# WHEN PRENATAL CARE BECOMES A CRIME

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*For decades, pregnant women have increasingly faced criminalization for their actions and conduct during pregnancy, with Alabama emerging as a focal point due to its aggressive use of section 26-15-3.2: Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed. Originally intended to protect children from the dangers of methamphetamine labs, this law has been reinterpreted to prosecute pregnant women who test positive for controlled substances. Central to these prosecutions are positive drug tests obtained from prenatal health records, causing many women to avoid prenatal care for fear of legal consequences.*

*This Note examines the evidentiary challenges of admitting such drug tests in court, focusing on their probative versus prejudicial value, and argues that the current application of this statute undermines public health goals. To address these concerns, the Note proposes the adoption of a new evidentiary rule in Alabama, modeled after Alabama Rule of Evidence 412, to mitigate the harmful policy effects of the statute's broad use. This proposed rule seeks to strike a balance between protecting the rights of defendants and ensuring fair judicial outcomes, while also promoting broader access to prenatal healthcare.*



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## INTRODUCTION

Quitney Armstead, a mother of two and a veteran of the Iraq war, had battled addiction for almost a decade.[1] After she became pregnant for the third time, however, she promised herself she would stay clean. Armstead stayed true to her promise and delivered her healthy daughter in 2019.[2] Unbeknownst to Armstead, whose drug tests came back negative, the hospital in Decatur, Alabama sent a sample of her baby's meconium (the newborn's first bowel movement) for further testing.[3] Unlike Armstead's initial tests, traces of substances used months earlier can appear in the meconium, as it stays in the fetus during the second and third trimesters of the pregnancy.[4] That is exactly what happened. The test detected traces of methamphetamine, to which Armstead admitted using before she knew she was pregnant.[5] The hospital then shared her newborn's test results with the police, who began reviewing Armstead's prior medical records and prepared to bring charges.[6] Almost a year after giving birth to her healthy daughter, "Armstead was arrested and charged with chemical endangerment of a child."[7]

In recent years, certain states[8] have broadened the use of child abuse and neglect laws to police pregnant women's[9] behavior under the framework of "fetal personhood."[10] Local prosecutors in these jurisdictions are increasingly targeting women who used drugs at any point during their pregnancies, even if the child is born healthy.[11] In some states, "prosecutors . . . aren't required to prove harm to [a] fetus or newborn"—mere exposure to drugs during the pregnancy satisfies the prosecution's

1. Cary Aspinwall, *These States Are Using Fetal Personhood to Put Women Behind Bars*, THE MARSHALL PROJECT (July 25, 2023, 6:00 AM), https://www.themarshallproject.org/2023/07/25/pregnant-women-prosecutions-alabama-oklahoma [https://perma.cc/E6HC-B9BU].

2. *Id.*

3. *Id.*

4. Benjamin Bar-Oz, Julia Klein, Tatyana Karaskov & Gideon Koren, *Comparison of Meconium and Neonatal Hair Analysis for Detection of Gestational Exposure to Drugs of Abuse*, 88 ARCHIVES DISEASE CHILDHOOD FETAL & NEONATAL ED. F98, F99–100 (2003).

5. Aspinwall, *supra* note 1.

6. *Id.*

7. *Id.*

8. *See* Anna Claire Vollers, *Conservatives Push to Declare Fetuses as People, with Far-Reaching Consequences*, STATELINE (July 31, 2024, 5:00 AM), https://stateline.org/2024/07/31/conservatives-push-to-declare-fetuses-as-people-with-far-reaching-consequences/ [https://perma.cc/LJ8M-JJLF] ("Most of the cases occur in a handful of Southern states—including Alabama, South Carolina, and Tennessee.").

9. Although the term "women" is used here and throughout this Note, it is intended to refer to all individuals who can become pregnant, regardless of gender identity.

10. Aspinwall, *supra* note 1. "Fetal personhood" is a concept, promoted by many antiabortion groups, that asserts a "fetus . . . has the same legal rights as a person who has been born." *Id.*

11. *See* Vollers, *supra* note 8; *see also infra* Part I.B.

burden.[12] These cases penalize women for being pregnant, as the charges could not be brought if not for the individual's pregnancy—an effort that reflects the "merging of the fetal personhood movement with the war on drugs."[13]

For decades, scholars have argued that women should not face additional charges for using illegal substances during their pregnancies.[14] And yet, for decades, local prosecutors have consistently treated prenatal drug use as a criminal issue rather than a public health or medical concern.[15] Although no state has enacted laws explicitly criminalizing prenatal substance abuse, prosecutors have creatively applied existing criminal statutes—such as child endangerment, child abuse, and drug delivery laws—to pursue such charges.[16] The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[17] further solidified this trend.[18] Anticipating the *Dobbs* ruling, several states hurried to implement laws criminalizing abortion.[19] As soon as *Dobbs* took effect, these "abortion-restrictive trigger bans that had

12. Aspinwall, *supra* note 1; *see also infra* Part I.B (Section 26-15-3.2(a)(1) requires only proof that the fetus was exposed to or had contact with a drug.). In 2022, "prosecutors overwhelmingly charged pregnant people with offenses that allow them to obtain convictions without 'proving' that the pregnant person actually harmed the fetus or infant." *Post*-Dobbs *Pregnancy Criminal Cases*, PREGNANCY JUST., https://www.pregnancyjusticeus.org/post-dobbs-pregnancy-criminalization/ [https://perma.cc/3VEZ-56ML] (last visited Apr. 2, 2025).

13. *See* PURVAJA S. KAVATTUR, SOMJEN FRAZER, ABBY EL-SHAFEI, KAYT TISKUS, LAURA LADERMAN, LINDSEY HULL, FIKAYO WALTER-JOHNSON, DANA SUSSMAN & LYNN M. PALTROW, THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 18 (2023), https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf [https://perma.cc/867D-DTJL].

14. *See* George Bundy Smith & Gloria M. Dabiri, *Prenatal Drug Exposure: The Constitutional Implications of Three Governmental Approaches*, 2 SETON HALL CONST. L.J. 53, 59 (1991) (arguing the criminal prosecution of drug-using mothers raises many serious constitutional issues); Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 253–54 (2011) ("Pregnant women cannot continue to face the risk that they will be arrested, committed, incarcerated, confined, or otherwise detained due to drug use during pregnancy.").

15. *See* Mohapatra, *supra* note 14, at 243.

16. *See* Myrisha S. Lewis, *Criminalizing Substance Abuse and Undermining* Roe v. Wade*: The Tension Between Abortion Doctrine and the Criminalization of Prenatal Substance Abuse*, 23 WM. & MARY J. WOMEN & L. 185, 189–90 (2017). Tennessee had a statute that directly criminalized pregnant women's drug use—a fetal assault law that amended the general assault statute to apply to the illegal use of a narcotic by a pregnant woman if the child was born "addicted to or harmed by" the prenatal drug use. *Id.* at 194–95; *see also* 2014 Tenn. Pub. Acts. 820. The law, however, was passed with a sunset provision and expired in July 2016. *See* Cara O'Connor, *A Guiding Hand or a Slap on the Wrist: Can Drug Courts Be the Solution to Maternal Opioid Use?*, 109 J. CRIM. L. & CRIMINOLOGY 103, 114–15 (2019).

17. 142 S. Ct. 2228 (2022).

18. On June 24, 2022, the U.S. Supreme Court held in *Dobbs* that the Fourteenth Amendment no longer protects abortion. *Id.* at 2267–68, 2279.

19. *See* Valena E. Beety & Jennifer D. Oliva, *Policing Pregnancy "Crimes"*, 98 N.Y.U. L. REV. ONLINE 29, 31 & n.11 (2023) (including Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming). Each state operates under its own criminal code, granting prosecutors the responsibility of enforcing state law with few institutional controls from the federal level. *See* AMNESTY INT'L, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 23 (2017).

lain dormant for years became enforceable law."[20] Thus, in states where abortion is now banned, the local prosecutors, who have wide discretion regarding which laws to prioritize enforcing, have increasingly weaponized child abuse and neglect laws against pregnant women.[21]

This prosecutorial approach is troubling because it criminalizes pregnant women rather than providing them with necessary medical support.[22] It also jeopardizes the essential relationship between patients and their doctors, as women are avoiding medical appointments out of fear of prosecution.[23] Current guidelines in the United States "recommend 13 to 14 prenatal visits with an obstetrician or midwife, starting between weeks eight and 10 of pregnancy."[24] These visits are essential to detect medical abnormalities—often treatable—that could harm the mother or fetus.[25] Especially for women who use drugs, prenatal healthcare is critical to support fetal health.[26] Physicians have identified prematurity and low birth weight as leading causes for neonatal mortality; women who use drugs but receive adequate prenatal care often experience better pregnancy outcomes with regard to prematurity and low birth weight than those who do not.[27] In fact, research shows that a

20. *See generally Dobbs*, 142 S. Ct. at 2267–68, 2279. As of January 2, 2025, twelve states have a total abortion ban. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER, https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans [https://perma.cc/WLG6-XZSR] (Jan. 2, 2025).

21. *See Post*-Dobbs *Pregnancy Criminal Cases*, *supra* note 12. Between January 2006 and June 2022, there were 1,396 documented cases of criminalized pregnancy in the United States, averaging about eighty-five cases per year. *See Pre*-Dobbs *Pregnancy Criminal Cases*, PREGNANCY JUST., https://www.pregnancyjusticeus.org/pre-dobbs-pregnancy-criminalization/ [https://perma.cc/5YCA-PP4E] (last visited Apr. 2, 2025). Meanwhile, "in the first year after *Dobbs*, prosecutors initiated at least 210 cases charging pregnant people with crimes related to pregnancy, pregnancy loss, or birth." *Post*-Dobbs *Pregnancy Criminal Cases*, *supra* note 12. This marked a more than twofold increase in such prosecutions following *Dobbs*. *Id.*; *Pre*-Dobbs *Pregnancy Criminal Cases*, *supra*.

22. *See infra* Part II.B.3.a.

23. *See* Amy Yurkanin, *One Alabama County Cracked Down on Pregnant Drug Users. 10 Years Later, Has It Gone Too Far?*, ADVANCE LOC. MEDIA, https://www.al.com/news/anniston-gadsden/2023/07/one-alabama-county-pledged-to-crack-down-on-pregnant-drug-users-ten-years-later-has-it-gone-too-far.html [https://perma.cc/9DV4-987T] (July 31, 2023, 2:48 PM). Professor Wendy Bach explained that women are avoiding medical care because they are afraid of arrest. *Id.* For example, one woman gave birth on the side of a highway in attempt to leave the state so that she could have her baby in a county where she would not be prosecuted. *See id.*

24. *See* CRISTINA NOVOA, CTR. FOR AM. PROGRESS, ENSURING HEALTHY BIRTHS THROUGH PRENATAL SUPPORT 2 (2020).

25. *See id.*

26. *See* Nancy K. Schiff, *Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197, 227 (1991).

27. *See* Ayman El-Mohandes, Allen A. Herman, M. Nabil El-Khorazaty, Pragathi S. Katta, Davene White & Lawrence Grylack, *Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes*, 23 J. OF PERINATOLOGY 354, 358–59 tbl.6 (2003) (finding that, in a study of 796 women who used illegal drugs during their pregnancy, higher levels of prenatal care were associated with a significant reduction in risk for prematurity, low birth weight, and small for gestational age). Conversely, the rates of prematurity and low birth weight are significantly higher with inadequate levels of prenatal care among women who used drugs during pregnancy. *See id.* at 356. These data confirm previous findings that prenatal care reduces the incidence of low birth weight in pregnancies exposed to drug use. *See* Abbey B.

lack of prenatal care is often "more detrimental" to fetal development than the mother's drug use itself.[28] Despite this, "pregnant women who use drugs are over-represented among women who receive late, limited, and no prenatal care."[29] This is, inter alia, due to a fear they will be caught using drugs and subsequently punished.[30]

This Note focuses on one statute in Alabama—section 26-15-3.2, Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed[31] (the "Chemical Endangerment of a Minor law"). Even though states throughout the country have used drug tests to prosecute women whose newborns test positive for drugs,[32] Alabama's application of this statute often occurs "without adequate procedures for confirming and handling drug test results."[33] Additionally, Alabama has become the "undisputed champion of arresting pregnant women for actions that wouldn't be considered crimes if they weren't pregnant."[34] This statute thus provides a compelling case study supporting this Note's proposal for a new evidentiary rule in Alabama. As prosecutors in other states observe Alabama's success with such prosecutions, similar practices could spread, using prenatal medical records to pursue criminal charges against pregnant women. Therefore, this Note's proposed evidentiary rule addresses not only Alabama's legal practices but also offers a model for adoption in other jurisdictions.

This Note proceeds in three parts. Part I discusses the history of pregnancy criminalization, provides an overview of Alabama's Chemical Endangerment of a Minor law,[35] explains Alabama Rule of Evidence 403,[36]

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Berenson, Gregg S. Wilkinson & Louis A. Lopez, *Effects of Prenatal Care on Neonates Born to Drug-Using Women*, 31 SUBSTANCE USE MISUSE 1063, 1064 (1996); *see also* Sarah C. M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 MATERN. CHILD HEALTH J. 333, 333 (2010).

28. *See* Schiff, *supra* note 26, at 227.

29. Roberts & Pies, *supra* note 27, at 333.

30. *See* Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUST. 1, 3 (2015) (interpreting the interviews of thirty women who were currently pregnant or pregnant within the last year); *see also* AMNESTY INT'L, *supra* note 19, at 7 ("If [I had] known that you go to the doctor and get a positive drug screen, I [would not] have gone[.] I'd let nobody know. Especially not the doctor . . . it's scary as hell that I've got to walk around carrying this baby and not know if [I will be] charged.").

31. ALA. CODE § 26-15-3.2 (2006).

32. *See* KEVIN ZEESE & DANIEL ABRAHAMSON, DRUG TESTING LEGAL MANUAL § 9:4, Westlaw (database updated June 2024).

33. Sarah E. Burns & Sarah S. Wheeler, *A Review and Look Ahead at Criminalizing Pregnancy in the Name of the State Interest in Fetal Life*, 76 SMU L. REV. 369, 391 (2023).

34. *See* Tessa Stuart, *Executive Director JaTuane Bosby Gilchrist Speaks with Rolling Stone on the Consequences of the Anti-Choice Movement in Alabama.*, ACLU ALA., https://www.aclualabama.org/en/news/rolling-stone-alabamas-war-women [https://perma.cc/BAH2-5UQN] (May 29, 2024, 10:15 AM). In Etowah County specifically, 257 pregnant women and new moms were arrested and charged with chemical endangerment between 2015 and 2023. *See* Yurkanin, *supra* note 23. As the district attorney of Etowah County said, "For us to do nothing, would make us an enabler of a deadly addiction, complicit in the abuse of a child, and ultimately lead to the death of a mother." *Id.*

35. ALA. CODE § 26-15-3.2 (2006).

36. ALA. R. EVID. 403.

and applies Rule 403's balancing test to the Chemical Endangerment of a Minor law. Part II evaluates the probative value of drug tests obtained during prenatal appointments against their prejudicial effect. Part II also introduces the reverse balancing test, developed in response to the harmful policy implications of admitting certain types of evidence, which serves as a rule of exclusion, rather than Rule 403's permissive inclusionary standard. This part delves into the implications associated with women abstaining from receiving prenatal care and explores how applying the Chemical Endangerment of a Minor law this way could lead to harmful policy consequences. Finally, Part III proposes adopting a new Alabama Rule of Evidence modeled after Rule 412. This proposed rule would render all prenatal medical records, including drug tests, inadmissible in criminal prosecutions under section 26-15-3.2, subject to a reverse balancing test.

## I. THE EVOLUTION OF PREGNANCY CRIMINALIZATION, EXPANSION OF AN ALABAMIAN CRIMINAL STATUTE, AND AN EVIDENTIARY BALANCING TEST

In the United States each year, there are approximately five million pregnancies,[37] 5.9 percent of which involve illegal drug use.[38] Despite impacting a small proportion of births, over the last forty years there has been an increasing application of criminal statutes to women who use drugs while pregnant.[39]

The term "fetal protection" first emerged in the late 1980s to "describe laws and policies intended to punish women . . . for conduct they engaged in while pregnant."[40] Coinciding with the emergence of "fetal protection" was the widespread societal fear of mothers giving birth to "crack babies";[41] because of this, these charges were mainly brought only against pregnant women who used crack cocaine.[42] Nevertheless, trial courts at the time were wary of defining "children" to include fetuses, finding it an "unconstitutional invasion of [a woman's] privacy."[43] To navigate this legal concern, prosecutors in certain jurisdictions applied existing drug trafficking and child

37. *See* Priscilla A. Ocen, *Birthing Injustice: Pregnancy As a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1173 (2017).

38. Ariadna Forray, *Substance Use During Pregnancy*, F1000RESEARCH, May 13, 2016, at 1, 3 (comparing that to 8.5 percent of pregnant women who drink alcohol and 15.9 percent of pregnant women who smoke cigarettes).

39. *See* Ocen, *supra* note 37, at 1173–74.

40. Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 6 GEO. L.J. 475, 478 (2021).

41. *See infra* Part I.A.

42. *See id.* at 478–79. Although Black and White pregnant women have similar levels of drug use, prenatal drug use prosecutions historically have disproportionately targeted Black women, reflecting a discriminatory application of fetal protection laws. *See id.* at 489–90. More recently, the opioid and methamphetamine crises have primarily occurred in low-income White communities, with these women who use drugs now facing higher rates of criminal punishment while pregnant. *See* Ocen, *supra* note 37, at 1171.

43. Schiff, *supra* note 26, at 197.

abuse statutes to protect fetuses.[44] This reinterpretation of existing criminal laws became the most common way to criminalize fetal endangerment.[45]

### *A. The Expansion of Fetal Endangerment Laws Through Prenatal Drug Testing*

Beginning in the 1980s, the stigma of "crack babies" spread throughout the country.[46] People believed that if a mother smoked crack while pregnant, her child would be born "addicted to crack and suffering from withdrawals"[47] or grow up to "have an IQ of perhaps 50."[48] Because of this pervasive idea, physicians and scientists have devoted nearly two decades to studying children thought to be most at risk.[49] Although cocaine crosses the placenta and constricts blood vessels, reducing blood flow to the fetus,[50] this does not necessarily lead to clinically significant outcomes in the long run.[51] Despite

44. *See id.* In *State v. Black*, No. 89-5325 (Fla. Cir. Ct. Jan. 3. 1990), *aff'd per curiam*, 642 So. 2d 1364 (Fla. Dist. Ct. App. 1994), and *State v. Johnson*, No. E89-890 (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), each defendant was convicted for delivering drugs to their newborn through the umbilical cord. *See* LYNN M. PALTROW, AM. C.L. UNION FOUND., CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW 18 (1992), https://www.pregnancyjusticeus.org/wp-content/uploads/1992/01/1992-State-by-State-Case-Summary.pdf [https://perma.cc/Y2UY-3GS8] (citing *Black*, No. 89-5325 and *Johnson*, No. E89-890). In *Commonwealth v. Welch*, No. 90-CR-006 (Ky. Cir. Ct. Mar. 15, 1990), *rev'd in part, aff'd in part*, No. 90-CA-1189 (Ky. Ct. App. Feb. 7, 1992), Ms. Welch, whose baby was born with neonatal abstinence syndrome, was found guilty of criminal child abuse and sentenced to seven years in prison because of her drug use during pregnancy. PALTROW, *supra*, at 24–25 (citing *Welch*, No. 90-CR-006).

45. *See* Boone & McMichael, *supra* note 40, at 481.

46. Chris Calton, *The Origins of the Crack-Baby Myth*, MISES INST.: MISES WIRE (July 24, 2017), https://mises.org/mises-wire/origins-crack-baby-myth [https://perma.cc/PPS9-49CA].

47. *Id.*

48. Susan Fitzgerald, *'Crack Baby' Development Issues Not Side-Effect of Drug, but Poverty*, THE CHRISTIAN SCI. MONITOR (July 25, 2013, 11:02 AM), https://www.csmonitor.com/The-Culture/Family/2013/0725/Crack-baby-development-issues-not-side-effect-of-drug-but-poverty [https://perma.cc/8SF8-Y8D8].

49. Laura M. Betancourt, Wei Yang, Nancy L. Brodsky, Paul R. Gallagher, Elsa K. Malmud, Joan M. Giannetta, Martha J. Farah & Hallam Hurt, *Adolescents with and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language*, 33 NEUROTOXICOLOGY & TERATOLOGY 36, 41 (2011) (concluding, based on a longitudinal cohort study that tracked participants over twenty years, that prenatal exposure to cocaine has little effect on a child's cognitive control, memory, or language processes); *see also* Alex C. Vidaeff & Joan M. Mastobattista, *In Utero Cocaine Exposure: A Thorny Mix of Science and Mythology*, 20 AM. J. PERINATOLOGY 165, 165 (2003) ("Although many reports associate cocaine with a variety of isolated structural anomalies, there is no detectable syndromic clustering, raising doubts about a real causal association."); Emmalee S. Bandstra, Connie E. Morrow, Elana Mansoor & Veronica H. Accornero, *Prenatal Drug Exposure: Infant and Toddler Outcomes*, 29 J. ADDICTIVE DISEASES 245, 245, 254 (2010) ("Prenatal cocaine exposure appears to be associated with what has been described as subtle decrements in neurobehavioral, cognitive, and language function," particularly "when viewed in the context of other exposures and the caregiving environment which may mediate or moderate the effects.").

50. *See* Vidaeff & Mastobattista, *supra* note 47, at 168.

51. Stacy Buckingham-Howes, Sarah Shafer Berger, Laura A. Scaletti & Maureen M. Black, *Systematic Review of Prenatal Cocaine Exposure and Adolescent Development*, 131

being scientifically discredited, the "crack baby" terminology left a lasting mark, successfully embedding the image of a stereotypical "bad mother" into the American psyche and fueling the criminalization of pregnant women who use drugs.[52] Although crack use has declined since the 1980s, state legislators and local prosecutors have increasingly sought to criminalize a wider range of conduct while pregnant, with the intention of protecting fetal life.[53] In fact, some states essentially now have "de facto fetal endangerment laws" because of how regularly they apply certain statutes to prenatal drug use.[54] Since 2006, more than 1,300 women in the United States "have been convicted of crimes ranging from child endangerment to second-degree murder as a result of conduct during pregnancy."[55] And throughout these cases, prosecutors have relied on positive drug tests as their central evidence.[56] Jennifer Johnson was the first woman convicted in the United States for drug trafficking on the theory that she "deliver[ed] drugs through her umbilical cord to her infant."[57] Although the Florida Supreme Court later

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PEDIATRICS e1917, e1935 (2013) ("There has not been a strong emergence of clinically relevant findings during adolescence."); *see also supra* note 47 and accompanying text.

52. *See* The Editorial Board, *Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://perma.cc/2364-GDYN] (explaining how the "notion that cocaine was uniquely and permanently damaging" to the fetus "had been written into social policies and the legal code" and, by the time experts realized the science did not support the claims, "the view that a fetus was a person with rights superseding the mother's had gained considerable traction"); *see also* Eloise Dunlap, Andrew Golub & Bruce D. Johnson, *The Severely-Distressed African American Family in the Crack Era: Empowerment Is Not Enough*, 33 J. SOCIO. & SOC. WELFARE 115, 124 (2006); Beety & Oliva, *supra* note 19, at 36; AMNESTY INT'L, *supra* note 19, at 22 ("The sensationalized images of infants born 'addicted' to drugs remained in the popular consciousness and in accounts of pregnant women's drug use.").

53. *See* Boone & McMichael, *supra* note 40, at 477. Research by the National Advocates for Pregnant Women (now Pregnancy Justice) identified at least 413 cases of pregnant women being prosecuted, arrested, or detained between 1973 and 2005, with an additional 380 cases recorded since 2005. *See* Ocen, *supra* note 37, at 1173–74. A separate report identified 479 pregnant women who have been prosecuted in Alabama since 2006. *See* Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene [https://perma.cc/M2EH-3C5M].

54. *See* Boone & McMichael, *supra* note 40, at 481. For example, Mississippi has used section 97-5-39, Felonious Abuse and/or Battery of a Child, to prosecute pregnant women who use illegal drugs—whether or not the child is harmed—under the argument that the "chemicals will end up in her baby's system, thus poisoning the child." Michelle Liu & Erica Hensley, *Delivering Justice: Why a Mississippi County Is Prosecuting Some Pregnant Women and New Moms*, MISS. TODAY (May 11, 2019), https://mississippitoday.org/2019/05/11/delivering-justice/ [https://perma.cc/M2UA-MVYF]. Additionally, Alabama's Chemical Endangerment of a Minor law was enacted to penalize those who exposed children to home methamphetamine labs but was almost immediately applied instead to prosecute women using drugs while pregnant. *See* Boone & McMichael, *supra* note 40, at 481.

55. Ocen, *supra* note 37, at 1163. The most common charge is child endangerment and, in nearly all these cases, "the conduct of the women prosecuted would have been lawful or subject to a lesser penalty had it been committed by a nonpregnant person." *Id.*; *see also Pre*-Dobbs *Pregnancy Criminal Cases*, *supra* note 21.

56. *See* ZEESE & ABRAHAMSON, *supra* note 32, § 9:4.

57. *See id.*; *see also* Johnson v. State, 578 So. 2d 419, 419 (Fla. Dist. Ct. App. 1991), *quashed*, 602 So. 2d 1288 (Fla. 1992). The State argued that "some of the cocaine left the mother and was received by the child after the birth but before the umbilical cord was cut." *Id.*

quashed her conviction, her case showed prosecutors that it was possible to interpret existing laws to apply in broader capacities, inspiring a trend of similar prosecutions throughout the country.[58]

Although once rare, the use of drug tests in criminal prosecutions is becoming pervasive.[59] Healthcare providers have implemented intricate drug testing procedures, and states have heavily invested in detection efforts.[60] Urine tests, in particular, are commonly used as evidence in these prosecutions.[61]

In *Ferguson v. City of Charleston*,[62] the Supreme Court set constitutional limits on the manner in which drug test results obtained from prenatal appointments may be used as evidence, ruling the specific testing done in this case was an unconstitutional search under the Fourth Amendment.[63] *Ferguson* involved pregnant women at the Medical University of South Carolina (MUSC), a public hospital where patients seeking prenatal care or delivering their babies were required to provide urine samples.[64] MUSC offered to partner with the city's law enforcement to prosecute mothers whose newborns tested positive for drugs.[65] They formed a task force, made up of hospital representatives, police officers, and local officials, to identify and test pregnant patients suspected of drug use.[66] The Court found the drug testing program unconstitutional, because it was specially designed to generate evidence for law enforcement.[67] Specifically, hospital employees may not "undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*."[68] With this decision, the Supreme Court allowed drug testing during prenatal appointments to continue, so long as the testing was not conducted for the sole purpose of being turned over to law enforcement.[69] This distinction highlights the tension between healthcare providers' roles in patient care and law enforcement's involvement in medical settings.[70] As the Court noted, the

58. *See* ZEESE & ABRAHAMSON, *supra* note 32, § 9:4. For example, in 2014, three pregnant women in Alabama who had positive drug tests were subsequently charged with exposing their children to drugs. *See id.* § 9:16. In Montana, after a drug test came back positive in her first trimester for benzodiazepines, THC, and opiates, a twenty-one-year-old was charged with "putting her unborn child at risk by taking illegal drugs." *Id.*

59. *See id.* §§ 9:4, 9:1.

60. *See* Ocen, *supra* note 37, at 1176. In Minnesota, physicians must test any woman, during pregnancy or within eight hours after childbirth, who has any obstetrical complication that indicates "possible" drug use during her pregnancy. *See* MINN. STAT. § 260E.32 (2023).

61. *See* ZEESE & ABRAHAMSON, *supra* note 32, § 9:1 .

62. 532 U.S. 67 (2001).

63. *Id.* at 85.

64. *Id.* at 70.

65. *Id.* at 71.

66. *Id.*

67. *Id.* at 83–84.

68. *Id.* at 85.

69. *Id.*

70. *Compare id.* ("[W]hen [hospital employees] undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights[.]"), *with id.* at 94 (Scalia, J., dissenting) ("*However strongly* a defendant may trust an

focus on prenatal care is critical—not only as a means to support maternal and fetal health but also to protect the integrity of the patient-provider relationship.[71]

### *B. Section 26-15-3.2: Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed*

"Between 2002 and 2006, there were 1,432 methamphetamine lab seizures within [Alabama]."[72] The Alabama state legislature, concerned about children's exposure to these home methamphetamine labs, enacted the Chemical Endangerment of a Minor law in 2006.[73] Alabama Code section 26-15-3.2 reads as follows:

> (a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:
>
> (1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260. A violation under this subdivision is a Class C felony.
>
> (2) Violates subdivision (1) and a child suffers physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.
>
> (3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.
>
> (b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.[74]

Around the same time the law was enacted, Alabama started to see a rise in the number of newborns testing positive for drug exposure.[75]

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apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with authorities." (quoting United States v. White, 401 U.S. 745, 749 (1971))).

71. *See id.* at 84 n.23 ("It is especially difficult to argue that the program here was designed . . . to save lives. *Amici* claim a near consensus in the medical community that programs [like this], by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health.").

72. Rachel Suppé, *Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama's Chemical Endangerment Law in* Ex Parte Ankrom, 7 HEALTH L. & POL'Y BRIEF 49, 49–50 (2014).

73. ALA. CODE § 26-15-3.2 (2006); *see* Kathleen Adams, *Chemical Endangerment of a Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights?*, 65 ALA. L. REV. 1353, 1359 (2014).

74. § 26-15-3.2.

75. *See* Suppé, *supra* note 72, at 55.

Although the statute was originally intended to punish parents who exposed their children to chemicals in their home methamphetamine labs, prosecutors began applying it more broadly.[76] Prosecutors argued that the term "child" included fetuses and that the womb constituted an "environment," finding women who "expose fetuses to drugs in the womb" in violation of the law.[77] On January 11, 2013, the Supreme Court of Alabama affirmed this interpretation in *Ex Parte Ankrom*,[78] ruling not only that the term "child" includes unborn children but that this statute encompasses all fetuses regardless of viability—expanding the statute's scope beyond the lower court's holding.[79]

Since 2006, Alabama prosecutors have charged more than 500 women under section 26-15-3.2 under two theories: (1) fetuses are children from the moment of fertilization, and (2) "using any amount of controlled substances [while pregnant] is the same as bringing a child to a methamphetamine lab."[80] The penalties range from one to ten years in prison if the baby suffers no harm (Class C felony), ten to twenty years if the baby has signs of exposure or harm (Class B felony), and ten to ninety-nine years if the baby dies (Class A felony).[81] This prosecutorial approach has earned Alabama the label of the "nation['s] capital for prosecuting women on behalf of their newborn children."[82]

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76. *See id.*

77. *See id.*

78. 152 So. 3d 397 (Ala. 2013).

79. *See id.* at 411–12. The Court rejected the lower court's limited applicability of the statute to only viable unborn children. *Id.* at 419.

80. *See* ZEESE & ABRAHAMSON, *supra* note 32, § 9:4. The arrests are not slowing down—on April 1, 2024, C.J.B. was arrested in Morgan County, Alabama for violating section 26-15-3.2 after a positive test for fentanyl during a prenatal appointment. *See Investigators Make Arrests for Chemical Endangerment*, MORGAN CNTY. SHERIFF'S OFF. (Apr. 9, 2024), https://www.morgancountysheriffal.gov/press_view.php?id=79 [https://perma.cc/68UE-BNHN]. In July 2022, H.B., a thirty-four-year-old mother of two, was arrested five weeks after giving birth due to a positive toxicology test taken the day after she gave birth. Burns & Wheeler, *supra* 33, at 395–96 n.176. The Etowah County Sheriff's Office's investigative report indicated that an investigator subpoenaed H.B.'s prenatal care provider for records regarding substance use tests throughout her pregnancy. *See* Amy Yurkanin, *Pregnant Women Held for Months in One Alabama Jail to Protect Fetuses from Drugs*, ADVANCE LOC. (Sept. 8, 2022, 4:03 PM), https://www.al.com/news/2022/09/pregnant-women-held-for-months-in-one-alabama-jail-to-protect-fetuses-from-drugs.html [https://perma.cc/ZBZ4-55HX]. Relying on these records, the Etowah County Sheriff's Office arrested H.B. from the hospital, and the district attorney brought chemical endangerment of a minor charges against her. *See id.*

81. *See* Beety & Oliva, *supra* note 19, at 38 n.42.

82. Lewis, *supra* note 16, at 191 (quoting Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES (Apr. 25, 2012), https://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html [https://perma.cc/3KUR-MQSR]). Notably, there are very few cases in which pregnant women charged with chemical endangerment of a child for prenatal substance abuse—where the central evidence is a positive drug test—have gone to trial. Due to the limited number of women who have gone to trial in these cases, there is little documented information on the factors judges consider most important when sentencing the women. *See id.* at 190. The data that is available, however, reveal that "arrests for prenatal substance use are pervasive." Nicole Rubin, *Risky Business: Prenatal Substance Use and Risk of Harm Under the G2i Framework*, 57 HARV. C.R.-C.L. L. REV. 789, 795 (2022).

### *C. Rule 403's Balancing Test and Its Applicability to Alabama's Chemical Endangerment of a Minor Law*

At trial, prosecutors must introduce evidence to prove each element of the charges beyond a reasonable doubt.[83] Before evidence can be introduced, however, the trial judge must deem it admissible under the applicable rules of evidence.[84] Federal courts follow the Federal Rules of Evidence, whereas each state has its own rules for state courts.[85] Alabama Rule of Evidence 403 mirrors its federal counterpart, obligating trial judges to exclude relevant and material evidence if its probative value is substantially outweighed by certain factors—including unfair prejudice.[86] The judge will examine the probative value of evidence against its prejudicial impact, and, if the prejudicial impact "substantially outweighs the probative value," the judge must exclude the evidence.[87] Mere prejudice, however, is insufficient for exclusion, as evidence can be damaging without being *unfairly* prejudicial.[88] Thus, Rule 403 applies a balancing test, with its language indicating that even a small amount of probative value can be outweighed by a high risk of prejudice.[89]

Under section 26-15-3.2, charges against women vary based on the extent of harm to the fetus.[90] The charges range from a Class C felony, which requires only evidence of exposure, typically shown by a positive drug test taken during pregnancy,[91] to a Class A felony, which requires the prosecution to prove that the child's death was caused by the prenatal substance abuse.[92] For the Class C felony, the prosecution only needs to show that there was a positive drug test because that proves that the fetus was exposed to a chemical substance.[93] The prosecution's burden of proof, however, is greater for subsections (2) and (3), where it must prove the child either suffered physical injury or died *because* of exposure, ingestion, inhalation, or contact with the

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83. *See* PRAC. L. LITIG., EVIDENCE IN FEDERAL COURT: OVERVIEW, Westlaw (database updated 2024). Examples of types of evidence include lay or expert witness testimony, documents, or electronically stored information. *See id.*

84. *See id.*

85. *See Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/evidence [https://perma.cc/2W8K-GW76] (last visited Apr. 2, 2025).

86. ALA. R. EVID. 403 advisory committee's notes. The rule specifically says, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* 403.

87. *Id.* 403 advisory committee's notes.

88. *See, e.g.*, State v. Parker, 740 So. 2d 421, 428 (Ala. Crim. App. 1996) (explaining that a defendant's constitutional right to a fair trial does not guarantee a trial free of all harmful or prejudicial evidence).

89. *See* Paul N. Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1203 (1995).

90. *See supra* Part I.B.

91. ALA. CODE § 26-15-3.2(a)(1) (2006); *see also In re* H.H., 871 N.W.2d 705 (Iowa Ct. App. 2015) (holding that the presence of an illegal drug in a child's body, determined by a positive drug test, is sufficient evidence of exposure).

92. § 26-15-3.2(a)(3).

93. *See* Rubin, *supra* note 82, at 816.

drug.[94] Rule 403 is therefore less applicable to subsection (1) of the statute, because subsection (1) does not mandate proving that the defendant's conduct led to the specific harm or death, only that the drug was in the mother's system while she was pregnant.[95]

Because subsections (2) and (3) require evidence of actual harm to the fetus for conviction, a 403 objection can be critical if the evidence could evoke an emotional response from the jurors, leading them to decide based on emotion rather than fact.[96] Rule 403 acts as a safeguard, ensuring that decisions are based on the evidence's true probative value rather than its potential to unfairly sway jurors.[97] Part II explores why drug tests from prenatal medical appointments are both probative and unfairly prejudicial and discusses legislative actions taken to address the negative policy consequences of admitting evidence when the prejudicial nature outweighs its probative value.

## II. THE PROBATIVE VALUE AND PREJUDICIAL NATURE OF ADMITTING DRUG TESTS OBTAINED DURING PRENATAL APPOINTMENTS INTO EVIDENCE AND ITS SUBSEQUENT POLICY EFFECTS

Three rationales are cited for prosecuting pregnant women who use drugs—"deterrence, retribution, and improving maternal or fetal health."[98] Prosecutors who apply the Chemical Endangerment of a Minor law to fetuses justify this interpretation by claiming it aligns with the statute's purpose of protecting children—because prenatal drug use harms the unborn child, mothers breach their legal duty not to endanger their children when they use drugs while pregnant.[99] Former Alabama District Attorney Gary McAliley believes these prosecutions deter other women from using drugs during their pregnancies: "It's important for society to know that [drug use while pregnant] will be prosecuted and dealt with severely."[100]

Part II is divided into two sections. Part II.A compares the probative value of drug tests with its unfairly prejudicial impact. Part II.B examines two rules of evidence designed to counteract bad policy and analyzes how Alabama prosecutors' use of the Chemical Endangerment of a Minor law has potentially created undesirable policy consequences.

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94. § 26-15-3.2(a)(2), (3).

95. *See* Rubin, *supra* note 82, at 816.

96. § 26-15-3.2(a)(2), (3); ALA. R. EVID. 403.

97. *See supra* Part I.C.

98. Kyle Kennedy, Note, *How to Combat Prenatal Substance Abuse While Also Protecting Pregnant Women: A Legislative Proposal to Create an Appropriate Balance*, 70 ARK. L. REV. 167, 168 (2017).

99. *See* O'Connor, *supra* note 16, at 116; *see also* Kennedy, *supra* note 98, at 168.

100. *See* Adams, *supra* note 73, at 1368. Law enforcement and prosecutors believe that these prosecutions will "serve as a warning to other women in the community," and thus women will be less likely to use drugs during any future pregnancies. *See id.*

### *A. Probative Value Versus Prejudicial Impact of Prenatal Tests in Section 26-15-3.2(a)*

A positive drug test lies at the core of these prosecutions.[101] When the drug test is one of the only pieces of evidence presented, it is highly probative because it serves as the necessary foundation for the jury to reach a conviction.[102] However, if the prejudicial effect of the test substantially outweighs its probative value—such as when it risks swaying the jury's decision based on emotions rather than the facts—then the test should be inadmissible, regardless of its probative nature.[103]

#### 1. How Drug Tests Obtained During Prenatal Care Are Probative to the Prosecutor's Case

Alabama recognizes a liberal test of relevancy, allowing evidence to be admitted "if it has any tendency to . . . make the existence of the fact for which it is offered more or less probable than it would be without the evidence."[104] Evidence is generally admissible if it tends to show "the commission of the crime, the manner in which it was committed, or elucidate[s] some matter in issue."[105] Thus, under Alabama law, evidence must simply have "any probative value, however slight, upon a matter in the case" to be admissible.[106] Because sections 26-15-3.2(a)(2) and 26-15-3.2(a)(3) specifically require showing that a child was harmed by "exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia,"[107] a positive drug test is often crucial.[108] Courts accept such evidence as sufficient to demonstrate that it is more probable than not that the child was harmed by drug exposure.[109] When the evidence relates to a material fact in the case and has "any probative value, however slight," it should be admitted into evidence.[110]

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101. *See supra* Part I.A.

102. *See, e.g.*, United States v. Wood, No. 24-10496, 2024 WL 5055519, at *2 (11th Cir. Dec. 10, 2024) (affirming defendant's revocation of supervised release based on a positive drug test and the defendant's admission of drug use).

103. *See* PRAC. L. LITIG., *supra* note 83.

104. Dotch v. State, 67 So. 3d 936, 967 (Ala. Crim. App. 2010) (quoting Brown v. State, 56 So. 3d 729, 735 (Ala. Crim. App. 2009)).

105. *Id.* (quoting Beasley v. State, 408 So. 2d 173, 179 (Ala. Crim. App. 1981)). Ultimately, evidence is probative so long as there is a logical reason for why it is being introduced. *Id.*

106. Smith v. State, 745 So. 2d 922, 929 (Ala. Crim. App. 1999) (quoting Tankersley v. State, 724 So. 2d 557, 562 (Ala. Crim. App. 1998)).

107. *Supra* Part I.B.

108. State v. Martin, 291 So. 3d 1216, 1220 (Ala. Crim. App. 2019) (holding the circuit court abused its discretion when it granted defendant's motion to suppress the test results).

109. *See id.*

110. *Smith*, 745 So. 2d at 929 (finding that, when there is evidence that the appellant aimed a .25 caliber pistol at individuals just before shooting, and it is undisputed that a .25 caliber pistol is the murder weapon, the pistol is of consequence to a material fact in the case and was properly admitted into evidence).

Evidence is also considered relevant if it "logically relates to the ultimate, material inference in the case for which it is proffered."[111] A common challenge to the probative value of drug tests is their reliability: unreliable tests should not carry significant weight with juries.[112] In *State v. Martin*,[113] however, the Alabama Court of Criminal Appeals directly addressed this concern, affirming that a positive drug test is probative under section 26-15-3.2.[114] Evidentiary rules exist to provide defendants with the opportunity to challenge the drug tests' reliability after they have been admitted.[115] Then, it is the jury's responsibility to determine whether to use the test and, if so, how much weight to assign to the outcome.[116] Simply precluding a positive drug test outright would foreclose any opportunity for the prosecution to lay a proper foundation for its admission and would eliminate the opportunity for the jury to assess its value.[117]

### 2. The Prejudicial Impact Drug Tests Obtained During Prenatal Care Can Have on Jurors

Alabama common law provides precedent for excluding evidence when its probative value is "substantially outweighed" by unfair prejudice, such as decisions made on an improper, often emotional basis.[118] This part focuses on three main reasons the drug tests obtained from prenatal appointments could be prejudicial: (1) they rely on misleading expert testimony, (2) there is a lack of procedure to prevent false positives, and (3) they evoke an emotional response from the jury.

#### *a. Reliance on Misleading Expert Testimony: The Case of* State v. McKnight

An essential component of the prosecution's case against pregnant women who have used drugs is testimony from an expert witness.[119] The prosecution will often introduce positive drug tests through physician testimony.[120] Despite years of training and clinical practice, physicians "are rarely

111. Dotch v. State, 67 So. 3d 936, 997 (Ala. Ct. App. 2010) (quoting Taylor v. State, 666 So. 2d 36, 52 (Ala. Crim. App. 1994)).

112. *See Is Drug Testing Reliable*, SMITH LEGACY L. (Apr. 11, 2024), https://smithlegacylaw.com/resources/insights/is-drug-testing-reliable/ [https://perma.cc/BUN2-MXT2].

113. 291 So. 3d 1216 (Ala. Crim. App. 2019); *id.* at 1220.

114. *See id.* at 1220.

115. *See id.* ("If the test is admitted at trial, Martin would have the ability to call and to examine the technician or other expert witnesses to explain that such tests are not always reliable or that the technician or other personnel might have made a mistake.").

116. *See id.*

117. *See id.*

118. ALA. R. EVID. 403 advisory committee's notes; *see, e.g.*, Murray v. Ala. Power Co., 413 So. 2d 1109, 1114 (Ala. 1982) (finding it proper to exclude evidence when it would work more to divert the attention of the jury than to provide probative worth); Fincher v. State, 58 Ala. 215, 220–21 (1877) (excluding evidence based on its tendency to mislead jurors by distracting their attention from the main fact at issue).

119. *See* Rubin, *supra* note 82, at 793; *see also supra* Part II.A.1.

120. *See* Rubin, *supra* note 82, at 818.

qualified to testify to the background causes of fetal death or harm," as the exact cause is often unknown.[121] However, obstetricians and medical examiners can testify as expert witnesses and make such assertions of causality.[122] When medical witnesses offer this testimony, scientific uncertainty is presented and accepted as fact, even though evidence exists to the contrary.[123]

One case that illustrates experts' inability to testify with sufficient certainty that drug use directly caused fetal harm is *State v. McKnight*.[124] In *McKnight*, Regina McKnight was convicted of homicide by child abuse after giving birth to her stillborn daughter with cocaine metabolites found in her baby's system.[125] The autopsy report provided three causes of death: (1) mild chorioamnionitis (inflammation of the fetal membranes),[126] (2) funisitis (inflammation of the umbilical cord),[127] and (3) cocaine consumption.[128] Chorioamnionitis and funisitis are commonly caused by infection.[129] The pathologist testified before the grand jury that the death was a homicide due to McKnight's cocaine consumption, dismissing the potential infectious causes, and McKnight was subsequently indicted.[130] Despite an initial mistrial "for reasons related to lack of evidence that cocaine caused the death," McKnight was found guilty in her second trial and sentenced to twenty years.[131]

When McKnight appealed the case two years later, she argued that there was insufficient evidence to prove cocaine use caused the stillbirth.[132] The State called two expert witnesses.[133] Dr. Edward Proctor, who conducted the autopsy, testified that "the only way for the infant to have [cocaine metabolites] present was through cocaine, and that the cocaine had to have come from the mother."[134] He only testified to the fact that the fetus was exposed to cocaine metabolites; he did not provide any evidence of a causal relationship between the fetus's exposure to cocaine metabolites and its death—a necessary relationship to meet the elements of homicide.[135] In fact,

121. *Id. See generally* State v. McKnight, 576 S.E.2d 168 (S.C. 2003).
122. *See* Rubin, *supra* note 82, at 818.
123. *See id.* at 819. Another example of inaccurate medical reasoning and improperly assigning causality can be seen when "courts have sentenced individuals to prison due to saliva exposure to HIV, even though it has been proven that HIV cannot be transmitted this way." *Id.*
124. 576 S.E.2d 168 (S.C. 2003).
125. *Id.* at 171.
126. *Chorioamnionitis*, MERRIAM-WEBSTER, https://www.merriam-webster.com/medical/chorioamnionitis [https://perma.cc/TWP4-UPZ4] (last visited Apr. 2, 2025).
127. *Funisitis*, SCIENCEDIRECT, https://www.sciencedirect.com/topics/medicine-and-dentistry/funisitis [https://perma.cc/XK6L-WSEU] (last visited Apr. 2, 2025).
128. *McKnight*, 576 S.E.2d at 171.
129. *See* Burns & Wheeler, *supra* note 33, at 384.
130. *McKnight*, 576 S.E.2d at 171.
131. Burns & Wheeler, *supra* note 33, at 384.
132. *McKnight*, 576 S.E.2d at 171.
133. *Id.* at 172.
134. *Id.*
135. *See* Burns & Wheeler, *supra* note 33, at 385.

in the first trial, Dr. Proctor "admitted it was possible for chorioamnionitis or funisitis alone to have caused the death of McKnight's fetus."[136] Furthermore, the second expert, Dr. Brett Woodward, "could not say the exact mechanism by which the cocaine had killed the infant," but testified anyway that "he believed the death was caused solely by the cocaine."[137] Despite a lack of proof or explanation of how the cocaine metabolites alone led to McKnight's stillbirth, "the conclusion that her cocaine use amounted to homicide was based on process of elimination by experts who themselves acknowledged they could not be sure."[138]

Although McKnight's appeal was unsuccessful and her conviction was affirmed, she petitioned for post-conviction relief five years later, which was granted due to her counsel's ineffective assistance.[139] McKnight's counsel failed to call expert witness, Dr. Steven Karch, who testified at the first trial that "although he could not determine the underlying cause of the chorioamnionitis and funisitis . . . those conditions alone were responsible for its death."[140] The Supreme Court of South Carolina also found McKnight's counsel ineffective for failing to introduce the autopsy report, which "would have served as hard evidence to (1) undermine the conclusion of Dr. Woodard, the only expert who opined that cocaine alone caused the fetal demise, and (2) remind jurors of the inconsistencies in the State's experts' testimony."[141]

### *b. Unverified Drug Tests and a Risk of False Positives*

Alabama has set procedures for processing drug tests, including handling tests and conducting the confirmatory testing, so as to preserve the tests' integrity.[142] However, when these personnel do not handle or confirm the tests appropriately, prosecutors still successfully bring charges under the Chemical Endangerment of a Minor law against pregnant women.[143] A confirmation test is necessary because false positives occur in an estimated 5 to 10 percent of all drug test types[144] and up to 43 percent of meconium samples.[145] In a study evaluating over 700 urine samples that previously tested positive for controlled substances, many did not withstand further

136. McKnight v. State, 661 S.E.2d 354, 357 (S.C. 2008).
137. *McKnight*, 576 S.E.2d at 172.
138. Burns & Wheeler, *supra* note 33, at 386.
139. *See McKnight*, 576 S.E.2d at 171; *see also McKnight*, 661 S.E.2d at 357.
140. *McKnight*, 661 S.E.2d at 358. Dr. Karch further explained how the only conclusion he could make from the cocaine metabolite presence in the fetus was that "the mother was a cocaine user." *Id.*
141. *Id.* at 365.
142. *See* Burns & Wheeler, *supra* note 33, at 391.
143. *See id.*; *see also* Yurkanin, *supra* note 80.
144. *See* Leigh Ann Anderson, *Can a Drug Test Lead to a False Positive?*, DRUGS.COM, https://www.drugs.com/article/false-positive-drug-tests.html# [https://perma.cc/22EZ-3ZEY] (Nov. 8, 2023).
145. Cristine Moore, Douglas Lewis & Jerrold Leikin, *False-Positives and False-Negative Rates in Meconium Drug Testing*, 41 CLIN. CHEM. 1614, 1614 (1995).

scrutiny.[146] Of the initial positive tests, 13.2 percent, 25.4 percent, 55.9 percent, and 90.7 percent turned out to be false positives for opioids, benzodiazepines, methamphetamine, and amphetamines, respectively.[147] These false positives can be caused by "legal, common household items, including ibuprofen, poppy seeds, body wash, anti-depressants, anti-histamines and other medications."[148] Despite these known inaccuracies, Alabama continues to enforce the law without requiring confirmatory testing.[149] One defense attorney from Alabama confirmed that "there is not a requirement for a verified, confirmatory toxicology test or chain of custody in [section 26-15-3.2] cases."[150] Rather, a *witness* to the positive drug test—often without actually producing the sample itself—satisfies the necessary testing procedures, diverging from Alabama's drug testing standards in other contexts.[151]

Federal Rule of Evidence 702 and its Alabama counterpart require a valid scientific basis for evidence to be admissible.[152] After *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[153] Rule 702 was created to address the "widespread concerns that courts were admitting unreliable scientific evidence."[154] According to Professor Jules Epstein, however, studies have shown "an appalling lack of understanding of *Daubert* . . . terms" and "[j]udges, when surveyed, have acknowledged 'that their [scientific] education had left them inadequately prepared to serve as gatekeepers under *Daubert*.'"[155] Particularly in the criminal context, other studies have concluded that *Daubert* has had a limited impact on improving the quality of

146. *See* Burns & Wheeler, *supra* note 33, at 392.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *See id.* at 394. For example, under Alabama's workplace drug testing law, positive drug tests must be verified by a confirmation test that is "different in scientific principle from that of the initial test procedure" and "capable of providing requisite specificity, sensitivity, and quantitative accuracy." ALA. CODE § 25-5-331(3), 335(c)(8) (2023).
152. *See* FED. R. EVID. 702; ALA. R. EVID. 702; *see also* Jim Hilbert, *The Disappointing History of Science in the Courtroom:* Frye, Daubert*, and the Ongoing Crisis of "Junk Science" in Criminal Trials*, 71 OKLA. L. REV. 759, 786–87 (2019). For the purposes of this Note, Alabama Rule of Evidence 702 and Federal Rule of Evidence 702 are the same. Alabama Rule 702 applies to a narrower set of cases; however, it includes cases brought under section 26-15-3.2, and thus Alabama Rule of Evidence 702 and Federal Rule of Evidence 702 can be used here interchangeably. FED. R. EVID. 702; ALA. R. EVID. 702.
153. 509 U.S. 579 (1993).
154. Hilbert, *supra* note 152, at 759. Specifically, the Court hoped to amend their previous ruling in *Barefoot v. Estelle*, 463 U.S. 880 (1983), in which "junk science" influenced the outcome. Hilbert, *supra* note 152, at 761 (using a psychiatrist's testimony "regarding the future dangerousness of the defendant in order to impose the death penalty"). As Justice Harry A. Blackmun explained in his dissent, "psychiatrists simply have no expertise in predicting long-term future dangerousness" and "*two out of three* predictions of long-term future violence made by psychiatrists are wrong." *Barefoot*, 463 U.S. at 920–21 (Blackmun, J., dissenting).
155. Hilbert, *supra* note 152, at 795 (quoting Jules Epstein, *The National Commission on Forensic Science: Impactful or Ineffectual*, 48 SETON HALL L. REV. 743, 757 (2018)).

scientific evidence used in trial.[156] According to legal scholars, the "lax oversight" criticized in *Barefoot v. Estelle*,[157] the case that prompted the Court to address unreliable scientific evidence, remains highly prevalent in criminal court.[158]

### *c. Public Opinion, Stigma, and Emotion Affect the Way Jurors View This Evidence*

Despite the lack of scientific consensus on the effects of prenatal drug use on childhood outcomes,[159] the public is drawn to this issue in ways that promote misinformation and maternal policing.[160] "Society does not measure medical impacts in the long-term; it sees harm to an innocent newborn and seeks redress from the individual who caused the harm."[161] As a result, juries may let their personal bias and emotion influence their decisions.[162] In fact, many jurors believe that a woman who uses drugs while pregnant "should go to prison regardless of whether the drug use actually caused the miscarriage or death of the child."[163] Specifically in the South where, as Professor David McLeod explains, "the idea of womanhood is held up in a classic way . . . [t]here are a lot of expectations around how a woman should nurture and care. When the courts see that the women don't fit those stereotypes, they can be more punitive."[164] Thus, women are labeled "bad

156. *See, e.g.*, *id.* at 796 ("*Daubert* has had little or no influence on the admissibility of science—good or bad—in criminal cases."); Jennifer L. Groscup, Steven D. Penrod, Christina A. Studebaker, Matthew T. Huss & Kevin M. O'Neil, *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCH. PUB. POL'Y & L. 339, 345–46 (2002) ("Contrary to the predictions of most commentators, the basic rates of admission at the trial and the appellate court levels did not change significantly after *Daubert* in criminal cases on appeal."); David M. Flores, James T. Richardson & Mara L. Merlino, *Examining the Effects of the* Daubert *Trilogy on Expert Evidence Practices in Federal Civil Court: An Empirical Analysis*, 34 S. ILL. UNIV. L.J. 533, 538 n.37 (2010) ("This lack of significant difference with respect to changes in admissibility rates in the realm of criminal cases represents something of a departure from what was found in research utilizing civil case samples."). This conclusion of *Daubert*'s minimal influence on the admission of scientific evidence in criminal cases stands in opposition to civil cases, where "judges are much more likely . . . to scrutinize expert testimony before trial" and then limit or exclude it. *See* Hilbert, *supra* note 152, at 797 n.215.

157. 463 U.S. 880 (1983).

158. *See* Hilbert, *supra* note 152, at 813.

159. *See supra* Part. I.A.

160. *See* Erin D. Kampschmidt, *Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and the Affordable Care Act Should Step Up*, 25 HEALTH MATRIX 487, 499 (2015).

161. *Id.*

162. *See* Kathryn A. Kellett, *Miscarriage of Justice: Prenatal Substance Abusers Need Treatment, Not Confinement Under Chemical Endangerment Laws*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 472 (2014) ("However, juries can be enigmatic, and they may be tempted to resort to personal bias and emotion as opposed to relying on the law.").

163. *See id.*

164. Mina Dixon Davis, *"Bad Moms" and Powerful Prosecutors: Why a Public Health Approach to Maternal Drug Use Is Necessary to Lessen the Hardship Borne by Women in the South*, 25 GEO. J. ON POVERTY L. & POL'Y 305, 317 (2018) (quoting Olga Khazan, *Into the*

mothers" when the public finds that they are failing to meet these societal expectations.[165]

Scholars have conducted studies to measure community sentiment around drug use during pregnancy.[166] Their research indicates that "as injury severity increases, so do emotions and responses to crime."[167] One study examined potential factors that could influence these emotional reactions and support for legal actions, focusing mainly on "(1) drug type, (2) severity of the baby's injuries, and (3) the woman quitting drug use during pregnancy."[168] The study found that emotional responses were quite strong, with participants being most affected by factor two, the severity of the baby's injuries.[169] "The higher the injury level, the more negative the emotional responses and the more supportive participants would be of various sentences."[170] The study concluded that jurors want to punish women more if they caused serious harm to their newborns.[171]

### *B. Evidentiary Rules Designed to Counteract Harmful Policy Effects*

Judges have shown greater willingness to use social science data in criminal cases.[172] For example, in *Miller v. Alabama*,[173] the Supreme Court relied on adolescent brain development to hold that automatic life without parole for youth offenders was cruel and unusual punishment.[174] Other courts have adopted a similar approach, drawing on social science data to assess how a suspect's race should factor into Fourth Amendment analyses.[175]

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*Body of Another*, ATLANTIC (May 8, 2015), https://www.theatlantic.com/health/archive/2015/05/into-the-body-of-another/392522/ [https://perma.cc/JN8Y-Q854]).

165. Nancy D. Campbell, *The Construction of Pregnant Drug-Using Women As Criminal Perpetrators*, 33 FORDHAM URB. L.J. 101, 101 (2006). One study found that "negative views [exist] toward individuals with opioid use disorder . . . including beliefs that this misuse reflects a character defect and lack of willpower and discipline." Alisha Desai, David DeMatteo, Kirk Heilbrun, Ryan Holliday, Claire Lankford & John Rotrosen, *Public Perception on Policies to Address Prenatal Substance Use: Recommendations Regarding Maternal Criminal Prosecution and Child Welfare*, 29 PSYCH., PUB. POL'Y & L. 402, 404 (2023). In this study, the majority of participants believed that the mother should be held criminally liable because her son was born with symptoms of alcohol or drug withdrawal. *Id.* at 407.

166. *See* Monica K. Miller & Alane Thomas, *Understanding Changes in Community Sentiment About Drug Use During Pregnancy Using a Repeated Measures Design*, *in* HANDBOOK OF COMMUNITY SENTIMENT 113, 116 (Monica K. Miller, Jeremy A. Blumenthal & Jared Chamberlain eds., 2015).

167. *Id.* at 117.

168. *Id.* at 123.

169. *See id.* at 119–20.

170. *Id.* at 124.

171. *See id.*

172. *See* Eve Brensike Primus, *Incorporating Social Science into Criminal Defense Practice*, CHAMPION, Nov. 2020 at 40, 40.

173. 567 U.S. 460 (2012).

174. *See id.* at 465, 471–73.

175. *See* Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (holding that analyzing flight as a factor in the reasonable suspicion calculus cannot be divorced from the

Just as social science has informed judicial approaches to certain cases, it has also played a critical role in shaping reforms to evidentiary rules. The Federal Rules of Evidence mandate the exclusion of certain types of evidence, based not only on relevance but also when public policy favors the behavior involved.[176] This part first introduces two such rules of evidence, Rule 412 and Rule 609(b). It then explores how public policy supports women receiving prenatal care and the effect Alabama's Chemical Endangerment of a Minor law has on that care.

### 1. How Rule 412 Addressed Harmful Myths and Prejudice in Sexual Assault Cases

Until the 1980s, a rape survivor's[177] prior sexual behavior was evidence the defendant could introduce in an effort "to impeach her credibility as well as to demonstrate her desire for sexual relations."[178] Upon realizing this evidence could be presented notwithstanding its limited probative value and significant emotional toll on survivors, Congress enacted Federal Rule of Evidence 412 (the "rape shield law"), an affirmative evidence shield.[179] The purpose of the rape shield law was to exclude otherwise arguably relevant evidence of a survivor's past sexual behavior.[180] Specifically, Rule 412 prohibits the admission of evidence offered to prove a survivor's sexual history unrelated to the defendant's actions or to depict the survivor's character as sexually promiscuous.[181] Shortly after, Alabama adopted its own version of Rule 412, incorporating nearly every feature of its federal counterpart.[182]

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findings in a police department report documenting a pattern of racial profiling of Black males in Boston); United States v. Brown, 925 F.3d 1150, 1156 (9th Cir. 2019) ("In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race.").

176. *See* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, DANIEL J. CAPRA & JESSICA BERCH, 1 FEDERAL RULES OF EVIDENCE MANUAL § 102.02 (13th ed. 2024); *see also* Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 902–03 (2013) ("If the policy underlying rape shields is to encourage reporting and prevent embarrassment and harassment, admitting sexual trauma evidence will discourage a particularly susceptible class of victims from coming forward and being compensated.").

177. "Her" is used here because the majority of rape victims are female, but this applies to any victim. *See Victims of Sexual Violence: Statistics*, RAINN, https://rainn.org/statistics/victims-sexual-violence [https://perma.cc/CA56-T66U] (last visited Apr. 2, 2025).

178. *See* Monnin, *supra* note 89, at 1169–70.

179. *See id.* at 1170; *see also* FED. R. EVID. 412.

180. *See* FED. R. EVID. 412(a) advisory committee's notes; *see also* A.J. STEPHANI & GLEN WEISSENBERGER, ALABAMA EVIDENCE COURTROOM MANUAL, LexisNexis (database updated 2024) (Alabama advisory committee discussing the federal version of Rule 412).

181. FED. R. EVID. 412(a).

182. *See* STEPHANI & WEISSENBERGER, *supra* note 180. Alabama's rule is different from the federal statute in that it (1) "expands the definition of 'evidence relating to past sexual behavior' to include opinion evidence regarding the victim's character," ALA. R. EVID. 412 advisory committee's notes (quoting ALA. R. EVID. 412(a)(3)), and (2) it allows the defense to notify the court that it "intends to introduce evidence of past sexual behavior that directly involved the accused" at any time before presenting it. *Id.* (citing ALA. R. EVID. 412(d)(1)).

Before rape shield laws, "evidence of sexual history and predisposition was not only freely admissible, but encouraged."[183] As experts explain, the probative value of this evidence is now known to be unfounded, flawed, and have perpetuated stigmas, including the idea that "'unchaste' women were considered more likely to consent to sex and . . . more likely to lie about it later."[184] Defense attorneys introduced such evidence, having found that damaging the survivor's reputation was an effective legal strategy.[185] Eventually, Congress realized that allowing such evidence humiliated survivors and disincentivized them from reporting rape and other sexual crimes.[186]

The drafters of Rule 412 acknowledged these harms and sought to prevent juries from basing verdicts on irrelevant and prejudicial evidence about a survivor's sexual history.[187] The drafting committee aimed to protect survivors from humiliation, invasions of privacy, and psychological distress during trial.[188] The law was also intended to counteract misconceptions about sexual misconduct and minimize the trauma associated with coming forward to increase reporting.[189] By acknowledging the minimal probative value of such evidence compared to its highly prejudicial nature, the rape shield law aimed to support survivors, encourage accountability, counter misconceptions about sexual misconduct, and benefit society by holding offenders accountable.[190]

### 2. The Creation of Rule 609(b) to Ensure Probative Value Outweighs Prejudice for Stale Convictions

Federal Rule of Evidence 609(b) allows past convictions more than ten years old to be used for impeachment purposes only if the "probative value [of the conviction] . . . substantially outweighs its prejudicial effect."[191] Alabama's Rule of Evidence 609(b) has nearly identical language.[192] Stale convictions have strict admissibility requirements due to the weak connection between past behavior and current truthfulness.[193] Congress also acknowledged the "exceptional potential for prejudice resulting from the

183. Hines, *supra* note 176, at 881.

184. R. Michael Cassidy, *Character, Credibility, and Rape Shield Rules*, 19 GEO. J.L. & PUB. POL'Y 145, 151 (2021) (quoting Packineau v. United States, 202 F.2d 681, 685 (8th Cir. 1953)).

185. *See* Hines, *supra* note 176, at 882, 890. "A witness with 'bad moral character' will be less truthful than one with 'good moral character.'" *Id.* at 882.

186. *See* Lukas Saunders, *Rape Shield Laws: Protecting Sex-Crime Victims*, NOLO, https://www.nolo.com/legal-encyclopedia/rape-shield-laws-protecting-sex-crime-victims.html [https://perma.cc/Y794-Z5JZ] (last visited Apr. 2, 2025).

187. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

188. *See id.*

189. *See id.*

190. *See* Hines, *supra* note 176, at 880, 883.

191. FED. R. EVID. 609(b).

192. *See* ALA. R. EVID. 609(b) ("Evidence of a conviction under this rule is not admissible . . . unless the court determines . . . that the probative value of the conviction . . . substantially outweighs its prejudicial effect.").

193. *See* Monnin, *supra* note 89, at 1204.

presentation of prior criminal acts."[194] Unlike Rule 403, which places the burden on "the opponent to show that *danger of prejudice* substantially outweighs *probative value*," Rules 412 and 609(b) reverse this standard.[195] Under these rules, the proponent must demonstrate that the "*probative value* substantially outweighs *unfair prejudice*."[196]

### 3. Harmful Policy Perpetuated by Section 26-15-3.2

A recent federal government effort to mitigate health inequalities, "Healthy People 2030," identified increasing prenatal care as a key focus.[197] Policymakers within state legislatures have also indicated that promoting a healthy start to life is one of their top priorities.[198] On an individual level, however, many patients refrain from seeking prenatal care, due to fear of legal repercussions for using illegal substances while pregnant, and "women who do not receive prenatal care are . . . three to four times more likely to die from pregnancy-related complications than those who do."[199] Specifically, there is a positive direct association between the number of prenatal appointments attended and a pregnant woman's risk of death: attending ten or more appointments reduces the risk of death from "one in three to almost one in five women."[200] Furthermore, with no prenatal care, newborns are "three times more likely to be low birth weight and five times more likely to die."[201]

As Part II.B.3.a explains, using medical records as evidence of criminal activity disincentives women to seek prenatal care and is thus counterproductive to the government's goals of protecting unborn children.[202] Part II.B.3.b then details how women who do not seek prenatal care end up costing the state more money than those who do.[203]

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194. *Id.*

195. Hines, *supra* note 176, at 885.

196. *Id.*

197. *See* Jessica Glenza, *Fewer US Women Received Early and Adequate Prenatal Care Last Year – CDC*, THE GUARDIAN (Aug. 24, 2024, 5:00 AM), https://www.theguardian.com/us-news/article/2024/aug/24/prenatal-care-decline-cdc-study [https://perma.cc/XPV3-RVLD].

198. *See State Approaches to Ensuring Healthy Pregnancies Through Prenatal Care*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2021), https://www.ncsl.org/health/state-approaches-to-ensuring-healthy-pregnancies-through-prenatal-care/ [https://perma.cc/LB5R-JBVL].

199. NOVOA, *supra* note 24, at 2; *see also infra* Part II.B.3.a; Desai et al., *supra* note 165, at 404.

200. AMIR MASOUD FORATI, MARIA RODRIGUEZ-ALCALA, WILLIAM TROLINGER, ROMI SIGSWORTH, DAVE SHIDELER & AVERY NIMS, HEARTLAND FORWARD, THE ECONOMIC CASE FOR INVESTING IN MATERNAL HEALTH 7 (2024).

201. *State Approaches to Ensuring Healthy Pregnancies Through Prenatal Care*, *supra* note 198; *see also* Thomas R. Moore, Willem Origel, Thomas C. Key & Robert Resnik, *The Perinatal and Economic Impact of Prenatal Care in a Low-Socioeconomic Population*, 154 AM. J. OBSTETRICS & GYNECOLOGY 29, 31 (1986) (concluding from a study that women who did not receive any prenatal care gave birth to newborns who experienced "significantly greater perinatal morbidity and mortality").

202. *See infra* Part II.B.3.a.

203. *See infra* Part II.B.3.b.

### *a. Alabama's Chemical Endangerment of a Minor Law Has a Direct Effect on Women Obtaining Prenatal Care*

As opposed to the prosecutors' reasons for criminalizing drug-using pregnant women, public health approaches incentivize engagement with the healthcare system.[204] As Professor James G. Hodge Jr. has suggested, criminal prosecution "tends to drive drug-abusing mothers underground, thus causing them to avoid prenatal care."[205] Afraid of being tested for drugs during an appointment, and not wanting to face criminal charges, many women delay or avoid prenatal care entirely.[206] As one woman said, "[t]hat whole time, that whole 9 months, you're like, I cannot go to this doctor because if I do, they're gonna take my kid or put [me] in jail for the rest of [my] 9 months just to take the baby when [I deliver]."[207] Beyond avoiding prenatal care, there is concern amongst public health experts that women would rather terminate their pregnancy than face criminal charges.[208]

A clear example of this occurred during the two-year period in which Tennessee enforced a fetal homicide law intended to curb prenatal opioid use by charging pregnant women with fetal assault.[209] While the law was in effect, the state experienced a "1,000% increase in maternal failure to obtain prenatal care" and "observed [higher] rates of mortality among infants with [neonatal opioid withdrawal syndrome] whose mothers did not receive [medication assisted treatment] during their pregnancy."[210]

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204. *See* James G. Hodge Jr., Annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L.R.5th 461, § 2(a) (1991).

205. *Id.* Women also avoid seeking delivery care for this same reason. *See* Adams, *supra* note 73, at 1364. One defense attorney said she "had a client who refused to go to the hospital when she went into labor for fear of criminal consequences if she tested positive for drugs. The woman instead gave birth at home with no medical assistance." *Id.*

206. *See* Kampschmidt, *supra* note 160, at 502; *see also* Stone, *supra* note 30, at 3. More specifically, the leading causes for refraining from seeking prenatal care include "[f]ear of judgmental physicians, reporting requirements, and criminal action." Kampschmidt, *supra* note 160, at 502. About half of U.S. states designate physicians and social workers as mandated reporters, requiring them to report women who they "perceive to be endangering their pregnancies." *See* KAVATTUR ET AL., *supra* note 13, at 13. Additionally, mandated reporters are liable for not reporting, but, because of immunity statutes in every state, they are protected from legal consequences when they do report, which creates an incentive for overreporting. *See* AMNESTY INT'L, *supra* note 19, at 20.

207. Roberts & Pies, *supra* note 27, at 338 (alteration in original).

208. *See* Miller & Thomas, *supra* note 166, at 113. It should be noted that on June 24, 2022, Alabama's total abortion ban came into effect, "prohibit[ing] abortion at all stages of pregnancy," after the U.S. Supreme Court overturned *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022). *See After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/?state=AL [https://perma.cc/6HMD-A69G] (last visited Apr. 2, 2025).

209. *See* 2014 Tenn. Pub. Acts 820.

210. Desai et al., *supra* note 165, at 404; *see also* AMNESTY INT'L, *supra* note 19, at 9 ("They have avoided OB care because of this law.").

### *b. Receiving Prenatal Care Is Economically Beneficial to the State*

Comprehensive women's healthcare boosts the economy, whereas poor perinatal care has severe financial consequences.[211] One systematic review of over 20,000 abstracts on the topic found that "women's health is tied to economic development."[212] According to the experts' findings, when women and children are healthy, they are more likely to pursue higher levels of education and be more productive in society.[213] When mothers or children face high risks or die during childbirth due to lack of prenatal care, the resulting burden affects both individuals and the state.[214] On a national scale, the "direct medical and related-nonmedical expenses, in combination with the broader indirect economic losses," such as reduced work hours, decreased productivity, and diminished human capital, "cost the U.S. . . . econom[y] $165.3 billion (0.8 percent of GDP) in 2020."[215]

According to physician-led research at the University of California San Diego, avoiding prenatal care not only worsens obstetric outcomes but also increases the financial burden on the mother.[216] The authors estimated the economic impact of not receiving prenatal care by comparing the associated costs of pregnancy complications in each cohort.[217] On average, the total inpatient cost for each "no care" mother-baby pair was $2,194 higher than the cost for patients who received care.[218] The total cost is likely higher, as this does not account for the "potential savings in aftercare," such as special education and follow-up medical support, "frequently required in the first years of a premature infant's life."[219]

Postnatal healthcare for preterm or underweight newborns is substantially more expensive than that of full-term newborns.[220] The average cost for a healthy, full-term baby in the United States is $6,400, compared to $238,000

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211. *See generally* Kristine Husøy Onarheim, Johanne Helene Iversen & David E. Bloom, *Economic Benefits of Investing in Women's Health: A Systematic Review*, PLOS ONE, Mar. 30, 2016, at 1 (finding that women's health is tied to nations' long-term productivity).

212. *Id.*

213. *See id.*

214. *See* FORATI ET AL., *supra* note 200, at 6 (finding that, if only *half* of these avoidable outcomes were prevented, the United States could save about $78.6 billion, or .36 percent of the country's gross domestic product).

215. *See id.*

216. *See* Moore et al., *supra* note 201, at 30.

217. *See id.* at 29.

218. *See id.* at 31. It should be noted that this study is from 1986. Adjusted for inflation and applying the consumer price index, the cost of perinatal care for the group receiving no care was $14,867 per pair, $6,592 higher than the cost for patients who received care. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. & STATS., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/GG47-RSQW] (last visited Apr. 2, 2025). This aligns with the numbers from a 2020 article, concluding the per-birth savings in the United States are estimated at $14,768 for each preterm birth and low–birth weight birth preventions. *See* FORATI ET AL., *supra* note 200, at 17.

219. Moore et al., *supra* note 201, at 33.

220. *See* FORATI ET AL., *supra* note 200, at 16 fig.1.

for a newborn delivered prior to twenty-eight weeks.[221] Low–birth weight infants (weighing 5.5 pounds or less) are also costly, approximately $114,000.[222] Overall, the economic burden of undesirable birth outcomes in the United States is an estimated $63.9 billion.[223]

## III. A PROPOSED NEW RULE OF EVIDENCE TO CORRECT FOR ALABAMA'S YEARS OF BAD POLICY

Rules of Evidence 412 and 609(b) were created to prevent the devastating prejudicial effects that certain types of evidence can have on a jury.[224] Both rules employ a reverse balancing test, allowing the admission of evidence related to a survivor's sexual history or a defendant's prior convictions only if its probative value substantially outweighs its potential for prejudice.[225] This principle reflects an acknowledgement of the significant harm that such evidence can cause, and it offers a framework that should be extended to prenatal medical records in Alabama. A similar reverse balancing test would ensure that these sensitive records are used judiciously, striking a balance between the evidentiary value and the potential harm to pregnant individuals.

Stories like Krista Harding's illustrate the severe consequences of using the Chemical Endangerment of a Minor law to prosecute pregnant women.[226] In September 2019, Krista was driving with her healthy eight-week-old daughter when she was arrested during a routine traffic stop due to a felony warrant issued for her arrest.[227] The officer drove her to the Etowah County Detention Center, nearly an hour away, where it took eight hours to be booked and more than a week to see a judge.[228] Krista was leaking breast milk and was not allowed clean underwear; every day she washed the one pair she had, "saturated with menstrual blood, in the cell sink and hung them to dry."[229] Only after all this did she learn that "the warrant for her arrest had been issued because of a urine test taken at a doctor's visit early in her pregnancy."[230] Such a case not only highlights the emotional and physical toll on women but also reveals the chilling effect the Alabama law has on public health.

Part III first examines how the principles underlying these existing evidentiary shields relate to the challenges posed by prenatal medical records. The part next proposes a draft for the new Alabama Rule of Evidence, specifically designed to protect against the misuse of prenatal medical records in these prosecutions. Finally, Part III draws comparisons between the policy concerns that motivated the creation of Rules 412 and

221. *Id.*
222. *Id.*
223. *Id.* at 17 (in 2020 U.S. dollars).
224. *See supra* Parts II.B.1–2.
225. *See supra* Parts II.B.1–2; *see also* Monnin, *supra* note 89, at 1203.
226. *See* Stuart, *supra* note 34.
227. *See id.*
228. *See id.*
229. *Id.*
230. *Id.*

609(b) and the detrimental policy effects of Alabama's current approach to enforcing section 26-15-3.2.

### *A. The Unfairly Prejudicial Impact Prenatal Health Records Have on Defendants*

Even though past convictions, prior sexual history, and positive prenatal drug tests present "qualitatively different considerations of probativeness and prejudice," the issues they raise are comparable in scale.[231] Some evidence is so prejudicial that it is completely unfair for the jury to hear.[232] Offering prior convictions to impeach a witness, sexual history to establish sexual propensity, or a drug test to prove harm all evoke emotional responses, which can lead jurors to base their decisions on emotions rather than facts.[233] Furthermore, these types of evidence are rarely probative of the issues they purport to prove.[234] Recognizing this, the drafters of the Federal Rules of Evidence adopted "uniquely stringent standards of admissibility" with Rules 412 and 609(b), which Alabama subsequently adopted in its Rules of Evidence governing state trials.[235] Therefore, the restrictive treatment of evidence that falls under the purview of Rules 412 and 609(b)—which allow admission of evidence only in rare and exceptional circumstances—should inform a similar standard for admitting prenatal records to prove harm to a fetus or child due to drug use during pregnancy.

Given the increasing reliance on social science research in judicial decision-making, creating this new rule would not be an extraordinary change.[236] Defense attorneys already use social science findings to limit prejudicial language in front of juries, such as referring to victims as a "complaining witness" and preventing the use of the phrase "domestic violence."[237] This Note expands upon common defense practices already in courts. Research shows that labels like "bad mother" evoke strong emotional responses from jurors, prompting them to punish the mother, even if the prosecution has not met its burden of proving causation.[238] In the same way that introducing evidence of a harassment survivor's previous sexual history invites the jury to infer she is "an unchaste and immoral woman" who deserved what happened,[239] a prosecutor introducing a positive drug test taken during a prenatal health appointment may lead jurors to conclude that the mother is unfit to care for her child, has failed her essential maternal role, and is deserving of up to ninety-nine years in prison.[240] The prejudicial effect

231. Monnin, *supra* note 89, at 1205.
232. *See supra* Part II.A.2.c.
233. *See supra* Parts II.A.2.c, II.B.
234. *See supra* Part II.A.2.
235. Monnin, *supra* note 89, at 1205; *see also supra* Part II.B.2.
236. *See supra* Part II.B.
237. Primus, *supra* note 172, at 41.
238. *See supra* Parts I.A, II.A.2.c.
239. *See* Monnin, *supra* note 89, at 1187; *see also* Part II.B.1.
240. *See supra* Part II.A.2.c.

of these tests is undeniable and necessitates a carefully crafted evidentiary standard.

Furthermore, the deeply prejudicial nature of prenatal drug tests, coupled with courts' acceptance of scientifically flawed evidence and experts' failure to properly address causation,[241] forces the defendants to "unjustly bear the burden" of the legal system's shortcomings.[242] As demonstrated in *McKnight*, a single drug test can rarely definitively prove that the drug use caused the alleged harm to the child.[243] Jurors substitute stigma and fear about drugs and drug-using parents for actual causation, resulting in wrongful convictions based on incomplete evidence.[244] The issue with admitting drug tests from prenatal appointments is that the courts "accept misleading or inconclusive evidence of fetal harm as scientific fact."[245] By assuming that drug use is the sole cause of harm, prosecutors and courts ignore the influence of numerous other factors that could plausibly or actually harm the fetus.[246] When it is impossible to distinctly discern which factor, among an intersection of influences, caused the fetal harm, and the only evidence to support causation is by means of a positive drug test,[247] such evidence should be deemed substantially prejudicial and insufficiently probative. Further, given the lack of reliability and willingness to restrict expert testimony admitted in criminal cases,[248] *Daubert* hearings alone are not a sufficient safeguard.[249]

241. *See supra* Part II.A.2.

242. *See* Rubin, *supra* note 82, at 832 ("The scientific community has overwhelmingly come out against these arrests and prosecutions, and the American Bar Association has passed a resolution opposing criminal prosecution of anyone who has experienced a miscarriage or stillbirth.").

243. *See supra* Part II.A.2.a.

244. Burns & Wheeler, *supra* note 33, at 386 ("This loose, deductive reasoning reveals stigma . . . about . . . drug-using parents.").

245. *See* Rubin, *supra* note 82, at 818. Even when harm is not required to meet the elements of the statute, as in section 26-15-3.2(a)(1), basing criminal liability solely on fetal exposure or drug contact relies on often contradictory scientific research. *See supra* Part II.A.2.a. In contrast, experts have resoundingly concluded that a lack of prenatal care is clearly associated with worse outcomes for mothers. *See supra* Part II.B.3.a. Punishing women solely for exposure, regardless of resulting harm, criminalizes behavior deemed morally repugnant by society while doing little, if anything, to prevent actual harm.

246. *See* Rubin, *supra* note 82, at 834. Poverty, for example, is associated with a "lack of access to prenatal care, lack of access to nutritious foods, increased stress, increased lead exposure, increased likelihood of eviction, and poor quality housing, all of which are known to cause harm to a pregnancy and impact the fetus." *See id.* at 804–06. One study found that women in poverty are less likely to have "had adequate nutrition and medical care during their pregnancies and [are] less likely to have healthy babies, whether they use cocaine or not." Kampschmidt, *supra* note 160, at 495 (quoting JOHN P. MORGAN & LYNN ZIMMER, CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 150 (Craig Reinarman & Harry G. Levine eds., 1997)).

247. *See supra* Parts II.A.2.a–b.

248. *See supra* Part II.A.2.a.

249. *See supra* Part II.A.2.a.

### *B. A Novel Rule of Evidence*

The proposed evidentiary rule for Alabama, and for adoption by other states, should incorporate language modeled on Alabama Rule of Evidence 412.[250] Proposed Rule X is presented below.

Rule X.

Admissibility of evidence relating to defendant in prosecution for Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed

(a) *Evidence Generally Inadmissible*. The following evidence is not admissible in any prosecution for chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed as provided in sections (b) and (c):

(1) Evidence offered from any of the defendant's prenatal or postnatal health records.

(b) *Exceptions*. The following evidence is admissible, if otherwise admissible under these rules:

(1) Evidence directly relevant and necessary to prove an essential element of the crime charged under § 26-15-3.2 whose probative value substantially outweighs any prejudicial impact.

(c) *Procedure to Determine Admissibility*.

(1) MOTION. If a party intends to offer evidence under Rule X(b), the party must:

(A) File a motion that specifically describes the evidence and states the purpose for which it is to be offered. The proper purpose may include impeachment to attack a witness's character for truthfulness;

(B) Do so a reasonable time before trial unless the court, for good cause, sets a different time; and

(C) Serve the motion on all parties.

(2) NOTICE. Regardless of who brings the motion, the prosecution shall notify the defendant of the motion before trial.

(3) HEARING. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the parties a right to attend and be heard. If at the conclusion of the hearing the court finds that any of the evidence introduced at the hearing is admissible under section (b) of this rule, the court shall by order state what evidence may be introduced and in what manner the evidence may be introduced. All in camera proceedings shall be included in their entirety in the transcript and record of the trial and case;

(4) The party may then introduce evidence pursuant to the order of the court.

250. *See* ALA. R. EVID. 412.

> (d) *Definitions*. As used in this rule, unless the context clearly indicates otherwise, the following words and phrases shall have the following respective meanings:
>
> > (1) PRENATAL HEALTH RECORDS. Any medical document or information that tracks the health and progress of a pregnant individual and their developing baby throughout pregnancy. These records are maintained by healthcare providers and include but are not limited to: the parent's medical history, physical examinations, laboratory tests, risk assessments, medications and supplements, and provider notes.
> >
> > (2) POSTNATAL HEALTH RECORDS. Any medical document or information that tracks the health and progress of an individual and their baby after childbirth. These records are maintained by healthcare providers during the postnatal or postpartum period, typically spanning the first six weeks after delivery, but may extend further. These records include but are not limited to: recovery progress, physical examinations, and newborn screening results.

### *C. The New Evidentiary Rule Will Counteract Harmful Policy Implications*

Policy concerns were central to the creation of the rape shield law and Rule 609(b),[251] and policy interests should carry equal weight in creating this new evidentiary rule. Rape shield laws were designed to encourage survivors to report crimes by reducing the risk of embarrassment and countering harmful stereotypes about sexual conduct.[252] Similarly, this new rule would encourage women to seek prenatal care by protecting them from the threat of prosecution based on their prenatal health records. Research consistently shows that policies perceived as punitive deter drug-using women from seeking prenatal care.[253] Drug-using women who do receive prenatal care, however, experience better birth outcomes and have greater access to health promoting interventions.[254]

Prosecuting women under section 26-15-3.2, a legal intervention that is theoretically meant to protect children from the dangerous chemicals produced in home methamphetamine labs,[255] not only fails to deter drug use but also creates a significant barrier to essential medical treatment.[256] Many women have expressed that they would rather avoid prenatal care altogether to escape potential legal consequences.[257] As one woman explained, "[W]omen are coming back from the hospital and they don't have their babies. So why seek help if you're going to get a charge? Back in the day

251. *See supra* Parts II.B.1–2.
252. *See supra* Part II.B.1.
253. *See* ZEESE & ABRAHAMSON, *supra* note 32, § 9:4.
254. *See* Roberts & Pies, *supra* note 27, at 333.
255. *See supra* Part II.A.1.
256. *See supra* Part II.B.3.a.
257. AMNESTY INT'L, *supra* note 19, at 9.

women didn't have ultrasounds and stuff. That's the way I would do it now. I wouldn't go to the doctor."[258]

Just as admitting irrelevant evidence of a victim's sexual history deters survivors from coming forward,[259] allowing prenatal drug tests as evidence discourages pregnant women from seeking necessary care out of fear of incarceration.[260] Society benefits when rape survivors report crimes and hold offenders accountable; society similarly benefits when mothers and their children receive adequate healthcare.[261]

## CONCLUSION

The current approach of criminalizing pregnant women under section 26-15-3.2 has failed to promote healthier pregnancies and instead causes significant harm. Alabama prosecutors' justification for using the statute this way is that they are incarcerating mothers to protect the fetuses from drug exposure.[262] There is no data, however, to suggest that imprisoning pregnant women leads to better health outcomes for their children.[263]

This approach also erodes the trust between pregnant women and healthcare providers, undermining public health goals and contradicting prosecutors' claims that these practices protect fetuses.[264] Establishing a new evidentiary rule that ensures women can access prenatal care without fear of prosecution would address this critical issue. By removing legal threats tied to healthcare visits, Alabama—and any other state considering following its lead—could foster a supportive environment where women are encouraged, rather than discouraged, to pursue medical care during pregnancy. This reform would promote healthier pregnancies and better health outcomes for both mothers and their children, achieving the very goals the current legal approach purports to serve.

258. *Id.* at 43.
259. *See supra* Part II.B.1.
260. *See supra* Part II.B.3.a.
261. *See supra* Part II.B.3.b. Also, expanding prenatal care to these women would "engender significant savings in delivery and nursery costs." *See* Moore et al., *supra* note 201, at 33.
262. *See* Yurkanin, *supra* note 23.
263. *See id.*
264. *See supra* Part II.B.3.a.