

# MISSISSIPPI INITIATIVE 26: PERSONHOOD AND THE CRIMINALIZATION OF INTENTIONAL AND UNINTENTIONAL ACTS BY PREGNANT WOMEN

*Valena Elizabeth Beety\**

The Mississippi Constitution protects the rights of life and liberty for all citizens.<sup>1</sup> If citizenship begins at the time of fertilization, then a tension develops between the unborn child's right to life and the mother's right to liberty. The question for the courts will be whether all citizens have equal rights, and how to balance these perhaps divergent and conflicting rights.

The intent of Initiative 26 is to criminalize abortion in the State of Mississippi by defining life—and rights of citizenship—as beginning at fertilization. Other possible outcomes include criminal charges against pregnant women accused of harming fetuses and increases in the prison population from newly incarcerated women. Such a trend is already observable in Alabama.<sup>2</sup> There the state prosecutes pregnant women who test

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\* Adjunct Professor, University of Mississippi School of Law; Staff Attorney, Mississippi Innocence Project. I would like to thank Allison Korn for her helpful assistance and discussion on this piece. I would also like to thank Fred Vars, Debbie Bell, and Mike Hoffheimer for their insightful comments. Finally, many thanks to Brittany Bartley of the *Mississippi Law Journal* for organizing the Mississippi Personhood and Initiative 26 Symposium.

<sup>1</sup> MISS. CONST. art. III, § 14.

<sup>2</sup> See Map of Arrests of Pregnant Women or New Mothers for Chemical Endangerment, Alabama Women's Resource Network and National Advocates for Pregnant Women, [http://www.awrn.org/Preg\\_NewMothers.html](http://www.awrn.org/Preg_NewMothers.html) (see "Alabama-Specific Policy and Research Materials" subheading; then select "Map of Arrests of Pregnant Women and New Mothers for Chemical Endangerment" hyperlink).

positive for drugs while at the hospital, even if they are giving birth to apparently healthy newborns.<sup>3</sup>

Initiative 26, however, will not grant the state permission to pursue such prosecutions. In Mississippi, the state currently does not have the authority to prosecute a pregnant woman for actions, intentional or unintentional, that are harmful to her unborn child. If Initiative 26 passes, the state *still* will not have the direct authority to criminally prosecute a mother for harm to the fetus, because the initiative only changes the definition of *person* within the limited scope of the Mississippi Bill of Rights.<sup>4</sup> The definition of *person* for all other statutes, including statutes defining crimes, will not be altered.<sup>5</sup>

Notably, this lack of authority for criminal prosecutions may be of little significance. The State of Mississippi is currently prosecuting pregnant women for unintentional, harmful acts toward a fetus, with or without any statutory basis. Already, the courts are challenged with determining whether the state may prosecute pregnant women on behalf of the unborn child. Initiative 26 only heightens the possible statutory confusion. Ultimately, politics may influence the end result more than a strict interpretation of the law. In the cautionary words of National Advocates for Pregnant Women on the potential impact of Initiative 26: “Never before have rights been given to a new class of people while taking away the rights of others.”<sup>6</sup> If the rules of statutory interpretation are carelessly disregarded, that day may indeed come.

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<sup>3</sup> See Matt Elofson, *Chemical Endangerment Charge Questioned*, DOTHAN EAGLE (Oct. 23, 2010), <http://www2.dothaneagle.com/news/2010/oct/23/chemical-endangerment-charge-questioned-ar-1002465/>.

<sup>4</sup> See Christopher R. Green, *A Textual Analysis of the Possible Impact of Measure 26 on the Mississippi Bill of Rights*, 81 MISS. L.J. SUPRA 39 (2011); Frederick E. Vars, *Probate Will Feel a Ripple*, 81 MISS. L.J. SUPRA 77 (2011).

<sup>5</sup> MISS. CODE ANN. § 1-3-39 (2005) (defining the term “person” when used in any statute); MISS. CODE ANN. § 97-3-1 to -117 (2006 & Supp. 2011) (“Crimes Against the Person”).

<sup>6</sup> Allison Korn, Staff Attorney, Nat’l Advocates for Pregnant Women, Presentation to the University of Mississippi School of Law Criminal Justice and Criminal Studies Class (Sept. 12, 2011), <http://law.olemiss.edu/media.html#podcasts>.

## I. FETICIDE STATUTES AND THE CRIMINALIZATION OF ABORTION

Feticide statutes seek to protect the fetus from harm when the pregnant woman does not consent.<sup>7</sup> Therefore, Mississippi's feticide statute<sup>8</sup> has not violated the right to privacy for an abortion because the woman consents to the action. Feticide statutes work on the understanding that a fetus, as an unborn child, does not have equal rights of citizenship. Thus, the state bestows additional protective rights to the fetus that are not inherent.<sup>9</sup> If the fetus is a citizen under law with equal rights of citizenship, then feticide statutes may be unnecessary, with courts then interpreting other statutes to apply equally to the unborn child as to living humans. This shift could eliminate any statutory or historic protection for the mother from criminal prosecution.

Historically, under the common law, abortion was not a crime because there had not yet been a live birth.<sup>10</sup> The development of criminal abortion statutes established certain limited rights of the fetus without condemning the pregnant woman or holding her criminally liable as the offender or as an accomplice.<sup>11</sup> Mississippi will statutorily re-criminalize abortion if *Roe v. Wade* is overturned.<sup>12</sup> Yet just as in other states with similar statutes, the

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<sup>7</sup> See, e.g., MISS. CODE ANN. § 41-41-73 (2009) (criminalizing actions by a physician to perform a partial-birth abortion, but providing that women seeking and obtaining such abortions may not be prosecuted); see also Lori K. Mans, Note, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights?*, 15 U. FLA. J.L. & PUB. POL'Y 295, 301 (2004); Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 462 (1998).

<sup>8</sup> MISS. CODE ANN. § 97-3-37 (2006 & Supp. 2011). This statute specifically provides that an "unborn child" can be the victim of assault, capital murder, and certain types of manslaughter, including depraved heart murder. *Id.*

<sup>9</sup> See JEAN REITH SCHROEDEL, *IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES* 43-50 (2000) (noting the point of viability at which the fetus is protected is generally between twenty-four and twenty-six weeks).

<sup>10</sup> *Roe v. Wade*, 410 U.S. 113, 161-62 (1973) (noting U.S. law had only accorded legal rights to unborn children in cases of inheritance and tort law, and then only when the pregnancy resulted in a live birth); EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 50 (William S. Hein Co. 1986) (1669).

<sup>11</sup> See, e.g., *Hillman v. State*, 503 S.E.2d 610, 612-13 (Ga. Ct. App. 1998) (noting the history of Georgia's prohibition against criminal abortion and the ostensible immunity granted to the pregnant woman by both courts and legislatures).

<sup>12</sup> MISS. CODE ANN. § 41-41-45(4) (2009) ("Any person, except the pregnant woman, who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape, upon

person who conducts the abortion will be criminally responsible for it, rather than the pregnant woman.<sup>13</sup> Although the feticide law in Mississippi charges capital murder or manslaughter for intentional harm to a fetus,<sup>14</sup> this law has not historically been used against the mother herself. However, while the current applicable terminology for terminating a pregnancy is abortion, if a fetus becomes a citizen, this intentional harm by the mother resulting in loss of the right to life could legally become murder. Although the “deliberate design to effect the death of an unborn child” is already recognized as murder under the feticide statute,<sup>15</sup> if the unborn child gains additional rights and standing as a citizen, the state may begin prosecuting not simply third parties, but mothers themselves. Furthermore, unintentional harm by the mother resulting in the death of a fetus, most commonly understood as a miscarriage, may become depraved heart murder.

## II. UNINTENTIONAL HARM TO THE FETUS: DEPRAVED HEART MURDER?

Although changing the definition of person in the Bill of Rights would not change the statutes governing criminal law, women are already questionably prosecuted in Mississippi for unintentional harm to a fetus resulting in a stillbirth. In *Gibbs v. State*, Ms. Gibbs was arrested and charged with depraved heart murder<sup>16</sup> when she suffered a stillbirth and also tested positive for

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conviction, shall be punished by imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than ten (10) years.”).

<sup>13</sup> This remains true no matter whether the woman acts alone or assists with the abortion. See, e.g., *Hillman*, 503 S.E.2d 610 (holding state could not prosecute a teenage woman who shot herself in the abdomen and caused the death of her fetus late in her pregnancy, pointing to common law doctrine against criminal liability for a woman who causes injury or death to a fetus); see also *State v. Ashley*, 701 So. 2d 338 (Fla. 1997).

<sup>14</sup> MISS. CODE ANN. § 97-3-37 (2006 & Supp. 2011); see also MISS. CODE ANN. § 97-3-19(1)(d) (2006) (covering “deliberate design to effect the death of an unborn child”). Previously, the only subsection of § 97-3-19(1) that applied to the “death of an unborn child” required a “deliberate design.” MISS. CODE ANN. § 97-3-19(1) (2006).

<sup>15</sup> MISS. CODE ANN. § 97-3-37 (2006 & Supp. 2011).

<sup>16</sup> MISS. CODE ANN. § 97-3-19(1)(b) (2006).

illegal substances.<sup>17</sup> The state alleged her drug use recklessly put the fetus in danger and caused the stillbirth.<sup>18</sup>

Depraved heart murder applies to behavior “evincing a depraved heart” but without any intent or “premeditated design” to cause the death of another.<sup>19</sup> At the time of Gibbs’ indictment and oral arguments as to the validity of the charges, unintentional harm to a fetus was not depraved heart murder.<sup>20</sup> In July 2011, the Mississippi State Legislature passed and enacted Senate Bill 2615,<sup>21</sup> which amended the feticide statute to include depraved heart murder.<sup>22</sup> This amendment may provide statutory justification for prosecuting a third party for involuntary or reckless harm to an unborn child, It does not, however, explicitly allow for the mother to be prosecuted. The state continues to prosecute Ms. Gibbs for depraved heart murder of her unborn child, as the Mississippi Supreme Court has declined to rule on Gibbs’ interlocutory appeal that challenged the indictment as statutorily unsupportable.<sup>23</sup>

The legal reality that Initiative 26 does not change the criminal code, does not convert abortion to murder, and does not legally re-define miscarriage as grounds to prosecute a mother for

<sup>17</sup> Order Dismissing Appeal, *Gibbs v. State*, No. 2010-IA-0819-SCT (Miss. Oct. 27, 2011) (en banc) (Serial: 172566), *available at* [http://courts.ms.gov/Images/Orders/700\\_61759.pdf](http://courts.ms.gov/Images/Orders/700_61759.pdf) (order dismissing interlocutory appeal as improvident).

<sup>18</sup> The indictment, issued February 4, 2007, stated that Ms. Gibbs “kill[ed] her unborn child, a human being, while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, by using cocaine while pregnant with her unborn child . . . in violation of MCA s. 97-3-19 . . .” Record Excerpts, *Gibbs v. State*, No. 2010-IA-0819-SCT (Miss. Nov. 12, 2010); *see also* Order Dismissing Appeal at 4-5, *Gibbs v. State*, No. 2010-IA-0819-SCT (Miss. Oct. 27, 2011) (en banc) (King, J., objecting) (Serial: 172566), *available at* [http://courts.ms.gov/Images/Orders/700\\_61759.pdf](http://courts.ms.gov/Images/Orders/700_61759.pdf). Sixteen at the time of her stillbirth, Ms. Gibbs faces a mandatory life sentence if convicted.

<sup>19</sup> MISS. CODE ANN. § 97-3-19(1)(b) (2006).

<sup>20</sup> MISS. CODE ANN. § 97-3-37 (2006).

<sup>21</sup> 2011 Miss. Laws ch. 307 (codified as MISS. CODE ANN. § 97-3-37 (Supp. 2011)).

<sup>22</sup> Specifically, the amendment declared feticide to also be murder, rather than strictly capital murder or manslaughter. Murder, as statutorily delineated in MISS. CODE ANN. § 97-3-19, includes depraved heart murder. MISS. CODE ANN. § 97-3-19(1)(b) (2006).

<sup>23</sup> After the Court granted leave to file the interlocutory appeal, and then heard oral arguments, the Supreme Court decided 498 days later that the appeal had been improvidently granted. Order Dismissing Appeal, *Gibbs v. State*, No. 2010-IA-0819-SCT (Miss. Oct. 27, 2011) (en banc) (Serial: 172566), *available at* [http://courts.ms.gov/Images/Orders/700\\_61759.pdf](http://courts.ms.gov/Images/Orders/700_61759.pdf).

depraved heart murder, is cold comfort. If passed, Initiative 26 will provide support for a popular interpretation of miscarriage or stillbirth as murder, with the mother criminally at fault. Although the title of the feticide statute explicitly covers “[i]njury to pregnant woman resulting in miscarriage or stillbirth,”<sup>24</sup> as noted earlier, the feticide statute may become irrelevant if a fetus is a citizen. The impartial terms of miscarriage and stillbirth, along with criminalizing only the acts of a third party who injures the pregnant woman, may no longer be applicable for that loss of life under a popular, albeit statutorily questionable, interpretation.

### III. CONSEQUENCES OF CRIMINAL CHARGES ON PREGNANT WOMEN

The murder of a citizen leads to understandable consequences, principally: investigation of the harm, inquiry into the facts, and criminal charges against the perpetrator. If the personhood amendment is enacted, the pregnant woman may come under intense scrutiny as to whether she intentionally acted to cause a miscarriage or stillbirth. Even without intent, she may be held criminally liable for recklessly causing harm to the fetus-citizen. In states that neither constitutionally nor statutorily recognize a fetus as a citizen, there are cases of pregnant women facing charges of harming the fetus.<sup>25</sup> This evidences heightened surveillance in general, and criminal investigation in particular, of acts that may harm an unborn child. A woman could be criminally indicted for risky behavior like smoking, drinking, using drugs, using legal medications, driving without a seatbelt, or disobeying traffic laws, if these are interpreted as reckless endangerment of

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<sup>24</sup> MISS. CODE ANN. § 97-3-37 (2006). The entire title is “[i]njury to pregnant woman resulting in miscarriage or stillbirth; ‘human being’ defined; crimes; exceptions.”

<sup>25</sup> See, e.g., Amie Newman, *Iowa “Feticide” Law Could Be Used to Target Mothers*, HUFFINGTON POST (Feb. 16, 2010, 11:48 AM), [http://www.huffingtonpost.com/amie-newman/iowa-feticide-law-could-b\\_b\\_463153.html](http://www.huffingtonpost.com/amie-newman/iowa-feticide-law-could-b_b_463153.html) (discussing pregnant mother of two who fell down the stairs, went to the hospital to check on the health of her unborn child where a nurse called the police; the mother spent two nights in jail facing possible charges of attempted fetal homicide before being released); see also Steve Lopez, *Grief Was Just the Beginning*, L.A. TIMES, Mar. 11, 2009, at A2, available at <http://articles.latimes.com/2009/mar/11/local/me-lopez11> (woman who suffered a miscarriage and called mortuary to have a burial had home invaded by police officers searching for evidence of feticide).

another life.<sup>26</sup> At an extreme, these prohibitions could include the failure to act, such as failing to have adequate prenatal medical care<sup>27</sup> or failing to submit to bed rest.<sup>28</sup>

Recognizing harm to the fetus by the mother as a criminal offense could have an immediate impact in Mississippi. For example, fourteen percent of women in Mississippi report smoking cigarettes in the third trimester of pregnancy,<sup>29</sup> an act that is a known risk factor for a developing fetus.<sup>30</sup> Even if unintentionally harming her unborn child, a mother could be charged with depraved heart murder if she smokes and has a miscarriage or stillbirth, because that unborn child is now a citizen. The same could occur for a range of habits, conditions, actions, or inactions that might cause harm to the unborn child, thus criminalizing the behavior of mothers. In most situations, there is no medically accurate way to determine whether a particular behavior caused a miscarriage or stillbirth.<sup>31</sup> However, when the Maryland Supreme Court determined whether a pregnant woman who ingested cocaine could be convicted of creating a substantial risk of death or physical injury to another person, it noted that “criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.”<sup>32</sup>

With no one at fault, almost a quarter of all pregnancies naturally end in miscarriage or stillbirth.<sup>33</sup> Yet it could be the

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<sup>26</sup> Newman, *supra* note 25; *see also* Hillman v. State, 503 S.E.2d 610, 613 (Ga. Ct. App. 1998).

<sup>27</sup> MISS. STATE DEP’T OF HEALTH, 2010 MISSISSIPPI INFANT MORTALITY REPORT 8 (2010), *available at* [http://msdh.ms.gov/msdhsite/\\_static/resources/4129.pdf](http://msdh.ms.gov/msdhsite/_static/resources/4129.pdf) (noting mothers who received inadequate prenatal care (defined as prenatal care that “began after the 4th month or less than 50% of recommended prenatal visits received”) had the highest infant mortality rate in Mississippi).

<sup>28</sup> *See Hillman*, 503 S.E.2d at 613; *see also* Burton v. State, 49 So. 3d 263, 264-65 (Fla. Dist. Ct. App. 2010) (stating state attorney obtained a court order to force a pregnant woman to stay in the hospital and submit to a cesarean section, when she refused bedrest because of care concerns for her children at home).

<sup>29</sup> MISS. STATE DEP’T OF HEALTH, MISSISSIPPI PRAMS SURVEILLANCE REPORT 47 (2006), *available at* [http://msdh.ms.gov/msdhsite/\\_static/resources/3145.pdf](http://msdh.ms.gov/msdhsite/_static/resources/3145.pdf).

<sup>30</sup> *Tobacco Use and Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION <http://www.cdc.gov/reproductivehealth/tobaccousepregnancy> (last updated Oct. 19, 2011).

<sup>31</sup> *Miscarriage*, AM. PREGNANCY ASS’N, (June 2007), <http://americanpregnancy.org/pregnancycomplications/miscarriage.html>.

<sup>32</sup> Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006).

<sup>33</sup> *See* AM. PREGNANCY ASS’N, *supra* note 31.

criminal justice system that determines whether this is a crime or a tragic occurrence of nature. If a fetus becomes a Mississippi citizen, even within the limited scope of the Bill of Rights, the courts will have to determine whether the state may continue the prosecutions it has already begun. The courts will be called upon to strike the appropriate balance between the liberty of the mother and the life of the unborn.