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide, a Class B felony.”<sup>209</sup> First, Patel appealed on the grounds that the offense of feticide requires the fetus to die, but her child was born alive. The Court of Appeal disagreed with this point, arguing that the plain language of the statute indicated otherwise.<sup>210</sup> However, they did note that the language of the feticide statute has constructed “. . . the apparently absurd outcome [of] a woman being convicted under both the neglect of a dependent statute, which requires a live infant, and the feticide statute, which does not require a dead infant.”<sup>211</sup>

Patel further appealed the conviction on the basis that her actions were not an act of feticide, but an illegal abortion.<sup>212</sup> Patel maintained that the feticide statute was not the law that “govern[ed] unlawful abortions; rather, unlawful abortions are governed by the Unlawful Abortion Statute, Ind. Code §16–34–2–7.”<sup>213</sup> The Court of Appeals ruled that the state legislature had purposefully drawn a clear distinction between feticide and illegal abortion. It noted that since enactment in 1979, the

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204. *Patel*, 60 N.E.3d at 1053 (citing *Herron v. State*, 729 N.E.2d. 1008, 1011 (Ind. Ct. App. 2000)).

205. *Patel*, 60 N.E.3d at 1055.

206. *Patel*, 60 N.E.3d at 1055.

207. IND. CODE. § 35–46–1–4 (2019).

208. *Patel v. State*, 60 N.E.3d. 1041, 1055–62 (Ind. Ct. App. 2016).

209. IND. CODE. § 35–46–1–4 (2019).

210. *Patel*, 60 N.E.3d at 1055.

211. *Patel*, 60 N.E.3d at 1056.

212. *Patel*, 60 N.E. 3d at 1056–57.

213. *Patel*, 60 N.E.3d at 1057.

feticide statute had been used to prosecute third parties who knowingly terminated pregnancies without the consent of the pregnant woman, often through use of violence targeted at the woman.<sup>214</sup> Patel's case was believed to be the first case of the government using the feticide offense to prosecute a pregnant woman or anyone else for performing an illegal abortion.<sup>215</sup>

Patel further contended that the legislation prohibiting abortions not performed under certain specified circumstances was intended to punish medical professionals, not women who performed their own abortions.<sup>216</sup> The Court of Appeals agreed with Patel's argument and accordingly overturned her feticide conviction, concluding that the legislature never intended for the feticide statute to apply to pregnant women.<sup>217</sup> As such, Patel's case was remanded to the trial court for resentencing for her conviction of class D felony neglect of a dependent.<sup>218</sup> She was sentenced to imprisonment for 18 months; due to time already served, Patel was released immediately.<sup>219</sup>

Patel's initial convictions of both a class A felony neglect of a dependent and a class B felony of feticide are examples of the fetus-first mentality. The prosecutors interpreted preexisting laws to obtain a conviction in order to punish the behavior of a pregnant woman towards her unborn child, as they deemed this behavior unacceptable. As with Hayley's case, the prosecution found ways within existing legislation to illustrate the perceived wrongfulness of the behavior. Unlike Hayley's case, the interpretation of the law—notably the feticide offense—which went beyond the intent of the state legislature was overturned on appeal. While Indiana recognizes the fetus as a person able to be the victim of homicide,<sup>220</sup> the penal code protects pregnant women from facing prosecution for ending the life of the fetus through an illegal abortion; in contrast, under English law, the fetus is not recognized as a distinct legal subject, and so cannot be a victim of homicide, but women can be held

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214. *Patel v. State*, 60 N.E.3d 1041, 1057–60 (Ind. Ct. App. 2016).

215. *Patel*, 60 N.E.3d at 1058.

216. *Patel*, 60 N.E.3d at 1060–62.

217. *Patel*, 60 N.E.3d at 1060–62.

218. *Patel*, 60 N.E.3d at 1062.

219. *Judge Says Purvi Patel Should Be Freed Immediately After Feticide Conviction Overturned*, THE GUARDIAN (Aug. 31, 2016, 10:19 PM), <https://www.theguardian.com/us-news/2016/sep/01/purvi-patel-freed-immediately-feticide-conviction-overturned>.

220. See IND. CODE § 35–42–1–1(4)(2019) (“A person who knowingly or intentionally kills a fetus in any stage of development commits murder, a felony.”).

criminally liable for an illegal abortion or attempting to end the life of the fetus capable of being born alive.<sup>221</sup>

Nevertheless, the fact that the state brought charges against Patel and secured a conviction illustrates their desire to punish her for behavior deemed to be unacceptable as a pregnant woman. Prosecutors were prepared to adapt law beyond the scope envisioned by state legislatures to facilitate a conviction and subsequent punishment. As the Court of Appeals argued in Patel's case, if the legislature wished to consider women who end their own pregnancies as performing an act of feticide, then they would have made this evident in the statute.<sup>222</sup> However, as other cases explored in this Article will demonstrate, judicial interpretation can also work to uphold prosecutors' stretching of offenses, driven by a fetus-first mentality. As outlined in Part IV of this Article, these judicial efforts have significant implications for fetuses and women.

Hayley and Patel's cases illustrate the function of the fetus-first mentality in both the UK and the US. In both cases attempts were made to use existing legislation to punish the women for their actions of causing the death of their fetus. In Indiana, the attempt to use the feticide offense ultimately failed following the Court of Appeals' ruling in Patel's favor and overturning her conviction for this offense.<sup>223</sup> In England prosecutors were successful, as Hayley was convicted of the offense of procuring a miscarriage, even though, as I have argued above, Hayley's actions should be seen as the killing of a fetus rather than procuring a miscarriage. While different legal means were used and different outcomes achieved, the message is clear: women are expected to adhere to the fetus-first mentality, to put the needs and well-being of their fetuses before themselves, even if they do not want the child. Neither Hayley nor Patel did this, and so their actions were deemed to be those of the "bad" mother and to require punishment, regardless of whether or not the law can or should be applied in response to such behavior.

### B. *Consuming Controlled Substances*

As argued above, the fetus-first mentality permeates the advice given to pregnant women, as medical and public health officials regularly provide guidance as to what substances they should consume, reduce, or avoid. The impact of women's consumption of substances on the health

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221. *See supra* text accompanying notes 18–24.

222. *Patel v. State*, 60 N.E.3d. 1041, 1061–62 (Ind. Ct. App. 2016).

223. *See supra* text accompanying notes 202–11.

of the fetus continues to be a core feature of advice, ranging from what not to eat, to how food should be cooked, to which vitamins and minerals women should be adding to their diets. It should be noted, however, that medical consensus about the appropriate advice to give pregnant women changes over time.<sup>224</sup>

One area of fierce controversy relates to women's consumption of controlled substances such as cigarettes, drugs, and alcohol during pregnancy. The advice given to women about the consumption of controlled substances and the reports of the impact of such substances on fetal health demonstrates the focus of medical and public health professionals, the general public, and the law on the fetus-first mentality.<sup>225</sup> Media storms about so-called "crack babies" and the panic over the impact and consequences of women's use of certain substances have resulted in general adoption of the principle that cigarette, drug, and alcohol use is bad for fetuses.<sup>226</sup> Thus, there is general public, medical, and political consensus that women must avoid these substances while they are pregnant and arguably during the pre-pregnancy period as well.<sup>227</sup> Perhaps unsur-

224. For example, in England, the public health message relating to the consumption of runny or raw eggs was revised in 2016. Runny or raw eggs are now deemed safe for pregnant women to eat. *Raw Eggs Safe for Pregnant Women in UK, Say Food Safety Experts*, THE GUARDIAN (July 26, 2016, 2:39 PM), <https://www.theguardian.com/world/2016/jul/26/raw-eggs-safe-for-pregnant-women-in-uk-say-food-safety-experts>.

225. See Cecilia Benoit et al., *Providers' Constructions of Pregnant and Early Parenting Women Who Use Substances*, 36 SOC. HEALTH & ILLNESS 252 (2014); Alexana Gaspari, Note, *Inheriting Your Mother's Eyes, Hair, and Drug Addiction: Protecting The Drug-Exposed Newborn By Criminalizing Pregnant Drug Use*, 54 FAM. CT. REV. 96 (2016); Raphaël Hammer & Sophie Inglin, *'I Don't Think It's Risky, But...': Pregnant Women's Risk Perceptions of Maternal Drinking and Smoking*, 16 HEALTH RISK & SOC'Y 22 (2014); Nicholas Hookway et al., *Risk, Morality and Emotion: Social Media Responses to Pregnant Women Who Smoke*, 19 HEALTH RISK & SOC'Y 246 (2017); Ann Oakley, *Smoking in Pregnancy: Smokescreen or Risk Factor? Towards a Materialist Analysis*, 11 SOC. HEALTH & ILLNESS 311 (1989); Lupton, *supra* note 57; Thom et al., *supra* note 4.

226. *Crack Babies: Twenty Years Later*, NPR (May 3, 2010), <https://www.npr.org/templates/story/story.php?storyId=126478643&ct=1583491940859>. See generally, Lisa Maher, *Criminalizing Pregnancy - The Downside of a Kinder, Gentler Nation?*, 17 SOCIAL JUSTICE 111 (1990) (arguing that the emergence of "crack pregnancies" as a public problem needs to be understood in the context of a conservative political agenda that is concerned with the promotion of "traditional family values" that embodied the principle of "say no" to particular forms of sexual activity and types of drugs).

227. As noted above, pre-pregnancy health is now a prominent feature of public health campaigns. See *supra* notes 57–58; see also Sevilay Temel et al., *Evidence-Based Preconceptional Lifestyle Interventions*, 36 EPIDEMIOLOGIC REV. 19 (2013); M. Whitworth & T. Dowswell, *Routine Pre-Pregnancy Health Promotion for Improving Pregnancy Outcomes*, COCHRANE DATABASE SYS. REV., Oct. 7, 2009; Thom et al., *supra* note 4.

prisingly, such messages have impacted the development and application of criminal law when pregnant women consume controlled substances. This section explores cases where women's consumption of substances perceived to be harmful has come under legal scrutiny. As illustrated in the cases below, perceptions that women should not take such drugs are entwined with the idea of the fetus-first mentality.

### 1. Amanda Kimbrough—Alabama, US

As outlined above, in a number of states in the US, fetuses are subject to legal protection beyond unlawful killing. One example of such protection is Alabama's chemical endangerment offense, which criminalizes a person responsible for a child if they "knowingly, recklessly, or intentionally [cause] or [permit] a child to be exposed to, to ingest or inhale or to have contact with a controlled substance, chemical substance, or drug paraphernalia."<sup>228</sup> The focus of the law, when introduced in 2006, was to address the concern that children were being exposed to dangerous chemicals used in the production of drugs such as methamphetamines in so-called "meth labs."<sup>229</sup> However, the rise in the number of babies testing positive for drugs at birth has led prosecutors to "[take] it upon themselves to begin applying the chemical endangerment law in a new manner."<sup>230</sup>

In 2008, Amanda Kimbrough's son was born after an emergency Caesarean section; she was 25 weeks and five days pregnant at the time.<sup>231</sup> Kimbrough's obstetrician diagnosed her with preterm labor and occult cord prolapse, which occurs when the umbilical cord descends through the birth canal before the fetus.<sup>232</sup> This condition restricts blood flow through the umbilical cord. The child, Timmy, was born not breathing and with a low heart rate. He died 19 minutes after birth.<sup>233</sup> Kimbrough's urine was screened for drugs and tested positive for methamphetamine, as did Timmy's blood and a sample of his liver tissue.<sup>234</sup> The pediatrician who treated Timmy determined that he had died from

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228. ALA. CODE § 26-15-3(a)(1) (2019).

229. Rachel Suppé, Note, *Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama's Chemical Endangerment Law in Ex Parte Ankrom*, 7 HEALTH L. & POL'Y BRIEF 49, 51 (2013).

230. *Id.* at 55.

231. *Ex parte Ankrom*, 152 So. 3d 397, 403 (Ala. 2013).

232. *Ex parte Ankrom*, 152 So. 3d at 403.

233. *Ex parte Ankrom*, 152 So. 3d at 403.

234. *Ex parte Ankrom*, 152 So. 3d at 403.

“respiratory arrest secondary to prematurity.”<sup>235</sup> However, a medical examiner with the Alabama Department of Forensic Sciences who performed an autopsy on Timmy concluded that he died from “acute methamphetamine intoxication.”<sup>236</sup> Kimbrough later stated that she had smoked methamphetamine with a friend three days before she had experienced labor pains.<sup>237</sup> Kimbrough pleaded guilty to chemical endangerment of a child, reserving the right to appeal.<sup>238</sup> The trial court sentenced her to ten years’ imprisonment, the mandatory minimum sentence due to the death of the child.<sup>239</sup>

Prosecutors argued that “child” in the penal code included fetuses as well as born children, which allowed them to apply the chemical endangerment law to fetuses and bring the charges against Kimbrough. Kimbrough and Hope Ankrom, a woman convicted of the same offense, both appealed to the Alabama Court of Criminal Appeals. Ankrom argued that “[t]he plain language of § 26-15-3.2, Ala.Code 1975, shows that the legislature intended for the statute to apply only to a child, not a fetus,” and that courts in other states with similar legislation have ruled that statutes do not apply to prenatal conduct that allegedly harms a fetus.<sup>240</sup> The Court of Criminal Appeals disagreed, arguing that the plain meaning of the term “child,” as used in the statute, includes an unborn child.<sup>241</sup> Ankrom and Kimbrough appealed to the Alabama Supreme Court, who upheld the ruling that the term ‘child’ was “unambiguous” in its inclusion of a fetus.<sup>242</sup> The court went further, ruling that “adoption of the viability distinction to be inconsistent with the plain meaning of the word “child” and with the laws of this State.”<sup>243</sup> Consequently, the Alabama Supreme Court rejected the Court of Criminal Appeals’ limited application of the chemical endangerment offense to a viable fetus in *Ankrom*,<sup>244</sup> and ruled that the statute applied to all fetuses, regardless of viability, meaning that from the point of conception a fetus is protected as a “child” under state law.<sup>245</sup>

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235. *Ex parte Ankrom*, 152 So. 3d at 403.

236. *Ex parte Ankrom*, 152 So. 3d at 403.

237. *Ex parte Ankrom*, 152 So. 3d 397, 404 (Ala. 2013).

238. *Ex parte Ankrom*, 152 So. 3d at 402.

239. *Ex parte Ankrom*, 152 So. 3d at 403.

240. *Ankrom v. State*, 152 So. 3d 373, 376 (Ala. Crim. App. 2011).

241. *Ankrom v. State*, 152 So. 3d 373, 376 (Ala. Crim. App. 2011).

242. *Ex parte Ankrom*, 152 So. 3d at 409.

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

244. *Ankrom v. State*, 152 So. 3d 373, 376 (Ala. Crim. App. 2011).

245. *Ex parte Ankrom*, 152 So. 3d at 419. The judgement was confirmed in *Hicks v. State*, 115 So. 3d 53 (Ala. 2014).

The convictions of Kimbrough and Ankrom, and the criminalization and punishment of numerous other women prosecuted under the offense of chemical endangerment (approximately 60 women total between 2006 and 2012),<sup>246</sup> could be interpreted as justifiable on the basis that the women have put the welfare of future children at risk. However, such an interpretation fails to consider the practical and legal details of these cases, all of which point towards prosecutors and the courts being influenced by the fetus-first mentality.

In terms of legal considerations, Rachel Suppé has produced one of the most coherent analyses of the chemical endangerment offense and the development of Alabama state law in relation to fetuses. She argues that the courts erred in finding the term “child” was unambiguous.<sup>247</sup> The Alabama Supreme Court’s decision was based on the reading of two dictionaries that included “fetus” in the definition, while ignoring the dictionaries that do not.<sup>248</sup> Suppé outlines examples where courts have discarded the reading of a dictionary due to the conflicting interpretations between texts,<sup>249</sup> yet this was not done in *Ex parte Ankrom*. Furthermore, Suppé argues the courts should have considered the four previous attempts made by Alabama’s legislators to amend the chemical endangerment statute to clarify that the offense applied to both born children as well as fetuses.<sup>250</sup> The attempts indicate that the original wording in the statute was not definitive and therefore the term child is ambiguous, because if the term was unambiguous then legislators would not have needed to attempt to clarify it in the legislation.<sup>251</sup> Thus, Suppé argues, there is an argument that the court’s legal basis is flawed and that Kimbrough had in fact not committed the offense of chemical endangerment.<sup>252</sup>

On a practical level, use of the law in cases involving fetuses has been criticized due to the lack of conclusive medical evidence that drug use during pregnancy causes harm to the fetus.<sup>253</sup> In instances where the

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246. Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES MAG. (Apr. 25, 2012), <http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html>.

247. Suppé, *supra* note 229, at 58.

248. *Id.* at 59.

249. *Id.* at 59–60.

250. *Id.* at 60.

251. *Id.*

252. *See id.*

253. *See generally* DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 156–159 (1997); Kylee Sunderlin & Laura Huss, *The Mythology of “Addicted Babies”: Challenging Media Distortions, Laws, and Policies that Fracture Communities*, DIFFERENTTAKES, Fall 2014, at 1, 3

pregnancy ends in a miscarriage or stillbirth, frequently the cause of fetal death is unknown; drug use cannot be definitively determined as the cause of the death of the fetus.<sup>254</sup> It is generally not possible to determine what impact, if any, substance use had on the well-being of the fetus. With this in mind, the conclusions of prosecutors that a woman who takes drugs while pregnant is endangering her unborn child becomes unfounded in fact.

There is even more doubt about the soundness of applying the chemical endangerment offense to pregnant women when considering the implication of the law on *all* women of reproductive age. Suppé argues the ruling in *Ex parte Ankrom* has made it a felony for pregnant women to take numerous prescription drugs which are legally prescribed to them, regardless of whether the prescription is harmful to the fetus.<sup>255</sup> The ban would include methadone, the drug often used in the care of opioid-dependent pregnant women.<sup>256</sup> Following the ruling of the Alabama Supreme Court, a woman in the very early stages of pregnancy who is unaware that she is pregnant could potentially still be committing this offense by consuming the legally prescribed medications because the law also applies to non-viable pregnancies.<sup>257</sup> While possession or sale of illegal narcotics is a crime in Alabama, use of those same narcotics is not.<sup>258</sup> Thus, the ruling by the Alabama Supreme Court has widened the law to capture behavior that is otherwise legal to non-pregnant people. Such an outcome of criminal law illustrates the epitome of gender discrimination, as—generally speaking—only women can

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(challenging the crack baby myth and program to sterilize women who use crack cocaine); Marsha Rosenbaum & Sheigla Murphy, *Women's Research and Policy Issues*, in *SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK* 1075–92 (Joyce H. Lowinson et al. eds., 2005) (arguing that women who use crack cocaine have been scapegoated through fetal protection laws related to drug-use to provide political cover for the larger social issues, such as the failed “post-Reagan social experiment” which cut social welfare programs, and complex social conditions that would require major political change).

254. See Murphy, *supra* note 36, at 872. See generally Deborah A. Frank et al., *Growth, Development and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systemic Review*, 285 *JAMA* 1613, 1619 (2001); Kathryn A. Kellett, *Miscarriage of Justice: Prenatal Substance Abusers Need Treatment, Not Confinement Under Chemical Endangerment Laws*, 40 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 455, 458 (2014).

255. Suppé, *supra* note 229, at 65.

256. *Id.*

257. It is not clear at what stage of gestation the law would begin to apply—whether from the moment of fertilization, or upon implantation of the embryo. See *supra* note 1.

258. Suppé, *supra* note 229, at 68.

become pregnant.<sup>259</sup> Thus, the statute punishes women, but not men, who use either illegal narcotics or lawful medication such as prescription drugs. As Suppé argues, since the punishment can result in sentences up to life imprisonment, the gender disparity of the statute is of grave severity.<sup>260</sup>

Further concern has been raised about the potential for convictions of pregnant women for chemical endangerment to be the start of further criminal regulation of behavior, resulting in a slippery slope of criminalization. There is the possibility that it will result in control and regulation of all women of reproductive age, just in case she is pregnant and just in case her activity is harmful to a fetus.<sup>261</sup> Commentators have argued that punishment of one type of “deviant” behavior during pregnancy under the veil of fetal protection makes it possible for the state to progress to punishing women for other acts during pregnancy.<sup>262</sup> For example, it may allow for the State to prosecute women who drink alcohol, smoke cigarettes, eat unhealthily, do not seek prenatal care, drive recklessly, work at locations that expose them to toxic fumes, or remain in violent and physically abusive relationships.<sup>263</sup>

Further concerns about the criminalization of women who test positive for controlled substances become evident when examining the trends of the personal characteristics of women who are generally prosecuted for these types of offenses.<sup>264</sup> Pregnant women of color, especially black women,<sup>265</sup> and women of low income are overrepresented among those who have been arrested or subjected to equivalent deprivations of

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259. This point is made with full awareness that gender is performative, and that people who identify as men or do not prescribe to the gender binary can and do become pregnant. See JUDITH BUTLER, *GENDER TROUBLE* xv-xvi (1999); Judith Halberstam, *The Pregnant Man*, 65 *THE VELVET LIGHT TRAP* 77, 77 (2010).

260. Suppé, *supra* note 229, at 69.

261. *Id.*

262. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 *ALB. L. REV.* 999, 1003 (1999); Johnsen, *supra* note 32, at 605-07; Kellett, *supra* note 254, at 455; Kathleen Adams, *Chemical Endangerment of a Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights*, 65 *ALA. L. REV.* 1353, 1366 (2014).

263. Suppé, *supra* note 229, at 69.

264. Fineman, *supra* note 111.

265. E.g. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *NEW ENG. J. OF MED.* 1202, 1202 (1990) (finding that black women in Pinellas County, Florida are reported at a rate ten times higher than white women despite the frequency of a positive result being similar).

liberty.<sup>266</sup> Pregnant women who are deemed to fit the stereotype of “white trash” are also criminalized at a higher rate than wealthier white women.<sup>267</sup> Convictions are more likely among this demographic for two reasons. Firstly, public clinics and hospitals that serve low-income women, who are also often from ethnic minority backgrounds, are more likely to comply with drug reporting regulations than private hospitals.<sup>268</sup> Secondly, doctors are influenced, either consciously or unconsciously, by drug-user profiles, which are based on racial stereotypes.<sup>269</sup> As such, black women are much more likely to be reported to the police than white women, despite comparable patterns of drug-use.<sup>270</sup> The disparity of prosecutions and convictions between black and white women and poor and rich women is significant and has rightly been the focus of criticism as the application of laws and policies of criminalization reflect discrimination based on race, ethnicity, and class.<sup>271</sup> As Dorothy E. Roberts, an eminent American scholar of race, gender, and the law, argues, society is much more willing to condone the criminalization of poor, black women who fail to meet the middle-class ideals of motherhood and thus this demographic of drug-users is more likely to face arrest and prosecution.<sup>272</sup> Consequently, Roberts argues, the criminal jus-

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266. Paltrow & Flavin, *Forced Interventions*, *supra* note 49, at 311; Paltrow, *supra* note 262, at 1002; ROBERTS, *supra* note 253, at 152; Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 18 WIS. J.L. GENDER & SOC. 241, 257–58 (2011); Linda C. Fentiman, *The New Fetal Protection: The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. L. REV. 537, 551 (2006).

267. Grace Howard, *The Limits of Pure White: Raced Reproduction in the Methamphetamine Crisis*, 35 WOMEN'S RTS. L. REP. 373, 394 (2014).

268. Loren Siegel, *The Criminalization of Pregnant and Child-Rearing Drug Users*, in THE REDUCTION OF DRUG-RELATED HARM 95, 97–98 (P. A. O'Hare et al. eds. 1992).

269. *Id.* at 98.

270. *Id.* at 97.

271. *See generally* ROBERTS, *supra* note 253 (arguing that convictions of pregnant women are based upon the principle of legitimizing fetal rights and that black women are easier targets for criminal justice as their arrests are more palpable for the general public than the arrest of white women); SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991) (discussing that mothers from low-income households and who are living in poverty are criminalized for behavior deemed to harm fetuses with the justification that the state wants to protect children. However, at the same time, services that would improve the health and well-being of pregnant women and their children are being cut); Chasnoff et al., *supra* note 265 (finding that despite similar rates of drug use between black and white women during the six month study, black women were reported at approximately ten times the rate of white women).

272. ROBERTS, *supra* note 253, at 150–200. As noted above, idealized images of motherhood, constructed through the myths of motherhood, are class and race/

tice system focuses on women whom society deems undeserving of motherhood.<sup>273</sup>

Legal responses to pregnant drug users also reflects US policy relating to the so-called “war on drugs” and the popular view that drug use is a crime, not a medical condition.<sup>274</sup> This approach to drug use persists despite the World Health Organization and the American Psychiatric Association classifying substance abuse as a disease.<sup>275</sup> In spite of such classifications, the belief that criminalizing pregnant women who use controlled substances will act as a deterrent from activity that will harm the fetus or encourage women who use drugs to quit prior to pregnancy continues to be held. Public perceptions that women who act in a way that would hurt a child—whether born or not—deserve to be punished and/or that punishment will act as a deterrent for others also plays a role in the use of criminal law in these cases.<sup>276</sup> Herein lies the connection to the fetus-first mentality. The myths of motherhood saturate public perception and encourage the belief that women should put their children—including their unborn children—before themselves. These myths dictate that the “good” mother would refrain from consuming controlled substances to protect her child, regardless of the nature or consequence of use. The state and public expect that, when pregnant, a woman will manage her fetuses’ risk by following guidance provided by the medical community.<sup>277</sup> In this instance, that means not consuming controlled substances. Paradoxically, while individual risk factors relating to the behavior and health of the pregnant woman are understood to have a consequence on the well-being of the fetus, the impact of social and economic factors on the welfare of pregnant women and their fetuses are disregarded. This disregard for the impact of social and economic factors occurs despite evidence that, as discussed below, these factors have as much, if not more, impact on the well-being of the fetus than substance use.<sup>278</sup>

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ethnicity biased. Collins, *Shifting the Center*, *supra* note 109; COLLINS, BLACK FEMINIST THOUGHT, *supra* note 109.

273. ROBERTS, *supra* note 253, at 152. *See also* RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA (2005).

274. Mohapatra, *supra* note 266, at 244.

275. Suppé, *supra* note 229, at 74.

276. Adams, *supra* note 262; Alisha Marano, *Punishing Is Helping: An Analysis of the Implications of Ex Parte Ankrum and How the Intervention of the Criminal Justice System is a Step in the Right Direction Toward Combating the National Drug Problem and Protecting the Child*, 35 U. LA VERNE L. REV. 113 (2013).

277. Ruhl, *supra* note 17, at 103.

278. BORDO, *supra* note 17, at 83–4; Karen Lane, *The Medical Model of the Body as a Site of Risk: A Case Study of Childbirth*, in SOCIOLOGY OF THE BODY: A READER 157

As outlined in Part II, medical conceptualization of the fetus as a separate patient has led to the pregnant woman being seen as a potential threat to the fetus, and thus the fetus's security needs to be managed by third parties.<sup>279</sup> Criminal cases such as Kimbrough and Ankrom's suggest that when self-management of the fetus's risk is perceived to not be completed by a pregnant woman, some women become subject to institutions that will manage the risk for them. In Kimbrough and Ankrom's instances, the criminal justice system stepped in to manage the perceived risk that they pose as mothers to children due to their drug use. In this instance criminal justice acts as a crime control mechanism.<sup>280</sup> Through identification of behavior considered risky through a criminal conviction, society is able to manage risk that women such as Kimbrough and Ankrom may pose to a future fetus. Kimbrough is controlled physically through her imprisonment, meaning that it is unlikely that she will become pregnant in the near future. While Ankrom was not imprisoned, her conviction means that she is potentially more likely to be monitored by child protective services and health professionals if she becomes pregnant again, as with other women who are "drug-affected."<sup>281</sup> As such, these cases suggest that feminist theorists have correctly identified that the fetus is the focus of intervention in pregnancy, rather than the general health and well-being of the woman.<sup>282</sup>

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(Jacqueline Low & Claudia Malacrida eds., 2008); Chavkin, *supra* note 17, at 147; Ellen S. Lazarus, *What Do Women Want?: Issues of Choice, Control, and Class in Pregnancy and Childbirth*, 8 MED. ANTHROPOL. Q. 25, 26 (1994); Ruhl, *supra* note 17, at 110–13.

279. HALLIDAY, *supra* note 78.

280. David Garland argues that from the 1970s onwards in both the UK and US, new forms of crime control mechanisms were employed based on the principle of hardline policies of deterrence, predicative restraint, and incapacitation. These developments occurred simultaneously with the ending of an era dominated by welfare state policies and social democratic politics, as well as increased market freedom and the rise of neoliberalism. *See generally* DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (Oxford University Press 2001).

281. Jeanne Flavin & Lynn M. Paltrow, *Punishing Pregnant Drug-Using Women: Defying Law, Medicine, and Common Sense*, 29 J. ADDICT. DIS. 231, 240 (2010).

282. *See* BORDO, *supra* note 17, at 71–98; MARTIN, *supra* note 74, at 54–67; ROTH, *supra* note 121, at 6; Chavkin, *supra* note 17, at 194; Phelan, *supra* note 17, at 481; Ruhl, *supra* note 17, at 107–09.

## 2. Sally—England, UK<sup>283</sup>

Unlike certain state laws in the United States, laws in the United Kingdom do not allow criminal convictions for the consumption of controlled substances while pregnant.<sup>284</sup> The fetus does not have legal personality and cannot be the victim of a crime against the person; the born-alive rule prevents a woman from being held criminally liable for behavior that may cause harm to the fetus.<sup>285</sup> Therefore, even if it is established that the mother's use of controlled substances harmed the fetus, potentially following the birth of a drug-dependent baby, she has not committed a criminal offense in relation to the consumption of the substance, or harm that may have been caused to the fetus due to the consumption of a substance.<sup>286</sup> This principle was recently upheld in *Criminal Injuries Compensation Authority v. First-tier Tribunal*.<sup>287</sup> The Court of Appeals' ruling related to harm done to a child who was born alive but with a long-term disability due to the alcohol consumption by her birth mother during pregnancy. The child (CP) instituted a civil case to claim compensation from the Criminal Injuries Compensation Authority on the grounds that the disability she faces is due to an injury sustained directly due to a crime of violence—her birth mother's

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283. "Sally" is not the defendant's real name. While the case was heard in open court, where her name was published, I have anonymized the case in line with requirements imposed by the court to view the case. The anonymization is of the identity of the defendant and all other parties involved in the case and includes withholding details such as class, exact age, ethnicity, geographical location, and the court in which the case was heard. As such no citations to the case are provided in this analysis.

284. It is not illegal to consume drugs in the UK, but criminal charges are attached to the possession, sale, and production of certain substances, regardless of pregnancy status, as well as allowing premises to be used for the consumption of drugs. See *Misuse of Drugs Act 1971*, c. 38, §§ 4-6, 8-9A (UK); *Prosecution Guidance: Drug Offences*, CROWN PROSECUTION SERV., <https://www.cps.gov.uk/legal-guidance/drug-offences> (last updated Mar. 12, 2019).

285. This excludes actions that are done with the intent to end the pregnancy but fall outside the *Abortion Act 1967*, c. 87 (Gr. Brit.). See *supra* note 135 (explaining the *Abortion Act* exemptions). This also excludes actions that kill a child capable of being born alive. In either case, the offenses of procuring a miscarriage and child destruction (respectively) have been committed. See *supra* notes 22-23 and accompanying text (explaining these offenses).

286. Unless it can be demonstrated that that substance was intentionally consumed in order to abort the fetus, or that the substance was consumed to kill a child capable of being born alive, in which case, the offenses of procuring a miscarriage and child destruction may have been committed. See *supra* notes 22-23 and accompanying text (explaining these offenses).

287. *CP (A Child) v. First-Tier Tribunal (criminal injuries compensation)* [214] EWCA Civ. 1554 [2015] QB 459, 479.

malicious administering of poison so as to endanger life or inflict grievous bodily harm.<sup>288</sup> Although this was a civil case, if ruling in favor of CP the Court of Appeal would have been required to rule that CP's birth mother had committed a criminal offense in consuming alcohol while pregnant in order for CP to recover compensation.<sup>289</sup> However, the court ruled against CP because at the time the alcohol was ingested, CP was not "any other person," as humans *in utero* do not have legal personality.<sup>290</sup> Upon being born alive, and thus becoming "any other person" and so capable of being a victim of a crime of violence, the administration of alcohol—the poison—had stopped. Therefore, the crime was never committed against the baby when it had legal personality and so the birth mother was not liable.<sup>291</sup>

Based on the letter of the law, it is not possible for a woman to be convicted of an offense due to her consumption of substances, illegal or not, while pregnant, so long as the substance is not consumed with intent to end the pregnancy or kill the child capable of being born alive.<sup>292</sup> However, as with Hayley's case, recent prosecutions and convictions of women who have been pregnant would suggest that criminal offenses *are* being used to punish behavior women exhibit while pregnant. One such example can be seen in the case of Sally, who was convicted on four counts of concealment of birth (hereafter "concealment"). While in her 30s, Sally gave birth to four children after receiving no medical care at any stage during her pregnancies. She claimed that all four were stillborn. The bodies were concealed in Sally's bedroom for over ten years. During the period of her pregnancies, Sally reportedly abused alcohol and marijuana. She was described as having neglected her living children. After the bodies were discovered, Sally was prosecuted for and pleaded guilty to four counts of concealment. For each count, Sally was sentenced to a community order for two years and subject to supervision for the whole period.

Due to the decomposed state of the babies' bodies, it was not possible to determine if the babies had been born alive or stillborn. Unlike in Hayley's case, there was no evidence to suggest that Sally had acted to end her pregnancies. Therefore, the prosecution had little option but to accept Sally's account that she had experienced a spontaneous labor for each child, who were all stillborn. In spite of the fact that Sally was not

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288. *Criminal Injuries Compensation Authority* at 463.

289. *Criminal Injuries Compensation Authority* at 463.

290. *Criminal Injuries Compensation Authority* at 474.

291. *Criminal Injuries Compensation Authority* at 474.

292. If either intent can be proven then the offenses of procuring a miscarriage or child destruction may have been committed. *See supra* notes 22–23.

convicted of any offense related to harming or killing the fetuses,<sup>293</sup> the judge specifically criticized Sally's conduct during her pregnancy and suggested that Sally was responsible for the poor outcomes of her pregnancies, "Whilst the circumstances and reasons for the stillborn births will never fully be able to be established, your chaotic lifestyle choices, including alcohol abuse and promiscuity at the time of your pregnancies was such as to put the good health of any unborn child at risk."

While evidence used in a sentencing hearing only impacts sentence length and not culpability, the judge's remarks express a belief that Sally's failure to maintain good health during her pregnancy may well have caused the death of the infants. The suggestion that Sally is being held culpable for the death of the children due to, among other behaviors, her consumption of harmful substances, is strengthened when considering the elements of the offense of concealment. The offense of concealment is concerned only with the secret disposal of a body to hide a child's existence, and not with how or when the child died. Therefore, there is arguably no requirement to comment on how Sally behaved when she was pregnant because how or when the child died has nothing to do with her conviction. The judge's suggestion that Sally's lifestyle choices while pregnant potentially contributed to or caused the stillbirths of her children indicates that the offense of concealment is being used to punish Sally for her perceived harmful behavior toward her unborn children, in addition to, or potentially instead of, punishing the acts of concealing the bodies. Concealment was used to punish her for her failing as a mother.<sup>294</sup> While Sally was not officially convicted of an offense due to her consumption of substances while pregnant, the implication that such behavior is harmful and may have caused the deaths of the fetuses suggests that the courts see such behaviors by pregnant women as worthy of involvement of criminal justice. Further evidence of this suggestion is apparent in the judge's remarks during sentencing that a mitigating factor in the case is that Sally can no longer have children due to her age. If Sally can no longer become pregnant, then she will no longer pose a risk to future unborn children and therefore her risk does not need to be managed by criminal justice.<sup>295</sup> Unofficial involvement of criminal justice in cases of drug use

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293. Without intent to end the pregnancy or kill the fetus, behavior that may be harmful or cause death to the fetus is not illegal in England. See *generally supra* notes 19, 23–24.

294. For further analysis of how concealment has been used to punish women for deviant behavior that is beyond the scope of the offense, see Milne, *Concealment of Birth*, *supra* note 27.

295. See *generally supra* notes 277–78.

in pregnancy such as Sally's demonstrate the extent to which the fetus-first mentality has permeated the criminal justice system and is now an acceptable feature of the application of criminal law, even where case law exists to preclude such uses of law.<sup>296</sup>

Such a reaction to a woman for failing to be a "good" enough mother, to not put the fetus's well-being before her own by abstaining from drug use, reflects the fetus-first mentality. Perceptions and motherhood ideologies have limited room, if any, for drug users within their narrative and construction of the "good" mother. Examples of the incompatibility between motherhood ideology and perception of drug users can be seen in a movement by campaigners to use financial rewards to promote and encourage women who use drugs to be sterilized or take long acting reversible contraception (LARC).<sup>297</sup> Furthermore, there are examples of cases from across states in the US where pregnant women have been imprisoned or forced to undergo drug rehabilitation treatment due to their use of controlled substances or suspicion that they may have used substances prior to becoming pregnant or will use them in the future.<sup>298</sup> Such reactions to substance users are troubling not only because of the implications on the rights of pregnant women, but also because of the negative impact of prison on pregnant women and their fetuses.<sup>299</sup> Instead of voluntary, supportive, free, and accessible treatment

296. Notably, the born-alive rule. *See supra* notes 18–21, 280–281.

297. While such campaigns have remained unofficial, promoted and funded by private groups, they have continued to operate in the US and have seen support in the UK. Paul Bois, *This Woman Pays Drug Addicts to Get Sterilized*, THE DAILY WIRE (Jan. 3, 2018), <https://www.dailywire.com/news/25334/woman-pays-drug-addicts-get-sterilized-paul-bois>; *Charity Offers UK Drug Addicts £200 to Be Sterilised*, BBC NEWS (Oct. 17, 2010), <https://www.bbc.co.uk/news/uk-england-london-11545519>.

298. For example, the Wisconsin "Unborn Child Protection" Law, which was deemed unconstitutional in May 2017. *Federal Court Declares Wisconsin "Unborn Child Protection" Law Unconstitutional*, NATIONAL ADVOCATES FOR PREGNANT WOMEN (May 1, 2017 12:33 PM), <http://advocatesforpregnantwomen.org/blog/2017/05/federal-court-declares-wiscons.php>; JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA 112–16 (2009); Flavin & Paltrow, *Punishing Pregnant Drug-Using Women*, *supra* note 281, at 233; David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L. J. 243, 247–56 (2001); Myrisha S. Lewis, *Criminalizing Substance Abuse and Undermining Roe v. Wade: The Tension Between Abortion Doctrine and the Criminalization of Prenatal Substance Abuse*, 23 WM. & MARY J. OF WOMEN AND THE L. 185, 189–98 (2017). *See also*, Paltrow & Flavin, *Forced Interventions*, *supra* note 49.

299. *See, e.g.*, Catherine Ingram Fogel, *Pregnant Inmates Risk Factors and Pregnancy Outcomes*, 22 J. OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING 33, 33–34 (1993); E. Bard et al., *Perinatal Health Care Services for Imprisoned Pregnant Women*

for pregnant drug users, there is limited support for women who use controlled substances during their pregnancies, and instead a promotion of methods that either prevent drug users from becoming pregnant or forcibly prevent women from using drugs while pregnant (imprisonment or court-ordered rehabilitation).<sup>300</sup>

Such response to drug users who are or may become pregnant, including criminal justice responses, provide further evidence for the fetus-first mentality. If the aim was to improve the health of pregnant women who use drugs while pregnant and so support the health of the fetus, then pregnancy and drug-use support would be advocated over punishment.<sup>301</sup> The message being conveyed is that the “good” mother will not consume controlled substances: If you consume controlled substances then we will either prevent you from being a mother or punish you for being the “bad” mother who takes drugs. Within this context, the cases of Kimbrough and Sally can be seen as outcomes of wider policy and perceptions towards women who use controlled substances, as well as towards women who are deemed to fall outside the ideology of the “good” mother. These cases, among others, indicate a perceived need to control and ultimately punish women for behavior deemed deviant for mothers.

## VI. IMPLICATIONS OF THE FETUS-FIRST MENTALITY

Two types of cases have been presented to illustrate the influence of the fetus-first mentality on legal interpretations of women’s behavior while they are pregnant. In each case, prosecutors and judges have interpreted or attempted to interpret the law to hold women criminally liable in instances where harm to the fetus has occurred or it is perceived that it could have occurred as a result of the pregnant woman’s behavior. It is not the intention of this Article to argue that the criminal justice systems were wrong to prosecute, convict, and punish these women. Instead, my aim is to outline how the fetus-first mentality is reflected in

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*and Associated Outcomes: A Systematic Review*, 16 BMC PREGNANCY AND CHILDBIRTH 285, 286 (2016); Caitlin McMillen Dowell et al., *Determinants of Infant Mortality for Children of Women Prisoners: A Longitudinal Linked Data Study*, 18 BMC PREGNANCY AND CHILDBIRTH 202, 214–17 (2018); G. G. Ferszt & J. G. Clarke, *Health Care of Pregnant Women in U.S. State Prisons*, 23 J. HEALTH CARE POOR UNDERSERVED 557, 557–59 (2012).

300. See Paltrow, *Pregnant Drug Users*, *supra* note 262, at 1007–09; Flavin & Paltrow, *Punishing Pregnant Drug-Using Women*, *supra* note 281, at 232–34; FLAVIN, *supra* note 298, at 111–12.

301. See SOLINGER, PREGNANCY AND POWER, *supra* note 273, at 234–35.

these cases. In so doing, it is important to consider the potential consequences these cases have beyond the impact on the women involved. This Part of the Article outlines the potential ramifications of protecting fetuses through criminal law by considering the results of criminalizing pregnant women on the well-being of fetuses, the impact on women's rights and freedoms, and on perceptions of motherhood.<sup>302</sup>

One justification for laws regulating women's behavior while pregnant is that they result in greater protection for fetuses and therefore improved fetal health outcomes.<sup>303</sup> This is often cited as the intended outcome of law by policy makers and criminal justice professionals.<sup>304</sup> If the laws actually improved fetal outcomes, perhaps there would be a justification for regulating women's behavior, as in the cases outlined above.<sup>305</sup> However, one of the critiques of criminalizing the conduct of women while pregnant is that this use of law has failed to protect fetuses from harm or death, as argued below.

One of the challenges of demonstrating the positive impact of fetal protection laws is that it is very difficult to determine whether the actions of pregnant women directly lead to harm to or death of the fetus. For example, in instances where illegal substances have been consumed and the pregnancy ends in a miscarriage or stillbirth, frequently the cause of fetal death is unknown.<sup>306</sup> Advocates argue that the socioeconomic background of the pregnant woman has a greater impact on maternal and fetal health than maternal behavior. Deprivation has a dramatic impact upon women's decisions about their health and life during pregnancy, such as whether they can afford to access healthcare.<sup>307</sup> Within the US context, access to available healthcare and affordability of health insurance have been noted to be a significant problem for poor

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302. The analysis in this section will focus on the US, as a greater level of critique of using criminal law to regulate and sanction pregnant women has been developed due to the development of fetal protection laws in these jurisdictions. Nevertheless, the arguments apply to England and Wales due to the way legislation has been interpreted and used in cases, as outlined in this Article.

303. See generally, Thom et al., *supra* note 4.

304. Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Laws*, 67 OHIO ST. L. J. 721, 734–35 (2006).

305. Such a statement needs to be considered in line with the arguments made below about the impact on the rights of women, as argued in Part VI of this Article.

306. Kellett, *supra* note 254; Mohapatra, *supra* note 266, at 249–50; Frank et al., *supra* note 254.

307. See Erin D. Kampschmidt, *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, 506–09 (2015); Steven J. Ondersma et al., *Prenatal Drug Exposure and Social Policy: The Search for an Appropriate Response*, 5 CHILD MALTREATMENT 93, 105 (2000); See generally Frank et al., *supra* note 254.

pregnant women; there are also racial and ethnic disparities in insurance status.<sup>308</sup> Lack of access to healthcare may be linked to women's behavior during pregnancy—for example they may not seek advice regarding substance use. However, the connection is indirect and a result of poverty and deprivation, rather than intent to harm the fetus.

Even when there is clear evidence that maternal behavior caused harm to the fetus, such as with fetal alcohol syndrome,<sup>309</sup> it is still not necessarily the case that legal sanctions against women will improve the well-being of the fetus. In fact, legal sanctions can lead to worse fetal outcomes. Many pregnant women who have been subject to criminal justice involvement in their pregnancies have been reported to the police by hospital staff.<sup>310</sup> The initiation of criminal justice involvement by medical professionals has led to fears that this may damage the doctor-patient relationships and lead women who may be at risk of being criminalized to avoid prenatal care altogether.<sup>311</sup> Such concerns have been mirrored by medical associations and groups, such as The American College of Obstetricians and Gynecologists,<sup>312</sup> and groups primarily concerned with the health and rights of children, such as the American Academy of Pediatrics and the Center for the Future of Children.<sup>313</sup> As with poverty, lack of prenatal care is a leading factor in poor pregnancy outcomes.<sup>314</sup> Criminal sanctions, rather than improving fetal outcomes, can lead to women foregoing prenatal care or deciding to terminate a

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308. Fentiman, *supra* note 266, at 587–92.

309. See generally *Alcohol and Pregnancy: Preventing and Managing Fetal Alcohol Spectrum Disorders*, BRITISH MEDICAL ASSOCIATION (June 2007), <https://www.bma.org.uk/collective-voice/policy-and-research/public-and-population-health/alcohol/alcohol-and-pregnancy> (last updated Feb. 2016).

310. Paltrow & Flavin, *Forced Interventions*, *supra* note 49; this was the case with Hayley and Patel, as outlined above.

311. Jessica M. Boudreaux & John W. Thompson, *Maternal-Fetal Rights and Substance Abuse: Gestation Without Representation*, 43 J. AM. ACAD. PSYCHIATRY LAW 137, 140 (2015).

312. Comm. On Health Care for Underserved Women, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, Opinion No. 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician–Gynecologist (January 2011 [Reaffirmed 2014]), available at <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co473.pdf?dmc=1&ts=20170224T0820264139> (last visited Mar. 1, 2016).

313. CENTER FOR REPRODUCTIVE RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN'S HEALTH AND CHILDREN'S INTEREST 8 (2000), <https://www.reproductiverights.org/document/punishing-women-for-their-behavior-during-pregnancy-an-approach-that-undermines-womens-health>.

314. See Kampschmidt, *supra* note 307, at 506–09; Ondersma et al., *supra* note 307, at 105; see generally Frank et al., *supra* note 254.

pregnancy out of fear of legal ramifications.<sup>315</sup> Therefore, one of the indirect consequences of the use of criminal law to regulate and sanction pregnant women could be harm or death to the fetus due to the pregnant woman deciding to not seek medical assistance or to terminate her pregnancy.<sup>316</sup>

Criminal sanctions for substance abuse during pregnancy can also lead to worse health outcomes for the pregnant woman. It is widely argued that medical treatment and support for women with substance abuse issues would be far more appropriate, safer, and result in better outcomes for both women and their unborn children.<sup>317</sup> Treatment of pregnant drug users would require financial commitment, as would providing adequate reproductive services to women throughout their lives, with specific targeted treatment for those who are most vulnerable. There is a lack of available treatment programs for pregnant drug users across the US due to stigma, lack of financial resources, private health insurance companies refusing to cover alcohol and drug treatment, and many rehabilitation programs' inability or unwillingness to provide pregnant women with both addiction treatment and prenatal medical care.<sup>318</sup> As Linda Fentiman, a specialist in health law and criminal law, argues, it is far easier and far cheaper to point to a vulnerable woman with a positive drug test who has given birth to a stillborn child and announce that it is she—and she alone—who is to blame for the death of her child.<sup>319</sup>

One of the most-cited negative implications of using criminal law to sanction the behavior of women while pregnant is the impact upon the rights of all women, whether pregnant or not. One of the key critiques of fetal protection laws raised by feminists in the US is that the laws may threaten women's ability to access abortion, as the determination that a fetus is a legal "person" allows for the fetus to be identified as

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315. Murphy, *supra* note 36, at 873–74.

316. This point is made with recognition of the increasing control and regulation placed on abortion in many states across America, resulting in a near ban on abortion in some states. *See supra* note 138.

317. *See generally* Emma Cave, *Drink and Drugs in Pregnancy: Can the Law Prevent Avoidable Harm to the Future Child?*, 8 *MED. L. INT'L* 165 (2007); Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 *J. L. MED. & ETHICS* 332 (1999); *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of Fetal Abuse*, 101 *HARV. L. REV.* 994 (1988); Murphy, *supra* note 36; Adams, *supra* note 262; Mohapatra, *supra* note 266; Fentiman, *supra* note 266; Brody & McMillin, *supra* note 298; FLAVIN, *supra* note 298; Kampschmidt, *supra* note 307.

318. *See Suppé, supra* note 229, at 67–73.

319. Fentiman, *supra* note 266, at 541.

an autonomous entity with rights equivalent and in opposition to the rights of the pregnant woman.<sup>320</sup> Many of the restrictions on abortion in the US have been implemented on the basis of states' rights to protect the life of the fetus.<sup>321</sup> While it has been argued that providing the fetus with legal personality would not be a significant enough legal challenge alone,<sup>322</sup> concern has been raised that legal protection for the fetus will contribute to a pro-life cultural message that portrays abortion as immoral within a wider message of the "culture of life."<sup>323</sup>

Beyond access to abortion, other implications of fetal protection laws have been identified by scholars, notably that the laws are discriminatory against women and interfere with women's rights to liberty and privacy.<sup>324</sup> By sanctioning the behavior of women while pregnant, as in the cases outlined above, the state is depriving women of their rights *because of* their pregnancy status. This is due to the fact that

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320. See generally Anannya Bhattacharjee, *Private Fists and Public Force: Race, Gender, And Sexuality*, in *POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION* 1–54 (Jael Miriam Silliman & Anannya Bhattacharjee eds. 2002); Amanda K. Bruchs, *Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-exist Peacefully?*, 55 *SYRACUSE L. REV.* 133 (2004); Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives after Webster*, 138 *U. PA. L. REV.* 179 (1989); Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 *HARV. J. ON LEGIS.* 215 (2002); Lisa McLennan Brown, *Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and in Vitro Fertilization*, 13 *AM. U. J. GENDER & SOC. POL'Y & L.* 87 (2005); Jean Reith Schroedel et al., *Women's Rights and Fetal Personhood in Criminal Law*, 7 *DUKE J. GENDER L. & POL'Y* 89 (2000); Folger, *supra* note 33; MacKinnon, *supra* note 77; Paltrow, *supra* note 262; De Ville & Kopelman, *supra* note 317.
321. See, e.g., *Webster v. Reproductive Health Service*, 492 U.S. 490, 504–07 (1989) (deciding that the Supreme Court did not need to consider the constitutionality of the preamble of Missouri's state laws, which stated that the life of each human being begins at conception, as it is not used to justify any abortion regulation otherwise invalid under *Roe v. Wade*. As such, the Court held that states have the right to determine when life begins as a value judgement.); Clarke D. Forsythe & Keith Arago, *Roe v. Wade & the Legal Implications of State Constitutional Personhood Amendments*, 30 *NOTRE DAME J. L. ETHICS PUB. POL'Y* 273, 284–95 (2016); Ramsey, *supra* note 304, at 726–43.
322. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 923–26 (1973); Michael C. Dorf, *How Abortion Politics Impedes Clear Thinking on Other Issues Involving Fetuses*, *FINDLAW* (May 28, 2003), <http://supreme.findlaw.com/legal-commentary/how-abortion-politics-impedes-clear-thinking-on-other-issues-involving-fetuses.html>.
323. Ramsey, *supra* note 304; Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 *COLUM. L. REV.* 753 (2006).
324. Johnsen, *supra* note 320, at 189; Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 *HARV. WOMEN'S L.J.* 9, 31–32 (1987); see also BORDO, *supra* note 17; FLAVIN, *supra* note 298; HALLIDAY, *supra* note 78.

the behavior would not be sanctioned if committed while not pregnant. Dawn Johnsen, a constitutional law scholar and professor, argues that such state prescription of behavior deprives women of the right to control their lives during pregnancy—a fundamental right of liberty and privacy, as guaranteed by the Constitution of the United States, and specifically the Fourteenth Amendment.<sup>325</sup> Women have the right to refuse medical intervention and to be free from criminal or civil liability for their conduct during pregnancy, based on the common law and constitutional rights of privacy, bodily integrity, and personal decision-making. These rights include the freedom from coercion of medical treatment, freedom in choice for a family life, the right to self-determination, the right to non-subordination, the freedom from bodily invasion, and appropriation of the body for the purpose of another (the fetus).<sup>326</sup> And yet, many US states have demonstrated that they are prepared to prioritize the protection of the fetus over the pregnant woman's rights to bodily autonomy and integrity.<sup>327</sup>

In England and Wales, as outlined above, women have no right to abortion, only the right to ask a doctor if they will be granted an abortion;<sup>328</sup> as such, women are restricted from the fundamental right to control their own bodies in relation to deciding to continue a pregnancy. It should be noted, however, that while abortion is legally restricted, the reality is that the procedure is widely available and free for all women who are entitled to free treatment under the National Health Service,<sup>329</sup> and there currently appears to be little to no appetite to reduce women's access to abortion.<sup>330</sup> Nevertheless, as recent legal cases

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325. Johnsen, *supra* note 320, at 191, 197–201.

326. Gallagher, *supra* note 324, at 29; *see also* BORDO, *supra* note 17; FLAVIN, *supra* note 298.

327. HALLIDAY, *supra* note 78, at 7–39.

328. Sheldon, *supra* note 162, at 13–14; Sheldon, *supra* note 23, at 342–46.

329. Jessica Potter, *Who Has to Pay for the NHS and When?*, THE CONVERSATION (Feb. 6, 2018, 1:00 AM), <http://theconversation.com/who-has-to-pay-for-the-nhs-and-when-91344>; PUB. HEALTH ENG., NHS ENTITLEMENTS: MIGRANT HEALTH GUIDE (Dec. 19, 2019), <https://www.gov.uk/guidance/nhs-entitlements-migrant-health-guide#free-for-all>. Primary care is free of charge for all registered patients and temporary patients (defined as a patient who is in the area for more than 24 hours and less than three months). Secondary care is free of charge for UK residents and those living lawfully in the UK on a properly settled basis for the time being.

330. However, Members of Parliament occasionally raise the prospect of reducing the term limit for abortions that are not due to risk of maternal death or fetal abnormality. Maya Oppenheim, *Jeremy Hunt Criticised for Taking 'Cavalier Approach' to Women's Needs After Abortion Time Limit Comments*, THE INDEPENDENT (June 10, 2019, 3:15 PM), <https://www.independent.co.uk/news/uk/politics/jeremy-hunt-abortion-time-limit-tory-leadership-contest-conservative-party-a8952306.html>.

analyzed above indicate, there is a trend towards limiting women's rights while pregnant. Connection is made within these cases as to women's harm to fetuses and rights to abortion, as apparent in sentencing remarks made by the Judge in Hayley's case, "There is no mitigation available to you by reference to the Abortion Act, whatever view one takes of its provisions, which are wrongly so liberally construed in practice as to make abortion available essentially on demand prior to 24 weeks, subject to medical practitioners' approval."

British advocates, such as Emeritus Professor Margaret Brazier, a leading scholar of medical law and ethics, have argued that changing the law to require pregnant women to act in the best interests of their fetuses would remove behavioral choice and prioritize the needs of the fetus over the pregnant woman.<sup>331</sup> Introducing law to protect the interests of the fetus would result in undue restrictions on women's liberty, autonomy, and privacy, as protected under human rights.<sup>332</sup> Every choice in a pregnant woman's life would be subject to scrutiny and so she would be rendered vulnerable to coercion by others. For example, if a woman is advised by her doctor that a medical procedure is required and legal sanctions were a potential consequence of a woman deciding to not follow medical advice, then her ability to "choose" to have the procedure is removed.<sup>333</sup>

In presenting a critical assessment of the impact of the fetus-first mentality on women's rights, I am not advocating that women should not be prosecuted for any criminal offense committed while pregnant. Instead, I am advocating that criminal law should be applied equally to all people—it should be applied to people who are pregnant the same as it is applied to people who are not pregnant. Therefore, differential application of criminal law or sentencing on the basis of a woman being pregnant or that she may become pregnant intrudes on fundamental rights of privacy and bodily autonomy, protected in the US under the Fourteenth Amendment's guarantee of liberty and in the UK under the Human Rights Act.<sup>334</sup> Without such protections, women would be forced to live in fear of being pregnant, or even being fertile, as the basis under which the government may impose extensive burdens on their

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331. Margaret Brazier, *Liberty, Responsibility, Maternity*, 52 CURRENT LEGAL PROBS. 359 (1999).

332. Human Rights Act 1998 c. 42 (Eng.).

333. EMILY JACKSON, REGULATING REPRODUCTION: LAW, TECHNOLOGY AND AUTONOMY (2001); Michael Thomson, *After re S*, 2 MED. L. REV. 127 (1994).

334. U.S. CONST. amend. XIV, §1; Human Rights Act 1998, c.42 (UK); *see also* Oppenheim, *supra* note 330.

freedoms.<sup>335</sup> Consequently, sanctioning women for conduct while pregnant reinforces the traditional sex-based discrimination by disadvantaging women based on their reproductive capacity, in spite of the fact that having a child involves a woman taking on an important function necessary for the survival of the human species.<sup>336</sup> No other person in any other circumstance is expected to put the well-being of someone else before themselves in the way that pregnant women are increasingly required to for their fetuses.<sup>337</sup> As Howard Minkoff, a leading American obstetrician and gynecologist, and Lynn M. Paltrow, Executive Director and founder of the National Advocates for Pregnant Women, a non-profit organization focused on human rights and civil liberties of pregnant women, argue, if a child needed a bone marrow transplant to survive, and the only available donor was the child's father, it would never be considered an acceptable intervention by the state to legally compel that man to donate.<sup>338</sup> However, when an equivalent situation occurs for a woman in relation to her fetus, as with an expectation that she will have a caesarean section, or not consume certain substances, repeatedly, in different jurisdictions, the state is willing to intervene to force women to comply.<sup>339</sup> As Minkoff and Paltrow argue, "the State has now endowed the fetus with greater rights than its living siblings and, for that matter, any born person of any age."<sup>340</sup>

A final concern of the fetus-first mentality in the context of criminal law is that it represents state-sanctioned motherhood. If the state indicates that it is prepared to curb the behavior of pregnant women through threat of imprisonment for the sake of the health of the fetus, "a state legitimized form of motherhood" is effectively being imposed on all women.<sup>341</sup> As outlined in Part II, the myths of motherhood have been recognized as operating in social and cultural contexts and having a discriminatory impact on women. The operation of such ideology within criminal justice has equally discriminatory implications. Most notably, who is perceived to be the "good" mother, and, more importantly,

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335. Johnsen, *supra* note 320, at 201.

336. Johnsen, *supra* note 32, at 620–25; *see also* Dawn Johnsen, *A New Threat to Pregnant Women's Autonomy*, 17 HASTINGS CTR. REP. 33 (1987); Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY J. GENDER L. & JUST. 1, 2 (1992).

337. *See* Johnsen, *A New Threat to Pregnant Women's Autonomy*, *supra* note 336.

338. H. Minkoff & Lynn M. Paltrow, *Melissa Rowland and the Rights of Pregnant Women*, 104 OBSTETRICS & GYNECOLOGY 1234, 1235 (2004).

339. *Id.*

340. *Id.* at 1235.

341. April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 149, 198 (2007).

the “bad” mother who needs to be controlled and regulated through criminal law.

Feminists have criticized fetal homicide laws on the basis that when implemented, legislatures were less concerned with the welfare of the fetus—evident in the detrimental impacts outlined above—and more concerned with the behavior of women and mothers. For example, Rickie Solinger, a historian focused on reproductive politics, race, class, and motherhood, argues that if the state valued women and children, then it would fund necessary medical treatment for pregnant women, such as drug rehabilitation, and assist women to achieve good health during pregnancy.<sup>342</sup> As such, Solinger argues, this state-intervention says far more about the “type” of woman that “should” be a mother. While Solinger’s critique is focused on the criminalization of pregnant drug users, her argument can be applied to other activities and behaviors by women while pregnant that may be deemed harmful to the fetus.<sup>343</sup> State-sponsored coercion of pregnant women’s behavior “compels women who desire children to reorganize their lives in accordance with judicially defined norms of behavior.”<sup>344</sup> Furthermore, laws designed to protect fetuses are applied discriminatorily; in the US, women of color and poor women are overrepresented among those arrested or subject to equivalent deprivations of liberty.<sup>345</sup> Such women are furthest away from the “ideal” mother represented in the myths of motherhood.

## V. CONCLUSION

The application of the fetus-first mentality within criminal law has resulted in dangerous legal developments that challenge women’s rights, while, evidently, doing little to protect fetuses. The implications are the same whether laws have been specifically enacted to protect fetuses, as in the US, or if such legal protection is technically not a feature of the

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342. SOLINGER, *supra* note 273, at 236.

343. *See also* FLAVIN, *supra* note 298; ROBERTS, *supra* note 253 (noting decisions by some courts to require women who take drugs to take long acting reversible contraception to prevent pregnancy, which indicates that the concern lies in the woman’s ability to get pregnant and her suitability as a mother, rather than the desire to treat her drug use to enable her to be a mother. If the focus of intervention was the latter then treatment for drug-users in general would be the focus of the criminal justice system and the state).

344. Johnsen, *supra* note 32, at 612.

345. Paltrow, *supra* note 262; Paltrow & Flavin, *Forced Intervention*, *supra* note 49; ROBERTS, *supra* note 253; Mohapatra, *supra* note 266; Fentiman, *supra* note 266; Howard, *supra* note 267.

criminal law, as in England and Wales. Criminalization of women who fall short of the ideals of motherhood is the most extreme aspect of the governance of pregnancy, outlined in Part II. Self-regulation and maternal sacrifice are defining characteristics of the myths of motherhood and are perceived to demonstrate a woman's "love" and devotion to her fetus and future child.<sup>346</sup> As illustrated by the CDC's message about women's consumption of alcohol and NHS Greater Glasgow & Clyde's report on preconception health,<sup>347</sup> public messages encourage women to self-regulate for the good of their unborn child, even if not yet conceived and if the woman has no plans or desires to conceive. It is clear from the content and tone of these public health messages that organizations such as the CDC consider it appropriate and acceptable to deliver such messages to all women of reproductive age; this suggests that there is a general acceptance of these messages and the ideologies that lie behind them—the principle that women should be prepared to self-regulate and deprive themselves of things they desire for the betterment of a future child. That is not to say that either the CDC's or NHS Greater Glasgow & Clyde's messages were accepted without contestation, as a number of commenters were highly critical of the press releases,<sup>348</sup> and a social media storm ensued.<sup>349</sup> The CDC later amended the infographic while standing by the message.<sup>350</sup> Nevertheless, the nature of messages such as these points to the wide acceptability of the principle that women should do what is best for the fetus. The criminalization of numerous women in the US and the small number of women in England, such as Hayley and Sally, can be seen as extreme examples of a wider social and

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346. Lupton, *supra* note 57; Bessett, *supra* note 126, at 376; Brooks-Gardner, *Pregnant Women as a Social Problem, in* SOCIAL PROBLEMS: CONSTRUCTIONIST READINGS 188, 190–92 (Donileen R. Loseke & Joel Best eds., 2003).

347. Crozier, *supra* note 58; Centers for Disease Control and Prevention, *supra* note 59.

348. Alexandra Petri, *The CDC's Incredibly Condescending Warning to Young Women*, WASH. POST (Feb 3, 2016, 3:11 PM), <https://www.washingtonpost.com/blogs/compost/wp/2016/02/03/the-cdcs-incredibly-condescending-warning-to-young-women/>; Darlena Cunha, *The CDC's Alcohol Warning Shames and Discriminates Against Women*, TIME (Feb. 5, 2016), <http://time.com/4209491/cdc-alcohol-pregnancy/>; Harry Yorke, *Leading Medical Expert Criticised for Saying Victims of Domestic Violence Should Be Told Not to Get Pregnant*, TELEGRAPH (May 26, 2016, 5:06 PM), <http://www.telegraph.co.uk/news/2016/05/26/leading-medical-expert-criticised-for-saying-victims-of-domestic/>; Williams, *supra* note 16.

349. Jessica Chia, *CDC Sets Off Firestorm for Condescending Alcohol Warning to Women*, DAILY MAIL (Feb. 6, 2016, 12:06 PM), <http://www.dailymail.co.uk/news/article-3435042/CDC-sets-firestorm-condescending-alcohol-warning-women.html>.

350. Daniel Victor, *C.D.C. Defends Advice to Women on Drinking and Pregnancy*, N.Y. TIMES (Feb. 5, 2016), <https://www.nytimes.com/2016/02/06/health/cdc-defends-advice-to-sexually-active-women-about-drinking.html>.

cultural movement towards state regulation of pregnancy. Thus, using criminal law to sanction the behavior of pregnant women should be understood as being at the extreme end of a spectrum of the regulation of women's behavior through public health messages, medical "advice" and intervention, and social and cultural expectations.

Nevertheless, one of the challenges in this area of law is how to balance the rights of the pregnant woman with the protection of the fetus. There is ongoing debate as to whether a fetus has rights and should be protected under law.<sup>351</sup> Engaging in this philosophical and ethical debate is outside of the scope of this Article; however, as analyzed above, it is important to note the practical implications of enshrining fetal rights in law—notably the negative consequences for women's rights and the limited gains in outcomes for fetuses. Supporting women—not just through their pregnancies and reproductive choices, but also more widely—is likely to have a far greater impact on the well-being of fetuses.<sup>352</sup> This is particularly true for women living in poverty, who are therefore at a greater risk of negative pregnancy outcomes. However, such an approach would require governments to acknowledge that their attitudes and practices towards women's rights are limited and are causing harm, and to be prepared to invest in services to support women. Sadly, labeling women as "bad" mothers who belong in prison is the far easier option.

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351. See, e.g., Charles J Dougherty, *The Right to Begin Life with Sound Body and Mind: Fetal Patients and Conflicts with Their Mothers*, 63 UNIV. DETROIT L. REV. 89 (1985); J. Eekelaar, *Does a Mother Have Legal Duties to Her Unborn Child?*, in HEALTH, RIGHTS AND RESOURCES: KING'S COLLEGE STUDIES 55–75 (Peter Byrne ed., 1988); JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (Princeton University Press, 1996).

352. Suppé, *supra* note 229; Fentiman, *supra* note 266.

