A Frightening Prosecution

What is the personhood of a pregnant woman?

BY GAYLYNN BURROUGHS

If you are a pregnant woman in Indiana, attempting suicide can land you in jail for life. That was the harsh reality faced by Bei Bei Shuai after she survived an attempt to end her own life in December 2010.

Shuai, who had emigrated to the U.S. from China a decade earlier, was 33 weeks pregnant when, despondent after learning her boyfriend was married and planning to abandon her, she ingested rat poison to kill herself. Luckily, friends discovered what she had done and quickly transported her to the hospital. Doctors stabilized her, and with her consent administered medications to improve her fetus’ chance of survival. Seven days later she delivered a baby girl, Angel, but soon after, doctors discovered that Angel had suffered a cerebral hemorrhage—allegedly as a result of Coumadin, an anticoagulant found in rat poison. Angel lived only a few days before dying in her mother’s arms.

Recent data suggests that more than 1 million adults attempt suicide every year, more women than men, and one suicide occurs in the U.S. every 15 minutes. Those who attempt suicide require services and support—not stigma, shame or punishment. But the latter is what Shuai received. On March 14, 2011, Indiana charged her with murder and attempted feticide, and she has been behind bars ever since.

The prosecution is attempting to convict Shuai based on a provision of the Indiana penal code that defines murder as “knowingly or intentionally killing [a] viable fetus.” The feticide statute makes it a felony to “knowingly or intentionally termi-nat[e] a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.” The statute exempts lawful abortions.

At least 38 states have enacted some type of fetal homicide law, and 23 of those laws apply to the earliest stages of pregnancy. Pro-choice advocates have long argued that these laws undermine the right to abortion recognized by the U.S. Supreme Court in Roe v. Wade. Indeed, if the court were to reconsider Roe, it would find a different legal landscape than in the early 1970s, and that landscape would include the establishment of fetal rights that make abortion seem more like a legal abortion than a protected constitutional right.

This is no accident. Even though many of these measures carve out exceptions for legal abortion, they serve to marginalize it in the law just as rigidity as statutes requiring unnecessary, restrictive regulation of abortion clinics serve to marginalize abortion access.

The Shuai case, however, reminds us that these laws, as well as purported state “personhood amendments” that declare fetuses to be people, also threaten pregnant women, not only abortion in the abstract. And that was not the original stated intent of these laws: Supporters promoted them as a way to curb violence against pregnant women. Indiana amended its definition of murder to include “fetal homicide” in 1997 after the shooting of a pregnant woman resulted in a stillbirth.

But, as Jeanne Flavin, Ph.D., warned in Our Bodies, Our Crimes: The Policing of Women’s Reproduction in America, these laws, by granting fetal rights that are independent from pregnant women, “not only represent a back-door to abolishing abortion but also they leave open the possibility that the laws used to prosecute those who assault pregnant women may be directed against pregnant women themselves.” Shuai is the first woman in Indiana to be charged with murder or attempted murder for acts she committed against herself while pregnant. Suicide is not a crime in Indiana, though, and had Shuai not been pregnant when she ingested rat poison, she would not be in jail. Her pregnancy loss is a tragic event precipitated by terrible circumstances. But, as her attorneys have argued, it should not be a crime.

The Indiana Court of Appeals disagrees. In a 2-1 decision, the court determined Shuai’s attempt to discontinue the charges against her. In dissent, Judge Patricia Riley chided the state for charging Shuai with fetal homicide and criticized its use of the feticide statute: “If the feticide statute is interpreted as advocated by the state and applied to women’s prenatal conduct, it could have an unlimited scope and create an indefinite number of new ‘crimes.’”

Riley noted that the state could charge, and imprison, women who harmed their fetuses by using over-the-counter medications, smoking or drinking alcohol. “The feticide statute could be construed as covering a full range of a pregnant woman’s behavior.”

In other words, any act a pregnant woman commits that has an adverse impact on her fetus could result in criminal liability. And why stop there? Substance abuse during pregnancy is grounds for civil commitment in three states: Minnesota, South Dakota and Wisconsin. The scope of possible regulation is truly mind-boggling.

That is not lost on Lynn Paltrow, executive director of National Advocates for Pregnant Women (NAPW). Paltrow describes the Shuai case as part of a “fetal separatist movement” that seeks to prioritize “eggs, embryos and fetuses over the pregnant women who carry, sustain and nurture them.” Recognizing separate legal rights for the unborn, she argues, means that upon becoming pregnant, women lose their civil rights.

NAPW asserts that since 2005, there have been more than 200 arrests of women based on fetal “separa-tism” arguments. Among them is Amanda Kimbrough, an Alabama woman struggling with drug dependency, whose pre-term baby died. The state convicted Kimbrough of violating its chemical endangerment law, meant to criminalize the exposure of children to methamphetamine labs, and she was sentenced to 10 years in jail—presumably on the bizarre theory that her drug use transformed her womb into a meth lab. Alabama has, in effect, criminalized post-pregnancy outcomes for women who, unsurprisingly, are not magically cured of addiction upon becoming pregnant.

Last fall, Shuai petitioned the state Supreme Court to consider dropping the charges. Her attorney, Linda Pence, argued that letting the case go forward would set a “frightening” and far-reaching precedent that “a pregnant woman’s rights are subsumed to her fetus.” But the court refused her appeal, and Shuai will now stand trial. (The local prosecutor’s office did not respond to Mrs. Brown’s interview requests.)

Regardless of the outcome, the Shuai case reminds reproductive rights advocates of an important truth: The movement has irrevocably shifted away from one primarily about abortion rights, and maybe even away from one about “choice,” to something more fundamental. Simply put, attempts to create and enforce fetal rights are an assault on a woman’s personhood. By elevating the fetus, or embryos and eggs, these measures diminish the humanity and dignity of all women, while creating a separate legal regime for pregnant women that makes them lesser citizens.

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