The Fetus Fetish *&* the Erosion of Reproductive Rights in the USA

by [Ruth Cain](http://criticallegalthinking.com/author/ruthcain/) • 4 July 2011

Rennie Gibbs, a 15 year old girl from Missisippi, has been charged with murder for the following reasons: [her baby was born dead, and she apparently took cocaine during pregnancy](http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-murder-charges). A direct causal link between the drug use and the stillbirth was not established. In similar vein, the state of Utah recently proposed legislation to criminalise miscarriage, [if the mother can be proven to have caused the fetal death](http://le.utah.gov/~2010/htmdoc/hbillhtm/HB0012.htm). What does this hardening of the concept of maternal-​fetal competition in predominantly (but not exclusively) Christian-​right, conservative ideologies mean in legal and cultural terms? What types of maternal and fetal bodies are created and envisaged by such punitive risk-​focused laws? It will be my argument here that the mother accused of ‘pre-​birth killing’ through neglect or toxicity to the fetus is caught in the paradox of what Lauren Berlant in The Queen of America Goes to Washington City (1997) calls the excessive Western ‘focus on the isolate body and the totality of its own political condition’. This paradoxical effect is achieved in two main ways: firstly, the mother’s body becomes construed as uniquely dangerous in and of itself to the fetal body contained within it, in a way which discounts other risks and dangers. Secondly, the ‘isolate body’ privileged in terms of victimisation and consequent rights is that of the fetus, which entirely displaces the mother’s.

An estimated 2% of pregnancies end in stillbirth, and at least 15 – 20% in miscarriage.The actual cause of any fetal death being in most cases difficult to pinpoint to one factor, this is clearly a move to both punish the ‘unruly’ mother (to use Rebecca Kukla’s (2005) term) for an increasingly broad range of actions deemed dangerous to the fetus, and to bolster up the legal personhood of the fetus itself. What we are seeing is the creation of new fetal legal ‘rights’ which overbear the mother’s. The US states which have created new laws to protect fetuses (Texas, South Dakota, Georgia, Kansas, to name but a few) already heavily proscribe access to abortion, although they cannot entirely ban it, since the Fourth Amendment protects the rights enshrined in [Roe v Wade](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0410_0113_ZS.html) (1973). Maternal punishment for neglect or toxicity to the fetus reinforces the doctrine of fetal personhood from conception. However, given that the ‘crime’ may be proven merely by the fact of fetal death and failure to show complete lack of involvement in it, maternal punishment is in fact achieved through fetal fetishisation– the creation of the fetus as an object or, indeed, person acknowledged as having a sublime value unique to itself, which operates to shut down argument or debate. The fetal fetish is perhaps the most visible, emotive sign of the way certain forms of consumerist individualism and risk-​focused thinking focus personal and legal attention on the (faulty) conduct and bodies of mothers. And through its distorting lens, all women of childbearing age are invasively viewed as potential mothers, whatever their personal reproductive plans or histories.

The persistent risk-​analysis pervasively applied to all Western pregnancies has produced a new regulative fiction, the ‘pre-​pregnant’ body. In mental health practice, for instance, certain drugs such as sodium valproate, which carries around a 0.1% risk of fetal malformation, are not prescribed to any woman of childbearing age regardless of the potential positive effects of the drug. The woman is simply not allowed to choose that risk for herself, regardless of her personal feelings about children, sexual preferences or contraceptive practices. In a different context, corporate interventions aimed at fetal protection have disqualified women of childbearing age from ‘risky’ jobs, as Michael Thomson’s (Reproducing Narrative, 1997) work explores. The fiction of a female body ever-​ready to produce a (pathological) pregnancy is a hysterical one, and we see this hysteria in its most malevolent form if we listen to Kansas state representative Pete de Graaf, who in a debate about health insurance coverage, recently argued that abortion should not be covered even in cases of rape and incest. He argued that women should see the risk of pregnancy through rape as something to ‘plan ahead for’. Images of the body as property that the good female citizen would not put at risk echo some of the uglier metaphors of the contemporary rape debates, such as ‘don’t leave your front door open if you don’t want to be burgled’. ([DeGraaf expands](http://blogs.pitch.com/plog/2011/05/pete_degraaf_rape_flat_tire.php): ‘I have a spare tire on my car… I also have life insurance. I have a lot of things that I plan ahead for.’)

This is not just a US issue, clearly: the fetishisation of the fetus is taking place across the Western world. No country with access to ultrasound visualisation technologies can avoid the imagery of the fetus, viewable during all ‘normal’ pregnancies and even on advertising billboards. Nonetheless, fetal fetishisation is most clearly illustrated in the Republican Southern and Mid-​Western states of America. Take for example the 2011[Georgia prenatal murder bill](http://www1.legis.ga.gov/legis/2009_10/fulltext/hb1.htm), which outlaws miscarriage or stillbirth with ‘human involvement’. This broad term would clearly cover a woman who deliberately injures herself, for example by throwing herself down the stairs (although many would argue that a woman in these circumstances needs support rather than criminalisation for such a devastating act of self-​harm ), but could clearly also cover pregnant women who drink, smoke, eat ‘junk’ food, drive fast, or work long hours in stressful jobs. US federal law has sent a clear message about fetal personhood through the [Unborn Victims of Violence Act (UVVA)](http://www.glin.gov/view.action?glinID=94990), enacted in 2004. This allows for the perpetrator of a violent crime against a pregnant women to be charged with crime against the fetus too. As Jeanne Flavin writes in Our Bodies, Our Crimes: The Policing of Women’s Reproduction in America (2008):

The Unborn Victims of Violence Act explicitly states that nothing in the act “shall be construed to permit the prosecution … of any woman with respect to her unborn child.” But state statutes have used nearly identical language (… only after hard-​fought battles to get the language included in the first place) and then have gone on to prosecute pregnant women for their drug use in what has been called a “legislative bait and switch.” (As quoted in online blog [RH Reality Check](http://www.rhrealitycheck.org/blog/2010/02/15/its-illegal-37-states-for-a-pregnant-woman-fall-down-stairs)).

The state rules recently created to inhibit abortion are legion: 24 hour mandatory ‘consideration periods’ before treatment, obligatory parental consent for women under 18, compulsory counselling (often with anti-​abortion ‘scripts’ and/​or held in specially-​equipped centres designed to help the mother to ‘bond’ with her unborn). In February this year the State of Texas passed a pre-​abortion ultrasound law in which a woman seeking abortion will be compelled to view sonograms described by a doctor before the24-​hour ‘waiting period’. (This is currently under challenge by the Center for Reproductive Rights (CRR) wich has filed a class action lawsuit challenging the law on behalf of [Texas medical providers performing abortions and their patients](http://reproductiverights.org/en/document/preliminary-injunction-texas-medical-providers-performing-abortion-services-v-lakey)).

The compulsory viewing of the fetus is a particularly clear instance of the usefulness of fetal personification as an instrument to limit reproductive choice. Since visualisation technologies revealed the womb’s contents to the screen, it has proven difficult to see the publicly lauded fetus as contained within the mother. The ultrasound picture is now almost universally accepted as the first instance of ‘bonding with’ and publicly announcing a ‘baby’. As such, we may understand the newly-​enacted Texan law to be a disciplinary form of the medical-​social ritual which now confirms most Western pregnancies around the 12 week mark. The law illustrates the principle that the perceived right of the female individual to control over her own reproductive processes reduces with fetal visibility.…

It is difficult not to interpret the new US state laws as brutal extensions of the risk-​focused philosophy of contemporary pregnancy. Western pregnancy literature already prescribes a limited, careful diet and ‘low stress lifestyle’ to the good and caring future mother. There is now a ‘canonical’ good pregnancy (as noted by Rebecca Kukla in Mass Hysteria (2005)) and a normative public fetus, with which all pregnant women are encouraged to identify themselves and their unborn babies. Maternal punishment for faulty behaviour in pregnancy is not necessarily a direct means of social control, since the woman in question is rarely helped to regulate her own health in pregnancy and may well find herself restricted by poverty, untreated addiction, or personal circumstances; rather, her punishment serves as a deterrent, informing all women that they had better be hypervigilant about the contents of their wombs, even if they are do not (yet) plan to fill them. The legislation maximally intensifies the generally accepted point that in pregnancy ‘your’ body is no longer yours, and your entire life must adapt to produce a safe baby. For the self-​disciplined woman who may slip up once or twice, eat unpasteurised cheese or take a sip of wine, the ‘punishment’ (for now, at least) will simply be unease or guilt regarding her responsibility for the health and welfare of the fetus. For the women criminalised for fetal murder, such retribution is dealt out by the law, given symbolic and disciplinary shape. As such, we may see the predominantly poor and young, white or black/​Hispanic women prosecuted for crimes against the fetus as performing a disciplinary social function for the entire pregnant, and pre-​pregnant, population of women: fail to follow the rules of pregnancy, and you, not just your baby, will suffer the consequences.

The sheer political irrationality and counterproductivity of laws which discourage 15 year old girls from seeking treatment for drug use since they will face prosecution if discovered, after making abortion unaffordable and logistically near-​impossible to obtain, following state failure to provide access to affordable contraception (not to mention sex education) is breathtaking. This reduction of women to ever-​ready womb combines old-​fashioned misogyny with the risk-​based thinking which implicates the unruly (usually female, but also black, or colonised, or any other way abject) body in all socially problematic events.

Rebecca Kukla and Barbara Duden (1993) have shown that the concept of fetal individuation and separation from the mother has been in progress since the Enlightenment exalted the concept of the bounded individual, in constant (self-​) development. As compulsive individualism has accelerated, the fetishisation of the fetus/​hero has entirely normalised maternal-​fetal competition. The fetus ‘him’self in ‘his’ public portraits (such as the famous 1965 photographs by Lennart Nilsson) exists in an apparently self-​contained world; the boundaries of the womb do not appear to limit him. Living children, post-​birth, shrink in stature compared to the glowing fetus in his personal space. Babies, by contrast, disturb the social world with their noisy wants and demands. It has become clear that the most likely ‘remedy’ for the effects of poverty and unwantedness in life of the disadvantaged post-​birth American is incarceration. A political system which can only contemplate individual rather than any form of collective responsibility for the health and welfare of children (and mothers) must prioritise the punishment of the unruly mother at whatever cost to her or her living children. Such a system is less about the protection of life than the expression of intense anxiety about, and hatred for, those bodies which threaten the fetish of wholesome fetal perfection.

A 1984 piece by Zoe Sofia, ‘[Exterminating Fetuses](http://uncledais.files.wordpress.com/2008/10/exterminating-fetuses.pdf)’, assesses the iconicisation of the fetus as a means to block out and denigrate the ‘messiness’ not only of the female body, but of the material world itself: she explores the allegory of the world-​eating fetus (as visualised in the iconic final sequence of 2001: A Space Odyssey) with the mother representing polluted and exploited Earth. Her dramatic vision, written in the context of the Cold War, now looks prophetic. Fetal ‘extraterrestrialism’ mirrors the destructive activities of a neoliberal agenda: a race to the bottom where the rights of living beings to bodily autonomy and a fair share of the things of the earth are eroded in favour of a mythology of self-​reproducing life, floating somehow beyond the wombs in which they are really contained. We must thus see the fetal fetish as something more than a reproductive rights issue, although it is certainly that. It is about the dangerous and inhuman denial of reproductive and personal complexity, setting a falsely perfected, ‘pre-​born’ fetal bubble against the permeable realities of human bodies and their environment.

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