

[Boom! Lawyered: Trump Judge Approves Manslaughter Charges for Pregnancy Loss](#)

Imani Gandy: Hello, fellow Law Nerds! Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that stans for Monica Lewinsky, because my God, she shut down the Internet yesterday. And if you haven't seen the tweet, I urge you to go find it. I'm Imani Gandy.

Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice, news, commentary, and analysis on the Web. And the Team Legal podcast is part of that mission. Thank you to our subscribers, and a welcome to our new listeners.

Imani Gandy: Jess, you know how for a while in the early aughts, anti-choicers really laid it on pretty thick when it came to keening about how abortion restrictions are about protecting women?

Jessica Pieklo: Oh, sure.

Imani Gandy: How abortion is harmful to women because it causes post-abortion traumatic syndrome, which is a totally made-up syndrome that doesn't exist. So remember that, right?

Jessica Pieklo: Yep.

Imani Gandy: And you remember how they used to argue that they're trying to protect women from themselves, and from the "abortionists" who want to subvert a woman's natural duty when it comes to becoming a mother?

Jessica Pieklo: I mean, how could I forget that? They wouldn't shut up about it.

Imani Gandy: They really wouldn't.

Jessica Pieklo: I mean, in the 1980s, for those of you who weren't around or don't remember, the anti-choicers were all about calling people who got abortions baby killers and barking at them like rabid dogs. We had Operation Rescue openly targeting doctors and patients. It was frankly terrifying.

Imani Gandy: It was, it was, absolutely.

Jessica Pieklo: Then after a few high-profile murders of abortion providers and Democrats finally taking power, following the Reagan and Bush years, the Clinton administration came in and tried to shut that shit down with the FACE Act. That's the Federal Access to Clinic Entrances Act. And yay! FACE Act.

Imani Gandy: Hurrah, hurrah!

Jessica Pieklo: That's a federal law designed to protect abortion patients and providers from harassment and intimidation. So anyways, there's a shift from that sort of "violent baby-killer" rhetoric to this saccharine, "We just want to help you, you poor, down-and-out woman.

Imani Gandy: Ohh ...

Jessica Pieklo: "We are going to save you from yourself."

Imani Gandy: Ugh. Right.

And the culmination of that sort of "pro-woman" nonsense was Anthony Kennedy's absolutely wretched decision in *Gonzales v. Carhart* ... Now, that's the case about the so-called partial birth abortion ban.

And in that case, Kennedy went ahead and adopted the rhetoric of anti-choicers, and moaned about abortion being a hard choice, that women are going to regret, and yada yada yada, blah blah blah.

Jessica Pieklo: Oh, and sincerely, he said, and here, let me quote it, 'cause it is just so blah. That's the legal term of fart, right there. That's just so blah.

Imani Gandy: In Latin, it's *blah-iss*.

Jessica Pieklo: That's shitty.

Imani Gandy: Oh ... [laughter]

Jessica Pieklo: [laughter] People are just done taking the bar exam, and they're going to come into this super-intense episode and hear us making fart noises and making up Latin. It's amazing.

Anyway, this is what Kennedy said. It's garbage.

"Respect for human life finds the ultimate expression in the bond of love the mother has for her child."

Dramatic pregnant pause.

"And while we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."

Imani Gandy: I love the dramatic reading. Also ... Jesus Christ, Tony ... Like, what are you talking about?

Jessica Pieklo: I'm putting that on a mug. "Jesus Christ, Tony."

Imani Gandy: Jesus Christ, Tony. But okay, so all of that "woe, suffer the poor woman" rhetoric is out the window. Anti-choicers no longer care about that shit. They've reverted to essentially shouting, "Baby killer!" at people who get abortions, and are trying really, really hard to toss as many pregnant folks in jail as possible. And they're succeeding.

Last month, the ultra-conservative 8th Circuit Court of Appeals reinstated an involuntary manslaughter charge against a Native American woman in South Dakota. Her name is Samantha Flute. She was indicted based on allegations that she ingested illegal drugs while she was pregnant, that caused the death of her newborn.

Now, this case represents a truly terrifying escalation in the conservative war on reproductive autonomy. With Trump Judge David Stras, one of Jessica's favorite people ... and she'll get into that a little later.

But Trump Judge David Stras cast the deciding vote in the case, and ruled for the first time ever, that the federal government can prosecute a pregnant person based on allegations that their actions while pregnant caused the death of their newborn.

Jessica Pieklo: That's just wild.

Imani Gandy: It's fucking wild. So in this episode, we're going to talk about the Samantha Flute case, and what it means that the 8th Circuit said that Flute could be prosecuted by the federal government, based on actions that she allegedly took while she was pregnant, and we're going to explain to you why this case has us so worried.

So, where do we begin with this case, Jessica?

Jessica Pieklo: Okay. We start with Samantha Flute. Flute is an indigenous woman from South Dakota. And in 2016, gave birth to a baby boy at a hospital in Sisseton, South Dakota. The baby was full term at about 38 weeks when delivered, and had no obvious signs of trauma or injury at birth.

Imani Gandy: That all sounds fine, right? Something clearly happened. What happened after that?

Jessica Pieklo: Well, unfortunately, the baby died just a few hours after birth.

Imani Gandy: Okay. That's unfortunate, yeah.

Jessica Pieklo: Yeah. Hospital officials performed an autopsy on the baby and noted the presence of several substances in its system that had not been medically administered at the hospital.

Officials then interrogated Flute, who admitted to using over-the-counter drugs and also lorazepam during her pregnancy. Now, she told officials the lorazepam was prescribed to her during her only pre-natal visit, Imani. Which was about a week before she delivered.

Imani Gandy: I just want to interrupt for a second, and point out how extremely screwed up it is that this woman was only able to attend one pre-natal visit.

Jessica Pieklo: Yeah.

Imani Gandy: A week before she delivered? And lest people think, "Oh, that's probably because she was irresponsible," it's really important to remind people that a lot of indigenous women are beholden to the Indian Health Services, which is a federal government agency that runs healthcare, and which doesn't do so great of a job of it all of the time. And makes it difficult for people to access care.

So, the fact that she only had one pre-natal visit, a week before her delivery, is alarming in and of itself.

Jessica Pieklo: At so late in her pregnancy, too. The stars have already aligned to make this a really tragic story, just from the beginning.

So, Flute told officials that she knew the substances that she used could possibly harm her pregnancy, but that she could not stop herself from using them. Right?

I think that's another really important element of this story here, is access to, inadequate pre-natal care, and also just the ravaging of substance use in indigenous populations from all of the shit. Right? Like, we've got this entire constellation.

So, the forensic pathologist performs an autopsy and concludes that the baby died from a combined drug toxicity due to the substances that Flute had ingested while she was pregnant.

Imani Gandy: As a result of this, the federal government indicted her on one count of involuntary manslaughter, under statutes governing crimes on tribal lands. Flute filed a motion to dismiss the indictment, and she made several arguments.

First, she argued that even if she had engaged in the conduct that the federal government was alleging that she had engaged in, she couldn't be charged for manslaughter, because that statute was not intended to prosecute pregnant people for their own conduct.

Second, she argued that because a fetus does not fit the definition of a human being in the federal manslaughter statute ... and that's the statute under which the Trump administration had indicted her ... she said that she could not be

prosecuted under the law. The District Court agreed and dismissed the indictment.

But of course, the Trump administration appealed that decision to the 8th Circuit Court of Appeals, because we're now living in a world where everyone wants to throw pregnant people in jail, and will pervert and twist the law in order to do so.

But the 8th Circuit Court of Appeals, which hears appeals from South Dakota and other neighboring states, took up the appeal. And, guess what happened?

Jessica Pieklo: What happened?

Imani Gandy: Give me a wild guess.

Jessica Pieklo: They dismissed it.

Imani Gandy: No! A divided three-judge panel ruled 2 to 1 to reinstate the indictment, with Trump appointee and Jess's mortal enemy, David Stras, casting the deciding vote to green-light Flute's prosecution.

Okay, mortal enemy might have been an overstatement. But Jess really doesn't like this guy. She really does not like this guy.

Jessica Pieklo: Anyway-

Imani Gandy: But after the break ... We already took a break, why am I saying "after the break"? Fuck needing a break. Let's just keep going.

Jessica Pieklo: Fuck the break, let's keep going!

Imani Gandy: We don't really.

Jessica Pieklo: Okay. Imani, this is a lot. This is a heavy case. And it's really sad. These cases always are. But why does this matter? This is one case of a Native woman in a three-judge panel decision, out of South Dakota. But it's not any bigger than that. Is it?

Imani Gandy: Oh no, it's actually huge. Flute was indicted for involuntary manslaughter under a statute, 18 U.S.C. § 1112. If you would like to go look it up, that's again, 18 U.S.C. § 1112.

That statute criminalizes "the unlawful killing of a human being without malice in the commission without due caution and circumspection of a lawful act which might produce death."

Jessica Pieklo: That's generally, that's just like a general manslaughter statute.

Imani Gandy: Exactly. Exactly.

Jessica Pieklo: You kill someone, in certain circumstances, it becomes a federal crime.

Imani Gandy: Right. It's not like premeditated, it's manslaughter. We're fine. We all get that. We've all seen Law and Order.

She was also indicted under § 1153, which provides federal jurisdiction over crimes in Indian country. Quote-unquote, Indian country. This is important, because generally, the federal government isn't involved in prosecuting-

Jessica Pieklo: Murder.

Imani Gandy: ... cases like murder, right? That's usually at the state thing. But because she lives on a reservation in "Indian country," there's a statute that gives the federal government jurisdiction over crimes committed in those regions.

So the questions before the 8th Circuit Court of Appeals were whether Baby Boy Flute is within the class of victims protected by that section I mentioned, 1112, which is the manslaughter section. And whether or not Flute is within the class of defendants covered by that section, § 1112.

Jessica Pieklo: In other words, can this federal manslaughter statute be read to prosecute a pregnant person for the death of their newborn, based on actions that person took, which might even be legal? Right, Imani?

Imani Gandy: Right. Exactly. I mean, as you said earlier, she was taking drugs that she was prescribed. Then she was taking drugs that she got over the counter. None of those things are illegal, so can she be prosecuted at all?

Jessica Pieklo: Right.

Imani Gandy: And, the 8th Circuit said "yes." They said, "Yes, she can."

Jessica Pieklo: Damn it!

Imani Gandy: And how they got to that conclusion is absolutely terrifying.

Jessica Pieklo: Ugh, it is. And we'll have to break now, because there's some competing statutes here. And when we talk about the sort of federal anti-choice legislation and folks say, "It's aspirational, it's not going to do anything. They just like to feel good about this stuff."

I'm here to tell you, listeners, that's garbage.

Imani Gandy: Yeah.

Jessica Pieklo: So. Little history lesson.

In 2002, Congress passed the Born Alive Infant Protection Act. That is designed to extend legal protections for newborns "born alive" after a failed abortion.

Imani Gandy: I'm just so over this born alive bullshit.

Jessica Pieklo: Ugh.

Imani Gandy: If you're born, you're born. What are you talking about?

Jessica Pieklo: We need a whole podcast episode about that.

Imani Gandy: Right. And all it would be is just us saying, "Born alive is nonsense because when you're born, you're fucking born." Like that's really all it is.

And Trump has, in this new Trump era, this new Trumpified era that we're in, this rhetoric has been re-upped, right?

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: All newborns are born alive. It's a tautology. It's an absurd attempt to just basically tap into the heartstrings of people inclined to believe that doctors are birthing, and then murdering newborns.

Jessica Pieklo: Absolutely. And this act is a prime example of them borrowing from that, right? It's got all of this word salad in it about being born alive after an abortion, and all of the things that we have debunked time and time again as not being true in science and medicine. Anyway-

Imani Gandy: Right.

Jessica Pieklo: Anyway.

Imani Gandy: Right.

Jessica Pieklo: What it does is attempt to define, for every single Act of Congress, Imani, every one! All of 'em!

Imani Gandy: Right.

Jessica Pieklo: The term "human being." And this is what they have. "In determining the meaning of an Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." Jesus, that's broad.

Imani Gandy: That's like everything. Just everything.

Jessica Pieklo: We are going to declare this definition fits for everything. Anyways, it says the words "person, human being, child, and individual shall include every infant, member of the species homo sapiens, who is born alive" ... and this is the kicker ... "at any stage of development."

Born alive at any stage of development.

Imani Gandy: That doesn't even make any sense. Like, it doesn't ... What are you talking about? Are you talking now that embryos are being born alive? Blastocysts are being born alive? What are you talking about? This doesn't make any sense.

Jessica Pieklo: We're going to screen shot my face as the reaction, basically.

Imani Gandy: This is obviously just an attempt to insert federal personhood language into every Act of Congress, all across the board. As Jess said, this was enacted in 2002. And it's been essentially symbolic up until now, when the 8th Circuit just up and decided that this definition could be used to justify a federal manslaughter prosecution-

Jessica Pieklo: It's barbarous!

Imani Gandy: Federal manslaughter prosecution of a pregnant woman who had a bad pregnancy outcome. Now, here's what the 8th Circuit Court of Appeals said.

"Because he was born alive" ... as most babies most are, except for stillborn ones, in which case that has nothing to do with abortion. Or ... Okay, I just ...

Jessica Pieklo: Imani's head just exploded. She's collecting herself.

Imani Gandy: It actually, I have to collect my brains on the wall. Pardon me for a few seconds. Okay, wipe-wipe-wipe, clean that up, all done. All right.

"Because he was born alive, under the plain language of these statutes, Baby Boy Flute was a human being. And because the language of the manslaughter statute plainly encompasses the death of a born alive child" ... I swear to God, I can't stand this born alive child shit.

"Because the language of the manslaughter statute plainly encompasses the death of a born alive child, a child at the earliest possible moment that it exists outside the womb, also known as a baby or a child, the statute necessarily extends to conduct that occurred in utero, and caused death to this born alive child.

"Baby Boy Flute's death, and Flute's conduct while pregnant, thus fall within the ambit of the involuntary manslaughter statute."

Jessica Pieklo: I just got a stomach ache.

Imani Gandy: I just, honestly, I can't.

Jessica Pieklo: Yeah.

Imani Gandy: It's just a bunch of nonsense and a bunch of word salad.

Jessica Pieklo: It makes me so mad. I mean, obviously, that like is extremely inflammatory just to say that. But also because when the District Court took a look at this issue, and was determining whether or not Flute could be prosecuted, that is whether or not the statute was even designed to reach pregnant people in the first place.

The court looked to a different federal statute for guidance, the Unborn Victims of Violence Act, and said, "no."

Imani Gandy: So what's the difference between the Born Alive Infant Protection Act and the Unborn Victims of Violence Act?

Jessica Pieklo: Well, here's the thing. In some sense there's really not a lot of difference between the two. Right? Both bills came out of the Bush administration, and both have tones of fetal personhood throughout.

The Born Alive Infant Protection Act, like we said, was first cast in 2002 by Congress and grants legal protections for those infants born alive.

The Unborn Victims of Violence Act, however, was passed a few years later in 2004. And that recognizes an embryo or fetus in utero as a person for purposes of over 60 federal crimes of violence.

It is federal fetal personhood, in effect, but it's got some interesting exceptions. So what were you going to say?

Imani Gandy: Okay. I just wanted to break this down a little bit because I'm a little confused. I'm sure our listeners are. The Born Alive Infant Protection Act-

Jessica Pieklo: Yeah, that came first.

Imani Gandy: ... grants legal protections for infants that are "born alive"-

Jessica Pieklo: Yep.

Imani Gandy: ... after a failed attempt at an abortion. Right?

Jessica Pieklo: Yep.

Imani Gandy: Then the Unborn Victims of Violence Act is sort of like ... I kind of think of it as the Laci Peterson, Scott Peterson stuff, right? When you kill someone who's

pregnant, then that person should get some sort of remedy for the life that was snuffed out inside them, especially if it's a wanted pregnancy, right?

Jessica Pieklo: Absolutely.

But specifically, with the Unborn Victims of Violence Act, that's an important distinction because it contains 1), an exception for abortion. Right? That's important.

And 2), it also states that the bill would not be construed to permit the prosecution of any person for conduct relating to an abortion, for which the consent of the pregnant person or person needed to act on their behalf.

Or, for any person of medical treatment of the pregnant person or their unborn child, or basically, any reason to prosecute a pregnant person would not fall within the ambit of this statute. They're very clear that they are creating and extending legal protections. But, that it is not to be weaponized against pregnant people.

Imani Gandy: So to go back to my Scott and Laci Peterson example.

Jessica Pieklo: Yes.

Imani Gandy: The reason that that would fall under the Unborn Victims of Violence Act is because Scott Peterson murdered Laci Peterson, and the child that she was carrying.

But if, for example, Laci Peterson had gone to get an abortion, then that act would not have applied to her, because it was her choice to go get an abortion, and that act would not apply to any medical treatment that she underwent, because again, it was her choice to get an abortion.

And the Unborn Victims of Violence Act is not intended to reach people who go and get abortions. I just want everyone to be clear on the differences between these two bills.

Jessica Pieklo: Right.

Imani Gandy: Okay. The District Court determined that the exception in the Unborn Victims of Violence Act, the exception that pregnant people should not be prosecuted, nor should their doctors ... the court determined that that exception was a "clear statement from Congress that the federal assault and murder statutes cannot be applied to the pregnant woman herself for any actions she takes with respect to her unborn child."

But the 8th Circuit disagreed, and said that the District Court was wrong to import guidance from that act, from the Unborn Victims of Violence Act, in order to shield Flute from prosecution.

Jessica Pieklo: I'm gonna scream.

Imani Gandy: Jess is raising her hand. I think she wants to scream. Go ahead.

Jessica Pieklo: I make my child, I make my kids raise their hand instead of interrupt and like rudely scream.

But this makes me bonkers, because one hot second earlier, the 8th Circuit had just said, "You know what we're gonna do? We're gonna look to the Born Alive Infant Protections Act to determine whether or not Flute should be prosecuted here."

Imani Gandy: Right.

Jessica Pieklo: And they said, "Sure!" So here, this is Stras, and he can do this. I've known this guy for a while. He can do this.

This is Stras, cherry picking, quite literally cherry picking which parts of which statutes he wants to come up with a way to prosecute Flute here.

This is intentional. This is about looking at what the District Court had in front of him, and say, "You know what? No. The best way that we can get to punishing Flute is by going through A, B, and C."

This is intentional. And it's crap.

Imani Gandy: Right. Right. I have to ask, is David Stras from Alabama?

Jessica Pieklo: No, he's from Minnesota.

Imani Gandy: This honestly sounds like the sort of shit that the Alabama Supreme Court would do.

Jessica Pieklo: Right.

Imani Gandy: It's actually the sort of shit that the Alabama Supreme Court has done.

Jessica Pieklo: Yep.

Imani Gandy: If you recall five years ago, six years ago now? Jesus Christ, we've been doing this for a while.

Jessica Pieklo: Time is a flat circle.

Imani Gandy: It really really is. But there are these cases, Hope Ankrom and Amanda Kimbrough, back in Alabama. You remember those cases, right?

Jessica Pieklo: Oh, yeah. And you covered the hell out of those cases and our old buddy, Roy Moore was involved with these.

Imani Gandy: Oh, yes our old favorite pedophile, Roy Moore, who was Chief Justice of the fucking Alabama Supreme Court at the time. And the Alabama Supreme Court just went rogue in those cases. It decided that these chemical endangerment statutes, which like one of the federal statutes we're talking about, was specifically not intended to ensnare pregnant people for prosecution.

The Alabama Supreme Court just said, "Eh, fuck it. We're gonna go ahead and just say, 'Yeah, we can use this chemical endangerment statute to say that using chemicals and endangering the fetus in utero is the same as having your four-year-old kid in your meth lab in the middle of New Mexico in the fucking desert.'"

Jessica Pieklo: Yeah.

Imani Gandy: These endangerment statutes were specifically enacted to protect people like Walter White Jr, who maybe Walter White would have taken him on his days off to go to the meth lab with Jesse to cook some meth.

I mean, this is not meant to ensnare drug-addicted or drug-dependent people who take drugs, either that are prescribed or that they are addicted to. It's not meant to prosecute these people.

Jessica Pieklo: No.

Imani Gandy: And it's cruel to prosecute these people.

Jessica Pieklo: No, and David Stras took a page right out of Roy Moore's book, and found a way to do it. So, Imani, what are these people doing here?

Imani Gandy: Essentially, what they want to do is they want the power to prosecute and punish pregnant people for failed pregnancy outcomes. They want to establish fetal personhood and end reproductive autonomy. This case is a pathway for them to do that.

Stras, as you said, is an ultra-conservative Trump appointee. And he has passed the litmus test, this litmus test that Trump has these days, of wanting to end Roe versus Wade and to end legal abortion.

His position is so extreme that not even his colleague, Bush appointee Steven Colloton would sign on.

Jessica Pieklo: Let me just say a word about that as the SCOTUS nerd here, because Steve Colloton has been on Trump's SCOTUS shortlist. He's not exactly some centrist. He himself is a very conservative judge. But after his dissent in Flute, I'm guessing he's no longer going to be on Trump's shortlist.

Imani Gandy: Probably not. Probably not.

Jessica Pieklo: Let's talk about it for a second. Because it's rare that I'm actually lifting up a conservative dissent. But, we live in strange times, Imani.

Imani Gandy: We do, we do.

Jessica Pieklo: Colloton's dissent goes through both common law and the history of the federal manslaughter statutes to conclude there's simply no way other than blind judicial activism to impose criminal liability for the conduct alleged in the case here.

Let's just let that sit for a minute. A Trump SCOTUS shortlister is accusing another Trump appointee of blind judicial activism in their quest to allow the prosecution of a pregnant person here.

Imani Gandy: Yeah. Yeah. The decision is terrible.

Jessica Pieklo: It is.

Imani Gandy: It's just fucking terrible. There's really no other way to say it. But it's just one decision out of the 8th Circuit Court of Appeals. So why should folks care? Isn't this just an outlier?

Jessica Pieklo: I don't think we can treat it as an outlier. No, not at all.

First of all, we've got Stras's logic here, and there's no limiting principle to it. If Flute's actions were to constitute manslaughter, think of all the other things that could be similarly charged under this statute, right?

Imani Gandy: Yeah.

Jessica Pieklo: Are you consuming alcohol during your pregnancy? Did you get chemotherapy? What if you negligently drove an automobile that caused an accident?

These aren't just me pulling examples out of the wind. These are the specific examples that the District Court used to say, "You know what we should not be doing here, folks? Is prosecuting pregnant people for failed pregnancy outcomes."

Imani Gandy: We're already in this surveillance state, and now we're going to be in a world where we're pitting just citizens against one another, right? It's like that "If you

see something, say something" shit during the War on Terror, except it's the War on Pregnant People.

You're going to have a pregnant person sitting in a bar with her partner, their partner, having a glass of wine, the one glass of wine that most doctors say you are allowed to drink per week.

And all the people looking at that pregnant person are gonna be calling the cops because, "Oh my God, there's a pregnant person drinking wine, and we really ought to just prosecute them. Put them in jail. What if they have a bad pregnancy outcome? Can we trace it back to that one glass of wine that person had several weeks ago?"

Jessica Pieklo: Oh, absolutely. And while the immediate decision is limited to this case, as we've seen, it can set the groundwork for broader prosecutions in other jurisdictions as they just look to Stras's decision, and use it as a model, right? That's what happened in Alabama. You mentioned the chemical endangerment statutes. Well those, Roy Moore said, "Yeah, sure, prosecute pregnant people."

And then we have that idiot who is setting up the estate for the aborted fetus?

Imani Gandy: Oh God, yeah.

Jessica Pieklo: And what do they cite in that lawsuit? They cite those Roy Moore decisions! I'm getting shouty. But that's how it happens. That is how the law gets built here. So, that's scary.

Imani Gandy: It is scary, and Flute's prosecution here sort of depended on ... in part, at least, delivering an infant that survived a few hours. Right?

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: That was "born alive." But there's nothing in Stras's opinion to suggest that the 8th Circuit wouldn't come to a similar conclusion for a miscarriage.

Jessica Pieklo: I have serious questions about this, just given the breadth of the language and the statute, and the willingness of the anti-choice movement to play Fantasyland with science, right? I mean, you sort of said, "What are they gonna do? Prosecute someone for a "born alive embryo"? I absolutely think they'd try that shit? Right?

Imani Gandy: Yeah.

Jessica Pieklo: They would say, "Well, there was a breath," whatever that means, or "There's a heartbeat," right?

Imani Gandy: Right.

Jessica Pieklo: I mean, I can see them importing that framework from these extreme abortion bans, and using that and to turn around as a means to justify it. Ugh. It's giving me hives.

Imani Gandy: Yeah, it's making me sweaty, as you often say. But we've seen other jurisdictions that are really eager to prosecute pregnant people for bad pregnancy outcomes. I think this is the first federal case?

Jessica Pieklo: Yeah. That's what's so scary about it.

Imani Gandy: And that's what's really scary about it, because the shit that's been percolating in the states has now made its way to the federal government; and all bets are off.

But it's not just the Alabama cases from six years ago that I mentioned. Those cases were I think 2013?

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: God, that's six years. Yikes. But there are newer cases that demonstrate that folks are really gonna go all in when it comes to criminalizing pregnancy.

For example, recently in Tennessee, a woman by the name of Tiffany Marie Roberts was charged with murder, aggravated child abuse or neglect, and a charge related to the victim being a viable fetus ... and this is according to court documents.

The twins were born premature at 23 weeks and died two days later. The newborns were born with drugs in their system, and Roberts herself tested positive for Ecstasy.

Jessica Pieklo: Oof. I mean, there's so much that's wrong with that here, right? 23 weeks as viable, and so much goes wrong when in this stage of pregnancy regardless. So that's one case.

Then there's another Alabama case, recently, where a 25-year-old woman was arrested for chemical endangerment after she admitted she had used synthetic marijuana during her pregnancy.

Imani Gandy: What the fuck is synthetic marijuana?

Jessica Pieklo: I don't know what synthetic marijuana is, because I live in Colorado. But-

Imani Gandy: I live in California, so I use real stuff.

Jessica Pieklo: But, the chemical endangerment. And there's the Wisconsin Act 292, right, the Cocaine Mom Law. Where they, same thing, like, this is all really, really

terrifying. But, as we mentioned earlier, that's been state action. What's especially scary about the Flute case is it's a federal prosecution.

Imani Gandy: What's even scarier is that the Trump administration has decided to reinstate federal executions.

Jessica Pieklo: Seriously.

Imani Gandy: I have these dystopian fantasies, and I don't even think they're dystopian anymore. But if we're reinstating federal execution, we know that these bad pregnancy outcomes tend to occur in communities of color, among the most vulnerable people. We know this administration is racist as all get-out. We know that there's a crisis, a health crisis, on Indian reservations and indigenous communities.

I just can envision a world where we're now executing indigenous people because they have a drug problem, or they're drug addicted in some way. And that leads to a bad pregnancy outcome. We're living in a world where fetuses are given priority over actual people that are born.

It's not that far-fetched to think of we're going to start executing people for murder of fetuses.

Jessica Pieklo: Well, and on the execution note, just to extend that conspiracy hat one click further, one of the folks that made it back on the list had been indicted and convicted of endangering and murdering a child. So I think they're sending messages to be not very subtle about it. It's terrifying.

You mentioned the impact on communities of color, and Indian health being a total clusterfuck and a disaster, and that these are people whose pregnancies are almost set up to fail.

Imani Gandy: Yeah.

Jessica Pieklo: And then will be punished as a result of it. The Tennessee case, while not involving an indigenous woman, I think is another really good example of this, because to prosecute you're going to have to rely on some sort of causation theory. And causation in these cases is always super difficult.

Proving what caused the death of a 23-week-old infant that is born, is not going to be a direct line. And the forensic science, like when we covered Purvi Patel, they were using a thing called the Lung Float Test-

Imani Gandy: Yeah, I remember that.

Jessica Pieklo: ... which is effectively like the Witch Test, right?

Imani Gandy: Yep.

Jessica Pieklo: If she floats, or if she sinks, she's a witch. That's where some of the level of this science is. It's going to really come down on the most vulnerable, and it's going to further criminalize folks who are basically just surviving and trying to not be criminalized in their very existence. And it's scary.

Imani Gandy: It is scary.

Jessica Pieklo: It's really bad.

Imani Gandy: We're going to end the episode here. But we were really only able to just scratch the surface of the intersection of Native people, of substance abuse, and of criminalizing pregnancy. So please, please, please be sure to listen to our podcast series The Breach.

Jessica Pieklo: Yes.

Imani Gandy: Last fall, investigative journalist Lindsay Beyerstein broke the news of pregnant Native people in Montana being drug tested without their consent, and then being convicted of felony drug charges.

Jessica Pieklo: Oh, my God.

Imani Gandy: I mean, it's an excellent podcast series.

Jessica Pieklo: It's so good. Listen to the series. It's excellent.

Imani Gandy: It's five episodes in total. You can listen to it at [Rewire.News/breach](https://rewire.news/breach). Lindsay went out to talk to these women in prison. She talked to prosecutors, the whole nine. So check that out again; that's [Rewire.News/breach](https://rewire.news/breach).

Aside from that, if you want to talk to me about this shit, or to Jess about this shit, you can follow me [@AngryBlackLady](https://twitter.com/AngryBlackLady) on Twitter. You can follow Jess [@hegemommy](https://twitter.com/hegemommy), H-E-G-E-M-O-M-M-Y. And you can follow [@Rewire.News](https://rewire.news) [@rewire_news](https://twitter.com/rewire_news).

You should join our Facebook group. You gotta answer the questions-

Jessica Pieklo: Absolutely.

Imani Gandy: ... and I know we haven't really talked about Brad McBeer or Justice Kegstand. Justice Beer Funnel, and all the other names.

But those are some of the names that will help you answer the question. So please do, because we're trying to keep the group just unified and full of people who are supportive of reproductive rights and the law.

Jessica Pieklo: Yes.

Imani Gandy: And aside from that, what are we going to do, Jess?

Jessica Pieklo: We'll see you on the tubes, folks.

Imani Gandy: See you on the doggone tubes, folks.

Jessica Pieklo: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who also is our executive producer. And the Rewire.News editor in chief is Jodi Jacobson.