CRIMINAL LAW — CRIMINALIZATION OF PREGNANCY — EIGHTH CIRCUIT UPHOLDS MANSLAUGHTER CHARGE AGAINST PREGNANT WOMAN FOR DEATH OF BABY BASED ON PRENATAL DRUG USE. — *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019).

Starting with the "crack baby" scare in the 1980s, state prosecutors have sought to use existing criminal laws to bring charges against pregnant people for acts that allegedly harmed the fetus.[1] These prosecutions have overwhelmingly targeted poor women of color.[2] On the whole, many have been dismissed either initially or on appeal, with courts often citing a lack of legislative intent for such charges.[3] However, a handful of notable state cases have upheld these charges. In *State v. McKnight*,[4] a young, African American woman in South Carolina was convicted of homicide after prosecutors claimed her prenatal cocaine use had caused her stillbirth.[5] In Indiana, a Chinese immigrant was charged with murder following a suicide attempt that precipitated the death of her baby after birth.[6] Recently, in *United States v. Flute*,[7] the Eighth Circuit upheld the first ever federal manslaughter charge against a pregnant person whose prenatal drug use resulted in the death of her baby after birth, determining that the "relevant statutes unambiguously encompass[ed] Flute and her conduct."[8]

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[1] *See* Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DEPAUL J. HEALTH CARE L. 369, 380 (2005); *see also* Jeanne Flavin & Lynn M. Paltrow, *Punishing Pregnant Drug-Using Women: Defying Law, Medicine, and Common Sense*, 29 J. ADDICTIVE DISEASES 231, 232 (2010). Available data indicate that, as of 2017, over 1000 women had been charged for prenatal conduct, over half of whom were charged between 2007 and 2017. *See* Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1174 (2017).

[2] Flavin & Paltrow, *supra* note 1, at 233.

[3] *Id.* at 235; *see, e.g.*, Reinesto v. Superior Court, 894 P.2d 733, 735, 738 (Ariz. Ct. App. 1995); Johnson v. State, 602 So. 2d 1288, 1293 (Fla. 1992); People v. Jorgensen, 41 N.E.3d 778, 780–81 (N.Y. 2015). Nonetheless, many of these cases involve lengthy periods of imprisonment awaiting resolution. In *Commonwealth v. Dischman*, 195 A.3d 567, 568 (Pa. Super. Ct. 2018) (affirming dismissal of aggravated assault charges against a defendant who overdosed on heroin during pregnancy, resulting in damage to the fetus), for example, Kasey Dischman had spent months in prison by the time the charges were dismissed. *See* The Editorial Board, *The Mothers Society Condemns*, N.Y. TIMES (Dec. 28, 2018), https://nyti.ms/2GKNumN [https://perma.cc/X6YA-Z2F4]. In addition, people facing these charges regularly plead guilty to lesser charges that carry substantial sentences rather than risk jury conviction and a much longer sentence. *See, e.g.*, Whitner v. State, 492 S.E.2d 777, 778–79 (S.C. 1997).

[4] 576 S.E.2d 168 (S.C. 2003).

[5] *Id.* at 171. McKnight was released eight years into her twelve-year sentence after doubt emerged that the cocaine was the cause of death. *See* McKnight v. State, 661 S.E.2d 354, 365–66 (2008).

[6] Shuai v. State, 966 N.E.2d 619, 622, 632 (Ind. Ct. App. 2012), *cert. denied*, 967 N.E.2d 1035 (Ind. 2012).

[7] 929 F.3d 584 (8th Cir. 2019).

[8] *Id.* at 590.

The decision in *Flute* escalates to the federal level the state judicial trend of using broad interpretations of statutes designed for other purposes to criminalize prenatal conduct. In doing so, *Flute* grants the federal government sweeping discretion to punish the conduct of pregnant people under its jurisdiction.

On August 19, 2016, Samantha Flute, an American Indian, gave birth to a full-term baby at a Sisseton, South Dakota, hospital in Indian country.[9] After the birth, while Baby Boy Flute was undergoing resuscitation, Flute admitted that she had ingested prescription and over-the-counter medications before coming to the hospital.[10] Four hours later, Baby Boy Flute died.[11] The forensic pathologist concluded drug intoxication was the cause of death.[12] In March 2017, Flute was arrested on allegations that she "did unlawfully kill Baby Boy Flute" in violation of the federal manslaughter statute, 18 U.S.C. § 1112,[13] "by ingesting prescribed and over-the-counter medicines in a grossly negligent manner."[14] Flute moved to dismiss for failure to state an offense and because the statute was unconstitutionally vague as applied to her.[15]

The United States District Court for the District of South Dakota dismissed the charge.[16] The opinion, by Judge Kornmann, determined that Baby Boy Flute fell within the class of victims Congress intended to protect under 18 U.S.C. § 1112 because the Born-Alive Infant Protection Act[17] defines "human being" throughout the federal code to include "every infant member of the species homo sapiens who is born alive at any stage of development."[18] However, the opinion found Flute was not "within the class of defendants Congress intended to punish."[19] Judge Kornmann relied on 18 U.S.C. § 1841, which creates a separate offense where criminal conduct results in death or injury "to[] a child, who is in utero at the time the conduct takes place."[20] Critically, § 1841(c)(3) exempts pregnant women from criminal charges, stating that nothing in the Act "shall be construed to permit the prosecution . . . of any woman with respect to her

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[9] *Id.* at 586.

[10] *Id.* Flute told providers she knew the substances could harm the baby but needed to get high. *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* § 1112(a) defines involuntary manslaughter in the relevant part as the "unlawful killing of a human being without malice . . . in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112(a) (2012).

[14] *Flute*, 929 F.3d at 586. Jurisdiction was claimed under 18 U.S.C. § 1153, which grants federal courts jurisdiction over Indians who commit major crimes. *Id.* at 587.

[15] *Id.* at 586.

[16] United States v. Flute, No. 17-CR-10017, 2004 WL 5495170, at *4 (D.S.D. Nov. 14, 2017).

[17] 1 U.S.C. § 8 (2018).

[18] *Flute*, 2004 WL 5495170, at *2 (quoting 1 U.S.C. § 8(a)).

[19] *Id.*

[20] *Id.* (citing 18 U.S.C. § 1841(a)(1) (2018)).

unborn child."[21] Judge Kornmann concluded the Act was a "clear statement from Congress" that federal murder statutes do not apply to the acts of pregnant people with respect to the fetus.[22] Flute's as-applied constitutional challenge was not addressed.

The Eighth Circuit reversed.[23] Writing for the majority, Judge Shepherd[24] agreed that Baby Boy Flute was a "human being" under the Born-Alive Act and therefore a protected victim under § 1112.[25] The court noted this interpretation was consistent with the common law born alive rule, which considered a baby a human being if born alive for any period.[26] The court denied Flute's contention that Baby Boy Flute was not a "human being" under § 1112 because he was not born when the relevant conduct occurred. Because the crime of manslaughter is only complete once death occurs, the court asserted, the victim's status is determined at death, not when the injuries are suffered.[27]

On the question of whether Flute was an intended defendant under § 1112, however, the court rejected the district court's premise that § 1841 clarified the statutory meaning of § 1112.[28] Judge Shepherd determined that there was "[n]o applicable exception for conduct of a mother" with regard to the fetus in § 1112 itself, and that the exceptions in § 1841 had "no . . . reach beyond [§ 1841]'s own provisions."[29] Because the plain statutory language of § 1112 was "unambiguous[]," the court found the rule of lenity inapplicable.[30] The court also rejected the common law meaning of manslaughter because it "[did] not fit" with the express statutory meaning.[31] Admonishing the district court for discussing congressional intent and the "potential ramifications" of criminalizing Flute's conduct, Judge Shepherd emphasized that such considerations were outside of the courts' limited task of "interpret[ing] the statute as written."[32] The court remanded Flute's as-applied constitutional challenge[33] and reinstated Flute's indictment for manslaughter.[34]

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[21] *Id.* at *3 (citing 18 U.S.C. § 1841(c)(3) (2018)).
[22] *Id.*
[23] *Flute*, 929 F.3d at 586.
[24] Judge Shepherd was joined by Judge Stras.
[25] *Flute*, 929 F.3d at 588.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 589.
[29] *Id.* at 589–90.
[30] *Id.* at 590. The rule of lenity commands courts to engage in strict construction in favor of a defendant where ambiguity exists in criminal statutes. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296 (2012).
[31] *Flute*, 929 F.3d at 590 & n.1 (quotation omitted).
[32] *Id.* at 589–90.
[33] *Id.* at 590.
[34] *Id.*

Judge Colloton dissented. Declaring the case a "significant issue of first impression,"[35] Judge Colloton maintained that the common law meaning of manslaughter was incorporated into the 1909 statute.[36] Under common law, the born alive rule allowed for a third party to be charged with homicide for fetal injuries resulting in death after birth, but did not extend liability to prenatal conduct by a mother.[37] Judge Colloton relied on early English cases and treatises to show that, under common law, a mother's willful prenatal neglect resulting in a baby's death after birth did not amount to manslaughter.[38] Absent a statute expressly extending § 1112 to include a mother's prenatal neglect, Judge Colloton concluded that "nothing in the statute dictates that its scope is broader than the common law meaning."[39]

The *Flute* panel engaged in broad statutory interpretation to dramatically expand criminality to a wide range of pregnant conduct without express legislative intent.[40] This judicial expansion of criminality is in line with a trend in state courts,[41] wherein relevant conduct need not be criminal in and of itself, but is made criminal by the presence of the pregnancy.[42] This indeterminate criminality allows prosecutors, judges, and medical providers discretion to ultimately define what conduct is criminal, and puts women, especially poor women of color, at risk of targeted, selective enforcement. *Flute* thus grants the federal judiciary widespread discretion to determine, for those under its jurisdiction, whose prenatal conduct is criminal.

The court's declaration that the statutory text was "unambiguous[]"[43] allowed it to ignore the traditional canons of construction and provided cover for the lack of deference to legislative intent. Despite the rise of state-level criminalization of pregnancy, Congress has declined to pass legislation allowing pregnant people to be criminally charged for harm

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35 *Id.* (Colloton, J., dissenting).

36 *Id.* (citing Morissette v. United States, 342 U.S. 246, 263 (1952)).

37 *Id.* at 592.

38 *Id.*; *see, e.g.*, Regina v. Knights (1860) 175 Eng. Rep. 952 (rejecting manslaughter charge for prenatal neglect); Rex v. Izod (1904) 20 Cox C.C. 690, 691 (Eng.) (manslaughter by a mother required "neglect [that is] subsequent to the birth]"); 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 675–76 (William Feilden Craies & Leonard William Kershaw eds., 7th ed. 1910) (prenatal neglect "resulting in the . . . birth and subsequent death of a child, is not sufficient in itself to warrant a conviction for manslaughter").

39 *Flute*, 929 F.3d at 594 (Colloton, J., dissenting).

40 *Flute* would also appear to allow medical providers who commit errors prenatally that result in death after birth to be criminally charged. Like pregnant people, medical providers are exempted under § 1841(c), *see* 18 U.S.C. 1841(c)(2) (2012), but under *Flute* those exceptions are inapplicable to § 1112.

41 *See* Ocen, *supra* note 1, at 1167–68.

42 *See id.* This renders pregnancy a form of status offense, in which "pregnancy, rather than a woman's conduct, is the essential fact that determines whether a crime has been committed." *Id.*

43 *Flute*, 929 F.3d at 590.

to their unborn babies.[44] Acknowledging pregnant prenatal conduct as outside the text's plain meaning, as the majority of state courts confronted with the question have done with their own state equivalents of § 1112,[45] would have required the court to consider the canons of construction. For example, the rule of lenity would likely have pointed to a different result.[46] Other canons that may have been applicable include constitutional avoidance (for vagueness or equal protection violations), imputation of common law meaning, and *in pari materia* (requiring statutes on the same subject to be interpreted harmoniously).[47] Declining to apply these canons enabled the *Flute* court to avoid discussing the clear signals that Congress did not intend to extend criminalization into pregnancy, including § 8(c) of the Born-Alive Act, which clarifies that the Act does not "affirm, deny, expand, or contract" the legal rights of unborn fetuses,[48] the common-law meaning of manslaughter, or the exemption for pregnant people in § 1841(c) cited by the district court.[49] Together with the rule of lenity, these interpretive guardrails could have prevented the Eighth Circuit from going down a path not taken by Congress.

The fact that *Flute* expands § 1112's criminal reach without considering legislative intent is revealed in part by the paradox the interpretation creates. Under the court's reading, conduct by a pregnant person severe enough to lead to the outright death of a fetus is not criminal under the express congressional language of § 1841(c), while less severe conduct that allows a fetus to survive long enough to be born alive but later results in its death amounts to homicide under a broad, nonspecific judicial reading of § 1112. If Flute had taken enough medication to kill her fetus in utero, she would face no charges. But because she took less, resulting in death after birth, she is liable for homicide. This contradiction imposes starkly disparate legal consequences for similar prenatal conduct and perversely incentivizes severely harmful conduct over less

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[44] *See, e.g.*, 18 U.S.C § 1841(c).

[45] *See, e.g.*, State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997) (holding that Florida homicide statutes do not alter common law doctrine exempting mother's prenatal conduct); State v. Aiwohi, 123 P.3d 1210, 1218 (Haw. 2005) (finding the Hawaii manslaughter statute inapplicable to prenatal conduct "because the mother's conduct is not committed . . . when the child is born"); People v. Jorgensen, 41 N.E.3d 778, 780 (N.Y. 2015) (holding New York manslaughter statute "ambiguous" as to pregnant prenatal conduct). *But see* Shuai v. State, 966 N.E.2d 619, 632 (Ind. Ct. App. 2012), *cert. denied*, 967 N.E.2d 1035 (Ind. 2012) (finding Indiana murder statute "unambiguous" as applied to the act of ingesting poison while pregnant).

[46] *See, e.g.*, Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992) (applying rule of lenity to construe a criminal statute in favor of pregnant mother).

[47] *See* SCALIA & GARNER, *supra* note 30, at 247, 320, 252.

[48] 1 U.S.C. § 8(c) (2018). The court's conclusion that because § 1112 protects "a child at the earliest possible moment . . . outside of the womb[,] the statute necessarily extends to conduct that occurred in utero and caused death" appears in direct tension with § 8(c). *Flute*, 929 F.3d at 588.

[49] United States v. Flute, No. 17-CR-10017, 2004 WL 5495170, at *3 (D.S.D. Nov. 14, 2017).

serious acts. In rejecting prenatal charges, state courts have cited similar paradoxes and the lack of legislative intent they illustrate.[50]

The decision in *Flute* follows a state court trend of criminalizing pregnancy largely without express legislative intent.[51] Relying on a "patchwork" of existing laws governing child abuse, homicide, and drug crime, many state prosecutions of prenatal conduct have involved broad interpretations of statutes that did not contemplate pregnant acts toward a fetus.[52] In Alabama, for example, a chemical endangerment law[53] designed to target parents who exposed children to dangerous methamphetamine fumes has been used to prosecute roughly 500 pregnant people for fetal drug exposure after the state supreme court ruled the term "child" included fetuses and "environment" included the womb.[54] In South Carolina, the state supreme court "effectively rewr[ote] state law to make the word 'child' in the state's child endangerment statute include a viable fetus," resulting in widespread prosecution of pregnant people.[55] The decision in *Flute* likewise relied on an existing criminal statute that did not specifically target pregnant people to extend liability to them.

The consequences seen at the state level are indicative of what is likely to unfold in the wake of *Flute* in federal law. Where courts have sanctioned criminal charges against pregnant people for fetal harm, widespread prosecutions have followed, in particular for drug use.[56] Prosecutors have been undeterred by mounting data indicating that

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[50] *See, e.g.*, *Jorgensen*, 41 N.E.3d at 781 (declining to create a "perverse incentive" for a mother to avoid taking steps to save a fetus harmed by her conduct for fear of criminal charges should the baby die after birth).

[51] *See* Sikich, *supra* note 1, at 380. However, broader legislative efforts to criminalize women's reproductive health are underway: twenty-three states consider substance use in pregnancy civil child abuse; three find it grounds for civil commitment; and twenty-five states require medical professionals to report prenatal substance use. *See Substance Use During Pregnancy*, GUTTMACHER INST. (Oct. 1, 2019), https://www.guttmacher.org/print/state-policy/explore/substance-use-during-pregnancy [https://perma.cc/RP7Y-RR7Q]; *see also* Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17, 19–20 (2016).

[52] AMNESTY INTERNATIONAL, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 15 (2017) https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf [https://perma.cc/2DVE-2S7T]; Ocen, *supra* note 1, at 1166. A prominent exception is a Tennessee statute that explicitly criminalized drug use during pregnancy and led to extensive prosecution. *See* Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 948–49 (2017). The law lapsed in 2016, but similar legislation is being considered in four other states. *Id.* at 949.

[53] ALA. CODE § 26-15-3.2 (1975).

[54] *Ex parte* Ankrom, 152 So. 3d 397, 401, 416 (Ala. 2013); Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene [https://perma.cc/MT2A-7254].

[55] Flavin & Paltrow, *supra* note 1, at 233.

[56] Michele Goodwin, *Alabama Isn't the Only State that Punishes Pregnant Women*, N.Y. TIMES (July 1, 2019), https://nyti.ms/2NpSJeK [https://perma.cc/S56C-3J6H].

most illegal drugs have limited fetal effects,[57] and that charging pregnant people ultimately harms fetal health by deterring people from seeking prenatal care.[58] In addition to drug use, the prenatal conduct argued to be criminal under state statutes includes reckless driving,[59] falling down stairs,[60] attempted suicide,[61] failing to obtain adequate prenatal care,[62] and having intercourse against medical advice.[63]

The breadth of criminality endorsed in *Flute* necessarily entails broad discretion by prosecutors, courts, and medical providers over what prenatal conduct is criminal. Where the line between criminal and noncriminal conduct is "fluid rather than fixed," prosecutorial discretion controls whose conduct counts as criminal.[64] However, the criminalization of pregnant conduct with respect to the fetus is unique in that a second group of discretionary actors — medical providers — also play a central role in determining criminal conduct, as well as policing pregnant people's behavior and selectively reporting patients to law enforcement.[65] Professor Michele Goodwin argues that these law enforcement roles conflict with traditional medical ethics, including the duties to do no harm and closely guard patient confidentiality.[66] She warns that criminalizing pregnancy pits doctors against their patients and can result in legal decisionmaking by providers that is "at odds with patients' constitutional rights."[67] Meanwhile, "there is no medical '*Miranda* Warning,'" so pregnant patients are not on notice that their statements to medical providers may be reported to law enforcement and used to incriminate them.[68] Flute's admission of drug use to her medical providers was used in the government's case against her, but Flute herself may have understood the admission as medical rather than criminal. The double weight of prosecutors abusing their discretion and medical

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[57] Lollar, *supra* note 52, at 951, 953. Unlike drugs like crack cocaine and opioids, legal drugs, such as alcohol and tobacco, are shown to have lasting harmful effects on fetuses. *Id.* at 952.

[58] AMNESTY INTERNATIONAL, *supra* note 52, at 50–51.

[59] Goodwin, *supra* note 51, at 24–25 (discussing the arrest of a woman for "child endangerment" after driving recklessly while four months pregnant).

[60] Ocen, *supra* note 1, at 1179 (discussing arrest of woman who fell down the stairs after she disclosed to medical staff she "felt ambivalence" about her pregnancy).

[61] *See supra* note 6 and accompanying text.

[62] Ocen, *supra* note 1, at 1179 (discussing prosecution of a woman for failing to take action to prevent HIV transmission to her second child).

[63] *Id.* (discussing prosecution of a woman with pregnancy complications for having sex against medical advice, after bleeding resulted in brain damage to the fetus).

[64] John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 1 (2010).

[65] Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 798–99 (2014).

[66] *Id.* at 797–98.

[67] *Id.* at 798.

[68] *Id.* at 827.

providers exceeding their authority renders pregnant people singularly vulnerable to arbitrary enforcement under decisions like *Flute*.

The elastic criminality established by *Flute* also enables the targeting of poor people of color, in particular American Indian women.[69] Moral constructions of poor women of color as lazy, promiscuous, and lacking in regard for their offspring have long been used to justify state intervention in pregnancy.[70] These biases are reflected in the disproportionate numbers of poor women of color that have faced state charges for prenatal conduct.[71] To the extent that *Flute* influences state law interpretations or rates of prosecution, or that women of color fall under federal jurisdiction,[72] it will likely increase the broader targeting of women of color. However, *Flute* particularly increases the risk of American Indian women being prosecuted because Native Americans on reservations can be directly charged with federal crimes.[73]

Flute indicates that legislative protections against criminalization of prenatal conduct are needed. Despite the public health consensus that prenatal drug use should be treated medically and not criminally,[74] judicial criminalization appears to be increasing.[75] The interpretation in *Flute*, like those of state courts, expands criminality beyond what legislators have ordered. The elastic criminalization gives unchecked discretion to prosecutors, medical providers, and courts to choose what conduct — and *whose* conduct — is found criminal. In the wake of *Flute*, and the escalation of criminal prosecution of pregnant people, we need a legislative remedy for criminal charges for prenatal conduct.

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[69] Poor and black mothers have overwhelmingly been targeted historically. *See* Flavin & Paltrow, *supra* note 1; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421 (1991). *But see* Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 815 (2020) (arguing the opioid epidemic has complicated this historic focus on criminalizing pregnant women of color).

[70] Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1300 (2018) (reviewing KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017)).

[71] *See* Flavin & Paltrow, *supra* note 1, at 233. Such disparities are aggravated by the fact that American Indian and African American women suffer perinatal loss at about 1.8 and 2.3 times the rate of white women, respectively. *See* DANIELLE M. ELY ET AL., CTRS FOR DISEASE CONTROL & PREVENTION, INFANT MORTALITY BY AGE AT DEATH IN THE UNITED STATES, 2016 at 2 (Nov. 2018) https://www.cdc.gov/nchs/data/databriefs/db326-h.pdf [https://perma.cc/P764-NEMX].

[72] Federal jurisdiction for homicide exists if the act occurs in conjunction with certain other federal violations, is on federal land, or implicates individuals in certain federal positions. C.J. Williams, *Making a Federal Case out of a Death Investigation*, 60 U.S. ATT'Y'S BULL. 1, 2–4 (2012) https://www.justice.gov/sites/default/files/usao/legacy/2012/01/26/usab6001.pdf [https://perma.cc/4K84-EHRZ].

[73] *Id.* at 3; *see also* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715–17 (2006).

[74] Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 254–55 (2011).

[75] *See* Ocen, *supra* note 1, at 1173–74.