

A WOMAN'S RIGHTS: PART 1

When Prosecutors Jail a Mother for a Miscarriage

BY THE EDITORIAL BOARD

The statutes granting personhood rights to fetuses are never more pernicious than when they criminalize acts of God.

Stomach pains woke Keysheonna Reed late one night last December. She climbed into the bathtub, hoping she would not wake any of the other nine people living in her small home in eastern Arkansas. Within minutes, she'd delivered twins, a boy and a girl. Both babies were born dead, the medical examiner would later determine. Their mother — 24 and already the mother of three — panicked. She found an old purple suitcase, put the bodies inside and got into her car. She "began to pray and just drove," she said, according to a court affidavit, eventually leaving the suitcase on the side of County Road 602.

This personal tragedy was soon heightened by a legal one: When the suitcase was found several weeks later, the Cross County Sheriff's Office, understandably, began an investigation and asked the public for information.

Ms. Reed turned herself in. An autopsy was performed, confirming that the babies had died in the womb. No illegal substances were found in their bodies. "Please pray for all the officers and people involved," the sheriff, J.R. Smith, asked in a statement. Ms. Reed was charged with two counts of abuse of a corpse, a felony in Arkansas carrying a minimum sentence of three years and up to a decade in prison. A judge set bail at \$50,000, a sum more than twice the per capita income for Cross County. Ms. Reed still awaits trial.

Few reasonable people could read the statute under which she is charged and not believe she is guilty of violating it — "A person commits abuse of a corpse if, except as authorized by law, he or she knowingly ... physically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities." But sending this young woman to prison for even three years, and denying her living children a mother, can serve no public good.

It's hard to find a compelling reason for prosecuting pregnancy loss. Nearly one million known pregnancies end in miscarriage or stillbirth annually, according to government statistics, and, despite improvements in prenatal care and medical technologies, the rate of early stillbirths has stayed stubbornly the same over the past 30 years. The cause is rarely, if ever, definitively found.

The involvement of law enforcement only compounds these traumas. It may deter pregnant women who are miscarrying — and even those with unremarkable pregnancies — from seeking medical help, and it forces health care providers who ought to be caring for their patients to collect evidence. Time and time again, it also jeopardizes the well-being of children left behind when their mothers are jailed.

Women facing these harrowing situations have few advocates beyond a handful of scholars and lawyers, with one non profit group, National Advocates for Pregnant Women, frequently organizing their defense.

So what motivates these prosecutions? The reality is that, in many cases, these women are collateral damage in the fight over abortion. As the legal debate over a woman's right to terminate her pregnancy has intensified, so too has the insistence of anti-abortion groups that fertilized eggs and fetuses be granted full rights and the protection of the law — an extreme legal argument with little precedent in American law before the 1970s.

Frustrated by the Roe v. Wade decision that legalized abortion, many in the anti-abortion movement hope for a sweeping rollback under a conservative Supreme Court — one that would block access to abortion even in states that protect women's access to such health services.

"We need to end this," Matt Sande, legislative director for Pro-Life Wisconsin, told Time magazine in 2013. "We need to end surgical abortion, without exception, without compromise, without apology. And that's what personhood does."

If a fetus were counted as a person under the Constitution, some legal theorists believe, there could be no legal abortion

anywhere. Justice Harry Blackmun noted as much in his majority opinion in *Roe*. “If this suggestion of personhood is established, [Roe’s] case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [14th] Amendment.” Justice Blackmun went on to suggest there is no legal precedent for that stance.

Such a finding would go far beyond restricting abortion. Some common forms of birth control could become illegal if personhood becomes accepted law. And, for many anti-abortion activists, that’s the goal.

In 2013, when Senator Rand Paul, a Republican from Kentucky and a physician, introduced the Life at Conception Act to ban abortion and grant the unborn all the legal protections of the 14th Amendment beginning at “the moment of fertilization,” he insisted that it would not curtail access to birth control, including the so-called morning-after pill. Tony Perkins of the Family Research Council disagreed, tweeting: “W/du respect to @SenRandPaul, Plan B isn’t ‘basically’ birth control. Its function is to create conditions hostile to human life in utero.” Though Plan B is, in fact, birth control — it prevents pregnancy from occurring — Mr. Paul got in line.

Republicans have made several attempts to advance the premise of fetal personhood in both state and federal law, including in a proposed version of President Trump’s tax bill passed by Congress last December. Last month Alabama voters approved a ballot initiative to change the State Constitution to read, “Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion,” and to say it is public policy to “recognize and support the sanctity of unborn life and the rights of unborn children.” A federal appeals court upheld a similar Tennessee measure earlier this year.

These activists are as unapologetic about pressuring prosecutors to treat miscarriage as murder, if it serves the cause of ending abortion. The fact that they’re targeting women who had no intention of aborting their fetuses — and who are often deeply grieving for a lost pregnancy — is a societal price they appear willing to accept. Provided someone else pays it. The vehicles for these prosecutions tend to be ancient statutes that were enacted for entirely different purposes.

Arkansas, where Keysheonna Reed is being charged, is one of several states that have outlawed the abuse of a corpse for decades. Most likely, the original intention of such regulations was to curb necrophilia or to have legal recourse when a murderer destroyed a body. Today, however, prosecutors consistently turn to them to punish pregnancy loss.

Abusing a corpse is only one example — the twin laws of concealing a birth and concealing a death are also felonies in Southern states like Arkansas and Virginia (and a misdemeanor in several more). It’s no coincidence that women until the 1850s were put to death for these crimes. While courts have ruled that to be cruel and unusual punishment, these laws are now frequently deployed as a workaround for anti-abortion vigilantes.

Katherine Dellis felt dizzy one day in 2016, passed out and woke up on her bathroom floor to find her stillborn fetus beside her. The baby’s lungs had never been exposed to air, a medical examiner in Virginia’s Franklin County later concluded, meaning the fetus, about 30 to 32 weeks along, had died up to three days before. Ms. Dellis cut the umbilical cord, wrapped the remains in her bath mat, which she then put in a garbage bag, and sought medical care. Unaware of the bag’s contents, her father disposed of it in a public dumpster.

After a doctor raised the alarm, a local prosecutor tried Ms. Dellis, 25, and convicted her of concealing a dead body. She was sentenced to five months in jail. Her appeal, which argued that the “fetus was never alive” so it “cannot be dead,” generated interest in the case from both opponents and proponents of abortion rights.

Gov. Ralph Northam of Virginia pardoned Ms. Dellis this past June, though not before an appellate court upheld the decision, making the argument that anti-abortion activists wanted: that under the law a stillborn fetus is the dead body of a person.

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Even New York is no stranger to these types of prosecutions. In 2008, a car driven by a 28-year-old woman named Jennifer Jorgensen crossed the double-yellow line of Whiskey Road in Ridge, on Long Island. The head-on collision that ensued cut three lives short. The driver of the car Ms. Jorgensen hit, Robert Kelly, 75, died at the scene; his wife, Mary Kelly, 70, died of her injuries three weeks later. The infant that Ms. Jorgensen, eight months pregnant, delivered via emergency cesarean section shortly after the accident died five days later.

In 2012, a Suffolk County jury acquitted Ms. Jorgensen of two counts of second-degree manslaughter in the deaths of the Kellys, one count of operating a motor vehicle while under the influence of drugs and alcohol, and one count of aggravated vehicular homicide.

The jury found Ms. Jorgensen guilty of a single manslaughter charge, holding that she recklessly caused the death of her daughter because she had not been wearing a seatbelt. She was sentenced to up to nine years in prison.

New York's highest court threw out the conviction three years later, ruling that the state's law doesn't hold women criminally responsible in such cases. If it did, a pregnant woman who ignored doctor's orders to stay in bed, took prescription or illegal drugs, shoveled snow or carried groceries could be charged with manslaughter if those acts resulted in the premature birth and death of the fetus, wrote Judge Eugene Pigott Jr. for the court's majority.

"The imposition of criminal liability upon pregnant women for acts committed against a fetus that is later born and subsequently dies ... should be clearly defined by the Legislature, not the courts," Judge Pigott wrote. "It should also not be left to the whim of the prosecutor."

That ruling sent a strong signal to Empire State prosecutors but, of course, has no effect outside the state's borders. In this matter, however, the rule in New York should be the rule for the country. Legislatures and courts around the nation should make it clear that women who miscarry or accidentally harm their fetuses should be treated as grieving parents, not criminals.

Ronald Reagan was governor of California, he signed one of the most liberal abortion laws in the land, in 1967. As late as 1972, a Gallup poll found that 68 percent of Republicans thought that the decision to have an abortion should be made solely by a woman and her doctor.