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IN THE NAME OF FETAL PROTECTION: WHY AMERICAN PROSECUTORS PURSUE PREGNANT DRUG USERS (AND OTHER COUNTRIES DON'T)

LINDA C. FENTIMAN*

For more than three decades, American prosecutors have been bringing criminal prosecutions against pregnant women based on their use of drugs while pregnant, with charges ranging from child abuse or neglect to murder. Almost all of these women are poor, and the vast majority are also women of color—many with histories of childhood sexual or physical abuse and mental disability.¹ In all but three states—Alabama, Kentucky, and South Carolina—such prosecutions have been declared unconstitutional or the resulting convictions have been overturned.² Nonetheless, prosecutions continue to be brought, in what can only be described as a crusade against pregnant women in the name of fetal protection. This Article seeks to answer two questions raised by this crusade. The first question is why—what's in it for the prosecutors who charge these women, particularly when they know that the prosecution will almost certainly be

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¹ See generally LAURA GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997); Lynn M. Paltrow, *Pregnancy, Domestic Violence, and the Law: The Interface of Medicine, Public Health and the Law: Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461 (2005); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997).

² These prosecutions are addressed in Part I, *infra*.

invalidated? The second question is a more cosmic, macro inquiry—what do these prosecutions tell us about the American criminal justice system when compared to the justice systems of other nations?

I. HISTORY OF PROSECUTIONS

The first criminal indictment against an American woman for using drugs during pregnancy was issued in 1977 in California, when Margaret Reyes was charged with two counts of felony child endangerment for her heroin use while pregnant.³ However, the California Court of Appeals issued an order enjoining further prosecution, on the ground that the legislature did not intend to include “unborn children” within the meaning of the term child.⁴ No further prosecutions were brought until the 1980s, when the pace of “fetal abuse” prosecutions picked up, as media attention to the myths of the “Crack epidemic”—as well as its sad reality—overtook the nation. Today, women in more than thirty states have been prosecuted for their use of alcohol and street drugs while pregnant.⁵

Dorothy Roberts, Dawn Johnsen, Laura Gomez, and Lynn Paltrow have written compellingly about prosecutions of pregnant women for endangerment of their fetuses.⁶ Beginning in 1989 and continuing through the present, hundreds of American women have been charged with, and convicted of, crimes based on their use of alcohol and other drugs while pregnant, as well as other assertedly “selfish” conduct, such as refusing a Caesarean section.⁷ Until the late 1990s, these charges were limited to less serious crimes such as child abuse, child endangerment, and delivery of

³ *Reyes v. Super. Ct.*, 141 Cal. Rptr. 912, 912 (Ct. App. 1977).

⁴ *Id.* at 913–14.

⁵ I have addressed the history of American “fetal protection” prosecutions in two articles. See Linda Fentiman, *The New “Fetal Protection”: The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537 (2006) [hereinafter Fentiman, *The New Fetal Protection*]; Linda Fentiman, *Pursuing the Perfect Mother: Why America’s Criminalization of Maternal Substance Abuse Is Not the Answer*, 15 MICH. J. GENDER & L. 389 (2008) [hereinafter Fentiman, *Pursuing the Perfect Mother*].

⁶ See generally Roberts, *supra* note 1; GOMEZ, *supra* note 1; Paltrow, *supra* note 1. See also Dawn Johnsen, *From Driving to Drugs: Government Regulation of Pregnant Women’s Lives After Webster*, 138 U. PA. L. REV. 179, 187–89 (1989).

⁷ For more discussion of Melissa Rowland’s “selfishness,” see text accompanying note 11, *infra*.

drugs to a minor (via the placenta or the umbilical cord).⁸ In all states but Alabama, Kentucky, and South Carolina, these convictions have been overturned, either because the reviewing courts determined that the state legislature had not intended the term “child” or “minor” to include a fetus, or because they judged that such prosecutions would only drive drug using women away from medical treatment and would not achieve the deterrent goals of the criminal law.⁹

Yet despite these clear rulings from the nations’ judges, in the late 1990s prosecutors began to up the ante. Since 1996, women in Hawaii, Oklahoma, South Carolina, Utah, and Wisconsin have been charged with murder, attempted murder, or manslaughter based on their use of drugs while pregnant or other behavior alleged to have caused stillbirth, death, or other fetal harm.¹⁰ A particularly egregious case involved Melissa Rowland, who was charged with murder by a Utah prosecutor after one of the twins she was carrying was stillborn and prosecutors learned that she had declined to have a Caesarean section after experiencing fetal distress.¹¹ South Carolina prosecutors have been the most zealous in the country, with many women convicted of child abuse based on their drug use since the mid-1990s. At least four women have been charged with murder after their fetuses were stillborn. The most notorious case was that of Regina McKnight, a homeless, mentally retarded, and drug-addicted woman, who went into labor at thirty-seven weeks and delivered a stillborn child. The South Carolina Supreme Court upheld her murder conviction and twenty

⁸ For examples of such charges, see Fentiman, *The New Fetal Protection*, *supra* note 5, at 551 n.66 and sources cited therein.

⁹ *Id.* at 551; Dave Parks, *Law Puts Some New Mothers in Jail*, BIRMINGHAM NEWS, Feb. 14, 2008, at 1; Philip Rawls, *New Moms Pay Price for Drug Use, Law Meant to Punish Parents Who Make Meth*, ROCKY MTN. NEWS, Aug. 4, 2008, at 33. See discussion of Alabama, Kentucky, and South Carolina cases in this Part.

¹⁰ See generally *State v. Aiwohi*, 123 P.3d 1210, 1210–13 (Haw. 2005); *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming twenty year sentence for felony murder based on child endangerment), *vacated*, 661 S.E.2d 354 (2008) (overturning conviction on grounds of ineffective assistance of counsel); *Wisconsin v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999).

¹¹ There is no reported decision regarding this defendant, Melissa Rowland, but her arrest and conviction on lesser charges were widely reported in the media. See, e.g., Pamela Manson, *Mother is Charged in Stillborn Son’s Death; Criminal Homicide: Prosecutors Say the West Jordan Woman Ignored Numerous Warnings from Doctors and Refused a Surgery that Could Have Saved the Boy’s Life: Prosecutors Say Mom Guilty in Baby’s Death*, SALT LAKE TRIB. (Salt Lake, UT), Mar. 12, 2004, at A1.

year sentence,¹² although last year it vacated her conviction on the grounds of ineffective assistance of counsel. McKnight had spent eight years in prison by that time.¹³

Three other women in South Carolina have been charged with homicide based on their use of drugs while pregnant.¹⁴ In 2007 an Oklahoma trial judge sentenced Theresa Hernandez to fifteen years in prison after she pleaded guilty to the murder of her stillborn son based on her methamphetamine use while pregnant.¹⁵ She was released from prison after serving nearly a year, on top of the two years that she spent in county jail awaiting trial.¹⁶ Today, prosecutors around the country, but mostly in Southern or border states, continue to bring homicide or fetal endangerment

¹² State v. McKnight, 576 S.E.2d at 171–73 (S.C. 2003).

¹³ McKnight v. State, 661 S.E.2d 354, 357–62 (S.C. 2008).

¹⁴ In 2005 Jennifer Arrowood was charged with homicide by child abuse; in 2006 she pleaded guilty to unlawful neglect by a custodian and was sentenced to ten years in prison. See Pickens County Thirteenth Judicial Circuit Public Index Search, <http://www.greenvillecounty.org/scjd/publicindex/SCJDPublicIndex39/PISearch.aspx?CourtType=G> (search last name “Arrowood,” first name “Jennifer,” follow case numbers “I675763” and “I675718”) (last visited Oct. 1, 2009); see also Nat’l Advocates for Pregnant Women, South Carolina: Leading the Nation in the Prosecution of Pregnant Women (July 17, 2006), http://www.advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/south_carolina_leading_the_nation_in_the_prosecution_punishment.php (reviewing South Carolina cases, including that of Ms. Arrowood). In 2006 Jamie Lee Burroughs was charged with homicide by child abuse; Burroughs later pled guilty. See Kelly Marshall Fuller, *Test for Drugs Sends Woman Back to Jail*, SUN NEWS (Myrtle Beach, S.C.), Apr. 24, 2007, at C1 (identifying the defendant, contrary to court records, as “Jamie Lynn Burroughs”); Georgetown County Fifteenth Judicial Circuit Public Index, <http://secure.georgetowncountysc.org/publicindex/PISearch.aspx?CourtType=G> (search for case number “H750929”) (last visited Oct. 1, 2009). Lorraine Patrick was charged in October 2007 with homicide by child abuse; as of this article’s publication, her case was still pending. Lexington County Eleventh Judicial Circuit Public Index Search, <http://www.lex-co.com/applications/scjdweb/publicindex/PISearch.aspx?CourtType=G> (search for case number “J820080”) (last visited Oct. 1, 2009); see also Sarah Blustain, *This is Murder?*, AM. PROSPECT, Dec. 14, 2007, available at http://www.prospect.org/cs/articles?article=this_is_murder.

¹⁵ The case of Theresa Hernandez is particularly chilling. Ms. Hernandez was initially charged with first degree murder and faced a life sentence. After being held in county jail awaiting trial for three years without being able to have her children visit her, she entered a guilty plea to second degree murder. Dana Stone, *Is Meth Murder Charge Useful?*, THE OKLAHOMAN, Dec. 19, 2007, available at <http://newsok.com/article/3182436/>.

¹⁶ Jay F. Marks, *Woman Was Charged in Her Stillborn Son’s Death; Meth Mom Wins Early Release*, THE OKLAHOMAN, Nov. 20, 2008, at 1A.

charges against pregnant women who use drugs, even though any ensuing convictions are likely to be reversed on appeal.¹⁷

II. WHAT MOTIVATES PROSECUTIONS?

Almost all appellate courts have rejected these convictions, and prosecutors' actions continue to be criticized as both counter-productive and poor public health policy because the prosecutions cannot deter the drug use of addicts and will instead drive drug using women away from treatment.¹⁸ Nonetheless, the persistence of the criminal prosecutions of American women based on their conduct while pregnant suggests that the prosecutions are serving several important functions. Thus we come to the central question of why—what incentives are there for prosecutors to bring these cases? Why invest scarce prosecutorial resources in a case that one is almost certain to lose on appeal?

A. Concerns about Fetal Harm: Risks & Realities

At an individual level, prosecutors may choose to charge pregnant women as an attractive way to stake out a position in favor of “family values” while increasing their chances of reelection or selection for a higher office.¹⁹ These prosecutions may also be consistent with public concerns

¹⁷ See, e.g., *Commonwealth v. Cochran*, No. 2006-CA-001561, 2008 Ky. App. LEXIS 8 (Jan. 11, 2008) (reinstating criminal charges for first degree wanton endangerment against Ina Cochran based on her use of cocaine while pregnant), *appeal docketed*, 2008-SC-0095-D, 2008 Ky. LEXIS 165 (Ky. Aug. 13, 2008); *Kilmon v. State*, 905 A.2d 306 (Md. 2005); *State v. Lewis*, Case 03CR113048 (Mo. Cir. Ct. 2004); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007); *Smith v. State*, No. 07-04-0490-CR, 2006 Tex. App. LEXIS 2370 (Crim. App., Mar. 29, 2006); *Ward v. State*, 188 S.W.3d 874 (Tex. Crim. App. 2006). For a survey of cases from other states, see *supra* text accompanying note 10. In Alabama, there have been a number of prosecutions but there are no reported decisions either upholding or reversing these convictions. For media reports, see Adam Nossiter, *Rural Alabama County Cracks Down on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008, at A10; Dave Parks, *Law Puts New Mothers in Jail*, BIRMINGHAM NEWS, Feb. 14, 2008, at 1; and Philip Rawls, *National Ire Over Alabama Prosecuting Pregnant Moms*, MOBILE PRESS-REGISTER, Aug. 3, 2008, at B7.

¹⁸ Wendy Chavkin, *Cocaine and Pregnancy—Time to Look at the Evidence*, 285 J. AM. MED. ASS'N. 1626, 1627 (2001) (noting the many medical and public health organizations that have filed amicus briefs against the criminal prosecution of pregnant women, on the ground that “criminal punishment is not therapeutic and is likely to deter frightened women from seeking medical care”).

¹⁹ See discussion *infra* Part II.B regarding prosecutors' use of their office as a stepping stone to higher political office and the political ambitions of one particular

about fetuses and children-at-risk because of parental actions. That juries continue to convict suggests that the public is anxious to denounce parental neglect, and that this anxiety can be expiated through the clear boundary-marking ceremony of a guilty verdict.²⁰

Of course, the fact that those who are prosecuted are almost all poor women of color²¹ suggests the multi-faceted nature of that juror anxiety. Michael Tonry has written compellingly to suggest that conservative anti-crime campaigns are important, cyclical means by which middle-class individuals distinguish themselves from racial and economic minorities through the scapegoating of those who are redefined as "the other."²² Furthermore, these prosecutions, and support for them, demonstrate a

prosecutor, Charles Condon of Charleston, South Carolina, who has repeatedly sought election to statewide office.

²⁰ See, e.g., KAI T. ERIKSON, *THE WAYWARD PURITANS* 69–70 (1966) (discussing the boundary-marking effect of the trials of witches in Salem, Massachusetts).

²¹ Roberts, *supra* note 1, at 938 (noting that seventy-five percent of the 160 women in twenty-four states who had been charged by mid-1992 were women of color).

²² Michael Tonry has written about the cyclical nature of anti-drug crusades in the United States. He observes that public and governmental denunciation of crime usually occurs after the fact and focuses on minority groups as a means of drawing a distinguishing line between mainstream, middle-class society and outsiders. Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 *UCLA L. REV.* 1751, 1767–81 (1999). Most recently, Tonry observed, politicians have manipulated the public's irrational concern over crime even as crime rates are decreasing. Thus:

[D]rug use peak[ed] in 1979–80 for most drugs (and 1982–84 for cocaine), the harshest antidrug laws . . . [were] passed in the late 1980s, and black inner-city residents [were] . . . portrayed as the enemy in the drug wars. The same pattern may hold true for crime in general. Crime rates have fallen since at least the early 1980s, the harshest laws were passed in the early 1990s, and blacks and Hispanics have been the principal targets of the crime wars.

Id. at 1776–77. He notes further:

[C]onservative politicians for two decades have harped on crime- and drug-policy issues, creating a political climate in which few politicians have dared risk being seen as soft on drugs or crime. . . . In the 1970s and 1980s, . . . particularly in the South and among working-class voters, crime issues acted both as a code word for racial animosity and as an emotional appeal to voters who were anxious about many changes in their lives.

Id. at 1787–88.

misunderstanding of the nature and sources of fetal harm—a misunderstanding which dovetails neatly with stereotypes of racial and economic minorities.

Approximately five to six percent of American women use illegal drugs during pregnancy, while estimates of alcohol use range from eleven to twenty-five percent.²³ Drug use is common across all ethnic groups and classes, although black women are about ten times more likely to be reported to prosecutors or child welfare authorities on suspicion of drug use.²⁴ Most scientists agree that drug use, broadly defined, during pregnancy can harm the newborn, but they disagree about both the severity and the permanence of such harm.²⁵ Generally speaking, scientific research has shown that poor birth outcomes have multiple determinants, with important factors including maternal poverty, poor nutrition, homelessness, a history of domestic violence, and lack of prenatal care.²⁶ These confounding variables make it extremely difficult to untangle the complex causal relationships between maternal drug use and other contributors to

²³ See *Addiction Medicine: Psychopathology of Pregnant Women with Alcohol and Drug Dependencies Examined*, WOMEN'S HEALTH WKLY., Aug. 23, 2001, at 8; Susan Okie, *The Epidemic that Wasn't*, N.Y. TIMES, Jan. 27, 2009, at D1–D9 (citing 2006 and 2007 data from the U.S. Dept. of Health and Human Services and noting that in 1996, 5.5% of women used illegal drugs during pregnancy, while 18.8% reported alcohol use during pregnancy, whereas a later study showed that 5% to 6% used illicit drugs during pregnancy, while 25% used alcohol).

²⁴ See 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. MED. 1202, 1204–06 (1990) (observing that black women were nearly ten times as likely as white women to be reported by their physicians for using drugs, despite equal rates of drug use).

²⁵ See, e.g., DAN STEINBERG & SHELLY GEHSAN, NAT'L CONF. OF STATE LEGISLATURES, STATE RESPONSES TO MATERNAL DRUG AND ALCOHOL USE: AN UPDATE (2000); Janet R. Hankin, *Fetal Alcohol Syndrome Prevention Research*, 26 ALCOHOL RES. & HEALTH 58, 58–59 (2002).

²⁶ Because many women who use illegal drugs also abuse alcohol, there is a need for comprehensive and intensive drug treatment programs that take into account the complex needs of this population, which has high “[r]ates of homelessness, poverty, unemployment, and prostitution . . . [and] histories of emotional, physical, and sexual abuse.” *Addiction Medicine*, supra note 23, at 8; see also Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 J. AM. MED. ASS'N. 1613, 1619 (2001); Steven J. Ondersma et al., *Prenatal Drug Exposure and Social Policy: The Search for an Appropriate Response*, 5 CHILD MALTREATMENT 93, 95–97 (2000).

poor birth outcomes. It is therefore not only simplistic but also shortsighted to focus solely on drug use as the source of fetal and childhood harm.²⁷

Notably, a legal drug—alcohol—is agreed to pose the greatest risk to fetal and child development if there is significant in utero exposure.²⁸ Even women who consume moderate amounts of alcohol while pregnant may give birth to children with learning and attentional problems, as well as lower IQs.²⁹ As a result, there is debate about whether even *minimal* alcohol consumption during pregnancy is risky.³⁰

In contrast, the impact of other drugs on fetal development is far from clear. While some studies observed a causal relationship between maternal cocaine use and subtle neurological problems,³¹ other studies found that most infants whose mothers used cocaine while pregnant were able to “catch up to their peers in physical size and health status by age 2.”³² A 2001 literature review concluded that a link between cocaine use during pregnancy and “major adverse developmental consequences in early childhood” had not been established. It further noted that it was impossible to separate out possible negative effects of cocaine exposure from those caused by in utero exposure to alcohol and tobacco.³³ Recent longitudinal research has shown even more clearly that cocaine exposure in utero has not caused the massive epidemic of “crack babies” described and predicted in the 1980s.³⁴ Instead, the data show that while such cocaine exposure can cause small differences in IQ and other subtle brain impairments, these effects are “less severe than those of alcohol and comparable to those of tobacco.”³⁵ A recent study by British researchers found that pregnant

²⁷ Frank, *supra* note 26, at 1615; Ondersma, *supra* note 26, at 95–97; *see also* Okie, *supra* note 23, at D9.

²⁸ *See* Ondersma, *supra* note 26, at 96.

²⁹ *Id.* at 95–96.

³⁰ N.Y. ACAD. OF MED., ACADEMY LECTURE TRACES TROUBLING EVOLUTION OF FETAL ALCOHOL SYNDROME, FROM MEDICAL DISCOVERY IN 1973 TO PERCEIVED “ABUSE EXCUSE” IN 1990S (2006), *available at* <http://www.nyam.org/news/2654.html> (summarizing 2006 lecture at the New York Academy of Medicine by Professor Janet Golden).

³¹ Ondersma, *supra* note 26, at 95–96.

³² STEINBERG & GEHSAN, *supra* note 25, at 15.

³³ Chavkin, *supra* note 18, at 1626 (citing Frank, *supra* note 26, at 1613).

³⁴ Okie, *supra* note 23, at D1.

women's use of tobacco and alcohol was correlated with a significantly increased risk of their children developing psychoses in adolescence.³⁶

Today, sensational reports about methamphetamine abuse frequently make headlines across the United States, and law enforcement officers and the media frequently profess its harmful effects on users, their children, and fetuses.³⁷ However, there is little data demonstrating a causal relationship between exposure to methamphetamine in utero and problems of infant development.³⁸ Caffeine is the latest drug to receive media

³⁵ *Id.* (summarizing experts' conclusions). For research showing the effects of maternal tobacco use on fetal development, see generally Naomi Kistin et al., *Cocaine and Cigarettes: a Comparison of Risks*, 10 PAEDIATRIC & PERINATAL EPIDEM. 269, 275–76 (1996) (noting that while children exposed to cocaine in utero were more likely to have adverse birth outcomes than children whose pregnant mothers consumed no drugs, children whose mothers used tobacco products while pregnant were at risk for the same adverse outcomes as children whose mothers used cocaine, although the magnitude of the risk was lower); see also U.S. DEPT. OF HEALTH & HUM. SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL—EXECUTIVE SUMMARY 11 (2006) (finding evidence of causal connection between maternal exposure to secondhand smoke during pregnancy and a small reduction in birth weight).

³⁶ Stanley Zammit et al., *Maternal Tobacco, Cannabis and Alcohol Use During Pregnancy and Risk of Adolescent Psychotic Symptoms in Offspring*, 195 BRIT. J. PSYCHIATRY 294, 294–300 (2009).

³⁷ See, e.g., Dana E. Hunt, *Methamphetamine Abuse: Challenges for Law Enforcement and Communities*, NATL. INST. OF JUSTICE JOURNAL, July 2006, at 24, available at http://www.ojp.usdoj.gov/nij/journals/254/methamphetamine_abuse.html (stating that “fifty-eight percent of county law enforcement agencies surveyed . . . listed methamphetamine as the number one drug problem in their area”); Katie Zernike, *A Drug Scourge Creates its Own Form of Orphan*, N.Y. TIMES, July 11, 2005, at A1; U.S. Warns of ‘Global Meth Threat,’ BBC NEWS, May 10, 2006, <http://news.bbc.co.uk/2/hi/Americas/4757179.stm>.

³⁸ Although media stories abound concerning the dangers of methamphetamine—including the risks of in utero methamphetamine exposure for the long-term development of children—others have criticized this media coverage as sensational and poorly informed. See, e.g., Stone, *supra* note 15; Daniel Thigpen, *Case of Lodi Baby Raises Difficult Legal Dilemma*, RECORD, Oct. 14, 2007, available at http://www.recordnet.com/apps/pbcs.dll/article?AID=/20071014/A_NEWS/710140305 (discussing a lack of medical data showing that methamphetamine causes developmental problems in children); Stop the Drug War, *Meth and Myth: Top Doctors, Scientists and Specialist Warn Mass Media on “Meth Baby” Stories* (July 29, 2005), <http://stopthedrugwar.org/chronicle/397/methandmyth.shtml>; see also RYAN S. KING, THE SENTENCING PROJECT, THE NEXT BIG THING? METHAMPHETAMINE IN THE UNITED STATES 16–28 (2006), available at http://www.sentencingproject.org/doc/publications/dp_nextbigthing_meth.pdf (asserting that the media have utterly failed to accurately report the science and epidemiological data surrounding methamphetamine addiction); *Newborn Hair Signals Expectant Mothers’ Meth Use: Study*, CBC NEWS, Oct. 31, 2006, <http://www.cbc.ca/health/story/2006/10/31/meth-hair.html> (noting the difficulty in

attention for its potential to harm fetal development, although the scientific evidence concerning caffeine's harmful effects is both limited and hotly debated.³⁹

In striking contrast to the media's preoccupation with women's drug use while pregnant is their almost complete failure to publicize the risk that assisted reproductive technology (ART) poses. In 2006 the Institute of Medicine issued a report noting that more than twelve percent of American children are delivered prematurely, a thirty percent increase over the rate of premature births in 1981.⁴⁰ ART is a significant contributor to these premature births,⁴¹ due to the use of fertility drugs and in vitro fertilization (IVF), which increase the chances of multiple births. Women who are pregnant with twins and other multiples are much more likely to have early deliveries; thus these newborns are likely to be smaller and more likely to have developmental or neurological problems—both of which can lead to long and expensive hospitalizations.⁴² For reasons that are not yet clear,

determining whether a newborn's low birth weight should be attributed to its mother's use of stimulants like methamphetamine and cocaine while pregnant or due to her poor nutrition and lack of "self-care" because of drug use).

³⁹ In January 2008 a report suggesting a link between caffeine intake and miscarriages received wide public attention, despite the statements of some scientists that the link might not be causal. *See, e.g.,* Denise Grady, *Pregnancy Problems Tied to Caffeine: Long-Held Concerns About Miscarriages Are Focus of New Study*, N.Y. TIMES, Jan. 21, 2008, at A10.

⁴⁰ Press Release, Inst. of Med. of the Nat'l Acads., *Preterm Births Cost U.S. \$26 Billion a Year; Multidisciplinary Research Effort Needed to Prevent Early Births* (July 13, 2006), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11622> [hereinafter IOM Preterm Birth Report Press Release]. The Institute of Medicine Report defines "preterm" as any birth that occurs at less than thirty-seven weeks of pregnancy, with a full-term pregnancy as being thirty-eight to forty-two weeks post-conception. *Id.*

⁴¹ INST. OF MED. OF THE NAT'L ACADS., *PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION* 16–17 (Richard E. Behrman & Adrienne Stith Butler eds., 2007), available at http://books.nap.edu/openbook.php?record_id=11622&page=R1.

⁴² Stephanie Saul, *The Gift of Life, and Its Price*, N.Y. TIMES, Oct. 11, 2009, at A1 (discussing the impact of assisted reproductive technology). *See also* Grady, *supra* note 39, at A10; *see also* Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 UTAH L. REV. 57, 60, 62–66, 69–70, 77–80 (noting that up to ten percent of children born via ART suffer some adverse consequences); Centers for Disease Control and Prevention, *Assisted Reproductive Technology and Trends in Low Birthweight—Massachusetts, 1997–2004*, 58 MORBIDITY & MORTALITY WEEKLY REP. 49, 49 (2009) (indicating that instances of low birthweight are increasing in the U.S., reaching more than eight percent of all births in 2005, the last year for which data are available).

even singleton infants who have been conceived through IVF “are twice as likely [as non IVF-assisted children] to be born preterm and to die within one week of birth.”⁴³

In addition, much less attention has been paid to the risk of birth defects and other health problems which are posed by environmental pollution, even those that are far more likely to affect a large number of children. For example, during the Bush Administration, the Environmental Protection Agency strongly resisted efforts to decrease environmental exposure to heavy metals.⁴⁴ Many fish species can pose risks to fetuses if consumed by the mother, primarily due to the mother’s resulting exposure to polychlorinated biphenyls (PCB) and mercury, yet women are not adequately warned, or protected, against these dangers.⁴⁵ Many widely-used pesticides are suspected endocrine disrupters, and both male and female exposure to such pesticides could increase the risk of reproductive harms.⁴⁶ Exposure to lead can also have negative reproductive effects. Men who are exposed to lead may experience altered hormone levels, altered sperm transfer, abnormal sperm shapes, and lower sperm counts⁴⁷—problems

⁴³ Inst. of Med. of The Nat’l Acads., *supra* note 40, at 16–17.

⁴⁴ See, e.g., *New Jersey v. E.P.A.*, 517 F.3d 574, 583–84 (D.C. Cir. 2008) (successfully challenging the E.P.A.’s decision to “delist” electric utility steam generating units (power plants) from the reach of § 112 of the Clean Air Act, which regulates mercury and many other hazardous air pollutants).

⁴⁵ Nick Fox, *Taking Worry off the Plate*, N.Y. TIMES, Jan. 30, 2008, at F5, available at <http://www.nytimes.com/2008/01/30/dining/30fish.html> (noting that due to fish consumption, “60,000 children were born each year exposed to levels of methylmercury . . . that could cause neurological and learning problems”); see also Jennifer Fisher Wilson, *Balancing the Risks and Benefits of Fish Consumption*, 141 ANN. INTERNAL MED. 977, 978–79 (2004), available at <http://www.annals.org/cgi/reprint/141/12/977.pdf> (explaining that “Children born to women exposed to high levels of methylmercury during or before pregnancy may face numerous health problems, including brain damage, mental retardation, blindness, and seizures. Lower levels of methylmercury exposure in the womb have caused subtle but irreversible deficits in learning ability. . . . PCBs [are] a probable carcinogen. . . . In children, PCB exposure in utero and from breast milk consumption has been linked with neurodevelopmental delays, impaired cognition, immune problems, and alterations in male reproductive organs.”).

⁴⁶ SHARON L. DROZDOWSKY & STEVE WHITTAKER, REP. NO. 21-3-1999, WASH. STATE DEP’T OF LABOR & INDUS. TECH., WORKPLACE HAZARDS TO REPRODUCTION AND DEVELOPMENT 48–50 (1999), available at <http://www.lni.wa.gov/Safety/Research/files/reprosumm.pdf>.

⁴⁷ DEP’T OF HEALTH & HUMAN SERVICES, PUB. NO. 96-132, THE EFFECTS OF WORKPLACE HAZARDS ON MALE REPRODUCTIVE HEALTH 2, tbl.1 (1997), available at <http://www.cdc.gov/niosh/malrepro.html>. Lead that workers bring home on their skin, hair,

which may result in sterility or infertility.⁴⁸ Women who are exposed to lead may also suffer infertility as well as a greater risk of miscarriages and stillbirths; children who have been exposed to lead in utero have a greater risk of developmental disorders.⁴⁹

In sum, there are multiple risks faced during fetal development, including the risk of miscarriage and stillbirth,⁵⁰ the possibility of premature birth or low birth weight, as well as the danger that the child will be born with mercury, lead, and other heavy metals in their systems due to parental—especially maternal—exposure to toxins.⁵¹ Yet, despite these disturbing outcomes, virtually all public outcry concerning fetal protection is targeted at pregnant women's use of legal and illegal drugs.⁵²

B. Legal Developments in the United States and the American Prosecutorial System

Elsewhere I have compared the American approach to fetal protection with that of two other Western nations—Canada and France.⁵³ Noting that criminal prosecutions are an historical relic in Canada and

clothes, toolbox, or car can cause severe lead poisoning for family members and can result in neurobehavioral and growth effects in a fetus. *Id.*

⁴⁸ *Id.*

⁴⁹ See DEP'T OF HEALTH & HUMAN SERVICES, PUB. NO. 99-104, THE EFFECTS OF WORKPLACE HAZARDS ON FEMALE REPRODUCTIVE HEALTH 2-3, 4, tbl.1 (1999).

⁵⁰ The risks of miscarriage and stillbirth increase with age. The risk of miscarriage ranges from ten percent for women aged twenty to more than fifty percent for women aged forty-five and older. The risk of stillbirth increases from 1.1 per 1,000 for women less than thirty-five to four per 1,000 for women over forty. See Rachel Nowak, *Older Moms; Births for U.S. Women 40-44 Years Old Rise 70 Percent between 1991-2000*, BUFFALO NEWS, Mar. 6, 2007, at C5; Christina S. Cotzias et al., *Prospective Risk of Unexplained Stillbirth in Singleton Pregnancies at Term: Population Based Analysis*, 319 BRIT. MED. J. 287, 287 (1999) (citing stillbirth rate ranging from 1 in 500 to 1 in 800).

⁵¹ IOM Preterm Birth Report Press Release, *supra* note 40. The Report defines "preterm" as any birth occurring at less than thirty-seven weeks of pregnancy, as compared to full-term pregnancy which is thirty-eight to forty-two weeks post-conception. *Id.* See *supra* text accompanying notes 44-49 for a discussion of risk to fetuses from environmental exposure.

⁵² See, e.g., Chavkin, *supra* note 18, at 1626; see also KING, *supra* note 38, at 16-28.

⁵³ See generally Fentiman, *Pursuing the Perfect Mother*, *supra* note 5.

nonexistent in France, I have suggested five key differences between the three nations that help to explain their divergent approaches to “fetal protection” prosecutions in particular and criminal prosecution in general.⁵⁴ First and foremost is the fact that both Canada and France have adopted strong, centralized governments that leave little power for the provincial or departmental levels of government.⁵⁵ In Canada and France there is a national penal code, written by the national parliament and interpreted by the nation’s highest court—the Supreme Court in Canada and the Cour de Cassation in France.⁵⁶ In contrast, in the United States, we have more than fifty separate bodies of criminal law that govern in the states, the District of Columbia, and Puerto Rico.⁵⁷ Although the United States Supreme Court is an important unifying force in the area of criminal procedure and other constitutional rights, it exerts remarkably little control over state substantive criminal law.⁵⁸ The major exceptions are when a statute is challenged on the grounds of vagueness and when a state’s choice of the elements of a crime intersects with due process requirements.⁵⁹

The second key difference is that the right to abortion in both Canada and France was established through the legislative process, as compared to the United States, where this right was established by the

⁵⁴ *Id.* at 454 (previous research report noting four primary differences between the legal regimes).

⁵⁵ *Id.* at 455–56.

⁵⁶ *Id.* at 442–43.

⁵⁷ *Id.* at 456.

⁵⁸ *Id.* at 456–57 (offering the “fragile” status of the right to abortion as an example). Of course, we also have a federal criminal code, and there is increasing concern about the federalization of criminal law, but that is not of critical import here. *See generally* JULIE O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* (3d ed. 2007); *see also* Kay Levine, *The State’s Role in Prosecutorial Politics*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 34–36 (John L. Worrall & M. Elaine Nugent-Borakove eds, 2008) [hereinafter *THE AMERICAN PROSECUTOR*].

⁵⁹ *See, e.g.,* *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (holding that a challenge to a city loitering ordinance was facially appropriate due to the ordinance’s “vagueness”). Aside from vagueness, a state’s penal law is most likely to be challenged when it involves a crime’s *mens rea* or a mental state defense. *See, e.g.,* *Clark v. Arizona*, 548 U.S. 735 (2006). However, constitutional challenges can also be brought when statutes criminalize status, not conduct, *see, e.g.,* *Robinson v. California*, 370 U.S. 660, 667 (1962), *but cf. Powell v. Texas*, 392 U.S. 514, 532–34 (1968); and challenges may be raised as an affirmative defense. *See Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

courts.⁶⁰ This Article posits that in the United States this has resulted in a situation where abortion rights are always seen as contingent, encouraging abortion opponents to try to undermine access to abortion using legal theory as well as practical barriers. The third difference is that both Canada and France have national health care systems that cover reproductive health procedures, including abortions; as a result, these procedures are perceived not as unusual and suspect practices, but rather as normal medical procedures.⁶¹ Fourth, there are important differences between the role of religion in the United States and the role of religion in Canada and France, which may shape prosecutors' choices in whether or not to bring charges in a particular case. When compared to his Canadian counterpart, the "average" American is much more religious, more likely to attend church, and more likely to consider religion in making political decisions.⁶² Similarly, France's official policy on the role of religion in government, known as "laïcité," is roughly translated as "religious secularism."⁶³

The fifth and perhaps most important difference between American prosecutors and their counterparts in other nations is that American prosecutors are elected locally, charged with the job of enforcing state, not national, law. In contrast, in both Canada and France prosecutors are appointed, not elected. They are part of a national criminal justice system and a civil service meritocracy, which has a hierarchical system of controls

⁶⁰ See, e.g., MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 145–57 (1987).

⁶¹ Thus, in the United States, references to physicians who perform abortions as "abortionists" are not uncommon. See, e.g., *Richmond Med. Ctr. For Women v. Hicks*, 409 F.3d 619, 620, 630 (4th Cir. 2005) (Niemyer, J., dissenting) (referring to petitioner, who sought to enjoin enforcement of a Virginia statute that termed "partial birth abortions" as "partial birth infanticides," as an "abortionist" performing "infanticide of a most gruesome nature"), *majority opinion vacated & remanded sub nom. Herring v. Richmond Med. Ctr. for Women*, 550 U.S. 901 (2007) (remanding the case in light of *Gonzales v. Carhart*, 550 U.S. 124 (2007)); see also *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1187 n.29 (9th Cir. 2006), *rev'd sub nom. Gonzales v. Carhart*, 550 U.S. 124 (2007) (noting that both Representatives Chabot and Sensenbrenner have called physicians who perform abortions "abortionists" while on the House floor).

⁶² Karen Dorne Steele, *Nations are Old Friends Growing Apart: As U.S. Attitudes Veer Right, Canadians Head Left*, SPOKESMAN REV., Sept. 5, 2004, at 1A.

⁶³ This does not mean that religious schisms do not exist, such as the one reflected in the recent controversy concerning the "headscarf law." See Jennifer M. Westerfield, Note, *Behind the Veil: An American Legal Perspective on the European Headscarf Debate*, 54 AM. J. COMP. L. 637, 646–48 (2002).

to rein in maverick prosecutors who decline to follow national legal rules and adhere to national norms.

It is this critical difference between elected and appointed prosecutors that this Article contends explains the zeal of American prosecutors who bring criminal charges against pregnant women who abuse alcohol and other drugs. Local district attorneys are able to score points with constituents and voters by appearing to take a stand against the problem of drugs and at the same time declare their desire to protect “innocent children” or “the unborn.” They are able to make an appeal to religious fundamentalism, moral righteousness, and public outrage that resonates with the electorate. Thus, it appears not coincidental that the states where some of the most zealous “fetal protection” prosecutions have occurred are also states in which religious conservatives hold significant power, and where abortion access, particularly for minors, is most tentative and fragile. Examples include Wisconsin, Alabama, South Carolina, and Missouri.

For individual American prosecutors, prosecuting pregnant women may be an attractive way to stake out a position in favor of “family values” and increase the prosecutor’s chance of reelection or election to higher office. Being a prosecutor in the United States, particularly in large urban areas, is often a ticket to higher political office. Among the former prosecutors now serving in the United States Senate are Patrick Leahy, Arlen Specter, Claire McCaskill, and Amy Klobuchar.⁶⁴ Former prosecutors who became governors include Earl Warren of California and Tom Ridge of Pennsylvania.⁶⁵ Charles Condon, the Charleston, South Carolina prosecutor who brought some of the most aggressive fetal protection prosecutions, has repeatedly sought higher office.⁶⁶ The United States is unique among developed nations in having a system of elected state prosecutors who are accountable almost to the local electorate, and who exercise enormous discretionary authority which is virtually unconstrained by the judiciary.

⁶⁴ See Joan Biskupic & Kathy Kiely, *‘Perry Mason’ helped ‘Mold’ Sotomayor; No Promises on Abortion, Nominee Says*, USA TODAY, July 16, 2009, at 4A; Carl Hulse, *Prosecutors in a Past Life, Sleuths of the Senate Now*, N.Y. TIMES, Mar. 23, 2007, at A19; Carl Hulse, *New Senators Resist Overhaul of Immigration*, N.Y. TIMES, June 28, 2007, at A1.

⁶⁵ See generally ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (1997); Sara Rimer, *A Nation Challenged: The Appointee*, N.Y. TIMES, Sept. 22, 2001, at B5.

⁶⁶ See, e.g., Sue Anne Pressley, *S.C. Verdict Fuels Debate Over Rights of the Unborn; Jury Finds Mother Guilty of Homicide*, WASH. POST, May 27, 2001, at A03 (describing Condon as a candidate for Governor).

American prosecutors are distinct in this regard. In France, the *procureur*, or prosecutor, is a judicial official who both prosecutes crimes and supervises their investigation, while the *juge d'instruction* only becomes involved in serious matters.⁶⁷ When compared to their counterparts in common law countries, the French police play a significantly larger role in investigations given the smaller number of judicial officials available to play such a role.⁶⁸ In addition, as is common in civil law systems, individual citizens are able to initiate prosecutions and to participate in pre-trial proceedings and the trial itself.⁶⁹ Virtually all French prosecutors receive nearly three years of specialized training at the National Magistrates' Institute.⁷⁰ They are invited to enter the Institute only after passing a highly competitive national exam, which they take after four years of university training in law.⁷¹

In Canada, prosecutors are also career civil servants, appointed by provincial or federal ministries of justice.⁷² While the federal or provincial Minister of Justice may change with the elections, individual prosecutors do not, and in the federal system and some provinces, there is an independent chief prosecutor with tenure who oversees the actions of individual prosecutors.⁷³

To understand current American prosecutors, we must look at their history. While scholars differ on the precise antecedents of present day

⁶⁷ JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 124, 128, 132–34 (1998). *L'instruction* is the judicial process used to determine whether there is sufficient evidence to justify bringing a suspect to trial. *Id.* at 124, 132; *see also* MARTIN WESTON, AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM 123 (1991) (noting that the *procureur* can always avoid a referral to a *juge d'instruction* by filing a lesser charge).

⁶⁸ *Id.* at 129–30 (discussing the “judicial police”).

⁶⁹ BELL, *supra* note 67, at 130, 134–35.

⁷⁰ ANDREW WEST, THE FRENCH LEGAL SYSTEM 96–98 (1998); Richard S. Frase, *France, in* CRIMINAL PROSECUTION: A WORLDWIDE STUDY 204 (Craig M. Bradley ed., 2d ed. 2007) [hereinafter CRIMINAL PROSECUTION].

⁷¹ WEST, *supra* note 70, at 96–98; Frase, *supra* note 70, at 204.

⁷² Kent Roach, *Canada, in* CRIMINAL PROSECUTION, *supra* note 70, at 85.

⁷³ E-mail from Kent Roach, Faculty of Law, University of Toronto (Apr. 9, 2009) (on file with author) (noting that Nova Scotia is one province where the chief prosecutor is tenured, and that Canadian prosecutors receive their training on the job, along with Continuing Legal Education programs); *see also* JOHN EDWARDS, THE ATTORNEY GENERAL, POLITICS AND THE PUBLIC INTEREST (1984).

prosecutors, they suggest two likely candidates: the Dutch Schout—a sort of sheriff who combined prosecutorial and enforcement functions—and the English attorney general.⁷⁴ Initially, colonial authorities from Britain and the Netherlands brought the legal practices of their homelands with them. Britain had a long-standing system of both public and private prosecutors, derived from ancient common law practices.⁷⁵ But because distances between towns were so great in the colonies, because each possessed different local customs and religious practices, and because towns were often far from the seat of royal governance, the practice quickly evolved into one in which one local authority served as prosecutor—eliminating the British system of private prosecution.⁷⁶ In 1686, the communities of Burlington, New Jersey and Philadelphia, Pennsylvania became the first in the colonies to establish the position of county prosecutor.⁷⁷ By 1687, the royal Attorney General of Virginia had appointed local prosecutors in every county, while keeping centralized control in Williamsburg.⁷⁸ In 1704, Connecticut became the first colony to provide for a decentralized prosecutorial system by statute, declaring that “[h]enceforth there shall be in every county a sober discreet and religious person appointed by the county court to be attorney for the Queen to prosecute . . . all criminals and to do all other things generally necessary . . . to suppress vice and immorality.”⁷⁹

After the American Revolution, this practice expanded rapidly. Although initially the prosecutor was viewed as a judicial officer, appointed by the court or sometimes the governor, this changed due to the democratic impetus of the Jacksonian period.⁸⁰ Judges as well as prosecutors became elected officials,⁸¹ and in 1820, the first American prosecutor was elected to

⁷⁴ JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 11–16 (1980); John L. Worrall, *Prosecution in America: An Historical and Comparative Account*, in *THE AMERICAN PROSECUTOR*, *supra* note 58, 4–5.

⁷⁵ JACOBY, *supra* note 74, at 7–10.

⁷⁶ *Id.* at 11–15.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.* at 14–15.

⁷⁹ Worrall, *supra* note 74, at 9 (quoting William Van Alstyne).

⁸⁰ JACOBY, *supra* note 74, at 13–17, 20, 22–25.

⁸¹ *Id.*

serve Cuyahoga County, Ohio.⁸² In newly drafted state constitutions, local prosecutors also moved from the judicial to the executive branch of government.⁸³ Local prosecutorial authority made sense in the years prior to the Civil War, as long distances and slow methods of communication and transportation made it essential to have law enforcement authority available at the local level.

However, by the early 1900s, the strength of the local elected prosecutor was beginning to verge on despotism, with one modern commentator observing that the prosecutor had become “the most powerful figure with respect to criminal law.”⁸⁴ Contemporary critics, particularly in the Progressive era, expressed concern about prosecutors’ unbridled discretion in deciding whom to indict and on what charges.⁸⁵ At the time, criticism was focused primarily on district attorneys’ corruption and involvement in overtly partisan politics.⁸⁶ Although there were occasional efforts to use judicial power to rein in prosecutorial discretion and compel them to bring indictments, these efforts were unsuccessful.⁸⁷ Therefore, courts ultimately relied on the power of the electorate to oust a prosecutor in order to achieve change in enforcement policy.⁸⁸

⁸² JACOBY, *supra* note 74, at 25; Worrall, *supra* note 74, at 8.

⁸³ JACOBY, *supra* note 74, at 25; Worrall, *supra* note 74, at 8.

⁸⁴ Worrall, *supra* note 74, at 8; *see also* ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 65 (1930). Pound states that:

[i]n a popular government, the close connection of criminal law and the administration of criminal justice with politics, which is another inherent obstacle to enforcement of law, has an especially bad influence. . . . [I]t is a common experience that criminal prosecutions may have partisan politics behind them, and out of this has arisen a fear of oppression through the criminal law which has been no mean factor in American legal history. . . . There have been examples . . . of drastic enforcement of severe penal laws in order to keep a people or a class in subjection.

Id.

⁸⁵ Worrall, *supra* note 74, at 8.

⁸⁶ *Id.* at 8–9.

⁸⁷ *Id.* at 9. At the urging of Supreme Court Justice Robert Jackson, in 1956 the American Bar Foundation conducted a study of criminal justice on the ground which revealed the significant discretion wielded by prosecutors and police. *Id.* at 12–13.

⁸⁸ *Id.* at 9.

In the last third of the twentieth century, prosecutors' workloads have increased substantially due to demands created by enhanced criminal procedure protections for defendants and greater public concern with "law and order"—including a focus on crimes of violence and those related to drug use. As state legislatures have enacted a wide array of statutes that criminalize additional conduct and enhance sentences and penalties across the board (particularly for drug offenses), prosecutors have been motivated to "get tough on crime."⁸⁹ These efforts often contain a thinly veiled layer of racism, as anti-drug and other crime control campaigns are often coded appeals to racial animosity—particularly among Southern and working class voters.⁹⁰ The post 9/11 emphasis on terrorism and the threat to national security has resulted both in hostility to individual civil rights and the punitive attitude toward accused persons with which we are all unfortunately familiar.

Today, there are more than 2,300 local prosecutors' offices in the United States.⁹¹ While forty-two of these prosecutors serve communities of more than a million, more than 2,000 serve towns of less than a quarter million people, and 1,000 serve communities of less than 40,000.⁹² In practice, there several important realities that animate prosecutors' decisions. Like many institutional actors—schools, religious institutions, and hospitals and other health care providers—prosecutors are increasingly called upon to solve a variety of social problems, particularly those involving drugs and child welfare. Many prosecutors appear frustrated with the widespread problem of drug addiction and dependency, which has resisted both the easy fixes of "just say no" and the "lock-em-up forever" approaches of "[t]hree strikes and you're out"⁹³ and the recently reformed Rockefeller Drug laws.⁹⁴ When prosecutors encounter pregnant women who

⁸⁹ *Id.* at 9–15.

⁹⁰ Tonry, *supra* note 22, at 1788.

⁹¹ Judith N. Phelan & Michael D. Schrunk, *The Future of Local Prosecution in America*, in *THE AMERICAN PROSECUTOR*, *supra* note 74, at 247–48.

⁹² *Id.* at 247–48. Three quarters of the elected prosecutors work full-time at their job, while the others combine it with other legal work. *Id.* at 248.

⁹³ Thomas D. Elias, *Legislators Need Political Mettle to Solve Budget Mess*, *SAN JOSE MERCURY NEWS*, Dec. 16, 2008, available at <http://www.allbusiness.com/government/government-bodies-offices-legislative/12172644-1.html>.

⁹⁴ Ikimulisa Livingston & Jennifer Fermino, *Gov Snuffs Out Hard-Time 'Rocky' Drug Laws*, *N.Y. POST*, Apr. 25, 2009.

have had repeat business with the criminal justice system or those whose drug use does not appear to have been affected by the deterrent threat of the criminal sanction, it must be tempting to seek harsh punishment as a “wake-up call,” both to the individual accused and to others in the community.⁹⁵

In a system of locally elected prosecutors, there is nothing to counterbalance this temptation, and much that reinforces it. A long-standing critique of the American system is the lack of transparency in prosecutorial decision-making during both the initial charging decision and the subsequent discussion about when those charges might be reduced or dismissed via a plea bargain.⁹⁶ Most prosecutors do not make clear—to themselves, their deputies, or the police—what standard they will use in evaluating a case against a particular accused, whether it may be preponderance of the evidence, proof beyond a reasonable doubt, or something in between. This leads inevitably, particularly when the screening standard chosen is a low one, to the risk that many people will be charged who would not be convicted by a jury but who will plead guilty in order to avoid the risk of a lengthy prison term.⁹⁷ This appears to be the

⁹⁵ In a 2005 Policy Statement, the National District Attorneys Association stated:

[A]s a means of prevention, the National District Attorneys Association [NDAA] endorses the testing of expectant mothers and newborn infants for the presence of drugs. The NDAA believes that such a measure permits the identification of fetuses and infants exposed to illicit drugs and the immediate intervention by medical personnel.

The [NDAA] encourages all states to enact legislation, which broadens the definition of child abuse and neglect to include infant and fetal exposure and which authorizes the testing of infant and fetal drug exposure and which authorizes the testing of infants and expectant mothers for the presence of drugs.

Nat'l Dist. Att'ys Ass'n, Resolution: Regulation of Precursor Chemicals, at 6 (April 30, 2005), http://www.ndaa.org/resolutions_policy_position_papers.html (follow “NDAA Resolution—Regulation of Precursor Chemicals” under section “2005”). At the same time, the NDAA opposes activities that support treatment, including needle exchange programs. *Id.* at 28. The NDAA also opposes mandatory treatment in lieu of prison and drug treatment for prisoners. *Id.* at 18.

⁹⁶ Brian Forst, *Prosecution Policy and Errors of Justice*, in THE AMERICAN PROSECUTOR, *supra* note 74, at 51–52.

⁹⁷ *Id.* at 52. Forst says:

This leads to a doubly flawed criminal justice system, in which there are *both* too many people in prison in jail [who] do not belong there, and too

case in a recent spate of criminal prosecutions by several Alabama district attorneys, who have targeted young woman who are using drugs while pregnant—offering them the “choice” of a guilty plea and one year in jail or a trial with the likelihood of a long prison sentence and the inevitable loss of child custody.⁹⁸

In the American criminal justice system, there are no built-in safeguards against prosecutors bringing a weak case because there are no institutional controls on the prosecutor’s exercise of discretion. This stands in marked contrast to both the Canadian system, which has centralized review of cases at either the provincial or federal level,⁹⁹ and the French system. In the case of serious crimes, once the prosecutor makes the initial decision to investigate a case, the investigation is turned over to the *juge d’instruction*, a magistrate whose job is to actively supervise the investigation and prepare a dossier on the accused.¹⁰⁰ Only after that magistrate has completed the investigation is the prosecutor given the authority to decide whether to proceed to a formal charge. While the prosecutor has significant discretion in deciding whether to proceed at this point, that discretion is tempered by the hierarchical constraints of the prosecutor’s office, by the Ministère Publique, as well as by circulars setting forth general guidelines for prosecution.¹⁰¹ In the United States, even in the rare states in which county prosecutors have some oversight provided by the state attorney general, there is no comparable limitation on the local prosecutor’s exercise of discretion.

many culpable offenders [who] remain at large. . . . [I]n many noncapital cases, the costs of incarceration appear clearly to exceed the alternative costs of intermediate sanctions that would permit those offenders to contribute to the productivity of the community and well-being of their families.

Id.

⁹⁸ Adam Nossiter, *Rural Alabama County Cracks Down on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008, at A10.

⁹⁹ See Roach, *supra* note 72, at 80–81; Canada Crim. Code, R.S.C., c. C-46, s. 557 (1985).

¹⁰⁰ See WESTON, *supra* note 67 at 123; Jacqueline Hodgson, *The Police, The Prosecutor and the Juge D’Instruction: Judicial Supervision in France, Theory and Practice*, 41 BRIT. J. OF CRIMINOLOGY 342–361 (2001).

¹⁰¹ See, e.g., WEST, *supra* note 70, at 226–27; WESTON, *supra* note 67, at 122; Frase, *supra* note 70, at 204. The prosecutor has limited power to plea bargain with an accused, by charging a lesser crime (a delit instead of a crime), but that can happen only with the consent of the victim as well as the accused. *Id.* at 122–23.

This lack of executive branch oversight is exacerbated by a virtually total lack of judicial control over the prosecutor. More than thirty years ago, in his book *The Passive Judiciary*, Professor Abraham Goldstein of Yale lamented what he deemed to be such a profound lack of oversight that it should be referred to as “judicial withdrawal,” rather than “judicial restraint.”¹⁰² He observed that in the lack of meaningful judicial review over what offenses a defendant is charged with, as well as decisions to grant witnesses immunity from prosecution and to offer defendants a plea bargain, judges seem “to have forgotten principles of legality which they have enforced energetically elsewhere in the criminal law—principles that make the legislature the primary source of law and the judiciary its authoritative interpreter.”¹⁰³ Goldstein noted that this “misunderstanding of the relationship between the concept of discretion . . . and the separation of powers” has meant that “[t]he absence of a clear-cut legal rule defined by the legislature is treated by the courts as if it endows the prosecutor not only with discretion to fill the interstices in the rule but with an exclusively ‘executive’ authority to do so.”¹⁰⁴

Goldstein’s criticism seems particularly apt in the context of fetal protection prosecutions. While appellate courts in all states except Alabama, Kentucky, and South Carolina have invalidated the criminal prosecution of women for their conduct while pregnant, trial judges across the nation have frequently let such prosecutions proceed. If one is a local prosecutor, frustrated by drug use and anxious to “take a stand” against conduct which risks harm to the fetus or newborn child, the withdrawal of many trial courts from any meaningful review of such prosecutions serves as a virtual green light for these prosecutions to continue.

Even prosecutors who lose at the trial level can end up winning. As one prosecutor in Wyoming observed, “We stuck our toe in the water on this thing. . . . People need to understand there’s a big hole in the law that needs to be filled.”¹⁰⁵ Prosecutors with such views stand to make a name for

¹⁰² ABRAHAM GOLDSTEIN, *THE PASSIVE JUDICIARY* 5 (1981).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 57.

¹⁰⁵ Associated Press, *Judge Drops ‘Meth Baby’ Charge*, CASPER STAR-TRIBUNE, (Casper, Wyo.) Sept. 29, 2005, available at http://trib.com/news/state-and-regional/article_9a3cc783-4652-5dd5-862c-31c5a64f97f9.html; *Woman Charged with Using Meth While Pregnant Arrested Again*, ASSOCIATED PRESS, May 2, 2005, available at http://www.billingsgazette.com/news/state-and-regional/wyoming/article_d3db5040-d51f-5c34-994b-53d0c41314e9.html.

themselves with the public, and they may also invoke their loss as a justification for legislative change.¹⁰⁶

III. CONCLUSION

The criminal prosecution of pregnant women for causing fetal harm exemplifies the idiosyncrasies and dangers of the American system of autonomous state prosecutors. Locally elected, politically ambitious, and largely unsupervised, individual prosecutors have wide discretion in deciding whether, when, and whom to prosecute. During the past thirty years, American prosecutors have overwhelmingly targeted women who are poor, mentally disabled, and racial minorities, seeking lengthy prison sentences based on the women's use of alcohol and other drugs while pregnant. These prosecutions both reflect and inflame deep societal divides over drug use and its prevention, reproductive autonomy, and racial stereotyping.

As this Article suggests, such prosecutions have achieved neither the goals of the criminal justice system—retribution, deterrence, incapacitation, and rehabilitation—nor the larger societal goals of protecting public health by addressing the treatment needs of substance-abusing women and ensuring the birth of healthy children. Instead, by vilifying women in need rather than increasing access to drug treatment and other forms of health care, prosecutions brought in the name of fetal protection endanger both mothers and their children as well as frustrate sound public policy.

¹⁰⁶ Indeed, a frequent response by appellate judges who overturn convictions based on a prosecution for homicide, child abuse, or neglect is that it is up to the legislature to decide whether a pregnant woman should be prosecuted for actual or potential harm to her fetus caused by her drug use. *See, e.g., Commonwealth v. Cochran*, No. 2006-CA-001561, 2008 Ky. App. LEXIS 8 (Ky. Jan. 11, 2008), *appeal docketed*, No. 2008-SC-0095-D, 2008 Ky. LEXIS 165 (Ky. Aug. 13, 2008).