1 CREATING A CRIME TO CREATE CARE

Drugs tend to take your right mind away … [but the] discipline … [of the] court system, along with the medical attention and the counseling, allows them to go back to being the nurturing, caring parents that they would want to be.[1]

Representative G. A. Hardaway, Memphis, Tennessee, 2013

Tennessee's fetal assault law was originally proposed in the spring of 2013. It became law about a year later, in the spring of 2014. It remained in effect until June 30, 2016. The law was proposed again in the spring of 2019, but that proposal did not make it out of committee. Although the United States has a long history of prosecuting women for this conduct, Tennessee's law was the first and, as of this writing, the only state law of its kind in the United States.[2] Before moving on to how the law was justified by those who supported it, we first need to understand some information about how the law was structured. This chapter begins with that information and then moves into the hearing rooms where the fetal assault law was debated.

First the structure of this particular law: Technically speaking, the legislature created this crime, not by creating an entirely new crime but by enacting a law expanding the scope of an existing criminal statute. This is how it worked: Like every other state, Tennessee makes assault a crime. It is a misdemeanor, which means that if you violate the statute, you can be incarcerated for no more than eleven months and twenty-nine days. Assault is defined, in Tennessee, as "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another."[3] You will notice, when you read this, that this particular language says nothing about pregnancy or a fetus. For prosecutors who might want to charge a woman with assault because of her drug use during pregnancy, the absence of specific language about pregnancy or the fetus in the statute

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could cause legal problems. She could argue, in that case, that taking drugs while pregnant is not what the legislators meant by assault.

Despite this possible legal problem, across the nation, and in Tennessee, women have been prosecuted for drug use during pregnancy for violating statutes that were not initially designed to criminalize this particular conduct. For example, women have been charged with assault, chemical endangerment of a minor, or child abuse, and the prosecutors in those cases have argued that in utero drug exposure was included in the definitions of those crimes. In many states, however, these charges led to legal disputes. The disputes in these cases often came down to the question of whether or not in utero drug exposure was the kind of conduct that the legislature intended to make criminal when they wrote the law. These legal disputes highlighted a tremendously important principle in criminal law. Prosecuting someone for a crime is a serious act. It can lead to prison as well as a whole host of other consequences. Thus, courts are generally very careful to make sure that the conduct being charged is actually what the legislature intended to criminalize. To figure that out, the court is supposed to look first to the language of the criminal statute. If the conduct being charged does not fit squarely into the words of the statute, that can be a serious problem for the prosecution. Here the argument was that exposing a fetus in utero is not assault, or chemical endangerment, or child abuse because when those legislatures were writing those laws they were not thinking about a fetus as a victim of those crimes. With two exceptions, in South Carolina[4] and Alabama,[5] prosecutors lost those cases on appeal for exactly these reasons.[6] In general, courts were coming to the conclusion that the victim contemplated in those criminal statutes did not include a fetus.

If you take another look at the Tennessee assault statute with these legal concepts in mind, the problem is pretty clear. The legal question facing prosecutors was whether a court would conclude that the word "another" in Tennessee's definition of assault included a fetus in utero. In fact, on February 1, 2013, the Tennessee Attorney General issued a memo making clear that the answer was no. According to the Attorney General, Tennessee law at the time "exempt[ed] from criminal liability any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant."[7] This was, however, an interpretation of a then-existing state law. If the legislature passed

a new law creating a new crime, this would no longer be the case. And that is precisely what happened. The fetal assault law that was in effect from 2014 to 2016 stated that:

> [N]othing in this section shall preclude prosecution of a woman for assault . . . for the illegal use of a narcotic drug . . . while pregnant, if her child is born addicted to or harmed by the narcotic drug and the addiction or harm is a result of her illegal use of a narcotic drug taken while pregnant.[8]

The enactment of this law set the legal ground for the prosecutions. As Part II of this book lays out in great detail, the vast majority of women prosecuted for this crime were poor. Their race varied. In the eastern, Appalachian regions of the state, the prosecutions were targeted almost exclusively at poor white women. In Memphis, in the far west of the state, both poor Black and poor white women were prosecuted.

Now that we have a basic sense of how the law worked, we can move on to how it was justified. This moves us into the hearing rooms. As we will see, those that supported the fetal assault law put forward, in addition to standard justifications for a criminal law, a seemingly strange set of arguments. They argued that it made sense to create a crime for the purpose of creating opportunities for women to receive care. To know just how strange that is, you have to know a little bit about how crimes are traditionally justified and about the conceptual difference between government systems that punish and government systems that provide support.

First, punishment: As every student who has completed the first year of law school could tell you, there are two fundamental schools of thought about the purpose of punishment in the criminal system. The first is retribution. As John Rawls explains, "the retributive view is that punishment is justified on the ground that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing."[9] The second school of thought, utilitarianism, sees the purpose of punishment differently. The purpose of the criminal system, in a utilitarian view, is forward-looking. As stated in a criminal casebook that a typical first-year law student might read "[u]tilitarian thought held that punishment's sole aim was to prevent crime and that it could do so by deterring, reforming and incapacitating offenders."[10] Therefore, the criminal system is

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either about retribution (getting even) or about some practical view of what we might do to those who commit a crime to try to make sure it does not happen again.

Utilitarianism splits into two basic ideas: incapacitation and rehabilitation. Incapacitation suggests that the purpose of the criminal system is just that – to separate the criminal from the society so that they cannot commit crimes. Rehabilitation suggests something different – that society might provide individuals in the criminal system with some level of support as a means to transform them from someone who is likely to commit crimes to someone who is less likely to commit crimes. For example, a person in prison might get the equivalent of high school classes, anger management, or drug treatment on the theory that these might make it less likely that the person will commit crime (or recidivate) afterwards. As one prominent legal theorist explains, the concept of rehabilitation is tied inextricably to our belief in prisons. "Convicted felons are separated from their former life, confined in a secure facility and subjected to some regiment that will change their attitude and enable them to be productive, law-abiding citizens once they are released."[11] Thus, prisoners receive services (drug treatment, anger management) and education (high school and college classes, vocational training) in the hope that they will leave prison and no longer commit crimes. The enormous attention we pay to the recidivism rates of those who participate in these programs is a sure tell that the goal of rehabilitation is precisely that – to provide services designed to make sure that those convicted of crimes no longer commit crimes. When it comes to rehabilitation, we have not only traditional "programs" that are located in prisons and included as a part of community-based sentences, but as Chapter 3 lays out, problem-solving courts, providing treatment inside the court process itself. While they are take a slightly different form, problem-solving courts are, for the most part, designed to accomplish the same goal that rehabilitation has always focused on: "customizing punishment . . . thereby reducing the likelihood of repeat offending and increasing the likelihood that the offender can become a productive member of society."[12]

In addition, in punishment systems (our jails and prisons), we also have to provide some basic level of care (food, shelter, health care) for those who are incarcerated because their incarceration bars them from

providing that care for themselves. That is, however, a by-product of our basic punishment purpose, not the purpose of the system itself.

Second, social welfare: In contrast to our criminal system, programs designed to provide social welfare support are, at least in theory, designed to do something very different than criminal systems. For a sense of what society claims these programs are for, we can take a look at the preamble to the first Social Security Act, the legislative source of much of the United States' social welfare system. According to that 1935 Congress, the Social Security Act was:

> An act to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes.[13]

To take another example, Congress has told us that the purpose of Medicaid, the health care program that provides medical care to more than seventy million low-income children and adults,[14] is to enable states to "furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care."[15] This sounds like care and not like punishment. What you will notice, though, in the legislative record in Tennessee, is that these distinctions, between punishment and care, start to blur.

This takes us into the hearing rooms. Fetal assault was the subject of hearings twice, in 2013, in advance of the original passage, and in 2016, as advocates tried, and ultimately failed, to lift the sunset date and keep the law on the books. While, as explained later in this chapter, there was an enormous emphasis on the relationship between the crime and care in those hearings, to be fair, it is true that this record also contains a hefty dose of traditional rationales for criminal laws. Take for example Representative Lamberth who repeatedly justifies the law as targeted at conduct meriting

punishment. As he questions witnesses during the hearings, he continually asks one question:

> Do you agree that a woman should be charged with child abuse for putting cocaine in her newborn baby's bottle? And if you do, what is the difference between that act and taking cocaine in the days before birth?[16]

For him both are equal and should be crimes and should be punished simply because we as a society should target this conduct for condemnation. He is not looking to provide care here, he is condemning the conduct as morally wrong and worthy of punishment, plain and simple. This sounds exactly like retribution.

Similarly, Amy Weirich, the District Attorney for Shelby County, called the mothers the "worst of the worst."[17] Representative Teri Lynn Weaver, who was the primary sponsor of the bill in the house, offered a slightly different set of rationales – rationales that sound more like deterrence and incapacitation. She described the women targeted by the law as women who "don't want help; they don't even recognize there's life in there."[18] In the 2013 hearing, Weaver is clear about her intent: "Let's just focus on the children."[19] Although both Wyrick and Weaver temper their remarks at different points, clearly for them and for others, there is a piece of what was happening that was about some mixture of separating the women from society and getting that proverbial eye for an eye.

In addition, a good deal of what was said in the hearings sounds like rehabilitation. As we listen, though, something strange starts to happen. Instead of thinking about rehabilitation as something society does as a part of punishing bad conduct and rehabilitating those who commit crimes, voices supporting the bill talk about the rehabilitation that prosecution can provide as so inherently valuable that it makes sense to create a crime just to get women access to that care. In their words we find two hypotheses. First, that creating a crime will lead to prosecution that will, in turn, lead to opportunities to access care, and second, and even more strange, that creating a crime will lead to prosecution, which, in and of itself, is a form of care.

We can begin with the first hypothesis – that prosecution is a road to accessing care. In both the hearings on initial enactment and the hearings on reauthorization, there are multiple statements suggesting

that the women who would be subject to prosecution could not access treatment without being prosecuted. Perhaps most striking was the statement of Barry Staubus, the Sullivan County District Attorney. Staubus characterized the crisis in dramatic terms: "We are drowning in east Tennessee . . . with these babies and we feel powerless."[20] For him the fetal assault law was the solution:

> I think when we see this statute . . . we are going to be able to bring lots and lots of women into a program we're creating specifically for drug addicted mothers and so I think that with this statute, what we'll see is that there will be a vacuum for that and we'll see a lot of programs and we'll see a lot of judges and we'll see a lot of prosecutors wanting to do this and recommending this and the judges I think will find the resources to do it.[21]

This is a really remarkable statement. He is saying that his community has an overwhelming need for health care for pregnant women struggling with substance use disorder, but the only way that that care need would be met is if the legislature creates a crime. Staubus was not alone. In 2016, District Attorney General Amy Weirich spoke in favor of reauthorization and offered the same rationale: "What was happening before we had this legislation is that those babies were being taken from their mothers and their mothers were left helpless without any chance of getting the help they need."[22] The way she said this, emphasizing that treatment was not available "before we had this legislation," clearly indicates that, in Weirich's view, it was the creation of the crime that led to women being able to access help.

Weirich suggests that prosecution is a road to accessing care, and Staubus suggests that we need prosecutions to convince those in power to provide care opportunities. Others posit however that that prosecution plays another role – that prosecution itself is a form of care. Listen, for example, to Representative G. A. Hardaway, a representative from Shelby County. He characterized the legislation as serving as a benevolent force in the mothers' lives: "[while] drugs tend to take your right mind away . . . [with the] discipline . . . [of the] court system . . . [the mothers can] go back to being the nurturing caring parents that they would want to be."[23] Here, prosecuting does not just provide opportunities to access care; it is framed as a form of care in and of itself.

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Admittedly, characterizing criminal sanctions as incentivizing defendants to cease engaging in illegal behavior and choose more positive paths is not unusual. Nor is it particularly unusual to characterize courts as able to use their coercive authority to compel behavioral changes in criminal defendants as well as others subject to the jurisdiction of various courts. What is unusual in this legislative record is the way that prosecutors and representatives begin to frame the creation of the crime, not just as creating an incentive for women to seek treatment but as the precondition to and provider of treatment itself. In the rhetoric of the supporters, it is the creation of the crime and the ability to prosecute that both makes treatment possible and is a form of treatment in and of itself. Repeatedly, legislators and prosecutors characterize prosecution itself as that which will provide access to treatment that is not otherwise available to the women. This point bears emphasis. In the rhetoric of the hearings justifying the passage of the statute, the "treatment" available only through the courts is contemplated as so beneficial that it justifies the criminalization of previously noncriminal conduct.

As we will learn in more detail in Chapter 3 these ideas are, in fact, closely linked to the growth, beginning in the late 1980s, of a new generation of problem-solving courts. At that time, as a result of the war on drugs, criminal courts found themselves with courtrooms filled with individuals with extensive needs that led to their criminal conduct, which led in turn to a new generation of courts that would attempt to address this problem. And in fact, the care rationale of the fetal assault law was largely born of the close linkage between this particular legislation and the Memphis drug court. For example, Senator Tate explained that "this bill what it does is gives the DA or a judge the right or authority if you will to send a mother of a child to a drug court."[24] Similarly, Representative Lamberth, looking back in 2016, argued that the law succeeded because it provided access to a drug court: "one hundred percent of the women that were seeking drug court assistance right … now would not be aware of it."[25]

Quite explicitly in the view of these proponents, if the problem is the lack of resources for women needing help, the solution is the creation of the crime. One proponent described the law as "offering their mothers

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the help they so desperately need but cannot obtain on their own."[26] As Senator Kelsey explained:

> The other issue that this committee also needs to consider is that these women are usually not being sent to jail at all but in fact the beginning of the prosecution is what the court [is] able to do to send them to drug treatment. That's another very important and positive aspect for the bill.[27]

This view is not restricted to legislators. Instead, for those women who desperately need treatment, it is descriptive of the searing reality in their communities. In one of the most revealing moments in the hearings, Nikki Brown,[28] an African American woman from Memphis who was prosecuted under the statute, and graduated from the Memphis Drug Court, testified in favor of making the fetal assault law permanent.[29] During the hearing, Representative William Lamberth asked Ms. Brown if "[w]ithout a statute on the books ... would you have gotten the help that you are getting right now?"[30] She responded, "No, I am very thankful for the program."[31] Clearly for Ms. Brown, no help was available to her before she was prosecuted.

Finally, revealing what some imply was the real justification for the statute – namely filling the seats of drug courts throughout the state – Senator Finney, from Jackson, Tennessee, talked about how his district might benefit from the creation of this crime: "we have a great drug court in Jackson ... and I'm sure it would benefit from something like this."[32] In Senator Finney's view, his drug court is so valuable that we should create crimes in order to create clients for that program.

At this point it should be clear that the central rationales for the creation of this crime included the idea that prosecution is a mechanism to create and help women access treatment resources and that accessing a drug court was a valuable form of treatment in and of itself. The defeat of the attempt to renew the crime and its ultimate demise, it turns out, had everything to do with those ideas. Nowhere among the statements of proponents of the legislation is there any suggestion that this state of affairs – the seemingly overwhelming lack of resources available to support pregnant women struggling with addiction – might call not for the creation of a new crime but instead for the augmentation of community-based

social support. Instead, in their statements, criminalization and treatment are inextricably intertwined.

When the last hearings on the issue of making the fetal assault permanent were held, the bill was in the Tennessee House of Representatives Criminal Justice Subcommittee. That committee had six members, and the bill needed four votes to move out of committee. Ultimately it got three. Representative Andrew Farmer, of Sevierville Tennessee, cast the deciding vote. Although one can never know precisely what motivates someone to cast a vote, he did make some statements that give us a window into his thinking. Here is what he said:

> If we are going to put these ladies in a situation that they can potentially be prosecuted … let's fund the treatment … Once they're prosecuted, we've all lost … The goal is to have these mothers off these opioids well before birth … Once we are to the prosecutorial stage, we've lost.. Let's ask this state to give $10, $20 million for rehabilitative funding for these ladies that are addicted to opioids … In a situation like that I may be able to support the bill but right now, to put the burden on these ladies the way we do and then leave them just hung out to dry, I just can't do that.[33]

Now it is possible that Representative Farmer was just being polite, or politically careful, when he stated that he might support the bill if treatment was available, but let us assume for a minute either this was his actual position, or, even if we do not think that, that he believed this to be a reasonable position. Representative Farmer was fine with criminalization. He just was not fine with criminalization without care.

As this chapter has laid out, care linked to punishment was a primary solution posited by those who supported the fetal assault law. The next chapter steps back from that "solution" to the question of what problem those legislators were trying to solve.

NOTES

1. *Hearing on S.B. 1295 Before the H. Crim. Just. Sub-Comm.*, 108th Gen. Assemb., 0:48:43 (Tenn. April 9, 2013) [hereinafter *Hearing on 1295 Before the H. Crim Just. Subcomm. (II)*], http://tnga.granicus.com/MediaPlayer.php?view_id=269&clip_id=7751 [https://perma.cc/5BB6-XGNK] at 0:28:25.

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2. Although no other US state has passed a law that explicitly targets this conduct, Rewire News has reported that the Assiniboine and Sioux Tribes in Montana have similar crimes on the books. Rewire. *The Breach: Investigating Big Horn County* (2018), https://the-breach.simplecast.com/episodes/a789ffaa-a789ffaa [https://perma.cc/GT5D-Z4MM].
3. Tenn. Code Ann. § 39–13–101(a)(1)–(2) (2018).
4. Whitner v. State, 492 S.E.2d 777 (S.C. 1997).
5. In Re. Ankrom, 152 So.3d 397 (Al. 2013).
6. *See, e.g.*, State v. Aiwohi, 123 P.3d 1210, 1223 (Haw. 2005) (holding that definition of "person" in a manslaughter statute did not include a fetus); Cochran v. Commonwealth, 315 S.W.3d 325, 330 (Ky. 2010) (*following* Commonwealth v. Welch, 864 S.W.2d 280, 285 (Ky. 1993) holding that wanton endangerment does not extend to mother's use of drugs while pregnant); State v. Mondragon, 145 145 P.3d 574, 579 (N.M. Ct. App. 2008) (*following* State v. Martinez, 137 P.3d 1195, 1198 (N.M. Ct. App. 2006) holding that the ordinary meaning of "child" in a child abuse statute did not include a fetus in a case where the mother used cocaine during pregnancy); State v. Bales, 2013-Ohio-4957 (Ohio Ct. App. Knox County 2013) (*following* State v. Gray, 584 N.E.2d 710, 711 (Ohio 1992) holding that criminal child endangerment does not apply to a fetus). *But see* Hicks v. State, 153 So.3d 53, 54 (Ala. 2014) (interpreting "child" in a criminal chemical-endangerment statute to include unborn); State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003) (*following* Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997) interpreting "person" in a criminal statute to include viable fetus).
7. Liability for Infants Born with Narcotic Drug Dependency, Op. Tenn. Att'y Gen. No. 13–01 (Revised) (February 1, 2013).
8. Tenn. Code Ann. § 39–13–107(c)(2) (2014) (expired July 1, 2016).
9. John Rawls, Two Concepts of Rules, 44 The Philosophical Rev. 3, 5 (1955).
10. J. Kaplan, R. Weisberg, & G. Binder, *Criminal Law Cases and Materials* 32 (2008).
11. Edward L. Rubin, The Inevitability of Rehabilitation, 19 Law & Ineq. J. 343, 347 (2001).
12. Robert V. Wolf, *Ctr. for Ct. Innovation, Principles of Problem-Solving Justice* 1, 7 (2007), www.courtinnovation.org/sites/default/files/Principles.pdf [https://perma.cc/2VE7-959D].
13. Social Security Act, H.R. 7260, 74th Cong. (1935).
14. Medicaid.gov *September 2020 Medicaid and CHIP Enrollment* (2021), www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html.
15. Social Security Act § 1901, 42 U.S.C. § 1396 (1994).
16. *See Debate on H.B. 1660 Before the H. Crim. Just. Sub-Comm.*, 109th Gen. Assemb. (Tenn. March 15, 2016) (statement of Rep. William Lamberth,

Chair, H. Crim. Just. Subcomm.), http://tnga.granicus.com/MediaPlayer.php?view_id=341&clip_id=12002 # [https://perma.cc/EE24-56F2] at 1:48.

17. *See id.* at 1:25:40.
18. *See Hearing on S.B. 1295 Before the H. Crim. Just. Sub-Comm.*, 108th Gen. Assemb., 0:56:06 (Tenn. March 13, 2013) [hereinafter *Hearing on 1295 Before the H. Crim Just. Subcomm. (I)*], http://tnga.granicus.com/MediaPlayer.php?view_id=269&clip_id=7499&meta_id=140901 [https://perma.cc/A2C6-LS8A].
19. *See id.* at 1:03:23.
20. *Hearing on S.B. 1391 Before the S. Judiciary Comm.*, 108th Gen. Assemb., 59th Sess. 2:04:00 (Tenn. March 18, 2014) [hereinafter *Hearing on S.B. 1391 Before the S. Judiciary Comm. (I)*], http://tnga.granicus.com/MediaPlayer.php?view_id=269&clip_id =9050 # [https://perma.cc/86M6-KQDV] (testimony of Barry Staubus, District Attorney of Sullivan County) at 2:14:05.
21. *See id.* at 2:15:09.
22. *See supra* note 16 at 1:30:00; *Hearing on S.B. 1391 Before the S. Judiciary Comm. (I)*, *supra* note 20; *Hearing on S.B. 1391 Before the S. Judiciary Comm.*, 108th Gen. Assemb. (Tenn. April 9, 2013) [hereinafter *Hearing on S.B. 1391 Before the S. Judiciary Comm. (II)*], http://tnga.granicus.com/MediaPlayer.php?view_id=262&clip_id=7746 # [https://perma.cc/8QA6-R2CP] (statement Dist. Attorney Gen. Amy Weirich).
23. *See Hearing on 1295 Before the H. Crim Just. Subcomm. (II) supra* note 1 at 0:28:25.
24. *See supra* note 22 at 2:27:57.
25. *See supra* note 16 at 2:20:45.
26. *See id.* at 1:04:03.
27. *Id.* (statement of Sen. Brian Kelsey, Chair, S. Judiciary Comm.) at 2:29:24.
28. Although this individual chose to testify publicly and used her real name in her testimony, the name used here is a pseudonym assigned by the research team. The pseudonym is used in the main text as well as in the notes that follow. Despite the public nature of many of the records cited in this book, to protect from unwanted additional disclosures, pseudonyms were assigned for each of the women whose cases are discussed in this book.
29. *See supra* note 16 at 1:12:50.
30. *See id.* at 1:15:00; *Hearing on S.B. 1391 Before the S. Judiciary Comm. (I)*, *supra* note 20; *Hearing on S.B. 1391 Before the S. Judiciary Comm. (II)*, *supra* note 22.
31. *See supra* note 16 at 1:15:10; *Hearing on S.B. 1391 Before the S. Judiciary Comm. (I)*, *supra* note 20; *Hearing on S.B. 1391 Before the S. Judiciary Comm. (II)*, *supra* note 22 (statement of Nikki Brown).
32. *Hearing on S.B. 1391 Before the S. Judiciary Comm. (I)*, *supra* note 16 (statement of Sen. Lowe Finney) at 2:20:50.
33. *See supra* note 16 (statement of Rep. Andrew Farmer, Chair, H. Crim. Just. Subcomm.) at 2:27:17.