

IN THE  
INDIANA COURT OF APPEALS

Case No. 49A02-1107-CR-590

BEI BEI SHUAI. )  
 )  
 Appellant, ) Appeal from the Marion Superior Court  
 )  
 v. ) Case No.: 49G03-1103-MR-14478  
 )  
 STATE OF INDIANA, ) Hon. Sheila Carlisle, Judge  
 )  
 Appellee. )

---

BRIEF SUBMITTED IN SUPPORT OF  
APPELLANT BEI BEI SHUAI  
BY *AMICI CURIAE*  
AMERICAN ASSOCIATION OF SUICIDOLOGY  
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS,  
AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS,  
AMERICAN MEDICAL WOMEN'S ASSOCIATION,  
AMERICAN NURSES ASSOCIATION,  
AMERICAN SOCIETY OF ADDICTION MEDICINE,  
ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS,  
BARON EDWARD DE ROTHSCHILD CHEMICAL DEPENDENCY INSTITUTE,  
CHILD WELFARE ORGANIZING PROJECT,  
DEPRESSION AND BIPOLAR SUPPORT ALLIANCE,  
HEALTHRIGHT INTERNATIONAL,  
INTERNATIONAL MENTAL DISABILITY LAW REFORM PROJECT,  
MENTAL HEALTH AMERICA,  
MENTAL HEALTH AMERICA OF INDIANA,  
NATIONAL ALLIANCE ON MENTAL ILLNESS,  
NATIONAL ALLIANCE ON MENTAL ILLNESS-INDIANA,  
NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM,  
NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH,  
NATIONAL ASSOCIATION OF SOCIAL WORKERS,  
NATIONAL ASSOCIATION OF SOCIAL WORKERS, INDIANA CHAPTER,  
NATIONAL COALITION FOR CHILD PROTECTION REFORM  
NATIONAL INSTITUTE FOR REPRODUCTIVE HEALTH,  
NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH,

NATIONAL PERINATAL ASSOCIATION,  
NATIONAL WOMEN'S HEALTH NETWORK,  
SOCIETY FOR MATERNAL-FETAL MEDICINE,  
THE WOMEN'S THERAPY CENTRE INSTITUTE,  
RICHARD ASHCROFT, PhD,  
EDMUND F. BYRNE, PhD, JD,  
ARTHUR L. CAPLAN, PhD,  
WENDY CHAVKIN, MD, MPH,  
DEBRA DEBRUIN, PhD,  
ANNE DONCHIN, PhD,  
NORMA FINKELSTEIN, PhD,  
NAFISA GHADIALI, MD,  
LESLIE HARTLEY GISE, MD,  
LINDA MACDONALD GLENN, JD, LLM,  
JODI HALL,  
KAREY HARWOOD, PhD,  
ANDREA L. KALFOGLOU, PhD,  
JOAN H. KRAUSE, JD,  
REBECCA KUKLA, PhD,  
KIMBERLY J. LEIGHTON, PhD,  
HILDE LINDEMANN, PhD,  
ANNE DRAPKIN LYERLY, MD, MA,  
MARY FAITH MARSHALL, PhD, FCCM,  
ALAN MEISEL, JD,  
SEEMA MOHAPATRA, JD, MPH,  
MALLAY OCCHIOGROSSO, MD,  
DAVID ORENTLICHER, MD, JD  
CONSTANCE PERRY, PhD,  
GAIL ERLICK ROBINSON, MD, DPsych,  
JEFFREY M. ROTHENBERG, MD, MS,  
DOUGLAS DAVID SCUDAMORE, MD,  
DIANE N. SOLOMON, MSN,  
BONNIE STEINBOCK, PhD,  
NADA L. STOTLAND, MD, MPH,  
LEONORE TIEFER, PhD,  
KATHERINE L. WISNER, MD, MS,  
SILVIA WOODS, MA,  
LINDA L.M. WORLEY, MD

---

Jennifer Girod, JD, PhD, RN  
Hall, Render, Killian, Heath & Lyman  
Suite 2000, Box 82064  
One American Square  
Indianapolis, IN 46282  
(317) 633-4884

David Orentlicher, MD, JD  
530 W. New York Street  
Indianapolis, IN 46202-3225  
(317) 274-4993

*Attorneys for Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . 2

INTEREST OF *AMICI* . . . . . 4

SUMMARY OF ARGUMENT . . . . . 17

ARGUMENT . . . . . 18

    I.    WOMEN SHOULD NOT BE PROSECUTED BECAUSE OF THE  
          OUTCOMES OF THEIR PREGNANCIES . . . . . 18

        A. *Punitive policies wrongly treat health problems as criminal  
           behavior* . . . . . 19

        B. *Punitive policies are counterproductive to the important goal of  
           promoting fetal welfare because they will discourage many women  
           from seeking health care* . . . . . 20

    II.   INDIVIDUALS SHOULD NOT BE SUBJECTED TO PROSECUTION  
          FOR SUICIDAL BEHAVIOR . . . . . 22

CONCLUSION . . . . . 24

CERTIFICATE OF SERVICE . . . . . 26

TABLE OF AUTHORITIES

Statute

Ind. Code § 35-42-1-6 (2011) . . . . . 22

Other Authorities

American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 Pediatrics 639 (1990) . . . . . 19, 20

American College of Obstetricians and Gynecologists, Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, 106 Obstetrics & Gynecology 1127 (2005). . . . 18-22

American College of Obstetricians and Gynecologists, Committee on Health Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 Obstetrics & Gynecology 200 (2011). . . . . 20

American College of Obstetricians and Gynecologists, News Release, *Depression During Pregnancy: Treatment Recommendations, A Joint Report from APA and ACOG*, August 21, 2009 . . . . . 23

American Foundation for Suicide Prevention, *Facts and Figures by Gender*, 2011 . . . . . 23

American Foundation for Suicide Prevention, *National Statistics*, 2011. . . . . 22

American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663 (1990) . . . . . 18-22

American Nurses Association, *Position Statement on Opposition to Criminal A Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Service for Alcohol and Drug Dependent Women of Childbearing Age*. (Apr. 5, 1991) . . . . . 19

American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts*, Position Statement, APA Document Reference No. 200101 (Mar. 2001) . . . . . 19

American Psychological Association, *Resolution on Substance Abuse by Pregnant Women* (Aug. 1991). . . . . 19

Indiana State Suicide Prevention Coalition, *Suicide Prevention State Plan* (2004) . . . . . 23

Institute of Medicine, *Reducing Suicide: A National Imperative* (2002) . . . . . 22

Ira J. Chasnoff, et al., <i>The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida</i> , 322 New Eng. J. Med. 1202 (1990) . . . . .	22
Dwight L. Greene, <i>Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug-Addicted Mothers</i> , 39 Buffalo L. Rev. 737 (1991) . . . . .	22
Veronika E.B. Kolder, et al., <i>Court-ordered Obstetrical Interventions</i> , 316 New Eng. J. Med. 1192 (1987) . . . . .	22
<i>Model Penal Code and Commentaries</i> (Official Draft and Revised Comments) § 210.5, Comment 2 (American Law Institute 1980).. . . . .	24
Social Work Speaks, National Association of Social Workers Policy Statements, <i>Mental Health</i> (8 <sup>th</sup> ed., 2009) ) . . . . .	24
The National Institute of Mental Health, <i>Suicide in the U.S.: Statistics and Prevention</i> , April 27, 2010 . . . . .	23
The Suicide Prevention Resource Center, <i>Suicide Prevention Basics- About Suicide</i> . . . . .	23

## INTEREST OF AMICI

The AMERICAN ASSOCIATION OF SUICIDOLOGY (AAS) is dedicated to decreasing the stigma that impedes the early detection and treatment of those at risk for suicide and to developing effective interventions for those at risk for suicide. AAS leads in the efforts to prevent suicide through research, education and training.

The AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (ACOG) is a non-profit educational and professional organization that works to improve all aspects of health care for women. The College's companion organization, the AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, is a professional organization dedicated to the advancement of women's health and the professional interests of its members. Sharing more than 54,000 members, the College and the Congress are the leading professional associations of physicians who specialize in the healthcare of women.

The AMERICAN MEDICAL WOMEN'S ASSOCIATION is an organization of women physicians, medical students and other persons dedicated to serving as the unique voice for the improvement of women's health and the advancement of women in medicine.

The AMERICAN NURSES ASSOCIATION (ANA) is the largest nursing organization in the United States. Through its Code of Ethics for Nurses, standards for nursing practice, and public advocacy, the ANA actively promotes patient safety and the public health.

The AMERICAN SOCIETY OF ADDICTION MEDICINE (ASAM) is a nationwide organization of more than 3600 of the nation's foremost physicians specializing in addiction medicine. ASAM believes that the proper, most effective solution to the problem of substance abuse during pregnancy lies in medical prevention, i.e. education, early intervention, treatment and research on chemically dependent pregnant women. ASAM further believes that state and local

governments should avoid any measures defining alcohol or other drug use during pregnancy as “child abuse,” and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health services.

The ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS is a multidisciplinary association of professionals who deliver services, provide education, conduct research, or influence policy on matters of reproductive health. Its members define reproductive health in broad terms and recognize that the best health care is delivered through a team of professionals partnering with an informed patient.

The BARON EDWARD DE ROTHSCHILD CHEMICAL DEPENDENCY INSTITUTE (Institute) is a leader in the field of addiction treatment. The Institute comprises a variety of clinical programs that care for some 13,000 individuals annually; these programs are provided on an inpatient as well as ambulatory basis, and include both long-term rehabilitation as well as acute intervention. They have served as models for clinicians from around the world for over three decades.

The CHILD WELFARE ORGANIZING PROJECT (CWOP) is an organization of New York City parents and professionals who seek reform of child welfare practices through increased, meaningful, parent/ client involvement in child welfare decision making at all levels, from case planning to policy, budgets and legislation. A large part of CWOP’s work involves debunking prevailing stereotypes about child welfare-involved parents and families, putting a human face on parents who are often unfairly and inaccurately demonized and ultimately protecting children by helping and strengthening their families and communities.

The DEPRESSION AND BIPOLAR SUPPORT ALLIANCE (DBSA) is the nation’s leading consumer-focused mental health organization, with the mission “to improve the lives of

people living with mood disorders.” Through over 1,000 support groups and over 350 national chapters, DBSA reaches nearly 5,000,000 people each year with current, consumer-friendly information about depression and bipolar disorder, as well as empowering tools focused on an integrated approach to wellness and recovery.

HEALTHRIGHT INTERNATIONAL is a global health and human rights organization working to build lasting access to health for excluded communities while strengthening human rights. It works closely with communities and establishes local partnerships to deliver health services, provides training and equipment and improves systems to enable its partners to deliver services on their own. Its projects address health and social crises made worse by human rights violations, with a particular focus and expertise in a number of areas, including women's access to safe and effective maternal and neonatal care. Since its founding by the late Dr. Jonathan Mann, HealthRight has worked in over 30 countries, with current projects in Asia, Africa, Eastern Europe, and the United States.

The INTERNATIONAL MENTAL DISABILITY LAW REFORM PROJECT is a human rights advocacy organization that is housed within the Justice Action Center at New York Law School. It is involved in legislative reform, lawyer and law student training, pro bono legal assistance, and the full range of law reform projects that relate to the practice of mental disability law. This project is closely related to the online, distance learning Mental Disability Law program that now offers thirteen separate courses in all aspects of mental disability law.

MENTAL HEALTH AMERICA (MHA) is a national non-profit advocacy and public policy organization that works to advance the rights of individuals with mental health conditions and improve the mental health of all Americans. Along with its more than 300 affiliates around the country, MHA is especially concerned with reducing the incidence of mental illnesses and

suicide and ensuring that the legal system not reverse the progress made to decriminalize mental illnesses in this country.

MENTAL HEALTH AMERICA OF INDIANA (MHAI) is a statewide organization, with over forty local affiliates, making it one of the largest Mental Health America state affiliates in the country. MHAI is a broad-based group of citizens, consumers, individuals in recovery, families, and professionals working to (1) promote the mental health and recovery of all Indiana citizens through educational programs that increase the public understanding and acceptance of persons with mental illness and addiction disorders, (2) foster the delivery of the most appropriate and effective services to all individuals in need, and (3) initiate reform of the mental health and addiction service delivery system through advocacy and public policy.

The NATIONAL ALLIANCE ON MENTAL ILLNESS (NAMI) is the nation's largest grassroots organization dedicated to improving the lives of individuals and families affected by mental illness. NAMI has 1,100 state and local affiliates in all 50 states and the District of Columbia that engage in advocacy, education, research and support. NAMI has a long history of advocacy to improve access to mental health care and to reduce the unnecessary incarceration and involvement of individuals living with mental illnesses with criminal justice systems.

NAMI-INDIANA is NAMI's state organization in Indiana dedicated to improving the quality of life of persons who are affected by mental illness. With 25 local affiliates throughout the state and more than 1,500 member households, NAMI-Indiana provides a comprehensive network of support, education, advocacy and promotion of research. NAMI-Indiana has demonstrated sustained leadership in promoting policies and practices that link people living with mental illness with appropriate treatment instead of incarceration.

The NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM's mission includes strengthening communities to reflect the social, political, health, and economic perspectives of Asian Pacific American women and girls on matter of reproductive justice, access to quality health care, immigrant and refugee rights, civil rights, violence against women, and economic empowerment.

The NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH (NPWH) works to assure the provision of quality health care to women of all ages by nurse practitioners. NPWH's mission includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

The NATIONAL ASSOCIATION OF SOCIAL WORKERS (NASW) is the world's largest association of professional social workers with nearly 145,000 members in fifty-six chapters throughout the United States and abroad. The NASW, INDIANA CHAPTER has 2,590 members. With a purpose of developing and disseminating standards of social work practice, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional standards and criteria, and develops policy statements on issues of importance to the social work profession.

The NATIONAL COALITION FOR CHILD PROTECTION REFORM (NCCPR) is an organization of professionals and academics drawn from the fields of law, psychology, social work and journalism, who are dedicated to improving child welfare systems and the understanding of maternal and infant health through public education and advocacy. These efforts include submitting amicus briefs in important child protection cases around the country.

In addition, NCCPR's members have been involved as litigators and experts in numerous precedent-setting cases involving child protection policies and proceedings.

The NATIONAL INSTITUTE FOR REPRODUCTIVE HEALTH (Institute) is a non-profit organization that was established to examine access to reproductive health services and develop innovative, proactive approaches to expand the availability family planning services in states all across the nation. The Institute's mission is to work with local organizations to confront issues that are national in significance, yet are best addressed through locally managed initiatives.

The NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH works to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization and policy advocacy. Latinas face a unique and complex array of reproductive health and rights issues that are exacerbated by poverty, gender, racial and ethnic discrimination and xenophobia. These circumstances make it especially difficult for Latinas to access reproductive health care services.

The NATIONAL PERINATAL ASSOCIATION (NPA) promotes the health and well being of mothers and infants enriching families, communities and our world. NPA is a multi-disciplinary organization comprised of doctors, nurses, midwives, social workers, administrators, parents, and those interested in collaborating to improve perinatal health.

The NATIONAL WOMEN'S HEALTH NETWORK (NWHN) is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN seeks to improve the health of all women by influencing policy and supporting informed consumer decision-making. The NWHN aspires to a health care system that is guided by social justice and reflects the needs of diverse women.

The SOCIETY FOR MATERNAL-FETAL MEDICINE (SMFM) is the membership organization of maternal-fetal medicine sub-specialists and others who are dedicated to the optimization of pregnancy and perinatal outcomes. We are obstetricians/gynecologists with advanced training and expertise in maternal and fetal healthcare. SMFM provides leadership for the advancement of women and children's health through pregnancy care, research, education and improvements in public policy.

THE WOMEN'S THERAPY CENTRE INSTITUTE (WTICI) offers innovative clinical training based on contemporary psychoanalytic theory integrated with an understanding that one's social location contributes to the psychic construction of the individual. The mission of WTICI is to train psychotherapists in feminist relational psychotherapy; to articulate a feminist voice and an understanding of gender in the evolving dialogue of contemporary psychoanalytic theory; and to sponsor educational programs for practitioners and the general public.

RICHARD ASHCROFT, PhD, is a Professor of Bioethics at the Law School of Queen Mary, University of London. He has served as Deputy Editor of the Journal of Medical Ethics and as a member of the Ethics Committee of the Royal College of Obstetricians and Gynaecologists.

EDMUND F. BYRNE, PhD, JD, is Emeritus Professor of Philosophy at Indiana University-Purdue University, Indianapolis and a Section Editor of the Journal of Business Ethics.

ARTHUR L. CAPLAN, PhD, is Emanuel and Robert Hart Professor of Bioethics and Philosophy at the University of Pennsylvania, where he also is Director of the Center for Bioethics and Chair of the Department of Medical Ethics. A fellow of the American Association for the Advancement of Science, he has served on special ethics advisory committees for the

United Nations, the International Olympic Committee, the President of the United States, the Department of Health and Human Services, and the National Institute of Mental Health.

WENDY CHAVKIN, MD, MPH, is a Professor of Clinical Public Health and Obstetrics and Gynecology at the Mailman School of Public Health and the College of Physicians and Surgeons at Columbia University. She has written extensively about women's reproductive health issues and done extensive research related to pregnant women, punishment and barriers to care for over two decades.

DEBRA DEBRUIN, PhD, is Director of Graduate Studies and Assistant Professor in the Center for Bioethics and an Assistant Professor in the Department of Medicine at the University of Minnesota Medical School. A professor of philosophy and bioethics, she also has served as a health policy fellow with the Health, Education, Labor and Pensions Committee of the United States Senate on a range of health care issues, including mental health and substance abuse.

ANNE DONCHIN, PhD, is Emerita Professor of Philosophy and Adjunct Professor of Women's Studies and Philanthropic Studies at Indiana University-Purdue University, Indianapolis, where she specialized in biomedical ethics.

NORMA FINKELSTEIN, PhD, is executive director of the Institute of Health and Recovery in Massachusetts, whose mission is to develop a comprehensive continuum of care for individuals, youth, and families affected by alcohol, tobacco, and other drug use, mental health problems, and violence/trauma.

NAFISA GHADIALI, MD, is Assistant Professor of Psychiatry in the Women's Mental Health Program at the University of Illinois Medical Center in Chicago.

LESLIE HARTLEY GISE, MD, is Clinical Professor of Psychiatry at the John A. Burns School of Medicine, University of Hawai'i. She has extensive experience teaching at the

professional level regarding reproductive depression, and she worked at a facility treating drug and alcohol addicted pregnant and parenting women for eight years. She is past President of the North American Society for Psychosocial Obstetrics and Gynecology under ACOG.

LINDA MACDONALD GLENN, JD, LLM, is a Fellow at the Institute for Ethics and Emerging Technologies. A bioethicist-attorney, she also is an Assistant Professor at the Albany Medical College, where she serves on the faculty of the Alden March Bioethics Institute.

JODI HALL is a PhD Candidate in Health and Rehabilitation Sciences at The University of Western Ontario.

KAREY HARWOOD, PhD, is an Associate Professor in the Department of Philosophy and Religious Studies at North Carolina State University. She specializes in bioethics and is the Director of the Health, Medicine, and Human Values minor at North Carolina State.

ANDREA L. KALFOGLOU, PhD, is Assistant Professor in the Health Administration and Policy Program of the Department of Sociology/Anthropology, at the University of Maryland, Baltimore County. She has staffed ethics and policy committees for the President's National Bioethics Advisory Commission, the Institute of Medicine, and the National Advisory Board on Ethics in Reproduction.

JOAN H. KRAUSE, JD, is Professor of Law in the School of Law, Adjunct Professor in the Department of Social Medicine, and Adjunct Professor in the School of Public Health at the University of North Carolina at Chapel Hill. Her areas of research and teaching include health care law and criminal law.

REBECCA KUKLA, PhD, is a Professor of Philosophy and Senior Research Scholar in the Kennedy Institute of Ethics at Georgetown University, with special interests in bioethics and public health ethics.

KIMBERLY J. LEIGHTON, PhD, is Assistant Professor in the Department of Philosophy and Religion at American University, with a main research focus in bioethics.

HILDE LINDEMANN, PhD, is Professor of Philosophy at Michigan State University. A Fellow of The Hastings Center, a leading bioethics research institution, her ongoing research interests include bioethics and the ethics of families.

ANNE DRAPKIN LYERLY, MD, MA, an obstetrician and bioethicist, is Associate Director of the Center for Bioethics and Associate Professor of Social Medicine at the University of North Carolina at Chapel Hill. She is nationally recognized for her research on ethical issues in reproductive health. She served on several national committees, including the Ethics Committee of the American College of Obstetricians and Gynecologists for seven years, which she chaired from 2007-2009.

MARY FAITH MARSHALL, PhD, FCCM, is Professor of Bioethics and Professor of Family Medicine and Community Health at the University of Minnesota. She has extensive research and publications in the areas of reproductive ethics, coercive interventions in pregnancy, and policy approaches to perinatal substance abuse — a subject on which she has testified before Congress and in US District Court. She sits on the ethics committee of the American College of Obstetricians and Gynecologists.

ALAN MEISEL, JD, is Dickie, McCamey & Chilcote Professor of Bioethics and Professor of Law and Psychiatry at the University of Pittsburgh School of Law, where he also is the founder and director of the University of Pittsburgh's Center for Bioethics and Health Law. He served on the Ethics Working Group of the White House Task Force on Health Care Reform in 1993, and he was assistant director for legal studies at the President's Commission for the Study of Ethical Problems in Medicine in 1982.

SEEMA MOHAPATRA, JD, MPH, is Assistant Professor of Law at the Dwayne O. Andreas School of Law, Barry University. Her current research interests include legal and ethical issues involved with public health regulation.

MALLAY OCCHIOGROSSO, MD, is Assistant Professor of Psychiatry at the Weill Cornell Medical College. Her research currently focuses on matters of women's mental health, and her areas of specialty include reproductive psychiatry.

DAVID ORENTLICHER, MD, JD, is Samuel R. Rosen Professor and Co-Director of the Hall Center for Law and Health at Indiana University School of Law-Indianapolis. He also serves as an adjunct professor of medicine at Indiana University School of Medicine. He was the primary staff author of the American Medical Association's policy position, *Legal Interventions During Pregnancy*, that is cited in this brief.

CONSTANCE PERRY, PhD, is Associate Professor in the Department of Health Sciences and Health Administration at the College of Nursing and Health Professions, Drexel University. She teaches undergraduate and graduate courses in biomedical ethics, and she serves as Co-Chair of the Hospital Ethics Committee for Hahnemann University Hospital – Tenet.

GAIL ERLICK ROBINSON, MD, DPsych, FRCPC, is Professor of Psychiatry and Obstetrics and Gynecology at the University of Toronto Faculty of Medicine and Director of the Women's Mental Health Program at the University Health Network, Toronto General Hospital.

JEFFREY M. ROTHENBERG, MD, MS, is Vice Chair, in the Department of Obstetrics and Gynecology at the Indiana University School of Medicine, Vice President of the Indiana University Health Medical Staff, and Chair of the Indiana Section of the American College of Obstetricians and Gynecologists. He practices obstetrics and gynecology full time out of University Hospital at the Indiana University School of Medicine.

DOUGLAS DAVID SCUDAMORE, MD, is Senior Instructor of Medicine at the University of Colorado School of Medicine and Medical Director of Hospitalist Services for the Network of Care at The Children's Hospital, Colorado. He is a hospital-based pediatrician and has extensive experience caring for hundreds of newborns each year, including many who are born to clinically depressed and drug-addicted mothers.

DIANE N. SOLOMON, MSN, is a Psychiatric and Mental Health Nurse Practitioner in Portland, Oregon.

BONNIE STEINBOCK, PhD, is Professor of Philosophy, University at Albany/SUNY. A Fellow of The Hastings Center and a member of the Ethics Committee of the American Society for Reproduction and Medicine, she specializes in biomedical ethics, with a particular interest in reproductive ethics. She is the author of *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (Oxford, 2d ed. 2011) and the editor of *Legal and Ethical Issues in Human Reproduction* (Ashgate Publishing, 2002).

NADA L. STOTLAND, MD, MPH, is a psychiatrist and Professor of Psychiatry at Rush Medical College in Chicago. She is the author or editor of five books on the psychiatric aspects of women's reproductive health and health care. She served for seven years as the Chair of the American Psychiatric Association (APA) Committee on Women. With her encouragement, the APA adopted a policy of non-punitive treatment for pregnant women with psychiatric problems. She is also a clinician expert in the care of women with pregnancy-related issues.

LEONORE TIEFER, PhD, is an Associate Clinical Professor of Psychiatry at both New York University School of Medicine and Albert Einstein College of Medicine and has a private psychotherapy practice in New York. In 2004, she received the Lifetime Career Award from the Association for Women in Psychology.

KATHERINE L. WISNER, MD, MS, is a Professor of Psychiatry, Obstetrics and Gynecology, and Director of Women's Behavioral HealthCARE at the University of Pittsburgh Medical Center. Her main focus is research related to the psychiatric treatment of women of childbearing age, and she is recognized as an expert in the treatment of depression during pregnancy and the postpartum period.

SILVIA WOODS, MA, is a practicing psychologist, with a Masters in Applied Ethics in Buenos Aires, Argentina.

LINDA L.M. WORLEY, MD, is a Professor of Psychiatry with a secondary appointment in Obstetrics and Gynecology in the College of Medicine at the University of Arkansas for Medical Sciences (UAMS). She is involved nationally as the Secretary of the Academy of Psychosomatic Medicine and as a past President of the Association for Academic Psychiatry. She received the American Psychiatric Association Gold Award for directing a model program for the nation for addiction treatment for women with their children.

## SUMMARY OF ARGUMENT

Punishing pregnant women because of fetal injury is counterproductive to the important goal of protecting fetal well-being. Accordingly, under long-standing policies, health care organizations, many of which are *amici* in this case, have opposed criminal prosecutions of pregnant women whose actions are believed to have harmed their fetuses.

Position statements rejecting criminal prosecution have been issued by the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American Medical Association, the American Nurses Association, the American Psychiatric Association, the American Psychological Association, and other professional associations in health care.

In this case, a criminal prosecution is especially inappropriate. The harm to Ms. Shuai's newborn allegedly was the unfortunate consequence of an attempt by Ms. Shuai to commit suicide. Like other states, Indiana recognized long ago that suicide is not a matter for punishment by law enforcement officials but a matter for treatment by psychiatric professionals. The prosecution should not be allowed to criminalize an act that the General Assembly has expressly chosen not to criminalize.

*Amici*, who are experts in matters of maternal, fetal, children's and mental health, as well as in bioethics and law, therefore urge the court to dismiss the charges against Ms. Shuai or grant bail.

## ARGUMENT

### I. WOMEN SHOULD NOT BE PROSECUTED BECAUSE OF THE OUTCOMES OF THEIR PREGNANCIES

More than twenty years ago, when concerns arose about the risks to fetal welfare from drug use by pregnant women, major health care associations began to consider how public policy should address the issue. Prosecutors in a number of states had leveled criminal charges against pregnant women for using cocaine or other illicit drugs, but many health professionals questioned whether a punitive approach made sense toward women who were responding to the physiological drives of their drug addiction.

In June 1990, the American Medical Association (AMA) issued a report, “Legal Interventions During Pregnancy,”<sup>1</sup> in which it assessed the considerations involved in prosecutions of pregnant women. For a number of reasons, the AMA rejected any role for criminal sanctions (or civil liability) because of actions by pregnant women that might result in fetal injury.<sup>2</sup> Similarly, in a series of statements, the American College of Obstetricians and Gynecologists (ACOG) rejected criminal prosecutions of pregnant women because of fetal harm. In its analysis, “Maternal Decision Making, Ethics, and the Law,”<sup>3</sup> the ACOG Committee on Ethics concluded that “pregnant women should not be punished for adverse perinatal outcomes.”<sup>4</sup> Other health care associations share the views of ACOG and the AMA. In its policy statement, the American Academy of Pediatrics observed that “punitive measures taken

---

<sup>1</sup> American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663 (1990) (hereinafter “AMA”).

<sup>2</sup> Id. at 2670.

<sup>3</sup> American College of Obstetricians and Gynecologists Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, 106 *Obstetrics & Gynecology* 1127 (2005) (hereinafter “ACOG”).

<sup>4</sup> Id. at 1135.

toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health.”<sup>5</sup> The American Nurses Association noted that “[t]he threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment.”<sup>6</sup> And according to the American Psychological Association, “no punitive action should be taken against women on the basis of behaviors that may harm a developing fetus.”<sup>7</sup>

The health care organizations cited several reasons for their positions, which continue to be their official policies:

A. *Punitive policies wrongly treat health problems as criminal behavior.*<sup>8</sup>

When pregnant women put their fetuses at risk by using illicit substances or attempting suicide, the women do so because they have a health problem.<sup>9</sup> If prosecutors respond by bringing criminal charges, they are in effect punishing the women for their health status. Prosecution for drug abuse represents punishment for the disease of addiction;<sup>10</sup> prosecution in this case represents punishment for the illness of depression.

The proper response when pregnant women appear to threaten the welfare of their fetuses is to make available the psychological and other medical treatment that can address the women’s

---

<sup>5</sup> American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 *Pediatrics* 639, 641 (1990) (hereinafter “AAP”).

<sup>6</sup> American Nurses Association, *Position Statement on Opposition to Criminal A Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age*. (Apr. 5, 1991)

<sup>7</sup> American Psychological Association, *Resolution on Substance Abuse by Pregnant Women*, (Aug. 1991). See also American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts*, Position Statement, APA Document Reference No. 200101 (Mar. 2001) (also opposing criminal prosecution of pregnant women for the use of substances that risk harm to fetuses, urging treatment as the appropriate response).

<sup>8</sup> ACOG, *supra* note 3, at 1133-34; AMA, *supra* note 1, at 2667-2668.

<sup>9</sup> American Psychiatric Association, *supra* note 7.

<sup>10</sup> ACOG, *supra* note 3, at 1133-34.

conditions. Indeed, studies overwhelmingly show that these women are very concerned about the possible consequences for their fetuses, and are eager to obtain treatment once they learn that they are pregnant.<sup>11</sup>

In its analysis, the AMA specifically considered whether an absolute rejection of punitive sanctions against pregnant women for fetal harm might be too extreme a position to take.<sup>12</sup> In concluding that an absolute prohibition against prosecution is the correct policy, the AMA observed that when women act in ways that could harm their fetuses, they generally also are acting in ways that are harmful to themselves. Accordingly, as in this case, psychiatric treatment is the appropriate response.

*B. Punitive policies are counterproductive to the important goal of promoting fetal welfare because they will discourage many women from seeking health care.*

When prosecutors adopt a policy of criminal punishment for pregnant women whose actions are believed to threaten fetal welfare, the prosecutors actually make it less likely that fetal welfare will be promoted.<sup>13</sup> As studies suggest,<sup>14</sup> this kind of prosecution will discourage other pregnant women who need health care from seeking it. Severely depressed women in Indiana now know that if their physician or other health care provider finds out about any behavior that might be construed as a suicide attempt, they could be charged with attempted homicide or attempted feticide. Other pregnant women also will be deterred from seeking treatment. If trying to

---

<sup>11</sup> Id. at 1134.

<sup>12</sup> AMA, *supra* note 1, at 2669.

<sup>13</sup> Id. at 2667.

<sup>14</sup> AAP, *supra* note 5, at 641; ACOG, *supra* note 3, at 1134; American Psychological Association, *supra* note 7. See also American College of Obstetricians and Gynecologists, Committee on Health Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 *Obstetrics & Gynecology* 200 (2011) (“Seeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties.”).

commit suicide can trigger criminal charges because of the potential for harm to the fetus, so can drinking alcohol or using other drugs. Instead of getting care for their alcoholism or drug addiction, pregnant women will try to avoid detection by physicians or other health care providers. As a result, physicians, nurses, psychologists and others are less able to provide the kinds of treatment that could address the woman's medical condition and help avert fetal harm. Indeed, infant mortality rose in South Carolina in the years after the state's supreme court held that anything a pregnant woman does that might be harmful to her viable fetus could be prosecuted as child abuse or, if she experienced a stillbirth, as homicide.<sup>15</sup>

In short, if this prosecution proceeds, other pregnant women who have taken action that might harm their fetuses will be reluctant to go to a hospital, clinic, or physician's office for fear that they will be reported to law enforcement officials. As a result, measures that could counteract the effects of the action will not be implemented, and the opportunity to prevent harm will have been lost. Ms. Shuai should receive the psychiatric care she desperately needs, and other pregnant women should be assured that their visits to a health care provider will result not in a prison term but in the health care that they and their unborn children need. Fetuses and children are healthier when their mothers are healthy. The law should help pregnant women be healthy, not raise barriers to that important goal.

Punitive policies can compromise fetal welfare in another way. Such policies may lead some pregnant women to have abortions.<sup>16</sup> Women who are addicted to alcohol or drugs, for example, would be at risk for prosecution under Indiana's feticide statute for feticide or attempted feticide. Similarly, any pregnant woman who does anything later viewed as harmful to her fetus would be subject to prosecution—even if her fetus is not yet viable. This could

---

<sup>15</sup> ACOG, *supra* note 3, at 1134.

<sup>16</sup> AMA, *supra* note 1, at 2667.

create a perverse incentive to abort a wanted pregnancy to avoid violation of the statute. The law should not force women to choose between having an abortion and risking felony feticide charges under Ind. Code § 35-42-1-6 (2011).

Prosecutions of pregnant women are problematic for a third reason. They not only are flawed in theory, they also are flawed in practice. Coercive or punitive measures have consistently been implemented in a discriminatory fashion. Studies have found that while harm to fetuses can occur from the action—or inaction—of pregnant women from all socioeconomic groups, legal proceedings typically are brought only against some women.<sup>17</sup> Whether in the context of a court order to require a cesarean section or a felony prosecution for the use of illicit drugs, the law extends its reach overwhelmingly to poor or minority women. Indiana courts should not permit a policy that likely will single out for punishment only some classes in society.

## II. INDIVIDUALS SHOULD NOT BE SUBJECTED TO PROSECUTION FOR SUICIDAL BEHAVIOR

Suicide is a very serious health problem.<sup>18</sup> Over 34,000 people die by suicide every year in the United States,<sup>19</sup> more than the number who die because of HIV or homicide. Many more people

---

<sup>17</sup> Id. at 2668; ACOG, *supra* note 3, at 1134-1135. Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *New Eng. J. Med.* 1202 (1990); Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 *Buffalo L. Rev.* 737 (1991); Veronika E.B. Kolder, et al., *Court-ordered Obstetrical Interventions*, 316 *New Eng. J. Med.* 1192 (1987).

<sup>18</sup> Institute of Medicine, *Reducing Suicide: A National Imperative* (2002), available at <http://www.iom.edu/Reports/2002/Reducing-Suicide-A-National-Imperative.aspx>.

<sup>19</sup> American Foundation for Suicide Prevention, *National Statistics*, 2011, available at [http://www.afsp.org/index.cfm?fuseaction=home.viewpage&page\\_id=050fea9f-b064-4092-b1135c3a70de1fda](http://www.afsp.org/index.cfm?fuseaction=home.viewpage&page_id=050fea9f-b064-4092-b1135c3a70de1fda).

attempt suicide.<sup>20</sup> For every death that occurs by suicide, there are an estimated 11 attempted suicides.<sup>21</sup>

Women are especially at risk when attempted suicide is prosecuted as a crime. They try to commit suicide three times as often as men.<sup>22</sup> And pregnancy raises their risk. Between 14 percent and 23 percent of pregnant women struggle with symptoms of depression, and some 13 percent take an antidepressant medication during their pregnancy.<sup>23</sup>

Working with experts in mental illness, state agencies across the country have developed policies to address the problem of suicide. The Indiana Suicide Prevention State Plan, for example, includes policies to promote public awareness that suicide is a preventable public health problem, to reduce the stigma associated with being a consumer of mental health and suicide prevention services, to develop effective suicide prevention programs, to improve access to mental health services, and to promote research on suicide prevention.<sup>24</sup> Neither in Indiana or in any other state do guidelines recommend prosecutions of people who attempt suicide.

To be sure, at one time in this country, suicide and attempted suicide were treated as crimes. Like other states, Indiana realized many years ago that suicidal behavior reflects the presence of psychiatric dysfunction rather than criminal intent. As the drafters of the Model

---

<sup>20</sup> The Suicide Prevention Resource Center, *Suicide Prevention Basics- About Suicide*, available at [http://www.sprc.org/suicide\\_prev\\_basics/about\\_suicide.asp](http://www.sprc.org/suicide_prev_basics/about_suicide.asp).

<sup>21</sup> The National Institute of Mental Health, *Suicide in the U.S.: Statistics and Prevention*, April 27, 2010, available at <http://www.nimh.nih.gov/health/publications/suicide-in-the-us-statistics-and-prevention/index.shtml>.

<sup>22</sup> American Foundation for Suicide Prevention, *Facts and Figures by Gender*, 2011, available at [http://www.afsp.org/index.cfm?fuseaction=home.viewPage&page\\_id=04ECB949-C3D9-5FFA-DA9C65C381BAAEC0](http://www.afsp.org/index.cfm?fuseaction=home.viewPage&page_id=04ECB949-C3D9-5FFA-DA9C65C381BAAEC0).

<sup>23</sup> ACOG News Release, *Depression During Pregnancy: Treatment Recommendations A Joint Report from APA and ACOG*, August 21, 2009, available at [http://www.acog.org/from\\_home/publications/press\\_releases/nr08-21-09-1.cfm](http://www.acog.org/from_home/publications/press_releases/nr08-21-09-1.cfm).

<sup>24</sup> Indiana State Suicide Prevention Coalition, *Suicide Prevention State Plan (2004)*, at <http://www.indianasuicidepreventioncoalition.org/plan.htm>.

Penal Code observed, people attempting suicide are more properly the subject of psychiatric care than law enforcement.<sup>25</sup> Accordingly, Indiana law does not penalize suicide or attempted suicide. Indiana law rightly recognizes that the person who attempts suicide needs psychiatric treatment, not criminal prosecution.

The prosecution of Ms. Shuai effectively represents an effort by the prosecution to ignore the clear intent of the Indiana General Assembly. The prosecutor's office is trying to criminalize the act of attempted suicide by pregnant women even though the legislature chose not to include the crime of attempted suicide in the Indiana Code. The prosecution may not substitute its view of what behavior the law should make criminal in place of the judgment of the legislature. If the Marion County Prosecutor believes that pregnant women should be incarcerated after a failed suicide attempt, then the proper forum for making its case is at the Statehouse, not in a courthouse.

### CONCLUSION

Accordingly, *amici* respectfully request that this court dismiss the charges against Ms. Shuai or grant bail.

Respectfully submitted,

Jennifer Girod, Atty No: 27117-49  
Hall, Render, Killian, Heath & Lyman, P.C.

David Orentlicher, Atty No: 21442-49  
530 W. New York Street

---

<sup>25</sup> Model Penal Code and Commentaries (Official Draft and Revised Comments) § 210.5, Comment 2 at 94 (American Law Institute 1980). See also Social Work Speaks, National Association of Social Workers Policy Statements, *Mental Health* (8<sup>th</sup> ed., 2009) 229, 235 (“[T]he correctional system should not be used as a de facto mental health system.”).

Suite 2000, Box 82064  
One American Square  
Indianapolis, IN 46282  
(317) 633-4884  
[jgirod@hallrender.com](mailto:jgirod@hallrender.com)

Indianapolis, IN 46202  
(317) 274-4993 (phone)  
(317) 274-0455 (fax)  
[dorentli@iupui.edu](mailto:dorentli@iupui.edu)

We verify that the brief contains no more than 7,000 words.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by United States first class mail, postage prepaid, upon the following counsel of record this 17<sup>th</sup> day of October, 2011.

Gregory F. Zoeller  
Andrew A. Kobe  
Ellen H. Meilaender  
Office of the Indiana Attorney General  
302 W. Washington St., IGCS 5<sup>th</sup> Floor  
Indianapolis, IN 46204

Katherine D. Jack  
National Advocates for Pregnant Women  
P.O. Box 813  
Greenfield, IN 46140

Jennifer Lukemeyer  
Voyles, Zahn, Paul, Hogan & Merriman  
141 E. Washington St., Suite 300  
Indianapolis, IN 46204

Jill Morrison  
National Women's Law Center  
11 Dupont Circle  
Washington, DC 20036

Sandra L. Blevins  
Betz & Blevins  
One Indiana Square, Suite 1660  
Indianapolis, IN 46204

Linda L. Pence  
David J. Hensel  
Pence Hensel LLC  
135 N. Pennsylvania St., Suite 1600  
Indianapolis, IN 46204

Monica Foster  
Attorney at Law  
1455 N. Pennsylvania Street  
Indianapolis, IN 46202

Sara Ainsworth  
Legal Voice  
907 Pine Street, Suite 500  
Seattle, WA 98101

Julie D. Cantor  
P.O. Box 1899  
Santa Monica, CA 90401

Emma S. Ketteringham  
National Advocates for Pregnant Women  
15 W. 36<sup>th</sup> Street, Suite 901  
New York, NY 10018

---

David Orentlicher