Punitive Courts and Shaky Science: The Case of the Floating Lungs Test in the Criminal Prosecution of Abortions

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Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions* (2019), available at SSRN.

The criminal regulation of abortion seems to be making a strong comeback. Aziza Ahmed in her draft paper, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, examines this trend, placing it in the context of what she calls a "prosecution-based approach to social issues including abortion, caretaking, and pregnancy." (P. 4.) Ahmed's paper offers a disturbing and important dive into the criminal prosecution of women who attempt to abort without help from a doctor—only to stand accused of crimes ranging from feticide to infanticide, to criminal child neglect, if the fetus was deemed to have been born alive. It is an inquiry that merits attention from family law scholarship, which has increasingly recognized that family regulation resides at the interstices of multiple regulatory regimes, including criminal law.[1]

The paper's title refers to the forensic test, the Hydrostatic or Floating Lung Test (HLT or FLT), used to determine whether a fetus was born alive. In its simplest form, it involves submerging the lungs in water and observing if they float, which would be an indication of the presence of air, possibly in the aftermath of drawing a breath. The test was invented by Galen, a Roman physician (129AD-200AD), but emerged as a criminal trial tool in the 17th century and, according to Ahmed, is making a reappearance in cases that involve criminal prosecutions of women who have tried self-managed abortion, miscarried, or even given birth to a stillborn baby. Part of the problem with the test seems to be that, as part of a criminal procedure, it rightly belongs in the seventeenth century. The relevant forensic literature has concluded that the test is unreliable, as good as "witchcraft" according to some lay commentators. Courts, however, regularly resort to it. According to Ahmed, the courts are in fact legitimating an unreliable test, partly influenced by the pressures of the carceral state, the need to produce finality and certainty in cases where there is little room for that, and a moral panic about pregnancy and abortion.

The first part of the paper explores the recent history of state engagement with abortion, pregnancy, and parenting, focusing on the shift from welfare law to criminal law in the eighties and nineties, a moment that also introduced us to "crack babies" and "shaken baby syndrome." Ahmed argues that, in both of those cases, agreement within the scientific community about either the effects of cocaine on fetuses or the existence of a medically recognizable "syndrome" was lacking. Court acceptance of both pathologies further solidified national panics about caretaking and drug use by young mothers, especially minority mothers. Ahmed argues that the same movement from dubious scientific evidence to court acceptance is currently happening in the context of self-induced abortions, which are likely to increase, given the momentum of punitive anti-abortion legislation and the relative ease of obtaining abortifacients online.

Ahmed delves into the Purvi Patel case in order to illustrate the test's problematic use in criminal courts. Patel, a young woman from a conservative South Asian family, used abortifacients, and delivered a fetus which she believed was dead. The state insisted it had been born alive. It prosecuted Patel for feticide

and neglect of a dependent resulting in death. The HLT was employed to prove that the fetus had been born alive. Two expert witnesses, one for each side, came to contradictory conclusions, noting, however, the limitations and potential false positives of the test, which occur frequently. The prosecution won, and Patel was sentenced to thirty years. Despite the fact that the decision was partly reversed on appeal on constitutional grounds not involving the HLT, the test was accepted as legitimate, and Patel's fetus was deemed to have been born alive on that basis. Even worse, the court seemed to validate the test regardless of where the alleged breath had been drawn inside or outside the birth canal. This overlooked the standard legal rule that the child needs to have been expelled from the birth canal for the determination of a live birth. The paper then offers a brief history of HLT's use by the courts since the nineteenth century that further highlights an overall inconsistent approach to the test since the nineteenth century, while more recent cases have relied on the test as proof of life.

The paper's discussion of the reasons why such a dubious test persists is perhaps the richest part of the article and the one that can potentially be mined for further development in a next version of the draft. First, Ahmed places the HLT in the broader context of rules of evidence on the admissibility of scientific expertise in criminal cases. The HLT survives against the background of very problematic evidentiary standards in regards to scientific expertise. Despite skepticism about forensic science, much of it remains admissible in criminal trials. (P. 26.) According to Ahmed, the return and perhaps further solidification of the HLT comes as a response to an intense need for finality and blame happening at a politically charged time when anti-choice activists have often successfully pushed for a conflation of abortion with infanticide. Ahmed argues that the current moment is also characterized by a moral panic about pregnant women who do not seem to behave according to a maternal instinct and seek instead to end their pregnancies. While Ahmed suggests that the application of the test has a raced and gendered logic, as do moral panics, the raced aspects of its application could use more detailed treatment.

Ahmed ends with the policy proposal that we should abandon the test altogether. This is not simply because of the test's unreliability. Indeed, if we follow Ahmed's thinking to the end, it leads to the conclusion that the decision about whether a fetus was born alive is a highly charged one, morally and politically. Rather than provide an objective way to assess when life begins, forensic science reflects and emerges from this fraught moral and political terrain. Overall, the paper compellingly draws our attention to the forceful comeback of punitive abortion regulation. Family law curricula sometimes heavily focus on the constitutional law aspects of decisions to have or not have a family. Ahmed points us to the growing shadow of the criminal law and compels us to pay attention.

1. *See, e.g.,* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 **Iowa L. Rev.** 1253 (2009); Tonya L. Brito, Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families, 15 **J. Gender Race & Just.** 617 (2012); Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 **Const. Comment.** 281 (2017); Jeannie Suk, Criminal Law Comes Home, 116 **Yale L. J.** 2 (2006); Andrea L. Dennis, *Criminal Law as Family Law*, 33 **Ga. St. U. L. Rev.** 285 (2017).

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