IN THE
COURT OF APPEALS OF INDIANA

Cause No. 49A02-1106-CR-00486

BEI BEI SHUAI.	)	
	)	
Appellant,	)	Appeal from the Marion Superior Court
	)	
v.	)	Cause No.: 49G03-1103-MR-014478
	)	
STATE OF INDIANA,	)	Hon. Sheila Carlisle, Judge
	)	
Appellee.	)	

BRIEF SUBMITTED IN SUPPORT OF APPELLANT BEI BEI SHUAI BY AMICI INDIANA NATIONAL ORGANIZATION FOR WOMEN, LAW STUDENTS FOR REPRODUCTIVE JUSTICE, NATIONAL WOMEN'S LAW CENTER, AND SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE

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INTEREST OF AMICI CURIAE

Amici[1] respectfully submit this brief to set forth the longstanding history of discrimination against women on the basis of pregnancy; to explain the detrimental effect this prosecution could have on pregnant women's bodily autonomy and integrity; and to describe the potential impact this prosecution could have on pregnant women's right to receive or refuse medical treatment.

Indiana National Organization for Women (Indiana NOW) is a grassroots non-profit organization working to eliminate discrimination against women in all its forms within the state of Indiana. Founded in 1966, Indiana NOW has taken action on issues involving sexual harassment, women's reproductive health and access to health services, domestic violence, and discrimination on the basis of gender or sexual orientation.

Law Students for Reproductive Justice (LSRJ) trains and mobilizes law students and new lawyers across the country to foster legal expertise and support for the realization of reproductive justice. LSRJ fills in the gaps left by formal legal education, through curriculum enrichment and professional training services, to ensure that budding legal experts have the information and skills they need to pursue reproductive justice in any realm – from the bar to the bench, school board meetings to congressional hearings, and beyond. Through peer education, campus activism, and coalition building, LSRJ's 90+ law school chapters raise awareness of

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reproductive justice issues and their intersections with other areas of law, policy, and struggles for social justice. LSRJ believes that reproductive justice will exist when all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence.

The National Women's Law Center (the Center) is a Washington D.C. based nonprofit organization with a longstanding commitment to equality on the basis of sex, and the constitutionally protected freedoms of liberty, privacy and bodily integrity. The Center advances and supports both state and federal policies that promote public health, and opposes policies that hinder access to health care, including prenatal care and mental health care. The Center has previously submitted *amicus* briefs on behalf of state and national organizations opposing the discriminatory treatment of pregnant women in cases in South Carolina, New Mexico, Kentucky, Mississippi and Maryland.

SisterSong Women of Color Reproductive Justice Collective (SisterSong) is a national organization of Indigenous women and women of color and allied organizations and individuals working for Reproductive Justice. Our core principles are threefold: We believe that every woman has the human right to choose if and when she will have a baby and the conditions under which she will give birth; the human right to decide if she will not have a baby and her options for preventing or ending a pregnancy; and, the human right to parent the children she already has with the necessary social supports to do so. Through advocacy, mentoring and support we raise the voices of women of color impacted by human rights violations on the national, state and local levels. SisterSong believes that the Shuai case is a perfect example of the reproductive oppression that we actively work against and that all women must maintain dignity and control over their bodies and reproductive choices.

SUMMARY OF ARGUMENT

Amici Curiae file this brief in support of Ms. Shuai, urging this Court to dismiss the Information filed by the Marion County Prosecutor pursuant to Indiana Code §§ 35-42-1-1, 35-42-1-6 and 35-41-5-1. Applying these statutes in this or similar cases would violate the constitutional rights of both Ms. Shuai and other pregnant women who suffer with depression and survive a suicide attempt.

This Brief sets forth the longstanding history of discrimination against women based on their pregnancies or capacity to become pregnant. Such discrimination has fueled similar attempts to misinterpret and misuse criminal statutes in a manner that violates the United States Constitution on the basis of sex. In bringing this case, the State is asking this court to judicially rewrite the law to create a unique and devastating penalty against a woman who survived a suicide attempt, and subsequently lost her newborn daughter.

As described herein, this prosecution threatens pregnant women's right to equal protection, as well as their bodily autonomy and integrity. First, this prosecution reflects longstanding stereotypes about women as needing to be regulated and restricted in the interest of pregnancy and motherhood. This opens the door to potentially limitless regulation of women for the duration of their pregnancies. Second, this prosecution has the perhaps unforeseen consequence of drastically limiting the ability of pregnant women to make medical decisions for themselves—a right which is firmly protected by the United States Constitution. In doing so, this prosecution presents an untenable infringement on a woman's right to become pregnant and continue that pregnancy without fear of punishment if she cannot guarantee a healthy birth. Finally, because the State cannot claim an "exceedingly persuasive justification" for this

prosecution, as is required when a state's policy or practice discriminates on the basis of sex, this court must dismiss the charges against Ms. Shuai.

The vast majority of courts across the nation, including Indiana courts,[2] have refused to uphold criminal charges against pregnant women for their own allegedly harmful actions during pregnancy. Each has found that such acts were not in the purview of the criminal law.[3] *Amici* urge this Court to follow the approach taken by sister states that have refused to rewrite their state laws to allow such prosecutions, and "decline[ ] the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread."[4]

ARGUMENT

I. Permitting this prosecution impermissibly perpetuates sex discrimination in violation of pregnant women's right to equal protection.

This prosecution punishes Ms. Shuai for attempting suicide, which is not a crime in the state of Indiana. In fact, it is the express public policy of the State to treat suicide as a public health matter.[5] It is only by virtue of her pregnant status that Ms. Shuai is being charged with a

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[2]*Herron v. Indiana*, 729 N.E.2d 1008 (Ind. 2000) (granting motion to dismiss an indictment against a woman for child neglect based on her ingestion of cocaine during pregnancy).

[3]*See, e.g., Cochran v. Commonwealth of Kentucky*, 315 S.W.3d 325 (Ky. 2010); *New Mexico v. Martinez*, 141 N.M. 763, 161 P.3d 260 (N.M. 2007) (quashing writ of certiorari and letting stand lower court decision in favor of defendant); *Kilmon v. Maryland*, 905 A.2d 306 (Md. 2006) (rejecting application of common law "born alive" rule in prosecution for reckless endangerment); *Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992) (legislature did not intend to include acts of pregnant women in statute prohibiting the delivery of a controlled substance to a minor); *But cf., South Carolina v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming homicide conviction because state's statutory definition of "child" included a viable fetus); *reversed and remanded by McKnight v. South Carolina*, 661 S.E.2d 354 (S.C. 2008) (finding ineffective assistance of counsel based on failure to present readily available evidence that cocaine use was not the cause of fetal death and failure to challenge jury instructions regarding criminal intent).

[4]*Johnson v. Florida*, 602 So. 2d 1288, 1297 (Fla. 1992).

[5]*Suicide in Indiana, 2001-2005: A Report on Suicide Completions and Attempts, Injury Prevention Program*, 3 (Sept. 2007) (noting that "suicide is an important public health issue";

crime. The goals of criminal punishment include retribution, rehabilitation, deterrence and prevention. This prosecution does nothing to rehabilitate Ms. Shuai or deter her or any other pregnant woman from making an attempt on her own life. Nor will this prosecution serve as an example to other pregnant women and prevent them from attempting suicide. This prosecution has the sole purpose of seeking to punish Ms. Shuai based on her pregnant status.

This differential treatment constitutes impermissible sex discrimination. The State's discriminatory actions cannot be justified by some compelling state interest in discouraging suicide attempts among pregnant women or preventing the deaths of newborns. Rather than improve health outcomes and reduce the likelihood of such tragic incidents in the future, this prosecution has the ability to do just the opposite.

A. This prosecution is based on the discriminatory belief that once pregnant, women can be denied all their constitutional rights and liberties, with the presumption that such deprivations guarantee a good pregnancy outcome.

Pregnant women are sometimes subject to a unique form of sex discrimination: they are charged with the duty of ensuring a perfect pregnancy and a healthy baby, despite the existence of factors, such as depression and other underlying health issues that may be well beyond their control. Pregnant women are expected to subsume all other interests in order to meet this goal, in part because motherhood has been long presumed to be a woman's singular contribution to society.[6] Because of pervasive stereotypes, only women are subject to this scrutiny, and even threatened with prosecution based on fetal health outcomes. For these reasons, this prosecution

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nowhere is the criminal prosecution of individuals who attempt suicide cited as a prevention strategy).

[6] April Cherry, *Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice*, 8 Tex. J. of Women and the L. 245, 256 (Spring 1999).

is rooted in these discriminatory stereotypes, violates women's right to equal protection, and should be rejected by this Court.

State action that "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" violates the Equal Protection Clause of the Fourteenth Amendment. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). Policies and laws based on stereotypes, presumptions and discriminatory beliefs regarding women's singular role in society as mothers deny women their right to equality, privacy, bodily integrity, liberty and autonomy.

The Supreme Court has recognized the harm that results when the state compels women to fulfill "its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). More recently, the Supreme Court has rejected state action that serves to perpetuate stereotypical and gendered roles regarding family life. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

Pregnant women are subject to a "highly demanding set of expectations," due to the widespread perception that their every action impacts the fetus.[7] While the relevant agency charged with protecting the health of Indiana citizens recognizes that the mental health issues that precede suicide are extremely difficult to resolve, the presumption of the prosecutor appears to be that Ms. Shuai should have been able to overcome her depression merely by virtue of being pregnant.

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[7]Renee I. Solomon, *Future Fear: Prenatal Duties Imposed By Private Parties*, 17 Am. J.L. & Med. 411, 420-21, (1991) (health club owner canceled membership of woman upon finding out she was 10 weeks pregnant, enforcing "unwritten rule" and expressing concern for the fetus).

In short, the State is attempting to make Ms. Shuai liable for her inability to overcome her depression. Imposing liability on pregnant women for their inability to provide "the best prenatal environment possible . . . would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities."[8] The *Stallman* court concluded that attempting to guarantee good outcomes by punishing a mother was to ignore the biological and practical complexities of life and severely restrain her privacy and bodily autonomy. *Id.*

Strikingly, should this prosecution be permitted to move forward, pregnant women suffering from major depression will be faced with two choices, both of which could be illegal: either continue to take medication that could possibly cause harm to the pregnancy or stop taking such medication and risk a relapse that could lead to suicide ideation.[9] It is by no means theoretical to assume that the state could attempt such prosecutions to punish women for a whole host of legal behaviors, including taking legally prescribed medication to treat depression. A pregnant woman in Wyoming was charged with felony child abuse for drinking alcohol, and in Wisconsin, a sixteen-year-old was held in detention throughout her pregnancy based on her tendency "to be on the run" and "lack of motivation or ability to seek medical care."[10] Melissa Ann Rowland was charged with murder for refusing to submit to a cesarean section.[11] As the

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[8]*Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a cause of action for unintentional prenatal infliction of injuries).

[9]See *infra* Section II.A.

[10]Charles Levendosky, *Turning Women into Two-Legged Petri Dishes*, Star Tribune (Minn.), Jan. 21, 1990, at A8 (Wyoming); Veronika E.G. Kolder, et al., *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192, 1195 (1987) (Wisconsin).

[11]Richard L. Berkowitz, *Should Refusal to Undergo A Cesarean Section Be A Criminal Offense?*, 104 Obstetrics & Gynecology 1220 (2004).

Supreme Court observed, "[p]erhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus." *Casey,* 505 U.S. at 898. Surely, if the state cannot give a husband this power, then it cannot assert this dominion itself.

B. This prosecution is based on long-standing stereotypes regarding women's capabilities and role in society.

This prosecution is consistent with the long-standing regulation of women in an effort to protect their offspring. The impulse to define women's legal rights and obligations primarily by reference to her reproductive capacity has a long and unhappy history. Women's ability to participate in society has often been restricted in the name of furthering their pregnancies and role as mothers. "Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

The United States Supreme Court once upheld a statute limiting only women to ten hour work days, finding that because, "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). Women were once denied higher education because of the common belief that rigorous study would interfere with their "reproductive organs," and interfere with "the adequate performance of the natural functions of their sex."[12] The guarantees of Due Process and Equal Protection make clear that the treatment of women under the law cannot be based on stereotypes, entrenched perceptions of proper gender roles, or sweeping generalizations regarding women's abilities or characteristics.[13]

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[12] *United States v. Virginia*, 518 U.S. 515, 537 n.9 (1996) (citation omitted).

[13] *Id.*

The military once discharged women who became pregnant or otherwise took on the responsibility of parenting, presuming that women would prioritize their "maternal duties" over military service.[14] And just recently, the Navy overturned its ban on women's service on submarines.[15] A 1995 Navy report concluded that the capacity to become pregnant is "incompatible with submarine deployments because [pregnancies] pose significant risks to the morbidity and mortality of the mother, and thus to the operational readiness of the unit."[16] In overturning the ban, the Navy recognized that restricting women due to their ability to become pregnant prevented the Navy from utilizing the full talents of the women who serve.[17]

Women also were once forbidden participation in athletic activity because rigorous competition was thought to cause physical and psychological harm–especially to their reproductive capabilities.[18] Laws requiring equal participation in federally funded education

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[14]*See Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978) (no rational basis for automatically discharging pregnant women from Navy); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (Marines; same).

[15]Associated Press, *Navy Names Four Subs to Carry First Women*, Oct. 22, 2010.

[16]Department of the Navy, *Submarine Assignment Policy Assessment* (Science Applications International Corp. Feb. 1995) at 33, available at http://cmrlink.org/CMRNotes/SAPA%20020195.pdf.

[17]The Chief of Naval Operations, in response to the policy change said, "Knowing the great young women we have serving in the Navy, as a former commanding officer of a ship that had a mixed gender crew, to me it would be foolish to not take the great talent, the great confidence and intellect of the young women who serve in our Navy today and bring that into our submarine force." Commander, Submarine Forces Public Affairs, *Navy Policy Will Allow Women To Serve Aboard Submarines*, Apr. 28, 2010, available at http://www.navy.mil/Search/print.asp?story_id=52954&VIRIN=78366&imagetype=1&page=1

[18]Women's Sports Foundation, *Women's Pre-Title IX Sports History in the United States* (Apr. 26, 2001), http://www.womenssportsfoundation.org/Content/Articles/Issues/History/W/Womens%20PreTitle%20IX%20Sports%20History%20in%20the%20United%20States.aspx.

programs, as well as major shifts in social trends, have led to the acceptance and promotion of women in sports.[19]

This prosecution reflects the same stereotypical views advanced by these examples: that women have inherently different capabilities and responsibilities, and must be treated differently by the state in order to protect their reproductive capacities. Ms. Shuai is being prosecuted for her failure to overcome depression for the sake of her unborn child. This is rooted in the notion that women, once pregnant, must be willing and able to overcome any circumstance that threatens their pregnancy outcomes, be it drug addiction, intimate partner abuse or mental illness. When women are punished for being unable to overcome anything that interferes with their ability to have a perfect pregnancy, the criminal law discriminates against them based on their pregnant status. Pregnancy is treated as a "transcendent moment" that requires them to do what no other person is expected to do, such as overcome addiction[20] or leave an abusive relationship,[21] or be held criminally liable for their failure to do so. Yet, there is nothing magical about pregnancy that allows women to overcome serious illnesses or other conditions that harm and endanger their lives.

Prosecutions of women for their inability to overcome serious illnesses such as depression have the effect of punishing women for not conforming to sex-based stereotypes

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[19]*Neal v. Bd. of Trs.*, 198 F.3d 763, 773 (9th Cir. 1999) (describing sea change in attitudes over the 27 years since the implementation of Title IX); *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996) (women's and men's relative interest in athletics participation reflects historical exclusion and stereotypes about women's abilities).

[20]Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95, 113 (Oct. 1993) (citation omitted).

[21]*Motherhood and Crime*, 79 Iowa L. Rev. at 109-13.

regarding their "natural" role in society. The potential for prosecutorial abuse when a woman fails to have a perfect pregnancy outcome is clear.

II. This prosecution would result in a weakening of pregnant women's rights to privacy, bodily autonomy and integrity.

A. By imposing criminal liability for fetal harm, this prosecution weakens pregnant women's right to make medical decisions regarding the treatment of their depression, or even seek medical assistance.

Pregnancy and depression are closely linked, in part because depression most frequently has its onset during women's childbearing years. The American Congress of Obstetrics and Gynecology (ACOG) notes that major depression is a "frequent medical disorder during pregnancy."[22] Suicide is the fifth leading cause of death among pregnant women and one study showed that approximately 2.6% of pregnant women exhibited current suicidal ideation.[23] For these reasons, ACOG strongly encourages screening for depression, and the screening tool includes a question on suicide ideation.[24] This prosecution could actually undermine ACOGs ongoing efforts to diagnose and treat prenatal depression. If women know that they could be prosecuted for homicide if they have a less than perfect pregnancy, they may be unwilling to seek assistance, or disclose suicidal thoughts to their obstetricians. Doctors might miss a crucial opportunity for interventions that could save the lives of pregnant women.

Because 50% of pregnancies are unplanned, one guidance notes "women may become pregnant while on antidepressants, may have their depression or anxiety relapse during

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[22]Jennifer L. Melville et al., *Depressive Disorders During Pregnancy: Prevalence and Risk Factors in a Large Urban Sample*, 116 Obstetrics & Gynecology 1064 (Nov. 2010).

[23]*Id.*

[24]*Id.* at 1066. The question was phrased as follows: "Over the last two weeks how often have you been bothered by thoughts that you would be better off dead or of hurting yourself in some way?"

pregnancy…or may be unwell and untreated before and during pregnancy."[25] Prescription drugs are approved without being tested on pregnant women, so the data available on the harmful effects on fetal development is sparse.[26] Women who suffer with depression are therefore often very conflicted about whether to continue taking legally prescribed medications to control their depression after they become pregnant.[27]

Adding to this dilemma, untreated depression causes its own harms to fetal development, including increased risk for preterm delivery, low birth weight, low fetal growth, higher risk for spontaneous abortion and higher risk for pre-eclampsia.[28] Furthermore, prescription drugs that were once thought to be safe based on observations of pregnant women have later been found to cause serious problems in pregnancy.[29]

This prosecution raises the very real concern that pregnant women, despite their doctors' guidance to discontinue or switch medications, may refuse to do so for fear that they could

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[25]Alicja Fishell, *Depression and Anxiety in Pregnancy*, 17 J. Popular Therapeutic Clinical Pharmacology 363 (Fall 2010).

[26]National Institute of Mental Health, *Mental Health Medications*, 15 (U.S. Dept. of Health and Human Services, 2008).

[27]FDA Office of Women's Health, *Depression* (Office of Women's Health, 2009), 2 (Cautioning pregnant women to consult with their doctors about the risks of medication versus untreated depression).

[28]*Depression and Anxiety in Pregnancy*, 364.

[29] *See, e.g.*, Food and Drug Administration, *Public Health Advisory: Treatment Challenges of Depression in Pregnancy and the Possibility of Persistent Pulmonary Hypertension in Newborns* (July 19, 2006) (finding that persistent pulmonary hypertension was "six times more common in babies whose mothers took an SSRI antidepressant after the 20th week of the pregnancy compared to babies whose mothers did not take an antidepressant").

relapse and attempt suicide.[30] Ironically, should those legally prescribed medications be found to have any harmful fetal effects, this very prosecution could also subject these same women to criminal charges for refusing to follow their doctors' orders.

B. This prosecution weakens the constitutionally protected right to refuse or receive medical care that may have an effect on pregnancy outcomes.

This prosecution imposes on pregnant women an unconstitutional duty to do everything in their power to minimize fetal harm and ensure the best possible pregnancy outcome. Allowing this prosecution to move forward would seriously undermine pregnant women's recognized right to refuse or receive medical treatment that may have a detrimental effect on the fetus. Everything a woman experiences in her pregnancy and every decision she makes may impact the fetus. Attempting to impose criminal sanctions on pregnant women's acts would result in unacceptable and unrelenting limits on their liberty. The nation's leading physicians' organizations support women's right to determine their own medical care and disfavor legal intervention in such cases, even when women's decisions may be to the detriment of the fetus.[31] Moreover, courts have consistently held that the state cannot deprive a pregnant woman the right to receive or refuse medical care and have demanded that the state exercise restraint with regard to actions that may violate pregnant women's constitutionally protected liberties.[32]

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[30] *Id.* (finding that "women who stopped their medicine were five times more likely to have a relapse of depression during their pregnancy than were the women who continued to take their antidepressant medicine while pregnant").

[31] American Medical Association, Board of Trustees Report, *Legal Interventions During Pregnancy: Court Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (1990); American College of Obstetricians and Gynecologists, Ethics in Obstetrics and Gynecology, Committee Op. 214 (Apr. 1999).

[32] *See, e.g., Taft v. Taft*, 446 N.E.2d 395, 396 (Mass. 1983) (state supreme court vacated lower court decision ordering a pregnant woman to have her cervix sewn to prevent a possible miscarriage; court did not adequately consider her right of privacy).

Allowing Ms. Shuai to be prosecuted because her attempt on her own life allegedly resulted in the death of her newborn would undermine pregnant women's liberty interest in making decisions regarding their medical care. The Supreme Court has reaffirmed the right to make decisions regarding one's person as a liberty interest grounded in the Constitution. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). The Indiana Supreme Court has likewise upheld individuals' right to refuse life sustaining treatment. *Matter of Lawrance*, 579 N.E.2d 32 (Ind. 1991) (finding parents of never-competent daughter were allowed to withdraw artificial nutrition and hydration pursuant to the Indiana Health Care Consent Act).

Pregnant women also have the same right to make decisions regarding their medical care taking numerous factors into consideration, including their ability to care for family members, or to continue employment or schooling. Even if a medical decision has the potential to effect the outcome of a pregnancy, the constitutionally protected right to bodily autonomy prohibits state interference. This prosecution calls into question whether these medical decisions could likewise subject pregnant women to criminal culpability, thus denying them the ability to make medical decisions that non-pregnant women and men may make without fear of imprisonment.

In the leading case on a pregnant woman's right to refuse medical interventions, *In re A.C.*, 573 A.2d 1235 (D.C. 1990), *rev'g en banc*, *In re A.C.*, 533 A.2d 611 (D.C. 1987), the D.C Court of Appeals found that the panel previously hearing the case had erred in permitting a cesarean to be performed on a pregnant woman without her consent for the benefit of her twenty-six-and-one-half-week-old fetus. "[C]ourts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health." 573 A.2d at 1243-44. After analyzing holdings that have refused to require organ donations between relatives, the

court concluded, "[A] fetus cannot have rights in this respect superior to those of a person who has already been born." 573 A.2d at 1244.

Every appellate court to consider similar issues after *A.C.* has supported a pregnant woman's right to make medical decisions that may endanger the fetus, or refuse treatment for the fetus's benefit, even when the procedure in question is minimally invasive to the woman. *See, e.g., In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (citing *Planned Parenthood v. Casey*, 505 U.S. at 852); *In re Doe*, 632 N.E.2d 326, 333-34 (Ill. App. Ct. 1994). Each of these courts acknowledged the serious infringement on a pregnant woman's liberty interests in ruling otherwise.[33]

Current federal regulations regarding participation in research and clinical trials further reinforce this point, as the regulations allow pregnant women the same decision-making power and potential benefits of participation as others. Furthermore, the government's interest in protecting fetuses, women's reproductive capacity, or potential future pregnancies cannot outweigh the woman's own interest in or motivations for participating in trials or research.[34] Indiana explicitly endorses these federal regulations in all research activities, whether or not such activities are federally-funded.[35]

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[33]Indeed, the one reported case to the contrary, *Pemberton v. Tallahassee Memorial Regional Medical Center*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999), illustrates the incredible violation of liberty that occurs when states act overzealously. Ms. Pemberton was forced to submit to a cesarean section against her will. *Id.* at 1250-51.

[34]*See* Protection of Human Subjects, 45 C.F.R. § 46.204, Research Involving Pregnant Women or Fetuses; *see also*, Office for Human Research Protections, IRB Guidebook (U.S. Dept. of Health and Human Services, 1993), Chapter VI.B ("In research undertaken to meet the health problems of a pregnant woman, her needs generally take precedence over those of the fetus, [45 C.F.R. 46.207] except, perhaps where the benefit to the woman is minimal and risk to the fetus is high.").

[35]*See, e.g.*, Indiana University, "Vulnerable Populations," *Standard Operating Procedures for Research Involving Human Subjects* (approved October 2010), available at

C. This prosecution compels women who suffer from depression or other mental health disorders to terminate their pregnancies or possibly face criminal charges should anything go wrong with their pregnancies.

The decision to bear a child is a fundamental liberty interest protected by the Fourteenth Amendment. "Liberty presumes an autonomy of self that includes ... certain intimate conduct." *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). The Fourteenth Amendment protects a person's right to make the most fundamental decisions free of undue governmental intrusion, including the right to "bear or beget a child." *Lawrence*, 539 U.S. at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). The Indiana Supreme Court has also recognized that the constitutional right to privacy extends to "decisions relating to marriage, procreation [and] motherhood." *State v. Criminal Court of Marion County*, 263 Ind. 236, 253, 329 N.E.2d 573, 585 (1975). The Indiana Constitution also "contains a fundamental right of privacy, rising to the level of a 'core constitutional value,' that includes 'protection of the right to make ...the decision to terminate pregnancy.'" *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 983 (Ind. 2005) (quoting *Clinic for Women v. Brizzi*, 814 N.E.2d 1042, 1049 (Ind. Ct. App. 2004)).

This prosecution impacts a woman's fundamental right to carry her pregnancy to term because a woman who finds herself depressed and pregnant could find herself criminally liable should anything go wrong with her pregnancy, or if her newborn dies shortly after birth. A pregnant woman who is depressed or suffering from some other mental health disorder or condition could avoid the looming risk of prosecution only by terminating her pregnancy.

Coercive policies that interfere with a woman's decisions about her pregnancy unconstitutionally impair her autonomy and ability to make her own health choices. The Court

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http://www.researchadmin.iu.edu/HumanSubjects/hsdocs/IU%20SOPs%20-%20Research%20with%20Human%20Subjects%20%28v4.01.2011%29.pdf

rejected, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), a mandatory maternity leave policy that would have forced women to lose income if they became pregnant, explaining that because such policies "directly affect 'one of the basic civil rights of man,' the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a [woman's] constitutional liberty." *Id.* at 640 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

The Court construed *LaFleur* in *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), and held that a policy presuming a pregnant woman was unable to work for 18 weeks, and was therefore ineligible for unemployment compensation, infringed upon "freedom of personal choice in matters of marriage and family life" as protected by the Due Process Clause. 423 U.S. at 46 (quoting *LaFleur*, 414 U.S. at 639). Permitting women struggling with depression or other mental health disorders to be prosecuted based on their pregnancy outcomes raises the same constitutional concerns, by injecting the state into a woman's decision about her pregnancy. The analysis as to whether sex discrimination is at issue for purposes of the Fourteenth Amendment and Title VII are the same.[36] *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

[36]Therefore, while under *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Gilbert*, *supra*, the withholding of a benefit to pregnant women did not constitute sex discrimination for purposes of Title VII or the Equal Protection Clause, the imposing of a burden does constitute such discrimination. This distinction was recently reaffirmed by the Supreme Court in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1970 (2009). *See also Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (holding that mandatory discharge of pregnant women from Marines presented unconstitutionally burdensome presumption about pregnancy and women under Equal Protection clause and *LaFleur* Due Process analysis).

III. This prosecution conflicts with the state legislature's public health approach to addressing suicide resulting from domestic violence.

Another irony presented by this prosecution is that it conflicts with the legislature's efforts to reduce suicides resulting from domestic violence. It is evident that both I.C. § 35-42-1-1(4) and § 35-42-1-6 were intended to be limited to the acts of third parties, including acts of domestic violence perpetuated by romantic partners.[37] Indiana Code § 12-18-8-7 explicitly acknowledges that being abused by a partner may actually cause a woman to commit suicide.[38] Indiana has taken the commendable step of requiring an investigation of suicides resulting from domestic violence in an effort to develop strategies to prevent such tragedy.

While I.C. § 12-18-8-7 emphasizes the need for prevention and intervention in such cases, should this prosecution stand, a pregnant woman who attempts suicide as a result of domestic violence could be prosecuted for a crime. Criminal prosecution of suicide survivors is not the type of public health oriented "prevention and intervention strategy" contemplated by the legislature in passing the Human Services Code section addressing domestic violence.

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[37]While the Indiana Law was the result of an act of violence by an assailant unknown to the victim, the Centers for Disease Prevention and Control has documented the large percentage of acts of violence against pregnant women, and notes that a number of these are presumably committed by intimate partners. Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95 Am. J. Pub. Health 471, 474 (Mar. 2005); *see also* Donna St. George, *Many New or Expectant Mothers Die Violent Deaths*, Wash. Post, Dec. 19, 2004, at A1 (noting trend over the last decade of pregnant women being killed by their spouses or partners).

[38]A local domestic violence fatality review team shall do the following:

> (1) Assist a local agency in identifying and reviewing a homicide or *suicide that results from domestic violence*."
>
> (2) Develop recommendations for coordinated *community prevention and intervention* strategies to prevent future homicides or suicides resulting from domestic violence.

(emphasis added).

IV. The State cannot establish an exceedingly persuasive justification for this discriminatory prosecution.

Given the discriminatory nature of this prosecution, it is the State's heavy burden to demonstrate an "exceedingly persuasive justification" for the prosecution, and that such prosecutions are narrowly tailored means to further the state's interest. *Virginia*, 518 U.S. at 533. The classification must serve "important governmental objectives" and be "substantially related to the achievement of those objectives." *Id.* (citation omitted). The state must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* at 533.

Charging a woman with a crime because she became pregnant, suffered the onset of a major depressive episode and attempted to kill herself violates her rights to liberty and bodily integrity without furthering any legitimate interest in fetal health. This prosecution only increases the stigma of mental health disorders and drives those who are contemplating suicide into further secrecy.

The State cannot show that its discriminatory means is substantially related to any legitimate state interest such as preventing suicide attempts among pregnant women. As set forth in the Amici Brief from public health advocates and experts, the punitive treatment of pregnant women for their actions during pregnancy has not been shown to protect the health of a fetus or the pregnant woman, let alone with the kind of close nexus required under the Fourteenth Amendment.

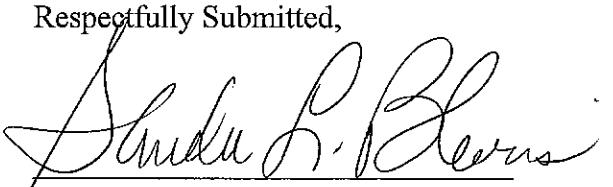
There is no evidence that this prosecution will encourage pregnant women who are suffering with major depression to seek help. To the extent that holding Ms. Shuai criminally culpable for her unsuccessful suicide attempt leads other depressed pregnant women to terminate

their pregnancies, these prosecutions obviously do not serve any asserted interests of the State.[39] Nor does the State have any interest in encouraging pregnant women to use the deadliest and most immediate method of suicide possible in order to avoid criminal prosecution for an unsuccessful suicide attempt.

CONCLUSION

Because this prosecution perpetuates unlawful sex discrimination and does so without advancing any state interest, we ask that this Court dismiss the Information against Ms. Bei Bei Shuai.

Respectfully Submitted,



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[39] Numerous courts dismissing prosecutions against women who gave birth despite an addiction problem have recognized the possibility of coerced abortions, and this same rationale could apply to pregnant women facing major depression. *See, e.g., Johnson*, 602 So. 2d at 1296 ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."); *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies."). Indeed, a policy of prosecution may have resulted in at least one coerced abortion. Gail Stewart Hand, *Women or Children First?*, Grand Forks Herald (N.D.), July 12, 1992, at 1 (a woman obtained an abortion twelve days after being arrested for sniffing paint fumes while pregnant).

WORD COUNT CERTIFICATE

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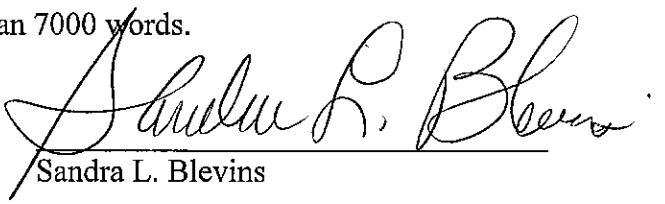

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been deposited in the U.S. Mail, first class postage prepaid, this 28th day of July, 2011, addressed to the following:

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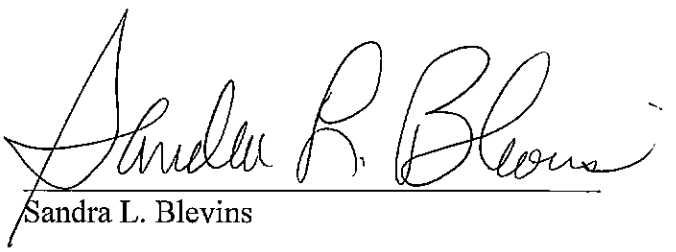

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