

Testimony of Professor Sarah E. Burns, South Carolina Resident and  
President of the Board of Directors of  
National Advocates for Pregnant Women  
to the Medical Affairs Committee of the South Carolina Senate  
in Opposition to H.3020

September 10, 2019

Thank you for the opportunity to address this Committee.

As a South Carolina resident, I am especially grateful to be here. By the way, born, raised and educated in Oklahoma, I am happy to be back south and living in the country!

I'm Sarah Burns, President of the Board of the National Advocates for Pregnant Women (NAPW), a non-partisan not-for-profit organization dedicated to the welfare of pregnant people and their families. NAPW supports each pregnant person in effectuating their own confidential medical decisions whether they carry to term, terminate the pregnancy or suffer a pregnancy loss. By profession, I am a tenured law professor at New York University School of Law and practicing attorney admitted in DC and NY.

I'm drawing on NAPW's 20 years of work on cases in which state actors intervened in a pregnant woman's medical decision-making or punished a pregnant woman for the outcome of her pregnancy.

Our message is simple: If abortion is banned, all pregnant women—including those who do not seek or have abortions—will increasingly be criminally prosecuted because they are pregnant. They will be prosecuted not just for abortions but also for miscarriages, stillbirths and for refusing cesarean surgeries. They will also be forced into other unwanted medical interventions because banning abortion is government action that elevates the protection of fertilized eggs, embryos and/or fetuses over the well-being of the pregnant woman.

It is myth that women will not be prosecuted if you ban abortion. Women were punished for abortion before *Roe v. Wade*<sup>1</sup> and are being punished for abortion now. In the last several years, we have seen very public examples of women in Indiana (Purvi Patel), Tennessee (Anna Yocca), Idaho (Jennie McCormack), Arkansas (Ann Bynum) and Georgia (Kenlissia Jones) being arrested because they were pregnant and allegedly had abortions or were allegedly criminally responsible for their own pregnancy loss..

If abortion is banned, it will be easier to attack a woman when her pregnancy fails, which happens in a quarter of all pregnancies annually. In countries where abortion is outlawed, women who have experienced miscarriages and stillbirths are sitting in jail because their losses looked like abortions to someone—a doctor, police officer, or neighbor. (El Salvador/Mexico). The same can happen here.

Even without proposed H. 3020, women in South Carolina are being criminally and civilly prosecuted for their pregnancies and pregnancy outcomes. In the late 1990s, in the case of a woman named Cornelia Whitner,<sup>2</sup> the South Carolina Supreme Court interpreted the state’s criminal *child* neglect law to permit the prosecution of a woman for being pregnant and risking (not even actually causing) harm to a viable fetus by using cocaine. That decision and other South Carolina policies and laws—many concerning abortion, have since been used to arrest or threaten arrest of an ever expanding group of pregnant women.

In South Carolina specifically, we’ve documented that arrests have included:

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<sup>1</sup> 410 U.S. 113 (1973). Lynn Paltrow, Life after Roe NYT, Sept. 1, 2018, <https://www.nytimes.com/2018/09/01/opinion/sunday/brett-kavanaugh-roe-abortion.html#> (describing the case of Shirley Wheeler who was convicted of manslaughter for having had an abortion in Florida in 1971).

<sup>2</sup> *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) (relying on unique South Carolina case law and the court’s common law authority to create new crimes, the court interpreted the word “child” in the Children’s Code to include viable fetuses, upheld conviction for child neglect of a woman who gave birth to a healthy newborn who tested positive for cocaine).

- Women who are pregnant and use any amount of *any* controlled substance including marijuana;<sup>3</sup>
- Women who are pregnant and drink alcohol;<sup>4</sup>
- Women who are pregnant and experience stillbirths;<sup>5</sup>
- Women who are pregnant and attempt suicide;<sup>6</sup>
- Women who are pregnant and disagree with their doctors' recommendations.<sup>7</sup>

We have received calls from social workers and midwives reporting that women in South Carolina who have not consented to cesarean surgery have been threatened with arrest. Laws still on the books restricting abortion in other states (NY, DC, IL) have been specifically cited and used to justify forcing pregnant women to undergo major surgery. The same is likely to happen here. In one case, such surgery resulted in the death of the woman and her baby.<sup>8</sup> In Utah and Florida, pregnant women were arrested for *delaying* cesarean surgery because they needed to look after their born children. (Melissa Rowland; Samantha Burton)

In 2013, authors Lynn Paltrow and Jeanne Flavin published a study<sup>9</sup> of pregnancy prosecutions in the peer-reviewed [\*Journal of Health Politics, Policy, and Law\*](#). Four hundred and thirteen (413) specific cases in 44 states between 1973 and

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<sup>3</sup> *State v. Russell*, No. 98GS07-1164 (S.C. Ct. Gen. Sess. Beaufort County Oct. 5, 1998); *Woman Arrested After Newborn Tests Positive for Pot*, CHARLOTTE OBSERVER (N.C.), May 30, 1998, at 2Y.

<sup>4</sup> *State v. Reid*, No. F-674-754 (S.C. Ct. Gen. Sess. Lancaster County Dec. 23, 2009); *Baby Born Intoxicated; Mother Charged*, POST & COURIER (Charleston, S.C.), Sept. 25, 1998.

<sup>5</sup> *McKnight v. State*, 661 S.E.2d 354 (2008).

<sup>6</sup> [https://www.upi.com/Top\\_News/2009/02/20/Woman-charged-with-babys-death/38361235182064/?ur3=1](https://www.upi.com/Top_News/2009/02/20/Woman-charged-with-babys-death/38361235182064/?ur3=1) (The pregnant woman eventually pled guilty to manslaughter to get out of jail – since she could not raise bail and may not even have been eligible for it).

<sup>7</sup> Twenty percent of the 413 cases analyzed in the study discussed below included allegations of failure to follow medical advice as part of the charging document. Lynn Paltrow & Jeanne Flavin, *Arrests of and forced interventions on pregnant women in the United States (1973-2005): The Implications for Women's Legal Status and Public Health*, 38 *Journal of Health Politics, Policy and Law* 299, 316 (April 2013), <https://doi.org/10.1215/03616878-1966324> (hereinafter Paltrow & Flavin 2013).

<sup>8</sup> *In re A.C.*, 573 A.2d 1235 (D.C. Ct. App. 1990).

<sup>9</sup> Paltrow & Flavin 2013.

2005<sup>10</sup> (a thirty-two year period) revealed a disturbing range of punitive state actions directed at pregnant women, including arrests and incarceration of women because they ended a pregnancy or expressed an intention to end a pregnancy; of women who carried their pregnancies to term and gave birth to healthy babies; of women who suffered unintentional pregnancy losses, both early and late in their pregnancies; and of women who could not guarantee a healthy birth outcome. The study revealed forced medical interventions such as blood transfusions, vaginal exams, and cesarean surgery on pregnant women. Pregnancy was a necessary element in all 413 cases.<sup>11</sup> “[I]n two out of three cases no adverse pregnancy outcome was reported.”<sup>12</sup> Moreover,

in cases where a harm was alleged (e.g., a stillbirth), [Paltrow & Flavin] found numerous instances in which cases proceeded without any evidence, much less scientific evidence, establishing a causal link between the harm and the pregnant woman’s alleged action or inaction. In other cases [Paltrow & Flavin] found that courts failed to act as judicial gatekeepers to ensure, as they are required to do, that medical and scientific claims are in fact supported by expert testimony based on valid and reliable scientific evidence.<sup>13</sup>

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<sup>10</sup> This study only referenced cases described in publically available desk searchable sources or known to the authors through word of mouth from persons involved. Accordingly, the cases numbering 413 were likely a severe undercount for the 1973-2005 time period. Moreover the article was not published until 2013 and the report did not include the additional 250 publically mentioned cases the authors had found from 2005 to 2013.

[http://advocatesforpregnantwomen.org/main/publications/articles\\_and\\_reports/executive\\_summary\\_paltrow\\_flavin\\_jhpll\\_article.php](http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/executive_summary_paltrow_flavin_jhpll_article.php) (Overview). Paltrow & Flavin (2013), at 301-05 (fully describing search methodology and limitations).

<sup>11</sup> *Id.* (passim).

<sup>12</sup> *Id.* at 318.

<sup>13</sup> *Id.*

Notably, South Carolina was the state with the most arrests of pregnant women.<sup>14</sup> African American women were represented disproportionately among South Carolina cases.<sup>15</sup> In the Paltrow & Flavin study generally, “[t]he vast majority of women ( $n = 295$ ) were charged with felonies, which are offenses punishable by more than one year of incarceration. African American women were significantly more likely than white women to be charged with felonies .... Eighty-five percent of African American women were charged with felonies, compared with 71percent of white women.”<sup>16</sup>

In 2014–2015, a systematic freedom of information act (FOIA) search conducted by two news organizations in Alabama documented at least 479 new and expecting mothers who had been criminally prosecuted across Alabama since 2006 (a nine year period).<sup>17</sup> Because the search obtained information on file with the government that may never have entered the popular media, the FOIA search identified some, albeit not all, cases involving pregnant women that could not be found in a desk searchable method from public sources. Once having identified the cases, the journalists were able to track down some of the women prosecuted and to obtain significantly more details about what transpired in the prosecution. As a result, that study unearthed many telling details.

One such detail concerned breaches of pregnant women’s medical privacy. One pregnant woman, Casey Shehi, who took two halves of a single valium during the stressful last weeks of her pregnancy lost custody of her child, and spent over a year and thousands of dollars fighting prosecution for a felony charge upon testing

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<sup>14</sup> *Id.* at 311 (South Carolina had 93 arrests).

<sup>15</sup> *Id.* at 311-12 (74% of arrests in South Carolina were arrests of African American pregnant women, while African Americans represent only 30% of the South Carolina population).

<sup>16</sup> *Id.* at 322.

<sup>17</sup> Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, Sept. 23, 2015, <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>.

positive for that one valium after giving birth. Nothing about the birth or Shehi's newborn indicated any health detriments. Shehi struggled for several years to regain custody of her child and stop the prosecution.<sup>18</sup> When she became pregnant in 2014, Katie Darovitz, who suffered from severe epilepsy, stopped her seizure prescription medications to avoid the related risks of miscarriage and birth defects, but needing some seizure control turned to marijuana (which carried no risk to the pregnancy) to control her seizures. Hospital staffers used her confidential medical information from the birth to report her positive marijuana drug test to law enforcement. Even though her son was perfectly healthy, she was arrested, detained and charged with a Class C felony—punishable by up to 10 years in prison.<sup>19</sup> Only after a very public campaign about her case did Darovitz successfully get the charges dropped. The cost in stress, family disruption and resources was quite high.<sup>20</sup>

Why am I taking the precious time of a South Carolina Senate Committee to tell you about Alabama cases? The depth of the research unassailably confirmed what appeared to be happening in South Carolina and nationwide observed in the 2013 Paltrow & Flavin study.<sup>21</sup> Nothing other than tests obtained as part of a confidential medical treatment could explain prosecutions such as Shehi's and Darovitz's, or for that matter many of the 413 in the Paltrow & Flavin study. In short, pregnancy prosecutions are frequently the result of hospital staff reporting confidential medical information, directly or indirectly, to state law enforcement,

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Nina Martin, *Alabama Mom's Charges Are Dropped, But Only After an Arduous Battle*, June 2, 2016, <https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-arduous-battle>.

<sup>21</sup> Paltrow & Flavin 2013, at 326-31.

including drug tests that were not consented to by the pregnant patient.<sup>22</sup> This was demonstrated to be true of cases particularly here in South Carolina.<sup>23</sup>

These privacy violation practices persist despite our supposed constitutional protection from unreasonable search and seizure and our legal system's bedrock promise of medical confidentiality. Pregnant women do not have those rights if fetal protection takes precedence, as when the fertilized egg, embryo or fetus is defined as a "child" presumably entitled to separate legal rights.

Further, the privacy violations persist despite the formal positions taken by virtually all major pregnancy-focused medical societies<sup>24</sup> that coercive state interventions against pregnant women harm reproductive health care and drive women away from prenatal care, which is the most important factor in healthy birth outcome.

The public is increasingly aware that pregnancy can mean not only all the health risks for which pregnancy is known but also criminal prosecution. Women

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<sup>22</sup> How Some Alabama Hospitals Quietly Drug Test New Mothers — Without Their Consent, Sept. 30, 2015, <https://www.propublica.org/article/how-some-alabama-hospitals-drug-test-new-mothers-without-their-consent>.

<sup>23</sup> *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)(finding Medical University of South Carolina's policy regarding involuntary drug testing of pregnant women to violated the Fourth Amendment).

<sup>24</sup> *Ferguson*, 532 U.S. at 85 n.23 (noting the "near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health"); *see, e.g.*, American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion 321, Maternal Decision Making, Ethics, and the Law (Nov. 2005); American Psychiatric Association, Position Statement, Care of Pregnant and Newly Delivered Women Addicts, APA Document Reference No. 200101 (March 2001); Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy, 264 JAMA 2663, 267 (1990); American Public Health Association, Policy Statement No. 9020, Illicit Drug Use b200101 (March 2001); Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy, 264 JAMA 2663, 267 (1990); American Public Health Association, Policy Statement No. 9020, Illicit Drug Use by Pregnant Women, 8 Am. J. Pub. Health 240 (1990).

with wanted pregnancies already consider and seek abortions because pregnancy is being prosecuted.<sup>25</sup>

The 2013 Paltrow & Flavin study included two additional observations worthy of your attention:

- Medical misinformation and ignorance about science and evidence-based research, particularly regarding drug use and pregnant women, played a major role in fueling the arrests, detentions, and forced interventions of pregnant women<sup>26</sup>;
- Prosecutions failed to present and judicial process failed to demand competent evidence in support of claims about causation of fetal harm by alleged substance use.<sup>27</sup>

The absence of competent causal evidence from the government, that in theory bears the burden of proof beyond reasonable doubt, rarely hindered successful prosecution.

An example from South Carolina vividly demonstrates the challenges the pregnant defendant faces. The example is described in a prominent decision by the Supreme Court of South Carolina granting post-conviction relief (PCR) to Regina McKnight.<sup>28</sup> The government had charged McKnight with homicide by child abuse after she had suffered a stillbirth of a late term baby girl in 1999. The government basically said cocaine caused the stillbirth.

A first trial in January 2001 ended in mistrial after the defense presented competent expert evidence, as the Supreme Court of South Carolina described, “of

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<sup>25</sup> Paltrow & Flavin, at 308 (Martina Greywind terminated a pregnancy because of prosecution). For a brief recounting of the Wisconsin Beltran case, including her hearing in which she asked whether the forced treatment would go away if she had an abortion, see The Case of Alicia Beltran, <https://www.youtube.com/watch?reload=9&v=X95W7p93Phc>.

<sup>26</sup> [http://advocatesforpregnantwomen.org/main/publications/articles\\_and\\_reports/executive\\_summary\\_paltrow\\_flavin\\_jhppl\\_article.php](http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/executive_summary_paltrow_flavin_jhppl_article.php) (Overview).

<sup>27</sup> Paltrow & Flavin 2013, at 318.

<sup>28</sup> *McKnight v. State*, 661 S.E.2d 354 (2008). Paltrow & Flavin, at 306.

recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with”<sup>29</sup> poverty. At the May 2001 retrial, defense counsel failed to present that expert testimony. South Carolina’s highest court concluded that failure represented ineffective assistance of counsel material to the conviction outcome and overturned McKnight’s conviction. That relief came 9 years after the tragic stillbirth and 7 years after McKnight’s conviction.<sup>30</sup>

McKnight’s case is a rare one because she initially obtained effective assistance in the form of a hardworking defense counsel supported by expert testimony contradicting commonly held, but unfounded, views that substance use, when present, is the necessary cause of negative pregnancy outcomes. Most defendants have no access to such experts or lawyers and ultimately plead guilty for lack of options. In other words, overcriminalization and mass incarceration have reached pregnant women—disenfranchisement in the guise of fetal protection.

I could provide examples where government officials purporting to protect a fetus intervened in a pregnant woman’s medical care and, as a result, put mother-to-be and unborn child at substantially greater risk than any circumstance used to justify the intrusion. So much more could be said<sup>31</sup> but your time is short.

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<sup>29</sup> *Id. at n. 2.*

<sup>30</sup> Facing the threat of retrial, McKnight pled guilty to manslaughter and was released from prison having served 8 years of her original sentence. Paltrow & Flavin 2013, at 306.

<sup>31</sup> See, for example, NAPW’s website, [www.advocatesforpregnantwomen.org](http://www.advocatesforpregnantwomen.org), and A Woman's Rights, December 28, 2018, <https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html> (eight part series of articles on the following topics regarding state action against pregnant and birthing women: “[When Prosecutors Jail a Mother for a Miscarriage](#),” “[The Feticide Playbook, Explained](#),” “[The Cost of Complacency About Roe](#),” “[Slandering the Unborn](#),” “[The Mothers Society Condemns](#),” [Can a Corpse Give Birth?](#) ; “[How My Stillbirth Became a Crime](#),” “[The Future of Personhood Nation](#).”

## Conclusion

Creating or perpetuating a legal regime that bans pregnancy termination or punishes pregnancy outcomes deeply disrespects the profound complexity of pregnancy as a life-creating process and disrespects the people who risk their lives and health to go through that process.

We urge you to reject H. 3020. State intervention in reproduction and reproductive health care should be limited to support for and protection of confidential, competent medical care rendered in a manner that respects and protects the private decision-making of the pregnant patient.