



LESSON FROM THE U.S. EXPERIENCE WITH UNBORN VICTIMS OF VIOLENCE LAWS

INTRODUCTION

This year, Canadian Member of Parliament Ken Epp (Edmonton Sherwood Park) introduced a private bill called The "Unborn Victims of Violence Act." MP Epp claims that an Unborn Victims of Violence Law will not create a basis for policing or punishing pregnant women. Specifically, MP Epp has cited Denise M. Burke, Vice-President and Legal Director of Americans United for Life, who asserts, "There are no cases that prosecuted mothers under fetal homicide statutes." Instead, she claims that there are cases in the U.S. that (1) prosecute third parties, not mothers, under fetal homicide statutes; and (2) prosecute women under child abuse or child endangerment statutes (for prenatal drug use), and not under fetal homicide statutes.ⁱ

MP Epp and Ms. Burke are mistaken. Women in the United States have in fact been prosecuted directly under fetal homicide and unborn victims of violence act laws ("UVVA"). (See discussion of cases below). Moreover, while the majority of these cases involve prosecutions of pregnant women who seek to continue to term in spite of a drug problem, pregnant women who drink alcohol have also been prosecuted as has a woman who exercised her right to informed medical decision-making and refused to have a cesarean section on a particular date.

Today, more than thirty U.S. states have case law or statutes that recognize the crime of feticide and create a separate legal status for the fetus. In practice, these laws treat the pregnant woman as little more than collateral damage in an attack portrayed to the public as one directed against the fetus.ⁱⁱ Moreover, pregnant women in states with such laws are more likely to be punished for behaviors and conditions that are not criminally sanctioned for other members of society.

OVERVIEW OF U.S. CASES

NAPW is in the process of reviewing hundreds of U.S. cases involving the prosecution of a woman in relationship to her pregnancy. Even in those cases where women are not prosecuted directly under a feticide statute, feticide laws are explicitly cited as the basis for interpreting a state's child abuse law to apply to pregnant women and the fetuses they carry. In every case where we have obtained information about the states' arguments, we have found that *all* explicitly rely on fetal homicide laws (or case law achieving the same result) as authority for interpreting the child abuse, drug delivery to a minor, and homicide by child abuse laws as now applicable to the relationship between a pregnant woman and the fetus she carries.ⁱⁱⁱ In other words, prosecutors arrest pregnant women and new mothers under such

things as child abuse laws based on the argument that a feticide statute provides the legal and legislative authority for interpreting the word "child" in the abuse laws to include fetuses.

When American women are able to obtain vigorous legal representation, they have, with the exception of women in South Carolina, eventually been able to get the charges dismissed. Nevertheless, our research is uncovering scores of cases where the charges were not challenged and women are serving lengthy prison terms based directly on feticide/UVVA laws or other statutes newly interpreted to apply to fetuses as a result of such laws. Even those women who were ultimately successful in challenging such prosecutions have often spent years in jail, separated from their children, while their case was pending.

As I am sure is true in Canada, UVVA/feticide laws are passed based on the claim that they are intended to protect fetuses and pregnant women from third party attacks. Over and over again we have seen these laws transformed into tools for policing pregnant women. They are used to promote the dangerous and inaccurate analogy that a pregnant woman who is unable to overcome a drug or alcohol problem is no different than a man who beats his pregnant girlfriend. These arguments are particularly cruel in the United States where we do not have universal health care and where most pregnant women who need and want mental health and drug treatment services cannot obtain appropriate care.^{iv}

The only U.S. state that has explicitly upheld prosecutions of women because they risked or allegedly caused harm to their fetuses, is South Carolina. In South Carolina, the state supreme court created a common law crime of feticide in a case where a man brutally attacked a pregnant woman.^v That case was cited as the primary source of precedent for later interpreting the state's criminal child abuse law to apply to pregnant women who risk harm to their fetuses^{vi} and for interpreting the state's homicide by child abuse laws to apply to a pregnant women who used an illegal drug while pregnant and coincidentally suffered an unintentional stillbirth.^{vii} Cornelia Whitner, who gave birth to a healthy baby served eight years in jail. Regina McKnight is currently serving twelve years on a twenty-year sentence.^{viii}

As the Supreme Court of South Carolina explained in the *Whitner* decision:

In a unanimous decision, we held it would be “grossly inconsistent ... to construe a viable fetus as a ‘person’ for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.” Accordingly, the Court recognized the crime of feticide with respect to viable fetuses. Similarly, we do not see any rational basis for finding a viable fetus is not a “person” in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.^{ix}

Our research found that at least 89 women and possibly as many as 300 women have been arrested in South Carolina based on the legal precedent established by South Carolina's judicially created fetal homicide law.

In the U.S., passage of feticide laws has prompted massive invasions of pregnant women's privacy and violations of patient-health care provider confidentiality. For example, in 2003, Texas, at the request of

so-called "right to life" groups, passed the Prenatal Protection Act (SB 319). Among other things, this law established that for the purposes of the penal code, including murder and aggravated assault, an individual is defined as "human being who is alive, including an unborn child at every stage of gestation from conception to birth."^x The bill was ostensibly written to ensure criminal liability in the event of a crime against a pregnant woman that harmed or killed her fetus – for example, a drunk-driving accident or an incident of domestic violence.^{xi}

The primary result of that law, however, was the arrest and prosecution of over forty pregnant women and new mothers who were believed to have had drug problems while pregnant.^{xii} Almost immediately after the law was passed, a local prosecutor took the position that this law now recognized fetuses as "minors," making the state's law criminalizing delivery of drugs to minors applicable to women who became pregnant, continued to term and were not able to overcome their addiction problems within pregnancy's timeline. As reported by a local newspaper:

The bill passed, was signed into law by Gov. Rick Perry, and took effect on Sept. 1, 2003. Three weeks later, 47th District Attorney Rebecca King (prosecuting in Potter and Armstrong counties) penned a letter to "All Physicians Practicing in Potter County" – Amarillo – informing them that under SB 319 "it is now a legal requirement for anyone to report a pregnant woman who is using or has used illegal narcotics during her pregnancy." Under King's reasoning, penned on Sept. 22, the new definition of "individual" – which was added to the Penal Code, among other statutes – directly affected the Controlled Substances Act, since the Penal Code provides punishment for "delivery" of narcotics, including marijuana, to children, and thus now to fetuses. While SB 319 supposedly protects mothers from any heightened civil or criminal liability, King says her reasoning is based on a "clear reading" of the statutes.^{xiii}

In response to the District Attorney's letter, physicians in fact turned in more than forty women in spite of U.S. Supreme Court precedent establishing that doctors may not collect evidence in the guise of medical care to further criminal investigations.^{xiv} Although we were eventually able to overturn the convictions, women spent years in jail while the cases worked their way through the court system.^{xv}

EXAMPLES OF U.S. PROSECUTIONS OF PREGNANT WOMEN BASED DIRECTLY ON FETAL HOMICIDE/UNBORN VICTIMS OF VIOLENCE LAWS

California is instructive on the issue of how fetal homicide/UVVA laws become weapons against pregnant women and new mothers. California may be the first U.S. state to have passed such a law in 1970. The California Supreme Court had recently held that the state's homicide statutes could not be used to prosecute a man who brutally attacked a pregnant woman and caused her to suffer a stillbirth.^{xvi} In response, the state legislature amended Section 187 of California Penal Code to define homicide as:

- (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.
- (b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:
 - (1) The act complied with the Therapeutic Abortion Act . . .
 - (2) The act was committed by a holder of a physician's and surgeon's certificate, . . .
 - (3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.^{xvii}

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As is true in other states with similar laws and similar exceptions, prosecutors quickly saw this law as a mechanism for punishing rather than protecting pregnant women. In 1973, Claudia Tucker, a twenty-four year-old white woman and mother of two, was approximately eight months pregnant when she took a .22 rifle and shot herself in the abdomen. According to press reports, Ms. Tucker's husband threatened to leave her if she had another child. She took desperate measures to hide the pregnancy from her husband including telling him that she had a uterine cyst. Personal correspondence from Ms. Tucker further explains that her case "involved horrendous spousal abuse." By the time she discovered her pregnancy it was too late to obtain a legal abortion.

Hours after the incident, Ms. Tucker was approached outside the hospital by police officers who told her she was under arrest for murder under Section 187. When asked why they charged Ms. Tucker with murder rather than illegal abortion, District Attorney David Minier responded, "If we didn't [prosecute her for murder], it would give a green light to this sort of thing." Eventually, a trial court dismissed the murder charge. Ms. Tucker pled guilty to performing an illegal abortion.^{xviii}

In 1991, state tried again to make California's feticide law applicable to pregnant women, this time in a case involving a totally unintentional stillbirth. Roseann Mercedes Jaurigue, a thirty-six year-old Latina woman from Gilroy, suffered a stillbirth. Ms. Jaurigue was charged with second-degree murder, again, under California's fetal homicide statute. The state filed the charges even though the fetal homicide law contains an explicit exemption for any act "solicited, aided, abetted, or consented to" by the pregnant woman. The prosecution argued that the exceptions were only meant to protect women who had abortions, not ones who suffered stillbirths as the result of another act such as using drugs. As a news story about the case reported:

San Benito County Dist. Atty. Harry Damkar replied in court papers that fears about adverse effects of the prosecution rest on unfounded speculation. Women would not be prosecuted unless, like Jaurigue, they knowingly disregard danger to a viable fetus by indulging in an act like drug use, he said.

Contrary to ACLU contentions, Damkar said, the fetal murder law exempts only abortion and can be invoked in the drug-related death of an unborn child. A court, in deciding whether a murder prosecution can go forward, should not succumb to appeals for sympathy for the mother, he said.^{xix}

Jaurigue, the mother of two other children, was arrested and initially held in lieu of \$50,000 bail. Eventually a court dismissed the charges but only after a lengthy public ordeal for Ms. Jaurigue and her family.^{xx}

In 1992, California prosecutors tried again to make use the state's feticide law as a mechanism for policing and punishing pregnant women. That year, Lynda Leigh Jones, a thirty-six year-old white woman, was seven and a half months pregnant when she gave birth in March of 1992. On the evening of March 15, her water broke, and she went into labor. Ms. Jones gave birth in the ambulance en route to the hospital. The infant was not breathing at the time of birth, and paramedics administered CPR until reaching the hospital, at which time the infant was placed on a respirator. The infant was thus technically born alive. Twenty-two hours after its birth, however, the newborn was declared dead.

According to a brief filed on behalf of Ms. Jones, "[b]ased upon questionable medical opinion that, among other things, ignores Mr. Jones' prior medical history, the District Attorney concluded that the death of Ms. Jones' infant was due to a premature birth induced by the alleged ingestion of methamphetamine." After waiting almost ten months, on January 6, 1993, the district attorney charged Ms. Jones with murder of a human being pursuant to Penal Code Section 187. According to the amended complaint, Ms. Jones:

On or about March 16, 1992 did willfully, unlawfully, and with malice aforethought murder baby boy Jones, a human being, by ingesting methamp[h]etamine, a controlled substance, during pregnancy which caused the separation of the placenta from the fetus resulting in the premature birth of the infant and the subsequent death of the infant due to anoxia directly caused by the use of methamp[h]amines by the mother during pregnancy, violating Section 187(a) of the California Penal Code, a felony.

Ms. Jones filed a motion to dismiss that was ultimately granted -- but more than a year after her arrest.^{xxi}

Although California courts have thus far rejected attempts to make the feticide law directly applicable to pregnant women, women in other states have been less fortunate. Women in Tennessee have been convicted under such laws.

In Tennessee, charges have been brought under a state feticide/UVVA law, but local public defenders have not challenged the application of those laws to women in relationship to their own pregnancies.

Beverly Ferguson, a forty-three year-old white woman, was eight months pregnant when she suffered a stillbirth. Ms. Ferguson left the hospital shortly after the birth and before the hospital obtained the results of drug tests on Ms. Ferguson and the infant. Both tests allegedly were positive for cocaine. According to the press, the autopsy report indicated that the stillborn died at least a week before the delivery due to placental abruption, and the autopsy listed the cause of death as "maternal cocaine abuse." Ms. Ferguson was charged with second-degree murder based on the allegation that she "did unlawfully distribute schedule II drugs, cocaine, to her viable fetus, ultimately causing death to said fetus." In 1989, Tennessee amended its murder statutes to include viable fetuses.^{xxii} Prosecutors interpreted this statute as allowing charges against a pregnant woman in relation to the fetus she carries.

Ms. Ferguson was held in jail pending the outcome of her case, and her bond was set at \$150,000. During preliminary hearings, her attorney argued that there was no proof that Ms. Ferguson's cocaine use caused the placental abruption. Her attorney also questioned whether the fetus was viable, citing evidence that stillborn had numerous genetic defects, including a heart defect, an extra finger and no anus, and that Ms. Ferguson's boyfriend assaulted her during her pregnancy. Ms. Ferguson pled guilty on July 22, 2005 to criminally negligent homicide.^{xxiii}

Johnna Lynne Craig, a thirty-three year-old white woman from Hampton, gave birth at home in December of 1997 and suffered a full term stillbirth. Prosecutors claimed that Ms. Craig's drug use, including "unprescribed" drugs, marijuana, and cocaine, and her failure to obtain prenatal care caused the stillbirth. Ms. Craig was charged with reckless homicide by "unlawfully and recklessly kill[ing] her

unborn child that she was carrying by consuming illegal, unprescribed drugs and smoking marijuana[.]” She was also charged with second-degree murder based on the claim that she distributed “a Schedule II Controlled Substance . . . cocaine, through her body, at the time she was carrying a child, said drug having been proven to be the proximate cause of the death of her unborn child an unwilling user[.]” She pleaded guilty to the charge of reckless homicide and was sentenced to eleven years in prison.^{xxiv}

UVVA and related laws have also been used a basis for arresting pregnant women who exercise their right to informed medical decision making. For example, Melissa Ann Rowland, a twenty-eight year-old white woman in Utah, gave birth to twins by cesarean section on January 13, 2004. One of the twins was stillborn; the one who survived allegedly tested positive for cocaine and alcohol at birth. Ms. Rowland was arrested the day after the birth and charged with child endangerment relating to the surviving infant. Two months later, Deputy District Attorney Kent Morgan charged Ms. Rowland with criminal homicide, murder, a first-degree felony in the death of the stillborn twin. Her alleged drug use was not cited in the charging documents relating to the murder. Instead, the charge was based on Ms. Rowland’s alleged refusal to follow doctors’ recommendations and undergo a cesarean section on an earlier date. B. Kent Morgan, a spokesman for the Salt Lake County district attorney’s office, explained:

the decision came down to whether the dead child -- a viable, if unborn, being as defined by Utah law -- died as a result of another person’s action or failure to take action. That judgment, he said, is required by Utah’s feticide law, which was amended in 2002 to protect the fetus from the moment of conception.^{xxv}

Ms. Rowland pled not guilty to the criminal homicide charge, and her bail was set at \$250,000. Facing an “unexpected storm of controversy” the state eventually dropped the murder charge, citing Ms. Rowland’s history of mental illness. After spending 105 days in jail, Ms. Rowland pled guilty to two counts of third-degree felony child endangerment as part of a plea bargain that would allow her immediate release from jail.^{xxvi}

Women in Pennsylvania have also been arrested based specifically on state feticide laws. In 1999, Priscilla Kimberly Shinault, a twenty-five year-old white woman from Erie, was eight months pregnant when she was arrested for retail theft, on November 28, 1999. Ms. Shinault allegedly told police that she used cocaine a few days before her arrest. According to a press report, in addition to retail theft charge, she was charged with aggravated assault of her fetus. Ms. Shinault was jailed on \$10,000 cash bond for the assault charge and \$4,000 cash bond for the theft charge. A press report quotes a state police spokesman as explaining that the “charge of assaulting an unborn child results from state law that took effect in April 1998.”^{xxvii} The law referenced was part of a legislative package entitled “Crimes Against the Unborn Child Act[.]”^{xxviii} The state police apparently used this statute as a basis for the aggravated assault charge despite an explicit provision stating, “[n]othing in this chapter shall impose criminal liability . . . upon the pregnant woman in regard to crimes against her unborn child.”^{xxix} The fetal abuse charge was ultimately dismissed.^{xxx}

It is clear in the U.S. that Unborn Victims of Violence Acts and other laws that create or even imply fetal rights separate from those of the pregnant women, no matter how carefully written, become a basis for arresting women. One final example is the state of Missouri.

The 1986 Missouri Abortion Act included a preamble stating that life begins at conception.^{xxx} This preamble was codified under chapter one “Laws in Force and Construction of Statutes” of the Missouri Code Section 1.205, and states in full:

1. The general assembly of this state finds that:
 - (1) The life of each human being begins at conception;
 - (2) Unborn children have protectable interests in life, health, and well-being;
 - (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.^{xxxii}

In a series of prosecutions of pregnant women, the State of Missouri sought to apply the state's criminal child abuse statutes to pregnant women who were unable to overcome an addiction problem before giving birth. In each case, the state specifically relied on the definition of "person" embodied in Section 1.205 and the decisions of Missouri appellate courts holding that fetuses are persons for purposes of the manslaughter statute,^{xxxiii} the murder statute,^{xxxiv} and the civil wrongful death statute,^{xxxv} -- all of which involved factual situations where a pregnant women suffered pregnancy losses, stillbirths, or infant deaths as a result of third party actions.^{xxxvi} Although in some cases the charges have been dismissed, many cases are pending. In 2007, after her motion to dismiss was denied at the trial court level, a woman accused of causing her newborn to die as a result of her alcoholism during pregnancy, pled guilty to involuntary manslaughter. She was sentenced to seven years in jail.^{xxxvii}

CONCLUSION

The experience in the United States demonstrates that Unborn Victims of Violence Acts and related laws become tools for policing and punishing pregnant women. It is also clear that such laws have not led to a reduction in violence against pregnant women. Indeed these laws and the debate about them have become a distraction from meaningful efforts to reduce violence against women and have been used as a mechanism for increasing medical misinformation and prejudice regarding pregnant, drug-using women in particular.^{xxxviii}

ⁱ See Americans United for Life, *Fetal Homicide and Unborn Victims of Violence Act Case Research*, Nov. 26, 2007, available at <http://www.kenep.com/issues/insidepage.asp?ID=79>

ⁱⁱ Lynn M. Paltrow, *Policing Pregnancy*, Tompaine.com, <http://www.tompaine.com/Archive/scontent/10189.html>

ⁱⁱⁱ See e.g., Memorandum in Opposition To Defendant's Motion to Quash at 4, *State v. Hoskins*, No. 971900205 (Utah Dist. Ct.-3d July 18, 1997) (state specifically relying on UTAH CODE ANN. § 76-5-201(1)(a) "A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, *including an unborn child at any stage of its development*" as the basis for interpreting the state's child abuse law to apply to a pregnant woman who experienced drug addiction).

^{iv} See e.g., Sheigla Murphy & Marsha Rosenbaum, *PREGNANT WOMEN ON DRUGS: COMBATING STEREOTYPE AND STIGMA* (1999); Susan C. Boyd, *MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS* (1999).

^v *State v. Horne*, 319 S.E.2d 703 (S.C. 1984).

^{vi} **Whitner v. State**, 492 S.E.2d 777 (S.C. 1997). On February 2, 1992, Cornelia Whitner, a twenty-eight year-old African-American woman gave birth to a son at Easley Baptist Medical Center. A test indicated that her son was prenatally exposed to cocaine. Although he was born in good health, on February 5, 1992, three days after giving birth, Ms. Whitner was arrested and led from the hospital in handcuffs. On April 7, 1992, she was indicted for violating South Carolina's unlawful neglect of a child statute. The affidavit in support of the arrest stated that, "the accused did fail to provide proper medical care for her unborn child by using crack cocaine while pregnant, there-by endangering the life of her unborn child."

Ms. Whitner could not afford private counsel. The court appointed counsel to represent Ms. Whitner, but the attorney did not meet with Ms. Whitner until the day of her scheduled court hearing. Ms. Whitner's defense attorney recently left employment at the prosecutor's office, where she participated in prosecutions of pregnant drug-using women like Ms. Whitner. At no point in either position did Ms. Whitner's attorney do any independent legal research on the issue of prosecuting pregnant women for using drugs. The attorney testified that, in discussing the charges with Ms. Whitner, "I don't think I ever pulled the book out." Ms. Whitner's attorney did not seek to obtain or review Ms. Whitner's hospital records. When asked about how the evidence was obtained and whether it might have been obtained illegally, Ms. Whitner's lawyer admitted, "[m]aybe I was prejudiced a little bit by my experience in prosecution."

The public defender nevertheless told her client that she "would try the best I could to get her placed on a probationary sentence; or if not, if she got an active sentence then to put her in a treatment facility so that she could help herself because she really wanted to." The attorney, however, knew of no recommendation for treatment from the solicitor, and when asked whether she informed Ms. Whitner that the solicitor was "unwilling to negotiate anything," she replied, "I don't know if I went that far. I told her that zero to 10 was her possible sentence." The lawyer also admitted that she knew of no drug treatment programs for pregnant women with substance abuse problems.

Ms. Whitner pleaded guilty to the charge of child abuse. At her guilty plea and sentencing hearing, Ms. Whitner admitted that she was chemically dependent and requested assistance with this medical problem from the court, stating "I need some help Your Honor." Although Ms. Whitner and her attorney emphasized both the need and desire for inpatient drug treatment, the court responded, "I think I'll just let her go to jail." The court then sentenced Ms. Whitner to eight years in prison.

After serving more than a year of her sentence, Ms. Whitner filed an application for post-conviction relief arguing that she had not received effective assistance of counsel and that she was convicted of a nonexistent crime — since only child neglect and not fetal neglect were criminal offenses in the state. The Pickens County Court of Common Pleas, which heard the post-conviction relief petition,

issued an order granting Ms. Whitner's application and vacating her sentence. The court found, as a growing number of other lower courts in South Carolina would, that the "plain, ordinary and popular meaning of 'a person under the age of eighteen' does not include a fetus" under the South Carolina Children's Code. Ms. Whitner was released after serving more than nineteen months in prison.

The state appealed the grant of post-conviction relief. In October of 1997, the South Carolina Supreme Court reversed the lower court's decision. A three-justice majority concluded that a viable fetus is a "person" under the Children's Code and agreed with the state that South Carolina Code section 20-7-50 therefore, "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*." Ms. Whitner then filed a petition for the writ of certiorari with the United States Supreme Court. The petition was denied on May 26, 1998, and Ms. Whitner was required to re-enter prison.

On December 8, 1998, Ms. Whitner filed a petition for the writ of habeas corpus under the federal habeas corpus statute, in the federal District Court of South Carolina. The petition was ultimately unsuccessful. The American Public Health Association and numerous other medical, legal, and substance abuse organizations filed amicus briefs in support of Ms. Whitner. Upon re-entering prison, Ms. Whitner completed a drug treatment program. Citing the nature and seriousness of her crime, the parole board denied her parole request in May 1999. Ms. Whitner served her full sentence. *See* Whitner v. South Carolina, 523 U.S. 1145 (1998) (denying certiorari following S.C. Supreme Court's decision); Whitner v. Moore, No. 2:98-3564-23AJ, slip op. (D.S.C. Sept. 28, 1999) (unsuccessful federal habeas corpus petition); Whitner v. State, No. 93-CP-39-347, slip op. (S.C. Ct. Com. Pl. Pickens County Nov. 22, 1993) *rev'd* 492 S.E.2d 777 (S.C. 1997) (granting Ms. Whitner post-conviction relief and vacating her conviction because the court lacked jurisdiction); Transcript of Record, State v. Whitner, No. 92-GS-39-670 (S.C. Ct. Gen. Sess. Pickens County Apr. 20, 1992) (Eppes, J.). *See e.g.*, Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALBANY L. REV. 999, 1029-35 (1999); *Abortion. When A Fetus Is a Person*, ECONOMIST, Jan. 10, 1998, at 24; *Affecting Women: The Fight for Reproductive Rights*, TRIAL, Aug. 2003, at 48, 50; *Court Keeps Coke Moms' Convictions*, POST & COURIER (Charleston, S.C.), Dec. 2, 1997, at B3; Lyle Denniston, *Supreme Court to Rule on Line-Item Veto; Constitutional Issue Scheduled for Quick Action*, BALTIMORE SUN, Feb. 28, 1998, at 3A; Arlene Levinson, *S.C. Jails Mother of Crack Baby: Appeals to Release Her Have Failed*, DEL. COUNTY TIMES (Pa.), Mar. 15, 1998, at 39; Tamar Lewin, *Abuse Laws Cover Fetus, a High Court Rules*, N.Y. TIMES, Oct. 30, 1997, at A22; Mark Pratt, *Convicted Pickens County Crack Mom Seeks Freedom*, GREENVILLE NEWS (S.C.), Dec. 11, 1998; Mark Pratt, *S.C. Mother of Three Asks Federal Judge to Release Her From Prison*, STATE (Columbia, S.C.), Dec. 10, 1998; Rita Rubin, *Study: Hands Off Pregnant Drug Users*, USA TODAY, Aug. 12, 1998, at 1D; *Use of Drugs While Pregnant Is Ruled Abuse*, N.Y. TIMES, July 17, 1996, at A10. National Advocates for Pregnant Women maintains a comprehensive collection of all briefs, motions, and other documents relating to the Whitner case.

^{vii} **State v. McKnight**, 576 S.E.2d 168 (S.C. 2003). On May 15, 1999, Regina McKnight, a twenty-one year-old African-American, went to the local hospital expecting to give birth and instead suffered a stillbirth. The hospital's focus was not on providing counseling or finding the medical and drug treatment Ms. McKnight needed, but rather on gathering evidence against her. Both mother and baby were tested for drugs, and an autopsy was performed on the stillborn infant the next morning. On October 7, 1999, Ms. McKnight was arrested on a charge of homicide by child abuse. The affidavit in support of arrest stated, "the defendant did give birth to a still born baby girl. The death resulted from the use of cocaine by defendant during the term of pregnancy. That defendant and baby tested positive for cocaine on the date of birth." More than nine months after she left the hospital, the state, through a grand jury, indicted her on one count of homicide by child abuse. The indictment was later amended to include a charge for delivery of drug to a minor. Without any more evidence than a positive test for cocaine metabolites, the state concluded that the pregnancy loss should be treated as a homicide case and Ms. McKnight's drug use should be identified as the cause of the stillbirth.

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Ms. McKnight filed a motion to dismiss both charges alleging that the state could not prove that the defendant's actions caused the stillborn's death. The court denied the motion. In January of 2001, her trial began. Ms. McKnight's public defender, with the support of several legal advocates, called both local and national medical experts. The national expert testified that cocaine did not cause the stillbirth and that other health problems and factors could have accounted for the pregnancy loss. However, the trial ended in a mistrial when some of the jurors admitted to researching cocaine's effects during pregnancy on the Internet.

The state decided to retry the case. At the second trial, in May of 2001, the defense counsel only called a local expert who, while testifying that she did not think cocaine caused the stillbirth, offered no alternative explanation for the pregnancy loss. The jury deliberated for less than fifteen minutes and found her guilty of homicide by child abuse. Although Ms. McKnight had no criminal record, she was sentenced to twenty years' imprisonment with eight years suspended.

Ms. McKnight appealed her conviction to the South Carolina Court of Appeals, which directed the case to the South Carolina Supreme Court. The South Carolina Medical Association and numerous other medical and feminist groups filed amicus curiae briefs in support of Ms. McKnight. The court affirmed her conviction and held that viable fetuses are persons under the state's homicide statute, effectively transforming a stillbirth from personal and family tragedy to "depraved heart" homicide. The decision permits conviction on any evidence that a pregnant woman engaged in any activity "public[ly] know[n]" to be "potentially fatal" to a fetus. No one in the case, including the prosecution, believed that Ms. McKnight had any intention of harming her fetus or losing the pregnancy. As the dissent pointed out, if Ms. McKnight had intentionally sought to end her pregnancy by having an illegal third trimester abortion, her sentence would have been two years in jail. Ms. McKnight sought review of her case by the U.S. Supreme Court. The American Public Health Association and numerous other medical groups filed an amicus curiae brief supporting Ms. McKnight. In October of 2003, the Court denied certiorari, a decision that generated nationwide media attention.

On October 1, 2003 Ms. McKnight filed a petition for post-conviction relief in the Horry County Court of Common Pleas arguing that she received ineffective assistance of counsel at trial, and that cocaine was not, as a matter of medical science, the cause of the stillbirth. At the hearing on the petition, Dr. Kim Collins, a forensic pathologist specializing in pediatric forensics, testified that medical research has not established a causal link between prenatal exposure to cocaine and stillbirths and that other factors caused Ms. McKnight's pregnancy loss. Ms. McKnight's trial counsel also admitted that she did not adequately represent her client by failing to call a helpful expert, someone like Dr. Collins, at the second trial.

Nevertheless, on November 3, 2004, the Horry County Court of Common Pleas denied the petition. Ms. McKnight filed a petition for certiorari with the South Carolina Supreme Court. In July 2007, the South Carolina State Supreme Court agreed to review the post-conviction relief decision. Briefs on behalf of Ms. McKnight were filed on September 17, 2007. The South Carolina Medical Association and other medical groups also filed an amicus curiae brief in support of Ms. McKnight. As of February 2008, the matter remains on the docket of the South Carolina Supreme Court. *See* McKnight v. South Carolina, 540 U.S. 101 (2003) (denying petition for writ of certiorari); Brief of Petitioner, McKnight v. State, No. 2003CP2605752 (S.C. Sept. 17, 2007); Amended Application for Post-Conviction Relief, McKnight v. State, No. 2003CP2605752 (S.C. Ct. Com. Pl. Horry County Nov. 3, 2004); Arrest Warrant, State v. McKnight, No. 2000GS2600432 (S.C. Ct. Gen. Sess. Horry County May 16, 2001); *A Busy Day for the Supreme Court*, CHI. TRIB., Oct. 7, 2003, at 8; Seanna Adcox, *Lawyers Argue Drug User Convicted in Stillbirth Didn't Receive Fair Trial*, POST & COURIER (Charleston, S.C.), July 28, 2004, at 3B; *Baby Drug Case Ends in Mistrial*, POST & COURIER (Charleston, S.C.), Jan. 13, 2001; Phillip Caston, *Groups Join Fight to Free Mother; Court Brief Urges Review of Case of Stillborn Baby*, POST & COURIER (Charleston, S.C.), July 30, 2001; Lyle Denniston, *Court Lets S.C. Murder Conviction Stand*;

Woman Who Used Drug in Pregnancy Is Serving Twelve-Years, BOSTON GLOBE, Oct. 7, 2003, at A2; David Firestone, *Woman Is Convicted of Killing Her Fetus By Smoking Cocaine*, N.Y. TIMES, May 18, 2001, at A12; Bob Herbert, Editorial, *In America; Stillborn Justice*, N.Y. TIMES, May 24, 2001, at A29; *Is a Fetus a Person?*, ECONOMIST, May 26, 2001; Shaina Jones, *Fetal Rights at Issue in South Carolina Case*, LEGAL TIMES, Sept. 25, 2003; Neil A. Lewis, *Justices Let Stand Ruling That Allows Forcibly Drugging an Inmate Before Execution*, N.Y. TIMES, Oct. 7, 2003, at A16 (discussing U.S. Supreme Court's denial of certiorari); Adam Liptak, *South Carolina: Twelve-Year Sentence in Death of Fetus*, N.Y. TIMES, Jan. 29, 2003, at A22; *Woman's Second Crack-Mom Trial Starts*, POST & COURIER (Charleston, S.C.), May 16, 2001, at B5; *Talk of the Nation: Fetal Protection* (Nat'l Public Radio broadcast June 20, 2001); Silja J.A. Talvi, *Criminalizing Motherhood*, NATION, Dec. 3, 2003, <http://www.thenation.com/doc/20031215/talvi>. National Advocates for Pregnant Women maintains a comprehensive collection of all briefs, motions, and other documents relating to the McKnight case.

^{viii} See http://realcostofprisons.org/materials/comics/hardlife_regina_pages.pdf

^{ix} *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997) (quoting *State v. Horne* 319 S.E.2d 703, 704 (1984)).

^x TEX. PENAL CODE § 1.07(a)(26) (2007).

^{xi} Jordan Smith, *Naked City, Save the Fetus --From Mom?*, AUSTIN CHRON., Sept. 10, 2004, available at <http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A228254>.

^{xii} Sean Thomas, *Women Await Freedom: Legal Process Slows for Six Cleared of Delivering Drugs to Unborn Babies*, AMARILLO GLOBE NEWS, Oct. 31, 2006, http://www.amarillo.com/stories/103106/new_5846884.shtml ("Forty-five cases were pending the outcomes of the appeal cases and have since been dropped.")

^{xiii} Jordan Smith, *Naked City, Save the Fetus --From Mom?*, AUSTIN CHRON., Sept. 10, 2004, available at <http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A228254>.

^{xiv} *Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (considering the constitutionality of a public hospital's policy, implemented in coordination with law enforcement, of drug testing pregnant women and holding that notwithstanding the State's asserted interest in protecting the fetus, the full protections of the Fourth Amendment applied).

^{xv} **Ward v. State**, 188 S.W.3d 874 (Tex. App. 2006). Tracy Yolanda Ward, a thirty-year-old African American woman gave birth on November 3, 2003 to a baby boy. On October 31, 2003, Ms. Ward experienced pregnancy complications and called an ambulance. According to press reports, Ms. Ward told the ambulance personnel that she smoked cocaine within the previous hour. Following a written directive from Potter County District Attorney, hospital staff notified the Amarillo Police Department. Ms. Ward was charge with delivery of a controlled substance to a minor, a second-degree felony. Ms. Ward filed a motion to dismiss on statutory and constitutional grounds. The motion was denied. Ms. Ward pled guilty to the offense in August 2004 reserving the right to appeal the applicability of the law to her. She was sentenced to five years probation. Ms. Ward immediately filed an appeal challenging the legality of her conviction. Ruling on narrow statutory interpretation and evidentiary grounds, the court of appeals held that the delivery of a controlled substance statute requires "an actual" transfer of drugs and that neither possession of drugs nor an actual transfer could be established as having occurred in the context of pregnancy and birth. *See also Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007) (citing with approval *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006)); *State v. Ward*, No. 48235-D, Judgement (Tex. Dist. Ct. Potter County Sept. 8, 2004) (Emerson, J.); Brief of ACLU as Amicus Curiae, *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006) (No. 07-04-00456-CR); Brief of Texas Ass'n of Obstetricians and Gynecologists et al as Amici Curiae in Support of Appellants, *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006) (No. 07-04-00456-CR); Clerk's Record, *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006) (No. 07-04-00456-CR); Indictment, *State v. Ward*, No. 48235-D (Tex. Dist. Ct. Potter County Sept. 8, 2004); *Babies & Controlled Substances: Slants & Trends*, DRUG DETECTION REPORT, Nov. 25, 2004, at 177; *Mother Avoids Trial in Fetus Case*, LUBBOCK AVALANCHE-J., Sept. 8, 2004,

http://www.lubbockonline.com/stories/090804/reg_090804054.shtml; Jim McBride, *Addicted Mom Get Probation*, AMARILLO GLOBE NEWS, Sept. 9, 2004; Jim McBride, *Woman Indicted in “Crack Baby” Case*, AMARILLO GLOBE NEWS, Feb. 6, 2004, at 1A; Mary Alice Robbins, *Delivery Before Birth: Outcome of Appeals May Determine If More DAs Prosecute Women for Taking Drugs While Pregnant*, TEX. LAW., Apr. 4, 2005, at 1; Mary Alice Robbins, *Woman to Go on Trial for Delivering Cocaine to Unborn Child*, TEX. LAW., July 23, 2004, at 1; Sean Thomas, *Women Await Freedom: Legal Process Slows for Six Cleared of Delivering Drugs to Unborn Babies*, AMARILLO GLOBE NEWS, Oct. 31, 2006, http://www.amarillo.com/stories/103106/new_5846884.shtml; *Woman Again Hit With Drug Offense Charge*, LUBBOCK AVALANCHE-J., Nov. 1, 2005, http://www.lubbockonline.com/stories/110105/reg_110105070.shtml.

Smith v. State, No. 07-04-0490-CR, 2006 WL 798069 (Tex. App. Mar. 29, 2006) (mem.) (incorporating *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006)). Rhonda Tulane Smith, a twenty-three year old white woman, gave birth on November 27, 2003 to Destiny Smith. Ms. Smith was accused of delivering drugs to a minor after her daughter allegedly tested positive for methamphetamines. Ms. Smith filed a motion to dismiss on statutory and constitutional grounds. The motion was denied. Ms. Smith pleaded guilty in October 2004 to delivery of a controlled substance to a minor child reserving the right to appeal the applicability of the law to her. She was sentenced to five years probation. Ms. Smith then filed an appeal challenging the legality of her conviction. The court of appeals, incorporating its opinion in *Ward v. State* issued on the same date, overturned the conviction. In the *Ward* decision, the court of appeals held that the delivery of a controlled substance statute requires "an actual" transfer of drugs and that neither possession of drugs nor an actual transfer could be established as having occurred in the context of pregnancy and birth. *See also Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007) (citing with approval *Smith v. State*, No. 07-04-0490-CR, 2006 WL 798069 (Tex. App. Mar. 29, 2006)); *State v. Smith*, No. 49124-D, Judgment (Tex. Dist. Ct. Potter County Oct. 4, 2004); Brief of ACLU as Amicus Curiae, *Smith v. State*, No. 07-04-0490-CR, 2006 WL 798069 (Tex. App. Mar. 29, 2006); Brief of Texas Ass'n of Obstetricians and Gynecologists et al as Amici Curiae in Support of Appellants, *Smith v. State*, No. 07-04-0490-CR, 2006 WL 798069 (Tex. App. Mar. 29, 2006); Clerk's Record, *Smith v. State*, No. 07-04-0490-CR, 2006 WL 798069 (Tex. App. Mar. 29, 2006); Indictment, *State v. Smith*, No. 49124-D (Tex. Dist. Ct. Potter County Oct. 4, 2004); Jim McBride, *Woman Indicted in “Crack Baby” Case*, AMARILLO GLOBE NEWS, Feb. 6, 2004, at 1A; Mary Alice Robbins, *Delivery Before Birth: Outcome of Appeals May Determine if More DAs Prosecute Women for Taking Drugs While Pregnant*, TEX. LAW., Apr. 4, 2005, at 1; Mary Alice Robbins, *Woman to Go on Trial for Delivering Cocaine to Unborn Child*, TEX. LAW., July 23, 2004, at 1.

Ex parte Perales, 215 S.W.3d 418 (Tex. Crim. App. 2007). Valerie Sue Perales was indicted for delivery of a controlled substance, based on the claim that she used cocaine while pregnant. She pleaded guilty to the offense pursuant to a plea bargain agreement. Following the decisions in *Ward v. State* and *State v. Smith*, she filed a writ of habeas corpus acting as her own lawyer. The Texas Court of Criminal Appeals, Texas's highest court for criminal cases, ruled in her favor and vacated the judgment. According to a news report Ms. Perales sent a letter to the Amarillo Globe-News explaining that her guilty plea constituted a violation of probation for credit card fraud, and as a result she was ordered to serve an additional four years. *See also State v. Perales*, No. W-49452-01-C (Tex. Dist. Ct. Potter County Feb. 14, 2007); Sean Thomas, *Women Await Freedom: Legal Process Slows for Six Cleared of Delivering Drugs to Unborn Babies*, AMARILLO GLOBE NEWS, Oct. 31, 2006.

^{xvi} *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970) *superseded by statute*, CAL. PENAL CODE § 187 (West 1970).

^{xvii} CAL. PENAL CODE § 187 (West 1970).

^{xviii} See Demurrer, Points and Authorities, *State v. Tucker*, No. 147092 (Cal. Santa Barbara Mun. Ct. June 1973); Becca Wilson, *.22 Cal Abortion Brings Prolonged Ordeal*, SANTA BARBARA NEWS & REV., May 3, 1974; Letter from Claudia Frances (Tucker) to C. Rauch Wise, Attorney-at-law (Jan. 30, 2003) (on file with National Advocates for Pregnant Women).

^{xix} Philip Hager, *Case Against Mother Spurs Debate on Fetal Murder Law: Authorities Are Divided on Whether Statute Applies to Drug-Using Women Whose Child Was Stillborn*, L.A. TIMES, June 17, 1992, at A1.

^{xx} See Reporter's Transcript, *Jaurigue v. Justice Court*, No. 23611 (Cal. Sup. Ct. San Benito County Aug. 21, 1992); Philip Hager, *Case Against Mother Spurs Debate on Fetal Murder*, L.A. TIMES, June 17, 1992, at 1; Philip Hager, *Murder Charge Rejected in Drug-Related Stillbirth*, L.A. TIMES, Aug. 22, 1992, at 1; Veronique Mistiaen, *Legal Haze: Is Drug-Use During Pregnancy Child Abuse?* CHI. TRIB., Oct. 11, 1992, at 1.

^{xxi} See Amended Complaint, *People v. Jones*, No. 93-5 (Cal. Justice Ct. Siskiyou County July 28, 1993); Case Disposition Notice, *People v. Jones*, No. 93-5 (Cal. Justice Ct. Siskiyou County July 28, 1993); Clerk's Docket and Minutes, *People v. Jones*, No. 93-5 (Cal. Justice Ct. Siskiyou County July 28, 1993); Complaint, *People v. Jones*, No. 93-5 (Cal. Justice Ct. Siskiyou County July 28, 1993); Memorandum of Points and Authorities in Support of Demurrer, *People v. Jones*, No. 93-5 (Cal. Justice Ct. Siskiyou County July 28, 1993); Reporter's Transcript of Proceedings, *People v. Jones*, No. 93-5 (Cal. Justice Ct. Siskiyou County July 28, 1993).

^{xxii} See TENN. CODE ANN. § 39-13-107 (1989).

^{xxiii} See *State v. Ferguson*, No. 82392, Judgment (Tenn. Crim. Ct. Knox County July 22, 2005) (Leibowitz, J.); Affidavit of Complaint, *State v. Ferguson*, No. 82392 (Tenn. Crim. Ct. Knox County July 22, 2005); Information, *State v. Ferguson*, No. 82392 (Tenn. Crim. Ct. Knox County July 22, 2005); Don Jacobs, *Baby's Mother Sought; Woman Faces Murder Charge After Son Stillborn From Her Alleged Cocaine Use*, KNOXVILLE NEWS-SENTINEL, June 10, 2004, at B1; Don Jacobs, *Fate of Unnamed Stillborn Baby Lies With Finding Missing Mother*, KNOXVILLE NEWS-SENTINEL, June 12, 2004, at B2; Bryan Mitchell, *Baby To Be Laid to Rest; Mom Arrested*, KNOXVILLE NEWS-SENTINEL, June 12, 2004, at B2; Jamie Satterfield, *Cocaine-Addicted Woman Faces Trial in Fetus Death*, KNOXVILLE NEWS-SENTINEL, Aug. 5, 2004, at B7.

^{xxiv} See *State v. Craig*, No. S14068, Judgment (Tenn. Crim. Ct. Carter County July 13, 1999) (Cupp, J.); True Bill of Indictment, *State v. Craig*, No. S14068 (Tenn. Crim. Ct. Carter County July 13, 1999); Briefs: *Mother Charged in Baby's Death*, KNOXVILLE NEWS-SENTINEL, June 12, 1998, at A4; *Cocaine Mom Sentenced to Eleven Years*, ASSOC. PRESS, July 14, 1999; Andy Sher, *Mom Charged With Addicting Baby*, CHATTANOOGA TIMES, June 13, 1998, at B1.

^{xxv} Kirk Johnson, *Harm to Fetuses Becomes Issue in Utah and Elsewhere*, NEW YORK TIMES, March 27, 2004.

^{xxvi} See *State v. Rowland*, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004) (Fuchs, J.); Case History and Minutes, *State v. Rowland*, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004); Information, *State v. Rowland*, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004); Statement of Defendant in Support of Guilty Plea and Certificate of Counsel, *State v. Rowland*, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004); Richard L. Berkowitz, *Should Refusal to Undergo a Cesarean Delivery Be a Criminal Offense?*, 104 OBSTETRICS & GYNECOLOGY 1220 (2004); Howard Minkoff & Lynn M. Paltrow, *Melissa Rowland and the Rights of Pregnant Women*, 104 OBSTETRICS & GYNECOLOGY 1234 (2004); Monica K. Miller, *Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act?*, 15 HEALTH MATRIX 383, 383 (2005); Matt Canham, *Prosecutors Drop Murder Charge in C-Section Case; Plea Bargain: After Three Months Behind Bars, the Mother of a Stillborn Baby Pleads Guilty to a Lesser Felony, May Leave Jail Soon; Rowland No Longer Faces the Murder Charge*, SALT LAKE TRIB., Apr. 8, 2004, at A1; Ellen Goodman, Editorial, *Eroding the Rights of Pregnant Women*, WASH. POST, Mar. 27, 2004, at A19;

Stephen Hunt, *From Murder Charge to Probation; After the Sentencing for Two Third-Degree Felonies, Rowland Says, "I'm Happy to Be Free,"* SALT LAKE TRIB., Apr. 30, 2004, at B1; Pamela Manson, *Mother Is Charged in Stillborn Son's Death; Criminal Homicide: Prosecutors Say the West Jordan Woman Ignored Numerous Warnings from Doctors and Refused a Surgery That Could Have Saved the Boy's Life; Prosecutors Say Mom Guilty in Baby's Death*, SALT LAKE TRIB., Mar. 12, 2004, at A1; Lynn Paltrow, Op-Ed., *Criminal Charges for Refusing Surgery*, L.A. TIMES, Mar. 29, 2004, at B10; Katha Pollitt, Editorial, *Pregnant and Dangerous; Subject to Debate; Melissa Rowland Accepts Plea to Two Counts of Child Endangerment for Using Drugs During Pregnancy*, NATION, Apr. 26, 2004, at 9; Alexandria Sage, *Mother Accused of Murder of Unborn Pleads Not Guilty*, LARAMIE BOOMERANG (Wyo.), Mar. 16, 2004; Alexandria Sage, *Women's Groups Defend Mom Charged in Stillbirth*, DENVER POST, Mar. 18, 2004; Alexandria Sage, *Utah Woman Charged With Murder; Allegedly Ignored Warnings About Unborn Baby*, ASSOC. PRESS, Mar. 11, 2004; Rene Sanchez, *Stillbirth Results in Charge of Murder for the Mother; Woman Reportedly Refused Caesarean Section*, WASH. POST, Mar. 12, 2004, at A2; Jacob Santini, *Stillborn Twin Case Fades, Issues Stay*, SALT LAKE TRIB., Apr. 16, 2004, at B4; Doug Smeath, *Activists Hope Rowland Case Generates Dialogue*, DESERET MORNING NEWS (Salt Lake City), Apr. 15, 2004; Posting of Susan Hodges, *C-Section Refusal Leads to Murder Charge*, Citizens for Midwifery listserv (Mar. 13, 2004) (on file with Nat'l Advocates for Pregnant Women); *Lesser Charge Dropped Against Mom: Prosecutors Press Murder Case Based on Drug Use Allegations*, CNN On-Line, Mar. 16, 2004, www.cnn.com/2004/LAW/03/16/crime.baby.ap/; Sheryl McCarthy, Editorial, *M May Stand for Many Things, But Not Murder*, NEWSDAY, Mar. 25, 2004, <http://www.newsday.com/news/columnists/ny-ypmcc253722080mar25,0,388855,print.column?coll=ny-news-columnists>; Melissa Anne Rowland Coalition, <http://www.upnet.org/melissa.html> (last visited Sept. 24, 2004); James Nelson, *Utah Mom Gets Probation in Stillborn Twin Case*, Reuters.com, Apr. 29, 2004, <http://www.reuters.com>; Lynn Paltrow, *Policing Pregnancy*, TOM PAINE.COMMON SENSE, Apr. 2, 2004, <http://www.tompaine.com/Archive/scontent/10189.html>.

^{xxvii} *Briefs from Erie, Sewickly, Titusville*, ASSOC. PRESS, Nov. 30, 1999.

^{xxviii} See 18 PA. CONS. STAT. § 2606 (1997).

^{xxix} 18 PA. CONS. STAT. § 2608(b) (1999).

^{xxx} See *Commonwealth v. Shinault*, No. CR-0000210-99 (Pa. Ct. Com. Pl. Erie County May 2, 2000); Case Print, *Commonwealth v. Shinault*, No. CR-0000210-99 (Pa. Ct. Com. Pl. Erie County May 2, 2000); *Associated Press State & Local Wire*, ASSOC. PRESS, Dec. 4, 1999; *Briefs from Erie, Sewickly, Titusville*, ASSOC. PRESS, Nov. 30, 1999.

^{xxxi} See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

^{xxxii} MO. REV. STAT. § 1.205 (2007). See also *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990).

^{xxxiii} *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992).

^{xxxiv} *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997).

^{xxxv} *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995).

^{xxxvi} From 1999 to 2002, prosecutors in Jackson County brought charges of endangering the welfare of a child in the first degree, a Class C felony, against twenty-two separate women, after each woman gave birth to a newborn who tested positive for cocaine in Truman Hospital, a public hospital. These cases are pending before Circuit Judge Kelly Moorhouse.

Child endangerment in the first degree is a Class C felony, punishable by imprisonment in the county jail from between one day and one year, imprisonment in a state prison from between one and four years, a fine of up to \$5,000, or a combination of imprisonment and a fine. MO. REV. STAT. § 568.045 (2007). The allegation in each case is that the mother knowingly acted in a manner that created a substantial risk to the life, body or health of a minor child (less than 17 years old) by ingesting cocaine

while pregnant. The state has argued that an unborn child is a child under the law under Missouri Revised Statute Section 1.205, which states that personhood begins at conception. MO. REV. STAT. § 1.205 (2007).

^{xxxvii} Kelly Wiese, *Woman pleaded guilty in Missouri court to causing baby's death*, DAILY RECORD AND KANSAS CITY DAILY NEWS-PRESS, Dec 11, 2007.

^{xxxviii} See David C. Lewis, et. al., "Meth Science Not Stigma; Open Letter to the Media," (2005), <http://www.jointogether.org/news/yourturn/commentary/2005/meth-science-not-stigma-open.html>; David C. Lewis, et. al., Physicians, Scientists to Media: Stop Using the Term "Crack Baby," (February 27, 2004) <http://www.jointogether.org/news/yourturn/announcements/2004/physicians-scientists-to-stop.html>