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Miranda and the Womb

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INTRODUCTION

What I may see or hear in the course of treatment, which of no account may be spread abroad, I will keep to myself, hold such things shameful to be spoken about.

Hippocratic Oath

The doctor-patient relationship is sacrosanct. However, this is not the case in Indiana. Instead, Indiana challenges the doctor-patient relationship with the legislature's requirement of legal and medical mandatory reporters.[1] The imposition of mandatory reporters often results in a breach of trust in the doctor-patient relationship, which not only can severely damage the relationship, but also harm the patient or client. In Indiana, this harm rises to prosecution and prison.[2] Indiana requires doctors to breach confidentiality and assist in prosecuting their patients, with a distinct focus on pregnant women.[3] Women in critical stages of their pregnancy risk arrest and conviction when they seek medical assistance,[4] and clients who disclose past criminal activity may face prosecution.[5]

Women acting in desperation because of unwanted pregnancies face severe sanctions by the state of Indiana. Proceeding with a pregnancy beyond the first trimester implicates the state in whatever a woman's choices. The more the fetus develops and becomes viable, the greater the state's interest in the pregnancy. A woman can be held culpable for her actions by the state once she allows the pregnancy to proceed into the second and third trimesters. The medical profession assists in sanctioning women who either induce abortions or attempt suicide. Both scenarios display a need for mental health intervention, but resulted in prosecutions to the fullest extent of the law.

States that choose to criminalize the behavior of pregnant women assert

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1. IND. CODE § 31-33-5-4 (2017).

2. *See* Lynn Paltrow, *Roe v. Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. OF PUB. HEALTH NO. 1, 18 (2013).

3. *Id.* at 17 (documenting the rise of fetal personhood and how it is being used as the basis of arrests, detentions and forced detentions on pregnant women).

4. *Id.*

5. *Id.*

concern for the fetus.[6] However, this concern for the fetus pits the mother against the fetus and the state, while simultaneously pitting doctors and lawyers against the individuals they are meant to serve: namely, pregnant women in need of medical attention. In Indiana, pregnant women who seek medical attention must be informed of their Miranda rights before receiving treatment. This runs afoul of the doctor-patient relationship, as pregnant woman turned criminal defendants will necessarily withhold communications from their doctors to avoid being blindsided and prosecuted. Indiana courts allow for an overbroad application of feticide laws that interfere with criminal defendants' Fifth Amendment right against self-incrimination.

Two cases highlight the dangers of Indiana's interpretation. In Part I of this article, I discuss the cases of Purvi Patel and Bei Bei Shuai as examples of how Indiana used its feticide laws to prosecute pregnant women and reach beyond the original intent of the statute.[7] In Part II, I analyze how medicolegal conflicts arise when the medical profession treats the fetus as a separate legal person from the mother. In Part III, I review the origin of Indiana's feticide laws and how overly zealous prosecutors deviated from the original intent of the law by prosecuting pregnant women. Lastly, in Part IV, I consider the disturbing trend of prosecuting mothers and pregnant women when they access medical care and the constitutional concerns that arise. I conclude by asserting the need for a civil Miranda when at-risk women become community pariahs and are prosecuted for endangering their fetuses.

I. BACKGROUND

A. Purvi Patel

Purvi Patel lived in Granger, Indiana where she managed the family restaurant.[8] Purvi, unbeknownst to her family, engaged in a sexual relationship with a married man.[9] Purvi was not aware that she was pregnant until a friend mentioned she should visit a doctor after complaining of cramps

6. *See generally* JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES, (Cornell University Press 2000) (providing a study of the rise of fetal personhood in a 50-state survey). *See also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (allowing states to assert a state interest in a viable fetus); IND. CODE § 16-34-1-9 (2017) (asserting a compelling state interest in a fetus of 20 weeks as the fetus is then capable of feeling pain).

7. Patel v. State of Indiana, 60 N.E.3d 1041, 1044 (Ind. App. 2016) (vacating the feticide conviction that was the basis of the 20-year sentence but holding that Purvi did endanger the fetus); Shuai v. State of Indiana, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

8. Patel, 60 N.E.3d at 1044.

9. *Id.*

and missing her menstrual cycle.[10] Upon confirming her pregnancy, she hid it from her family.[11] Purvi wanted to terminate the pregnancy, but knew that she was beyond the acceptable time to take "a pill" and, instead, ordered Chinese tablets to end the pregnancy.[12]

Purvi ingested four Chinese tablets over three days to begin the abortion.[13] The next day, she began bleeding and cramping, and Purvi aborted the fetus on her bathroom floor.[14] Purvi continued to have cramps and pass blood clots.[15] On the way to the hospital, Purvi disposed of the fetal remains in a restaurant dumpster, and then went to the hospital.[16]

Dr. Tracy Byrne was the attending physician for Purvi.[17] Dr. Byrne consulted her partner, Dr. Kelly McGuire, regarding the potential cutting of the umbilical cord.[18] Both doctors provided medical care to Purvi, in addition to working in concert with the Grange police department.[19] At times, the duty to their patient overlapped with the duty of being a mandatory reporter. Eventually, the doctors assisted law enforcement.[20] Purvi, the patient, became secondary to the doctors' concerns and assisting in the Purvi's prosecution became their primary function. Purvi was never given her Miranda warnings.[21] Dr. McGuire posed questions that would end up being the basis of the state's case against her, and Purvi answered the questions and incriminated herself.

Once Dr. McGuire surmised that the fetus could be alive, he took the extraordinary step and accompanied the Grange, Indiana police to locate the fetus.[22] Purvi, in a weakened state, transitioned from patient to defendant. Purvi was in route to surgery after substantial blood loss during the miscarriage.[23] Instead of receiving Miranda warnings, warnings about self-

10. *Id.*

11. *Id.* at 1045. Patel texted her friend "[m]y Fam would kill me n him."

12. Id. Later that day, Patel ordered mifepristone and misoprostol online from a Hong Kong pharmacy for $72 and had the package shipped to Moe's so "no one [would] know."

13. *Id.* at 1045–46.

14. *Id.* at 1046.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* ("Dr. McGuire had been participating in the search for approximately thirty to forty-five minutes").

21. *Id.* ("Patel was asked for more specific information regarding the baby's location, and she ultimately revealed that she had put the baby in a plastic bag and placed it in a dumpster . . .").

22. *Id.*; Brief for Appellant at 7, Patel v. State, 60 N.E.3d 1041 (Ind. App. 2016) (No. 71A04-1504-CR-166) [hereinafter, Brief for Appellant: Patel].

23. Brief for Appellant: Patel, *supra* note 22, at 6.

incrimination, or the consequences of her answers, she cooperated with the doctors attending to her, and with law enforcement.[24] When the police and Dr. McGuire were unable to locate the fetal remains, Dr. McGuire called St. Joseph's Hospital to obtain more details from Purvi regarding how she disposed of the fetus.[25] Purvi offered more details, and the police eventually located the remains of the aborted fetus.[26] Essentially, Purvi incriminated herself by telling the police where to find the fetal remains. The "life-saving" mission quickly transitioned into a criminal investigation. The state of Indiana used the autopsy results of the fetus and the expert testimony of a forensic pathologist to convict Purvi Patel of feticide.[27] Purvi's trial, and ultimate conviction, resulted in the trial judge issuing a 20 year sentence.[28]

Purvi, in an emotionally and physically weakened state, incriminated herself and assisted in her own eventual prosecution. The question presents itself of whether Dr. McGuire was a doctor on a lifesaving mission, or a state actor working in furtherance of a criminal investigation. Once Dr. McGuire was in the company of law enforcement, he ceased being a doctor and appeared to transform into a state actor. Dr. McGuire specifically sought the remains of the fetus in the presence of, and along with, the Grange police.[29] And though Indiana, similar to the majority of states, requires mandatory reporting of child endangerment,[30] mandatory reporting does not require a doctor's presence at a potential crime scene.[31] Even if Dr. McGuire could be considered a mandatory reporter, his role as a doctor on an emergency call

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24. *Id.* at 6–7.
25. *Id.* at 7.
26. *Id.*
27. *Id.* at 9–10, 13.
28. Patel, 60 N.E.3d at 1048.
29. Brief for Appellant: Patel, *supra* note 22, at 7. Doctors are mandated to save the life of the fetus if the fetus from a partial birth abortion remains alive after the abortion is performed. IND. CODE § 16-34-2-3(c) (2017). Purvi Patel had no medically performed abortion. She attempted a self-induced abortion. *See* IND. CODE § 16-34-2-7(a) ("a person who knowingly or intentionally performs an abortion not expressly provided for in this chapter commits a Level 5 felony. . . "). Indiana Code provides:

> An abortion may be performed after the earlier of the time a fetus is viable or the time the post fertilization age of the fetus is at least twenty (20) weeks only if there is in attendance a physician, other than the physician performing the abortion, who shall take control of and provide immediate care for a child born alive as a result of the abortion. During the performance of the abortion, the physician performing the abortion, and after the abortion, the physician required by this subsection to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child. However, this subsection does not apply if compliance would result in an increased risk to the life or health of the mother. IND. CODE § 16-34-2-3(b).

30. IND. CODE § 31-33-5-4 (2017).
31. *Id.* at § 31-33-5-1.

terminated once the Grange police located the fetal remains. The police presence satisfied the doctor's responsibility as a mandatory reporter, and alleviated Dr. McGuire's duty to notify a local agency of child harm. The doctors eventually determined that Purvi miscarried at 25 weeks,[32] and Indiana statutes define fetus viability beginning at 20 weeks.[33] Thus, the remains of Purvi's fetus became the evidence in the state's case against her, and Dr. McGuire's role was altered from mandatory reporter to state actor.

Afterwards, Dr. McGuire's remaining role was a prosecution witness. Dr. McGuire testified beyond the capacity of an eyewitness and became the State's expert witness, becoming a state actor. Dr. McGuire testified, not only to what he saw, but the effects of what he saw. Specifically, Purvi Patel's Appellant Reply Brief describes the impact of the doctor's testimony:

> Dr. McGuire testified he believed it possible he might find a live baby in the Target parking lot, but he was describing his thinking before the body was found - when "guesstimates" based on the umbilical cord ranged from 25 to 30 weeks.[34]

The brief further noted the doctor's testimony in describing whether Purvi's fetus could survive:

> Q. Okay. Based on your training and experience and based on what you saw, would you expect a baby of that developmental age to exhibit signs of life upon birth?
>
> A: [Dr. McGuire] Yes.
>
> Q: Such as?
>
> A: [Dr. McGuire] Just movement, possibly crying.[35]

Notably, the questions asked for Dr. McGuire's training and experience and asked questions based on what he saw. The former appears to be something asked of an expert working on behalf of the state, while the latter appears to be that of a fact-based, neutral witness. Ultimately, the state of Indiana charged Purvi with feticide, which requires proof that the fetus was alive during birth.[36] Dr. McGuire's testimony as an expert was key for the supposition that Purvi's fetus was alive at birth.[37] Thus, Dr. McGuire became

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32. *See* Brief for Appellant: Patel, *supra* note 22, at 9.
33. IND. CODE at § 16-34-1-9.
34. Reply Brief for Appellant at 4, Patel v. State, 60 N.E.3d 1041 (Ind. App. 2016) (No. 71A04-1504-CR-166) [hereinafter, Reply Brief for Appellant: Patel].
35. *Id.*
36. *Id.* at 3–4.
37. *Id.* at 4.

a state agent.

1. Mandatory Reporting and the Purvi Patel Case

The intent of Indiana's mandatory reporting laws is to provide protection for abused and neglected children.[38] The mandatory reporting requirement encompasses all parties in contact with a potentially abused child, including doctors and attorneys who have a confidentiality ethos.[39] The primary focus of the law was to identify abused and neglected children—not to prosecute offenders.[40] And yet, in Purvi's case, the law was transformed as a prosecutorial one. Not only was the law transformed, Dr. McGuire's presence at the scene where the fetus was found, transformed his role from medical provider into a mandatory reporter and prosecution witness. Moreover, Dr. McGuire used his role as a state actor to call the hospital and require Purvi to answer incriminating questions.[41] No attorney was on hand to advise Purvi, and law enforcement did not advise Purvi of her Miranda rights.[42] Having miscarried, under heavy medication, and suffering from substantial blood loss, the answers she gave to Dr. McGuire's inquiry eventually led to her trial, conviction and imprisonment.[43] Thus, Dr. McGuire's inquiry was pivotal in the prosecution of Purvi. The doctor's role, like that of Dr. McGuire, was transformed based on Indiana's mandatory reporting requirement and feticide laws.

When Dr. McGuire called to gain information from Purvi, the quintessential question is whether Purvi was free to leave.[44] The answer is both yes and no. Purvi was not in custody for interrogation or arrest purposes, but she also was not free to leave the hospital. Purvi sought medical care for the excessive bleeding she suffered from the miscarriage.[45] After waking up

38. IND. CODE §31-33-1-1 (2017).

39. IND. CODE at § 31-33-5-1 ("Duty to make report. Sec. 1. In addition to any other duty to report arising under this article, an individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report as required by this article.").

40. Daymude v. State, 540 N.E.2d 1263, 1266 (Ind. Ct. App. 1989).

41. Brief for Appellant: Patel, *supra* note 22, at 7.

42. *See generally, id.*

43. *Id.* at 6–7.

44. Compare Salinas v. Texas, 570 U.S. 178, 185–86 (2013) (noting that as the individual was "free to leave" he was outside the scope of the Fifth Amendment), with Miranda v. Arizona, 384 U.S. 436, 467–68 (1966) (noting that *Miranda* rights applied to individuals in custody).

45. *See* IND. CODE § 16-34-2-7(d) Performance of an Unlawful Abortion (2016) (explicitly not allowing for prosecution of women who receive partial birth abortions). *See* IND. CODE § 16-34-2-7(d) (2016) (explicitly prohibiting prosecution of women upon whom partial birth abortions are performed). The statutory construction seems to suggest that a woman who obtains a partial birth abortion in accordance with the statute is exempt from prosecution, while one who performs it herself may be subject to prosecution. Compare IND. CODE § 16-34-2-7(a) (stating that "a person who knowingly or intentionally performs an

from the surgery, a Grange Police Detective, Galen Pelletier, questioned her.[46] While Dr. McGuire's actions blurred the lines between physician and state actor, Purvi's hospital bed became her place of detention when Detective Pelletier questioned her as she recovered from anesthesia.[47] As a result, Purvi went into St. Joseph's Hospital for treatment, and left the hospital a feticide suspect. St. Joseph's, as an agent of the state, held a duty to warn Purvi, as a patient, that they cooperate with law enforcement. She needed medical assistance, but her doctors became a key component in her conviction. The death of a fetus is not a private matter, for the state has a compelling interest in the life of the fetus that supersedes the rights of the birth mother or the right to confidentiality of the medical patient.[48]

Dr. McGuire joined the Grange police to search the area where Purvi discarded the fetal remains of her miscarriage.[49] Based on how Purvi discarded the remains, she did not want them to be found.[50] The doctor and law enforcement searched for the fetus without success, needing to make an additional inquiry with Purvi to complete the search.[51] Once found, the remains became the basis for the feticide charge.[52] Dr. McGuire conducted the search with law enforcement officers after consulting on Purvi's condition as a patient.[53] As such, the doctor began to blur the lines of medical care provider and state actor.

A conflict of laws exists in cases such as Purvi Patel's—the mandatory reporting laws versus the Fifth Amendment. The mandatory reporting laws required Dr. McGuire and other medical professionals who treated Purvi to contact law enforcement.[54] With the fetus located, it then transformed an abuse and neglect investigation into a criminal investigation. The doctor was sent to rescue a fetus after treating Purvi. The mission failed, and the doctor became one of the leading witnesses in the prosecution's case-in-chief. Dr. McGuire cooperated in the investigation and testified against Purvi.[55] Consequently, the prosecutor used the doctor's role and knowledge to bolster

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abortion not expressly provided for in this chapter commits a Level 5 felony"), with IND. CODE § 16-34-2-7(d) (stating that "[a] woman upon whom a partial birth abortion is performed may not be prosecuted for violating or conspiring to violate section 1(b) of this chapter").

46. *See* Brief for Appellant: Patel, *supra* note 22, at 7.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See Id.* at 6 (noting that Purvi Patel discarded the fetal remains in a Target store dumpster).

51. *Id.* at 7.

52. IND. CODE § 35-42-1-6 (2017).

53. *Id.*

54. IND. CODE § 31-33-5-4 (2017).

55. Brief for Appellant: Patel, *supra* note 22, at 7.

the state's case against Purvi.[56] Purvi incriminated herself in a physically and mentally weakened state when she spoke to Dr. McGuire and law enforcement officers. She had no medical or prenatal care while pregnant and did not seek any medical advice regarding terminating her pregnancy. Purvi induced a crude self-abortion, not understanding the medical and legal consequences. The state used her vulnerable state to violate her rights against self-incrimination. Pregnant women who are impoverished, with substance abuse problems, or lack prenatal care are highly susceptible to prosecution. Their only safeguard is the Constitution.

B. Bei Bei Shuai

In the case of Bei Bei Shuai, a woman became distraught when her boyfriend, who was married to another woman, informed her that he would not be continuing their relationship.[57] At the time, Bei Bei was eight months pregnant, and became despondent and suicidal.[58] Because of her suicidal ideations, Bei Bei ingested rat poison purchased from a hardware store, but ultimately, did not die.[59] Later, the police received an anonymous call and conducted a welfare check on Bei Bei.[60] During the welfare check, she convinced the officer that she was fine.[61] Bei Bei's friend later convinced her to go to a local hospital, where she was admitted and eventually transferred to Methodist Hospital in Indianapolis.[62]

Methodist initially treated Bei Bei for her mental health and obstetric concerns, but later transitioned from treating Bei Bei for depression and rat poison ingestion to providing her incriminating medical advice. Methodist medical staff advised her on decisions that would eventually lead to her murder charges.[63] Instead of appointing legal counsel for a depressed and suicidal woman to assist in making life-altering decisions or warn Bei Bei of the consequences of her choices, she became the first woman charged with feticide as a mother, and not as a third party.

Bei Bei and her baby progressed enough that discharge was imminent, and on December 25, 2010, hospital staff informed Bei Bei that she could be discharged within a day or two.[64] Unfortunately, on December 31, 2010,

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56. Patel, 60 N.E.3d at 1053–54.
57. Shuai v. State of Indiana, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Brief of Appellant at 5, Shuai v. Indiana, 966 N.E.2d 619 (Ind. Ct. App. 2012) (No. 49A02-1106-CR-486) [hereinafter, Brief of Appellant: Shuai].
64. *Id.*

things took a turn for the worse.[65] A doctor detected an unusual fetal heart rate and advised Bei Bei to consider caesarean surgery to protect the baby.[66] The doctor warned Bei Bei of the potential risks, which included her own death and the death of her baby.[67] Despite these risks, Bei Bei consented to the surgery and gave birth to a female infant she named Angel.[68]

From December 31, 2010 to January 2, 2011, Angel remained in the neonatal unit while Bei Bei recovered from her caesarean procedure.[69] Unfortunately, Angel began to hemorrhage.[70] On January 2, 2011, the neonatal doctor informed Bei Bei that Angel's prognosis looked dim, and Angel needed to be removed from the life-supporting ventilator.[71] While Bei Bei decided whether to remove Angel from life support, Methodist staff simultaneously contacted Marion County authorities, including the Marion County Coroner.[72] The Coroner subsequently informed the Indianapolis Metropolitan Police Department ("IMPD") and the Marion County Department of Child Services ("DCS").[73] DCS informed Methodist that it would be Bei Bei's decision as to Angel's medical care, including removing life support or other medical interventions.[74] On January 2, 2011, Bei Bei agreed to remove Angel from the ventilator.[75] She held Angel for five hours after the staff removed her from life support.[76] Angel then died on January 3, 2011.[77]

Angel's death triggered an immediate investigation by the Marion County Coroner and the IMPD.[78] The IMPD obtained Bei Bei's medical records without a warrant or her permission.[79] As a result, Bei Bei became suicidal once again, and transferred to the psychiatric unit of Methodist where she remained for thirty-two days.[80]

Methodist eventually released Bei Bei on February 4, 2011.[81] The Marion

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 5–6.
74. *Id.* at 6.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 6.
80. *Id.* at 13.
81. *Id.*

County Prosecutor charged Bei Bei with murder and attempted feticide.[82] After an interlocutory appeal, the Indiana Court of Appeals ordered her release on February 8, 2012.[83] However, Bei Bei remained in custody for 435 days until she posted a $50,000 bond on May 22, 2012.[84] At a status hearing on August 2, 2013, Bei Bei pled to the misdemeanor charge of criminal recklessness.[85] In return, the Marion County Prosecutor dismissed the murder and attempted feticide charges.[86]

C. Indiana Prosecuting Pregnant Women

Indiana set a precedent for charging pregnant women with feticide for the unfortunate deaths of fetuses by utilizing a law meant to sanction violent acts against pregnant women and their unborn children.[87] Normally, the fetal deaths prosecuted under this law have been under tragic circumstances, and with mothers under a great amount of stress.[88] Bei Bei Shuai was hospitalized for suicidal ideation after losing her baby and originally ingesting rat poisoning; Purvi Patel after inducing crude abortion lost a substantial amount of her blood.[89] Both of these women were under great physical and mental strain. In each situation, the medical profession was the catalyst for prosecution.[90] Furthermore, the feticide charges in both cases have been reduced or dismissed.[91] These cases demonstrate that a problem exists in both the criminal justice system and the medical profession. The problem begins with how the women are treated when they seek medical treatment and are reported to law enforcement.

II. FETUS VERSUS MOTHER MEDICOLEGAL RESPONSE

When the United States Supreme Court declared that women had the right to privacy to have abortions, a parallel and paradoxical legal response arose:

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82. *Id.*

83. Shuai, 966 N.E.2d at 622.

84. Tim Evans, *Judge Could Call Up to 200 Jurors in Bei Shuai Case,* INDIANAPOLIS STAR (June 1, 2013), https://www.newspapers.com/newspage/107925702/.

85. *See State of Indiana v. Bei Bei Shuai*, 49G03-1103-MR-14478; *see also* David Stafford, *Shuai Case Resolved, Thorny Legal Issues Remain*, INDIANA LAWYER (Aug. 14, 2013), http://www.theindianalawyer.com/shuai-case-resolved-thorny-legal-issuesremain/PARAMS/article/32121.

86. Stafford, *supra* note 85.

87. Sarah Kaplan, *Indiana woman jailed for "feticide." It's never happened before.*, WASHINGTON POST (Apr. 1, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/01/indiana-woman-jailed-for-feticide-its-never-happened-before/?utm_term=.74fd002f1f2f.

88. *Id.*

89. *See supra* Sections I.A, I.B.

90. Kaplan, *supra* note 87; *see also* Brief of Appellant: Shuai, *supra* note 63.

91. Stafford, *supra* note 85; Patel, 60 N.E.3d at 1062.

fetal rights.[92] The rise of fetal rights puts the mother/patient-doctor relationship in a legal quandary. Legislators and courts place doctors in a precarious position with their patients when the law interferes with the relationship: Statutes require doctors to report their pregnant patients' behavior, placing medicine and the law into conflict.[93] Mandatory reporting laws are just one illustration of what doctors are required to report, and patients can be prosecuted based on information shared to doctors.[94] For example, blood and urine screens of pregnant women are a requirement that can be used for prosecution of the mother.[95] Prosecution of mothers increased with the rise of fetal viability and fetal rights, and is a drastic shift from past medical practice and policy.[96] Incongruously, the medical profession only recently began treating the fetus as a separate patient from the mother.

Prior to *Roe v. Wade*, medical ethics and practice placed the life of the fetus as secondary to that of the mother.[97] The law had not readily granted rights to the fetus until *Roe*.[98] Courts recognized fetal rights in narrowly defined situations when the rights were contingent upon a live birth.[99] The fetus did not receive any rights independent of the mother.[100] A decade later courts began to recognize the rights of the fetus as redress for wrongful death and criminal cases.[101] The medical profession also began to recognize the

92. Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Rights with Liberty, Privacy and Equal Protection*, 95 YALE L. REV. 599, 614 (1986).

93. *Id.*

94. For example, blood and urine screens of pregnant women are a requirement that can be used for prosecution of the mother. Kary Moss, *Substance Abuse During Pregnancy,* 13 HARD. WOMEN'S L.J. 278, 293 (1990).

95. *Id.*

96. *See generally* David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense*: Helping Women Help Themselves, 12 HASTINGS WOMEN'S L.J. 243, 249 (2001) (noting that Minnesota, South Dakota, and Wisconsin permit prosecution of mothers).

97. Roe v. Wade, 410 U.S. 113 (1973). The Supreme Court held in *Roe* that a fetus, even when viable, is not a person under the Fourteenth Amendment. *Id.* at 158. It held further that a woman's right to choose, in consultation with her physician, whether or not to terminate her pregnancy is protected by the constitutional right to privacy. *Id.* at 152–53. Although the Court found that the state has a compelling interest in the "potentiality of human life" of the fetus after it reaches viability, it concluded that this interest could not justify prohibiting an abortion even after the point of viability if the abortion is necessary to preserve the life or health of the woman. *Id.* at 162–63. *See also* Johnsen, *supra* note 92.

98. Roe, 410 U.S. at 162–63.

99. Johnsen, *supra* note 92, at 601. Johnsen noted "Yet because they contained a live birth requirement, these narrow exceptions were consistent with the prevailing view of the fetus as part of the woman." *Id.* One of these first instances of legal recognition of the fetus involved the right of inheritance and tort law began looking to the period prior to birth in order to allow a cause of action for prenatal injuries. *Id.*

100. *Id.*

101. *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (1984) ("Since at least the

fetus as a legal person and separate from the mother.

Scientific breakthroughs increased the viability of fetuses outside of the womb and created an ongoing ethical dilemma of the fetus as a patient.[102] Science moved faster than ethics, however, and no clear-cut ethical approach emerged among medical practitioners and medical ethicists. Medical ethicists wrestled with the fundamental concepts of what is a person, what is life, and does life have sanctity.[103] Medical practitioners viewed the fetus differently than the pregnant patient and began separating the care of the fetus from that of the mother.[104] For example, a 1971 obstetrics textbook noted the progress care afforded to the fetus:

> [S]ince World War II and especially in the last decade, knowledge of the fetus and environment has increased remarkably. As an important consequence the fetus has acquired status as a patient to be cared for by the physician as long as he is accustomed to caring for the mother.[105]

The revolutionary idea of treating the fetus as an independent patient grew with technological advances.[106] Another consequence was the increased care and concern for the fetus. A 1980 journal article in Obstetrics and Gynecology noted the increased concern for the care of the fetus: [T]he fetus rightfully achieved the status of second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother.[107]

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fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide. . . The rule has been accepted as the established common law in every American jurisdiction that has considered the question."). *See, e.g.,* CAL PENAL CODE § 187 (West Supp. 1986) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); ILL. ANN. STAT. Ch. 38, § 9-1.1 (Smith-Hurd Supp. 1985); IA CODE ANN. § 707.7 (West 1979); MI COMP. LAWS. ANN. § 750.322 (West 1968); MISS. CODE ANN. § 97-3-37 (1973); OKL. STAT. ANN. tit. 21, § 713 (West 1983); UTAH CODE ANN. § 76-5-201 (Supp. 1983); WASH. REV. CODE ANN. § 9A.32.060 (1977); WIS. STAT. ANN. § 940.04 (West 1982).

102. *See* Jeffrey L. Lenow, *The Fetus as Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1 (1983–1984). (identifying potential medicolegal conflicts that may arise as fetal surgery became an acceptable medical practice and surveying the legal rights of the unborn person with a particular emphasis on the role of viability in determining those rights).

103. H. Tristam Engelhardt, Jr, *What Is a Person?*, *in* Medicine and the Concept of Person 169 (Michael Goodman ed., 1988) (examining the concept of person and argues that terms like "human life" and even "human persons" are complex and heterogeneous, and finding that human life has more than one meaning with multiple meanings having implications for medicine).

104. Claire Williams, Priscilla Alderson, and Bobbie Farsides, *Conflicting Perceptions of the Fetus: Person, Patient, 'Nobody', Commodity?,* 20 NEW GENETIC & SOCIETY 225 (2001) (describing that medical practitioners and health care staff have varying perceptions of the fetus including how the pregnant woman decides how she perceives that fetus and how her ideas influence medical staff and how the practitioner influence a pregnant woman's perception of her fetus).

105. L.M. Hellman and J.M. Pritchard, WILLIAMS OBSTETRICS, 199 (14th ed. 1971).

106. *Id.*

107. J.R. Liberman, W.C. Mazor & A. Cohen, "*The Fetal Right to Live*", 53

Further, medical advances made the life of the fetus a separate and urgent priority.[108] The separation of care of the fetus from the mother evolved to the present day fetal rights and fetal legal personhood.[109] As a result, doctors and courts began to aggressively intervene on behalf of the fetus.[110]

Medical treatment and intervention for the fetus became the linchpin used against the mother.[111] Doctors and hospitals worked against the will of the mother to enforce medical treatment, citing the health and welfare of the fetus as the reason for intervention.[112] Early hearings would take place in the patient's hospital room with a judge, attorneys, and a court reporter present.[113] The court would determine that the fetus was a dependent and neglected child, and would proceed to order the mother to have a Cesarean section to save the fetus's life.[114]

States sought criminal remedies as well. Prosecutors charged women who refused Caesarean sections with murder in cases where doctors asserted the procedure necessary to save the fetus's life.[115] For instance, in 2004, Utah filed a first degree criminal homicide charge against a mother who refused a Caesarean section, resulting in the death of one of her twin fetuses.[116] The fetus became a legal person, and doctors, the state, and courts gave legal deference to the fetus.[117] Initially, fetuses were legally defined as a patient separate from the parent, or mother, and the definition evolved to recognizing the fetus and parent as separate, independent entities with separate legal rights and protected interests.[118] State intervention juxtaposes the mother against and the fetus, resulting in a caustic legal regime. Indiana went even a step further when it began to prosecute pregnant women for their behavior while pregnant and not just for failure to choose medical intervention.[119]

OBSTETRICS & GYNECOLOGY 515 (1979).

108. *Id.*

109. Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for the Harm They do to Their Fetus*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 289 (1987).

110. *Id.*

111. *Id.* at 292.

112. *Id.*

113. Watson A. Bowes & Brad Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTETRICS & GYNECOLOGY 209, 212 (1981) (reviewing the case of a mother who refused a cesarean operation to save the fetus's life and for whom the hospital administration intervened, requesting a court order to have to procedure performed against the mother's will).

114. *Id.* at 210.

115. *Id.*

116. Francie Grace, *Utah C-Section Mom Gets Probation*, CBS NEWS (Mar. 12, 2004), http://www.cbsnews.com/news/utah-c-section-mom-gets-probation/.

117. *Id.*

118. McNulty, *supra* note 109, at 280.

119. *Id.* at 291.

A. The Hippocratic Oath

In both the Purvi Patel and Bei Bei Shuai cases, the key component of prosecution was the advice or testimony elicited from doctors. Due to the impact of the doctors, both Patel and Shuai could have faced 20 years to life in prison. As previously mentioned, mandatory reporting was not implicated in either case.[120] Thus, the facts beg the question of why the doctors gave incriminating advice or testified against their own patients.

The classic Hippocratic Oath asserts "What I may see or hear in the course of treatment. . . which of no account may be spread abroad, I will keep to myself, hold such things shameful to be spoken about."[121] Author Dale Smith notes that the Hippocratic Oath serves three functions in modern medicine: 1) an obligation to voluntarily assume practice according to the ethics affirmed in the text; 2) a professional statement to the public about the ethics of the profession; and 3) the oath takers' and lay witnesses' awareness of and affirmation of the venerable tradition of social and professional responsibility.[122] The doctors in the Patel and Shuai cases fail to affirm the text in the Hippocratic Oath. Dr. McGuire's testimony gave an eyewitness account of finding the fetal remains.[123] As harrowing as the doctor's discovery was, he then proceeded to testify about whether the fetus was still alive after "birth."[124] The doctor's testimony damned Purvi. Their actions were far from upholding the oath. Further, the public testimony of Dr. McGuire did not engender the public with confidence. Potentially, even worse was Shuai's case in which physicians advised a suicidal mother to take her baby off life support, and then transformed her care into a criminal investigation: a failure of confidence as well. Ethically, an emergency appointment of a guardian would have been more appropriate, upholding the role of the doctor versus that of the state. But, the hospital became a party to the investigation. The doctors failed in the social and professional responsibility to uphold the oath.

III. INDIANA FETICIDE LAWS

In 1835, Indiana enacted its first statute criminalizing behavior that caused pregnant women to miscarry.[125] The state did not punish women in Indiana

120. *See supra* Sections I.A, I.B (discussing the implications of mandatory reporting in each case).

121. Peter Tyson, *The Hippocratic Oath Today*, PBS (Mar. 27, 2001), http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html.

122. Dale C. Smith, *The Hippocratic Oath and Modern Medicine*, 51 J. OF THE HISTORY OF MEDICINE & ALLIED SCIENCES 484 (1996).

123. Patel, 61 N.E.3d at 1045.

124. *Id.*

125. Sandra L. Smith, *Fetal Homicide: Woman or Fetus as Victim- A Survey of Current*

seeking to procure a miscarriage; instead, the State punished the service provider who induced the miscarriage.[126] The statute criminalized induced miscarriages.[127] Nearly fifty years later, Indiana lawmakers determined that pregnant women should be punished, in addition to the service provider, because of their agency in seeking miscarriages.[128] As a result, Indiana legislators added pregnant women to the punishment regime.[129] In 1881, the Indiana General Assembly not only punished pregnant women, but rewrote the original statute, adding harsher penalties to include women who had an illegally induced miscarriage or died from the miscarriage.[130] The statute, however, failed to distinguish punishment between the women procuring the miscarriages from the women dying from the miscarriages.[131] The intent to induce the miscarriage was the illegal act, not necessarily the outcome.[132] Further, the service provider was only liable if either or both the pregnant woman and fetus died.[133] Sanctions for terminating or attempting to terminate a pregnancy bordered on tyrannical. Indiana's legislative history is silent as to the circumstances that motivated the General Assembly to create such harsh punishments for service providers and criminalize the behavior of pregnant women whose actions caused miscarriages. While pregnant women were prohibited from intentionally inducing miscarriages, no law existed in Indiana until the 1970s that addressed fetal existence separate from the pregnant woman.

In 1979, the Indiana legislature enacted its first feticide statute.[134] The

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State Approaches and Recommendations for Future State Application, 41 WM. & MARY L. REV. 1845, 1853 (2000) [hereinafter, *Fetal Homicide: Woman or Fetus as Victim*].

126. *Id.*

127. *Id.*

128. *Id.*

129. IND. CODE §1924 (1881) ("Every woman who shall solicit any person any medicine, drug, or substance or ting whatever, and shall take the same, or shall submit to any operation or other means whatever, with the intent thereby to procure a miscarriage (except when a physician for the purpose of saving the life of the mother or child), shall be fined not more than five hundred dollars nor less than ten dollars, and imprisoned in the county jail not more than twelve months nor less than thirty days; and any person who, in any manner whatever, unlawfully aids or assists any such woman to a violation of this section shall be liable to the same penalty.").

130. IND. CODE §1923 (1881) ("Whoever prescribes or administers to any pregnant woman, or to any woman he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure the miscarriage of such woman; or, with like intent, uses any instrument or other means whatever, unless such miscarriage is necessary to preserve her life, —shall, if the woman miscarries or dies in the consequence thereof, be fined not more than five hundred dollars nor less than fifty dollars, and imprisoned in the State prison not more than fourteen years nor less than three years.").

131. *Id.*

132. *Id.*

133. *Id.*

134. IND. CODE § 35-42-1-6 (1979) ("A person who knowingly or intentionally

focus of the statute was to penalize third parties who caused the death of a pregnant woman's fetus,[135] and defendants prosecuted under the feticide statute face a maximum of twenty years in prison.[136] The feticide statute intended to penalize violence perpetrated against a victim that was not a human being, as defined under Indiana statute.[137] In other words, the statute penalized violence that was perpetrated against a fetus.

Additionally, a fetus's death resulting from an attack on a pregnant woman became the basis of feticide charges.[138] When a husband strangled his pregnant wife, the state prosecuted him for the deaths of his wife and the fetus she carried.[139] In the 1990s, the focus of feticide began to expand beyond pregnant women who were victims of domestic violence.[140] Random violent acts that killed the fetus also became an area of feticide prosecution.[141] In 1995, Melanie Knox, an eight-month pregnant woman suffered gunshot wounds and delivered a stillborn baby.[142] The court imposed a maximum of eight years of prison for the death of the Knox baby.[143] As a result of the verdict, Ms. Knox and her boyfriend, Kevin Elmore, lobbied to increase criminal sentencing from a Class C to a Class A felony.[144] In 1997, the Indiana legislature did not raise the penalty for feticide, but overhauled the murder statutes by overriding the governor's veto.[145]

In 1997, the Indiana legislature codified feticide in all homicide statutes.[146] The codification included a drastic provision: the murder of a pregnant woman that resulted in the intentional death of a viable fetus could serve as

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terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide, a Class C felony. This section does not apply to an abortion performed in compliance with IC 35-1-58.5.").

135. *Id.*

136. *Id.*

137. Baird v. State, 604 N.E.2d 1170, 1189 (1992).

138. *See id.* at 1175; *see also* Shane v. State, 716 N.E.2d 391, 396 (Ind. 1999) (prosecuting the defendant, under an accomplice theory, for plotting to kill his friend's pregnant girlfriend, who died, along with her fetus, of gunshot wounds).

139. *Baird*, 604 N.E.2d at 1175.

140. *See Fetal Homicide: Woman or Fetus as Victim*, *supra* note 125, at 1879–80.

141. *See id.*

142. *Id.* at 1853 (*citing* Jennifer E. Smith, *Grieving Families Seek Law Change*, INDIANAPOLIS STAR, June 28, 1995, at E1, ("reporting the case of an Indiana couple who criticized the low penalties in the state's feticide law after they had been shot and injured as they sat on their porch, killing her eight-month-old fetus")).

143. *Id.*

144. *Id.*

145. *Id.* (*citing* Editorial, *A Vote for the Unborn's Worth,* INDIANAPOLIS STAR, Jan. 24, 1998, at A8, ("reporting the governor's concern that physicians could be prosecuted for late-term abortions, even though the legislation exempted legal abortions")).

146. *Id.*

an aggravating circumstance for a death sentence or life imprisonment.[147] Additionally, voluntary and involuntary manslaughter included new provisions that penalized causing the death of a viable fetus.[148] The legislature even rewrote aggravated battery to include causing the death of a fetus, which increased the penalty to a Class B felony.[149] As evidenced by these developments, the Indiana legislature accorded great deference to the idea of the personhood of the fetus and the expansion of fetal rights.

The Indiana legislature continued to respond by bringing down an increasingly firm hand against acts of violence towards a fetus. In 2008, during a bank robbery, a bank robber shot a teller who was five months pregnant with twins and suffered a miscarriage.[150] Outrage over the deaths of the twin fetuses caused a State proposal to the legislature for removal of the viability requirement in the murder statute.[151] Rather than changing the viability requirement, Indiana instead responded by substantially increasing the penalty for feticide from a Class C felony to a Class B felony.[152] The initial intent of Indiana feticide laws was to punish violent acts against a fetus by a third party.[153] The Bei Bei Shuai and Purvi Patel cases expanded the intent of infanticide to prosecute the mother of the fetus.[154]

The prosecutors in the Patel and Shuai cases took advantage of a law that did not explicitly exclude charging pregnant women. Counsel for Bei Bei Shuai challenged her murder charge, insisting that it was never the intent of the Indiana legislature to charge pregnant women with murder.[155] The State countered that the statute need not have an explicit prohibition for pregnant women to be prosecuted for acts that harm the fetus.[156] The Indiana Court of

147. IND. CODE § 35-50-2-9(16) (2012).

148. IND. CODE § 35-42-1-3(2) (2009); IND. CODE §35-42-1-4(2)(b) (2009).

149. IND. CODE § 35-42-2-1.5(3) (2009).

150. *Shot Bank Teller Loses Twins*, RTV 6 ABC (Apr. 26, 2008, 6:05 AM), https://www.theindychannel.com/news/shot-bank-teller-loses-twins.

151. Steven Ertelet, *Indiana Prosecutor Wants Unborn Victims Law to Apply Throughout Pregnancy,* LIFENEWS, *(*Apr. 30, 2008, 9:00 AM), http://www.lifenews.com/2008/04/30/state-3182/.

152. IND. CODE § 35-42-1-6 (2009).

153. *See* Shuai, 966 N.E. 2d at 635–36 (Riley, J., dissenting) ("[I]t was never the intention of the legislature that the feticide statute should be used to criminalize prenatal conduct of a pregnant woman."); Andrew S. Murphy, *Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 857 (2014).

154. *See generally* Paltrow, *supra* note 3 (discussing the rise of fetal personhood and how it is being used as the basis of arrests, detentions and forced detentions on pregnant women); *see also supra* Sections I.A, I.B (discussing the prosecution of Bei Bei Shuai and Purvi Patel).

155. Shuai, 966 N.E.2d at 628.

156. *Id.* at 629.

Appeals agreed with the State.[157] Analyzing English common law, the court found that where no law existed, the prosecutor was free to charge pregnant women with murder and feticide.[158]

However, the court was wrong. I argue the common law does not yield to laws that do not exist.[159] Instead, where no laws exist, common law fills the gap.[160] The intent throughout the history of the born alive rule in English common law was to punish third party conduct towards pregnant women, not punishing pregnant women themselves.[161]

The Court of Appeals eventually acknowledged that it was not the legislative intent to charge pregnant women with feticide.[162] In the Patel decision, the court held that the feticide statute did not explicitly address pregnant woman, and the legislature drafted a specific abortion statute.[163] Therefore, the legislature did not intend the feticide statute to apply to women who have abortions.[164] The Court of Appeals finally put an end to overzealous prosecution of pregnant women and women have abortions.

IV. CRIMINALIZING MOTHERS AND CIVIL MIRANDA

Any mother who falls short of the idealized version of motherhood risks the ire and punishment of the society and the state. The social construction of the good and the bad mothers, according to sociologist Evelyn Nakano Glenn, stems from motherhood being the normal and expected role for women as women have the reproductive role.[165] The expectation is that women possess maternal instincts and desire to be mothers.[166] If women fall short of such desires, it is problematic.[167] Society views pregnant women who

157. *Id.*

158. *Id.* at 630.

159. Geneva Brown, *Bei Bei Shuai: Pregnancy, Murder and Mayhem in Indiana*, 17 J. GENDER, RACE & JUST. 221, 244 (2014).

160. *Id.* at 242.

161. *Id.* at 243.

162. Patel, 60 N.E. 3d at 1044.

163. *Id.* at 1059–61.

164. *Id.* at 1061.

165. Evelyn Nakano Glenn, *Social Construction of Mothering: A Thematic Overview, in* PERSPECTIVES ON GENDER 1, 3 (1994).

166. April Cherry, *Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses*, 28 J.L. & HEALTH 6, 41 (2015) (quoting ANN OAKLEY, WOMAN'S WORK: THE HOUSEWIFE, PAST AND PRESENT 186 (Random House Inc. 1974)) ("Motherhood is viewed not just as natural and instinctive, but as required - consider, for instance, the "maternal instinct." The notion that women have, or should have, a "maternal instinct" reinforces the belief that all women should be and desire to be mothers."); J. SWIGART, THE MYTH OF THE BAD MOTHER: THE EMOTIONAL REALITIES OF MOTHERING 8 (Doubleday ed. 1991).

167. SWIGART, *supra* note 166.

engage in negative behavior that affects the fetus as "bad mothers."[168] Society deems women who act contrary to female nature as deviant;[169] consequently, these women risk falling outside of the law's protection.[170]

Twenty-six years ago, scholar Lisa Ikemoto warned about the dangers of state intervention using fetal protection laws as a disguise to interfere with pregnancy and motherhood.[171] Ikemoto asserted that "fetal protection policy was the attitude, put into writing and backed by the courts, that women could be controlled, excluded, and marginalized in order to protect fetal and other interests."[172] Unfortunately, Ikemoto's foretelling came to fruition because states prioritized fetal protections over the rights of the mothers.[173] However, while many state legislatures passed infanticide laws to protect the fetus,

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168. MOLLY LADD-TAYLOR & LAURI UMANSKY, "BAD" MOTHERS: THE POLITICS OF BLAME IN THE TWENTIETH CENTURY AMERICA 3–4 (1998) (discussing the three general categories of "bad" mothers into which women have been classified over the last century); *see* Cherry, *supra* note 166, at 45 ("Pregnant women who engage in behavior that may, or is believed to, negatively affect their fetuses, often fall into all three of Ladd-Taylor and Umansky 'bad' mother classifications. They are often single, poor, and uneducated and participate in behaviors thought to produce sub-standard children. Moreover, female gender norms are heightened with regard to pregnant women. Pregnant women are expected to be all-sacrificing toward their fetuses. Not only are they are expected to give up their lives for their fetuses, they are expected, after death, to continue their sacrifice.").

169. Janice G. Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Woman*, *in* LIFE CHOICES: A HASTINGS CENTER INTRODUCTION TO BIOETHICS 302, 306 (Joseph H. Howell & William Frederick Sale eds., 2d ed. 2000) ("There is, moreover, a distinct moral language that is part of this tradition that celebrated women's altruism. It is the language of selflessness and responsibility toward others in which women's very possibilities are framed. It is the discourse of materialism, which traditionally has been the discourse of devotion and dedication in which women may turn away their own needs. [. . .] *If a woman chooses a different destiny and directs herself elsewhere, she risks placing herself outside female nature and culture*." (emphasis added)).

170. *See* Cherry, *supra* note 166, at 36 (citing Susan Marken, *Feeding the Fetus: On Interrogating the Notion of Maternal-Fetal Conflicts*, 23 FEMINIST STUD. 351 (1997)) (arguing that the development of fetal rights stems from anti-abortion rhetoric, along with technological innovation).

171. Lisa Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1281–82 (1992).

172. *Id.*

173. For a more thorough discussion, *see* Priscilla Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163 (2016); Dara E. Purvis, *The Rules of Maternity*, 104 CAL. L. REV. 1299 (2016); Marissa Kreutzfeld, *An Unduly Burdensome Reality: The Unconstitutionality of State Laws that Criminalize Self-induced Abortions in the Age of Abortion Restrictions*, 38 WOMEN'S RTS. L. REP. 55 (2016); Vanessa Soderberg, *More than Receptacles: The International Human Rights Analysis of Criminalizing Pregnancy in the United States*, 31 BERKELEY J. GENDER L. & JUST. 299 (2016); Jennifer Henricks, *What to Expect When You Are Expecting: Fetal Protection Laws that Strip Away the Constitutional Rights of Pregnant Women*, 35 B.C. J.L. & SOC. JUST. 117 (2015); Cheryl E. Amana Burris, *Reproductive Rights Under Attack: Can Fundamentals of Roe Survive?*, 8 BIOTECHNOLOGY & PHARMACEUTICAL L. REV. 1 (2015); Cherry, *supra* note 166, at 29–30.

Indiana prosecutors wrongly use infanticide laws to prosecute pregnant women.[174] Eventually, the Indiana Court of Appeals forbade the use of the law in future prosecutions where there were not third-party defendants.[175]

The Indiana Court of Appeals was the gatekeeper to protect the rights of women prosecuted with feticide.[176] While the court eventually corrected the misinterpretation of the feticide statute, both Bei Bei Shuai and Purvi Patel endured long term incarceration before their cases were modified or overturned.[177] Ensuring that the *Miranda* rights of patients such as Shuai and Patel are sufficiently protected is the best way to avoid the injustices like the two women faced.[178] Warning potential patients at the pre-investigation phase that their actions may become evidence for a law enforcement investigation gives them fair warning and protects them from unintentionally divulging potentially incriminating information. Constitutional protections are complicated when medical staff is involved in the investigation and prosecution.

The Supreme Court declared that patients who enter hospitals for treatment should not be the subject of criminal investigations or have their Fourth Amendment rights violated.[179] In *Ferguson v. Charleston*, the Charleston District Attorney trained medical staff on how to collect pregnant women's urine as part of a criminal investigation, and instructed how medical staff could maintain chain of custody once the evidence was collected.[180] The investigation targeted indigent African American women, ten of whom filed a § 1983 action against the hospital and Charleston government officials.[181] The Court held the hospital violated the patients' Fourth Amendment rights against illegal search and seizure.[182]

The hospital sought to justify its actions of conducting drug tests without the knowledge of the patients and turning over the results to law enforcement.[183] The Fourth Circuit affirmed a lower court's ruling applying the "special needs" doctrine.[184] The Fourth Circuit found that the reasons

174. *See* Murphy, *supra* note 153, at 857; *see also* discussion *supra* Sections I.A, I.B.

175. Patel, 60 N.E.3d at 1061 (holding that the feticide statute did not apply to pregnant women who had legal or illegal abortions).

176. *Id.*

177. *Id.* at 1044 (stating that Purvi Patel was charged with over 30 years of imprisonment for the death of her baby); Stafford, *supra* note 85 (noting that Bei Bei Shuai spent over 30 months in prison).

178. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (discussing the rights of individuals who have been arrested); U. S. CONST. amend. V.

179. Ferguson v. Charleston, 532 U.S. 67, 67 (2001).

180. *Id.*

181. *Id.* at 73.

182. *Id.* at 86; U.S. CONST. amend. IV.

183. Ferguson, 532 U.S. at 68.

184. *Id.*

asserted by the Charleston Hospital of "curtailing pregnancy complications and costs associated with maternal cocaine usage justified the minimal intrusion on the privacy of the patients."[185]

In reversing the Fourth Circuit decision, Justice Stevens declared that since MUSC was a state hospital, its employees were government actors and "subject to the strictures of the Fourth Amendment."[186] Justice Stevens found the action of the Charleston hospital far more intrusive than actions taken by other entities asserting "special needs" when implementing drug or urine tests.[187] The Court determined that the "special needs" asserted by the Charleston hospital did not justify the absence of a warrant or individualized suspicion.[188] More importantly, the hospital dissemination of the drug test results to third-party law enforcement, who then used it to coerce patients into drug rehabilitation, was untenable.[189] The Court likened the hospital's acts to that of having a "general interest of crime control."[190]

Neither Shuai, nor Patel's doctors maintained direct links to law enforcement akin to the medical staff in *Ferguson*; thus, the constitutional guarantees of Miranda were not triggered by either case.[191] Courts have rejected civil Miranda claims, including § 1983 claims.[192] For example, the

185. *Id.* at 75.

186. *Id.* at 76.

187. *Id.* at 78–79 ("In three of those cases, we sustained drug tests for railway employees involved in train accidents, Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989), for United States Customs Service employees seeking promotion to certain sensitive positions, *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) and for high school students participating in interscholastic sports, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). In the fourth case, we struck down such testing for candidates for designated state offices as unreasonable. *Chandler v. Miller*, 520 U.S. 305 (1997). In each of those cases, we employed a balancing test that weighed the intrusion on the individual's interest in privacy against the "special needs" that supported the program.").

188. *Id.* at 80–81.

189. *Id.*

190. *Id.* at 82.

191. *See supra* Sections I.A, I.B (discussing the factual details of the Shuai and Patel cases).

192. *See* Jennifer Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1054–57 (2010); *see also* Hannon v. Sanner, 441 F.3d 635, 638 (8th Cir. 2006) ("T]he admission of Hannon's statements in a criminal case did not cause a deprivation of any 'right' secured by the Constitution, within the meaning of 42 U.S.C. § 1983."); Jones v. Cannon, 174 F.3d 1271, 1291 (11th Cir. 1999) ("Failing to follow Miranda procedures triggers the prophylactic protection of the exclusion of evidence, but does not violate any substantive Fifth Amendment right such that a cause of action for money damages under § 1983 is created."); Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976) ("The Constitution and laws of the United States do not guarantee Bennett the right to Miranda warnings. They only guarantee him the right to be free from self-incrimination."); *see also* 42 U.S.C. § 1983 (2006); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

United States Supreme Court rejected the civil application brought by a former suspect who challenged a statement elicited by law enforcement after law enforcement failed to give her the constitutionally required Miranda warning in *Chavez v. Martinez*.[193] Jennifer Laurin proposed that courts perceive that there is less of a constitutional duty of the police regarding Miranda warnings, and that courts enforce Miranda at the adjudicatory and trial phases rather than during a suspect's interrogation.[194] The courts only allow challenges where there is the potential for conviction, rather than routine violations due to the custodial officer not advising rights.[195] The legal community will not give a remedy to Patel or Shuai cases, so the medical community must be the arbiter of its own behavior and not become law enforcement agents.

Indiana law pushed the limits of maternal criminalization to include pregnant women who were either distressed like Purvi Patel or suffering from suicidal ideation like Bei Bei Shuai. The medical profession became the unfortunate catalyst to these women being prosecuted. It is especially disturbing that the women were in physically and mentally weakened states. When seeking medical assistance, they received medical professionals acting as an extension of law enforcement. The Indiana Court of Appeals was the only mechanism that stopped local prosecutors from continuing this pattern of prosecutions.

The Patel decision detailed how the Indiana legislature did not intend illegal abortions to be considered feticide.[196] Women who attempted illegal abortions were not to be treated as murderers. Amicus briefs filed on behalf of Purvi Patel and Bei Bei Shuai argued vociferously against their prosecution.[197] Prosecuting pregnant women for feticide can be likened to prosecuting pregnant women for substance abuse since the arguments are the same, and several healthcare organizations have spoken out against prosecuting pregnant women for substance abuse.[198] The American Academy

193. Chavez v. Martinez, 538 U.S. 760, 760 (2003).

194. Laurin, *supra* note 192, at 1070.

195. *Id.*

196. Patel, 60 N.E.3d at 1044.

197. Amended Brief for National Advocates for Pregnant Women and Experts in Public Health Advocacy and Bioethics as Amici Curiae Supporting Respondents, Patel v. State of Indiana, 60 N.E.3d 1041 (Ind. App. Ct. 2016).

198. Stephen W. Patrick & Davida M. Schiff, *A Public Health Response to Opioid Use in Pregnancy*, 139 PEDIATRICS 3 (2017) ("More than 20 national organizations have since published statements against the prosecution and punishment of pregnant women who use illicit substances: these include the American Medical Association, the AAFP, the ACOG, the American Public Health Association, the American Nurses Association, the American Psychiatric Association, the National Perinatal Association, the American Society of Addiction Medicine, the March of Dimes, and the Association of Women's Health, Obstetric and Neonatal Nurses. Despite the strong consensus from the medical and public health

of Pediatrics supports the proposition that pregnant women should not be prosecuted for substance abuse: "[P]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health" and argued that "the public must be assured of nonpunitive access to comprehensive care that meets the needs of the substance-abusing pregnant woman and her infant."[199] Public policy and medical ethics dictate that prosecuting pregnant women does more harm than good. Thus, Indiana set a dangerous precedent with the prosecution of Bei Bei Shuai and Purvi Patel.

CONCLUSION

Indiana women who seek medical attention and have a problem pregnancy, or are mentally ill, will no longer face the threat of long-term incarceration. The Indiana Court of Appeals corrected the aberrant behavior of overly ambitious district attorneys. The legacy remains that doctors and other medical personnel, however, were willing and eager to see women like Purvi Patel and Bei Bei Shuai prosecuted to the fullest extent of the law. The danger still exists that medical personnel ignore the Hippocratic Oath for more politicized issues of abortion, feticide and the life beginning at conception.

The Indiana Court of Appeals understood the original intent of feticide legislation was not to incarcerate mothers and pregnant women. The court corrected the overzealous prosecution of Purvi and Bei Bei. The medical profession, however, has had no course correction. When doctors seek to impose their values upon their patients and additionally work in conjunction with the state, they rob patients of their constitutional rights and their autonomy. As medical ethicist Dr. Edmund Pellegrino wrote:

> Autonomy has taken on a distinctive negative connotation. Arising, as it did, as a moral claim against invasion of human rights by tyrannous government, it has come to mean a right of self-determination against those who would usurp that right. In medical ethics, it is conceived largely as a moral and legal defense against physician paternalism and against those who would impose their values - social, moral, or otherwise - on others.[200]

The shocking and violent choices of Purvi and Bei Bei had dire

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communities affirming that a punitive approach during pregnancy is ineffective and potentially harmful, there has been a recent increase in the number of states passing and considering criminal prosecution laws that selectively target pregnant women with substance use disorders.").

199. *Id.*

200. Edmund Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. OF CONTEMPORARY HEALTH LAW & POL'Y 47, 49 (1994).

consequences for them. The criminal justice system was on the verge of locking both women up for decades. Judicial intervention lessened their punishment and shut the door to future prosecutions. As radical as the concept may be, Purvi and Bei Bei needed to exercise their autonomy knowing they would suffer for their choices. Punishment should be meted out by the legal profession not from the medical staff that assisted them. A civil protection is needed.

The provision of a civil Miranda[201] warning serves as a vulnerable woman's only defense, and the Indiana medical community must craft its own version to protect pregnant women from the overzealous medical and legal actors. A civil Miranda would advise patients that whatever information they gave to the healthcare provider could be used by the healthcare provider against them or surrendered to law enforcement. The medical profession as a body has not done proper self-examination of its role in the Purvi Patel and Bei Bei Shuai cases. As Dr. Pellegrino noted, "[h]uman beings who lack or have lost the capacity for autonomous actions are nonetheless humans who retain their inherent dignity."[202] Only through critical evaluation by the medical profession and the creation of a civil Miranda can the inherent dignity of these women, who have seemingly lost the capacity for autonomous action by the prosecution of these state laws, be maintained.

201. Mathew G. Weber, *Internal Investigations, Self-Disclosure and Remediation for Healthcare Industries*, 2008 WL 5689403, at *4. Weber describes an example where the healthcare provider investigates its own employees, "counsel typically will provide advisements to employees (sometimes called "civil Miranda advisements") designed to explain that they represent the provider organization (or the authorizing committee) rather than the employee, that the employee's cooperation is expected, that the employee must tell the truth." *Id.*

202. *Id.*