

2013

Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama Chemical Endangerment Law in *Ex parte Ankrom*

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PREGNANCY ON TRIAL: THE ALABAMA SUPREME COURT'S ERRONEOUS APPLICATION OF ALABAMA'S CHEMICAL ENDANGERMENT LAW IN *EX PARTE ANKROM*

Rachel Suppé*

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INTRODUCTION

The National Substance Abuse Index states that methamphetamine is becoming the largest drug pandemic in Alabama.¹ Between 2002 and 2006, there were 1,432

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¹ *Alabama: Drug Climate*, NAT'L SUBSTANCE ABUSE INDEX, <http://nationalsubstanceabuseindex.org/alabama/index.php> (last visited Dec. 3, 2013) [hereinafter *Alabama: Drug Climate*].

methamphetamine lab seizures within the State.² Due to a growing concern that Alabama's children were being exposed to the dangerous chemicals used in the production of drugs such as methamphetamine, the State passed what has become known as its "chemical endangerment law" in 2006.³ The law indicates that a person commits the crime of chemical endangerment when he or she knowingly, recklessly, or intentionally exposes a child to contact with a controlled substance, chemical substance, or other drug paraphernalia.⁴ Violation of the statute is a felony.⁵

While the law had admirable aims and sought to protect children forced to grow up in clandestine at-home methamphetamine labs, it was not long before Alabama prosecutors gave the statute new meaning by using it to prosecute women who tested positive for drugs during pregnancy. Sixty women in Alabama have been prosecuted under the statute thus far—a number which continues to rise.⁶ Medical, pro-choice, and anti-poverty groups have challenged use of the law in this manner, arguing that the law was not intended to criminalize women whose fetuses are exposed to controlled substances in utero. On January 11, 2013, the Alabama Supreme Court rendered a perilous opinion in *Ex parte Ankrom*,⁷ holding that the term "child" in the chemical endangerment statute applies to fetuses, and that women who take controlled substances while pregnant can and will be charged with felonies.⁸

Part I of this article discusses the rising use of methamphetamine, and state and federal responses to the growing epidemic. It discusses Alabama's attempt to shield children from methamphetamine labs and state prosecutors' subsequent use of the law to convict pregnant women. Part I also examines the case of two women, Amanda Kimbrough and Hope Ankrom, whose convictions under the chemical endangerment statute reached the Alabama Supreme Court. Part II of this article argues that the Alabama Supreme Court erred in its decision that the term "child" in the statute included fetuses and erred in finding the convictions proper. Part III discusses policy considerations and recommends the use of medical treatment, rather than incarceration, to address drug use. Lastly, Part IV argues that the Alabama State Legislature should clarify that the chemical endangerment law may not be used to prosecute pregnant women, as such a use has dangerous implications for the State's women and families.

² *Alabama: Substance Abuse Statistics*, National Substance Abuse, <http://nationalsubstanceabuseindex.org/alabama/stats.php> (last visited Dec. 3, 2013).

³ See generally Brief *Amicus Curiae* of Rep. Patricia Todd on Behalf of Petitioner, *Ex parte Ankrom*, No. 1110176, (Ala. Jan. 11, 2013) [hereinafter Todd Brief].

⁴ ALA. CODE § 26-15-3.2 (2012).

⁵ *Id.*

⁶ Cameron Steele, *Fetal Argument: County DA to Begin Prosecution of Mothers Who Use Drugs During Pregnancy*, ANNISTON STAR (Sept. 30, 2013), http://www.annistonstar.com/view/full_story/20320041/article-Fetal-Argument—County-DA-to-begin—prosecution-of-mothers-who-use-drugs-during-pregnancy.

⁷ No. 1110176, 2013 WL 135748 (Ala. Jan. 11, 2013).

⁸ See *id.* at *19.

I. BACKGROUND

A. National and State Level Methamphetamine Statistics

There are currently more than 1.4 million methamphetamine users in the United States, and the number continues to rise.⁹ Methamphetamine, or “meth,” is a highly addictive stimulant with potent central nervous system stimulant properties.¹⁰ Though methamphetamine is legally available under certain conditions, it is a Schedule II stimulant under the Controlled Substances Act.¹¹ Methamphetamine produces a brief, intense sensation or rush, and oral ingestion or snorting methamphetamine produces a long-lasting high which lasts up to half a day.¹² Both the rush and the high are believed to result from the release of very high levels of the neurotransmitter dopamine into areas of the brain that regulate feelings of pleasure.¹³ Due to its intense high, highly addictive nature, easy accessibility, and low cost, methamphetamine has become one of the most popular drugs in use in the U.S. today.¹⁴ The largest population of methamphetamine users tends to be the Caucasian rural poor.¹⁵ Within Alabama, the state’s overall poverty rate is 17.5 percent with rural areas having a higher poverty level than urban areas.¹⁶ Nearly half of Alabama’s methamphetamine users are female and ninety-two percent of Alabama’s drug users are white.¹⁷ The National Substance Abuse Index, an independent guide to addiction resources throughout the U.S., reports that “[m]eth is becoming the biggest drug threat in Alabama” and methamphetamine abuse surpasses cocaine abuse statewide.¹⁸

Distributors of methamphetamine have taken to making the product at home in what have been referred to as “meth labs.” Ingredients for methamphetamine can be obtained at any local pharmacy, as the main ingredient used to produce methamphetamine is found in the widely available, non-prescription drug Sudafed, which contains

⁹ *The Reach of Meth*, FRONTLINE (May 16, 2011), <http://www.pbs.org/wgbh/pages/frontline/meth/map/>.

¹⁰ *Drugs of Abuse 2011*, U.S. DEP’T OF JUSTICE DRUG ENFORCEMENT ADMIN 48 (2011), http://www.justice.gov/dea/docs/drugs_of_abuse_2011.pdf.

¹¹ *See id.* at 49 (stating that methamphetamine is available only through a prescription that cannot be refilled and that there is only one legal methamphetamine product, Desoxyn, which is currently marketed in 5-milligram tablets and has very limited use in the treatment of obesity and attention deficit hyperactivity disorder (ADHD)).

¹² *Id.* at 48.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 884-85, 895 (2010).

¹⁶ ALABAMA DEP’T OF MENTAL HEALTH, OFFICE OF PREVENTION, ALCOHOL, TOBACCO, AND OTHER DRUGS: CONSUMPTION AND CONSEQUENCES IN ALABAMA 5 (2011) [hereinafter ALCOHOL, TOBACCO, AND OTHER DRUGS: CONSUMPTION AND CONSEQUENCES IN ALABAMA], http://www.mh.alabama.gov/Downloads/SA/ALStateEPIProfilefinal_2011-11-22.pdf.

¹⁷ *Substance Abuse Treatment Admissions by Primary Substance of Abuse According to Sex, Age Group, Race, and Ethnicity Year = 2010*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., CTR. FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, available at <http://www.dasis.samhsa.gov/webt/quicklink/AL10.htm> (last visited Dec. 3, 2013).

¹⁸ *Alabama: Drug Climate*, *supra* note 1.

pseudoephedrine, the most important ingredient in methamphetamine production.¹⁹ The production process involves the use and release of dangerous toxic chemicals, and the deadly toxic waste left from a methamphetamine lab is often discarded near schools, on roadsides, or at local parks.²⁰

According to the Federal Drug Enforcement Agency, there were 11,239 clandestine methamphetamine lab seizures nationwide in 2010.²¹ Of those, 666, or approximately seventeen percent, were in Alabama.²² In 2010, 13,172 drug related arrests were reported in Alabama,²³ and 2,220 of those arrests were for the sale of drugs including barbiturates, amphetamines, and methamphetamine.²⁴ Within Alabama, methamphetamine labs tend to be located in isolated rural communities: 207 labs were seized in 2002, 280 in 2003, and 297 in 2004.²⁵ Methamphetamine is such a large problem in Alabama that the Alabama District Attorneys Association has sponsored an anti-methamphetamine awareness and educational campaign called Zero Meth with the goal of “stopping this drug and its life threatening consequences.”²⁶ The campaign’s website states that “[m]eth is the number one drug related issue for law enforcement officials in Alabama” and that Zero Meth is Alabama’s response to the state’s growing epidemic.²⁷

B. State Responses to Methamphetamine Production and Use

Because so many methamphetamine labs are in homes, Alabama has become increasingly concerned about the effect that the drug’s toxic ingredients can have on the children living in those homes. The Department of Justice Office of Justice Programs (OJP) reports that “[a] child living at a clandestine methamphetamine laboratory is exposed to immediate dangers and to the ongoing effects of chemical contamination. In addition, the child may be subjected to fires and explosions, abuse and neglect, a hazardous lifestyle (including the presence of firearms), social problems, and other risks.”²⁸ OJP’s website lists two specific examples which highlight the detrimental effect that at home methamphetamine labs can have on children:

The five children ranged in age from 1 to 7 years old. The one-bedroom home had no electricity or heat other than a gas stove with the oven door opened. Used hypodermic needles and dog feces littered areas of the residence where

¹⁹ Ahrens, *supra* note 15, at 865.

²⁰ *ZeroMeth: Facts*, ALABAMA DISTRICT ATTORNEYS ASS’N, available at <http://www.zerometh.com/facts.php> (last visited Dec. 3, 2013).

²¹ Neal Vickers, *Meth Gets More Emphasis in Alabama*, EXAMINER.COM (Nov. 27, 2011), <http://www.examiner.com/article/meth-gets-more-emphasis-alabama>.

²² *Id.*

²³ *See id.* (adding that of those, fifteen percent were for sale of drugs and eighty-five percent were for possession).

²⁴ *Id.*

²⁵ *Alabama: Drug Climate*, *supra* note 1.

²⁶ *Zero Meth: Home*, *supra* note 20.

²⁷ *Id.*

²⁸ *Dangers to Children Living at Meth Labs*, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/children/pg5.html> (last visited Dec. 3, 2013).

the children were found playing. Because there were no beds for the children, they slept with blankets underneath a small card table in the front room. The bathroom had sewage backed up in the tub, leaving no place for the children to bathe. A subsequent hospital exam revealed that all the children were infected with hepatitis C. The youngest was very ill. His liver was enlarged to the size of an adult's. The children had needle marks on their feet, legs, hands, and arms from accidental contact with syringes.

At another lab site, a 2-year-old child was discovered during a lab seizure. Her parents both abused and manufactured methamphetamine. She was found with open, seeping sores around her eyes and on her forehead that resembled a severe burn. The condition was diagnosed as repeated, untreated cockroach bites.²⁹

In response to these dangers, states have undertaken a variety of efforts to protect children exposed to methamphetamine labs. For example, many states have established Drug Endangered Children Programs which coordinate the efforts of law enforcement, medical services, and child welfare workers to ensure that children found in these environments receive appropriate attention and care.³⁰ Such programs are modeled after the national program created by the Federal Interagency Task Force for Drug Endangered Children.³¹ North Carolina, Illinois, Kansas, Nebraska, Arkansas, and California are examples of states which have undertaken efforts, whether through training, policy, education, or research, to address the problem of children being exposed to methamphetamine.³²

Some states have addressed the crisis legislatively. In Colorado, Indiana, Iowa, Michigan, Montana, South Dakota, Tennessee, and Virginia, child abuse or neglect includes manufacturing a controlled substance in the presence of child or on a premises occupied by a child.³³ In Arizona and New Mexico, allowing a child to be present where there are chemicals or equipment for the manufacture of controlled substances or where controlled substances are used or stored is considered child abuse or neglect.³⁴ In Florida, Hawaii, Illinois, Minnesota, and Texas, child abuse or neglect includes selling or distributing drugs, as well as, giving drugs or alcohol to a child.³⁵ In Kentucky, New

²⁹ *Id.*

³⁰ *Methamphetamine Frequently Asked Questions*, RURAL ASSISTANCE CENTER, available at <http://www.raconline.org/topics/substance-abuse/faqs/#meth> (last visited Dec. 3, 2013).

³¹ See *Drug Endangered Children*, OFFICE OF NATIONAL DRUG CONTROL POLICY, available at <http://www.whitehouse.gov/ondcp/dec-info> (last visited Dec. 3, 2013).

³² *Methamphetamine and Child Welfare*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., available at https://www.childwelfare.gov/systemwide/substance/drug_specific/meth.cfm#state (last visited Dec. 3, 2013).

³³ *Feature: Methamphetamine as Child Abuse Laws Gain Ground, But Do They Help or Hurt?*, DRUG REFORM COORDINATION NETWORK (July 14, 2006), <http://stopthedrugwar.org/chronicle-old/444/drug-child-abuse-laws.shtml>.

³⁴ Child Welfare Information Gateway, *Parental Drug Use as Child Abuse*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (July 2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/drugexposed.pdf.

³⁵ *Id.* at 3.

York, Rhode Island, and Texas, child abuse and neglect includes use of a controlled substance by a caregiver that impairs the caregiver's ability to adequately care for the child.³⁶ Exposing a child to drugs or drug paraphernalia is a crime in Nebraska, New Hampshire, North Dakota, South Carolina, Utah, Washington, and Wyoming.³⁷ Lastly, exposing a child to drug sale or distribution or to drug-related activity is a crime in the District of Columbia.³⁸

C. Enactment of Alabama's Chemical Endangerment Law

In 2006, Alabama joined the list of states in which it is a crime to expose a child to drugs.³⁹ That year, the State legislature passed what has become known as Alabama's chemical endangerment law. The law is housed under the title "Child Abuse Generally"⁴⁰ and utilizes strict penalties as a means of deterrence.⁴¹ Under the law (hereinafter § 26-15-3.2), a person who knowingly, recklessly, or intentionally causes or permits a child to be exposed to, ingest or inhale, or have contact with a controlled substance, chemical substance, or drug paraphernalia, violates the statute.⁴² Causing or permitting a child to be exposed to, ingest or inhale, or have contact with a controlled substance, chemical substance, or drug paraphernalia is a Class C felony, resulting in up to ten years in prison and a fine of up to \$15,000.⁴³ If that exposure, ingestion, inhalation, or contact results in serious physical injury to the child, the crime is a Class B felony, resulting in up to twenty years in prison and a fine of up to \$30,000.⁴⁴ Finally, if the exposure, ingestion, inhalation, or contact results in the death of the child, the crime is a Class A felony, which results in up to life behind bars and a fine of up to \$60,000.⁴⁵ In addition to fines and prison time, countless state and federal collateral consequences attach to such felony convictions.⁴⁶ Under the Alabama statute, exposure of a child to any controlled substance, chemical substance, or drug paraphernalia, be it cocaine, marijuana, or certain prescription drugs, is a felony. The only exception is that it is not a felony to expose a child to a controlled substance which is lawfully prescribed to that child.⁴⁷

³⁶ *Id.*

³⁷ *Id.* at 4.

³⁸ *Id.* at 10.

³⁹ *Id.* at 3; Chemical Endangerment of Exposing a Child to an Environment in which Controlled Substance are Produced or Distributed, ALA. CODE § 26-15-3.2 (2006).

⁴⁰ ALA. CODE § 26-15-3.2 (2012).

⁴¹ H.B. 723, 2008 Sess. (Ala. 2008), Statement of Rep. McLaughlin, <http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html> ("My purpose in bringing this bill is to get help for that mother so she doesn't do it again.").

⁴² ALA. CODE § 26-15-3.2.

⁴³ *See id.* (laying out the appropriate conviction designations for the violation of the statute); ALA. CODE § 13A-5-11(2013) (providing the fines required for each class of felony); ALA. CODE § 13A-5-6 (2013) (providing the sentences of imprisonment for each class of felonies).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See infra* note 190 and accompanying text.

⁴⁷ ALA. CODE § 26-15-3.2(c).

While the law was intended to punish parents who exposed their children to chemicals during the drug manufacturing process, Alabama began to see a rise in the number of babies testing positive for drugs at birth.⁴⁸ Soon, prosecutors took it upon themselves to begin applying the chemical endangerment law in a new manner. Looking to the statute's wording, prosecutors argued that the term "child" in the statute included fetuses as well as born children. Under this theory, they argued, women who expose fetuses to drugs in the womb violate the statute. As a result, in 2007 and 2008, eight women in one Alabama jurisdiction (population 37,000) were prosecuted in an eighteen-month period for drug use during pregnancy.⁴⁹ The local prosecutor in the cases referred to the need to protect the "child-to-be" from prenatal drug use.⁵⁰

The debate as to whether the word "child" included fetuses was settled by the Alabama Supreme Court, on January 11, 2013, in the case of *Ex parte Ankrom*.⁵¹ The Alabama Supreme Court opinion involved the consolidated cases of Hope Ankrom and Amanda Kimbrough, two women convicted under § 26-15-3.2. On April 29, 2008, during her twenty-fifth week of pregnancy, Amanda Kimbrough went into labor prematurely and had an emergency C-section at the hospital.⁵² Her premature infant died nineteen minutes after birth.⁵³ A urine sample taken at the hospital tested positive for methamphetamine and Kimbrough later admitted to smoking methamphetamine three days before she went into labor.⁵⁴ The Colbert County Department of Human Resources was informed of the drug test results and Kimbrough's two other children were temporarily removed from her custody.⁵⁵ Kimbrough was ultimately sentenced to ten years in prison.⁵⁶

Less than a year later, on January 31, 2009, Hope Ankrom gave birth to a healthy son at a medical center in Enterprise, Alabama.⁵⁷ Medical records indicate that Ankrom tested positive for cocaine prior to giving birth and that the infant tested positive for cocaine after birth.⁵⁸ Ankrom's doctor also noted that she had tested positive for marijuana and cocaine during her pregnancy.⁵⁹ Though she gave birth to a healthy baby, approximately three weeks after the birth, Ankrom was arrested and charged with chemical endangerment of a child.⁶⁰ She was indicted by a grand jury and was

⁴⁸ Steele, *supra* note 6.

⁴⁹ Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 825 (2008-2009).

⁵⁰ *Id.*

⁵¹ *Ex parte Ankrom*, 2013 WL 135748 (Ala. Jan. 11, 2013).

⁵² *Id.* at *23.

⁵³ *Id.*

⁵⁴ *Id.* at *4; *see also* ALA. CODE § 20-2-27 (2013) (defining methamphetamine as a Schedule III controlled substance and therefore within the purview of the chemical endangerment law).

⁵⁵ *Ex parte Ankrom*, 2013 WL 135748 at *4.

⁵⁶ *Id.*

⁵⁷ *Id.* at *1.

⁵⁸ *Id.*; *see also* ALA. CODE § 20-2-25 (2013) (defining cocaine as a Schedule II controlled substance and therefore within the purview of the chemical endangerment law).

⁵⁹ *Ex parte Ankrom*, 2013 WL 135748 at *1.

⁶⁰ *Id.*

sentenced to three years in prison, though her sentence was suspended and she was placed on probation for a year.⁶¹

Both women appealed their convictions to the Alabama Court of Criminal Appeals. While the court did not publish its decision in Kimbrough's case,⁶² on appeal, Ankrom argued that she could not be guilty under § 26-15-3.2, as it applied to endangerment of a child, not to endangerment of a fetus.⁶³ The court held that her conviction was proper because the plain meaning of the term "child" includes a viable fetus and the court could only engage in judicial interpretation of the statute's language if the language was ambiguous.⁶⁴

The court found the word "child" unambiguous for three reasons. First, it found that the Alabama Legislature had a policy of protecting "born and unborn life" and that the statute was therefore meant to protect born and unborn life.⁶⁵ Second, the court noted that Alabama Supreme Court had previously interpreted the term "minor child" to include viable fetuses for purposes of Alabama's wrongful-death-of-minor statute, and therefore the same interpretation should be applied to § 26-15-3.2.⁶⁶ Finally, the court stated that the dictionary defines "child" as "an unborn or recently born person."⁶⁷ For these reasons, the court held, a mother who ingested a controlled substance during her pregnancy may be prosecuted for chemical endangerment if she tested positive for drugs during pregnancy or if the child tested positive at birth.⁶⁸ Therefore, the guilty verdicts of the two women were sustained.⁶⁹

As a matter of first impression, the Alabama Supreme Court granted certiorari to address whether the term "child" as used in § 26-15-3.2 includes an unborn child.⁷⁰ The high court upheld Kimbrough and Ankrom's convictions, finding that the term "child" as used in the statute includes fetuses.⁷¹ The court stated that the term is unambiguous and therefore no judicial interpretation of the statute was required.⁷² Because the language of the statute was clear, the women had sufficient notice of their crime and the rule of lenity did not apply.⁷³ Lastly, the court expanded the statute's scope. While the lower court had held that this statute encompassed only *viable* fetuses,⁷⁴ the Alabama Supreme Court held that the statute protected *all* fetuses, regardless of viability.⁷⁵

⁶¹ *Id.* at *2.

⁶² *Id.*

⁶³ *Ankrom v. State*, 2011 WL 3781258 at *1 (Ala. Crim. App. Aug. 26, 2011).

⁶⁴ *Id.* at *10-11.

⁶⁵ *Id.* at *5.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at *11.

⁶⁹ *Ex parte Ankrom*, 2013 WL 135748 at *20.

⁷⁰ *Id.* at *19.

⁷¹ *Id.* at *20.

⁷² *Id.* at *7.

⁷³ *Id.* at *11.

⁷⁴ *Ankrom v. State*, 2011 WL 3781258 at *7.

⁷⁵ *Ex parte Ankrom*, 2013 WL 135748 at *18.

The prosecutions of pregnant women and the decision of the Alabama Supreme Court drew the attention of advocates from both the pro-choice⁷⁶ and the anti-choice⁷⁷ camps, as such laws can have drastic effects on abortion rights. “Fetal abuse” or “fetal neglect” laws afford legal protection to a fetus. Pro-choice advocates fear that such laws are steps towards establishing “fetal personhood,” or affording full legal protections to a fetus or embryo from the moment of conception.⁷⁸ If a fetus is afforded such legal protection, pro-choice advocates contend, the fetus is legally considered a human being and thus cannot be aborted.⁷⁹ Pro-choice groups contend, therefore, that “fetal abuse” and “fetal neglect” laws are used as a tactic to incrementally grant legal rights to a fetus, with the goal of eventually achieving full personhood and criminalizing abortion.⁸⁰ Likewise, anti-choice groups readily admit they use such laws as a backdoor tactic aimed at criminalizing abortion.⁸¹

This Alabama Supreme Court decision makes Alabama only the second state, along with South Carolina,⁸² to hold that laws designed to protect children from exposure to drugs can be used to prosecute women for using drugs during their pregnancy. The courts of Texas, Florida, Georgia, Michigan, Kentucky, North Dakota, Missouri, Maryland,

⁷⁶ See, e.g., *ACLU Asks Alabama Court To Protect The Rights Of Pregnant Women*, AM. CIVIL LIBERTIES UNION (July 6, 2010), <https://www.aclu.org/reproductive-freedom/aclu-asks-alabama-court-protect-rights-pregnant-women> (“The ACLU argues that using the law this way infringes on a woman’s fundamental right to continue a pregnancy and singles out pregnant women for discrimination. Similar attempts to punish pregnant women who suffer from addiction have been struck down as unconstitutional, as in a recent case in Kentucky in which the ACLU was also involved.”).

⁷⁷ See, e.g., Steven Ertelt, *Alabama Court Rules Unborn Children Deserve Legal Protection*, LIFE NEWS (Jan. 1, 2013), <http://www.lifenews.com/2013/01/11/alabama-court-rules-unborn-children-deserve-legal-protection/> (discussing the amicus brief submitted by the anti-choice group Liberty Counsel, which asserted according to “medical science,” the unborn are, in fact, human beings and that the Alabama Supreme Court must therefore accord them with the full protection of the law).

⁷⁸ Tamar Lewin, *Abuse Laws Cover Fetus, a High Court Rules*, NY TIMES, Oct. 30, 1997, <http://www.nytimes.com/1997/10/30/us/abuse-laws-cover-fetus-a-high-court-rules.html>.

⁷⁹ See *Personhood In The Womb: A Constitutional Question*, NAT. PUB. RADIO (Nov. 21, 2013), <http://www.npr.org/2013/11/21/246534132/personhood-in-the-womb-a-constitutional-question> (explaining that the “personhood movement” seeks to recognize fertilized eggs, embryos, and fetuses as completely separate constitutional persons under the law in an effort to recriminalize abortion).

⁸⁰ See *id.* (“If fetus is a person, everything a pregnant women does is potentially child abuse, abortion is murder”); see also *Personhood USA Surpasses 1 Million Signatures Against Abortion: Launches Groundbreaking Campaign for 10 Million*, PERSONHOOD USA, <http://www.personhoodusa.com/press-release/personhood-usa-surpasses-1-million-signatures-against-abortion-launches-groundbreaking/> (explaining that in an effort to protect the unborn, the group is collecting signatures to implement ballot initiatives outlawing abortion).

⁸¹ See Jill Filipovic, *The Flaws in Prosecuting Mothers who Suffer from Drug Addiction*, THE GUARDIAN (Apr. 26, 2012), <http://www.theguardian.com/commentisfree/cifamerica/2012/apr/26/flaws-prosecuting-mothers-drug-addiction>.

⁸² See Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J. L. & SOC. CHANGE 233, 237-38 (2011) (noting that in every other state which attempted to prosecute a woman in such a way, every state except Alabama and South Carolina has invalidated or overturned the convictions of pregnant drug users). See generally *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) (upholding the criminal conviction of a woman charged with child neglect for using cocaine during pregnancy).

Hawaii, and Ohio have all struck down prosecutors' attempts to use state drug laws to prosecute women for drug use during pregnancy.⁸³

II. ANALYSIS

The Alabama Supreme Court erred in holding that the State's chemical endangerment statute extends to fetuses. Specifically, the court erred by holding that the term "child" was unambiguous and mistakenly found that the legislative intent of the law demonstrated that it was meant to apply to fetuses. The court then incorrectly concluded that the rule of lenity did not apply. The Alabama judiciary has a less than desirable track record concerning women's rights, including abortion rights,⁸⁴ and it seems the court offered a contrived opinion in order to arrive at the conclusion it set out to achieve.

A. The Alabama Supreme Court erred in finding that the term "child" as used in § 26-15-3.2 of the Alabama Code was unambiguous and included fetuses.

In a statutory construction case, a court's first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."⁸⁵ Only if the language is ambiguous, should the court employ other canons of construction.⁸⁶ The Alabama Supreme Court thus properly began its analysis by assessing whether or not the statute in question was worded in an ambiguous manner, stating:

When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning—they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature.⁸⁷

When the language is unambiguous there is no room for judicial construction; the clearly expressed intent of the legislature must be given effect—"it is [the judiciary's job] to say what the law is, not to say what the law should be."⁸⁸

Section 26-15-3.2 states that a person commits the crime of chemical endangerment by exposing a child to an environment in which he or she knowingly, recklessly, or

⁸³ Motion for Leave and Brief of Amici Curiae in Support of Petition of Amanda Helaine Kimbrough at 22-27, *Ex parte* Ankrom, 2013 WL 135748 (Ala. Jan. 11, 2013) [hereinafter Motion for Leave] (*citing Ex parte* Perales, 215 S.W.3d 418 (Tex. Crim. App. 2007); *Johnson v. State*, 602 S.2d 1288, 1296-97 (Fla. 1992); *State v. Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. App. 1991); *Cochran v. Commonwealth*, 315 S.W. 3d 325 (Ky. 2010); *State v. Geiser*, 763 N.W.2d 469, 471-74 (N.D. 2009); *State v. Wade*, 232 S.W. 3d 663, 666 (Mo. 2007); *Kilmon v. State*, 905 A.2d 306, 313-14 (Md. 2006); *State v. Aiwohi*, 123 P.3d 1210, 1214 (Haw. 2005); *State v. Gray*, 584 N.E.2d 710, 710 (Ohio 1992).

⁸⁴ *See Alabama*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/alabama.html> (last visited Dec. 3, 2013) (assigning Alabama an "F" grade on choice related laws).

⁸⁵ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

⁸⁶ *Id.*

⁸⁷ *Ex parte* Ankrom, 2013 WL 135748 at *9 (Ala. Jan. 11, 2013) (*citing Ex parte* Pfizer, Inc., 746 So.2d 960, 964 (Ala. 1999)).

⁸⁸ *Id.*

intentionally causes or permits a child to be exposed to, ingest or inhale, or have contact with a controlled substance, chemical substance, or drug paraphernalia.⁸⁹ The question of whether or not the statute was ambiguous turns on the meaning of the word “child.” To determine the meaning of the word “child,” the court looked at the two dictionary definitions presented by the State. The State relied on Black’s Law Dictionary, which defines “child” as a “baby or fetus” and the Merriam-Webster Dictionary, which defines “child” as “an unborn or recently born person.”⁹⁰ Relying on only these two definitions, the court held that the word “child” clearly included fetuses and thus ended its analysis of whether or not the term “child” was ambiguous.⁹¹

The court was incorrect in holding that the term “child” was unambiguous. While looking to a dictionary definition is a customary and well-accepted tool of statutory construction, a court need not limit its use of dictionary definitions to the ones presented by litigants. In countless other cases, the Alabama Supreme Court has furnished its *own* dictionary definitions, outside of the definitions provided by the parties before the court.⁹² To develop a thorough and balanced understanding of the word, the court could have and should have done so here. Instead, the court relied on these two dictionary definitions which mention unborn life, and ignored dictionary definitions which do *not* mention unborn life. For example, the Cambridge Dictionary defines “child” as a “boy or girl from the time of birth until he or she is an adult, or a son or daughter of any age,”⁹³ and the Oxford Dictionary defines “child” as “a young human being below the age of puberty or below the legal age of majority”⁹⁴ Likewise, the American Heritage Dictionary offers a number of definitions of the term, the first of which being “a person between birth and puberty.”⁹⁵ Therefore, looking to the dictionary definition of “child” does not prove that the term is unambiguous, as some definitions of the term “child” include unborn life and some do not.

Moreover, the Alabama Supreme Court has previously stated that there are times when looking to the dictionary definition of a word will “leave reasonable doubt as to the meaning of” the term in question⁹⁶ and will not prove useful in resolving doubts and

⁸⁹ ALA. CODE § 26-15-3.2 (2012).

⁹⁰ *Ex parte* Ankrom, 2013 WL 135748 at *11 (“As the definitions cited by the State indicate, the 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.”).

⁹¹ *Id.*

⁹² *See, e.g.,* Lambert v. Coregis Ins. Co., Inc., 950 So. 2d 1156, 1163 (Ala. 2006) (rejecting the dictionary definition presented by the petitioner and instead presenting the definitions of a separate dictionary); Board of Zoning Adjustment of City of Trussville v. Tacala, Inc., 2013 WL 149060 at *7 (Ala. Civ. App. April 12, 2013) (providing the dictionary definitions of the terms “extend,” “useful,” and “life” without the parties before the court having presented any dictionary definitions).

⁹³ *Child*, CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH (Cambridge University Press 2013), available at <http://dictionary.cambridge.org/us/dictionary/american-english/child?q=child>.

⁹⁴ *Child*, OXFORD DICTIONARY OF AMERICAN ENGLISH (Oxford University Press 2013), available at http://www.oxforddictionaries.com/us/definition/american_english/child.

⁹⁵ *Child*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Harcourt Publishing Co., 5th Ed. 2013), available at <http://www.ahdictionary.com/word/search.html?q=child&submit.x=30&submit.y=26>.

⁹⁶ State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 309 (Ala. 1999).

confusion as to a particular term's scope.⁹⁷ In such instances, the court has stated, reliance on those dictionary definitions is inappropriate.⁹⁸ Similarly, the U.S. Supreme Court has stated that a dictionary definition of an undefined statutory term is not always dispositive of the term's meaning.⁹⁹ Therefore, simple reliance on the dictionary is not always sufficient to determine a statute's meaning. Because the dictionary definitions of the term "child" do not resolve the question of whether the term includes a fetus or not, the dictionary definitions should not have been determinative of the Alabama Supreme Court's decision. For the court to make such a decisive determination based on ambiguous dictionary definitions represented a subjective and one-sided assessment of the term.¹⁰⁰

In addition to the dictionary definitions, further evidence demonstrates the ambiguity of the term "child" in § 26-15-3.2. After the chemical endangerment law was passed in 2006, Alabama legislators made four attempts to amend the statute's wording to clarify that the statute applies to *both* born children as well as fetuses.¹⁰¹ These attempted revisions demonstrate that the statute's original wording was not definitive. If the term "child" was unambiguous, such legislators would not have needed to attempt to clarify the statute. Yet, the Alabama Supreme Court still found the term to be unambiguous.

The Alabama Supreme Court was wrong to conclude that "the plain meaning of the word 'child' is broad enough to encompass all children—born and unborn."¹⁰² The mixed dictionary definitions and the attempted amendments to further explain what was meant by "child" demonstrate that the court erred in finding the term unambiguous.

B. The Alabama Supreme Court mistakenly held that the Alabama legislature intended § 26-15-3.2 to apply to drug use during pregnancy.

When a statute's wording is ambiguous, courts are to engage in judicial interpretation of the statute by using various tools of statutory construction, including traditional canons of statutory interpretation, and the statute's legislative history and purpose.¹⁰³ Because the court found that the term "child" was unambiguous, the court did not employ

⁹⁷ See *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 309 (Ala. 1999); *Espey By and Through Espey v. Convenience Marketers, Inc.*, 578 So. 2d 1221, 1223 n. 1 (Ala. 1991) (finding that although there may be instances when it is necessary to base a judgment on dictionary definitions, this is an unduly narrow approach in some situations).

⁹⁸ *State Farm Fire*, 747 So. 2d at 309.

⁹⁹ See *e.g.*, *United States v. Santos*, 553 U.S. 507 (2008); *Johnson v. United States*, 529 U.S. 694 (2000).

¹⁰⁰ See Imani Gandy, *Hope Ankrom and Amanda Kimbrough: Victims of Alabama's Personhood Agenda*, RH REALITY CHECK (Jan. 18, 2013, 10:52 AM), <http://rhrealitycheck.org/article/2013/01/18/hope-ankrom-and-amanda-kimbrough-victims-alabama-supreme-courts-zeal-to-protect-u/> (referring to the Alabama Supreme Court's decision in *Ankrom* as "judicial activism" and "the Alabama judiciary's zeal to promote an anti-choice personhood agenda at the expense of pregnant women").

¹⁰¹ Todd Brief, *supra* note 3 at 10; see *infra* Part II(b) for a discussion of the intent and failure of these subsequent amendments.

¹⁰² *Ex parte Ankrom*, 2013 WL 135748 at *11 (Ala. Jan. 11, 2013).

¹⁰³ *Id.* at *4 ("Principals of statutory construction instruct this court to interpret the plain language of the statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous."); See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

other tools of statutory interpretation.¹⁰⁴ However, when one engages in such judicial construction, it is evident that § 26-15-3.2 was meant to protect children growing up around narcotics, and not fetuses exposed to chemical substances in utero.

In attempting to interpret statutes, courts often look to contemporaneous statements made by legislators during the legislative process.¹⁰⁵ In the instant matter, a number of Alabama legislators spoke out against the use of this law to prosecute women for using drugs during pregnancy. For example, one of the law's original sponsors, former Alabama State Senator Lowell Barron stated that he did not intend for the law to be used against new mothers, saying, "I hate to see a young mother put in prison away from her child . . . maybe we need to revisit the legislation."¹⁰⁶ Alabama Representative Patricia Todd submitted an amicus brief to the Alabama Supreme Court in support of Kimbrough and Ankrom.¹⁰⁷ In her brief, Todd explicitly stated that the legislature had considered making the law applicable to pregnant women who use drugs, but expressly rejected the idea.¹⁰⁸ She added that she was actively involved in the legislature's ultimate refusal to adopt such measures and that the prosecutions were "contrary to the letter of the law and the express will of the Legislature."¹⁰⁹ Representative Jeffery McLaughlin stated that "there can be no prosecution under this bill for a woman who has exposed a child in the womb."¹¹⁰

While the petitioners included Senator Barron's statement in their brief, the court dismissed the statement as unpersuasive, noting in a footnote that "[f]ormer Senator Barron's views are irrelevant; this Court will not rely solely on the views of a single legislator in ascertaining the intent of a bill, even when that legislator was a sponsor of the bill."¹¹¹ The court went on to provide a long string cite of court opinions from an assortment of jurisdictions indicating that legislator statements regarding the intent of the law should not be afforded too much weight.¹¹²

The court was incorrect in refusing to acknowledge such legislator statements. An equal number of opinions, including U.S. Supreme Court and Alabama court opinions,

¹⁰⁴ *Ex parte Ankrom*, 2013 WL 135748 at *7 ("The term 'child' in § 26-15-3.2, ALA. CODE 1975, is unambiguous; thus, this Court must interpret the plain language of the statute to mean exactly what it says and not engage in judicial construction of the language in the statute.")

¹⁰⁵ *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n. 9 (1989) (looking to legislator statements to help determine the intent behind a federal employment discrimination law); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (stating that a law's purpose can be demonstrated by examining the statements of a decision-making body).

¹⁰⁶ Phillip Rawls, *National Ire Over Ala. Prosecuting Pregnant Moms*, USA TODAY, Aug. 1, 2008, http://usatoday30.usatoday.com/news/nation/2008-08-01-4274196709_x.htm.

¹⁰⁷ *See generally* Todd Brief, *supra* note 3.

¹⁰⁸ *Id.* at 14.

¹⁰⁹ *Id.* at 18.

¹¹⁰ H.B. 723, 2008 Sess. (Ala. 2008), Statement of Rep. McLaughlin, <http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html> ("My purpose in bringing this bill is to get help for that mother so she doesn't do it again.")

¹¹¹ *Ex parte Ankrom*, 2013 WL 135748 at *14 n. 8 (Ala. Jan. 11, 2013).

¹¹² *Id.*

do, rely heavily on legislators' statements.¹¹³ The court should have taken all relevant case law into account in its analysis—even case law that says that a court *may* rely on legislator statements when determining legislative intent.

Similarly, the State argued that § 26-15-3.2 was clearly intended to apply to fetuses because the Alabama legislature “has stated that ‘[t]he public policy of the State of Alabama is to protect life, born, and unborn.’”¹¹⁴ While Alabama has stated its policy of protecting unborn life, it has also, on multiple occasions, stated its policy of protecting women, women's health, and pregnant women.¹¹⁵ Statements regarding the State's policy of protecting women should have been considered by the court alongside statements of policy regarding unborn life, but they were not and the court unquestioningly accepted the State's assertion.

Next, Kimbrough and Ankrom argued that had the legislature intended the law to apply to fetuses, it would have said so in explicit terms, just as the legislature had done in other statutes.¹¹⁶ The petitioners cited the State's Partial Birth Abortion Act which uses the word “fetus,” as well as the State's Women's Right to Know Act, which uses the term “unborn child.”¹¹⁷ In addition, in 2006, the same year that § 26-15-3.2 passed, the legislature amended the State's homicide law to redefine “person” to include a fetus, demonstrating that when the legislature wants to make clear that a law applies to a fetus, it makes a conscious and explicit effort to do so.¹¹⁸

In response, the court stated that a review of such statutes “provides no conclusive evidence” as to how the court should interpret the word “child.”¹¹⁹ The court merely wrote that in the aforementioned examples, the legislature chose to use the words “fetus” and “unborn child” because those statutes could simply not apply to born children.¹²⁰ Had the court delved deeper in its analysis, it may have noted that the legislature purposefully uses the term “child” differently than it uses the term “fetus” or “unborn child,” and understood that the term “child” does not encompass the term “fetus.”

In addition to the examples proffered by the petitioners, numerous other Alabama statutes differentiate between the terms “child” and “fetus.” Alabama's abortion statute uses the term “unborn life.”¹²¹ Another Alabama statute reads that the death of a “fetus”

¹¹³ See *supra* note 105.

¹¹⁴ *Ex parte Ankrom*, 2013 WL 135748 at *13 (citing the state's abortion law found at ALA. CODE § 26-22-1(a) (2012)).

¹¹⁵ See, e.g., ALA. CODE § 22-12D-1 (establishing the Office of Women's Health for the purpose of advocating for women's health and identifying, coordinating, and establishing priorities for programs, services, and resources the state should provide for women's health issues and concerns relating to the reproductive, menopausal, and postmenopausal phases of a woman's life, with an emphasis on postmenopausal health); *Rice v. United Ins. Co. of America*, 465 So. 2d 1100 (Ala. 1985) (stating that discrimination based on pregnancy violates Title VII of the Civil Rights Act).

¹¹⁶ *Ex parte Ankrom*, 2013 WL 135748 at *12.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *13.

¹²⁰ *Id.*

¹²¹ ALA. CODE § 26-22-1 (1997).

must be reported to a particular agency.¹²² Alabama’s organ donation statute states that the term “decedent” includes a “stillborn infant . . . or fetus.”¹²³ Alabama property law refers to real estate which devises to any other person “born or unborn.”¹²⁴ The state’s drivers’ licensing statute offers special rules if the applicant has custody of a “minor or unborn child.”¹²⁵ It is evident from these statutes that Alabama legislators purposefully differentiate between life inside the womb and life outside the womb when drafting such laws. If the legislature had intended § 26-15-3.2 to apply to both fetuses and born children, the legislature would have written “child or fetus” or a “born or unborn child,” rather than just “child.”

Courts “must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹²⁶ The Alabama Supreme Court did not take heed of these instructions from the U.S. Supreme Court. The fact that the Alabama legislature only used the word “child” in the chemical endangerment law strongly indicates the legislature only intended the law to apply to children. For the court to say that the examples of other Alabama statutes offered by the petitioners “provide no conclusive evidence” sweeps very convincing evidence under the rug.

An additional argument advanced by the petitioners was that the legislative attempts to amend the chemical endangerment statute demonstrate that the original law was not meant to apply to fetuses.¹²⁷ On four separate occasions, amendments were introduced to reword § 26-15-3.2 to state that for the purposes of this law, the term “child” includes fetuses and children.¹²⁸ None of these bills were ever enacted. To these arguments the court replied that “interpreting a statute based on later attempts to amend that statute is problematic” because “several equally tenable inferences may be drawn from such inaction”¹²⁹

While that conclusion may be true in some circumstances, it is not true here, where it is abundantly clear why these amendments failed. During floor debates on these proposed amendments, Representative Patricia Todd, Representative Jeffery McLaughlin, Representative Pebblin Warren, Representative Dario Melton, and Representative Yusuf Salaam all discussed the implications of expanding the scope of the chemical endangerment law to allow for the prosecution of women who use drugs during pregnancy.¹³⁰ Representatives expressed concerns about incarcerating drug users

¹²² ALA. CODE § 22-9A-13 (2012).

¹²³ ALA. CODE § 22-19-161 (2008).

¹²⁴ ALA. CODE § 19-3-170 (1975).

¹²⁵ ALA. CODE § 16-28-40 (2009).

¹²⁶ *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

¹²⁷ *Ex parte Ankrom*, 2013 WL 135748 at *13-14 (Ala. Jan. 11, 2013).

¹²⁸ See Todd Brief, *supra* note 3, at 14 (“The rejection of two proposed amendments to the chemical endangerment law in the 2008 legislative session and two more in 2011 further demonstrates that the law was never intended to apply to a pregnant woman who uses a controlled substance during pregnancy.”).

¹²⁹ *Ex parte Ankrom*, 2013 WL 135748 at *15.

¹³⁰ H.B. 723, 2008 Sess. (Ala. 2008), Statement of Rep. McLaughlin, <http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html> (“My purpose in bringing this bill is to get help for that mother so she doesn’t do it again.”).

rather than offering them treatment, deterring women from seeking prenatal care, and encouraging abortions as a means to avoid criminal prosecution, and more.¹³¹ These concerns were never discussed when the chemical endangerment law was originally debated. That the proposed amendments raised concerns about the effect of the law on pregnant women while the original law did not raise such concerns, strongly supports the conclusion that the original chemical endangerment law was not intended to be used to prosecute a pregnant woman for endangering a fetus.

Moreover, the fact that the debate centered on *expanding* the scope of the law to make it apply to fetuses unequivocally demonstrates that the original bill had a narrower scope and did not apply to fetuses. Even more convincingly, a number of representatives who voted to pass the chemical endangerment law during its original passage in 2006 voted against these amendments, signifying an awareness of the major shift in the implications that the proposed amendments would create.¹³² Thus it is clear that in the case of Alabama's chemical endangerment law, there were definite and identifiable reasons why the amendments were rejected. The court was therefore wrong to conclude that "several equally tenable inferences may be drawn from such inaction"¹³³

While the court rejected the petitioner's above-mentioned arguments, further analysis demonstrates that the law as written was not meant to apply to fetuses. First, Alabama enacted the chemical endangerment law on June 1, 2006. Thereafter, the Alabama Department of Human Resources (DHR) was tasked with promulgating rules and regulations to carry out the law.¹³⁴ On April 30, 2008, the Department adopted a final rule defining the term "chemical endangerment."¹³⁵ The regulation reads as follows:

Chemical endangerment occurs when children are in a situation/ environment where, through direct or indirect exposure, they ingest or inhale a controlled substance (e.g., methamphetamine) or chemical substance (e.g., pseudoephedrine, freon, sulfuric acid, etc.) used in the production of methamphetamine and parents'/primary caregivers' purpose for being in possession of the chemicals is to produce or manufacture crystal meth for personal use or distribution.¹³⁶

No other definition of or commentary on the term "chemical endangerment" appears in Alabama's regulatory code. According to the rule, chemical endangerment only occurs when the child is exposed to chemicals during the production of methamphetamine and when the parent possesses the chemicals to produce or manufacture methamphetamine. Methamphetamine cannot be produced or manufactured in the womb. Therefore the rule demonstrates that the intent of the law was to protect children growing

¹³¹ *Id.*

¹³² Todd Brief, *supra* note 3, at 15.

¹³³ *Ex parte Ankrom*, 2013 WL 135748 at *15 (quoting *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

¹³⁴ ALA. ADMIN. CODE r. 660-1-3-.01 (1983).

¹³⁵ ALA. ADMIN. CODE r. 660-5-34-.02 (2008).

¹³⁶ *Id.*

up in methamphetamine labs. Under this regulation, a pregnant woman who uses methamphetamine has not committed chemical endangerment.

When the rule was adopted on August 30, 2008, the DHR was aware of pregnant women being charged under § 26-15-3.2 for use of narcotics during pregnancy. For example, on April 29, 2008, Amanda Kimbrough tested positive for methamphetamine at an Alabama hospital before receiving a C-section.¹³⁷ Her test results were delivered to the DHR.¹³⁸ A DHR social worker had spoken with her twice before and was aware that she had used methamphetamine.¹³⁹ Even earlier than Kimbrough's case, on July 26, 2005, Frieda Baker, Deputy Director of the Family and Children's Services division of the DHR testified before the U.S. Congress about Alabama's growing methamphetamine problem and the drastic effects that the problem has had on the State's children.¹⁴⁰ It is evident that the Department was aware that Alabama mothers were using methamphetamine during pregnancy. Yet, despite this knowledge, the Department still chose to promulgate the rule in a manner which could not logically apply to drug exposure in utero. The DHR administrators, hired for the purpose of developing and carrying out state social services regulations,¹⁴¹ were tasked with interpreting "chemical endangerment" and consciously did so by limiting the term to refer to exposure of children to chemicals used during methamphetamine production. Courts routinely give deference to agency interpretations of statutory language, and should have done so here.¹⁴²

Second, according to the interpretation of the court in *Ex parte Ankrom*, it is now a felony for pregnant women to take many prescriptions which are lawfully prescribed to them, whether or not that prescription is harmful to the fetus. This interpretation by the court could not have been the intention of the legislature. Many prescription medications are considered "controlled substances" under the chemical endangerment statute:

Many types of schedule II, III, IV, and V controlled substances are medications, including painkillers, anti-seizure drugs, and stimulants that are routinely, appropriately prescribed for patients—including pregnant women. A recent survey of obstetricians and gynecologists found "that approximately a third

¹³⁷ *Ex parte Ankrom*, 2013 WL 135748 at *3.

¹³⁸ *Id.* at *4.

¹³⁹ *Id.*

¹⁴⁰ *Fighting Meth in American's Heartland: Assessing the Impact on Local Law Enforcement and Child Welfare Agencies, Hearing Before the Subcomm.on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 109th Cong. 108 (2006) (statement of Freida Baker, Deputy Director of Family and Children's Services, Alabama Department of Human Resources), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhr24946/html/CHRG-109hhr24946.htm>.

¹⁴¹ See ALA. CODE § 38-2-6 (1975); ALA. ADMIN. CODE r. 660-1-2-.03 (1983).

¹⁴² See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (U.S. 2002) ("In the context of an unambiguous statute, [the United States Supreme Court] need not contemplate deferring to the agency's interpretation."). See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

of their pregnant patients took at least one prescription medication other than prenatal vitamins during pregnancy prior to labor.”¹⁴³

The petitioners noted that “many preexisting chronic conditions require continued drug management during pregnancy, and pregnant women may develop diseases or pregnancy-related disorders that require treatment during pregnancy.”¹⁴⁴ Pregnant women are routinely issued prescriptions for conditions such as chlamydia, urinary tract infection, depressed mood, generalized anxiety disorder, chronic insomnia, asthma, major depressive disorder, hypertension, frequent/severe headaches, flu, and diabetes.¹⁴⁵

Importantly, methadone, used for the treatment of opioid addiction—oftentimes during pregnancy—is a controlled substance covered by the chemical endangerment statute.¹⁴⁶ Methadone maintenance treatment is the standard of care for opioid dependence during pregnancy.¹⁴⁷ There are numerous benefits of methadone use during pregnancy, including improved prenatal care, longer gestation, higher birth weight, and increased rates of infants discharged home in the care of their mothers.¹⁴⁸ Alabama’s women rely on methadone for the purposes of opiate withdrawal: Alabama ranks seventh in the nation for states with the highest rates of methadone treatment users.¹⁴⁹ The Alabama Supreme Court has thus made it a felony for pregnant women to take crucial medications, forcing them to choose between their health as well as the health of their child and jail time.

Even if a prescription medication taken by a pregnant woman did cause harm to the fetus, it is evident that the legislature would not condone prosecution of such an act. The State’s homicide law specifically states that a woman may not be charged with a homicide for causing the death of, or injury to, a fetus by taking medication prescribed to her.¹⁵⁰ This indicates that the legislature wanted to protect women who took lawfully prescribed medications during pregnancy, even if those prescriptions caused death or injury to the fetus. Thus, it is illogical that the legislature would prosecute a woman for harm to a fetus caused by a prescription under § 26-15-3.2, but would not prosecute a woman for that exact same act under the State’s homicide law. In *Ex parte Ankrom*, the Alabama Supreme Court stated that it wanted to respect the intentions of the State legislature.¹⁵¹ Yet the court directly opposed the clear intent of the legislature when it ruled that the chemical endangerment statute could be used to prosecute a woman who takes necessary and often times lifesaving drugs during pregnancy.

¹⁴³ Motion for Leave, *supra* note 83, at 17 (citing Maria A. Morgan et al., *Management of Prescription and Nonprescription Drug Use During Pregnancy*, 23 J. MATERNAL-FETAL & NEONATAL MED., 815-17 (2010)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 20 (citing SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., *Methadone Treatment for Pregnant Women*, Pub. No. SMA 06-4124 (2006)).

¹⁴⁷ *Substance Use in Pregnancy*, SOC. OF OBSTETRICIANS AND GYNAECOLOGISTS OF CANADA (2011), <http://sogc.org/wp-content/uploads/2013/01/gui256CPG1104E.pdf>.

¹⁴⁸ *Id.*

¹⁴⁹ ALCOHOL, TOBACCO, AND OTHER DRUGS: CONSUMPTION AND CONSEQUENCES IN ALABAMA, *supra* note 16, at 62.

¹⁵⁰ ALA. CODE § 13A-6-4(b) (1988).

¹⁵¹ *Ex parte Ankrom*, 2013 WL 135748 at *9, *18, *19 (Ala. Jan. 11, 2013).

C. Because the petitioners had no notice of their alleged crime, the Alabama Supreme Court was incorrect in concluding that the rule of lenity did not apply.

Criminal statutes are to be strictly construed against the state¹⁵² and due process requires that parties before the court have notice that their alleged conduct was proscribed by law.¹⁵³ The notice given must provide ordinary persons with clear notice of what is prohibited.¹⁵⁴ When no such notice exists, the rule of lenity applies and criminal statutes are to be construed in favor of the accused.¹⁵⁵ Kimbrough and Ankrom argued that there was no notice that their conduct was illegal under § 26-15-3.2.¹⁵⁶ Without much discussion, the Alabama Supreme Court determined that because the term “child” unambiguously includes fetuses, the rule of lenity did not apply.¹⁵⁷

As demonstrated in Parts II(a) and II(b), the term “child” was ambiguous in its use. Section 26-15-3.2 states that a person commits the crime of “chemical endangerment” by exposing a child to an environment in which the child comes into contact with a controlled substance, chemical substance, or drug paraphernalia.¹⁵⁸ To satisfy due process, “notice of a crime must provide ordinary persons with clear notice of what is prohibited.”¹⁵⁹ This statute does not provide clear notice to ordinary persons. This case raised the question of whether the term “child” did or did not include fetuses. The question was debated by politicians, attorneys, judges, and others trained in legal scholarship throughout Alabama and the Nation. Once the question reached the Alabama Supreme Court, the decision still was not unanimous, as two judges dissented. When those trained in legal scholarship are unable to conclusively decipher the meaning of a term, an ordinary person without legal training cannot be expected to do so. As stated in the dissents of Chief Justice Malone and Justice Murdock, because the petitioners had no notice of their crime, the rule of lenity applied, and the court should have overturned their convictions.¹⁶⁰

III. POLICY CONSIDERATIONS AND RECOMMENDATIONS

In addition to the aforementioned legal concerns raised by § 26-15-3.2, the statute has a number of dangerous policy implications for Alabama’s women and families. While a few cases such as Hope Ankrom’s and Amanda Kimbrough’s have been sensationalized in the media, these stories represent just a few of the hundreds of women and families who are put in danger by the statute.¹⁶¹ The statute puts a vulnerable population (pregnant, usually low-income, substance-abusing women) at higher risk physically,

¹⁵² See *id.* at *4 (citing *Castillo v. United States*, 530 U.S. 120, 131 (2000)).

¹⁵³ *Id.* at *25 (Malone, C.J., dissenting).

¹⁵⁴ *Id.* at *26 (Murdock, J., dissenting) (citing *United States v. Sepulveda*, 115 F.3d 882, 887 n. 12 (11th Cir. 1997)).

¹⁵⁵ *Id.* at *9 (quoting *Ex parte Bertram*, 884 So. 2d 889, 891 (Ala. 2003)).

¹⁵⁶ *Id.* at *1-2.

¹⁵⁷ *Id.* at *6-7.

¹⁵⁸ ALA. CODE § 26-15-3.2 (2012).

¹⁵⁹ See *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010).

¹⁶⁰ *Ex parte Ankrom*, 2013 WL 135748 at *24-26 (Malone, C., J. and Murdock, J., dissenting).

¹⁶¹ Ahrens, *supra* note 15, at 883-84 (referencing similar cases in Hawaii, Wyoming, and Oklahoma).

emotionally, and financially. While this article does not endorse the use of narcotics, this article does warn that granting legal rights to a fetus is dangerous for women and that drug use should be treated with appropriate medical care rather than incarceration.

A. Personhood and Abortion Rights

While Alabama's chemical endangerment law has many tangible and specific consequences, the overarching danger of this law is that it creates legal rights for a fetus. When legal rights are given to a fetus, the legal rights of the pregnant woman carrying that fetus are automatically compromised. Granting legal rights to fetuses may snowball: if one legal right is given to a fetus, as is the case with the chemical endangerment laws, the door opens for granting additional rights, if not full, legal protections, to a fetus. Granting full legal rights to a fetus would create fetal personhood, and grant the fetus the same legal rights and protections as a human being. If fetuses are considered human beings for legal purposes, abortion becomes murder, and thus, illegal.

Moreover, recognition of a fetus as a person would be inconsistent with existing Alabama law. Like every other state in the U.S., Alabama does not legally recognize fetal personhood. Though attempts have been made in Alabama to pass such legislation, time and time again, the State legislature has actively chosen not to give legal rights to fetuses.¹⁶² Despite the State's decision not to create such rights for the unborn, the Alabama Supreme Court opinion usurps this decision. The opinion, hailed as "sett[ing] the stage for [a] personhood amendment,"¹⁶³ stands in stark contrast to the will of the legislature and dangerously compromises the legal rights of Alabama's women.

B. Punishing Pregnancy

Section 26-15-3.2's current use is problematic because it punishes women in a way that men cannot be punished. While possession or sale of illegal narcotics is a crime, use of narcotics is not. Generally speaking, because only women can become pregnant and because the Alabama Supreme Court has held that § 26-15-3.2 applies to narcotics use during pregnancy, § 26-15-3.2 punishes women, but not men, who use illegal narcotics. In addition to illegal narcotics, § 26-15-3.2 punishes women, but not men, who take medications lawfully prescribed to them by a health care provider—a punishment that,

¹⁶² See S.B. 205, 2013 Reg. Sess. (Ala. 2013), S.B. 5, 2012 Reg. Sess. (Ala. 2012), H.B. 405, 2011 Reg. Sess. (Ala. 2011), S.B. 301, 2010 Reg. Sess. (Ala. 2010), S.B. 225, 2009 Reg. Sess. (Ala. 2009), H.B. 348, 2008 Reg. Sess. (Ala. 2008), H.B. 128, 2007 Reg. Sess. (Ala. 2007); see also *Historic Personhood Bills and Amendments Introduced in Alabama Legislature*, PERSONHOOD USA, available at <http://www.personhoodusa.com/press-release/historic-pro-life-personhood-bills-and-amendments-introduced-alabama-legislature/> (last visited Dec. 3, 2013) (highlighting Alabama's personhood movement and referring to it as "an effort to provide equal protection to unborn children by defining them as persons under the laws of Alabama").

¹⁶³ *The Alabama Supreme Court Opinion Sets the Stage for Personhood Amendment*, RIGHT REMEDY: A MINISTRY OF DR. PATRICK JOHNSTON AND FAMILY, available at <http://rightremedy.org/articles/399> (last visited Dec. 3, 2013).

if convicted, can result in a felony conviction and up to life behind bars,¹⁶⁴ making the statute's gender disparity of grave severity.¹⁶⁵

When women are punished for “deviant” behavior during pregnancy, it is not unlikely that the state will go on to punish women for other acts during pregnancy. Under the veil of fetal protection, that state could allow for the prosecution of pregnant women who drink alcohol, smoke cigarettes, eat unhealthily, fail to seek prenatal care, drive recklessly, work at a location that exposes them to toxic fumes, attempt suicide, or stay in a physically abusive relationship. While such punishments may seem absurd, many of them have been proposed in states across the U.S., including Alabama.¹⁶⁶ The chemical endangerment law begs the question—where does one draw the line? Punishing women solely due to their pregnancy status is a dangerous step towards future erosion of women's rights.

C. Dangerous for the Health of the Women, Fetuses, and Families

The interpretation of § 26-15-3.2 adopted by the court guarantees the opposite effect that prosecutors intended. Alabama State prosecutors urge that such prosecutions are necessary to protect unborn life.¹⁶⁷ For three reasons, the interpretation of the law actually harms unborn life. First, healthcare in Alabama prisons ranks among the lowest in the nation:

In Alabama, medical care in prison is appalling. Alabama received an “F” rating for the delivery of prenatal care to pregnant inmates. Alabama is last in the nation in terms of per inmate medical spending. The Julia Tutwiler Prison for Women is overcrowded and has a history of failing to provide basic medical care, adequate hygiene, beds, ventilation, and nutrition. County jails in Alabama are similarly ill equipped to provide healthy environments to

¹⁶⁴ ALA. CODE § 26-15-3.2 (2013); ALA. CODE § 13A-5-11(2013) (providing the fines required for each class of felony); ALA. CODE § 13A-5-6 (2013) (providing the sentences of imprisonment for each class of felonies).

¹⁶⁵ See Meghan Horn, *Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse*, 14 WM. & MARY J. WOMEN & L. 635, 648 (2008) (“If prosecutors persist in seeking to hold women criminally responsible for fetal injuries as a result of parental substance abuse, they should apply the same statutes to new fathers with substance abuse problems.”).

¹⁶⁶ See, e.g., *Bei Bei Shuai v. State*, 966 N.E.2d 619, 628 (Ind. Ct. App. 2012) (charging the defendant with murder and attempted feticide for attempting to commit suicide while pregnant); *Smoking While Pregnant May be Illegal*, ASSOCIATED PRESS (June 13, 2006, 4:51 PM), http://www.fox16.com/news/story/Smoking-While-Pregnant-May-be-Illegal/P8kkEclKmE-5hB4mHZ-_Iw.csp (discussing former Arkansas Governor Mike Huckabee's proposal to ban pregnant women from smoking cigarettes); *Punishing Women for Their Behavior During Pregnancy An Approach That Undermines Women's Health and Children's Interests*, CTR. FOR REPROD. RIGHTS 2 (2000) [hereinafter PUNISHING WOMEN], http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf (providing examples of criminal prosecutions against pregnant women who drank alcohol, failed to heed a doctor's recommendation to remain on bed rest, and failed to heed a doctor's recommendation to refrain from engaging in sexual intercourse).

¹⁶⁷ See Steele, *supra* note 6.

pregnant women. Such conditions are antithetical to the health and well-being of pregnant women and their fetuses.¹⁶⁸

If a state is concerned about fetal life, it should not place pregnant women in prison, where the jails are among the most decrepit in the Nation and where healthcare and prenatal healthcare is nothing short of abominable.¹⁶⁹

Second, overwhelming empirical research demonstrates that when women are threatened with punishment for illegal acts during pregnancy, those women will not seek vital prenatal medical care due to concern that their doctors will report them to the authorities.¹⁷⁰ The American Medical Association and the American College of Obstetricians and Gynecologist, among others, have spoken out on this issue and submitted amicus curiae briefs to the Alabama Supreme Court, stating that women will avoid prenatal care when they believe doctors are gathering evidence for law enforcement.¹⁷¹ While medical care is crucial for any pregnant woman and the fetus, it is even more crucial when that woman is using illegal narcotics.¹⁷² Quitting drugs cold turkey can be medically unsafe for both the mother and the fetus. It is therefore paramount that pregnant drug users and

¹⁶⁸ Motion for Leave, *supra* note 83, at 15-16.

¹⁶⁹ See Statement of Patricia Todd (audio recording), available at <http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html> (discussing the deplorable healthcare of Alabama's prisons and how dangerous it is for a pregnant woman to be forced to live in such conditions in relation to H.B. 723, 2008 Sess. (Ala. 2008)).

¹⁷⁰ See Steele, *supra* note 6 (“By effect, some gynecologists say, prosecuting mothers harms infants more than helps them: Prenatal attention ‘can greatly reduce the negative effects of substance abuse during pregnancy,’ according to Dr. David Garry, a New York obstetrician and member of the American Congress of Obstetricians and Gynecologists. When women aren’t getting it, that risk goes up.”).

¹⁷¹ See Motion for Leave, *supra* note 83, at 4 (written by National Advocates for Pregnant Women and the Southern Poverty Law Center and signed onto by the American Academy of Addiction Psychiatry, American College of Obstetricians and Gynecologists, American Psychiatric Association, American Medical Women’s Association, American Nurses Association, The Alabama Women’s Resource Network, American Society of Addiction Medicine, Black Women’s Health Imperative, Child Welfare Organizing Project, Global Lawyers and Physicians, Harm Reduction Coalition, Institute for Health and Recovery, International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute, International Centre for Science in Drug Policy, International Doctors for Healthy Drug Policies, International Mental Disability Law Reform Project, Legal Action Center, National Asian Pacific American Women’s Forum, National Association of Nurse Practitioners in Women’s Health, National Association of Social Workers, Alabama Chapter, National Council on Alcoholism and Drug Dependence, Inc., National Institute for Reproductive Health, National Latina Institute for Reproductive Health, National Organization for Women – Alabama, National Perinatal Association, National Women’s Health Network, National Women’s Law Center, Our Bodies Ourselves, Southern Center for Human Rights, Pippa Abston, MD, PhD, FAAP, Sheila Blume, MD, Susan C. Boyd, PhD, Wendy Chavkin, MPH, MD, Nancy Day, MPH, PhD, Gabriele Fischer, MD, Deborah A. Frank, MD, Leslie Hartley Gise, MD, Stephen R. Kandall, MD, Howard Minkoff, MD, Daniel R. Neuspiel, MD, MPH, Robert G. Newman, MD, MPH, Linda Worley, MD, Trecia Wouldes, PhD, and Tricia E. Wright, MD, MS).

¹⁷² Steele, *supra* note 6 (stating that the nurse manager for the obstetrics (OB) department acknowledged that pregnant women who are struggling with drug problems already are scared of getting help for their addictions or prenatal care because they do not want DHR to take away their babies).

their doctors develop safe and trusting relationships, as well as attainable medical plans during pregnancies.

In addition, critics of the law suggest that women may choose to leave the State during labor to deliver their child outside of Alabama to avoid prosecution.¹⁷³ Such a journey may create delay in receipt of medical attention and poses significant health risks for both mother and child. If Alabama prosecutors are truly concerned about the welfare of the State's unborn, they should encourage women to seek prenatal care and immediate access to medical care when experiencing symptoms of labor, rather than deter them from doing so with the threat of incarceration.

Third, while the State prosecutors urge that this law will protect unborn life, such a policy will likely encourage abortion.¹⁷⁴ A woman convicted under the chemical endangerment law could face up to life behind bars and a fine of up to \$60,000.¹⁷⁵ The law forces women to choose between an abortion and jail time. National Advocates for Pregnant Women state that the law will actually increase instances of abortion in Alabama:

Although it is difficult to know how frequently abortions result from fear of prosecution, one study reported that “two-thirds of the women [surveyed] who reported using [c]ocaine during their pregnancies... considered having an abortion.” In at least one well-documented case, a woman did obtain an abortion to win her release from jail and prevent prosecution. In *State v. Greywind*, a pregnant woman accused of child endangerment, based on alleged harm to her fetus from drugs she had taken, obtained an abortion. The prosecutor then dropped the charge.¹⁷⁶

State prosecutors claiming to protect future life are, in actuality, incentivizing women to end their pregnancies rather than carry them to term.

Additionally, women convicted under § 26-15-3.2 are likely to be living below the poverty line. The largest population of methamphetamine users tends to be the Caucasian rural poor.¹⁷⁷ Within Alabama, the State's overall poverty rate is 17.5 percent with rural areas having a higher poverty level than urban areas.¹⁷⁸ Nearly half of Alabama's methamphetamine users are female and ninety-two percent of Alabama's drug users are white.¹⁷⁹ Abortion can be incredibly expensive and even cost prohibitive to a woman

¹⁷³ *Cf. id.*

¹⁷⁴ *Ex parte Ankrom*, 2013 WL 135748 at *25 (Ala. Jan. 11, 2013) (Malone, J., dissenting) (“[T]he chemical-endangerment statute will now supply women who have, either intentionally or not, run afoul of the proscriptions of the statute a strong incentive to terminate their pregnancy.”).

¹⁷⁵ § 26-15-3.2; § 13A-5-11; § 13A-5-6.

¹⁷⁶ Motion for Leave, *supra* note 83, at 11-12.

¹⁷⁷ *See Ahrens, supra* note 15, at 884-85, 895.

¹⁷⁸ ALCOHOL, TOBACCO, AND OTHER DRUGS: CONSUMPTION AND CONSEQUENCES IN ALABAMA, *supra* note 16, at 5.

¹⁷⁹ *Substance Abuse Treatment Admissions by Primary Substance of Abuse According to Sex, Age Group, Race, and Ethnicity Year = 2010*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., CTR. FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, <http://www.dasis.samhsa.gov/webt/quicklink/AL10.htm> (last visited Dec. 3, 2013).

lacking in financial resources. Thus, a woman facing conviction under § 26-15-3.2 who can afford an abortion can bypass a felony conviction by obtaining one, while a woman facing conviction under § 26-15-3.2 who cannot afford an abortion would have no choice but to accept a felony conviction. Therefore, the law may disproportionately affect the poor because the poor are less likely to be able to afford the one escape from prosecution under § 26-15-3.2: an abortion.

Not only does § 26-15-3.2 harm women and fetuses, but it also harms Alabama's families as well. The law hurts the spouses, significant others, the dependents, including other children that are left behind when women convicted under § 26-15-3.2 are put in prison.¹⁸⁰ Such economic consequences have a particularly devastating effect on low-income families.¹⁸¹ Currently, Alabama prosecutes pregnant women who use harder drugs, specifically cocaine, methamphetamine, and other opiates—drugs which tend to be used more in poor communities.¹⁸² These already financially devastated communities become even more entrenched in poverty when incarceration is used as a tool for punishing drug use.¹⁸³ Conviction under § 26-15-3.2 results in heavy jail time and exorbitant monetary fees.¹⁸⁴ In addition, such families must gather the money for lawyers' fees and bails often set at \$500,000.¹⁸⁵ Moreover, such a conviction could carry severe collateral consequences at a state and federal level. Depending on the type of conviction, a woman guilty of violating the chemical endangerment law can

¹⁸⁰ See Motion for Leave, *supra* note 83, at 3-4 (“[A]mici contend that the relevant medical and scientific research does not support the prosecution of women who use a controlled substance and continue to term for the crime of ‘chemical endangerment’ and that such prosecutions undermine maternal and fetal health. Amici recognize a strong societal interest in protecting the health of women, children, and families. In the view of amici, however, such interests are undermined, not advanced, by the judicial expansion of the chemical endangerment law to apply to pregnant women who seek to continue their pregnancies to term despite a drug problem.”).

¹⁸¹ See, e.g., Marcos Ortiz, *Meth Bust Sends Family into Poverty*, ABC NEWS, May 5, 2013, http://www.abc4.com/content/news/top_stories/story/Meth-bust-sends-family-into-poverty/2L_4Dj5100S7pqlCVaP9aA.csp (last visited Dec. 3, 2013).

¹⁸² See Filipovic, *supra* note 81 (“So they focus on the most vulnerable, least sympathetic pregnant women first and establish the rights of fetuses there. They can’t go right for the prescription-drug-using upper-middle-class white women, in part because those women are considered at least marginally important in society, and in part because the people doing the prosecuting come from the same backgrounds and social classes as upper-middle-class white women and are therefore less likely to easily tag those women as criminals and unfit mothers. So women of colour, poor women and rural women are the targets, and they’re having a wide pro-life strategy built on their backs.”).

¹⁸³ Sasha Abramsky, *Toxic Persons: New Research Shows Precisely How the Prison-to-Poverty Cycle Does its Damage*, SLATE (Oct. 8, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/toxic_persons.single.html (reporting that children of prisoners are more likely to live in poverty, to end up on welfare, and to suffer the sorts of serious emotional problems that tend to make holding down jobs more difficult).

¹⁸⁴ See ALA. CODE §§ 26-15-3.2, 13A-5-11, 13A-5-6 (2013); see also ALA. CODE § 26-15-3.2 (2013) (noting that judges may choose to apply another provision of the law only if it provides a harsher penalty than this section).

¹⁸⁵ Ada Calhoun, *The Criminalization of Bad Mothers*, NY TIMES, Apr. 25, 2012, http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?pagewanted=all&_r=0.

be denied public assistance and food stamps for the rest of her life,¹⁸⁶ can be denied public housing,¹⁸⁷ can be asked during a job interview about her past convictions and denied employment on the basis of those convictions,¹⁸⁸ can lose her license to practice a regulated profession,¹⁸⁹ can be denied federal welfare benefits,¹⁹⁰ can be denied social security benefits while imprisoned,¹⁹¹ and more.

In addition, conviction under § 26-15-3.2 takes a heavy toll on the family's children. Ankrom, for instance, has three young children. Her prosecution under § 26-15-3.2 means that those children have to cope with the stress and turmoil of their mother being taken to prison and their mother carrying a felony conviction for the rest of their lives. Like Kimbrough, mothers convicted under such chemical endangerment laws may have their children taken away from them and even placed into the foster care system. In Alabama, the DHR performed 2,432 child removals from a home due to alcohol and/or drug abuse in fiscal year 2010.¹⁹² Most of these removals were due to drug abuse by a parent.¹⁹³ For a law which prosecutors say is meant to protect the child-to-be, its application seems to forget about the best interests of the child that already is.

Lastly, there are enormous economic costs resulting from conviction under § 26-15-3.2 which can have an extremely devastating impact on Alabama's families. Once released from prison, a woman charged under § 26-15-3.2 must overcome the stigma associated with her conviction and the felony conviction on her record, making it difficult, if not impossible, for her to find employment. Ankrom, for example, was studying to be a physical-therapy assistant. Due to her conviction, it has become impossible for her to find work.¹⁹⁴ She now stays home with the children full time.¹⁹⁵

¹⁸⁶ See *After Prison: Roadblocks to Reentry*, LEGAL ACTION CTR, <http://lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=AL> (last visited Dec. 3, 2013) (explaining Alabama's collateral consequences); see also *A Report on State Legal Barriers Facing People with Criminal Records*, LEGAL ACTION CTR., available at http://www.lac.org/roadblocks-to-reentry/upload/reportcards/5_Image_Alabama%20final.pdf (last visited Dec. 3, 2013).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ David McKnight, *Criminal Law and Civil Death: The Collateral Consequences in Alabama*, REENTRY NET (2012), http://www.reentry.net/library/item.411672-Criminal_Law_and_Civil_Death_The_Collateral_Consequences_in_Alabama (citing ALA. CODE § 38-13-2(31) (1975)).

¹⁹⁰ *Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up*, AM. CIVIL LIBERTIES UNION, ET AL. 12 (2012), [http://www.sentencingproject.org/doc/State%20Collateral%20Consequences%20Legislative%20Roundup%20Sept%202012%20\(1\).pdf](http://www.sentencingproject.org/doc/State%20Collateral%20Consequences%20Legislative%20Roundup%20Sept%202012%20(1).pdf)

¹⁹¹ McKnight, *supra* note 189 (citing 20 C.F.R. § 404.468 (2013) (stating that “no monthly benefits will be paid to any individual for any month . . . the individual is confined . . . for conviction of a felony”).

¹⁹² ALCOHOL, TOBACCO, AND OTHER DRUGS: CONSUMPTION AND CONSEQUENCES IN ALABAMA, *supra* note 16, at 90.

¹⁹³ *Id.*

¹⁹⁴ Calhoun, *supra* note 185.

¹⁹⁵ *Id.*

D. Recommendations

Both the World Health Organization and the American Psychiatric Association classify substance abuse as a disease, and the American Medical Association explains that “addiction is not simply the product of a failure of individual willpower.”¹⁹⁶ As the National Association for Perinatal Addiction Research and Education explains, “[t]hese women are addicts who become pregnant, not pregnant women who decide to use drugs.”¹⁹⁷ As such, drug use should be treated with health care, not incarceration.¹⁹⁸

While some drug treatment programs are specifically tailored for pregnant and parenting women to help them overcome their addictions and improve birth outcomes, such programs are extremely rare and overburdened.¹⁹⁹ A number of factors contribute to this shortage of programs and willingness of pregnant women to utilize them. First, numerous barriers exist to treatment for pregnant women including stigma, lack of financial resources, lack of child care, fear of losing custody of children, and fear of prosecution.²⁰⁰ Second, the private insurance industry does not support coverage for alcohol and drug treatment,²⁰¹ making rehab cost-prohibitive for many pregnant women struggling with addiction. Third, many rehab programs are unable or unwilling to provide pregnant women with both addiction treatment and prenatal medical care.²⁰² These programs often report fear of program liability, inability to care for infants, lack of services for other children while mothers are in treatment, lack of financial resources, and limited staff training and knowledge about pregnancy and substance use.²⁰³

The circumstances are no different in Alabama. The State’s lack of resources for pregnant, drug-addicted mothers is one of the biggest problems contributing to the rise in infants born with drug withdrawal symptoms.²⁰⁴ Many of the State’s drug rehabilitation programs will not take pregnant women due to the added health care responsibilities associated with treating drug-addicted women who are pregnant.²⁰⁵

As discussed, punishing pregnant women through felony conviction is damaging to the women, to the fetuses, and to the families involved. Alabama lawmakers should correct the dangerous decision rendered by the Alabama Supreme Court in *Ex parte Ankrom* by

¹⁹⁶ PUNISHING WOMEN, *supra* note 166, at 7.

¹⁹⁷ *Id.*

¹⁹⁸ See Motion for Leave, *supra* note 83, at 7 (citing the recommendations of the American College of Obstetricians and Gynecologists regarding substance use and/or abuse during pregnancy).

¹⁹⁹ *Id.* (citing a 1991 report by the Federal General Accounting Office that found that the most critical barrier to women’s treatment “is the lack of adequate treatment capacity and appropriate services among programs that will treat pregnant women and mothers with young children”).

²⁰⁰ *Facts About Drug Treatment*, NAT’L ADVOCATES FOR PREGNANT WOMEN, <http://www.advocatesforpregnantwomen.org/issues/crackfacts.htm> (last visited Dec. 3, 2013).

²⁰¹ *Id.*

²⁰² Substance Abuse Treatment: Addressing the Specific Needs of Women, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (2009), available at <http://www.ncbi.nlm.nih.gov/books/NBK83238/>.

²⁰³ *Id.*

²⁰⁴ See Steele, *supra* note 6.

²⁰⁵ See *id.*

clarifying that the law may not be used to prosecute women for the exposure of a fetus to controlled substances or chemical substances in utero.

CONCLUSION

The Supreme Court of Alabama engaged in judicial activism when it incorrectly upheld Hope Ankrom and Amanda Kimbrough's convictions. The court erred when it held the term "child" to be unambiguous and ignored the unequivocal evidence provided by the legislative history. The court also erred in not applying the rule of lenity. Importantly, the court ignored the over forty health care professionals, medical, social, and legal groups, including the American Medical Association, American College of Obstetricians and Gynecologists, and American Psychiatric Association, which appeared as amici in *Ex parte Ankrom*, warning the court of the dangerous implications of criminalizing drug use during pregnancy.²⁰⁶

"A court must not rewrite a statute to make it consistent with the court's idea of orderliness and public policy."²⁰⁷ Rather than acting as neutral arbiters, the judges acted as advocates, legislating from the bench and refusing to engage in a deep analysis and true consideration of the law's intent. When a court ignores both precedent and congressional intent, it embarks upon a dangerous path, where parties before the court come to fear its unpredictability, rather than seek refuge in its commitment to justice. As a result of *Ex parte Ankrom*, Alabama's women have been pushed to the peripheral and left in an extremely precarious position, forced to grapple with the rewritten and damaging policy of the Alabama Supreme Court.

²⁰⁶ See Motion of the American Medical Association and Medical Association of Alabama to Appear as Amici Curiae and Adopt, in part, the Briefs of Amici Curiae Filed by the American Academy of Addiction Psychiatry, et al., in Support of the Petitioners, *Ex parte Ankrom*, 2013 WL 135748 (Ala. Jan. 11, 2013); see also Motion for Leave, *supra* note 83, at 4 (written by National Advocates for Pregnant Women and the Southern Poverty Law Center and signed onto by the American Academy of Addiction Psychiatry, American College of Obstetricians and Gynecologists, American Psychiatric Association, American Medical Women's Association, American Nurses Association, The Alabama Women's Resource Network, American Society of Addiction Medicine, Black Women's Health Imperative, Child Welfare Organizing Project, Global Lawyers and Physicians, Harm Reduction Coalition, Institute for Health and Recovery, International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute, International Centre for Science in Drug Policy, International Doctors for Healthy Drug Policies, International Mental Disability Law Reform Project, Legal Action Center, National Asian Pacific American Women's Forum, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers and National Association of Social Workers, Alabama Chapter, National Council on Alcoholism and Drug Dependence, Inc., National Institute for Reproductive Health, National Latina Institute for Reproductive Health, National Organization for Women – Alabama, National Perinatal Association, National Women's Health Network, National Women's Law Center, Our Bodies Ourselves, Southern Center for Human Rights, Pippa Abston, MD, PhD, FAAP, Sheila Blume, MD, Susan C. Boyd, PhD, Wendy Chavkin, MPH, MD, Nancy Day, MPH, PhD, Gabriele Fischer, MD, Deborah A. Frank, MD, Leslie Hartley Gise, MD, Stephen R. Kandall, MD, Howard Minkoff, MD, Daniel R. Neuspiel, MD, MPH, Robert G. Newman, MD, MPH, Linda Worley, MD, Trecia Wouldes, PhD, and Tricia E. Wright, MD, MS).

²⁰⁷ *People v. Freed*, 766 N.E.2d 253, 262 (4th Dist. 2002).