

Claims that US “fetal homicide / “unborn victims of violence” laws target pregnant women:

A Smoke-screen to attempt to discredit Bill C-484

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May 5, 2008

This is an analysis of claims made by Joyce Arthur, Coordinator of the Abortion Rights Coalition of Canada, that Bill C-484, the Unborn Victims of Crime Act, will be used to target pregnant women who cause harm to their own unborn children.¹ To support this claim, Ms. Arthur relies on information provided by Lynn M. Paltrow, executive director of the US-based National Advocates for Pregnant Women, which alleges that hundreds of women have been arrested/prosecuted under supposedly similar laws in the US² and that “Unborn Victims of Violence Acts...become tools for policing and punishing pregnant women.”³

This analysis will show that these alarmist claims are without foundation in the facts of the US experience and do not apply to the proposed amendment of the Criminal Code contained in Bill C-484.

¹ “Talking points against the Unborn Victims of Crime Act,” Abortion Rights Coalition of Canada, Talking point #9 (Pregnant women have been arrested under U.S. fetal homicide laws) posted at <http://www.arcc-cdac.ca/action/unborn-victims-act.htm>

² The information from NAPW is contained in articles posted on NAPW’s website (<http://www.advocatesforpregnantwomen.org/>) and in the document “Lessons from the U.S. Experience with Unborn Victims of Violence Laws,” posted at <http://www.arcc-cdac.ca/action/LessonsfromUS.pdf>

³ “Lessons from the U.S. Experience with Unborn Victims of Violence Laws,” NAPW, p. 7.

Executive Summary

- A vast majority of the cases cited by NAPW do not involve “fetal homicide”/ “unborn victims of violence” laws, but rather child abuse and endangerment laws. In all cases, except in South Carolina, the charges were eventually dropped.
- Only South Carolina has upheld convictions of women under child abuse and endangerment laws, citing South Carolina’s unique judicially enacted “fetal homicide” law of 1984 as a precedent.
- There were a few isolated incidents in other States where cases were brought by prosecutors under “fetal homicide” laws, (for example, NAPW cites only a couple of California cases, even though California has had a fetal homicide law for almost 40 years!) but these cases were later dismissed or distinguished on their facts and are in no way representative of application of the legislation in the 37 States with these laws.
- In both the US and Canada, people have been falsely charged under a variety of laws and the charges subsequently withdrawn, but it would be illogical to suggest that all such laws should be struck down. The possibility exists for someone to be falsely arrested under any law, in the US or in Canada. Successful prosecution is a different issue.
- **Comparing the US cases referred to by NAPW to C-484 in the Canadian context is to compare apples and oranges!** South Carolina’s 1984 judicially enacted “fetal homicide” law and the “fetal homicide” statutes in other states such as California, as well as the child abuse/endangerment laws in other states discussed by NAPW are stand-alone offences, whereas C-484 creates an offence *only in the commission of an offence against the pregnant mother*. A mother endangering her unborn child through drug or alcohol abuse is not a victim of a crime in accordance with the wording of C-484, so C-484 cannot possibly apply. *For greater certainty, C-484 explicitly excludes acts or omissions by the pregnant mother*, unlike the “fetal homicide” and child abuse/endangerment statutes in the US states referenced by NAPW.

In other words, regardless of whether or not there has been charging of women in the US for harm to their unborn babies, what happens in the US is irrelevant and misleading in regard to what would happen in Canada were C-484 to be enacted into law, because *C-484 is not the same as the laws in the US which NAPW and ARCC are comparing it to*.

- The alarmist and misleading claims made regarding US laws are an attempt at misdirection intended to take the focus off the clear wording and intent of Bill C-484—protecting pregnant women and their unborn children from third-party attacks and providing for appropriate criminal charges in regard to the actions of anyone who would harm or kill a pregnant woman’s unborn child against her will.

Detailed Analysis

Much of NAPW's criticism of "unborn victims of violence" laws, and hence, an attempt to apply that criticism to C-484, stems from the situation in South Carolina, where NAPW claims that anywhere from 89 to 300 women have been arrested based on a legal precedent established by South Carolina's judicially created fetal homicide law in 1984.⁴ For that reason, I will address the situation in South Carolina first, and then address the other US states discussed by NAPW.

South Carolina

As NAPW points out, South Carolina has had a judicially enacted "fetal homicide" law since 1984 when the Supreme Court of South Carolina, in *State v. Horn*, recognized a viable fetus as a person for the purposes of applying state homicide laws.

This decision was used as a precedent in *Whitner v. State* to conclude that a viable fetus qualifies as a "person" under South Carolina's *Children's Code*. In 1997, Cornelia Whitner was found guilty of criminal child neglect because her son was born with crack cocaine in his system due to his mother's ingestion of this substance during the third trimester of her pregnancy.

In 2003, Regina McKnight was convicted of homicide by child abuse, following a stillbirth caused by cocaine use. Again, applying previous case law (*State v. Horn* and *Whitner v. State*), the court found that the term "child" as used in the state's "homicide by child abuse" statute included a viable fetus.

NAPW cites the Whitner and McKnight cases and numerous others as examples of how "fetal homicide" / "unborn victims of violence" laws in the US are used to target pregnant women. In an article entitled "The so-called 'Unborn Victims of Violence Act' does not protect women or children," NAPW says:

To the best of our knowledge since 1984 only one man has been prosecuted and convicted of murder based on the recognition of fetal personhood. In contrast between 50 and 100 women in South Carolina have been arrested based on claims of fetal personhood. Women who gave birth to healthy babies, but nevertheless were deemed to have put those pregnancies at risk have been sentenced to jail terms for as long as 10 years."⁵

This article is misleading, beginning with the title which implies that the article is about the Unborn Victims of Violence Act. One can only assume NAPW is referring to the US federal Unborn Victims of Violence Act (also known as Laci & Connor's Law) which was enacted in 2004. But almost the entire article is devoted to case law stemming from South Carolina's 1984

⁴ "Lessons from the U.S. Experience with Unborn Victims of Violence Laws," NAPW, p. 2.

⁵ "The so-called 'Unborn Victims of Violence Act' does not protect women or children," March 5, 2004, posted at: http://advocatesforpregnantwomen.org/issues/unborn_victims_of_violence_act/the_socalled_unborn_victims_of_violence_act_does_not_protect_women_or_children_1.php ; See also, "SC: Leading the nation in the prosecution of pregnant women," July 17, 2006 posted at: http://advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/south_carolina_leading_the_nation_in_the_prosecution_punishment.php

common law (i.e., judge made) crime of fetal homicide (i.e. *State v. Horne*). The NAPW article also mentions some cases involving California laws. However, the NAPW article gives no indication as to how the federal UVV Act “does not protect women or children” as claimed in the article’s title.

For the purposes of comparison with Bill C-484, ***the “fetal homicide” law that was judicially enacted in South Carolina in 1984 is completely different from Bill C-484*** in three very important ways as listed below.

1. In *State v. Horne* the court recognized that a fetus is a “person” for the purposes of homicide laws, effectively changing the definition of “person” at least in cases of homicide, without clearly stating one way or another whether the changed definition would apply to other laws as well, leaving it open for courts in future to extend this interpretation to other laws (e.g. the Whitner and McKnight cases which dealt with child abuse and endangerment laws). ***C-484, on the other hand, does NOT change the definition of “human being”*** in Canada’s Criminal Code. The term “human being” (which is the term used in the definition of all types of homicide and assault offences as well as any other criminal offences against “persons” in Canada’s Criminal Code) would have the same meaning if C-484 were enacted into law as it has now. Therefore, there is no possible way C-484 can affect any of the crimes that deal with “human beings.”

2. *State v. Horne* did ***not*** stipulate that killing the fetus was a crime only in the case where the mother herself was a victim of a crime. C-484, on the other hand, clearly states that the harm or injury to the child applies ***only in the commission of an offence against the pregnant woman***. Accordingly, C-484 is not intended to nor could it properly be used as the basis for prosecuting/convicting in a Whitner or McKnight type of case because in those cases, *there were no crimes committed against these two women by a third party*.

3. *State v. Horne* did ***not*** exclude actions by the mother of the child, leaving the door open for pregnant women to be prosecuted for harm to their own children. ***C-484, on the other hand, has an explicit exclusion for pregnant women in regard to their fetus***. C-484 would amend the Criminal Code to clearly state: ***“For greater certainty, this section does not apply in respect of.... (c) any act or omission by the mother of the child.”*** This added provision was not necessary, because the new offence would only come into play during the commission of an offence against the mother. However, this explicit provision was placed into Bill C-484, *precisely* to prevent this law from being misinterpreted. This law is ***not*** intended to target pregnant women.

Texas

As NAPW points out, Texas passed the Prenatal Protection Act (SB 319) in 2003. This was an amendment to the *Penal Code*. The definition of “Individual” in the *Penal Code* was expanded to include an unborn child as follows:

1.07(a)(26) "Individual" means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

Since all the criminal homicide offences (Title 5, Chapter 19) use the term “individual,” unborn children became included under these provisions of the *Penal Code*. The Prenatal Protection Act includes an exception for actions by the mother of the unborn child (section 19.06(1)).

In those cases cited by NAPW, women were arrested, not under the *Texas Penal Code* which had expanded the definition of “individual” to include unborn children, but rather, they were arrested under an entirely different statute, that is the *Controlled Substances Act* (§ 481.122. Delivery of controlled substance or Marihuana to child) which created an offence for delivering drugs to children under 18 years of age. The term “individual” isn’t even used in this offence; the term used is “child” and the law states: “In this section, ‘child’ means a person younger than 18 years of age.”

The prosecutor was interpreting the *Controlled Substances Act* as applying to “individuals” as defined in the *Penal Code*. But the term “individual” is applicable only within the *Penal Code*—not within the *Controlled Substances Act*. So this was a problem of misinterpretation of a law by a prosecutor who misapplied a definition contained solely within one statute to an entirely different statute. No conviction resulted.

This type of misinterpretation by a prosecutor has been addressed in C-484 because C-484 does not redefine any words currently used in the Criminal Code (unlike the term “individual” in the Texas Penal Code which was expanded to include “unborn child”). This eliminates the possibility that a prosecutor could misapply an expanded definition to any other offence. The new offence created by C-484 is completely self-contained and has no impact on any other offences, either in the Criminal Code itself, or in any other statute. The new offence created by C-484 only takes effect in the commission of an offence against the mother, and so it’s not possible simply for that reason for the law to be misinterpreted as applying to pregnant women who might harm their own unborn children. And “for greater certainty” acts or omissions by the pregnant woman are explicitly excluded.

Tennessee

A ‘fetal homicide’ law was passed in Tennessee in 1989 that allowed for a fetus to be considered a victim of homicide or assault:

39-13-214. Viable fetus as victim. —

(a) For purposes of this part, “another” and “another person” include a viable fetus of a human being, when any such term refers to the victim of any act made criminal by the provisions of this part.

(b) Nothing in this section shall be construed to amend the provisions of § 39-15-201, or §§ 39-15-203 — 39-15-205 and 39-15-207.

(c) It is the legislative intent that this section shall in no way affect abortion, which is legal in Tennessee. This section shall in no way apply to acts that are committed pursuant to usual and customary standards of medical practice during diagnostic or therapeutic treatment.

39-13-201. Criminal homicide. —

Criminal homicide is the unlawful killing of another person, which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide.

NAPW cites two cases (*State v. Ferguson*, and *Tennessee v. Craig*) where pregnant women who had abused drugs were prosecuted under Tennessee’s ‘fetal homicide’ law when their babies were stillborn. ***The Tennessee law has no exceptions for conduct by the pregnant woman, whereas C-484 explicitly excludes acts or omissions by the pregnant woman.***

Utah

NAPW discusses the Utah case of Melissa Ann Rowland. Rowland was initially charged with murder in the death of a stillborn twin because she refused to follow doctor’s recommendations and undergo a cesarean section at an earlier date; the other twin tested positive for cocaine and alcohol at birth. As part of a plea bargain the murder charge was dropped and she pleaded guilty to two counts of child endangerment.

The Utah ‘fetal homicide’ law is as follows:

76-5-201. Criminal homicide -- Elements -- Designations of offenses.

(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. (*Emphasis added*)

(b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion.

(2) Criminal homicide is aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide.

Like the law in Tennessee, ***it is important to note that the Utah ‘fetal homicide’ law does not exclude conduct by the mother, whereas C-484 does exclude conduct by the mother.*** So a woman who refuses a cesarean section in Canada and whose baby dies as a result, would ***not*** be prosecuted under C-484 because all actions (or omissions) by the pregnant woman are excluded. C-484 only comes into play ***in the commission of an offence against the mother...***no offence is being committed against the mother when she herself refuses a cesarean section; therefore ***C-484 would not appropriately be used to lay criminal charges.***

It is important to highlight the following caution expressed by researchers at our Library of Parliament:

This case [Rowland] has been widely discussed in US media, but it is important to use caution when analyzing the case because no court decision was ever published. The publicly-available information on this case comes from media reports and statements made by individuals involved in the proceedings. The Rowland case is the only case found in the course of this research in which a pregnant woman in Utah was charged in the death of her own fetus.⁶

As far as the charge of child endangerment goes, the Utah code includes unborn children in the definition of “human being” as per section 76-5-201 (see above). Utah’s child endangerment statute defines “child” as “a human being who is under 18 years of age.” (Utah Code 76-5-109 (1)(a)) Thus Utah’s child endangerment statute does cover unborn children, not just born children. AND the child endangerment code provides no exceptions for the mother or her behaviour. Again, this law is completely different from C-484. C-484 *explicitly excludes* pregnant women and it *only applies in the commission of an offence against the pregnant woman*.

Pennsylvania

NAPW mentions the Pennsylvania case of Priscilla Kimberly Shinault who was charged with “aggravated assault of unborn child” in 1999⁷ for supposedly taking cocaine while eight months pregnant. This offence does include an exception for the mother, and the charge was eventually dismissed.

This is an isolated case that happened almost ten years ago in which the police initially misapplied the law, but they subsequently corrected that mistake. The possibility exists for any law to be misapplied. It would be absurd to deny protection to unborn children who are wanted by their pregnant mothers in Canada because the police in the US, in very isolated cases, misapplied a law.

Ms. Arthur and Ms. Paltrow do not assess false arrests under US laws dealing with other than the unborn child, however general knowledge would imply that they have occurred. Does misapplication of the law, including improper arrests or prosecutions in another country suggest that Canadian laws which bear some similarity should be struck down? Do such occurrences in Canada result in the laws being removed from application in order to avoid the possibility those laws could ever be misapplied again? It seems absurd to suggest invalidating a law simply because it might on rare occasions be misapplied.

⁶ “Prosecution of pregnant women under ‘fetal homicide laws’ and ‘unborn victims of violence laws’ in the United States,” January 17, 2008, Law and Government Division, Library of Parliament.

⁷ Section 2606 of Pennsylvania Consolidated Statutes, Crimes and Offenses, Title 18.

California

NAPW refers to two California cases, *Jaurigue v. Justice Court* in 1992 and *State v. Tucker* in 1973, in which women were prosecuted under California's fetal homicide law which was enacted in 1970. In the first case, Roseann Mercedes Jaurigue's baby was stillborn after she had used cocaine and alcohol during a binge; in the latter case, Claudia Tucker shot herself in the abdomen with a rifle.

The California law does have an exclusion for acts by the mother. Accordingly, in both cases, the charges were dismissed. Again, these are isolated incidents dealing with extreme facts, in one prosecutor's office. A handful of cases in almost forty years in no way constitutes a systematic charging of women under California's fetal homicide law. Moreover, the justice system worked properly and the cases were dismissed.

The wording of the California statute states:

§ 187. Murder defined

(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, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother or the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) **The act was solicited, aided, abetted, or consented to by the mother of the fetus.**
(Emphasis added.)

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

The almost forty years of non-prosecution under legislation exempting the mother from the criminal charge of murder of the fetus is not overcome by two improperly laid charges that were dismissed and, in fact, provides evidence of the successful nature of such exemption in criminal legislation – as is proposed in C-484.

Conclusion

As the above shows, a full analysis comparing the Canadian situation if C-484 is enacted into law with the US situation presents a different picture than that painted in the NAPW article.

The US references made by NAPW and relied upon by ARCC to discredit C-484 are either legislation or a court initiative worded sufficiently differently from C-484 as to not provide the protections noted in the Canadian bill (by not excluding the mother's decision from prosecution) or evidence that the protection of the mother from prosecution clearly stated in legislation successfully prevented prosecution of improperly laid charges.

As well, some of the US state laws changed the definition of "human being" or "individual" to include the unborn child, leaving it unclear as to whether the changed definitions should apply to other statutes as well such as child abuse/endangerment laws. C-484 proposes to work with existing wording of the Criminal Code, preventing the possibility that the C-484 amendment could be open to misinterpretation or misapplication to the interpretation of other legislation.

The alarmist claims made by the National Advocates for Pregnant Women, that "*Unborn Victims of Violence Acts...become tools for policing and punishing pregnant women,*"⁸ and relied upon by the Abortion Rights Coalition of Canada in an attempt to discredit C-484, are without foundation in the facts of the US experience and do not apply to the proposed amendment of the Criminal Code contained in Bill C-484. Such claims provide only a smoke-screen in an effort to take the focus off of what Bill C-484 is really about—protecting pregnant women and their unborn children from third-party attacks and to condemn the actions of anyone who would harm or kill a pregnant woman's unborn baby against her will. By painting an alarming picture of the US situation and analogizing it to Canada, these organizations seek to instill an irrational fear that C-484 will be used against pregnant women in Canada, when C-484 goes to clear and stated effort to ensure that the choice of pregnant women will be respected.

Simply put, Bill C-484 has not been designed, intended, nor can it be interpreted to restrict the actions of the mother of the unborn child or result in her criminal prosecution for her decisions in regard to that unborn child. It is strictly and explicitly aimed at third-parties who criminally attack a pregnant woman and in the process, harm or kill her unborn baby.

The onus is on those who claim that C-484 can be used to "police" and "punish" pregnant women to prove how. Given they are unable to do this, then intellectual honesty and integrity demand that they put an immediate end to their campaign of fear.

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⁸ "Lessons from the U.S. Experience with Unborn Victims of Violence Laws," NAPW, p. 7.