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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN BENITO  
BEFORE THE HONORABLE DONALD CHAPMAN, JUDGE

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ROSEANN MERCEDES JAURIGUE,

PETITIONER,

vs.

JUSTICE COURT OF  
SAN BENITO COUNTY,

RESPONDENT,

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

REAL PARTY IN INTEREST.

Case No. 18988

Justice Court  
CR No. 23611REPORTER'S TRANSCRIPT

Hearing

August 21, 1992

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REPORTED BY:

SUE HERFURTH, C.S.R. 9645

APPEARANCES:

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JUSTICE

FOR THE REAL PARTY  
IN INTEREST:

HAROLD NUTT  
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SAN BENITO COUNTY  
Hollister, CA

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1 HOLLISTER, CALIFORNIA

AUGUST 21, 1992

2  
3 THE COURT: Calling the matter of Jaurigue vs.  
4 Justice Court, action number 18988. What's the correct  
5 pronunciation?

6 MR. NUTT: Jaurigue.

7 THE COURT: Is Miss Jaurigue here?

8 MR. NUTT: Yes, Your Honor.

9 THE COURT: Where is she? Can you stand, please,  
10 so I can see who you are?

11 Do you want her to be able to sit with you?

12 MR. PINTO: She's fine where she is, Your Honor.

13 THE COURT: May I have the appearances of the  
14 parties, please. Moving party?

15 MS. BRICK: Ann Brick and Margaret Crosby of the  
16 American Civil Liberties Union Foundation of Northern  
17 California representing Miss Jaurigue.

18 THE COURT: Would you spell your name, please.

19 MS. BRICK: B-R-I-C-K.

20 THE COURT: Middle initial?

21 MS. BRICK: V as in Victor.

22 THE COURT: Your name?

23 MR. PINTO: Robert Pinto, lead counsel.

24 THE COURT: Middle initial?

25 MR. PINTO: H.

26 MS. CROSBY: Margaret Crosby, C-R-O-S-B-Y, with  
27 American Civil Liberties Union.

28 THE COURT: ACLU?

1 MS. CROSBY: Yes.-

2 THE COURT: Middle initial?

3 MS. CROSBY: Y.

4 THE COURT: For Respondent?

5 MR. NUTT: I don't believe there is an appearance  
6 for Respondent. There is an appearance on behalf of the Real  
7 Party in Interest. Harold Nutt, Deputy District Attorney,  
8 San Benito County.

9 THE COURT: Harold Nutt. Your middle initial?

10 MR. NUTT: L.

11 THE COURT: I was amazed at the materials submitted  
12 to me. This pile here was delivered to my house and my  
13 office. I have an office in my home since I retired. I have  
14 read it all. It's quite a bit of work that's gone into this.

15 I will entertain oral argument at this time. Who  
16 wishes to proceed first?

17 MS. BRICK: May it please the Court. The issue  
18 here today is the scope of subdivision b(3), the exception to  
19 the feticide statute, and the question to be decided is to  
20 what conduct does that exception apply. In answering that  
21 question, there are three valuable sources of information to  
22 which this Court can turn.

23 First and foremost, there's the language of the  
24 statute itself, and that's where all statutory construction  
25 has to begin. The exception here is written broadly. It  
26 says that this section shall not apply to any person  
27 including a pregnant woman who commits an act that results in  
28 the death of her fetus if the act is consented to by the

1 mother of the fetus. A woman who commits an act that results  
2 in the death of her fetus by definition consents to her own  
3 conduct, and so the exception applies. That's what the  
4 exception says, but what the exception does not say in this  
5 case is equally important. This exception does not say that  
6 it applies only to an act committed for the purpose of  
7 terminating a pregnancy. And it does not say that this  
8 exception only applies to an act that's committed with the  
9 aid of third parties.

10 Finally, it does not say that this exception  
11 applies only to acts that result in the death of a nonviable  
12 fetus. The statutory language --

13 THE COURT: Say that last part again.

14 MS. BRICK: The exception does not say that it  
15 applies only in the case of an act that results in the death  
16 of a nonviable fetus.

17 THE COURT: In this case it was clearly a viable  
18 fetus. This was the last week of pregnancy.

19 MS. BRICK: A very late-term pregnancy, but the  
20 exception says it shall not apply to an act that results in  
21 the death of the fetus. It does not say in the death of a  
22 nonviable fetus. The exception makes no distinction on the  
23 basis of time, and so that is the language of the statute,  
24 and the analysis could begin and end right there.

25 If there are doubts, unsettled doubts of statutory  
26 construction, the doubts must be settled in favor of the  
27 Defendant, but in this case in addition to the language of  
28 the statute we also have the legislative history and

1 historical context surrounding the enactment of the  
2 California feticide statute. We know that the feticide  
3 statute was enacted in response to a very specific set of  
4 facts, and those were the facts giving rise to the Supreme  
5 Court's decision in Keeler v. Superior Court, the 1970  
6 Supreme Court decision that said the murder statute does not  
7 apply to the man who beats his wife for the purpose of  
8 killing the fetus because at that time under existing law the  
9 fetus was not a human being, and it was --

10 THE COURT: You mean a viable fetus even?

11 MS. BRICK: Even a viable fetus. You have to  
12 remember this was 1970. The debate of viable versus  
13 nonviable was not a debate that had been answered by the  
14 United States Supreme Court or the California Supreme Court,  
15 so we know first of all that the statute was a response to a  
16 very specific set of circumstances.

17 THE COURT: You made a clear statement that prior  
18 to the Keeler case in 1970 it was not possible for anyone to  
19 murder a fetus.

20 MS. BRICK: That's right. The Supreme Court --

21 THE COURT: Under any circumstances?

22 MS. BRICK: Right. The murder statute said murder  
23 is the unlawful killing of a human being with malice  
24 aforethought. In Keeler the Superior Court held that "human  
25 being" as that word had been used through the ancient law and  
26 California law, the term "human being" did not include a  
27 fetus.

28

1 THE COURT: Does that statute now make the fetus a  
2 human being --

3 MS. BRICK: No.

4 THE COURT: -- or does it merely describe when the  
5 fetus can be murdered?

6 MS. BRICK: The statute says murder is the unlawful  
7 killing of a human being or a fetus with malice aforethought.  
8 That's subsection (a). And then we get to subsection (b).  
9 This section shall not apply to any person who commits an act  
10 that results in the death of a fetus if the act is committed  
11 with the consent of the mother of the fetus.

12 THE COURT: Going back to -- so as of today under  
13 California law even a viable fetus just days before birth is  
14 still not a human being?

15 MS. BRICK: That's correct. That is the law in  
16 this state.

17 THE COURT: So the only prosecution for murder can  
18 be by someone who comes under the provisions of the statute  
19 itself?

20 MS. BRICK: That's correct, and that was a very  
21 deliberate decision on the part of the legislature, as you  
22 know from reading the Webb article. The initial legislation  
23 was going to change the definition of human being to include  
24 fetus, and after legislative debate a different formulation  
25 was used that murder is the killing of either a human being  
26 or a fetus, and that's an important distinction. So that's  
27 the first thing we know in the historical context. That's  
28 what motivated the legislature to enact the feticide statute,

1 and we also know from the legislative history that as this  
2 legislation evolved its reach was progressively narrowed.  
3 The legislature did not want every act that might otherwise  
4 come within this broad definition to be punished as murder.

5 We know, for example the legislature was very clear  
6 it did not want the act of abortion to be punished as murder.  
7 And we also know that the legislature wanted to be sure the  
8 pregnant woman who chooses an abortion would not be punished  
9 for murder any more than would those persons whose aid she  
10 might seek in carrying out the decision.

11 THE COURT: Is there any circumstance in your  
12 opinion where the mother can be charged with the murder of  
13 her unborn fetus?

14 MS. BRICK: No.

15 THE COURT: Suppose you have an odd set of  
16 circumstances where the mother specifically intends to murder  
17 her unborn child?

18 MS. BRICK: Your Honor, that's just another way of  
19 describing an abortion. If you have a woman who decides to  
20 terminate her pregnancy, the termination of the pregnancy  
21 results in the death of the fetus, and it is absolutely clear  
22 that the legislature concluded that that act, while it might  
23 want to make it criminal, and it said very specifically that  
24 nothing in subdivision (b) shall preclude a prosecution under  
25 some other provision of the law, did not want it punished as  
26 murder. So, for example, if a woman obtained a late-term  
27 abortion, she would be prosecuted under Penal Code Section  
28 275, and the penalty at that time was five years; but she



1 could not be subject to a prosecution where if she intended  
2 to terminate the pregnancy of course it would be first degree  
3 murder, express malice, and she would be facing twenty-five  
4 years to life. The legislature made it a very clear that  
5 that does not fall within the terms of the murder statute,  
6 but what the legislature was getting at was a much more  
7 egregious situation of the man who attacks his estranged wife  
8 for the purpose of killing the fetus and succeeds, and until  
9 this statute was enacted he could of course be prosecuted for  
10 abortion but that was all; and the legislature felt that the  
11 other act, the act of Robert Keeler, deserved punishment as  
12 murder, and it changed the statute.

13 THE COURT: Two questions. Going back to my  
14 question, is there any circumstance where the mother can be  
15 charged with murder of her unborn fetus? Suppose you have a  
16 unique set of facts wherein she becomes aider and abettor to  
17 one who does cause the death of the unborn child. Could she  
18 under those circumstances be guilty of murder?

19 MS. BRICK: Again no, because the statute says it  
20 shall not apply to persons who commit an act that results in  
21 the death of a fetus if the act is aided or abetted by the  
22 mother of the fetus, and again, if she is aiding or abetting  
23 it's because she wants to terminate the pregnancy. You have  
24 this intentional act, this specific intent, and the  
25 legislature made that crystal clear that was to be punished  
26 if at all only as abortion, not as murder.

27

28

1 THE COURT: So the specific facts of this case  
2 aren't relevant, the only thing relevant is the death of the  
3 unborn fetus.

4 MS. BRICK: And that the person charged with the  
5 death is the mother.

6 THE COURT: Another question: Given the facts of  
7 this case, assume it's proved that she took drugs during the  
8 pregnancy knowing that the drugs were endangering this unborn  
9 child, and the child is stillborn. Is she subject to  
10 prosecution for abortion?

11 MS. BRICK: No.

12 THE COURT: Why not?

13 MS. BRICK: Because Section 275 is a specific  
14 intent statute. It reads that -- I will read the language.

15 "Every woman who solicits of any person any  
16 medicine, drug or substance whatever and takes the  
17 same, or who submits to any operation or to the use  
18 of any means whatever with intent thereby to  
19 procure a miscarriage --"

20 Now that intent is not present in the facts that  
21 are alleged here. It is an act of lesser culpability, and  
22 just as the legislature made the deliberate and considered  
23 decision not to amend the manslaughter statute to include the  
24 death of a fetus, we see that the legislature concluded that  
25 this less culpable conduct should not be the subject of  
26 criminal law.

27 THE COURT: So if a woman intentionally has the  
28 child aborted, you charge abortion; but if she does not have

1 intent, no matter how gross the conduct in endangering the  
2 child, she is not subject to prosecution for anything?

3 MS. BRICK: That's right. Let me give another  
4 example where the conduct is very parallel, but I think it  
5 becomes clear to you why the legislature wouldn't want that  
6 statute to apply. A woman is diagnosed with cancer. She is  
7 eight months pregnant, and the cancer can be treated either  
8 surgically or by radiation. Each treatment has various  
9 advantages and disadvantages as far as the pregnant woman is  
10 concerned. Radiation has the disadvantage that like  
11 ingesting drugs during pregnancy it might kill the fetus.  
12 The woman knows that. Her doctor knows that. They weigh all  
13 the options, and she decides to opt for radiation. The  
14 cancer is cured. The fetus dies. She and her doctor,  
15 knowing of the danger to the fetus, made the decision to go  
16 with radiation therapy, a very important, a very personal  
17 health decision. Under any other interpretation of the  
18 statute, that would meet the definition of implied malice,  
19 and she and her doctor could both be prosecuted for murder  
20 but for this exception. The exception tells you that act  
21 which she and her doctor committed with her consent which  
22 resulted in the death of her fetus may not, and I would  
23 submit should not, be punished as murder.

24 If the legislature wants to deal with the issue of  
25 substance abuse during pregnancy, it is perfectly capable of  
26 doing so. It has had enough of an opportunity to do so where  
27 bills have been presented and the legislature has rejected  
28 them. If after this case is decided the legislature decide

1 that it is dissatisfied with the result, it can do just what  
2 it did in the Keeler case and can enact a new statute; but  
3 the statute before this Court both in terms of its plain  
4 language and its legislative history and I think the very  
5 persuasive evidence of how the legislature has responded to  
6 our suggestions that criminal sanctions are not a fruitful  
7 approach to the problem of substance abuse, all tell us that  
8 not only does the language of the statute not support that  
9 interpretation, but it would not be carrying out the  
10 legislative intent.

11 THE COURT: Are there any states that have statutes  
12 that allow a mother to be charged with murder for the death  
13 of her unborn fetus?

14 MS. BRICK: Not that I know of, but I can't tell  
15 you authoritatively that they don't. What I can tell Your  
16 Honor is that in many --

17 THE COURT: There is a raft of cases --

18 MS. BRICK: There is a raft of cases where the  
19 prosecution tried to do just what it is trying to do here.  
20 The statute never intended to deal with the issue of  
21 substance abuse during pregnancy. It might have been the  
22 child abuse statute or assault with a deadly weapon. It  
23 might be delivering drugs to a minor child. When those  
24 statutes were enacted the legislature never had in mind those  
25 statutes be used to punish substance abuse during pregnancy  
26 that harm the fetus, just as in the fetal murder statute here  
27 it was never so intended, but prosecutors took it upon  
28 themselves to do what the legislature had not done and

1 attempted to rewrite those statutes. And in every court in  
2 which prosecution has been contested, the courts have  
3 dismissed those prosecutions. The Supreme Court of Ohio, the  
4 Supreme Court of Florida, a number of appellate courts and a  
5 number of trial courts, they are all unanimous in saying  
6 that's not what the language of the statute says, and that is  
7 not what the legislature intended. For example, in the  
8 Florida decision Johnson v. State just decided a few weeks  
9 ago --

10 THE COURT: That case is not a published opinion --

11 MS. BRICK: Yes, it is or will be. It hasn't  
12 gotten into the Reporter yet. This Court can take judicial  
13 notice of decisions of other states, but --

14 THE COURT: If it was not a published opinion in  
15 California it would not be legally cited.

16 MS. BRICK: The way the court system operates, what  
17 operates is precedent, and there is nothing that prohibits  
18 this Court from taking judicial notice of decisions of courts  
19 of other states.

20 THE COURT: Even though they are not published?

21 MS. BRICK: Yes, and in the case of the Florida  
22 Supreme Court case, within a week or two or a month or so, it  
23 will be published in the Official Reports and West Reporter.  
24 That would go up to the United States Supreme Court because  
25 there is a federal question. To date that hasn't happened.  
26 I think it's important because what this tells you, eighteen  
27 different courts have all responded the same way. In the  
28 Florida case, for example, there was a legislative history

1 very similar to the legislative history here where the  
2 legislature has had before it proposals that would  
3 criminalize conduct during pregnancies that harm the fetus,  
4 and the legislature, giving a lot of weight to the  
5 overwhelming consensus of expert opinion in the field of  
6 infant medicine and addiction that criminal sanctions  
7 frustrate rather than further the goal of helping women have  
8 healthy babies because criminal sanctions make women afraid  
9 to get the health care they need, driving them away from the  
10 care they need for fear of prosecution.

11 Those are policy questions. Those aren't questions  
12 the courts are empowered to deal with. Those are problems  
13 for the legislature. The Florida court recognized that. It  
14 recognized that the legislature had rejected this kind of  
15 legislation just like the California legislature did, and it  
16 said if the Florida legislature did not like the result it  
17 could change it.

18 THE COURT: Did the Florida court actually find  
19 that prosecution of mothers would actually hinder mothers  
20 seeking help?

21 MS. BRICK: It's my recollection that it did. I  
22 know immediately that I can tell you that the South Carolina  
23 decision that we just sent you made that finding. You will  
24 find it in a number of state court decisions, but I think  
25 it's correct that the Florida court did as well.

26 THE COURT: What did they base the finding on,  
27 studies or writings or opinions of people?

1 MS. BRICK: The opinion of the American Medical  
2 Association, and their excerpts and references to the opinion  
3 of the American Medical Association that are cited in our  
4 brief.

5 THE COURT: Prosecution would be counterproductive  
6 according to the American Medical Association?

7 MS. BRICK: Absolutely, because it drives women  
8 away from health care and drug treatment, and there's a  
9 report that's been submitted by the GAO to the United States  
10 Senate that has cited statistics that show in fact those  
11 threats of criminal prosecution have precisely that effect,  
12 that it's not a theoretical matter that women are in fact  
13 deterred from seeking the prenatal care they need and, you  
14 know, when there is a substance abuse problem if the woman  
15 gets good prenatal care chances of her having a healthy baby  
16 increase dramatically in the view of the AMA or American  
17 Academy of Pediatrics or the American Public Health  
18 Association or a whole raft of organizations, all of which  
19 are listed in our brief, and I would be happy to repeat them  
20 for you here because I think it's important, and it's an  
21 impressive list. It's the American Medical Association, the  
22 American Public Health Association, American Academy of  
23 Pediatrics, American Society on Addiction, the March of  
24 Dimes, Southern Regional Conference on Infant Mortality,  
25 Southern Legislative Conference, Women's Network, National  
26 Conference of State Legislators, and finally the staff of an  
27 organization known as Center for the Future of Children.

1           Now, in that list I just gave you are some of the  
2 most highly regarded institutions in the medical community,  
3 institutions which deal directly with the issue of what is  
4 best for the infant, how do we best deal with the problem of  
5 addiction when the California legislature rejects the  
6 proposals to criminalize substance abuse during pregnancy on  
7 the basis that it results in harm to the fetus. It had that  
8 information before it. It had the information of its own  
9 task force that recommended against imposing a punitive  
10 response, that recommended in favor of treatment, and so the  
11 legislature made that policy decision.

12           At some other time it can make a different policy  
13 decision, but that is the problem of the legislature, not the  
14 problem of the Prosecution to ask this Court to rewrite  
15 California's fetal murder statute to deal with a problem that  
16 it was never intended to deal with, that the language of the  
17 statute does not deal with, and that it is the province of  
18 the legislature to address.

19           There is something else the legislature can think  
20 about and something the legislature can do in addressing this  
21 problem that this Court would be unable to do if it were to  
22 rewrite the statute, and that is the legislature can address  
23 the specific problems it has on its mind, the issue of  
24 substance abuse during pregnancy; but if this Court has to  
25 rewrite the statute, there is no limiting principle that can  
26 be applied. The concept of implied malice is broad enough to  
27 encompass not only the issue of substance abuse during  
28 pregnancy but the issue that we talked about a moment ago,



1 the health care decisions that every woman must make. It can  
2 apply to her decisions about diet. It can apply to her  
3 decisions about recreational activities she engages in. It  
4 can apply to the decisions she must make about her employment  
5 situation. It can apply to whether or not she uses her  
6 employment funds to obtain medical care for her existing  
7 children, or fearing a threat of prosecution uses those funds  
8 for prenatal care because she doesn't have enough money to do  
9 both. There is no limiting principle when we give, when we  
10 rewrite the exception --

11 THE COURT: You're saying if I were to hold that  
12 malice, implied malice be justified murder in this case, the  
13 next case down the line might be an alcoholic mother?

14 MS. BRICK: Yes, or a smoker.

15 THE COURT: Someone whose work endangers the child,  
16 working in areas where there are dangerous chemicals, and  
17 even decisions about proper use of funds?

18 MS. BRICK: That's right, because implied malice  
19 doesn't make those distinctions. It looks at whether the act  
20 has consequences dangerous to life, if whether the person  
21 committing the acts knows of those dangers and commits the  
22 act anyway. That is a dangerous road for a court to go down  
23 just in order to address the issue of substance abuse during  
24 pregnancy.

25 Once again, that is why the legislature is the body  
26 that is best equipped to deal with this situation. Penal  
27 Code Section 6 and the due process clause tells us -- Penal  
28 Code Section 6 tells us that there are no common law crimes

1 in California, that the Court cannot create a crime that the  
2 legislature has not created.

3 The due process clause tells us that even if the  
4 Court can create a common law crime, which it can do in some  
5 other states, it can't apply it to the case at bar.

6 THE COURT: Ex post facto?

7 MS. BRICK: It's the exact same idea as ex post  
8 facto.

9 THE COURT: There would be no way this court could  
10 create ex post facto law. Either I approve the prosecution  
11 or I do not approve.

12 MS. BRICK: Well, for example --

13 THE COURT: If I grant the writ, the prosecution is  
14 terminated subject to the rights of the People to take it to  
15 the appellate court. If I deny the writ, then the Defense  
16 could appeal to the appellate court.

17 MS. BRICK: That's right.

18 THE COURT: But I don't see how I can create a law  
19 that would not apply in this case but would somehow apply to  
20 future cases.

21 MS. BRICK: Because the Penal Code says you can't.  
22 That's right.

23 THE COURT: Only the Supreme Court or Court of  
24 Appeals --

25 MS. BRICK: Not even the Court of Appeals or the  
26 Supreme Court can create a common law crime.

27  
28

1 THE COURT: They can give the statute a  
2 construction that would apply in the future to similar  
3 crimes.

4 MS. BRICK: It couldn't apply in this case.

5 THE COURT: Because of due process?

6 MS. BRICK: That's right.

7 THE COURT: That's your position?

8 MS. BRICK: That's right, but there's really an  
9 easy answer in this case. As we go back to the words of the  
10 statute, we go back to the context in which it was enacted,  
11 we look at what the legislature has done and we say this  
12 Court is not going to usurp the legislative function of  
13 dealing with a very serious problem of substance abuse during  
14 pregnancy. We are going to hold that the exception applies  
15 here because by its very terms it does, and if the  
16 legislature wants to make it a crime it has all the tools at  
17 its disposal to deal with the problem, and we can look at it  
18 when it comes up.

19 THE COURT: You say "easy answer". That means it's  
20 an easy answer to say this woman cannot be held accountable  
21 for a gross act that results in the death of her child, and  
22 that's an easy answer?

23 MS. BRICK: When I say "easy answer", I mean  
24 understanding what the statute says. We mean the result is  
25 difficult. The courts are forced to make difficult decisions  
26 all the time, just like the Supreme Court in the Keeler case  
27 was forced to make what I am sure was a most unpalatable  
28 decision when it held that Robert Keeler could not be

1 prosecuted for murder, but it knew that principle and rules  
2 of law is more important than the result in just one case,  
3 and I think it also knew that there was a legislature that  
4 could remedy the problem in the future.

5 THE COURT: Right. The legislators can't do  
6 anything about this case.

7 MS. BRICK: Not this case, but about all future  
8 cases, and I think in the long run we are all better off  
9 sticking by principles of law, applying the law as it's  
10 written and letting the legislature change the law if it  
11 feels that's an appropriate result, because if this Court  
12 upholds and permits prosecution in this case then that  
13 interpretation of that statute is also going to permit murder  
14 prosecution in the case of a woman who doesn't follow  
15 doctor's orders; a woman who engages in dangerous employment  
16 because she has to put food on the table; the woman who  
17 smokes; the woman who engages in recreational activity that  
18 poses a risk; or a woman who chooses radiation treatment for  
19 cancer instead of surgery. It is for that reason that we  
20 must interpret the statute to do what it was intended to and  
21 leave it to the legislature to deal with one aspect of the  
22 problem that is prescribed in a manner that may seem  
23 unpalatable. There is a remedy, not in this case, but in the  
24 long view the rule of law is the better path.

25 THE COURT: Thank you.

26 MS. BRICK: Mr. Worthington, who is amicus for  
27 California Attorneys for Criminal Justice, wanted to say a  
28 few words.

1 THE COURT: Let's go through the people that are  
2 already here at counsel table.

3 MS. CROSBY: No, Your Honor.

4 THE COURT: Mr. Pinto?

5 MR. PINTO: Learning to be quiet is important, Your  
6 Honor. It's well said already.

7 MR. NUTT: Your Honor, I would object to the amicus  
8 being allowed to speak. She filed their papers for whatever  
9 they are worth. They are not an actual party in this matter.  
10 What else can be added to the papers that they didn't include  
11 in them?

12 THE COURT: It's not unusual for an amicus to be  
13 allowed to be heard. State your appearance, please.

14 MR. WORTHINGTON: Thomas Worthington for California  
15 Attorneys for Criminal Justice. It's up to the Court, of  
16 course. That's why we didn't come forward until invited. We  
17 would very much like to be heard.

18 THE COURT: First, who are the California Attorneys  
19 for Criminal Justice?

20 MR. WORTHINGTON: California Attorneys for Criminal  
21 Justice is a statewide organization of criminal lawyers who  
22 practice almost entirely in criminal law. There are also  
23 many lawyers outside of California who belong to California  
24 Attorneys for Criminal Justice. The organization is  
25 approximately two thousand strong.

26 THE COURT: How old of an organization is it?

27 MR. WORTHINGTON: Almost twenty years now. 1974.  
28 About eighteen years now. We stand for individual rights in

1 criminal cases. We defend people on their individual rights  
2 in criminal cases, and we defend people whether they have  
3 done right or wrong. We stand for the proposition people  
4 need to be defended. We also as part of the effort to have  
5 some influence on public policy and on constitutional law  
6 issues file amicus briefs in many, many cases all over the  
7 country. These amicus briefs are almost always limited to  
8 cases that have reached appellate court or Supreme Court  
9 level. We offered to file a brief in this case here as  
10 amicus in this case at the Superior Court level because we  
11 see the issues involved in this case as being of absolutely  
12 immense constitutional proportions.

13 May I make just a few comments?

14 THE COURT: Do you see anything differently than  
15 Miss Brick?

16 MR. WORTHINGTON: There are only a couple of things  
17 I may add, Your Honor. Ms. Brick made an absolutely, very  
18 cogent and thorough argument. Of course I certainly don't  
19 think I can make any more intelligent argument than she made.  
20 We approach this from the perspective of criminal lawyers who  
21 are very experienced in the specific field of criminal law  
22 and specific defenses available when a person is charged with  
23 a criminal offense. My comments are really just two areas.  
24 One has to do -- apparently you are giving me permission to  
25 go forward.

26 THE COURT: Yes. Go ahead.

27 MR. WORTHINGTON: Thank you. On the first issue,  
28 the question of whether or not this statute is open for

1 interpretation, we deal with statutes and Your Honor does  
2 every single day, and the question of whether the statute  
3 could or could not have been written slightly more clearly  
4 with less ambiguity in it, I don't think I've ever seen a  
5 statute, and I doubt if the Court has ever seen a statute  
6 that is perfect, that you could say this could not have been  
7 made clearer. There is -- every statute the legislature ever  
8 tries to write is always open to some possibility of  
9 interpretation. But just as jurors every day -- when you  
10 instruct jurors in this Superior every day they are told that  
11 reasonable doubt is not any doubt, because all things that  
12 are subject to moral evidence and to subjective evidence, all  
13 things are open to some possible or imaginary doubt. I would  
14 say the same principle applies when you are trying to  
15 determine whether the legislature left any doubt in this  
16 particular penal statute. Sure, the prosecutor has done a  
17 good job, best job that could possibly be done of raising all  
18 possible and imaginary doubt, but to our way of thinking  
19 there is no reasonable doubt.

20 THE COURT: What is the standard of proof in terms  
21 of whether the statute applies or does not apply?

22 MR. WORTHINGTON: It is not even a reasonable doubt  
23 standard. In fact, in the criminal law field the courts  
24 require that the statute be interpreted in the matter most  
25 favorable to the accused, and all reasonable doubt about the  
26 interpretation of the statute must be resolved in favor of  
27 the interpretation that best favors the accused, so that's  
28 the standard. This one would have been hard for the

1 legislature to write it clearly. To our thinking, the  
2 legislature said they intended to exempt the mother from all  
3 acts that she aids, abets or consents to.

4 The second comment we have to make, Your Honor,  
5 really goes to the public policy issue and whether or not  
6 this Court should, even if it felt that it could give a  
7 different interpretation to this statute, whether or not the  
8 Court should give a different interpretation to this statute.  
9 There isn't a person in this courtroom whose heart does not  
10 go out to the crack babies that we see in our society. There  
11 is not a person in this courtroom whose heart does not go out  
12 to the family that has a stillborn baby. There is not a  
13 person in this courtroom whose heart does not go out to the  
14 unfortunate woman who does something negligent or does  
15 something in desperation that results in the death of that  
16 baby that she is carrying. There's not one person in this  
17 courtroom whose heart does not go out to those situations.

18 What we are concerned about is that the  
19 Prosecutor's solution to this terrible social and medical  
20 health problem that we have in our society, the Prosecutor's  
21 solution would be to invoke the heavy hand of the government.  
22 All of us are concerned about loss of civil liberties that  
23 some of us at least see occurring as our society becomes more  
24 complex and a more and more dangerous place in which to live.  
25 Many of us are concerned that we respond these days by a loss  
26 of a lot of our civil liberties; but I cannot think of an  
27 area in which the heavy hand of the government is more  
28 heavily applied, where it is more disruptive to the



1 objectives that we have as a society to live as free people  
2 making our own decisions, right or wrong. I cannot think of  
3 an area in which the government performs more poorly than the  
4 area where it starts prosecuting people for moral decisions  
5 and where the government starts criminalizing --

6 THE COURT: You feel that deliberately making a  
7 decision with specific knowledge it's endangering the life of  
8 the unborn child is a moral decision?

9 MR. WORTHINGTON: I don't say it's a morally  
10 correct decision.

11 THE COURT: Is it only a moral decision? Doesn't  
12 it go beyond being a moral decision?

13 MR. WORTHINGTON: It does, of course, because it is  
14 mala in se to begin with. In discussing whether it's --

15 THE COURT: Almost a death occurring in the  
16 commission of a felony.

17 MR. WORTHINGTON: That's right. The decision to do  
18 so is wrong first of all because the law says it is wrong,  
19 but it is certainly wrong in every moral sense if the mother  
20 who takes drugs knows they are going to harm her child.  
21 That's wrong whether the mother knew that it was against the  
22 law or not, and it would be wrong to my standards and I'm  
23 sure to those of California Attorneys for Criminal Justice  
24 whether it were against the law or not.

25 THE COURT: That's precisely what she's charged  
26 with.

27 MR. WORTHINGTON: Yes, murder, and what the  
28 Prosecution thinks they can prove is that she took cocaine

1 and that they think they can prove there is a causal  
2 connection that the injection of cocaine was the cause of the  
3 death of this fetus. Those may or may not be things that the  
4 prosecution can prove, but of course that's not what the  
5 issue is before the Court now. What we are suggesting as  
6 amicus is that it's a very dangerous area for the Prosecutor  
7 to try to solve this problem.

8 We know, all of us know we have hundreds, thousands  
9 of women who are carrying fetuses who are ingesting  
10 substances that can harm those fetuses. Now all responsible  
11 citizens would like to find some way to address all of the  
12 problems that medical science tells you are harming and can  
13 harm fetuses right down from perhaps the least dangerous  
14 which is moderate smoking to the next step up, which is  
15 moderate or heavy drinking. All of us would like to try and  
16 address the problems and help women carrying fetuses to  
17 understand that medical science says that's going to harm  
18 your fetus in some fashion. Let's find ways to stay away  
19 from those substances.

20 Certainly all of us want to address the problem of  
21 taking dangerous substances like cocaine. The evidence is  
22 even stronger that those kinds of substances harm fetuses,  
23 but the question remains would the Prosecutor's  
24 interpretation of this statute that would allow a mother to  
25 be prosecuted for murder, would that interpretation take us  
26 anywhere at all toward solving the problem that we have? I  
27 suggest that it would not. California Attorneys for Criminal  
28 Justice suggests that it would not, and we suggest this Court

1 should not allow this Prosecutor to take this additional step  
2 toward interfering with individual lives of decisions that  
3 are made by mothers.

4 Your Honor, we have to say that however wrong the  
5 decision the particular mother made appears to be. We ask  
6 the Court to take that position because we are so concerned  
7 about the invasions of personal liberties that that involves.  
8 We suggest instead that this is a problem for the legislature  
9 to continue to try to deal with in other ways, in other  
10 noncriminal ways.

11 Thank you very much for permitting me to speak.

12 THE COURT: Thank you. Mr. Nutt?

13 MR. NUTT: Yes, Your Honor. The Defense has  
14 mentioned policy, and I just want to address that for a  
15 moment here. There are policies to consider. The primary  
16 policy was stated by the Supreme Court interpreting under the  
17 Constitution in 1973 the case of Roe vs. Wade in which it  
18 stated in the case of a compelling state interest in  
19 protecting the life of a viable unborn fetus, that's a  
20 policy. The states have a compelling state interest. That's  
21 the most, the strictest test, I should say Constitutional  
22 interpretation, that there is. And we intend to do that, to  
23 protect the rights of the unborn fetus, the viable unborn  
24 fetus. That baby that isn't born that happens to be over the  
25 age of twenty-four to twenty-eight weeks gestation has  
26 Constitutional rights, and somebody has to listen to that  
27 voice. Even though no one else can hear it, we hear it, and  
28 we intend to protect that child's Constitutional rights.

1 Now, there's also another policy, and that was  
2 enacted by the California legislature in 1970. And that  
3 policy is unborn children fetuses should be protected from  
4 murder. The Defense has relentlessly misstated the  
5 legislative intent of the fetal murder law. The fetal murder  
6 law was never intended to protect pregnant women from assault  
7 by third parties which results in death of the fetus. The  
8 purpose was to protect the unborn child from murder. That's  
9 the purpose. When you look at the two statements that we  
10 have made as far as legislative intent goes, there is a  
11 bright line distinction there and it's very important for  
12 consideration of this case.

13 THE COURT: Go back just a second. You made a  
14 statement that you are going to protect -- you hear the voice  
15 of the unborn child and you are going to protect the rights  
16 of that unborn fetus, and that's what you should. Of course  
17 they are suggesting the way you protect that is not by trying  
18 to give a new construction to the statute but by seeking  
19 appropriate legislation that would specifically deal with the  
20 problem.

21 MR. NUTT: Perhaps the legislation should be sought  
22 too. I'm not trying to rewrite the statute. I believe the  
23 statute is clear and the statute, especially when you look at  
24 the statute and interpret it by legislative intent. The  
25 statute is clear. It protects the unborn child from murder.

26 THE COURT: By others other than the mother or by  
27 even the mother?  
28

1 MR. NUTT: Even the mother, it's our belief. Now  
2 let me address that for just a moment. Legislative, general  
3 legislative intent with regard to the fetal murder law is  
4 clear. It's to protect, to create a new class of beings that  
5 are protected by the murder statute. That's clear. That's  
6 the general legislative intent. We do not have any specific  
7 legislative intent with regard to subsection (b)(3) of  
8 Section 187. There is no specific intent. According to the  
9 language -- and the Court is familiar with the argument I  
10 made in my brief. According to the language it does not  
11 exempt as prosecution --

12 THE COURT: You could say by looking at the statute  
13 on its face clearly the statute means that if the mother  
14 takes -- does something truly dangerous in the final weeks of  
15 pregnancy such as to use drugs and the baby is stillborn,  
16 that the mother can be charged with murder?

17 MR. NUTT: I think you can. 187(a) says anyone who  
18 murders a child, fetus, with malice aforethought is  
19 chargeable with murder.

20 THE COURT: Except when -- if it's with consent of  
21 the mother.

22 MR. NUTT: Right, and again I have already argued  
23 in the paperwork the language does not deal with direct  
24 actions on the part of the mother. Let me point out  
25 something here. I quoted part of the language for the Court  
26 in the papers. It's out of the Webb opinion, which is part  
27 of the legislative intent.

28 THE COURT: I'm sorry, I can't hear you.

1 MR. NUTT: It's in the Webb comment, which is part  
2 of the legislative intent documents attached to both parties'  
3 materials. It's on page 172, and it says:

4 "Biddle's original intent was simply to include  
5 the fetus in or beyond the twentieth week of uteral  
6 gestation as a human being for purposes of murder or  
7 manslaughter."

8 THE COURT: You said that very fast.

9 MR. NUTT: "Biddle's original intent was simply  
10 to include a fetus in or beyond the twentieth week  
11 of uteral gestation as a human being for purposes of  
12 murder and manslaughter."

13 That was the original intent. That's the general  
14 intent I talked about. During the process of the bill  
15 through the committee hearings and floor sessions of the  
16 Assembly and Senate, however, several changes had to be made.  
17 The first was to add the exception to the bill to insure it  
18 did not conflict with the abortion statute. That's what the  
19 exception is for. That's what the legislative intent says.  
20 The legislative intent was to avoid conflict with the  
21 abortion statute, and that's what they are directed to.

22 Now, there is a lot of discussion in the  
23 legislative intent materials. Why should then even include  
24 that? It's already lawful. It's not an unlawful act as  
25 contained in 187(a), but they decided to go ahead and include  
26 the language anyway, just to be overly protective. I guess.  
27 It's our contention that subsection (b)(1)(2) and (3) apply  
28 solely to the abortion setting and do not apply to anything

1 that occurs outside the abortion setting, and the abortion  
2 setting is very well controlled.

3 THE COURT: Do you agree that -- and I don't want  
4 to interrupt your thought. Do you agree it is the law of the  
5 State of California that the statute must be given the  
6 interpretation most favorable to the accused if there is a  
7 reasonable doubt as to the meaning of the language?

8 MR. NUTT: I believe that's true in general.  
9 However --

10 THE COURT: And that all reasonable doubt is in  
11 favor of the construction that does favor the accused. Is  
12 that the law?

13 MR. NUTT: I believe that's probably the law, yes,  
14 but we're talking --

15 THE COURT: I have one more question. If that's  
16 the case, how can it be that so many people, so many  
17 agencies, so many bodies feel that it's inappropriate that  
18 the mother be prosecuted for the murder of an unborn fetus  
19 and that every state is to the contrary?

20 MR. NUTT: When you're referring to other agencies,  
21 who are you referring to?

22 THE COURT: American Medical Association.

23 MR. NUTT: I would like to point out for the Court  
24 the American Medical Association has stated that addicts may  
25 be unable to abstain --

26 THE COURT: I'm sorry?

27 MR. NUTT: I keep forgetting. The American Medical  
28 Association -- and I'm taking this language from the language

1 quoted in the Florida decision that Defense Counsel referred  
2 to.

3 MS. BRICK: Could we have the page number?

4 MR. NUTT: Thirteen, on the back of your reply  
5 brief in support of prohibition. It's taken out of a copy of  
6 that decision, and they quote:

7 "The American Medical Association is stating  
8 that punishment is simply not an effective way of  
9 curing dependency or preventing future substance  
10 abuse."

11 The American Medical Association's belief, as I  
12 understand it, is that punishment is not an effective way of  
13 dealing with anyone's substance abuse. Obviously the  
14 legislature in this state feels differently. That's why we  
15 have the Health and Safety Code 11305 to 11350, et cetera.  
16 The legislature in this state or in no other state has  
17 exempted pregnant women from prosecution for being under the  
18 influence of drugs. They are not specifically exempt.

19 THE COURT: Is there any state that permits  
20 prosecution of a mother for murder as distinguished from  
21 abortion, murder of an unborn fetus?

22 MR. NUTT: I don't know if there are any other  
23 states that have the same construction we have. Now  
24 historically common law was the fetus was not a human being.  
25 Most states have not included the definition of fetus or have  
26 not created that additional class within their murder  
27 statute, and there is something you alluded to before, about  
28 all other cases. These cases the Defense has brought to the



1 Court's attention do not deal with the murder statute. They  
2 do not deal with the fact they have specifically included the  
3 language of fetus or have defined human being to include  
4 fetus, and without exception I believe all these cases talk  
5 about, that indicate that without some specific legislative  
6 intent that it was their intent to include fetuses. Common  
7 law compels them to hold that human being does not include  
8 fetus. That's the exact same analysis that the Supreme Court  
9 in this state in Keeler made, and that's what was changed by  
10 the legislature, so we are talking about apples and oranges,  
11 and these cases that have been cited deal with different  
12 statutes. I don't think they deal with the murder charge,  
13 and they are dealing with statutes that do not specifically  
14 define fetus or include fetus within a class of people --

15 THE COURT: Do you agree that under the statute in  
16 California that an unborn fetus is not a human being?

17 MR. NUTT: Do I agree? Well, the language of the  
18 statute indicates that the following entities may be the  
19 subject of murder: a human being and human fetus.

20 THE COURT: You start out with Keeler, common law,  
21 unborn fetus is not a human being, therefore cannot be  
22 subject of murder charge. California has carved out an  
23 exception, but in deciding so they don't define fetus as  
24 human being. They say human being or an unborn fetus, so  
25 would it logically follow under California law today an  
26 unborn fetus, no matter how close to the time of delivery, is  
27 still not a human being?  
28

1 MR. NUTT: I suppose that's true, yes. It  
2 certainly isn't for other statutes such as endangering life  
3 of the child or furnishing controlled substances, that sort  
4 of thing. The only statute that includes fetus as a class is  
5 the murder statute, and I don't know the reason --

6 THE COURT: You have to look to the statute --

7 MR. NUTT: Right.

8 THE COURT: -- to see whether or not this woman can  
9 be prosecuted for the murder of the unborn fetus.

10 MR. NUTT: Right. Yes. I just want to point out  
11 to the Court that the issue has been raised regarding malice  
12 and specific intent and that sort of thing, and in addition  
13 to the existence of other statutes the abortion statute is --  
14 which also punishes the same behavior -- an argument was made  
15 by the Defense that you shouldn't punish someone for murder  
16 when there is a specific abortion statute existing, but the  
17 legislature understood that and specifically made the acts  
18 committed by Keeler subject to a murder charge even though  
19 the Supreme Court in that case specifically said he could be  
20 charged with abortion; so the legislature understood that.  
21 They understood the concept that you could have the same act  
22 punishable in different ways depending upon malice.

23 Now, the Defense has cited in their reply brief  
24 some law indicating that malice is the same as intent, and  
25 that is simply not the case.

26 THE COURT: I know the difference between malice  
27 and implied malice. A little while ago I asked a question,  
28 what about murder committed -- death results from commission

1 of a felony. You commit a felony, robbery, and you shoot a  
2 guard or run over a pedestrian trying to get away. That's  
3 murder during the course of a felony. You use drugs, the  
4 baby dies. Is that murder during the commission of a felony  
5 or isn't it? Do we run it into the definition of human  
6 being? Do you follow?

7 MR. NUTT: Yes. There is a reason why it is not.  
8 I'm trying to recall what the reason is.

9 THE COURT: It can't be felony murder because it's  
10 not a human being.

11 MR. NUTT: I think even more fundamental than that,  
12 supplying drugs is not an inherently dangerous act for the  
13 purpose of second degree murder. We know that.

14 THE COURT: Well, I'm looking to not just this  
15 specific case, but to determine if there is any case where a  
16 mother can be charged with murder for conduct on her part  
17 that results in the death of an unborn fetus. It could be  
18 some other kind of felony.

19 MR. NUTT: You asked that question before. I think  
20 it was the same question you asked the Defense, and I came up  
21 with a hypothetical fact as I was sitting there, and the  
22 hypothetical is not terribly far-fetched. If a mother  
23 believed that the full-term baby that she was carrying  
24 because of some delusion on her part was the devil incarnate  
25 and she asked somebody to stomp it out of her just like Mr.  
26 Keeler did, obviously that third person would be charged with  
27 murder. I can see no reason why she shouldn't be charged  
28 with --

1 THE COURT: Except the statute says if she consents  
2 to it --

3 MR. NUTT: This only applies to the abortion  
4 setting, and the distinction can be made because of the  
5 viability of the fetus an issue of malice as well as the fact  
6 that this situation did not occur within an abortion setting.  
7 Clearly --

8 THE COURT: Just talking about this, doesn't it  
9 appear that there are two reasonable constructions you can  
10 give to the statute?

11 MR. NUTT: If there were two reasonable  
12 constructions, the specific statute that a person is charged  
13 with murder, can be charged with murder, that person murders  
14 a fetus with malice aforethought. If there is some issue as  
15 to vagueness or two reasonable constructions, that applies  
16 only to the exception.

17 THE COURT: Say that again, please.

18 MR. NUTT: The issue as to vagueness or two  
19 reasonable constructions only applies to the exception. It  
20 doesn't apply to the general statute. We know what the  
21 intent of the legislature was with regard to the statute.

22 THE COURT: I mean, the general statute, the mother  
23 cannot be guilty of murder because the fetus is not a human  
24 being, so we have to look to the exception, and in looking at  
25 the exception it has two reasonable constructions, don't we  
26 as a matter of law have to accept that as a defense?

27 MR. NUTT: I'm still trying to understand how the  
28 Court reaches the conclusion that --

1 THE COURT: I haven't reached any conclusion,  
2 believe me. I'm trying to find my way to the correct  
3 decision, and that's the purpose of my questions.

4 MR. NUTT: Okay. I don't believe that the  
5 definition in 187(a) of a fetus is dependent upon the  
6 exceptions at all. I think it stands on its own. The  
7 exceptions do not help to define the word "fetus" in 187(a).  
8 Therefore, it's my contention that could stand or fall and  
9 still not eliminate the language in 187 that makes it murder  
10 to murder a fetus or, you know, to kill a fetus with malice  
11 aforethought.

12 THE COURT: I'd like to have you repeat that,  
13 because frankly I am having a little trouble following it.

14 MR. NUTT: We discussed how the only place in the  
15 law that definition of fetus exists is in 187(a). The  
16 legislature specifically carved out a different class or  
17 different class of entities that is protected by the murder  
18 statute. That was the intent. That was the original intent.  
19 Later on, they had to add some exceptions, (b)(1), (2) and  
20 (3). Those exceptions --

21 THE COURT: What did you mean by "later on"?  
22 Wasn't it all enacted at one time?

23 MR. NUTT: No. It was a process. That's what is  
24 reflected in the legislative intent section. I just read  
25 that Biddle's original intent was to include the definition  
26 of a fetus within the murder and manslaughter statute, but  
27 later on they had to attach the exceptions to avoid  
28 conflicting with the abortion laws.

1 THE COURT: They didn't attach the exception, they  
2 just decided they were not going to include fetus as human  
3 being. At the outset wasn't it the intent to redefine a  
4 fetus to make it constitute a human being if it is viable?

5 MR. NUTT: Yes.

6 THE COURT: They didn't do that. Instead they  
7 opted to talk about what sort of conduct could result in  
8 murder charges in the death of an unborn fetus. It seems to  
9 me though the statute was just one piece when it was enacted.

10 MR. NUTT: It was. I'm saying as the process began  
11 it started out simply as an effort to amend statutes to add,  
12 I assume, the definition "fetus" to the word "human being"  
13 for purpose of murder, but then there was some discussion as  
14 to making sure that it, the murder statute, did not conflict  
15 with the right to abortion and therapeutic abortion act.

16 THE COURT: With that thought in mind, restate  
17 again why you don't think there are two reasonable  
18 constructions to 187(a).

19 MR. NUTT: That's even a step further back than I  
20 think we needed to go for --

21 MR. PINTO: Please answer the Judge's question.

22 THE COURT: Please, Counsel. I'm trying to find my  
23 way. I don't want to turn this into a confrontation.

24 MR. NUTT: Again, the legislature included in  
25 187(a) the definition of a fetus as a separate class of  
26 entity to be protected.

27 THE COURT: They did?

28

1 MR. NUTT: Right. (b)(1), (2) and (3) don't add  
2 anything to that definition. I don't believe (b)(1), (2) and  
3 (3) whether it stands or falls detracts from the existence of  
4 that definition within that statute, because the legislature  
5 stated at the time it was enacted (b)(1), (2) and (3), even  
6 though some people didn't feel it was necessary because the  
7 definition in 187(a) already says that it only applies to an  
8 unlawful act. They were saying well, in the abortion setting  
9 killing a fetus is not unlawful. It's lawful, so why did we  
10 need exceptions; but they decided to put them in anyway in an  
11 overabundance of caution, so I don't think the definition  
12 187(a)(1) stands or falls based on the existence of --

13 THE COURT: Is there a statutory construction --  
14 Strike the question.

15 MR. NUTT: Now, getting back to the question you  
16 asked, which was whether I felt given two reasonable  
17 conclusions that the Court was compelled to move in favor of  
18 the Defendant, I would contend number one that the Defense's  
19 interpretation is not a reasonable interpretation, because  
20 they base it on a misguided statement of legislative intent.

21 Two, I would state since you're talking about  
22 exceptions under (b)(1), (2) and (3), exceptions to the  
23 general rule in that statement of statutory interpretation  
24 should not apply.

25 THE COURT: Suppose you didn't have access to  
26 legislative intent and you looked into a statute to see how  
27 it works, and in looking to see how it works there is one  
28 construction that will make it work so the mother could be

1 prosecuted and another construction that would work that  
2 she's exempted because she consented to the act. If you are  
3 just looking at the statute itself on its face, would you  
4 think there was two reasonable constructions?

5 MR. NUTT: I believe in this particular statute  
6 there are not two reasonable constructions.

7 THE COURT: Even without access to legislative  
8 intent?

9 MR. NUTT: Yes. If you look at the language at the  
10 heading part of (b), it says this section shall not apply to  
11 any person who commits an act. Any person who commits an  
12 act. (b)(3) says that act, the act that was committed by any  
13 person up here was solicited, consented to, et cetera, by the  
14 mother, that could not encompass the mother's act, that  
15 encompasses the third party's act. That to me is what the  
16 specific language of the statute said, and that's the  
17 construction that should be given. That's the plain language  
18 of the statute.

19 THE COURT: Yet before the statute was enacted  
20 there was never a way that the mother could have been  
21 prosecuted for murder.

22 MR. NUTT: Right.

23 THE COURT: It's only by virtue of this statute she  
24 can be prosecuted for murder. If she consents to an act,  
25 somebody else does it, she cannot be guilty of it. If she  
26 does it herself, she can be?

27 MR. NUTT: No. I don't believe that. I think that  
28 the language of the -- all right. I see what the Court said.



1 THE COURT: I don't mean to box you in. I'm still  
2 trying to find a way to a correct decision here.

3 MR. NUTT: You asked me specifically on the  
4 language of the statute. Now I'm not necessarily contending  
5 what I just told you is supported by legislative intent. I'm  
6 saying on the language of the statute that's the way it  
7 applied. In my mind, interpreting this statute depends on  
8 legislative intent, and legislative intent comes to different  
9 conclusions and that (b)(1), (2) and (3) specifically  
10 involved the abortion setting. I argued in the alternative  
11 in my brief. The two views, the alternative. And so  
12 specifically these deal with the realm of abortion only.  
13 That's what it was meant to exempt in that situation.

14 THE COURT: I follow your logic. Your logic is  
15 under Keeler the fetus is not a human being, there can be no  
16 murder charge at all.

17 MR. NUTT: Right.

18 THE COURT: Under statute 187(a) the fetus can be  
19 the subject of a murder charge with the exception that if the  
20 fetus is destroyed in abortion with the consent of the mother  
21 there can be no murder charge.

22 MR. NUTT: In an abortion setting; however, outside  
23 the abortion setting -- late-term setting doesn't involve  
24 abortion. I don't think she can consent --

25 THE COURT: There is nothing on the face of the  
26 statute that says only applies to abortion.

27 MR. NUTT: I believe we get down to legislative  
28 intent. I believe that is what the intent was.

1 THE COURT: Is there anything in any of the  
2 writings that describe legislative intent or writing that was  
3 relied upon by the legislators that indicates that there was  
4 any thought that this amending statute to 187(a) to include  
5 unborn fetus that a mother can be prosecuted for murder?

6 MR. NUTT: I'm not sure that there are.  
7 There is -- in fact yesterday I went back through the  
8 legislative intent, and there are some documents which can be  
9 construed to raise that issue, but I'm not sure that they do,  
10 really.

11 THE COURT: All right. I appreciate your thoughts.  
12 Thank you.

13 MR. NUTT: And specifically I'm referring to a  
14 letter written by the District Attorney of Ventura County  
15 asking for clarification. There is no answer to that letter.

16 THE COURT: What letter?

17 MR. NUTT: Let me find it for you.

18 THE COURT: I think I have a copy of every paper in  
19 this case. If it's too hard to find, I'll withdraw the  
20 question. Did you attach all the legislative intent  
21 documents?

22 MR. NUTT: I don't have it.

23 THE COURT: I'll withdraw the request. Anything  
24 else you would like to say? And please don't misunderstand  
25 my questions. I'm not trying to indicate --

26 MR. NUTT: I just want to bring to the Court's  
27 attention one further thing. That is the language we quoted  
28 in page 23 from the case of Boyce Motor Lines. It says:

1 "Criminal statutes must be sufficiently  
2 definite to give notice of required conduct to  
3 one to avoid penalties and guide the judge in  
4 application and the lawyer in defending one charged  
5 with violation, but few words possess the precision  
6 of mathematical symbols. Most statutes must deal  
7 with untold variations in factual situations. The  
8 practical necessities of discharging the business  
9 of the government inevitably limit the specificity  
10 with which legislators can spell out prohibitions.  
11 Consequently, no more than a reasonable degree of  
12 certainty can be demanded, nor is it unfair --"  
13 I want to focus on this -- "nor is it unfair to  
14 require that one who goes perilously close to an  
15 area of prescribed conduct, shall take the risk  
16 that he may cross the line."

17 187(a) is specific. Anybody that kills an unborn  
18 fetus with malice aforethought you prosecute with murder.  
19 It's unfair to allow someone who goes perilously close to  
20 that to avoid prosecution. I believe --

21 THE COURT: All right. Thank you.

22 MS. BRICK: I'll try to be brief. I appreciate the  
23 Court's patience in listening to us.

24 Your Honor has found the touchstone that governs  
25 the decision of this case, and that is that where there are  
26 two reasonable constructions that doubt must always favor the  
27 defendant. Subdivision (a) of the statute cannot be read  
28 without reference to subdivision(b), because subdivision (b)

1 says that this section shall not apply to any person who  
2 commits an act that results in the death of a fetus, if that  
3 act is consented to by the mother of the fetus.

4 THE COURT: Is it true the legislature in enacting  
5 that exception intended to prevent an abortion being charged  
6 with murder?

7 MS. BRICK: They absolutely had that on their  
8 minds, among other things.

9 THE COURT: What other things?

10 MS. BRICK: I think that's what they had at the top  
11 of their minds, but I think the comment Mr. Nutt --

12 THE COURT: And so if the death is other than an  
13 abortion effort, does it fail to come not within the  
14 exception or can she be prosecuted?

15 MS. BRICK: She cannot be prosecuted. Assemblyman  
16 Biddle tells us no legislator ever suggested that legislation  
17 as it was finally adopted could be used to make punishable as  
18 murder conduct by a pregnant woman that results in the death  
19 of her fetus.

20 THE COURT: When did he have occasion to write  
21 that?

22 MS. BRICK: April 23, 1992.

23 THE COURT: On what occasion did he make that  
24 statement?

25 MS. BRICK: I had read the Webb article --

26 THE COURT: This prosecution --

27 MS. BRICK: I called Assemblyman Biddle. I had  
28 read the Webb article, and I asked him to tell me what

1 happened, so that I could tell the Court, describe arguments  
2 made to the legislature at the time. Now Assemblyman Biddle  
3 was the author of the legislation --

4 THE COURT: Read it again, please.

5 MS. BRICK: "No legislator ever suggested that  
6 this legislation as it was finally adopted could be  
7 used to make punishable as murder conduct by a  
8 pregnant woman that resulted in the death of her  
9 fetus."

10 THE COURT: Is that the entire statement in  
11 context?

12 MS. BRICK: It's certainly in context, but I will  
13 read you the entire paragraph.

14 THE COURT: Does he say it wasn't discussed or --

15 MS. BRICK: That's really all he says. He says:

16 "I agree to all of the amendments to the bill  
17 because none of them undermine the purpose of the  
18 legislation as that purpose was explained to the  
19 legislature to make punishable as murder a third  
20 party's willful assault on a pregnant woman  
21 resulting in the death of her fetus. That was the  
22 sole intent of about AB-816."

23 "No legislator ever suggested that this  
24 legislation as it was finally adopted could be  
25 used to make punishable as murder conduct by a  
26 pregnant woman that resulted in the death of  
27 her fetus."  
28

1 And if Your Honor would like to refer to that  
2 later, that is Exhibit Number 3 in Appendix, Volume I.

3 THE COURT: So he has written as author that the  
4 sole purpose of the legislation was to enable the state to  
5 prosecute third parties that commit acts without the consent  
6 of the mother resulting in the death of the fetus?

7 MS. BRICK: He states that was the purpose  
8 explained to the legislature. That was the sole attempt of  
9 AB-816. No one ever suggested it would be used in other  
10 situations.

11 THE COURT: Is that under a law of California that  
12 a letter is usable in ascertaining legislative intent?

13 MS. BRICK: Yes, it is. It's not a letter, Your  
14 Honor. It's a declaration under penalty of perjury.

15 THE COURT: Usable in California to ascertain  
16 legislative intent?

17 MS. BRICK: Because it explains the arguments made  
18 to the legislature and recounts events leading up to the  
19 legislation, and a declaration of a legislator that does that  
20 is admissible under the California Teachers Association case.  
21 That's cited in our brief. The cite to that case is 28Cal3d.  
22 It's California Supreme Court 28Cal3d.692,1981.

23 THE COURT: Thank you. Mr. Pinto?

24 MR. PINTO: I said too much already.

25 MS. BRICK: I haven't quite finished, but I think I  
26 should make it brief. I would suggest one other thing and  
27 that is the abortion definition is not reasonable. First of  
28 all --

1 THE COURT: Excuse me. The abortion definition?

2 MS. BRICK: I didn't state that well. The  
3 Prosecution's contends subdivision applies only in the  
4 context of abortion is not a reasonable construction for  
5 several reasons.

6 One, if we look at (b)(1) and (b)(2), it is clear  
7 from the language they are talking about abortion, but  
8 subdivision (b)(3) is written in broader language. It does  
9 not say that this section shall not apply to a person who  
10 commits an act for the purpose of terminating a pregnancy.  
11 In the other two subdivisions there is specific reference  
12 either to abortion or childbearing, but subdivision (b)(3) is  
13 written broadly. It does not have that limiting language, so  
14 what the Prosecution has to do is rewrite the state to put in  
15 that for the purpose of terminating pregnancy language.

16 Second, we have the legislative history I just  
17 read, that no one ever suggested that it would be used in  
18 this manner.

19 Thirdly, limiting it to the context of abortion,  
20 and in this connection let me say that not all abortions are  
21 legal. The legislature contemplated not only exempting the  
22 legal abortion but the illegal abortion as well. The  
23 Prosecution in its brief cites two parts of the legislative  
24 history that make that clear. I'll read it. It's the report  
25 of the Assembly Committee on Criminal Procedure, page nine,  
26 which is cited on page fourteen.

27 "The bill does not apply to illegal  
28 abortion solicited or consented to by the mother."

1           So what you would have here is a situation that  
2 really leads to what we call an incongruous result in our  
3 brief, a woman who intentionally terminates pregnancy in the  
4 eighth or ninth month by the very terms of this statute may  
5 not be prosecuted although she had the specific intent to do  
6 so. A higher level of culpability than the woman who does  
7 the same thing, who ingests a drug not for the purpose of  
8 terminating a pregnancy, who ingests the drug because she is  
9 addicted, never intending and probably hoping that it will  
10 not harm her fetus, although she knows it might. That's  
11 clearly a higher level of culpability. It is inconceivable  
12 that the legislature concluded that the intentional illegal  
13 abortion during a late-term pregnancy should be punished only  
14 as an abortion and yet also have intended that the unintended  
15 consequences of this action be punished.

16           THE COURT: That's not necessarily incongruous, is  
17 it? Let's take an example of a person who intentionally  
18 kills somebody and it's voluntary manslaughter, but the  
19 person who negligently kills somebody during say a robbery,  
20 it's murder. There are times when a specific intent can be a  
21 lesser crime than the unintended result.

22           MS. BRICK: The intentional taking of life -- I  
23 would submit representatively to Your Honor that we would  
24 need some pretty clear legislative history to tell us that  
25 that's really what the legislature had on its mind, and to  
26 the extent we have legislative history, it's to the contrary.  
27 We have Assemblyman Biddle's declaration. We also know  
28 reading the Webb article that the third exemption was



1 controversial. The legislators looked at it and said, this  
2 is giving a lot of power to the woman. Do we want to do  
3 that, and ultimately they said yes.

4 The broad language in which this statute and this  
5 exemption is written leads to the conclusion that a  
6 reasonable construction -- I would submit the only reasonable  
7 construction is that this statute does not reach the facts of  
8 this case as they are alleged by the Prosecution.

9 If after this situation comes to the attention of  
10 the legislature it wants to rethink that situation, it can do  
11 so. But this Court should not rewrite the statute. It  
12 should not add this word. It may not limit the exemption  
13 beyond that which the legislature limited it. because that is  
14 not the province of the Court.

15 Where there are two reasonable constructions, the  
16 doubt must called in favor of the defendant, and we must look  
17 to the legislature to remedy whatever problem we see as the  
18 result.

19 Thank you.

20 THE COURT: Thank you. Mr. Pinto?

21 MR. PINTO: No, Your Honor.

22 THE COURT: Just a comment on Assemblyman Biddle's  
23 letter?

24 MR. NUTT: Yes. I was going to ask you if I could  
25 indicate to the Court I have dealt with that in the brief. I  
26 don't believe it is appropriate material for the Court to  
27 consider. I believe the case is very specific to what  
28 material can be considered. His opinion is not relevant.

1 THE COURT: All right. Matter submitted?

2 MS. CROSBY: Submitted, Your Honor.

3 THE COURT: I would like to complete the case  
4 today. I would like to think about it for a couple of hours.  
5 Can we reconvene say at 2:30?

6 MR. NUTT: Fine.

7 MS. CROSBY: Yes, Your Honor.

8 MR. PINTO: Thank you, Your Honor.

9 (THE LUNCHEON RECESS WAS TAKEN.)

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1 HOLLISTER, CALIFORNIA

AUGUST 21, 1992

2 AFTERNOON SESSION:

3  
4 THE BAILIFF: Remain seated and come to order.

5 THE COURT: Good afternoon, ladies and gentlemen.  
6 Once again, welcome to the Superior Court. Calling the  
7 matter of Roseann Jaurigue vs. Justice Court, action number  
8 18988. The record will show all parties are personally  
9 present.

10 I'm prepared to announce my decision at this time.  
11 I have given considerable thought to it. This case has been  
12 well briefed and well argued. It's the kind of case that  
13 makes the practice of law worthwhile. It's a very important  
14 case, and it has been extensively briefed, as you can see.

15 I am not unsympathetic to the position of the  
16 Prosecution in this case. I believe it is desirable for  
17 every wrong that there be a remedy, and it runs against the  
18 grain for me to be told that a pregnant woman just days  
19 before giving birth to a human being can deliberately do a  
20 wrongful act with full knowledge that the act will jeopardize  
21 the life of that person, to be actually causing that death,  
22 and yet not be subject to prosecution unless she specifically  
23 intended death, in which event she may be prosecuted for  
24 abortion but not for murder.

25 The Defense has argued there is only one reasonable  
26 construction of Section 187(a), to wit a mother can never be  
27 prosecuted for murder causing the death of a fetus  
28 deliberately or otherwise. I disagree. I believe the

1 District Attorney has placed a reasonable construction on the  
2 statute, that is that murder was amended, Section 187 of the  
3 murder statute was amended to make the unlawful killing of  
4 either a human being or a fetus a murder unless done with  
5 intent to cause abortion, and then only if the mother  
6 consents.

7 Under this reasonable construction, anyone killing  
8 a fetus, including the mother, with malice aforethought  
9 express or implied, and other than in the context of an  
10 abortion would be subject to prosecution for murder; however,  
11 I also believe that is reasonable to construe the statute as  
12 permitting a murder prosecution only as to acts causing death  
13 to a fetus by persons other than the mother.

14 I am satisfied that there is nothing in the  
15 legislative history of the statute or amendment that suggests  
16 that the legislature contemplated that a mother could be  
17 prosecuted for murder for the death of her unborn child.  
18 Prior to birth the mother and child are seen as one, that  
19 present policy considerations must go into the decision to  
20 make her subject to murder of a part of herself. I cannot  
21 believe that this can be accomplished as a side effect meant  
22 to respond to a court case barring prosecution of another  
23 person for an act on the mother, killing the unborn child.  
24 Such an important policy decision should be made by the  
25 legislature only after appropriate debate and research and  
26 due deliberation. Such a prosecution is unheard of in the  
27 annals of American jurisprudence. It is clear to me that  
28 where a statute is susceptible of two reasonable

1 interpretations the courts must adopt the interpretation  
2 which is most favorable to the defendant. All the legal  
3 authorities that I have read in this case hold against  
4 upholding, weigh against upholding prosecution. Any  
5 reasonable doubt must be resolved in favor of the accused,  
6 and so I must resolve that doubt in this case in favor of the  
7 accused.

8 I was particularly struck by the observation of  
9 Defense Counsel that if we adopted the construction sought by  
10 the District Attorney we would have to follow that  
11 construction to its logical conclusion, and murder charges  
12 could result from smoking, drinking, working in contaminated  
13 atmosphere, failure to follow doctor's orders and many other  
14 circumstances that come to mind and some that would not even  
15 be predictable at this time. Even improper diet might draw a  
16 parallel to the Dan White Twinkie case where he contended the  
17 bad diet caused him to do a very wrongful act.

18 There is also an ex post facto problem. While the  
19 statute was enacted prior to the instant act, the statute  
20 does not on its face put a mother on notice that she is  
21 subject to a possible murder charge if she uses drugs during  
22 pregnancy. If I were to find from such a construction it  
23 would certainly act as ex post facto law as far as Mrs.  
24 Jaurigue is concerned.

25 I have considered the argument of the District  
26 Attorney that if the mother is exempted from prosecution for  
27 murder it denies equal protection to others that are subject  
28 to prosecution. This rules only applies as to a person

1 similarly situated, in a similarly situated group. The  
2 mother is not in such a group. She is uniquely situated with  
3 regard to her own fetus, so in the end I find that the writ  
4 should be granted barring prosecution of this case in Justice  
5 Court of San Benito County. I of course invite the  
6 Prosecution to consider appeal, but in my own humble opinion  
7 the time and effort might be better spent to seek appropriate  
8 legislation.

9 Thank you, folks.

10 MS. BRICK: Thank you, Your Honor.

11 MR. NUTT: So the matter is to be remanded to  
12 Justice Court?

13 THE COURT: Only for the purpose of dismissing.

14 MR. PINTO: Could that be set for Tuesday morning?

15 THE COURT: One more time to consider your rights  
16 in the matter --

17 MR. NUTT: Yes.

18 THE COURT: A week from Tuesday.

19 MR. PINTO: The reason why I ask for Tuesday is  
20 that a week from Tuesday I won't be here. I really would  
21 like to be here for that moment. They have done all the  
22 work, but I have had responsibility for the trial.

23 MR. NUTT: I prefer we put it off at least one more  
24 week.

25 THE COURT: When do you leave?

26 MR. PINTO: After next Friday.

27 THE COURT: Why don't we specially set it for  
28 Friday? Is that agreeable with you?

1 MR. PINTO: Can I say why I requested it like this?

2 THE COURT: I'll specially set it. What time?

3 MR. PINTO: May I please tell the Court why I want  
4 to do it this coming Tuesday? My client is under judicial  
5 restraint under the program, and with dismissal of the  
6 Complaint she will be free from judicial restraint. If this  
7 Court has jurisdiction to do that, we would request it, or we  
8 will request it downstairs. We want her free. That's the  
9 purpose of what we are doing.

10 MR. NUTT: I suppose this Court has jurisdiction to  
11 handle that.

12 MR. PINTO: I would request that such an order be  
13 entered, that she be freed from judicial restraint.

14 THE COURT: She is on O.R?

15 MR. PINTO: She is under order to attend the  
16 program, which means judicial restraint.

17 THE COURT: I'm not sure I have jurisdiction to do  
18 that. I have limited jurisdiction to determine application  
19 for writ of prohibition.

20 MR. PINTO: As you see, we have a seventy-five  
21 pound brief.

22 THE COURT: Tuesday, with leave to the Prosecutor  
23 to ask for extension.

24 MS. BRICK: Will your office then issue the formal  
25 writ of prohibition?

26 THE COURT: I will be in chambers for a short while  
27 to confer with Counsel about the mechanics, about drafting  
28 the writ. I would have thought you would have it prepared.

1 MR. PINTO: We will go do it. When do you want it?

2 THE COURT: I will be here for whatever time it  
3 takes this afternoon.

4 Thank you folks. Once again, I congratulate you,  
5 each of you. Mr. Nutt, I congratulate you. Your briefs were  
6 very well written, and I appreciate the efforts of all of  
7 you. Even good lawyers occasionally have to lose. If an  
8 issue is decided correctly, you don't lose, do you?

9 MR. NUTT: That's true.

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C E R T I F I C A T E

I, SUE HERFURTH, DO HEREBY CERTIFY: THAT I  
WAS APPOINTED BY THE COURT TO ACT AS COURT REPORTER IN  
THE ABOVE-ENTITLED ACTION; THAT I REPORTED THE SAME  
IN STENOTYPE AND THEREAFTER TRANSCRIBED THE SAME INTO  
TYPEWRITING AS APPEARS BY THE FOREGOING TRANSCRIPT; THAT  
SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPT OF THE  
PROCEEDINGS TO THE BEST OF MY ABILITY.

DATED THIS 9TH DAY OF SEPTEMBER, 1992.

  
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