

WLJ

WOMEN LAWYERS JOURNAL

2013
VOL. 98
NOS. 1 & 2

Extraordinary Commitment

*Officers and award winners
named at Annual Meeting*

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Selma Moidel Smith
Student Writer Award Winner

7 Rules for Helping Women

Review: *Rebels at the Bar*



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Cover Story: 10 Meet New NAWL officers and award winners



The 2013 Annual Meeting & Awards Luncheon was held in July at the Waldorf Astoria in New York. New officers took their seats; interesting and practical programs were offered and awards were bestowed upon a group of women and men who exemplify the values of NAWL.

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SAVE THE DATE

NAWL 2014 MID-YEAR MEETING

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Women Lawyers Journal is published for NAWL members as a forum for the exchange of ideas and information. Views expressed in articles are those of the authors and do not necessarily reflect NAWL policies or official positions. Publication of an opinion is not an endorsement by NAWL.

Articles about current legal issues of interest to women lawyers are accepted and may be edited based on the judgment of the editor. Editorial decisions are based upon potential interest to readers, timelines, goals and objectives of the association as well as the quality of the writing. WLJ also accepts book reviews related to the practice of law. We reserve the right to edit all submissions.

Send submissions via email to williaml@nawl.org or by mail to 5055 Carnoustie Dr., Reno, NV 89502. Do not send unsolicited photos or other original artwork. No material can be returned unless accompanied by a self-addressed, stamped envelope.

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Women Lawyers Journal (ISSN 0043-7468)
is published quarterly by the National Association
of Women Lawyers (NAWL)®
321 North Clark Street, MS 21.1, Chicago, IL 60654.

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About NAWL

Founded in 1899, NAWL is a professional association of attorneys, judges and law students serving the educational, legal and practical interests of the organized bar and women worldwide. Both women and men are welcome to join. Women Lawyers Journal®, National Association of Women Lawyers®, NAWL, and the NAWL seal are registered trademarks.

By joining NAWL, you join women throughout the United States and overseas to advocate for women in the legal profession and women's rights. We boast a history of more than 100 years of action on behalf of women lawyers. For more information about membership and the work of NAWL, visit www.nawl.org.

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- A voice on national and international issues affecting women through leadership in a national and historical organization
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- A subscription to the quarterly Women Lawyers Journal and the ability to be kept up to date on cutting edge national legislation and legal issues affecting women
- The opportunity to demonstrate your commitment and the commitment of your firm or company to support diversity in the legal profession.

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NAWL award winners light way with courage and persistence

'Do you remember how it was on safari? In the afternoons I would send you ahead, to find a place and wait for me?'

'And you can see the fire and come to this place.'

'Well, it is like that. Only this time, I am going first and I will wait for you.'

'Is it far where you are going?'

'Yes.'

'This fire must be very big so I can find you.'

—Out of Africa

Recipients show professional excellence, selfless dedication as role models and advocates

By Maritza Ryan

The 1985 movie, "Out of Africa" has become one of those classic movies that summons for many women of a certain age the romantic ideals of their youth, what with Meryl Streep as a reserved but fiercely independent woman and Robert Redford playing her dashing love interest. Perhaps a less prominent aspect of the film, from which the bit of dialogue, at left, is taken, is its portrayal of the crucial importance of those people who – like the guide, Farah – willingly brave uncharted and dangerous landscapes, shrouded in darkness, only to light a fire for others to follow.

This issue of the Women Lawyers Journal celebrates those extraordinary individuals whose professional excellence and selfless dedication as role models, advocates, mentors and legal innovators, have earned them NAWL's highest awards this year. In several cases, the awards are themselves named for yet other light-bearing guides who, each in her unique way, worked in the face of overwhelming odds to create a more hospitable personal and professional landscape for women.

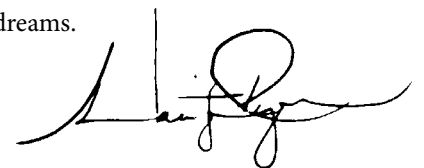
Arabella Babb Mansfield became the first female lawyer in the United States in 1869. Although women were not authorized to sit for the bar, Mansfield, undaunted, took the exam anyway. Not only did she pass, but she did so with flying colors. Never previously known for unbridled enthusiasm, the board of examiners was moved to recommend her admission despite gender, noting that her dazzling performance had "given the very best rebuke possible to the imputation that ladies cannot qualify for the practice of law." The state of Iowa consequently amended its licensing statute, becoming the first state in the nation to admit women to the legal profession.

Mahala Ashley Dickerson, elected NAWL's first African-American president in 1984, was also

the first black female attorney in her home state of Alabama and Alaska's first black attorney. A brilliant and utterly fearless advocate in and out of the courtroom, Dickerson never hesitated to join the battle on behalf of women, the poor, and the underprivileged. "I'm just not afraid to fight somebody big," she once said. "Whenever there's somebody being mistreated, if they want me, I'll help them."

And, lastly, the indomitable, ever-radiant *Selma Moidel Smith*, truly a renaissance woman whose achievements as a winning civil practitioner and litigator; leading citizen of the bar; ground-breaking scholar with a passion for the history of women in the law; and internationally renowned composer of classical music, among many other accomplishments, are already the stuff of legend. With a "nod to the past" and her "face to the future" – as she observed about NAWL in her article celebrating our 1999 Centennial, "A Century of Achievement" – Smith continues to add luster to her extraordinary record.

The setting for the remarkable exploits of these courageous pioneers, whose names grace the NAWL awards, is not the plains of British East Africa in the 1920s, abounding with prides of lions, venomous snakes and other dangers. Nevertheless, the legal, cultural and political territory in which these lawyers thrived featured perils and obstacles to women's success and wellbeing of a different kind. We who are privileged to be members of the legal profession realize that the long journey continues still. We are grateful that these lawyers – and all the attorneys honored by NAWL – have built for us very big fires indeed. Clearly visible even at great distances of time and place, they beckon us onward, glowing through the darkness from the farthest horizons of our boldest dreams.



Maritza Ryan is a Colonel in the U.S. Army, and is serving as Professor & Head of the Department of Law, U.S. Military Academy at West Point. She can be contacted at Maritza.Ryan@usma.edu

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From left: Rachel, Seth, Deborah, Steven and Rebecca.

Making yourself vulnerable has its advantages

Opening yourself to others broadens and deepens your connection

By Deborah S. Froling

Welcome to another edition of the Women Lawyers Journal. As we approach the holidays, it is always nice to reflect upon all that we have to be grateful for in our lives from simple pleasures like a warm bed to important things like family, friends and the ability to work in a profession to which we have given our all.

As I continue in my presidential year, I keep finding ways in which I am connected to NAWL, my community and the profession. Someone told me recently that we should make ourselves vulnerable from

time to time; it serves to show our humanity.

With that in mind, I find that identifying myself as a breast cancer survivor causes many people to approach me to discuss their friend, their sister, their mother or their neighbor who has fought the fight or is continuing the fight or, in some cases, lost the fight. Regardless of their story, it is a connection that we share, and a strong one at that.

As the mother of three teenagers, including a college freshman, I find that many colleagues, friends and strangers

have stories to share that help me navigate through these tumultuous times.

And as the daughter of aging parents, I need those who have gone before me in this journey to steer me in the right direction.

NAWL is a place to find those connections amongst us. However, we can find those connections more readily if you are willing to share your stories. NAWL will be asking members over the next year to share their stories with us. NAWL wants to make sure that we facilitate making connections but also to be certain that we are providing value to members and sponsors. I believe that making those connections – with colleagues, clients and leaders in the legal profession – is what NAWL is about, and telling your story is an important piece of finding them.

I hope that NAWL will be a partner with you and your organization to help you make those connections and achieve success. NAWL has many programs geared toward developing leadership amongst our members and continuing the diversification of our profession to foster those connections. NAWL strives to be the voice of women in the law and has many ways in which we seek to do so.

If you are interested in learning more about NAWL or having me or a member of the NAWL board come speak to your organization, please let us know. We would be happy to tell our story and ask you to join us in making this a better legal profession for all.

Warm wishes,

Deborah S. Froling is a member of Arent Fox LLP's Corporate/Securities and Real Estate Groups in the Washington, D.C. office. She has served as NAWL's President-elect and as Chair of NAWL's Publications Committee, and has served as editor of the Women Lawyers Journal. She can be reached at 202.857.6075 or president@nawl.org

Tell us how you got here

We all have a unique story to tell, whether it is about our own journey, about someone we met along the way – mother, sister, teacher, friend – or some event that changed our lives or directed us along the better path. We are planning a future issue of Women Lawyers Journal to share those stories with NAWL membership and we would love to include yours. In this season of reflection, or in the quieter calm of the coming year, please take some time to write down your story and send it along. We look forward to your emails: president@nawl.org



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NAWL's new governing body

Incoming officers and board members took their positions during the 2013 Annual Meeting in July

Deborah S. Froling, left, officially took her position as NAWL president at NAWL's 2013 Annual Meeting. Froling is a member of Arent Fox LLP's Corporate/Securities and Real Estate Groups in the Washington, D.C., office. She has served as chair of NAWL's Publications Committee, and as Editor of the Women Lawyers Journal. Beth L. Kaufman, right, is immediate past-president and a member of the ABA House of Delegates. She is a senior partner at Schoeman Updike Kaufman Stern & Ascher LLP, an AV® Preeminent™ Law Firm based in New York, one of the largest women-owned law firms in the United States.



FRONT ROW, left to right: Susie L. Lees, member-at-large; Beth L. Kaufman, immediate past-president and ABA delegate; Lisa M. Passante, president-elect; Deborah S. Froling, president; Marsha L. Anastasia, vice-president; Leslie Richards-Yellen, treasurer; DeAnna D. Allen, treasurer-elect. BACK ROW, left to right: Angela Beranek Brandt, secretary; Sarretta C. McDonough, assistant secretary; Maritza S. Ryan, member-at-large and executive editor, WLJ; Kristin L. Bauer, member-at-large; Michele Coleman Mayes, member-at-large; Kristin D. Sostowski, member-at-large; Carol Robles-Román, member-at-large; Heather C. Giordanella, member-at-large; Jennifer M. Guenther, member-at-large; Diane E. Ambler, member-at-large. Not pictured: Wendy Schmidt, member-at-large; Suzan A. Miller, member-at-large.

For more information on your 2013-2014 officers and for contact information, visit NAWL.org and follow the link under the About NAWL drop-down menu.

2013 Annual Meeting photos by Paula Vlodkowski

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Catherine J. Douglass

The NAWL Public Service Award is presented to a member dedicated to exemplary public service

Her Justice was founded in 1993 as inMotion Inc. In its 20 years of service, the organization has provided free legal services to low-income women and children in New York City. It has helped thousands of women free themselves from abusive relationships, stay in their homes and win the financial support to which they – and their children – are legally entitled. Her Justice's mission is to make a real and lasting difference in the lives of low-income, underserved or abused women by offering them legal services designed to foster equal access to justice and an empowered approach to life. Last year alone, 2,700 volunteers provided free legal services to 6,500 women and children.

Catherine J. Douglass is the founder of Her Justice. She drew upon 14 years of private practice (six of them as a corporate partner) with the law firm of Willkie Farr & Gallagher LLP in conceiving a pro bono program attractive to thousands of lawyers working at major law firms who want to use their skills to help women

and their families in times of crisis. She was also inspired by her seven years of service on the board of directors of an agency serving battered women and their children.

Additionally, in 1995, Douglass co-founded the Lawyers Committee Against Domestic Violence – a coalition of more than 100 legal services lawyers, prosecutors, private practitioners, representatives of the court system and members of academia – that educates professionals about domestic violence, strives to improve the response of the judicial and law enforcement systems to the needs of survivors of domestic violence, and advocates for legislative reforms that assist both

adult and child victims of abuse. She served as its co-chair until June 2009. She was awarded the Ruth G. Shapiro Memorial Award by the New York State Bar Association in January 2006, in recognition of her noteworthy contributions to addressing the concerns of women in the courts.

Douglass graduated from the University of Arizona Law School in 1976; 25 years later, in May 2001, her law school gave her its Distinguished Alumnus Convocation Award in recognition of her significant contributions to the public interest law community through Her Justice and the Lawyers Committee Against Domestic Violence.

“It was my mother who instilled in me a sense that you should understand an individual’s situation. What I got from her was a real awareness that some people don’t have anything but determination and dreams.” – Douglass



She serves on the board of directors of the Fund for Modern Courts. Formerly, she served on the Committee on Matrimonial Practice of the New York State Unified Court System, the Mayor of New York City's Advisory Committee on the Judiciary, the New York State Parent Education Advisory Board, the New York City Domestic Violence Fatality Review Committee and the New York State Bar Association President's Committee on Access to Justice.

Before becoming a lawyer, Douglass taught high school English. She earned her bachelor's degree from the University of Michigan, College of Literature, Science and the Arts, which awarded her its Humanitarian Service Award in 2010. She earned her master's degree in English Literature from the University of Minnesota in 1971.

In a column she wrote in 2007 for the New York Times (Jobs: The Boss; Working From the Heart, bit.ly/1kk2CAf) Douglass conveyed that her commitment to public service developed as she moved through college to career – through life changes, volunteer work and new careers – meeting people in all walks of life.

She also credits her family: "It was my mother who instilled in me a sense that you should understand an individual's situation. What I got from her was a real awareness that some people don't have anything but determination and dreams," she wrote in the column.

Douglass and her husband, Bruce P. Dohrenwend, reside in New York City. ■

For more information about Her Justice, go to herjustice.org.

*Last year, 2,700
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New York Life legal department honored

The President's Award is given in recognition of an organization's policies, programs and procedures that advance women lawyers

New York Life, a Fortune 100 company founded in 1845, is the largest mutual life insurance company in the United States and one of the largest life insurers in the world, with \$400 billion in assets under management.

This year, the President's Award is presented to New York Life's legal department, which is made up of 80 lawyers – 42 of whom (52.5 percent) are women.

The department is headed by a woman lawyer, Sheila Kearney Davidson. She joined the company in 1991 and currently serves as executive vice president, chief legal officer and general counsel. She has six direct reports in her legal department: 67 percent (four of six) are women.

She oversees the Office of the General Counsel, Corporate Compliance, the Office of the Secretary, the Office of Governmental Affairs and the Office of Chief Tax Counsel. She is a member of the company's Executive Management Committee, which is comprised of New



Sheila Kearney Davidson accepted the award for New York Life.

New York Life is committed to diversity and inclusion, which has led to vibrant employee networking groups and family friendly policies.

York Life's senior executive leadership and she directs the policies and procedures for the company.

New York Life is committed to diversity and inclusion, which has led to vibrant employee networking groups and family friendly policies

such as balanced hours, on-site health screening, back-up daycare and the Women's Leadership Project. Flexible schedule policies, including a generous maternity leave, work for the women and men who take advantage of them.

These policies have helped Davidson attract and retain many women lawyers. She is also a powerful advocate for lawyers within New York Life. A lawyer who works with Davidson said she gives the women in the legal department precisely what they need: “a voice at the table, where they are encouraged to think strategically, to be proactive, to act to implement their ideas and to be accountable for them.”

She has fostered an environment in which the lawyers in the New York Life legal department believe each has the ability to advance. She acts as a mentor. She sponsors them. She gives them the opportunity to diversify their experience and knowledge of New York Life’s business. She facilitates interaction between lawyers in her legal department and the business leaders within New York Life.

The New York Life legal department also works in the community: It was one of the first signatories to the New

York City Bar’s Statement of Diversity Principles. When retaining new outside counsel, New York Life routinely asks law firms about the composition of their partnership, their hiring and retention of minority and women associates and the number of part-time associates and partners. New York Life also tracks fees paid to minority and women-owned law firms and encourages its attorneys to be active in specialty bar associations. ■



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Daniel J. Goldstein

Pitney Bowes executive puts emphasis on hiring and retaining women and minorities

The Lead by Example Award is presented to a male practicing lawyer who is a leader in his law firm, company, government unit or public interest entity and supports the advancement of women.

Daniel J. Goldstein, executive vice president and chief legal and compliance officer at Pitney Bowes Inc., is the recipient of this year's award. At Pitney Bowes, he is responsible for a wide range of corporate functions, including legal, intellectual property, governance, ethics, compliance, environment and health & safety.

Goldstein originally joined Pitney Bowes in 1999 as Associate General Counsel; in 2005 he was appointed vice president, deputy general counsel. He left Pitney Bowes to serve as senior vice president and general counsel for GAF Materials Corp., and International Specialty Products, ISP Minerals, then returned to Pitney Bowes in 2010.

Since his return, his focus is on hiring more women and minority-owned outside law firms. He also works to retain the women and minorities who were already on staff by providing opportunities for networking, career development and advancement. His success is apparent: When Goldstein was nominated by members of his staff in early 2013, a full 56 percent of direct reports to Goldstein were women; women headed up seven of the departments under his direction; and 22 percent of his reports were minorities.

Prior to joining Pitney Bowes in 1999, Goldstein held legal management roles with the U.S. Securities and Exchange Commission's Division of Enforcement in the Northeast Regional Office. As Branch Chief and Assistant Regional Director, he directed investigations and litigations related to securities law violations.

Earlier in his career, Goldstein was a litigation associate at the law firm of Debevoise & Plimpton and was law clerk to the Hon. Caleb M. Wright, a federal judge.

Goldstein received a bachelor's degree summa cum laude from the University of Pennsylvania and a bachelor's degree summa cum laude from the Wharton School of Finance. He received his J.D. magna cum laude from the Harvard Law School. ■

Goldstein's staff at a glance

- Percentage of female direct reports: 56%
- Percentage of female attorneys who report (directly or indirectly): 55%
- Percentage of female non-attorneys at director level or above who report (directly or indirectly): 56%
- Percentage of direct reports who are Hispanic, Black or Latina women: 22%
- Percentage of attorneys who report (directly or indirectly) who are Hispanic, Black or Latina women: 21%
- Percentage of non-attorneys at director level or above who report (directly or indirectly) who are Hispanic, Black or Latina women: 11%

(March 2013)



Veta T. Richardson

An advocate for the minority attorneys in corporate departments and law firms

Named after trailblazer Mahala Ashley Dickerson, NAWL's first African-American President (1984-85), this award is presented to lawyers who have promoted and advanced diversity in the legal profession.

Veta T. Richardson has an illustrious history working to advance diversity. Currently, she is president and chief executive officer of the Association of Corporate Counsel. ACC has more than 30,000 members in more than 75 countries – and Richardson works tirelessly to expand the Association's reach.

ACC serves as the “voice of the in-house bar” and provides practical resources and extensive networking opportunities for its in-house counsel members.

Prior to ACC, Richardson served as executive director of the Minority Corporate Counsel Association (MCCA), advocating for the expanded hiring, promotion and retention of minority attorneys by corporate law departments and law firms.

In that role, from 2001-2011, Richardson raised the bar on the advancement of diversity in the legal profession through the establishment of a multipronged platform of groundbreaking research and white papers; thought-provoking publications, such as Diversity & the Bar; and best-in-class programs, services and networking events.

Under her leadership, the MCCA emerged as a thought leader on diversity, recruitment and retention and pipeline initiatives for multinational corporations around the world.

Earlier in her career, Richardson played another important role at ACC, serving as vice president and deputy general counsel where she foresaw the need for more access to online resources for ACC members.

Her own expertise in the in-house arena was shaped by her work as in-house counsel to Sunoco Inc., based in Philadelphia, where her practice focus was corporate governance, transactions, securities and finance.

She received a bachelor's in Business Management from the University of Maryland at College Park, and a J.D. from the University of Maryland School of Law in Baltimore. ■



Four are recognized for exemplary contributions to NAWL



Above from left: Macarena Tamayo-Calabrese, NAWL executive director; Sandra Ng Cassidy, chief legal officer of Pruco Securities LLC; April Boyer, a partner at K&L Gates LLP, Miami; Jennifer A. Champlin, associate general counsel in the Employment Division of the Walmart Legal Department; Elizabeth A. Levy, counsel at the Massachusetts Institute of Technology, Cambridge, Mass.; and Marsha Anastasia, NAWL vice-president and vice-president and deputy general counsel at Pitney Bowes.

April Boyer helped make sure the Annual and Mid-Year Meetings ran according to plan

A partner at K&L Gates LLP in its Miami office, April Boyer practices in the areas of employment law and complex commercial litigation. She has significant experience litigating the enforceability of restrictive covenants as well as defending employers in discrimination, harassment and whistleblower/retaliation lawsuits.

She also trains and counsels employers on making day-to-day employment decisions, drafts and interprets enforceability of restrictive covenants, and conducts internal investigations concerning compliance with applicable laws.

Boyer was centrally involved in a case before the U.S. Supreme Court and has experience with numerous jury trials, bench trials, arbitrations and evidentiary hearings. A regular speaker on employment law issues, she provides interviews for various national and local media outlets, including NBC's The Today Show.

The South Florida Business Journal has recognized her with the Key Partners Award for Labor & Employment Law, the 40 Under 40 award and the Heavy Hitters in Human Resources award.

Boyer also has been named a Top 50 Entrepreneur in South Florida (Business Leader), Top Attorney (Super Lawyers, Corporate Counsel Edition), Florida Super Lawyer, Employment & Labor practice area, and a Florida Legal Elite, Labor & Employment Law (Florida Trend).

Additionally, Boyer has been an active member of NAWL, serving on the Planning Committee for the Annual Meeting (co-chair Sponsorship (2013); Sponsorship Subcommittee (2011-2013). She is on the Planning Committee for the Mid-Year Meeting (co-chair Marketing (2013); Logistics and Sponsorship Subcommittees (2011), and she has served in various roles on the Planning Committee for NAWL's Miami Networking Night of Giving event.

She is involved in many Florida and Miami organizations, including serving on the Board of Directors for the Women's Fund of Miami-Dade.

Boyer received her bachelor's cum laude from Allegheny College in Meadville, Penn., and J.D. (Order of the Barristers) from the University of Pittsburgh.

Elizabeth A. Levy has served in the NAWL Mentor Program since 2010

Elizabeth A. Levy is counsel at the Massachusetts Institute of Technology in Cambridge, Mass., supporting its Technology Licensing Office.

Before joining MIT, she was counsel for Siemens Healthcare Diagnostics. Levy began her legal career as a patent agent while attending night law school, having worked as an engineer for eight years. She obtained her J.D. with honors from Suffolk University Law School in Boston, and her bachelor's in mechanical engineering with honors from the University of Texas.

Levy practiced intellectual property law at three firms, was a partner at two and holds two U.S. patents.

She has been active with NAWL since 2007, serving on its annual General Counsel Institute (GCI) and Midyear Meeting Planning Committees and as a mentor since 2010. She chaired GCI7 and led her team to raise almost

\$300,000 for GCI8. She also serves on NAWL's Regional GCI Committee.

Levy was profiled in Power and Influence for Lawyers: How To Use It To Develop Business and Advance Your Career (S. Letterman White, West/Thomson Reuters 2011).

She was a panelist in Suffolk University Law School's Legal Education and Practice Program and co-chairs the law school's Corporate Counsel Institute, now in its second year.

Levy is a member of Women Entrepreneurs in Science and Technology and co-leads a Cohort in WEST's Leading For Impact program.

She was profiled in Corporate Counsel magazine (September 2012) in an article on diversity and women in-house lawyers, and was honored as a 2013 "Leader in the Law" by The Massachusetts Lawyers Weekly and In-House Legal.

Jennifer A. Champlin chaired the program book committee for the 2013 Annual Meeting

Jennifer A. Champlin is an associate general counsel in the Employment Division of the Walmart Legal Department. She partners with company leadership and field management to provide legal advice on employment issues. She also manages the defense of employment litigation and administrative charges nationwide for Sam's Club and the California employment litigation for Walmart U.S.

Prior to joining Walmart, Champlin was a commercial litigator with specialized expertise in electronic discovery at Crowe & Dunlevy in Tulsa, Okla. Before that, she was a white collar criminal defense attorney in the Boston office of Nixon Peabody LLP.

Champlin has been actively involved in the NAWL since 2010. Most recently, she co-chaired Program Book Committee for the 2012 and 2013 Annual Meetings, co-chaired the Logistics Committee for the 2013 Mid-Year Meeting and chaired the Co-Sponsorship Committee for the 2013 General Counsel Institute.

She also volunteers on the Advisory Board of the collegiate chapter of Alpha Chi Omega at the University of Arkansas. She obtained her bachelor's in English with honors and a French minor from Oklahoma State University and her J.D. from Cornell (N.Y.) Law School.

Sandra Ng Cassidy raises NAWL's profile in New Jersey and throughout the U.S.

Sandra Ng Cassidy currently serves as the chief legal officer of Pruco Securities LLC, the retail broker/dealer and investment adviser within the Prudential Financial enterprise. Its products include variable life, variable annuities, mutual funds, managed money programs, financial planning and other security products.

Prior to joining Prudential, Cassidy spent nine years at the U.S. Securities & Exchange Commission in

Washington, D.C., and before that she was in-house counsel at Gruntal & Co. and The Guardian Life Insurance Co. of America.


Cassidy is a great ambassador for NAWL and encourages others to join the organization. She has served on every planning committee for programs hosted in New Jersey over the past several years and she also served on the 2011 Mid-Year Miami committee and the 2012 Annual Luncheon committee. She was a subcommittee chair for the 2013 Annual Luncheon.

Cassidy also played a key role in advancing NAWL's relationship with Prudential, helping provide a benefit to NAWL law student members via their internship programs. NAWL works with Prudential to place students in summer legal internships at her company.

She is a graduate of Cornell (N.Y.) University, and received her J.D. from The National Law Center at George Washington University in Washington, D.C.



Virginia S. Mueller Outstanding Member awards were presented by NAWL vice-president Marsha Anastasia, left, to Sandra Ng Cassidy, April Boyer, Jennifer Champlin and Elizabeth Levy.



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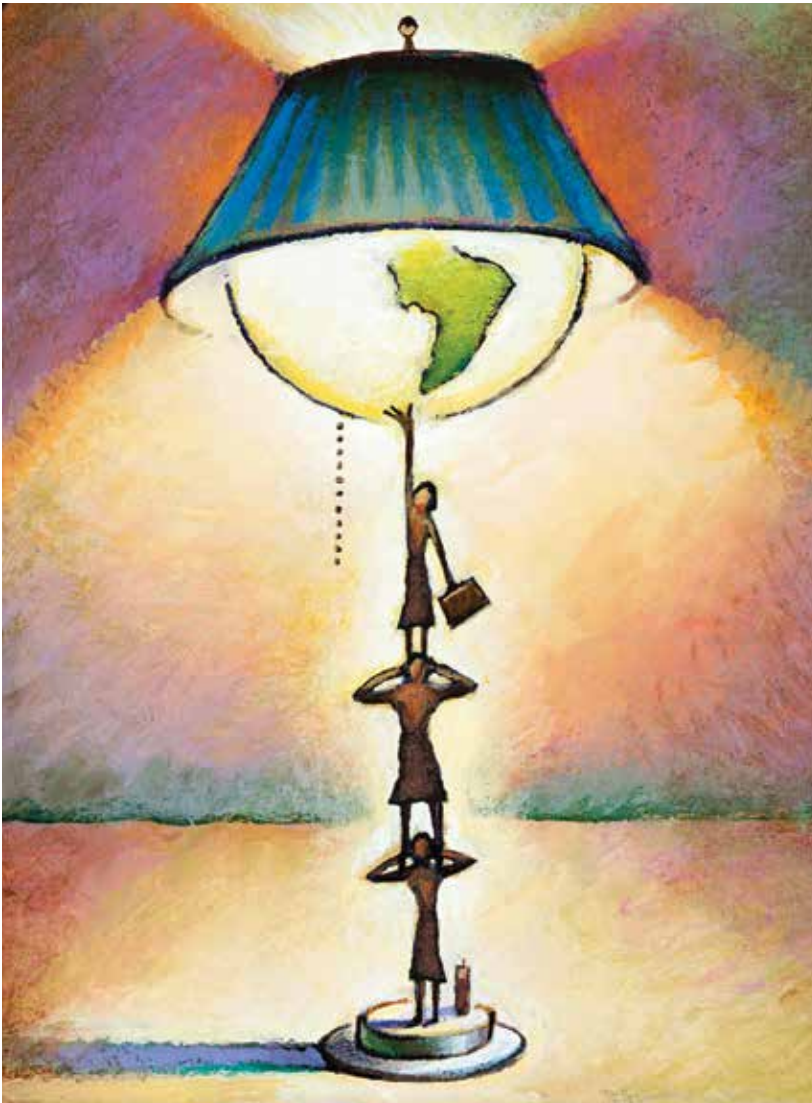
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Women helping women

*Seven simple rules
to help women – and you*

By Cathy Fleming

As a lawyer who loves lawyers and our profession, I've spent a lot of time in the past 10 years working with advancing women's issues and women lawyers. It has been a labor of love. I attend and teach at programs discussing how women can

advance, including by helping other women. Yet, it is ironic that almost all of my business in my practice has originated from men. While I represent a number of cherished female clients and while I have several wonderful female referral sources, the vast majority of work that comes to me comes from men.

Women in private practice often lament that women in-house send work to their firms through men. In-house counsel lament that they often feel like "chum" being wooed solely for their ability to send work to lawyers. These comments are from well-intentioned, intelligent women who really want to help other women. Why the disconnect? It may happen because the essential rules are not stated clearly enough. So let me say it clearly: "A woman who helps a woman really helps women."

The way to help women is simple: Follow the Rules.

Rule 1: Make your colleagues aware of opportunities

In everyday life, most of us encounter opportunities. When an interesting opportunity comes across my desk – almost always in an area in which I don't practice – I think about who might be interested in and suited for that particular opportunity. I pass those opportunities along. Because of my work with NAWL, I am often asked for names of candidates for jobs or for boards. Over the years I have had the opportunity to recommend lawyers for various opportunities. I do not make opportunities known simply for the reason of making referrals; rather I truly try to think of who might be a good fit for the opportunity. Both beneficiaries of the referral – the employer and the candidate – appreciate the effort and often remember it. Making qualified colleagues aware of opportunities advances the interests of women – and helps you!

Rule 2: Invite a colleague to events that benefit her

Another avenue for helping women is to invite them to events which may help further their goals. It can be as simple as passing along information for a CLE program

or for a networking event. Our firm runs programs in-house which provide CLE and CLE ethics credits and I am able to invite clients to attend. It is beneficial for our clients to have an easy way to keep up their CLE credits and a good opportunity for the firm to showcase special expertise and ability. These gatherings are also enjoyable because there is generally a social component tacked on to the CLE. Be creative. I am a golf nut. I am always happy to take a colleague golfing – or to recommend a clinic or teacher for a new golfer who wants to hone her skills. Because I love golf, it is an enjoyable marketing event. Helping women connect in this environment advances collegiality as well as connectivity of women.

Rule 3: Send business to other women

The choice of reference always requires that the lawyer be qualified and excellent. Excellence is presumed. When the opportunity arises, send work to a woman. Private lawyers can send conflict work to other women in private practice. In-house counsel can try to send matters to a woman, or to a firm of choice through their female contacts.

"There is a special place in hell for women who don't help other women."

~ Madeleine Albright

Much has been said and written about the differences between men and women and how they market. Women foster relationships; men foster business. In-house counsel should remember that she who originates (meaning gets the call to bring the business in) – even if she does not do the

The best thank you to in-house counsel is to handle the matter brilliantly and cost effectively with no surprises and no hiccups.

work – gets credits on her scorecard. Thus, while I am a litigator and white-collar lawyer, I get credit on my score card, which is reflected in my compensation and stature

in the firm, when I bring in matters for other departments. Such a scenario is a win-win for the corporate client and the originator.

As the originator, I am able to watch carefully the bills and have both the ability and incentive to oversee quality control and cost-effectiveness. I often am surprised that in-house counsel do not always understand the dynamics of a law firm. I have friends who have called lawyers in my firm who they met

through me. While I am always happy to see work come to my firm, it benefits me directly if it comes in through me.

And remember: the best thank you to in-house counsel is to handle the matter brilliantly and cost effectively with no surprises and no hiccups. Make your client look good for having hired you! Remember: thinking female first on the great issues of our times is laudatory. Thinking female first in business is good business.

Rule 4: Honor and compliment women who deserve it.

Lawyers in private practice frequently forget that our in-house colleagues are being evaluated by their employer. It is important to acknowledge in-house counsel on a job well done. Just as an outside counsel appreciates when a client makes it known to firm management that she has done a good job, so is it important that outside counsel make sure that in-house management knows what an



Cathy Fleming serves as managing partner of the New York office of Hodgson Russ LLP. She focuses her practice on complex civil litigation and white collar criminal cases. She is regularly involved in investigations and enforcement matters. Fleming has tried more than 50 cases to verdict, most of which have been in federal courts, including in California, Florida, Illinois, Massachusetts, New York, New Jersey, Pennsylvania and Texas. She has served as president of NAWL and as a member of board of the NAWL Foundation. She can be reached at CFleming@hodgsonruss.com.

Making qualified colleagues aware of opportunities advances all women

excellent job its representative has done. There are lots of opportunities to spread the credit. Similarly, make sure that you do not disrespect the in-house counsel by taking all the credit in a case. Good results always have lots of credit-sharing potential. Do it!

Rule 5: Talk to each other, honestly

I have often heard that women – who tend to develop friendly relationships with their women clients – foster concerns about business somehow interfering with the friendship. I confess, I used to feel that way. A male colleague, mystified about my attitude, asked me once

whether I thought there was any lawyer who could do a better job than I for a particular

client after I expressed reluctance at approaching a client with whom I had developed a close friendship for more business. I responded, sincerely, that no one could do it better. He asked me why I would want to deprive my dear friend of the best lawyer for the job. He was absolutely correct. She continues to be a favorite client. The fact is, you will perform your best work and be most responsive when you have a friendship as well as a client-lawyer relationship. Be proud enough about your work to be willing to share it with your friends.

Rule 6: Work hard at your career as well as on each matter

I have had in-house counsel tell me they did not want to bother me with more work when they knew I was swamped, especially when it would involve emergency

You will perform your best work and be most responsive when you have a friendship as well as a client-lawyer relationship.



work on weekends or holidays. The sentiment sounds lovely, but the fact is that a lawyer in private practice is happy to get new work even if it appears that the timing is inconvenient. Careers are built on hard work, not lovely sentiment.

Rule 7: Ask other women for help

The hardest task in private practice is to ask for business. I am told by my in-house friends that they have an equally hard time asking their outside counsel colleagues for help. This should be the easiest fix of all. I have never been anything but pleased and flattered when another lawyer asked me for help – with finding a job, with recommending her for a position or a board, when asking

if I could make her work product known to someone else, or when asked to make an introduction.

When I am able to fulfill these requests I am genuinely happy. Lawyers are happy to help advance colleagues personally, and the profession generally. I believe the same to be true of my colleagues in-house.

So here goes: to those ladies who are reading this and who have opportunities to share, I would be pleased to hear from you if I, or others in my firm, could be of help. Do give me a jingle! As Rick says at the close of “Casablanca,” “Louis, I think this is the beginning of a beautiful friendship.” ■

I have never been anything but pleased and flattered when another lawyer asked me for help.



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Prosecutorial indiscretion in Alabama

District attorneys misuse chemical endangerment law to criminalize pregnant women's substance abuse

By Amy P. Kokot

American culture is fixated on pregnancy more than ever before. Mothers-to-be often document and broadcast pregnancy-related developments, with social media providing the perfect platform to convey each sonogram, kick, and contraction. Expectant parents share the moment they discover their baby's sex at gender-reveal parties, unveiling ultrasound results among family and friends.¹ Reality television launches anonymous teenage mothers to fame; websites and magazines chronicle these teens' ensuing decisions and missteps. Underemployed actresses and singers are even utilizing pregnancy as a viable "Plan B" because baby bumps and motherhood frequently generate appearances, infant clothing lines, and book deals.²

Alongside this cultural obsession is the escalating legal regulation of pregnancy. Women's behavior while pregnant is increasingly susceptible to statutory control. In the forty years since *Roe v. Wade*,³ legislation has steadily attempted to limit its reach.⁴



Amy Kokot grew up in New York. She earned her bachelor's in psychology *summa cum laude* from Mount Holyoke College in 2003, and was inducted into Phi Beta Kappa. Her undergraduate thesis, *College Women's Plans for Different Types of Egalitarian Marriages*, was published in *Journal of Marriage and Family*. Currently, Kokot is a J.D. candidate (class of 2014) at the Catholic University of America, Columbus School of Law, where she is a Notes and Comments Editor on the *Catholic University Law Review* and a recipient of the school's Student Scholar Award. Since 2004, she has worked in the Civil Division of the United States Department of Justice, where she is a Paralegal Supervisor. In that capacity, she received the Civil Division Award for Excellence in Paralegal Support (2009) and the Civil Division Special Commendation Award (2008, 2013).

The views expressed in this article do not necessarily represent the views of the Department of Justice or the United States.

An earlier version of this paper was submitted in partial satisfaction of degree requirements at the Catholic University of America, Columbus School of Law.

For example, state laws have curtailed women's reproductive rights by prohibiting abortions after twenty weeks,⁵ requiring ultrasounds before terminating a pregnancy,⁶ or attempting to restrict access to abortions.⁷ North Dakota recently passed the strictest law to date, proscribing abortions once a fetal heartbeat can be detected (as early as six weeks into pregnancy).⁸ Medical advancements have both pushed viability to an earlier point in pregnancy than twenty-eight weeks' gestational development (as was true when *Roe* was decided) and reduced the risks associated with later-term abortions, fueling the controversy.⁹

This paper examines one specific aspect of pregnancy regulation: prosecutors' expanded interpretations of criminal statutes to police chemical intake during pregnancy. No state has explicitly criminalized pregnant women's illicit drug use,¹⁰ but mothers have nonetheless been prosecuted for this conduct under an array of statutes that target child abuse and neglect, assault, feticide,¹¹ manslaughter, and murder.¹² One striking example of this trend is in Alabama. The state's "chemical endangerment law,"¹³ enacted in 2006 to prosecute those who expose children to methamphetamine laboratories, has been construed to enable proceedings against women who subject their fetuses¹⁴ to controlled substances in utero.¹⁵ At least seventy mothers have been prosecuted following their newborns' deaths or positive drug tests.¹⁶ Elsewhere, such convictions are rare, because typically, child-protective services and related agencies handle cases of maternal substance abuse rather than law enforcement.¹⁷

Alabama's chemical endangerment law was never meant to criminalize pregnant women's substance abuse. In this paper, I argue that district attorneys (DAs)

are exercising undue discretion in utilizing the statute to prosecute women for their illicit drug use during pregnancy.¹⁸ These proceedings contravene the law's plain text and the legislature's clear intent, but Alabama courts have nevertheless

Alabama's chemical endangerment law was never meant to criminalize pregnant women's substance abuse.



Selma Moidel Smith, in whose honor the competition is named, has been an active member of NAWL since 1944. Smith is the author of NAWL's *Centennial History* (1999), and recently received NAWL's Lifetime of Service Award. She is a past western region director, state delegate from California, and chair of numerous NAWL committees. Smith served two terms as president of the Women Lawyers Association of Los Angeles, and was recently named their first and only Honorary Life Member. She was also president of the Los Angeles Business Women's Council. In the ABA Senior Lawyers Division,

Smith was appointed the chair of the Editorial Board of *Experience* magazine (the first woman to hold that position) and was elected to the governing council for four years, also serving as chair of several committees and as NAWL's Liaison to the Division. Smith is a member of the board of directors of the California Supreme Court Historical Society and is publications chair and editor-in-chief of the Society's annual journal, *California Legal History*. She was president, and also a charter member of the National Board of the Medical College of Pennsylvania, which recently honored her at the Board's 50th anniversary.

Smith's career as a general civil practitioner and litigator are recognized in the first and subsequent editions of *Who's Who in American Law* and *Who's Who of American Women*, and also in *Who's Who in America*, among others. Her articles on the history of women lawyers have been published in the *Women Lawyers Journal* and *Experience* magazine, and have been posted online by the Stanford Women's Legal History Biography Project (together with her own biography). Her original research includes the discovery of the first two women members of the ABA (Mary Grossman and Mary Lathrop), both of whom were vice presidents of NAWL.

Smith is also a composer. Many of her 100 piano and instrumental works have been performed by orchestras and at the National Museum of Women in the arts. She is listed in the *International Encyclopedia of Women Composers*.

In addition to the winning paper published on the following pages, Jacqueline Clarke, a May 2013 graduate of Michigan State University College of Law received an Honorable Mention for her essay entitled, "[In]equitable relief: how judicial misconceptions about domestic violence prevent victims from attaining innocent spouse relief under i.r.c. §6015(f)." Clarke earned her Bachelor of Arts from Kalamazoo College in 2010. While at Michigan State, she served as the Senior Notes Editor of the *Michigan State Law Review* where she mentored 42 students through the student note-writing process. She also volunteered at the Alvin L. Storrs Low-Income Taxpayer Clinic where she prepared federal and state income tax returns for individuals and businesses and also negotiated Offers in Compromise with the IRS. Clarke hopes to focus her legal career on family law and estate planning and continue her scholarship in the areas of domestic violence and tax controversies in the family law context.



No state has explicitly criminalized pregnant women's illicit drug use, but expectant mothers have nonetheless been prosecuted

upheld women's convictions, and, in turn, prosecutors' misconstruction of the code. In this regard, Alabama is an outlier because the vast majority of state courts have rejected comparable approaches.¹⁹

To explore this trend, this paper proceeds in three parts. Part I places current regulations in historical context, and discusses significant cases since *Roe* that have stemmed from pregnant women's substance abuse. Part II turns to Alabama's chemical endangerment statute, and examines it as a means through which prosecutors are exercising undue discretion to criminalize mothers' conduct. The law's plain intent is to shield children from methamphetamine laboratories and other hazardous environments, but routinely, the statute is construed to prosecute women for their drug use during pregnancy.²⁰ Given that the legislature did not intend for the law to apply to maternal substance abuse, the Alabama Supreme Court's recent affirmance of such proceedings is erroneous. In Part III, I propose ways to curb prosecutorial initiatives and address this problem. Legislative actions could counteract unchecked prosecutorial discretion by amending the code's language to specify that it does not pertain to pregnant women, their drug use, or their unborn children.

I. Significant cases and developments since *Roe v. Wade*

In 1973, *Roe v. Wade* established a woman's right to choose whether to terminate a pregnancy.²¹ Moreover, the *Roe* Court held that the word "person" as used in the Fourteenth Amendment does not include unborn children.²² Even so, in the four decades since *Roe*, women nationwide have been arrested for harming their fetuses.²³ Many of these proceedings rely on "unborn victims of violence" laws that treat a mother and her fetus as separate entities to impose additional penalties when pregnant women are the victims of a crime.²⁴ Increasingly, however, the laws are being applied to pregnant women's conduct.²⁵ For example, an Indiana woman was prosecuted for the death of her newborn following a suicide attempt

during pregnancy.²⁶ In Iowa, after a pregnant woman, Christine Taylor, fell down the stairs, hospital personnel surmised that she had done so intentionally because she confided that she had considered abortion.²⁷ Taylor was arrested for attempted feticide, although ultimately, the DA declined to prosecute – but only because Taylor was in her second trimester when she fell as opposed to her third, rendering the statute inapplicable.²⁸

Prosecutors have also tried to utilize well-established criminal laws to attack maternal substance abuse.²⁹ State statutes governing criminal child abuse and endangerment, drug delivery, and homicide have been applied to prosecute more than 200 women in at least thirty states.³⁰

A. Prosecutions for child abuse and endangerment

In 1977, Margaret Reyes became the first woman in the United

States to be indicted for substance abuse during pregnancy.³¹ Reyes was warned by a nurse that if she continued using heroin and failed to obtain prenatal care, she would jeopardize the health of her twins.³² Yet Reyes's drug use lasted throughout her pregnancy, and her twins were born addicted to heroin.³³ Reyes was indicted on felony child endangerment charges, but the California Court of Appeal held that the state's child endangerment statute did not extend to a woman's conduct while pregnant.³⁴ The court stressed the code's language, stating that had the legislature "meant to include unborn children among the class of victims described . . . it could easily have so provided by amending that statute" as it had done for others.³⁵ In addition, the court emphasized the lenity principle,³⁶ and the state's policy to "construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit."³⁷

Following a dormant decade post-Reyes, prosecutions under statutory theories of child abuse, endangerment, and mistreatment resurfaced, but hardly any succeeded.³⁸ State appellate courts consistently overturned women's convictions, concluding that the legislature did not intend for "minor children" to include fetuses.³⁹ For example, in

Given that the legislature did not intend for the law to apply to maternal substance abuse, the Alabama Supreme Court's recent affirmance of such proceedings is erroneous.

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Alabama is an outlier because the vast majority of state courts have rejected comparable approaches

Commonwealth v. Welch, the court held that Kentucky's child abuse statute did not extend to drug use during pregnancy because the legislature did not intend for the code to apply to prenatal injuries.⁴⁰ Similarly, in *Kilmon v. State*, the Maryland Court of Appeals reversed two convictions for reckless child endangerment based on the women's cocaine use during pregnancy.⁴¹ The court examined the statute's legislative history, and determined that the law was not meant to apply to pregnant women's drug use: "[T]he General Assembly, despite being importuned on numerous occasions to do so, has chosen not to impose additional criminal penalties for the effect

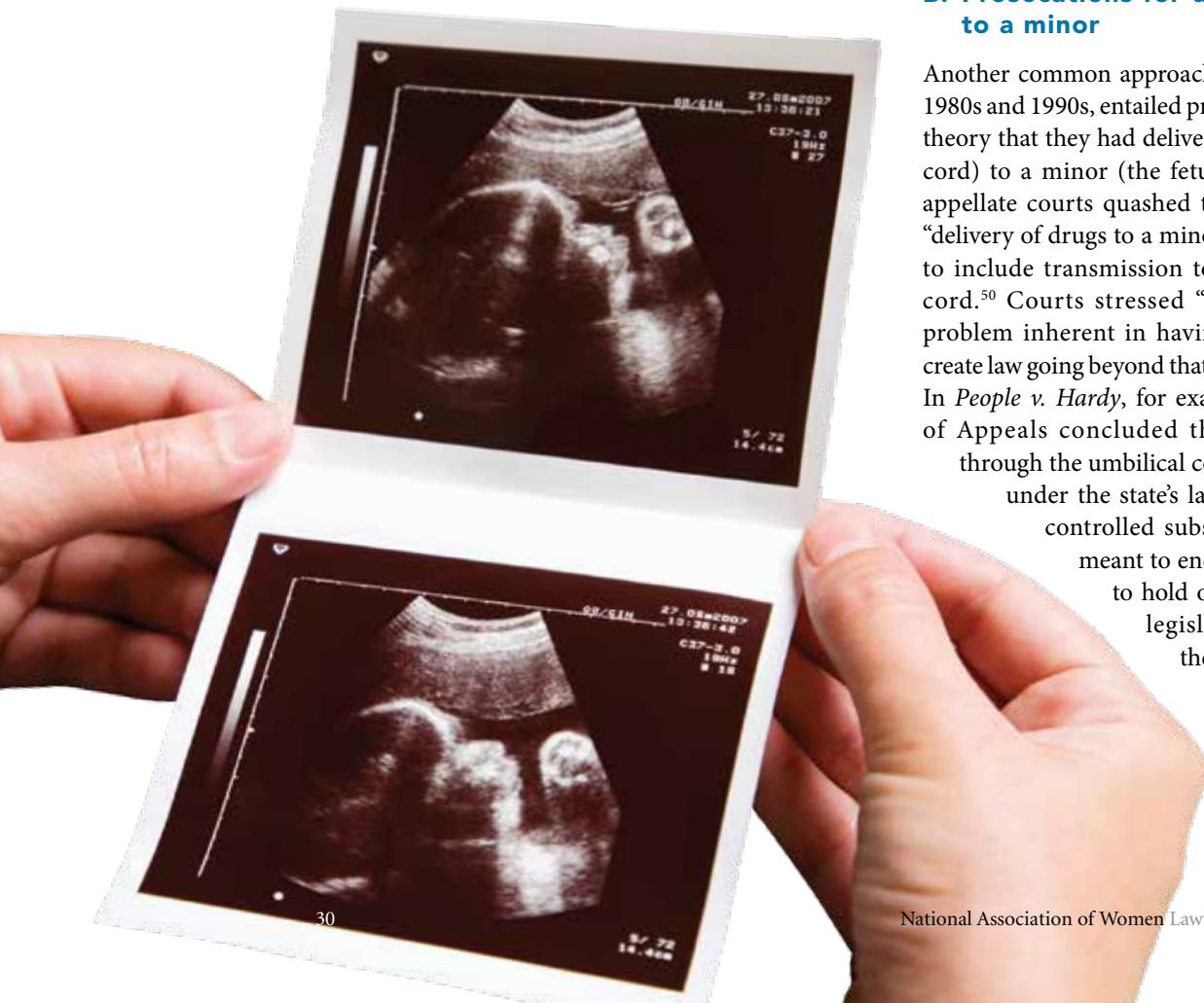
that [a woman's] ingestion of [controlled] substances might have on the child, either before or after birth."⁴²

In contrast, the South Carolina Supreme Court has held that a viable fetus is a "child" within the meaning of the state's child abuse and endangerment statute.⁴³ In *Whitner v. State*, Cornelia Whitner pled guilty to criminal child neglect because she ingested crack-cocaine during her third trimester.⁴⁴ Her son was born with cocaine in his system, and she was sentenced to eight years in prison.⁴⁵ The court interpreted the scope of South Carolina's Children's Code as "quite broad," applying to "all children who have need of services."⁴⁶ The Chief Judge authored a vigorous dissent, which emphasized the lenity principle.⁴⁷ He argued that based on a reading of the entire statute, the term child "means a child in being and not a fetus," and as a penal statute, the code must be "strictly construed against the State" and in Whitner's favor.⁴⁸

The South Carolina Supreme Court has held that a viable fetus is a "child" within the meaning of the state's child abuse and endangerment statute.

B. Prosecutions for drug delivery to a minor

Another common approach, especially during the late 1980s and 1990s, entailed prosecuting women under the theory that they had delivered drugs (via the umbilical cord) to a minor (the fetus).⁴⁹ Again, however, state appellate courts quashed these prosecutions because "delivery of drugs to a minor" could not be interpreted to include transmission to fetuses via the umbilical cord.⁵⁰ Courts stressed "the separation of powers problem inherent in having judges and prosecutors create law going beyond that enacted by the legislature."⁵¹ In *People v. Hardy*, for example, the Michigan Court of Appeals concluded that cocaine transmission through the umbilical cord could not be prosecuted under the state's law concerning delivery of a controlled substance.⁵² The code was not meant to encompass maternal drug use; to hold otherwise would contravene legislative intent.⁵³ Put simply, the court was "not at liberty to create a crime."⁵⁴




C. Prosecutions for homicide

Beginning in the late 1990s, DAs initiated more aggressive prosecutions against pregnant women, seeking homicide convictions.⁵⁵ Yet homicide and assault laws aim to protect fetuses from injuries inflicted by a third party, such as an abusive partner – that is, someone other than the mother,⁵⁶ which courts recognize.⁵⁷ For example, in 2003, Tayshea Aiwohi was convicted of manslaughter for recklessly causing her son's death at two days old because she ingested crystal methamphetamine shortly before his birth.⁵⁸ The Hawaii Supreme Court overturned her conviction, and held that Aiwohi's prosecution for her own prenatal conduct was beyond the plain meaning of Hawaii's manslaughter statute.⁵⁹ At the time of Aiwohi's actions, her fetus was not a person, and because conduct must be committed against a person who has been born and is alive, her conviction was invalid.⁶⁰

Beginning in the late 1990s, DAs initiated more aggressive prosecutions against pregnant women, seeking homicide convictions.

The South Carolina Supreme Court, however, reached a different conclusion in a similar case.⁶¹ Regina McKnight, homeless and with an IQ of 72, was addicted to drugs when she gave birth to a stillborn child.⁶² Her daughter's blood showed the presence of cocaine, and McKnight was charged with homicide by child abuse.⁶³ Ultimately, she was sentenced to twenty years.⁶⁴ Relying on *Whitner*, the court determined that the statute applied to stillbirths, and sustained McKnight's conviction.⁶⁵ This verdict was the first of its kind in that no other state had upheld homicide charges based on a pregnant woman's substance abuse and ensuing stillbirth.⁶⁶

The cases discussed above involve various states, statutes, and circumstances, but all entail proceedings



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The law's plain intent is to shield children from methamphetamine laboratories and other hazardous environments

against women for their substance abuse during pregnancy. In the forty years since *Roe*, DAs nationwide have pursued charges stemming from pregnant women's conduct. Courts rarely sustain mothers' convictions, but prosecutors remain undeterred, and continue to bring cases under an array of criminal laws.

II. Alabama's chemical endangerment statute as a means for prosecutors to exercise undue discretion and criminalize pregnant women's substance abuse

Part II of this paper turns to proceedings initiated under Alabama's chemical endangerment statute, and examines the law as a contemporary means through which prosecutors are exercising undue discretion to criminalize maternal substance abuse. This section first takes a step back to consider canons of statutory construction, and then shifts to Alabama's chemical endangerment statute. Based on tenets of statutory interpretation, as well as the code's legislative history, DAs are misconstruing the law and exercising undue discretion in pursuing prosecutions against women for their substance abuse during pregnancy.

A. Canons of statutory construction

Canons of statutory construction "are no more than rules of thumb that help courts determine the meaning of legislation,"⁶⁷ and to do so, the starting point is the plain language of the statute itself.⁶⁸ Under the "plain meaning rule," if the statute's text is clear, the court may not look beyond the statute to ascertain its meaning.⁶⁹ The court's primary function is to follow and enforce the law according to its terms because "the duty of interpretation

does not arise, and the rules which are to aid doubtful meanings need no discussion."⁷⁰ In construing an unambiguous statute, courts must "view the law as it is and not as it might wish it to be."⁷¹ Yet if a literal application leads to consequences that the legislature could not have contemplated, courts may interpret the statute to adhere to legislative intent.⁷²

Another key tenet of construction mandates that a statute be read as "a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes."⁷³ Statutes are enacted in their entirety – not in individual parts – and are driven by one central purpose.⁷⁴ Each section should thus be interpreted in conjunction with all others, and not in a vacuum.⁷⁵ Courts may not favor a single segment in isolation because a provision that may seem ambiguous by itself is often clarified elsewhere.⁷⁶

In construing statutes holistically, courts must also give effect to each word, clause and sentence.⁷⁷ If words are not well-defined in the text, they are given their ordinary meanings,⁷⁸ and courts frequently rely on dictionary definitions for interpretation.⁷⁹ Courts must presume that every word of a statute is in place for a particular purpose, and must also presume that every word *excluded* was done so purposely as well.⁸⁰

A statute is considered ambiguous if reasonably well-informed persons can provide two or more interpretations.⁸¹ Courts may then rely on extrinsic aids, such as legislative history, to determine intent.⁸² That said, ambiguity is not always a prerequisite to using extrinsic aids;⁸³ the Supreme Court has affirmed that "[w]hen aid to construction of the meaning of words, as used in [a] statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination' "⁸⁴ Finally, when a statute is ambiguous, its meaning may be deciphered by examining comparable statutes and the common law in other jurisdictions.⁸⁵

In addition to these canons of construction, the Supreme Court has adopted the rule of lenity, which requires that ambiguous penal statutes be construed in defendants' favor.⁸⁶ If congressional intent is ambiguous, leading to more than one reasonable interpretation of a criminal statute, the lenity principle mandates that courts apply the less punitive option.⁸⁷ Courts "treat the rule as a tie breaker when there is an otherwise unresolved ambiguity."⁸⁸ It seeks to guard against expansive judicial interpretations that override legislative intent or create unintended penalties, and ensures that "legislatures, not courts, define criminal liability."⁸⁹ The rule, however, does

Under the "plain meaning rule," if the statute's text is clear, the court may not look beyond the statute to ascertain its meaning.

not require a more favorable interpretation if such would clearly contravene legislative intent.⁹⁰

B. Alabama's chemical endangerment statute

As discussed above, nearly all state appellate courts have rejected women's convictions for their infants' positive drug tests,⁹¹ with canons of construction and the lenity principle guiding review of these prosecutions.⁹² Yet in recent years, Alabama courts have considered and upheld a wave of cases brought against women under the state's chemical endangerment statute. Specifically, prosecutors are utilizing the law to criminalize maternal drug use, even though the legislature clearly meant for the code to protect children from methamphetamine laboratories.

1. Overview and legislative history

Alabama's chemical endangerment statute, enacted in

2006, proscribes the knowing, reckless, or intentional exposure of a child to a controlled or chemical substance or to drug paraphernalia, and reads in part as follows:

Ala. Code § 26-15-3.2: Chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed.


- (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. . . .
 - (2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance,

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An Indiana woman was prosecuted for the death of her newborn following a suicide attempt during pregnancy

chemical substance, or drug paraphernalia. . . .

- (3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. . . .⁹³

If a child dies (a Class A felony), the crime carries a sentence of at least ten years.⁹⁴

In drafting the law, the legislature sought to protect children from explosive methamphetamine laboratories.⁹⁵ The law's original title, in fact, specified that it pertained to "Chemical Endangerment of Exposing a Child to a Methamphetamine Laboratory,"⁹⁶ and the bill's stated purpose was to "create the crime of chemical endangerment of exposing a child to a methamphetamine laboratory."⁹⁷ Alabama law defines a "child" as a person under eighteen years of age,⁹⁸ whereas state law defines "unborn child and fetus" as an "individual organism of the species *Homo sapiens* from fertilization until live birth."⁹⁹

The legislature has declined to amend the law to encompass maternal substance abuse several times.¹⁰⁰ Throughout the 2008 debate on whether to expand the statute, legislators voiced concern that if the law was revised, women with histories of drug addiction would eschew prenatal care and seek abortions to avoid prison.¹⁰¹ More recently, representatives sought to broaden the term "child" by adding the following language: "[T]he term 'child' includes, but is not limited to, an unborn child in utero at any stage of development regardless of viability."¹⁰² These attempts to modify the statute show that the code, by its plain language, does not apply to an "unborn child and fetus."¹⁰³ If it did, no amendments would be necessary.¹⁰⁴

2. Recent proceedings and developments

Despite the clear legislative intent behind Alabama's chemical endangerment law, DAs have prosecuted at least seventy women for their newborns' deaths or positive drug tests.¹⁰⁵ Over an eighteen-month period in 2007 and 2008, eight women in one jurisdiction alone (of approximately 37,000 people) were prosecuted for their substance abuse during pregnancy.¹⁰⁶ Twenty-year-old Tiffany Hitson was

one of the first women to be arrested and charged with chemical endangerment of a child after her infant tested positive for cocaine and marijuana.¹⁰⁷ Her successful prosecution influenced proceedings in other counties, "making Alabama the national capital for prosecuting women on behalf of their newborn children."¹⁰⁸

For example, in 2009, Hope Ankrom was prosecuted after she and her son tested positive for cocaine.¹⁰⁹ She pled guilty to chemical endangerment of a child, and received

a suspended three-year sentence, with one year of probation.¹¹⁰ Ankrom's case followed that of Amanda Kimbrough, whose son was born prematurely in 2008; he died shortly thereafter.¹¹¹ Kimbrough tested positive for methamphetamine, and the DA charged her with chemical endangerment of a child.¹¹² She pled guilty, and received the minimum ten-year sentence.¹¹³

Ankrom and Kimbrough appealed their convictions to the Alabama Supreme Court, making theirs cases of first impression.¹¹⁴ They argued that "child" as used in the statute does not apply to fetuses, stressing the legislature's omission of the term,¹¹⁵ failed attempts to amend the code, and other courts' determinations that women could not be criminally prosecuted for prenatal drug use under statutory theories of child abuse or endangerment, or drug distribution.¹¹⁶ The petitioners also emphasized that even if the term "child" was found to be ambiguous, the lenity principle required that the code be construed in their favor.¹¹⁷

The court affirmed Ankrom's and Kimbrough's convictions, holding that the word "child" as used in the statute is unambiguous, and extends to an unborn child or a fetus.¹¹⁸ Moreover, the court accepted the State's argument that "[t]he fact that the [l]egislature ultimately failed to take any action on [the] proposed amendments may easily be read as proof that it believed the statute clearly included an unborn child within its protection," noting that "[i]nterpreting a statute based on later attempts to amend that statute is problematic."¹¹⁹ Finally, the court rejected the petitioners' arguments

The court affirmed Ankrom's and Kimbrough's convictions, holding that the word "child" as used in the statute is unambiguous, and extends to an unborn child or a fetus.

concerning the rule of lenity, finding that because the term “child” was unambiguous, the principle did not apply.¹²⁰ In its conclusion, however, the court recognized “that the legislature may disagree” with this interpretation, and invited action “to effect a different scope” for the law’s application.¹²¹

3. These proceedings contravene canons of construction and legislative intent

Prosecutors are improperly construing Alabama’s chemical endangerment law to criminalize pregnant women’s substance abuse. These proceedings run contrary to principles of statutory construction and are inconsistent with legislative intent. The plain text of the statute is unambiguous. Its words, therefore, must be given their ordinary meaning. Nothing in the code suggests that “child,” defined as a person under eighteen years of age, encompasses an “unborn child” or “fetus,” nor does the language specify that “environment” extends to the womb.¹²² Read in its entirety, the law neither addresses pregnant women’s substance abuse nor elaborates on the words “child” and “environment.” The legislature selected each word deliberately, and purposely excluded certain terms as well, such as “fetus,” “unborn child,” “pregnancy,” “uterus,” and “womb.”¹²³ Prosecutors and courts have not construed the law to adhere to its intent.

Even assuming *arguendo* that the law’s text is ambiguous, leading to more than one reasonable reading, the rule of lenity should guide courts’ interpretation of this issue. As a penal statute, Alabama’s chemical endangerment law must be construed in women’s favor to ensure that its application will not contravene legislative intent.¹²⁴ The rule seeks to reduce the risk of arbitrary or selective enforcement,¹²⁵ and places the burden on the legislature to provide adequate notice about unlawful behavior.¹²⁶ It further prompts legislative action to improve statutory language if a law should, in fact, pertain to additional classes of cases.¹²⁷ Women are entitled to lenity out of deference to both them and the legislature – if the legislature intends for these cases to be included within the statute’s purview, it can intervene

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Courts must presume that every word of a statute is in place for a particular purpose

to clarify textual ambiguities.¹²⁸

Ambiguity, however, is not at issue here, given the statute's plain text and the legislature's well-established intent. The legislature never intended for the code to apply to pregnant women's substance abuse.¹²⁹ In addition to the legislative history, State Senator Lowell Barron, the law's sponsor, has confirmed that it was never meant to be used in these circumstances.¹³⁰ In 2008, he stated, "I hate to see a young mother put in prison away from her child," and that "if she could be put in a treatment program with her children, that would be the best course. Maybe we need to revisit the legislation."¹³¹ Even former DA Greg Gambriel,¹³² who led these prosecutions, acknowledged that the statute needs clarification if these proceedings are to continue because the law does not refer to pregnant women.¹³³

4. District attorneys are exercising undue discretion

Prosecutions against women for their substance abuse during pregnancy are inconsistent with the statute's clear intent. DAs are thus exercising undue discretion in bringing these cases. Whether driven by concern for unborn children, personal beliefs, or election platforms, these proceedings are beyond the law's contemplation, and they contravene its legislative purpose.

The realization of legislative intent depends on the decisions of those in the executive and judicial branches.¹³⁴ As such, DAs may misconstrue the legislature's objective when they exercise prosecutorial discretion.¹³⁵ Prosecutors nationwide enjoy considerable autonomy because legislatures and courts rarely attempt to interfere with prosecutorial discretion in the charging function.¹³⁶ This discretion is "firmly entrenched"¹³⁷ and vital for prosecutors to determine how to apply laws and policies to the facts of each case.¹³⁸ The proceedings under Alabama's chemical endangerment statute exemplify DAs' misconstruction of legislative intent in their exercise of

prosecutorial discretion. Below, I discuss several reasons for this overreach.

As background, Alabama is divided into forty-one districts,¹³⁹ a handful of which have steadily attempted to criminalize pregnant women's substance abuse.¹⁴⁰ Initially, only one DA pursued these cases.¹⁴¹ Yet more recently, additional prosecutors have initiated proceedings,¹⁴² some of whom were encouraged by the state's courts' upholding of convictions.¹⁴³ Former DA

Greg Gambriel spearheaded these efforts.¹⁴⁴ He maintained that his goal was to protect women and children by directing women into treatment,¹⁴⁵ and that the law guaranteed children a safe and drug-free environment, even in utero.¹⁴⁶ Gambriel further contended that "[n]o one is to say whether that environment is inside or outside the womb."¹⁴⁷ This position has guided prosecutions, and suggests that their boundaries "are seemingly limitless," potentially justifying proceedings against women who engage in any type of behavior that

could threaten the womb or their children's outcome.¹⁴⁸

Steve Marshall, the DA for Marshall County,¹⁴⁹ has praised Gambriel's approach.¹⁵⁰ Marshall has brought his own cases against mothers following their newborns' positive drug tests,¹⁵¹ as did former Marshall County Assistant DA Mitch Floyd.¹⁵² Floyd has stated that substance-abuse prevention motivated his aggressive prosecutions.¹⁵³ He agrees that "a viable fetus is included in the term 'child' as used in the [statute]," and that "child" is unambiguous; "thus, [the] court must interpret the plain language of the statute to mean exactly what it says and not engage in judicial construction."¹⁵⁴ In 2012, Floyd's political career underwent significant changes in that he announced his candidacy for Marshall County District Judge.¹⁵⁵ His campaign emphasized his prosecutions under the chemical endangerment statute – how he "championed new laws [that] allow mothers to be prosecuted when their newborn tests positive for drugs."¹⁵⁶ He won the Republican primary by a thirty

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percent margin.¹⁵⁷

In all likelihood, Floyd's stance on maternal drug use contributed to his political success, and, like Gambriel, he was recognized for his work. Alabama's courts have sanctioned these prosecutions as well, and DAs who are "anxious to 'take a stand' against conduct [that] risks harm to the fetus or newborn child" now have "a virtual green light" to pursue cases.¹⁵⁸ The judicial and executive branches have authorized these proceedings, which are in line with DAs' personal beliefs and career ambitions, but in clear contravention of the legislature's intent. I will now consider ways to counteract this trend.

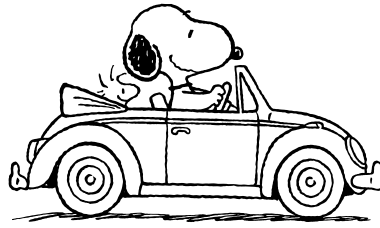
III. Thwarting prosecutorial overreach under Alabama's chemical endangerment statute

Prosecutorial discretion is a fixed component of America's criminal justice system,¹⁵⁹ but various issues and authorities have guided prosecutors' misapplication of Alabama's chemical endangerment law. Below, I propose governmental actions to address this problem.

A. Legislative initiatives could counteract endorsement of these prosecutions

The realization of legislative intent depends on the decisions of those in the executive branch.¹⁶⁰ America's criminal justice system "runs on the premise that prosecutors will respect, and courts will enforce, the boundaries on criminal conduct set by the legislature."¹⁶¹ In their exercise of prosecutorial discretion, Alabama's DAs have misconstrued the legislature's plain intent. Admittedly, preventing such conduct through executive actions proves challenging because these prosecutors have been both elected and praised publicly for their stance on maternal substance abuse.¹⁶² In addition, the state's courts have endorsed DAs' misuse of the law. Legislative initiatives, therefore, supported by non-governmental organizations (NGOs) will more likely lead to reformed practices.

One approach, for example, entails legislative intervention by providing written criteria for charging decisions.¹⁶³ In Washington, the legislature has enacted laws with recommended guidelines and commentary to establish pre-determined and objective criteria



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Alabama law defines a “child” as a person under 18 years of age

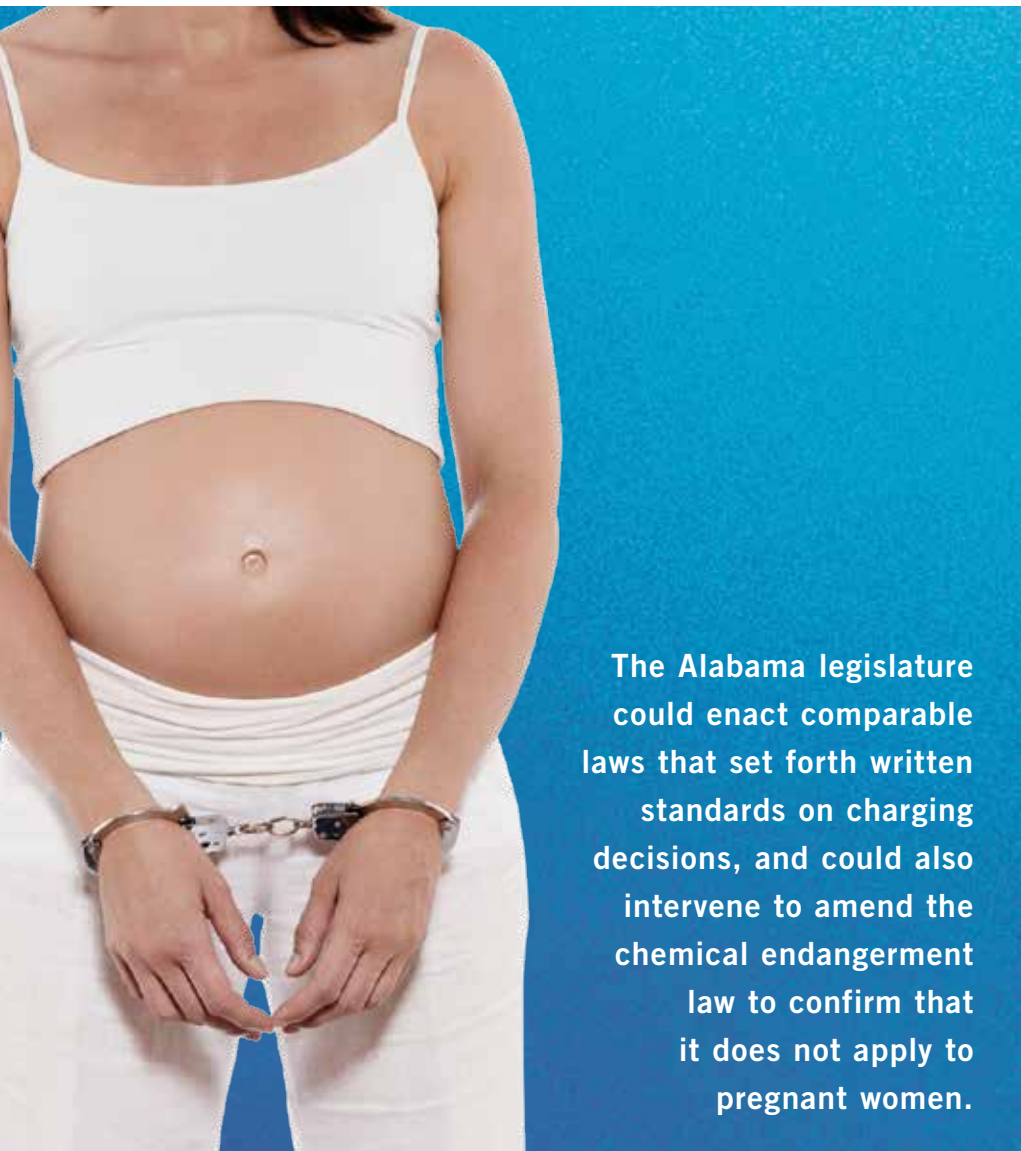
to “advance impartiality in prosecutorial decision-making.”¹⁶⁴ The code addresses the “evidentiary sufficiency” necessary for decisions to prosecute, and makes plain that a DA “may decline to prosecute . . . in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question, or would result in decreased respect for the law.”¹⁶⁵ The Alabama legislature could enact comparable laws that set forth written standards on

charging decisions, and could also intervene to amend the chemical endangerment law to confirm that it does not apply to pregnant women, their substance abuse, or their unborn children. Even though the code’s language is unambiguous, DAs and judges have not construed the law to adhere to its purpose, and textual modifications would resolve these competing interpretations.¹⁶⁶ To facilitate this process, NGOs – including the ACLU, the American Medical Women’s Association, and other organizations that supported Ankrom and Kimbrough – could lobby the legislature to amend the law.¹⁶⁷ These groups could continue their advocacy by attending committee hearings and requesting meetings with the legislature, members of whom would likely be amenable to such initiatives.¹⁶⁸

Moreover, these recent decisions have set Alabama apart from nearly all other jurisdictions, making it the only state besides South Carolina to uphold such prosecutions. In the process, the state and its proceedings have attracted national media attention.¹⁶⁹ NGOs could build on this coverage, and continue raising public awareness through outreach and even social media campaigns to garner support from residents who oppose these prosecutions. Among such residents are those who voted against former Covington County DA Greg Gambril. In 2010, Gambril lost his re-election bid, which reflects the public’s disagreement with his platform.¹⁷⁰ His defeat demonstrates that efforts to criminalize pregnant women’s substance abuse do not ensure political success, and further suggests that the public disagrees with this approach. As such, people might be open to becoming involved with a public interest campaign, in turn encouraging others to voice their opinions and raise awareness.

IV. Conclusion

Alabama’s chemical endangerment statute was never intended to criminalize maternal



The Alabama legislature could enact comparable laws that set forth written standards on charging decisions, and could also intervene to amend the chemical endangerment law to confirm that it does not apply to pregnant women.

**Gambriel's defeat demonstrates
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substance abuse. Since the law's enactment, however, DAs have misconstrued the code to prosecute mothers despite the legislature's clear intent. Courts have further upheld women's convictions, and in turn, prosecutors' misuse of the statute. The implications of these rulings could affect states other than Alabama and women beyond its borders. If left unchallenged, Alabama's chemical endangerment law – and DAs' misapplication of it –

could serve as a model for states such as South Carolina to enact similar legislation, and could even become more accepted nationwide. Such proceedings might also provide a bridge to invite further regulation of women's conduct throughout pregnancy. Yet legislative actions could counteract unchecked prosecutorial discretion and

confirm that the law was never meant to apply to maternal drug use. ■

I thank Professor Cara Drinan for her willingness to navigate this topic with me and for her invaluable insight, guidance, and feedback throughout the writing process. I also thank the National Association of Women Lawyers and the Women Lawyers Journal for their work in bringing this article to publication. Finally, my utmost

Endnotes

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- 2 Jacob Bernstein, *The Baby Bump*, N.Y. Times, Apr. 27, 2012, <http://www.nytimes.com/2012/04/29/fashion/the-baby-bump.html?ref=fashion>.
- 3 *Roe v. Wade*, 410 U.S. 113 (1973).
- 4 See, e.g., Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 Alb. L. Rev. 999, 1000, 1012 (1999) (emphasizing that legislative initiatives are widely recognized as a means to restrict abortion); see also *News in Context: States Enact Record Number of Abortion Restrictions in 2011*, Guttmacher Institute (Jan. 5, 2012), <http://www.guttmacher.org/media/inthenews/2012/01/05/endofyear.html>; Editorial, *If Roe v. Wade Goes*, N.Y. Times, Oct. 15, 2012, <http://www.nytimes.com/2012/10/16/opinion/if-roe-v-wade-goes.html?src=me> (noting that despite *Roe* and later decisions sustaining abortion rights, more than half of states have enacted barriers such as mandatory waiting periods, counseling that lacks medical justification, parental consent, and "onerous clinic 'safety' rules intended to drive clinics out of business").
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- 6 Last year, for example, Virginia joined several other states in requiring women to have an ultrasound before undergoing an abortion. See, e.g., Lucy Madison, *Virginia Gov. Bob McDonnell Signs Virginia Ultrasound Bill*, CBS News, Mar. 7, 2012, http://www.cbsnews.com/8301-503544_162-57392796-503544/virginia-gov-bob-mcdonnell-signs-virginia-ultrasound-bill/; *State Policies in Brief: Requirements for Ultrasound*, Guttmacher Institute, Aug. 1, 2013, http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf. As of August 1, 2013, seven states mandated that providers both perform ultrasounds on women seeking abortions and required that women be given the opportunity to view the image. Guttmacher Institute, *supra*.
- 7 See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (plurality opinion) (upholding a Missouri statute that proscribed the use of public staff, funds, and facilities for abortions and allowed abortions after twenty weeks only if test results confirmed that the fetus was not viable); *Colautti v. Franklin*, 439 U.S. 379, 391 (1979) (declaring unconstitutional a state law that required doctors to determine, "based on [their] 'experience, judgment or professional competence,'" that a fetus was not viable before performing an abortion) (citation omitted); *Maher v. Roe*, 432 U.S. 464, 468-74 (1977) (holding that in states with policies to cover childbirth-related expenses, the government was not obligated to subsidize non-therapeutic abortions).
- 8 Dave Thompson, *North Dakota Governor Signs "Heartbeat" Abortion Ban*, Reuters, Mar. 26, 2013, <http://www.reuters.com/article/2013/03/26/us-usa-abortion-northdakota-idUSBRE92P0UA20130326>; John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. Times, Mar. 26, 2013, <http://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html?pagewanted=all>. North Dakota's ban followed closely behind one in Arkansas – also linked to the detection of a fetal heartbeat – which prohibits abortions at twelve weeks. Eligon & Eckholm, *supra*; Erik Eckholm, *Arkansas's Abortion Ban and One Man's Strong Will*, N.Y. Times, Mar. 11, 2013, http://www.nytimes.com/2013/03/12/us/arkansas-senator-jason-raperts-abortion-ban.html?src=rechp&_r=0. To enact this law, the Arkansas state legislature overrode the governor's veto. Juliet Eilperin, *Antiabortion Measures Gain Momentum in the States*, Wash. Post, Apr. 11, 2013, http://www.washingtonpost.com/politics/antiabortion-measures-gain-momentum-in-the-states/2013/04/11/686b9492-a2d3-11e2-9c03-6952f305f35_story.html.
- 9 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (plurality opinion) ("[T]ime has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973 . . . and advances in neonatal care have advanced viability to a point somewhat earlier.") (citation omitted); Randy Beck, Gonzales, Casey, and the *Viability Rule*,

- 103 Nw. U. L. Rev. 249, 250 & n.10 (2009). Today, viability may occur as early as twenty gestational weeks' development (eighteen weeks post-fertilization). Stedman's Medical Dictionary 2122 (28th ed. 2006).
- 10 Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 Wis. J.L. Gender & Soc'y 241, 248 (2011); see also Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pol. Pol'y & L. 299, 320-21 (2013) (stating that "no state legislature has amended its criminal laws to make its child abuse [and drug delivery] laws applicable to pregnant women in relationship to the eggs, embryos, or fetuses that [they] carry").
- 11 Feticide refers to fetal death that is usually the result of assault or battery to a pregnant woman as opposed to a woman's own actions. Black's Law Dictionary 654 (8th ed. 1999).
- 12 Mohapatra, *supra* note 10, at 248; see also *Punishing Women for Their Behavior During Pregnancy*, Center for Reproductive Rights at 2 (Sept. 2000), http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf.
- 13 Ala. Code § 26-15-3.2 (2006): Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed.
- 14 Fetus is medically defined as the "product of conception from the end of the eighth week of gestation to the moment of birth." Stedman's Medical Dictionary, *supra* note 9, at 711.
- 15 Mohapatra, *supra* note 10, at 249-50; see also Krista Stone-Manista, Comment, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. Crim. L. & Criminology 823, 825 (2009).
- 16 *Press Statement: National Advocates for Pregnant Women's Lynn Paltrow on Alabama Supreme Court's Decision in "Personhood" Measure in Disguise Case*, National Advocates for Pregnant Women, Jan. 12, 2013, http://advocatesforpregnantwomen.org/blog/2013/01/press_release_national_advocat.php.
- 17 See, e.g., Ada Calhoun, *The Criminalization of Bad Mothers (Mommy Had to Go Away for a While)*, N.Y. Times, Apr. 25, 2012 (Magazine), <http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?hpw>; Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse Is Not the Answer – A Comparative Legal Analysis*, 15 Mich. J. Gender & L. 389, 406 (2009) [hereinafter Fentiman, *Pursuing the Perfect Mother*].
- 18 In recent years, other scholars have set forth similar arguments and have examined, *inter alia*, the criminalization of maternal substance abuse, specific state proceedings, and alternatives to such prosecutions. See, e.g., Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (and Other Countries Don't)*, 18 Colum. J. Gender & L. 647, 651 (2009) [hereinafter Fentiman, *In the Name of Fetal Protection*] (analyzing prosecutors' motives for bringing these cases); Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 393-94 (arguing that "fetal protection" prosecutions are part of a wide-ranging attack on women's rights, and advocating for treatment over punishment); Mohapatra, *supra* note 10, at 245-46 (emphasizing public health approaches to reduce substance abuse during pregnancy); Stone-Manista, *supra* note 15, at 823 (offering strategies to challenge impermissible and unconstitutional child abuse and endangerment prosecutions). See also Paltrow & Flavin, *supra* note 10, at 300-01, 322-26 (identifying cases since *Roe v. Wade* in which pregnancy led to "attempted and actual deprivations" of women's physical liberty, and discussing the legal theories behind these prosecutions).
- 19 See, e.g., Stone-Manista, *supra* note 15, at 824-25; Mohapatra, *supra* note 10, at 248; Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 399-400.
- 20 See discussion *infra* Part II.B.
- 21 *Roe v. Wade*, 410 U.S. 113, 153 (1973).
- 22 *Id.* at 157.
- 23 See, e.g., Calhoun, *supra* note 17.
- 24 Katha Pollitt, *Protect Pregnant Women: Free Bei Bei Shuai*, Nation, Mar. 7, 2012, <http://www.thenation.com/article/166664/protect-pregnant-women-free-bei-bei-shuai>.
- 25 *Id.*
- 26 See, e.g., *id.*; Julie Rovner, *Woman Who Tried to Commit Suicide While Pregnant Gets Bail*, NPR Health Blog, May 18, 2012, <http://www.npr.org/blogs/health/2012/05/18/153026015/bail-granted-for-indiana-woman-charged-in-attempted-feticide>.
- 27 Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands?*, CBS News, Mar. 2, 2010, http://www.cbsnews.com/8301-504083_162-6255683-504083.html; see also Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. Pa. J.L. & Soc. Change 233, 238 & n.27 (2011) [hereinafter Fentiman, *Rethinking Addiction*].
- 28 John Mangalanzo, *Feticide Charges Dropped*, Hawk Eye, Feb. 11, 2010, <http://www.thehawkeye.com/story/Fetus-death-021110>. In Iowa, attempted feticide is trying to "intentionally terminate a human pregnancy, with the knowledge and voluntary consent of the pregnant person, after the end of the second trimester of the pregnancy where death of the fetus does not result." *Id.* (citation omitted); see also Fentiman, *Rethinking Addiction*, *supra* note 27, at 238 & n.27.
- 29 *State Policies in Brief: Substance Abuse During Pregnancy*, Guttmacher Institute (Aug. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf.
- 30 Mohapatra, *supra* note 10, at 251 & nn. 74-75; see also Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 398 & n.31, 466-69 (listing cases by state involving pregnant women's prosecutions for substance abuse (through approximately 2009) made available through a published decision, court document, or newspaper article).
- 31 *Reyes v. Super. Ct.*, 141 Cal. Rptr. 912 (Cal. App. 1977); see also Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 Denv. U. L. Rev. 537, 551 n.66 (2006) [hereinafter Fentiman, *The New "Fetal Protection"*].
- 32 *Reyes*, 141 Cal. Rptr. at 912-13.
- 33 *Id.* at 913.
- 34 *Id.* at 912-13.
- 35 *Id.* at 915 (citations omitted).
- 36 The lenity principle is discussed further in Part II.A.
- 37 *Id.* at 914 (citations omitted). *Reyes* further held that defendants are "entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute." *Id.* (citations omitted).
- 38 See, e.g., Fentiman, *The New "Fetal Protection," supra* note 31, at 551 n.66; Fentiman, *In the Name of Fetal Protection, supra* note 18, at 648; Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. Rev. L. & Soc. Change 381, 386-87 (2008).
- 39 See, e.g., *Reinesto v. Super. Ct.*, 894 P.2d 733, 735 (Ariz. App. 1995) (dismissing child abuse charges brought against a pregnant woman addicted to heroin, and stating that Arizona's statute "refers to conduct that directly endangers a child, not to activity that affects a fetus"); *State v. Wade*, 232 S.W.3d 663, 666 (Mo. App. 2007) (affirming that Missouri's child endangerment statute does not apply to pregnant women's drug ingestion because the statute's plain language "does not proscribe conduct harmful to fetuses, and . . . clearly prohibits any cause of action against a mother for improper prenatal care") (citation omitted); *State v. Gray*, 584 N.E.2d 710, 711, 713 (Ohio 1992) (holding that Ohio's child endangerment statute does not apply to women who abuse drugs during pregnancy even where, as here, the child was born addicted to cocaine, and underscoring that criminal statutes must be "liberally construed in favor of the accused"); *State v. Dunn*, 916 P.2d 952, 955 (Wash. App. 1996) (concluding that a fetus is not a "child" within the meaning of Washington's criminal mistreatment statute).
- 40 *Commonwealth v. Welch*, 864 S.W.2d 280, 281-84 (Ky. 1993). The court further stated that the legislature did not contemplate criminal penalties

for pregnant women's substance abuse "apart from the punishment imposed upon everyone caught committing a crime involving those substances." *Id.* at 284. Finally, the court recognized the danger of criminalizing women's conduct while pregnant, and where that could lead:

The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road? The defense asks where do we draw the line on self-abuse by a pregnant woman that wantonly exposes to risk her unborn baby?

Id. at 283; *see also* *Cochran v. Commonwealth*, 315 S.W.3d 325, 330 (Ky. 2010) (overturning a mother's indictment for child endangerment, and emphasizing legislative intent – Kentucky's penal code did not permit such prosecutions, and the legislature, not the judiciary, "has the power to designate what is a crime").

41 *Kilmon v. State*, 905 A.2d 306, 307 (Md. 2006).

42 *Id.* at 314. That same year, the New Mexico Court of Appeals dismissed child abuse charges against a mother who used cocaine while pregnant because the legislative intent and "plain meaning of the words of the statute" established that a viable fetus was not included within the definition of "child." *State v. Martinez*, 137 P.3d 1195, 1196-98 (N.M. App. 2006).

43 *Whitner v. State*, 492 S.E.2d 777, 779, 784 (S.C. 1997). To date, South Carolina has not retreated from this conclusion, and has ardently prosecuted women for their drug use during pregnancy. Between 1989 and 2006, more than eighty women were arrested. Charges include unlawful child neglect and homicide by child abuse. National Advocates for Pregnant Women, *South Carolina: Leading the Nation in the Prosecution and Punishment of Pregnant Women*, July 17, 2006, http://www.advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/south_carolina_leading_the_nation_in_the_prosecution_punishment.php.

44 *Whitner*, 492 S.E.2d at 778-79.

45 *Id.*

46 *Id.* at 781 (quoting S.C. Code § 20-7-20(B) (1985)); *see also* Center for Reproductive Rights, *supra* note 12, at 4 (noting that in *Whitner*, the state "went out of its way to hold that any behavior during pregnancy that was potentially harmful to the fetus, whether illegal or legal, could be the basis for a charge of criminal child endangerment").

47 *Whitner*, 492 S.E.2d at 786-87 (Finney, C.J., dissenting).

48 *Id.* at 786. An additional dissent reasoned that the legislature's repeated failure to pass proposed bills addressing drug use during pregnancy demonstrated that the state's child abuse and neglect statute was not meant to apply here. *Id.* at 787-88 (Moore, J., dissenting).

49 *See, e.g., Mohapatra, supra* note 10, at 248; Fentiman, *Pursuing the Perfect Mother, supra* note 17, at 398-99 (explaining that these convictions were in line with the public attention given to the epidemic of crack-cocaine use during these years).

50 *See Mohapatra, supra* note 10, at 248; *see also* Johnson

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- v. State, 602 So. 2d 1288, 1291, 1296 (Fla. 1992) (holding that the transfer of cocaine through the umbilical cord, even after birth, did not entail “delivery” of a controlled substance to a minor within the statute’s language).
- 51 Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 399; *see also* State v. Luster, 419 S.E.2d 32, 34-35 (Ga. App. 1992) (reiterating the importance of determining legislative intent to prevent limiting or expanding statutes’ applications).
- 52 People v. Hardy, 469 N.W.2d 50, 52-53 (Mich. App. 1991).
- 53 *Id.* at 53.
- 54 *Id.*
- 55 Mohapatra, *supra* note 10, at 248; *see also* Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 400, 405-06 & nn. 74-78 (reviewing cases in which women were charged with homicide based on their substance abuse while pregnant).
- 56 Mohapatra, *supra* note 10, at 248; *see also* Joanne Pedone, Note, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 Colum. J.L. & Soc. Probs. 77, 78 n.5 (2009) (“A key difference between abortion laws and fetal homicide laws is that the latter are designed to remedy a harm that occurs without the consent of the woman.”); Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 Ohio St. L.J. 721, 721-22 (2006) (stating that the federal government and the majority of states have “enacted laws that treat the killing of a fetus by someone other than the pregnant woman or an abortion provider as a criminal homicide”) (footnote omitted).
- 57 *See, e.g.*, State v. Deborah J.Z., 596 N.W.2d 490, 491, 493 (Wis. App. 1999) (quashing the prosecution of a woman who threatened to drink herself and her unborn child to death after going into labor at a bar; the charges included attempted first-degree intentional homicide and first-degree reckless injury). Moreover, under Wisconsin’s “born alive” rule, a fetus is not a human being, and as such, the state’s attempted homicide statute did not apply. *Id.* at 493. The court further recognized the “significant slippery slope problem” created by prosecuting pregnant women given the “extended continuum of maternal behavior” that could potentially harm a fetus. Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 401; Deborah J.Z., 596 N.W.2d at 494-95.
- 58 State v. Aiwohi, 123 P.3d 1210, 1211 (Haw. 2005). Aiwohi received a twenty-year prison sentence, which was suspended as part of a plea agreement requiring her to obey her probation terms for the next ten years. Ken Kobayashi, *Mother Gets Probation in Ice Death*, Honolulu Advertiser, Aug. 26, 2004, at B1, *available on* Westlaw (2004 WLNR 22855061). The prosecutor maintained that the indictment was a necessary “wake-up call” so that Hawaii would “never see a case like this again.” *Id.* The sentencing judge agreed, indicating that “the State, with good reason, has served clear notice that such conduct can and will result in serious felony charges brought where the child is born alive and later dies or suffers injury due to knowing, intentional or reckless drug use.” Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 403 n.56 (citation omitted).
- 59 Aiwohi, 123 P.3d at 1225.
- 60 *See id.* at 1214-18, 1224.
- 61 State v. McKnight, 576 S.E.2d 168 (S.C. 2003).
- 62 *Id.* at 171; *see also* Mohapatra, *supra* note 10, at 249; Michele Goodwin, *Prosecuting the Womb*, 76 Geo. Wash. L. Rev. 1657, 1658 (2008) (providing additional background on McKnight).
- 63 McKnight, 576 S.E.2d at 171.
- 64 *Id.* Prosecutors have maintained that their actions are necessary to deter pregnant women from using drugs. Fentiman, *Rethinking Addition*, *supra* note 27, at 239; *see also* discussion *infra* Part II.B.4. Following McKnight’s conviction, then-South Carolina Attorney General Charles Condon proclaimed that South Carolina was “on the cutting edge of protecting the innocent life of the unborn,” and that the state’s “unborn children have a much better chance at a long, happy life” than they did previously. *See* Fentiman, *Rethinking Addition*, *supra* note 27, at 239 (quoting then-South Carolina Attorney General Charles Condon); *see also* Sue Anne Pressley, *S.C. Verdict Fuels Debate over Rights of the Unborn; Jury Finds Mother Guilty of Homicide in Stillbirth*, Wash. Post, May 27, 2001, at A03, *available on* Westlaw (2001 WLNR 13173108).
- 65 McKnight, 576 S.E.2d at 174-75, 179. As he did in *Whitner*, Judge Moore dissented, reiterating that only the legislature may “expand the application of a criminal statute to conduct not clearly within its ambit.” *Id.* at 180 (Moore, J., dissenting).
- 66 Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 402-03. After serving nine years of her sentence, McKnight was granted post-conviction relief on the grounds of ineffective assistance of counsel. McKnight v. State, 661 S.E.2d 354, 357-62 (S.C. 2008); *see also* Mohapatra, *supra* note 10, at 249. More recently, Rennie Gibbs, a teenager in Mississippi, was charged as an adult with depraved heart murder related to maternal drug use, which carries a life sentence without parole until the age of sixty-five. *See, e.g.*, Calhoun, *supra* note 17; Mohapatra, *supra* note 10, at 242-43. In 2006, Gibbs gave birth to a stillborn child, who tested positive for cocaine, leading to her arrest. Mohapatra, *supra* note 10, at 242-43; Ed Pilkington, *Outcry in America as Pregnant Women Who Lose Babies Face Murder Charges*, Guardian, June 24, 2011, <http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-murder-charges>. Gibbs moved to dismiss her case, arguing that the state’s homicide law pertains to third parties who harm pregnant women, and was not intended as a means to hold women criminally liable for their pregnancy outcomes. Lynn M. Paltrow & Emma S. Ketteringham, *Personhood Measures in Disguise*, Huffington Post, Apr. 2, 2012, http://www.huffingtonpost.com/lynn-m-paltrow/personhood-measures-in-di_b_1396795.html (cmts.). *See also* Gibbs v. State, No. 2010-IA-00819-SCT, Docket of Proceedings, http://courts.ms.gov/appellate_courts/general_docket.html (detailing the case’s procedural history). Her case awaits resolution. *See* Paltrow & Ketteringham (cmts.), *supra*.
- 67 Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253 (1992).
- 68 *See* United States v. Gonzales, 520 U.S. 1, 4 (1997); *see also* Conn. Nat’l Bank, 503 U.S. at 253-54 (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”); Consumer Prod. Safety Comm’n v. GTE Sylvania, 447 U.S. 102, 108 (1980) (“[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”); Sharp v. United States, 580 F.3d 1234, 1237 (Fed. Cir. 2009) (“To determine Congress’ intent, we use the traditional tools of statutory construction, beginning with the text of the statute. . . . Where the intent is unambiguously expressed by the plain meaning of the statutory text, we give effect to that clear language without rendering any portion of it meaningless.” (citing *Splane v. West*, 216 F.3d 1058, 1068 (Fed. Cir. 2000) (citing *Gonzales*, 520 U.S. at 4))).
- 69 *See, e.g.*, Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 46:1 (7th ed. 2007), *available at* Westlaw SUTHERLAND [hereinafter Singer & Singer, Statutory Construction]; Yule Kim, Congressional Research Service, Report for Congress, *Statutory Interpretation: General Principles and Recent Trends* at 2 (Aug. 31, 2008), <http://www.fas.org/sgp/crs/misc/97-589.pdf> [hereinafter CRS Report].
- 70 Caminetti v. United States, 242 U.S. 470, 485 (1917).
- 71 Singer & Singer, Statutory Construction, *supra* note 69, § 46:2; *see also id.* § 46:3 (“[C]ourts must be guided by what the legislature said in the statute in question, not by what the courts may think the legislature said.”).
- 72 *Id.* § 46:2; *see also id.* § 46:7.
- 73 CRS Report, *supra* note 69, at 2.
- 74 Singer & Singer, Statutory Construction, *supra* note 69, § 46:5; *see also* Attorney Gen. v. Am. Way Life Ins. Co., 465 N.W.2d 56, 58 (Mich. App. 1991) (“Neither clinical construction nor the letter of the statute nor its rhetorical framework should be permitted to defeat [an] act’s purpose and intent as gathered from consideration of the whole act.”).
- 75 Singer & Singer, Statutory Construction, *supra* note 69, § 46:5.
- 76 *See, e.g., id.* § 46:5; CRS Report, *supra* note 69, at 2; *see also* United Savings Ass’n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (emphasizing that statutory construction “is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear . . .” (citations omitted)).

- 77 *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Singer & Singer, Statutory Construction*, *supra* note 69, § 46:6.
- 78 *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (stating that in the absence of a statutory definition, the Court “construe[s] a statutory term in accordance with its ordinary or natural meaning”).
- 79 *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).
- 80 *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433-34 (2002). Similarly, if the legislature uses a word in one section but not in another, the word should not be implied where omitted. *Singer & Singer, Statutory Construction*, *supra* note 69, § 46:6.
- 81 *Id.* § 49:4; *see also id.* § 59:4 (“A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.”).
- 82 *See United States v. Donruss Co.*, 393 U.S. 297, 303 (1969); *United States v. Morgan*, 224 F.3d 339, 343 (4th Cir. 2000); *United States v. Cruz-Guerrero*, 194 F.3d 1029, 1031 (9th Cir. 1999).
- 83 *Singer & Singer, Statutory Construction*, *supra* note 69, § 48:1.
- 84 *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 543-44 (1940)); *see also FCC v. Cohn*, 154 F. Supp. 899, 910 (S.D.N.Y. 1957) (stating that “[T]he plain meaning rule . . . is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files.”) (citation omitted).
- 85 *See Tom Rice Buick-Pontiac v. Gen. Motors Corp.*, 551 F.3d 149, 157 (2d Cir. 2008); *Singer & Singer, Statutory Construction*, *supra* note 69, § 50:1.
- 86 *See, e.g., Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *Singer & Singer, Statutory Construction*, *supra* note 69, § 59:4. The rule of lenity “developed because of a concern for individual liberty and a belief that one should not be punished . . . unless the law has provided a fair warning of what conduct is considered criminal,” placing the burden on the legislature to “clearly and unequivocally warn people” about behavior that would subject them to liability. *Singer & Singer, Statutory Construction*, *supra* note 69, § 59:4; *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (recognizing that the rule of lenity “ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered”).
- 87 *See United States v. Barbosa*, 271 F.3d 438, 455 (3d Cir. 2001); *Singer & Singer, Statutory Construction*, *supra* note 69, § 59:4. If, however, a statute’s text is unambiguous, the rule of lenity does not apply. CRS Report, *supra* note 69, at 28.
- 88 *Singer & Singer, Statutory Construction*, *supra* note 69, § 59:4.
- 89 *Id.*; *see also United States v. Kozminski*, 487 U.S. 931, 952 (1988) (reiterating that one purpose behind the lenity principle is to “maintain the proper balance between Congress, prosecutors, and courts”).
- 90 *Singer & Singer, Statutory Construction*, *supra* note 69, § 59:4.
- 91 *See discussion supra Part I; see also Brief of Amici Curiae in Support of Hope Elisabeth Ankrom*, No. 11-10176, at 22, available at http://advocatesforpregnantwomen.org/main/publications/brief_bank/alabama_kimbrough_ankrom.php (Ala. Mar. 13, 2012) (underscoring that with one exception,

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every state appellate court has declined to expand laws pertaining to drug delivery, child abuse, and homicide to punish pregnant women who carry to term (or attempt to do so) despite drug addiction).


- 92 See discussion *supra* Part I; see also *Reyes v. Super. Ct.*, 141 Cal. Rptr. 912, 913-14 (Cal. App. 1977) (holding that California's child endangerment statute does not extend to fetuses because to commit child endangerment, the offender must "'hav[e] the care or custody' of [a] child," and this "requirement presupposes the existence of a living child susceptible to care or custody") (citations and quotation marks omitted); *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992) (quashing a mother's prosecution for her substance abuse while pregnant because the legislative history did "not show a manifest intent to use the word 'delivery' in the context of criminally prosecuting mothers for delivery of a controlled substance to a minor" via the umbilical cord, and this absence – as well as the uncertainty about whether "delivery" applied to maternal drug transmission – obliged the court to construe the statute in Johnson's favor); *State v. Aiwohi*, 123 P.3d 1210, 1224 (Haw. 2005) (stressing the "clear and unambiguous" text of the state's manslaughter statute in holding that the word "person" was not meant to include fetuses); *id.* ("[I]t is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning.") (quoting *State v. Haugen*, 85 P.3d 178, 183 (Haw. 2004)); *id.* (discussing the lenity principle to recognize that even if, *arguendo*, the statute's text is unclear, it must be construed in Aiwohi's favor); *Cochran v. Commonwealth*, 315 S.W.3d 325, 330 (Ky. 2010) ("It is the legislature, not the judiciary, that has the power to designate what is a crime."); *State v. Gray*, 584 N.E.2d 710, 711, 713 (Ohio 1992) (holding that Ohio's child endangerment statute does not pertain to women who use drugs during pregnancy, and stating that criminal statutes must be "liberally construed in favor of the accused").
- 93 The statute further provides that "[i]t is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance." Ala. Code § 26-15-3.2 (c).
- 94 Ala. Code 1975 § 13A-5-6(a)(1). Prior to the law's enactment, women who used drugs while pregnant were charged with endangering the welfare of a child (a misdemeanor). Kenny Smith, *Addicted Mothers Target of State Law*, Aug. 17, 2008, http://blog.al.com/live/2008/08/addicted_mothers_target_of_sta.html.
- 95 *Id.*; see also Goodwin, *supra* note 62, at 1714; Fentiman, *Rethinking Addiction*, *supra* note 27, at 238.
- 96 See Brief of Petitioner (Appellate Petition, Motion, and Filing), Ward v. Circuit Court of Covington Cnty., No. 1080164, 2008 WL 7934902, at *7 (Ala. Oct. 24, 2008) [hereinafter Ward Brief]; see also *Special Order Calendar by: House Rules Committee* (Ala. Feb. 8, 2006), <http://www.legislature.state.al.us/SearchableInstruments/2006RS/Resolutions/HR237.htm>.
- 97 A Bill Creating the Crime of "Chemical Endangerment of Exposing a Child to a Methamphetamine Laboratory," HB 331, 2005 Sess. (Ala. 2005), <http://www.legislature.state.al.us/searchableInstruments/2005RS/Bills/HB331.htm>.
- 98 Ala. Code § 26-14-1(3).
- 99 *Id.* § 26-22-2(8).
- 100 See, e.g., *Ex parte Ankrom*, No. 1110176, – So.3d –, 2013 WL 135748, at *14 (Ala. Jan. 11, 2013); Brief of Amici Curiae in Support of Petition for Writ of Certiorari, *Ankrom v. State*, No. 11-10176, at 9, available at <http://www.socialworkers.org/assets/secured/documents/ldf/briefDocuments/ANKROM%20Cert%20Petition%20Brief.pdf> (Ala. Nov. 18, 2011); Brief of Amici Curiae in Support of Hope Elisabeth Ankrom, No. 11-10176, at 4, available at http://advocatesforpregnantwomen.org/main/publications/brief_bank/alabama_kimbrough_ankrom.php (Ala. Mar. 13, 2012); see also Chemical Child Endangerment Debate, House Bill 723 (audio) (Ala. 2008), <http://altaxdollarsatwork.blogspot.com/search/label/chemical%20child%20endangerment%20act%20alabama>; Cameron Steele, *Fetal Argument: County DA to Begin Prosecution of Mothers Who Use Drugs During Pregnancy*, Anniston Star, Sept. 30, 2012, http://www.annistonstar.com/view/full_story/20320041/article-Fetal-Argument--County-DA-to-begin--prosecution-of-mothers-who-use-drugs-during-pregnancy.
- 101 Chemical Child Endangerment Debate, House Bill 723 (audio) (Ala. 2008), *supra* note 100; see also Brief of Amici Curiae in Support of Petition for Writ of Certiorari, *Ankrom v. State*, No. 11-10176, at 9-10 & n.8, available at <http://www.socialworkers.org/assets/secured/documents/ldf/briefDocuments/ANKROM%20Cert%20Petition%20Brief.pdf> (Ala. Nov. 18, 2011) (summarizing representatives' concerns, including the lack of substance abuse treatment offered through the criminal justice system, and how incarcerating pregnant women would threaten maternal, fetal, and newborns' health).
- 102 A Bill to Amend Section 26-15-3.2, Code of Alabama 1975, HB 8, 2011 Sess. (Ala. 2011), <http://www.openbama.org/index.php/bill/fulltext/3106>; see also *Ex parte Ankrom*, 2013 WL 135748, at *14.
- 103 See Ward Brief, No. 1080164, 2008 WL 7934902, at *5 (Ala. Oct. 24, 2008).
- 104 *Id.*
- 105 Press Statement: National Advocates for Pregnant Women's Lynn Paltrow on Alabama Supreme Court's Decision in "Personhood" Measure in Disguise Case, National Advocates for Pregnant Women, Jan. 12, 2013, http://advocatesforpregnantwomen.org/blog/2013/01/press_release_national_advocat.php.
- 106 Mohapatra, *supra* note 10, at n.16; Stone-Manista, *supra* note 15, at 825.
- 107 Adam Nossiter, *In Alabama, Crackdown on Pregnant Drug Users*, N.Y. Times, Mar. 15, 2008, <http://www.nytimes.com/2008/03/15/us/15mothers.html?pagewanted=all>. Like others involved in similar actions, Hitson did not want to risk trial, and she spent one year in prison. *Id.* (noting that through March of 2008, none of the women prosecuted had gone to trial).
- 108 Calhoun, *supra* note 17; see also *Court Upholds Charges Against Mother with Drug Addicted Baby*, Oct. 17, 2008, <http://www.wave3.com/story/9198625/court-upholds-charges-against-mother-with-drug-addicted-baby> (summarizing the case of Shekelia Ward, who was indicted after her newborn tested positive for cocaine); Elizabeth Summers, *Boaz Woman Faces Chemical Endangerment Charges*, Sand Mountain Reporter, Oct. 19, 2011, http://www.sandmountainreporter.com/news/local/article_30b7676a-fa96-11e0-928d-001cc4c002e0.html?mode=story (providing background on additional cases).
- 109 *Ex parte Ankrom*, No. 1110176, – So.3d –, 2013 WL 135748, at *1 (Ala. Jan. 11, 2013).
- 110 *Id.* at *2.
- 111 *Id.*; Calhoun, *supra* note 17.
- 112 *Ex parte Ankrom*, 2013 WL 135748, at *2; Calhoun, *supra* note 17; Pilkington, *supra* note 66.
- 113 *Ex parte Ankrom*, 2013 WL 135748, at *2; see also Calhoun, *supra* note 17. According to the Chief Assistant District Attorney, Kimbrough might have faced more jail time had a jury found her guilty. Calhoun, *supra* note 17. Her plea bargain permitted her to appeal her conviction on constitutional grounds without challenging the details of her case. *Id.*
- 114 *Ex parte Ankrom*, 2013 WL 135748, at *1, *7. Upon granting Ankrom's and Kimbrough's petitions for certiorari, the court consolidated the cases. *Id.* at *1.
- 115 Ankrom and Kimbrough also stressed that in 2006 – the same year that the chemical endangerment law was enacted – the legislature amended the state's homicide statute to define "person" to include an unborn child, but made no such specifications here. *Id.* at *12.
- 116 See generally *id.* at *8-17 (summarizing petitioners' arguments, as well as the State's).
- 117 *Id.* at *8.
- 118 *Id.* at *11. In reaching this conclusion, the court cited dictionary definitions of "child" that include the terms "fetus" and "unborn person." *Id.* at *10. The court determined that "[t]he plain meaning of the word 'child' is broad enough to encompass all children – born and unborn – including Ankrom's and Kimbrough's unborn children in the cases before us." *Id.* at *11.

- 119 *Id.* at *14-15 (citation omitted).
- 120 *Id.* at *11. Despite this determination, the court later acknowledged the statute's ambiguity, stating:
[I]t is possible to conclude, as Kimbrough argues, that the legislature understood the original chemical-endangerment statute to protect only children who were already born. It is also possible to conclude, as the State argues, that the legislature understood the original chemical-endangerment statute to protect all children – born and unborn – and that proposals to amend the statute were unnecessary attempts to clarify the legislature's original intent. This Court cannot determine the intentions of the legislature apart from the language in the chemical-endangerment statute that is now before us . . . the plain meaning of that statutory language is to include within its protection unborn children.
Id. at *15.
- 121 *Id.* at *19. Of note, two dissents accompanied the Majority's opinion. *See generally id.* at *24-26 (Malone, C.J. and Murdock, J. dissenting). Then-Chief Justice Malone stressed the lenity principle, criticizing the Majority for discussing the rule but nonetheless construing "the term 'child' as used in the statute as broadly as possible." *Id.* at *24 (Malone, C.J., dissenting). He further noted that expansion leads to practical problems in that expectant women (perhaps unaware that they are pregnant) who ingest substances, legal or not, become subject to prosecution, even though the act was committed without intent or knowledge. *Id.* at *25. Justice Murdock's dissent echoed that of Chief Justice Malone, reiterating that "criminal statutes must provide ordinary persons with clear notice of what is prohibited." *Id.* at *26 (Murdock, J., dissenting).
- 122 *See, e.g.,* Calhoun, *supra* note 17. Moreover, as noted above, the statute is inapplicable if "the controlled substance was provided by lawful prescription for the child," and "was administered to the child in accordance with the prescription instructions." Ala. Code § 26-15-3.2 (c); *see also supra* note 93. By its plain text and a common-sense reading of its affirmative defense provision, the code does not pertain to unborn children because prescriptions are written for and administered to children who have been born, and not fetuses. *See* Brief of Amici Curiae in Support of Hope Elisabeth Ankrom, No. 11-10176, at 16-17, *available at* http://advocatesforpregnantwomen.org/main/publications/brief_bank/alabama_kimbrough_ankrom.php (Ala. Mar. 13, 2012); Imani Gandy, *Hope Ankrom and Amanda Kimbrough: Victims of Alabama's Personhood Agenda*, RH Reality Check, Jan. 18, 2013, <http://threalitycheck.org/article/2013/01/18/hope-ankrom-and-amanda-kimbrough-victims-alabama-supreme-courts-zeal-to-protect-u/>.
- 123 *See* Calhoun, *supra* note 17. (citation and quotation marks omitted); Smith, *supra* note 94 (noting that the statute poses obstacles for prosecution because it "calls for death or serious injury to the child . . . [and one must] determine if the child was injured. It's a difficult situation." (quoting then-Baldwin County District Attorney Judy Newcomb)) (emphasis added).
- 124 *See* discussion *supra* Part II.A.; *see also* Singer & Singer, Statutory Construction, *supra* note 69, § 59.4 (stating that the lenity principle "rests on the fear that expansive judicial interpretations will create penalties not originally intended by the legislature").
- 125 *United States v. Kozminski*, 487 U.S. 931, 952 (1988).
- 126 *See* Singer & Singer, Statutory Construction, *supra* note 69, § 59:4.
- 127 *See id.*
- 128 *See id.*; *see also* *United States v. Lanier*, 520 U.S. 259, 266-67 (1997).

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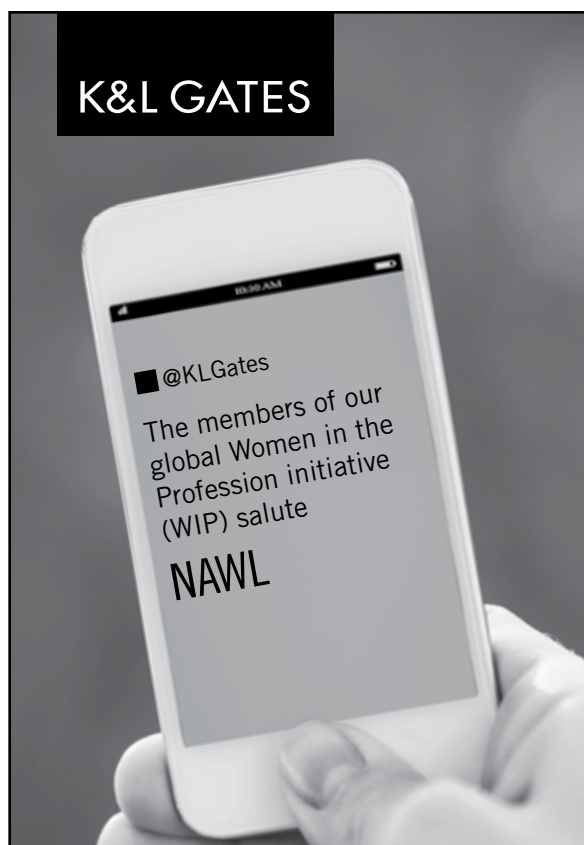
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- 129 See discussion *supra* Part II.B.
- 130 Phillip Rawls, *National Ire over Ala. Prosecuting Pregnant Moms*, Associated Press, Aug. 1, 2008, http://usatoday30.usatoday.com/news/nation/2008-08-01-4274196709_x.htm.
- 131 *Id.* (quoting State Senator Lowell Barron). State Representative Patricia Todd echoed Senator Barron in an amicus brief supporting Ankrom and Kimbrough. Steele, *supra* note 100 (reiterating that the law “‘was never intended to, and does not, apply to permit prosecution of’ women who expose their fetuses to drugs”) (quoting State Representative Patricia Todd).
- 132 Gambriel was the District Attorney of Covington County, Alabama, until he lost his re-election bid in November of 2010. Stephanie Nelson, *Merrell Claims DA’s Race*, Andalusia Star News, Nov. 3, 2010, <http://www.andalusianstarnews.com/2010/11/03/merrell-claims-das-race/>. He is currently a Deputy District Attorney General in Tuscaloosa. Tuscaloosa County District Attorney, *Deputy District Attorney Staff Directory*, <http://www.tuscaloosada.com/f-y-i/staff/> (last visited Aug. 12, 2013).
- 133 Dave Parks, *Law Puts Some New Mothers in Jail*, Birmingham News, Feb. 14, 2008, at 1, available on Westlaw (2008 WLNR 3000083). These cases have also elicited strong reactions from the public. See, e.g., Smith, *supra* note 94. An Alabama obstetrician/gynecologist (OB-GYN), for example, emphasized that the threat of mothers’ arrests would work against protecting infants. *Id.* She cited examples from South Carolina, where fear of prosecution “‘drove [women] underground’” and led them to avoid prenatal care. *Id.* (quoting Ruth Shields, M.D.); see also Steele, *supra* note 100 (interviewing Shelley Birchfield, nurse manager of the obstetrics department at an Alabama medical center, who recognizes that pregnant women struggling with addiction are hesitant to seek prenatal care because they fear that their children will be removed). Another OB-GYN, who completed his residency in Alabama, opposed the proceedings because he believed them capable of “opening the door to other prosecutions,” perhaps including those over cigarette or alcohol use during pregnancy. Rawls, *supra* note 130. In addition, organizations including the American Civil Liberties Union and National Advocates for Pregnant Women have reiterated that “the law is turning pregnant women into criminals instead of into women who need help.” Margo Gray, *Kimbrough Case May Change Child Endangerment Law*, ABC9/KTRE, Aug. 8, 2012, <http://www.ktre.com/story/19004849/kimbrough-case-may-change-child-endangerment-law?clienttype=printable>. These groups have voiced their opposition at state House and Senate hearings. Elizabeth Summers, *Assistant DA Pleased with Ruling Giving Rights to Unborn Children*, Sand Mountain Reporter, Sept. 12, 2011, http://www.sandmountainreporter.com/news/local/article_af582c82-dd84-11e0-a505-001cc4c03286.html. Others, however, support the proceedings. An Alabama nurse practitioner at a regional hospital commended the prosecutor’s aggressive approach because “the welfare of the mother and baby come first.” Parks, *supra*. Her opinion is in line with those of the prosecutors pursuing these cases, who maintain that they are trying to “‘salvage lives’” because they “‘have an affirmative duty to help the child, and help the mother.’” Smith, *supra* note 94 (quoting Randy Hillman, Executive Director of the Alabama District Attorneys’ Association).
- 134 Andrea L. Dennis, *Prosecutorial Discretion and the Neglect of Juvenile Shielding Statutes*, 90 Neb. L. Rev. 341, 342 (2011).
- 135 *Id.*
- 136 Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 Am. J. Comp. L. 643, 645 (2002); see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1525 (1981) (explaining that charging decisions are left to prosecutors with few restrictions); Leslie C. Griffin, *The Prudent Prosecutor*, 14 Geo. J. Legal Ethics 259, 266 (2001) (noting that prosecutorial discretion is “quite broad and often unregulated” because courts presume that “‘criminal prosecutions are undertaken in good faith and in a nondiscriminatory manner’” (quoting Michelle A. Gail, *Prosecutorial Discretion*, 85 Geo. L.J. 983, 983-85 (1997))); Richard Bloom, *Prosecutorial Discretion*, 87 Geo. L.J. 1267 (1999) (same). Scholars have even labeled the prosecutor as “‘the single most powerful figure in the administration of criminal justice.’” Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors’ Offices*, 22 Cornell J.L. & Pub. Pol’y 53, 74 (2012) (quoting Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 Am. Crim. L. Rev. 473, 477 (1976)).
- 137 Krug, *supra* note 136, at 649.
- 138 Griffin, *supra* note 136, at 264. Moreover, in recent years, “the discretionary part of prosecution has expanded,” as has prosecutors’ broad power in the criminal justice system. *Id.* at 261, 263 & n.18.
- 139 See Alabama Office of Prosecution Services, *DA Listing*, <http://www.alabamaprosecutor.com/DAList.aspx> (last visited Aug. 12, 2013).
- 140 See Mohapatra, *supra* note 10, at 249-50; Steele, *supra* note 100.
- 141 Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 408; see also Steele, *supra* note 100 (observing that in 2006, these prosecutions were limited to “‘little pockets’ in the northern and southern parts of the state”).
- 142 Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 408.
- 143 Steele, *supra* note 100.
- 144 Goodwin, *supra* note 62, at 1714. In recognition of Gambriel’s work in this area, the Alabama District Attorney’s Association and the Alabama District Attorney Investigators Association named him District Attorney of the Year in 2009. Michele Gerlach, *Gambriel named ‘DA of Year’*, Andalusia Star News, July 6, 2009, <http://www.andalusianstarnews.com/2009/07/page/19/>.
- 145 Nossiter, *supra* note 107. As detailed above, however, mothers are also sent to prison, and whether in jail or in a rehabilitation clinic, they are separated from their infants. In turn, they resent the collaboration of police, prosecutors, judges, physicians, and social workers, whom women say are less focused on help than punishment. *Id.*
- 146 *Id.* Almost immediately after the law’s passage, Gambriel declared that it would “help us prosecute [mothers] who illegally [ingest] substance[s].” Lauren Davis, *Prosecuting Mothers with Drug Addiction*, WTVY4, July 26, 2006, <http://www.wtvty.com/news/headlines/3431336.html>.
- 147 Nossiter, *supra* note 107. Gambriel has elaborated on his position, stating that “[w]hen drugs are introduced in the womb, the child-to-be is endangered,” and as such, “[i]t is . . . a continuing crime.” *Id.* (quoting then-DA Greg Gambriel).
- 148 Goodwin, *supra* note 62, at 1714.
- 149 See Alabama Office of Prosecution Services, *DA Listing*, *supra* note 139. Marshall also served as the President of the Alabama District Attorney’s Association. *Steve Marshall – Marshall County DA*, Alabama Republican Party, Dec. 5, 2011, <http://algotp.org/steve-marshall-marshall-county-da/>.
- 150 Rawls, *supra* note 130.
- 151 *Id.*
- 152 Summers, *supra* note 133. As discussed *infra*, Floyd is now a District Judge in Marshall County. Charles Whisenant, *Floyd Wins in a Landslide*, Arab [Alabama] Trib., Mar. 19, 2012, <http://www.thearabtribune.com/articles/2012/03/20/news/news6.txt>.
- 153 See Calhoun, *supra* note 17.
- 154 Summers, *supra* note 133 (quoting former Marshall County Assistant DA Mitch Floyd).
- 155 *Mitch Floyd for District Judge*, Jan. 13, 2012, <http://www.mitchfloyd.com/>. Floyd’s announcement came shortly after Marshall’s career experienced a change of its own: in December of 2011, Marshall switched from the Democratic to the Republican Party. Keith Clines, *Marshall County District Attorney Steve Marshall Switches to Republican Party*, Huntsville Times, Dec. 5, 2011, http://blog.al.com/breaking/2011/12/marshall-county-district_attor.html; Lionel Green, *Marshall Switches to GOP*, Sand Mountain Reporter, Dec. 2, 2011, http://www.sandmountainreporter.com/news/local/article_9926ce5a-1d1c-11e1-a26c-001871e3ce6c.html. With Marshall’s decision came the announcement that since 2006, nearly “every local elected office [in Marshall County] ha[d] changed to Republican hands.” Green, *supra*.

- 156 *Mitch Floyd for District Judge*, *supra* note 155. One of Floyd's advertisements featured Dr. Melvin D. Thornbury, Jr., an OB-GYN, who praised his efforts on behalf of the county's "born and unborn." *Videos Posted by Mitch Floyd*, Feb. 27, 2012, available at <http://www.facebook.com/video/video.php?v=3336404058855>. In particular, Floyd ensured that these children's mothers are "jailed and [that] the babies are placed in a safe home." *Id.* Another advertisement contained a mother with her child. The mother claimed that her time in prison led to her treatment, which enabled her to "turn her life around" and "be a good mother to her son." Calhoun, *supra* note 17.
- 157 Whisenant, *supra* note 152. Floyd was elected by default because there was no Democratic nominee. *Id.*
- 158 See Fentiman, *In the Name of Fetal Protection*, *supra* note 18, at 668.
- 159 See, e.g., Russell M. Gold, *Promoting Democracy in Prosecution*, 86 Wash. L. Rev. 69, 91-92 (2011); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2123 (1998).
- 160 See Dennis, *supra* note 134, at 342.
- 161 *Evans v. United States*, 504 U.S. 255, 296 (1992) (Thomas, J., dissenting).
- 162 See discussion *supra* Part II.B.4 & n.144.
- 163 Krug, *supra* note 136, at 651-52.
- 164 *Id.* at 650-51.
- 165 Wash. State Legislature, *Recommended Prosecuting Standards for Charging and Plea Dispositions*, Wash. Rev. Code § 13.40.077, available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=13.40.077>. Moreover, in Minnesota, the legislature requires local prosecutors to implement their own standards. Krug, *supra* note 136, at 650-51. Written guidelines must govern "the county attorney's charging and plea negotiation policies and practices." Minn. Stat. § 388.051, Subd. 3.
- 166 In fact, as noted *supra*, the Alabama Supreme Court specifically invited action if the legislature disagreed with the court's interpretation of the statute. *Ex parte Ankrom*, No. 1110176, – So.3d –, 2013 WL 135748, at *19 (Ala. Jan. 11, 2013); see also discussion *supra* Part II.B.2.
- 167 See Brief of Amici Curiae in Support of Hope Elisabeth Ankrom, No. 11-10176, at A1-A15, available at http://advocatesforpregnantwomen.org/main/publications/brief_bank/alabama_kimbrough_ankrom.php (Ala. Mar. 13, 2012); Brief of Amici Curiae in Support of Amanda Helaine Kimbrough, No. 11-10219, at A1-A15, available at http://advocatesforpregnantwomen.org/main/publications/brief_bank/alabama_kimbrough_ankrom.php. Supporters include the American Medical Women's Association, the American Psychiatric Association, the American College of Obstetricians and Gynecologists, and the American Nurses Association. See *id.*; see also Fentiman, *Pursuing the Perfect Mother*, *supra* note 17, at 461-62 (suggesting that advocacy groups urge federal and state prosecutors to cease criminal prosecutions against pregnant women for their illicit drug use).
- 168 Several legislators – including the law's sponsor, State Senator Barron – have confirmed that the statute was never meant to be used in these circumstances. See discussion *supra* Part II.B.3.
- 169 Steele, *supra* note 100.
- 170 See *supra* note 132 and accompanying text.



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Memories of Myrna

Two-term NAWL President Myrna S. Raeder was an expert in evidence and procedure, a leader in promoting gender equity in the criminal justice system and dedicated to the advancement of women lawyers

By Margaret Drew

I do not have the eloquence to describe the depth of Myrna Raeder's character. She was a generous mentor, a brilliant and accomplished lawyer, a dedicated and happy wife and mother. Her passing on Nov. 16, 2013, was sad news to all.

Myrna succeeded in many roles. A professor with Southwestern University School of Law, she was a recognized expert on evidence as well as gender studies. Myrna was an active member of the ABA's Criminal Justice Section and was a section past chair having experienced criminal law practice as both a prosecutor and as defense counsel. In her capacity as chair, as in all of her leadership roles, Myrna prioritized communication, encouraging those with divergent views to talk with each other. Myrna wrote: "[O]ne of my prime motivations over the years has been to encourage discussion between prosecutors and defense counsel to devise policies that will benefit the entire criminal justice community."

Working within the criminal justice system, Myrna was sensitive to the disparities in treatment and outcomes for women and children. Myrna gently but fearlessly spoke on issues that limit women. When her children were young, she facilitated a support group for working lawyer-mothers. Myrna was persuasive when speaking for

under-represented women who were prevented from mothering their children because of unreasonable or gender-biased practices and policies.

Myrna served two terms as NAWL president from 1994-1996. A natural leader, she ensured that NAWL had a seat at the table of influential organizations. During Myrna's first year as president the organization was in desperate financial condition. The board determined that Myrna was in the best position to see NAWL through its crisis, which she did. Myrna reluctantly agreed to serve a second year placing her dedication to NAWL over her desire to eliminate the time-consuming demands of the presidency.

Myrna combined expertise with kindness and courage. Ever the mentor, Myrna appointed me as liaison to the ABA Commission on Domestic Violence (now the Commission on Domestic and Sexual Violence). The appointment led to an opportunity for me to later serve as a commissioner and then as chair of the Commission, all the while continuing to represent NAWL in my liaison capacity. I was but one among many lawyers mentored by Myrna.

Myrna supported NAWL's international presence in maintaining NAWL's NGO status with the United Nations and by encouraging communication and collaboration with foreign women lawyers. She encouraged activism regarding ABA policy, supporting or opposing positions depending upon the impact on women.

If Myrna had any fear in taking strong leadership roles, she gave nothing away. Always acting with integrity, Myrna was clear, respectful and confident in addressing wrongs and suggesting remedies. "I've always believed that the raised voices of many who share the same interest is the best way to effect change," she said.

Myrna was a critical and powerful author. Her work influenced her fields of study as well as policy changes that advanced those for whom she advocated. Myrna continued active leadership until shortly before her death. In August, she completed her term as a commissioner with the ABA's Commission on Domestic and Sexual Violence.

Myrna taught as long as she was able, attending class in a wheelchair when she no longer had the strength to walk. Initially, Myrna did not share her breast cancer diagnosis with many colleagues; she did not want those relationships to change because of her illness. While sporting her stylish post-chemo wig, Myrna enjoyed comments from her colleagues on how much they liked her new hairstyle. One of her confidantes was Katherine Henry, also a past president of NAWL.

Katherine provided great support to Myrna and it was my pleasure to watch these two amazing women come together in their selfless and remarkable friendship.

Myrna was recognized for the extraordinary woman and lawyer that she was. She was recognized by Southwestern Law School several times for her academic accomplishments. In 2003, the

Los Angeles Women Lawyers honored Myrna with the Ernestine Stallhutt award for her contributions to the community and the legal profession. Two years later, Myrna was inducted into the Hunter College Hall of Fame, an award that particularly excited her because it brought her into contact with other accomplished Hunter College graduates.

The ABA honored Myrna with two prestigious awards. In 2002, Myrna was recipient of the Margaret Brent award. Recovering from my own illness and unable to attend the celebration, a colleague called me from the luncheon. While we were talking, he walked to the podium and handed his cell phone to Justice Ginsberg, who shared the dais with the Margaret Brent winners. In what has become my favorite memory of Myrna, as I was speaking with Justice Ginsberg I heard Myrna in the background saying to the Justice, "That's Margaret on the phone?! When you are done I want to speak with her." Justice Ginsburg complied. I particularly loved Myrna as a girlfriend that day.

Shortly before her death, Myrna was honored with the prestigious Charles English award from the ABA Criminal Justice Section. Too ill to attend, Myrna's older son, Tom, accepted the award on Myrna's behalf. Myrna wrote remarks that Tom read graciously. Myrna the advocate encouraged us to oppose the

*'I've always believed
that the raised voices
of many who share the
same interest is the best
way to effect change.'*

—Myrna S. Raeder

The ABA honored Myrna with two prestigious awards

relocation of female prisoners from Danbury federal prison to Aliceville, Ala., where it would be virtually impossible for children of the incarcerated mothers to visit.

Combining generosity with commitment, Myrna and her husband, Terry Kelly, established the Myrna Raeder Endowment Fund at Southwestern University School of Law. The fund will provide scholarships for

students who grew up in kinship or foster care, or are children of an incarcerated parent.

Myrna loved her husband, Terry, and their two sons, Tom and Mike. She credited Terry with encouraging her to speak on behalf of others, even when her advocacy may not have been welcome. Tom and Mike were never ending sources of love, enjoyment and, often, amusement. I knew Tom and Mike as they grew through Myrna's many updates and stories.

I cannot imagine the pain of Myrna's family as they go forward without this remarkable, wise and loving woman. In her remarks, Myrna wrote, "Family and friends have always been important to me, and I would particularly like to recognize my husband, Terry Kelly, who has always encouraged me to reach for the stars and speak out on the causes I hold so dear, and our two sons Tom and Mike who have grown up thinking that lawyering is women's work."

Myrna leaves an immeasurable gap in the lives of those who knew her. ■

When Myrna Raeder was too ill to attend, her oldest son, Tom Kelly, accepted the Charles English Award in her honor. Left to right: Rebecca Henry, deputy counsel to the ABA Commission on Domestic and Sexual Violence; Kelly; and Margaret Drew.



Professor Margaret Drew, a longtime member and past officer of NAWL, is a member of NAWL's Amicus and Supreme Court Committees.



Larson King recognized by Eaton law department

Firm was presented Eaton's 'Inclusion and Diversity Excellence' Award

Larson King was recognized for their efforts in support of Eaton's diversity initiatives as part of Eaton Law Department supplier recognition program. The firm was the only one chosen for the Supplier Inclusion and Diversity Excellence Award from a select group of firms.

Larson King, with about 30 attorneys, is headquartered in St. Paul, Minn. It specializes in litigation. "Larson King is an ideal partner for the Eaton legal team and they are a leading advocate for inclusion and diversity programs in the community and the legal profession," said Mark McGuire, Eaton executive vice president and general counsel.

Eaton, with offices in Ireland and Cleveland provides energy-efficient solutions to manage electrical, hydraulic and mechanical power. Eaton has 102,000 employees and sells products to customers in more than 175 countries.

Larson King is a sponsor of the National Association of Women Lawyers.

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LITIGATION REDEFINED

Nina Chang promoted to vice president of legal

Nina Chang was promoted to vice president of legal affairs and senior counsel at Appcelerator. Prior to joining Appcelerator in 2012, she was commercial law counsel at EMC and held legal positions at TIBCO software and Siebel Systems. Chang received her J.D. from the University of San Francisco Law School and a bachelor's from Boston University.

Appcelerator is an international mobile enterprise platform company headquartered in Mountain View, Calif. The privately held company has more than 150 employees with offices in Australia, China, Germany, Singapore, the United Kingdom and the United States.

Mary-Christine Sungaila receives Judith Soley Lawyer as Citizen Award

The California Women Lawyers presented Mary-Christine Sungaila with the Judith Soley Award October 10. Sungaila is an appellate partner with the law firm of Snell & Wilmer LLP in Costa Mesa, Calif. She focuses on counseling clients on appellate and class action issues. She was named as one of the Top Women Lawyers by the Daily Journal in May 2013 and received the Distinguished Service Award by the Women Lawyers' Association of Los Angeles, among many other notable awards.

The Judith Soley Award is given to "an honoree who has made a significant contribution to her community, extending beyond the practice of law, to devote time and effort to the public good and values through the tradition of public service and involvement, and who exemplifies the values and missions of California Women Lawyers," according to the association.



Mary-Christine Sungaila

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Patricia Gillette receives Fay Stender Award



Patricia K. Gillette

The California Women Lawyers also presented the Fay Stender Award to Patricia K. Gillette. Gillette is employment partner at Orrick Herrington & Sutcliffe LLP.

The award is given to a lawyer committed to representing “women, disadvantaged groups and unpopular causes,” according to the association. It was established in 1982 in honor of a Bay Area attorney who fought for prisoners’ rights.

Gillette has been involved in national projects focused on the retention of women in law. In 2006 she co-founded the Opt-In Project, a nationwide initiative with the goal of increasing the retention and advancement of women.

She served on the ABA Commission on Women for three years and co-chairs the San Francisco Bar Association’s No Glass Ceiling Initiative. She is on the board of the NAWL Foundation and is a member of the ABA’s Gender Equity Task Force.

NAWL board member named to Fast Track list

Heather C. Giordanella, counsel in the Commercial Litigation Practice Group of Drinker Biddle & Reath LLP was among 38 Pennsylvania attorneys named as a 2013 “Lawyer on the Fast Track” by the Legal Intelligencer. The Fast Track list recognizes lawyers under age 40 who are making an impact on the legal community in Pennsylvania.



Heather C. Giordanella

Giordanella also is a member of the firm’s Women’s Initiative and has served on the Board of the National Association of Women Lawyers for many years. She attended Temple University School of Law and received her J.D. cum laude.

Keep us informed

Contribute your member news via email to Laura Williams at williaml@nawl.org.



Sheryl L. Axelrod

Sheryl L. Axelrod writes on diversity in leadership

Sheryl L. Axelrod founder of The Axelrod Firm PC, published “Disregard Diversity at Your Financial Peril: Diversity as a Competitive Financial Advantage,” in the May/June 2013 issue of Diversity & the Bar.

Axelrod was also selected a 2013 Top Rated Lawyer in Labor & Employment by American Lawyer Media and Martindale-Hubbel. Among her clients are The Salvation Army, GlaxoSmithKline and Blue Cross Blue Shield.

She graduated from Brandeis University, Boston, in 1990 and Temple University Law School, Philadelphia, in 1993.

To read the article, go to bit.ly/1gKunSr

Judges honored by BWLA

Judge - Designate Andrea Wood and the Honorable Sara Ellis, both newly appointed to the bench for the District Court in the Northern District of Illinois, were honored in November at a reception hosted by the Black Women Lawyers' Association.



Judge-Designate
Andrea Wood



Honorable Sara Ellis

The Senate confirmed Judge Ellis' nomination on Oct. 7, 2013. Prior to her elevation to the federal bench, Judge Ellis was counsel at Schiff Hardin LLP, handling litigation and white-collar crime. She is a graduate of Indiana University and Loyola University Chicago School of Law. Following law school, Judge Ellis worked at the Federal Defender Program and later joined the law firm of Stetler Duffy & Rotert Ltd. She also served as Assistant Corporation Counsel for the City of Chicago.

The Senate confirmed Wood's nomination on Oct. 14, 2013. Prior to her elevation to the federal bench, Wood served as senior trial counsel in the Division of Enforcement of the United States Securities and Exchange Commission. She is a graduate of the University of Chicago, and Yale Law School, New Haven, Conn. After law school, Wood clerked for Circuit Judge Diane Wood of the United States Court of Appeals for the Seventh Circuit and also practiced at Kirkland & Ellis as a litigation associate.

Abbene is recipient of human rights award



Norma Abbene

Chief of Staff for Legal Affairs & Deputy Counsel to New York Mayor Michael R. Bloomberg Norma Abbene was awarded the 2013 Frederick Douglass Human Rights Award for her work advancing the cause of eradicating human trafficking. Abbene served as an observer on the Uniform Law Commission Drafting Committee on Prevention of and Remedies for Human Trafficking and as global coordinator of the New York Mayor's Office Survivors of Human Trafficking Working Group.

See Abbene's story on child trafficking in WLJ, vol 97, issue 3&4

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NAWL co-sponsors Ms. JD's Annual Conference

*Conference is geared to
young women lawyers and law students*

The National Association of Women Lawyers is co-sponsoring Ms. JD's Sixth Annual Conference on Women in Law Feb. 21-22, 2014. The conference is geared to women law students and young lawyers.

This year's theme, Passion Forward, will help participants identify and showcase their passion. Participants will identify what they are passionate about and then presenters will work with participants to build concrete skills to showcase what is most important to them via social media, blogs, networking and other formats.

The second day of the conference is the Women in Law Institute, an all day intensive workshop for second- and third-year law students, judicial clerks, and LL.M.s.

Attendees will have the opportunity to network with one another and speak with attorneys from top firms.

Ms. JD will also be honoring exceptional women this year.

The event is held in conjunction with the Center for Women in Law at the University of Texas School of Law, 727 East Dean Keeton St., Austin, Texas 78705.

For more information go to <http://ms-jd.org/passionforward>.

NAWL's Mid-Year Meeting Slated for March

Geared to women lawyers at all stages of their careers, NAWL's Mid-Year Meeting will be March 19 - 20, 2014 at the Marriott Renaissance in Washington, D.C.

This year's program will focus on the advancement of women in the profession. It's a good time to network with colleagues and catch up on continuing legal education requirements with dynamic, interactive programs in all legal disciplines.

A special rate (\$259 plus tax) is available for NAWL members on a first-come, first-served basis for March 19 and 20 at the Marriott Renaissance Washington, 999 9th Street NW, Washington, D.C., 20001.

To reserve your room go to: bit.ly/1hCH5Wt or call

Marriott reservations at (800) 468-3571 or (202) 898-9000. Be sure to mention your NAWL membership to get the special rate.

Early women lawyers worked for social justice

Rebels at the Bar: The Fascinating, Forgotten Stories of America's First Women Lawyers by Jill Norgren

Reviewed By Jackie Ruffin

In an age when the number of women attorneys continues to grow each year, and women make up nearly half the students in our nation's law schools, it's easy to forget the daunting hurdles that aspiring women lawyers once faced. In *Rebels at the Bar*, legal historian and author Jill Norgren highlights the stories of several women who not only fought for the right to be educated and practice law, but lived lives dedicated to the betterment of society.

Norgren provides a wealth of detail on the legal profession in the 19th century, along with the prevailing perceptions of women and the emerging women's rights movement. Post-Civil War America saw numerous changes in society, but reforms benefiting women were slow in coming. Women were still denied the right to vote, hold office and serve on juries. Educational opportunities were limited at best. A woman with a desire to pursue any profession ran smack into the traditional separate spheres convention of the times, which held that men were best suited to the rough-and-tumble professional life and women to the home.

Women eager to enter the practice of law, either to prove their intellectual mettle, to earn their living or to promote social issues such as women's equality, suffrage or temperance, were often hard pressed to find a law school to admit them. Clara Foltz brought suit against San Francisco's Hastings College of the Law to gain admittance, eventually winning in the California Supreme Court. Others received their education by studying with a supportive male lawyer, often a relative.

Once they received that education, even more daunting hurdles remained – being accepted at the bar and finding employment. These “sisters-in-law” as Norgren calls them, had to combat negative perceptions by male attorneys (one of whom, according to Illinois attorney Catherine Waugh, advised she “go home and take in sewing”) as well as the public. Positions in law firms were hard to find, and many women lawyers had to survive

in solo practices and wait patiently for business to come in the door.

Just how high were these hurdles? In 1873, Myra Bradwell, already a successful publisher of the Chicago Legal News, fought all the way to the U.S. Supreme Court to be admitted to the Illinois bar, only to lose her case. Initially denied, Lavinia Goodell won her appeal to be admitted to the Wisconsin Supreme Court in 1879. Belva Lockwood fought for equal opportunity for women in law schools, and later lobbied Congress to

Post-Civil War America saw numerous changes in society, but reforms benefiting women were slow in coming.

pass legislation allowing women to be admitted to the U.S. Supreme Court; she was the first woman to argue a case there in 1880. Others, like Lelia Robinson, wrote legislation so that she and other women could obtain bar admittance in Massachusetts.

The battles to be accepted into the profession weren't these women's only stories. Norgren details their passions for reform and social justice. Lavinia Goodell was committed to the improvement of prison conditions. Clara Foltz fought for the idea of public defenders to represent the poor. Mary Hall of Connecticut established the Good Will Club to give poor children opportunities for advancement. They also wrote and spoke widely on issues of women's suffrage and equal opportunity.

These “rebels at the bar” were intelligent, they were ambitious, they were passionate. Their struggles and victories inspired other women of the last century to follow their own dreams of succeeding in a changing world, and they continue to inspire today, a vivid reminder of the precious and hard-fought gains won by women.

Rebels At The Bar: New York University Press, May 2013.

Jackie Ruffin is the former Communications Manager of the National Council of Juvenile and Family Court Judges.



Thanks to our Institutional Members

Our institutional members support the professional development of their women lawyers and students and they also help NAWL conduct substantive research related to women lawyers and the entire legal profession.

With their help, NAWL is able to provide women lawyers with a national network of support, a platform for business development and professional mentoring. Their support helps NAWL keep its membership fees, programming and continuing legal education at an affordable rate.

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As one of the country's largest and fastest-growing workplace law firms, we are committed to the advancement of women at our firm, in the legal profession, and in the communities we serve. Our female attorneys hold leadership positions both locally and nationally and are active in bar associations and women's business organizations throughout the U.S.

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NAWL welcomes new members

Membership in the National Association of Women Lawyers has many advantages, among them, opportunity for continuing legal education, the Women Lawyers Journal, NAWL's Mentoring Program and professional networking with other members. Please welcome these new members who joined to take advantage of these and the many other services provided by NAWL.

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At the 2013 Annual Meeting, NAWL assistant secretary Sarretta C. McDonough shares a moment with Katherine Larkin-Wong president of Ms. JD and an associate at Latham & Watkins, San Francisco. McDonough is of counsel at Gibson Dunn & Crutcher, Los Angeles.

Photo: Paula Vlodkowski



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2013 Outstanding Law Students

Selected by their law schools as the outstanding students of their class, these talented and dedicated award winners are among the best and brightest. They are honored for academic achievements and for the impact they have made beyond their classrooms. The men and women listed below have worked to further the advancement of women in society and promoted the concerns of women in the legal profession with tenacity and enthusiasm that inspired their fellow law students and their professors.

NAWL salutes these individuals who have begun working early in their careers to promote justice for women. We encourage them to continue making a difference as their careers blossom.

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| ADO Adoption | CNS Construction | EXC Executive Compensation | LIT Litigation | RSM Risk Management |
| ADR Alt. Dispute Resolution | COM Complex Civil Litigation | FAM Family | LND Land Use | SEC Securities |
| ADV Advertising | CON Consumer | FIN Finance | LOB Lobby/Government Affairs | SHI Sexual Harassment |
| ANT Antitrust | COR Corporate | FRN Franchising | MAR Maritime Law | SPT Sports Law |
| APP Appeals | CRM Criminal | GAM Gaming | MEA Media | SSN Social Security |
| ARB Arbitration | CUS Customs | GEN Gender & Sex | MED Medical/Malpractice | STC Security Clearances |
| AVI Aviation | DIV Diversity & Inclusion | GOV Government Contracts | M&A Mergers & Acquisitions | TAX Tax |
| BDR Broker Dealer | DOM Domestic Violence | GRD Guardianship | MUN Municipal | TEL Telecommunications |
| BIO Biotechnology | EDU Education | HCA Health Care | NET Internet | TOL Tort Litigation |
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| CCL Compliance Counseling | ENT Entertainment | INT International | PRL Product Liability | WCC White Collar Crime |
| CIV Civil Rights | EPA Environmental | INV Investment Services | | WOM Women's Rights |
| CLT Consultant | ERISA ERISA | IST Information Tech/ Systems | | WOR Worker's Compensation |
| | EST Estate Planning | | | |

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Left, ABA President, Laurel G. Bellows, The Bellows Law Group, PC, principal, welcomes special guests of the National Association of Women Lawyers, Major Catherine Brantley, U.S. Army and LTC Roseanne Bennett U.S. Army.

Photo: Paula Vlodkowski



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Left, Daniel J. Goldstein, executive vice president and chief legal counsel at Pitney Bowes and Michele Coleman Mayes, NAWL member at large and vice president and general counsel of The New York Public Library served as panelists at NAWL's Annual Meeting in July.

Photo: Paula Vlodkowski



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Koriambanya (Kori) Carew, Director of Strategic Diversity Initiatives with Shook Hardy & Bacon LLP, right, clarifies a point with Beth Finkle, senior executive, business development with Kiersted Systems, New York.

Photo: Paula Vlodkowski

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