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The Disproportionate Effect on Native American Women of Extending the Federal Involuntary Manslaughter Act to Include a Woman's Conduct Against Her Child in Utero: *United States v. Flute*

Andie B. Netherland

THE DISPROPORTIONATE EFFECT ON NATIVE AMERICAN WOMEN OF EXTENDING THE FEDERAL INVOLUNTARY MANSLAUGHTER ACT TO INCLUDE A WOMAN'S CONDUCT AGAINST HER CHILD IN UTERO: *UNITED STATES v. FLUTE*

Andie B. Netherland[*]

> *I raise up my voice—not so that I can shout, but so that those without a voice can be heard . . . . We cannot all succeed when half of us are held back.*
>
> —Malala Yousafzai

I. Introduction

Samantha Flute, a Native American woman, was charged with committing involuntary manslaughter against her newborn baby boy after it was revealed that she took over-the-counter and prescription drugs shortly before delivery.[1] Although the District Court for the District of South Dakota dismissed the charges, the Eighth Circuit found that the Federal Involuntary Manslaughter Act (FIMA) included a woman's prenatal actions that caused the death of her born-alive child.[2] Flute's case is one of first impression as these actions and particular circumstances have never before constituted involuntary manslaughter at the federal level.[3]

This Note will explore the Eighth Circuit's holding to determine whether the FIMA should be extended to cover actions, such as Flute's, which result in the death of a newborn child. Additionally, this Note will explore how the *Flute* holding, as it stands, disproportionately affects Native American women compared to the rest of the population. Considerations such as culture and healthcare will demonstrate that, under the holding in *Flute,* Native American women face further oppression. Part II of this Note lays out the pertinent legal history of federal jurisdiction over Native Americans. In Part III, this Note summarizes the Eighth Circuit's decision in *United States v. Flute*. Finally, Part IV interprets the FIMA as it should be applied

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* Third-year student, University of Oklahoma College of Law.

1. United States v. Flute, 929 F.3d 584, 585–86 (8th Cir. 2019).
2. *Id.* at 589.
3. *Id.* at 591 (Colloton, J., dissenting).

in this situation and further analyzes the effect of the *Flute* holding on Native American women.

II. A Perfect Storm: The Statutory Basis for Flute's Conviction

A. Federal Jurisdiction

Congress enacted 18 U.S.C. § 1153, known as the Major Crimes Act, in 1885.[4] The Act was adopted in response to the decision in *Ex parte Crow Dog*, where an Indian-against-Indian murder conviction prosecuted under the General Crimes Act was overturned due to the Indian-against-Indian exception of the General Crimes Act.[5] Conversely, the Major Crimes Act sought to confer criminal jurisdiction to the United States over serious crimes that "might otherwise go unpunished under [the] tribal criminal justice system[]."[6] As a result, the Major Crimes Act now federally criminalizes a list of enumerated crimes committed by one Indian against another Indian.[7] The Major Crimes Act provides that "[a]ny Indian who commits against . . . another Indian . . . any of the following offenses . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing . . . the above offenses, within the exclusive jurisdiction of the United States."[8]

Flute's actions, if considered to be involuntary manslaughter, fall within the purview of the Major Crimes Act; Flute and her baby, the victim of the crime, are Native American.[9] Additionally, Flute committed the act in Agency village, which is within Indian Country.[10] Thus, because the conduct falls within the domain of the Major Crimes Act and occurred between tribal members, the United States has exclusive jurisdiction over Flute.[11]

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4. Major Crimes Act, 18 U.S.C. § 1153.

5. CONF. OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK § 4:9 (2020 ed.), AILDKBK § 4:9 (Westlaw) [hereinafter DESKBOOK] (citing *Ex parte* Crow Dog, 109 U.S. 556 (1883)).

6. United States v. Other Medicine, 596 F.3d 677, 680 (9th Cir. 2010).

7. DESKBOOK, *supra* note 5; 18 U.S.C. § 1153.

8. 18 U.S.C. § 1153(a).

9. Redacted Indictment, United States v. Flute, No. 1:17-CR-10017-CBK, 2017 WL 5495170 (D.S.D. Nov. 14, 2017), *rev'd and remanded*, 929 F.3d 584 (8th Cir. 2019).

10. *Id.*

11. *See* 18 U.S.C. § 1153.

B. Involuntary Manslaughter

Flute was indicted for involuntary manslaughter under 18 U.S.C. § 1112, the FIMA.[12] The FIMA defines involuntary manslaughter as "the unlawful killing of a human being without malice . . . [i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution . . . of a lawful act which might produce death."[13] The prosecution believed that Flute's actions fell within this definition and a grand jury returned an indictment under the Act.[14]

The United States alleged that Flute "unlawfully killed a human being, Baby [] Flute, without malice, in the commission of a lawful act in an unlawful manner which might produce death."[15] Involuntary manslaughter caused by negligence has been interpreted to mean a "wanton or reckless disregard for human life."[16] To be characterized as involuntary, this negligent killing must be unintentional and must not be of such a reckless disregard for human life that it would "support a finding of malice."[17] Additionally, to support a conviction under the Act, the prosecution must prove the responsible party "had actual knowledge that [the] conduct was a threat to the lives of others, or to have knowledge of such circumstances as could . . . have made foreseeable . . . the peril to which [the] acts might subject others."[18] Neither the intent nor the malice of the defendant is considered a factor needed to establish involuntary manslaughter.[19]

Flute did not believe her conduct fit within the requisite elements of the FIMA; therefore, she moved to dismiss the charges after her indictment.[20] Flute contended that, in reading the involuntary manslaughter statute, neither the class of victims protected nor the class of defendants sought to be criminalized includes mothers and newborn children injured in utero.[21] Rather, the Act only mentions that "victims" refers to human beings who are unlawfully killed.[22] The definition of "human being" in reference to

12. Redacted Indictment, *supra* note 9.
13. 18 U.S.C. § 1112(a).
14. Redacted Indictment, *supra* note 9.
15. *Id.*
16. United States v. Blount, 514 F. App'x 469, 473 (5th Cir. 2013).
17. United States v. Paul, 37 F.3d 496, 499 (9th Cir. 1994) (quoting United States v. Lesina, 833 F.2d 156, 159 (9th Cir. 1987)) (internal quotation marks omitted).
18. United States v. Pardee, 368 F.2d 368, 374 (4th Cir. 1966).
19. *Id.* at 373.
20. United States v. Flute, 929 F.3d 584, 586 (8th Cir. 2019).
21. *Id.* at 586.
22. 18 U.S.C. § 1112(a).

infants is set out in 1 U.S.C. § 8, the Born-Alive Infants Protection Act (BAIPA), which applies broadly to all acts of Congress.[23] Moreover, the BAIPA does not set out any specific exception for actions of mothers when the victim is their own child.[24] The broad implications of the BAIPA create ambiguities when considering the BAIPA in conjunction with other acts like the FIMA, as in this case. In light of this, statutory interpretation determines whether Flute's conduct meets all of the requisite elements of the federal involuntary manslaughter offense.

C. Healthcare in Indian Country

Historically, the federal government has recognized an obligation to provide healthcare to Native Americans as a result of treaties and agreements between the government and Native tribes throughout the country.[25] As early as the nineteenth century, the United States began to provide "modest provisions for health care" for Native Americans in an effort to prevent the spread of contagious diseases.[26] In 1921, Congress enacted 25 U.S.C. § 13, known as the Snyder Act, which authorized the federal government to fund and enact various Indian programs for purposes such as "relief of distress and conservation of health."[27] This Act authorized the Bureau of Indian Affairs (BIA) to expend only for the named purposes and provided that "Congress may from time to time appropriate, for . . . assistance of the Indians throughout the United States" instead of guaranteeing any specific service to Native Americans.[28] The Snyder Act's vague authorization of funds resulted in inconsistent and meager federally provided healthcare for Native Americans.[29] This continued until the 1950s

23. 1 U.S.C. § 8. This Act provides that for any Act of Congress that uses the words "'person', 'human being', 'child', and 'individual'," the meaning of such words includes "every infant member of the species homo sapiens who is born alive at any stage of development." *Id.*

24. *See id.*

25. Koral E. Fusselman, Note, *Native American Health Care: Is the Indian Health Care Reauthorization and Improvement Act of 2009 Enough to Address Persistent Health Problems Within the Native American Community?*, 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 389, 394 (2012).

26. Betty Pfefferbaum et al., *Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 368–69 (1996).

27. 25 U.S.C. § 13; *see also* Fusselman, *supra* note 25, at 395.

28. 25 U.S.C. § 13.

29. *See* Pfefferbaum et al., *supra* note 26, at 376–77, 386; *see* Fusselman, *supra* note 25, at 395 ("[T]he Act failed to define specific programs for assistance and eligibility requirements, and did not represent a general entitlement to services.").

when new legislation transferred the responsibility of Indian medical services from the BIA to the Department of Health, Education, and Welfare, which is now known as the Department of Health and Human Services.[30]

Despite this change in responsibility, there remained a severe need for healthcare improvements as the "health status of Native Americans was far below that of the general population."[31] In 1976, the Indian Health Care Improvement Act sought to improve the health of Native Americans by implementing various health programs and services.[32] The Act specifically recognized that the United States has a "special responsibilit[y] and legal obligation to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary."[33]

Since the enactment of the Indian Health Care Improvement Act, there has been an expansion in healthcare programs and healthcare access for Native Americans, but problems and shortfalls of the Indian Health Service still remain.[34] One shortfall is the fact that Native Americans are subject to limitations as a result of the control the federal government has over the Indian Health Service. Despite the recognition that healthcare for Native Americans is a historical obligation of the federal government, Native American healthcare is subject to the same congressional limitations as government-provided healthcare.[35] In particular, Native American women may not receive abortions through the Indian Health Service, due to the enactment of the Hyde Amendment, just as women receiving Medicaid may not.

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30. Fusselman, *supra* note 25, at 395; Pfefferbaum et al., *supra* note 26, at 382.

31. Fusselman, *supra* note 25, at 396.

32. *Id.*; Indian Health Care Improvement Act, Pub. L. No. 94-437, § 3, 90 Stat. 1400, 1401 (1976) (codified at 25 U.S.C. § 1602).

33. Indian Health Care Improvement Act § 3, 90 Stat. at 1401.

34. Fusselman, *supra* note 25, at 407 (explaining the shortage of health professionals on reservations and the Indian Health Service's failure to "adequately address the health needs of local Native Americans.").

35. Congress has restricted the use of federal funds for abortions by the Department of Health and Human Services and the Indian Health Service. *Infra* note 45 and accompanying text. As the Department of Health and Human Services is the funding mechanism for Medicare and Medicaid, government-provided healthcare likewise does not cover abortions. *How is Medicare funded?*, MEDICARE.GOV, https://www.medicare.gov/about-us/how-is-medicare-funded#:~:text=The%20Centers%20for%20Medicare%20%26%20Medicaid,and%20Human%20Services%20(HHS).&text=This%20money%20comes%20from%20the%20Medicare%20Trust%20Funds (last visited Dec 2, 2020).

D. The Hyde Amendment

In 1976, the Hyde Amendment was added to the annual Health and Human Services Appropriations Bill.[36] The original Amendment provided that no funds appropriated to the Department of Health could be "used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."[37] Subsequently, Congress broadened the Hyde Amendment to include an exception allowing for the use of federal funds for abortions when "necessary for the victims of rape or incest" or "the termination of an ectopic pregnancy."[38] Despite challenges to the Hyde Amendment in consideration of the equal protection guarantees of the Fifth Amendment Due Process Clause, the Supreme Court, in *Harris v. McRae*, held the Hyde Amendment to be constitutional in accordance with the Fifth Amendment.[39] Today, the Hyde Amendment still stands for the same proposition: federally allocated funds may not be used for abortions, except in the narrow circumstances of rape, incest, ectopic pregnancy, or other instances where the mother's life is endangered.[40]

Since the Hyde Amendment was specifically targeted at cutting off the federal funding of abortions for women on Medicaid,[41] it did not affect Native American women until later on. It was not until 2008 that the Senate realized there was a loophole in the Hyde Amendment caused by its intersection with the funding mechanism for the Indian Health Service. Because the Hyde Amendment provided that "[n]one of the funds contained in [the] Act" could be used for abortions, the Amendment did not apply, at that time, to the funds allocated to the Indian Health Service through a different act.[42] In 2008, the Senate proposed an amendment to the Indian Health Care Improvement Act extending the Hyde Amendment's application to the Indian Health Service as well.[43]

The Senate approved the Indian Health Care Improvement Act's amendment and, shortly thereafter, added a provision that limited the use of

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36. *Senate Moves to Bar Abortion Funding from Indian Health Care Bill*, 15 Andrews Health L. Litig. Rep. (West) No. 11, at 10, 10, 2008 WL 780623 at *1 (Mar. 26, 2008).

37. Health and Human Services Appropriations Bill, Pub. L. No. 94-439, sec. 209, 90 Stat. 1418, 1434 (1976).

38. Act of Oct. 1, 1980, Pub. L. No. 96-369, sec. 110, 94 Stat. 1351, 1356 (providing continuing appropriations for the fiscal year of 1981).

39. 448 U.S. 297, 326 (1980).

40. Act of Oct. 1, 1980 sec. 110, 94 Stat. at 1356.

41. Health and Human Services Appropriations Bill sec. 209, 90 Stat. at 1434.

42. *Id.*

43. *Senate Moves to Bar Abortion Funding from Indian Health Care Bill*, *supra* note 36.

funds by the Indian Health Service to the Indian Health Care Improvement Act.[44] The new amendment provided that any limitations contained in "an Act providing appropriations for the Department of Health and Human Services . . . with respect to the performance of abortions shall apply . . . with respect to . . . using funds contained in an Act providing appropriations for the Indian Health Service."[45]

These various pieces of legislation play an important role in Flute's conviction of federal involuntary manslaughter, discussed in Part IV(B) of this Note. The Major Crimes Act and the FIMA are the Eighth Circuit's basis for convicting Flute. The legislation surrounding Indian healthcare and the Hyde Amendment are relevant to the proposition that Native American women are disproportionately affected by the Eighth Circuit's holding in *Flute*. This legislation created the "perfect storm" for defendant Flute.

III. The Case: United States v. Flute

Flute gave birth to a baby boy on August 19, 2016 at a hospital in Sisseton, South Dakota.[46] Baby Flute was born full-term at thirty-eight weeks; he was seemingly healthy "with no obvious signs of trauma or injury."[47] Despite this fact, Baby Flute died four hours after birth.[48] While efforts were made to resuscitate Baby Flute, the mother admitted to abusing several over-the-counter and prescription drugs immediately prior to her admission to the hospital for Baby Flute's delivery.[49] Specifically, Flute told the doctors she: (1) took "three times the daily dose of Lorazepam," a drug prescribed to her during a prenatal medical visit; (2) snorted hydrocodone, which she believed was laced with cocaine due to the feeling it gave her; and (3) drank cough medicine.[50]

When Flute was initially admitted for delivery, lab results indicated she tested positive for "cocaine and a number of prescription and over-the-counter drugs."[51] Additionally, Flute admitted she was aware that ingesting these substances could hurt Baby Flute, but did so anyway because "she

44. *Id.*
45. 25 U.S.C. § 1676.
46. United States v. Flute, 929 F.3d 584, 586 (8th Cir. 2019).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

needed to get high."[52] Baby Flute's autopsy confirmed the presence of substances that had not been administered to him during the time he was alive at the hospital.[53] The pathologist who conducted the autopsy concluded that Baby Flute died from the drug toxicity of the substances ingested by his mother just prior to his birth.[54]

Samantha Flute was indicted on March 15, 2017 on one count of involuntary manslaughter committed by an Indian in Indian country.[55] As previously discussed, this charge was subject to the jurisdiction of the federal government under the Major Crimes Act.[56] The indictment claimed Flute "unlawfully kill[ed] Baby . . . Flute by ingesting prescribed and over-the-counter medicines in a grossly negligent manner, and did thereby commit the crime of involuntary manslaughter."[57] Following the indictment, Flute filed a motion to dismiss, arguing her actions did not fit the conduct of the offense under the FIMA; she argued that an unborn child does not meet the "human being" requirement and that the Act was unconstitutionally vague.[58]

The District Court for the District of South Dakota granted Flute's motion to dismiss on the basis that she was not within the class of defendants the FIMA sought to criminalize.[59] More specifically, the court found through statutory interpretation that the FIMA was not applicable to a woman and her unborn child.[60] The prosecution appealed this dismissal, arguing the district court's statutory interpretation of the FIMA was incorrect; to the district court's understanding, the FIMA does, in fact, apply to women who injure their child in utero causing the child's death after birth.[61]

On appeal, the Eighth Circuit considered two separate issues. The first issue was whether babies who die shortly after birth due to injuries sustained while they were in utero—such as Baby Flute—are included in the class of victims the FIMA seeks to protect.[62] The court also considered whether mothers who cause the death of their child after birth through

52. *Id.*
53. *Id.*
54. *Id.*
55. Redacted Indictment, *supra* note 9.
56. 18 U.S.C. § 1153(a); *see Flute*, 929 F.3d at 586–87.
57. Redacted Indictment, *supra* note 9.
58. *Flute*, 929 F.3d at 586 (quoting 18 U.S.C. § 1112(a)).
59. *Id.*
60. *Id.* at 587.
61. *Id.*
62. *Id.*

negligent actions during pregnancy are within the class of defendants under FIMA.[63]

Regarding the first issue, the Eighth Circuit determined that babies such as Baby Flute *are* within the class of victims recognized under the FIMA.[64] In reaching this conclusion, the Eighth Circuit conducted a statutory interpretation analysis to determine what class of victims the Act was intended to protect.[65] The Eighth Circuit disagreed with Flute's contention that the Act did not apply to her because, at the time of her actions that caused Baby Flute's later death, Baby Flute was not yet a human being.[66] Citing to the BAIPA, the Eighth Circuit noted that "human being," as it relates to any act of Congress, "include[s] every infant member of the species homo sapiens who is born alive at any stage of development."[67] The BAIPA defines "born alive" to mean that an infant was completely expelled or extracted from his or her mother with a beating heart.[68] The Eighth Circuit considered this Act in conjunction with the FIMA, and concluded that Baby Flute was a human being for purposes of the FIMA.[69]

Baby Flute survived only hours after his birth before the drugs in his system caused his death.[70] Under the court's analysis, Baby Flute fit within the purview of the BAIPA because he was alive following the complete expulsion from his mother.[71] The court reasoned that, because the BAIPA was created with the intention to apply to all acts of Congress, a born-alive child whose death is caused after birth by in utero injuries falls within the victims protected by the FIMA.[72]

The court noted that this interpretation of the FIMA was consistent with the common law "born alive" rule, "whereby liability extend[s] to the death of a child born alive related to injuries received in utero."[73] The court only considered whether Baby Flute was a human being at the time of death when considering the application of the FIMA.[74] "[H]omicide does not

63. *Id.*
64. *Id.* at 588.
65. *Id.* at 587–88.
66. *Id.*
67. *Id.* at 588 (quoting 1 U.S.C. § 8 (internal quotation marks omitted)).
68. *Id.*; *see also infra* note 112 and accompanying text.
69. *Flute*, 929 F.3d at 588.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

occur unless and until the victim actually dies."[75] "[B]ecause death completes the offense of manslaughter, the victim's status at death" is the most important factor to consider, "rather than the victim's status when the injuries were sustained."[76] Given that Baby Flute was considered a "human being" at the time of his death, and even if the injuries which caused death occurred prior to his birth, he and similar victims fall within the protection of the FIMA according to the Eighth Circuit.[77]

On the second issue—whether Flute falls within the class of defendants referenced in the FIMA—the Eighth Circuit found that the mother of a child who is born alive but then subsequently dies due to the mother's negligent conduct while the child was in utero *is* criminally culpable under the Act.[78] Although the district court originally found that conduct such as Flute's was excluded from the FIMA due to an exception for mothers of unborn children, the Eighth Circuit disagreed.[79] The district court based this exception on the Unborn Victims of Violence Act, which "criminalizes the killing or injuring of unborn children during the commission of certain federal offenses."[80] The Unborn Victims of Violence Act creates offenses for people who engage in the enumerated crimes, including involuntary manslaughter, that result in the death of "a child, who is in utero at the time the conduct takes place."[81] This Act does not include conduct committed by "any woman with respect to her unborn child."[82] The district court concluded that the exception provided in the Unborn Victims of Violence Act was a "clear statement from Congress that the federal assault and murder statutes cannot be applied to the pregnant woman herself for any actions she takes with respect to her unborn child."[83] The Eighth Circuit, on the other hand, found this interpretation to be erroneous.[84]

The Eighth Circuit reasoned that the Unborn Victims of Violence Act's exception "has no applicability or reach beyond its own provisions."[85] The Eighth Circuit found that the plain language of the Unborn Victims of

75. *Id.*
76. *Id.*
77. *Id.* at 588–89.
78. *Id.* at 589.
79. *Id.*
80. *Id.* (quoting United States v. Montgomery, 635 F.3d 1074, 1086 (8th Cir. 2011)).
81. *Id.* (quoting 18 U.S.C. § 1841(a)(1) (internal quotations omitted)).
82. *Id.* (quoting 18 U.S.C. § 1841(c) (internal quotations omitted)).
83. United States v. Flute, No. 1:17-CR-10017-CBK, 2017 WL 5495170, at *3 (D.S.D. Nov. 14, 2017), *rev'd and remanded*, 929 F.3d 584 (8th Cir. 2019).
84. *Flute*, 929 F.3d at 589.
85. *Id.*

Violence Act made it clear that the exceptions of the statute applied only to that specific statute and not to any unrelated statutory provisions, such as the FIMA.[86] Additionally, the Eighth Circuit held that Congress did not intend for the exception for mothers and their conduct affecting their unborn children found in the Unborn Victims of Violence Act to be applied broadly to other statutory provisions.[87] The court stated that it "will not read an exception into a statutory provision where it does not exist."[88] Because there was no applicable exception found for mothers and their own children, the court considered no other information in finding that Flute was within the class of defendants criminalized by the FIMA.[89] Additionally, the Eighth Circuit noted that the district court was erroneous when it based its holding on "the potential ramifications of applying the federal involuntary manslaughter statute" in this instance.[90] Since the plain meaning of the statue answered the issue in contention, the Eighth Circuit believed no other considerations should play a part in the analysis.[91]

Based on the plain language of the statute, the Eighth Circuit found that Flute was "an appropriate defendant within the scope of [the FIMA] and may be criminally charged for her conduct . . . ultimately resulting in Baby Flute's death after birth."[92] According to the Eighth Circuit, federal involuntary manslaughter includes the killing of "human beings" which, in light of the BAIPA, includes children who are born alive.[93] Additionally within this reasoning, the FIMA includes no exception for a mother's conduct, criminalizing negligent behavior of mothers that harms their child in utero and later results in their child's death.[94]

86. *Id.*
87. *Id.*
88. *Id.*
89. *See id.* at 589–90.
90. *Id.* at 589.
91. *See id.* at 590.
92. *Id.*
93. *Id.*
94. *Id.*

IV. Analysis of the United States v. Flute *Decision and Its Implications for Native American Women*

A. Can a Mother's Prenatal Actions Constitute Federal Involuntary Manslaughter?

The *Flute* district court's interpretation of the FIMA corresponds with congressional intent for the Act, prior precedent, and policy concerns. However, the Eighth Circuit disagreed with the district court's interpretation and application of the Act.[95] Finding that the plain meaning of the statute showed no ambiguity nor exceptions for a mother's actions toward her child in utero, the Eighth Circuit performed no further statutory interpretation in holding that Flute's actions constituted involuntary manslaughter.[96] The Eighth Circuit's interpretation of the plain meaning of the FIMA as applied in these circumstances is not in line with Congress' intent for the Act; thus, the intent of the drafters should instead be the controlling interpretation.

There is no discrepancy between the decision of the lower court and appeals court over whether Baby Flute was considered to be a human being for the purposes of the Act. Both the district court and the Eighth Circuit found that, due to the definition of "human being," Baby Flute fell within the class of victims that the FIMA sought to protect.[97] The courts, however, did not agree as to whether a mother's actions taken against her unborn child qualified her as a defendant that Congress sought to criminalize.[98]

In order to ascertain the meaning of a statute, a court may use the canons of construction as a rule of thumb, but should turn to the first canon of construction before all others.[99] Thus, in determining the meaning of a statute, a court should first look at the "language in which the act is framed."[100] If the language of the act is plain, then "the sole function of the courts is to enforce it according to its terms."[101] As a general rule, courts should presume "that a legislature says in a statute what it means and means in a statute what it says there."[102] In interpreting a statute, a court should

95. *Id.* at 589.
96. *Id.* at 590.
97. United States v. Flute, No. 1:17-CR-10017-CBK, 2017 WL 5495170, at *2 (D.S.D. Nov. 14, 2017), *rev'd and remanded*, 929 F.3d 584 (8th Cir. 2019); *Flute*, 929 F.3d at 590.
98. *Flute*, 2017 WL 5495170, at *4; *Flute*, 929 F.3d at 590.
99. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).
100. Caminetti v. United States, 242 U.S. 470, 485 (1917).
101. *Id.*
102. *Conn. Nat'l Bank*, 503 U.S. at 253–54.

consider not only the bare meaning of words and phrases but also their broader meaning within the statutory scheme as a whole.[103] Words in isolation are not always controlling in light of the statutory construction because "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities."[104] Interpretation of the meaning of a statute depends on the interpretation of the statue as a whole giving value to both its purpose and context and in light of any informative precedent or authority.[105]

Albeit rare, there are cases where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[106] Interpretations in conflict with the intentions of drafters occur where the plain meaning creates a conflict with another section of the code, is contrary to an important state or federal interest, or is contrary to the view suggested by legislative history.[107] In such cases, the intentions of the drafters, rather than the plain language, "must be controlling."[108]

On its face, the FIMA seems to have an unambiguous plain meaning, especially in light of the BAIPA. The FIMA defines manslaughter as "the unlawful killing of a human being without malice."[109] Further, manslaughter is considered to be involuntary when the unlawful killing occurs "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."[110] For the purposes of federal legislation, a human being is defined to "include every infant member of the species homo sapiens who is born alive at any stage of development."[111] Further, "born alive" means:

> the complete expulsion or extraction from his or her mother . . . at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the

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103. Holloway v. United States, 526 U.S. 1, 6 (1999) (quoting Bailey v. United States, 516 U.S. 137, 145 (1995)) (explaining that in statutory interpretation courts "'consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'").

104. *Id.*

105. *Id.*

106. Griffin v. Oceanic Contractors, 458 U.S. 564, 571 (1982).

107. *See* United States v. Ron Pair Enters., 489 U.S. 235, 243 (1989).

108. *Griffin*, 458 U.S. at 571; *see also Ron Pair Enters.*, 489 U.S. at 242.

109. 18 U.S.C. § 1112(a).

110. *Id.*

111. 1 U.S.C. § 8(a).

> umbilical cord, or definite movement of voluntary muscles . . . regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.[112]

As the Eighth Circuit noted, given the plain meaning of the Act in conjunction with the definition of "human being," Flute's conduct seems to constitute involuntary manslaughter.[113] The court, however, inaccurately found no conflict between the intention of the FIMA's drafters and the literal application of the Act when applied to mothers for their fatal prenatal actions. The Act is one of the rare cases where the intentions of the drafters, rather than the plain meaning, should be controlling.

Congress never intended for the Act to apply to mothers for their prenatal actions, as evidenced by prior precedent, legislative history, and policy concerns. Prior precedent shows that "the government has never before charged a mother with manslaughter based on prenatal neglect that causes the death of [her] child."[114] In addition to the fact that the Act has never been applied in this way, the legislative history points to an interpretation alternative to the one that the Eighth Circuit adopted.

Congress passed the BAIPA in 2001 in response to developing case law allowing partial-birth abortions.[115] Through the Act, Congress sought to protect living infants completely expelled from their mothers.[116] For instance, the legislative history states that this Act would protect an infant "born alive at a Federal hospital as a result of a failed abortion attempt" so doctors would be required to treat the born alive infant "as they would treat a similarly-situated infant who was born as a result of natural labor."[117] History makes clear that Congress intended this Act to protect infants from criminal conduct after birth, despite the manner or point in development at which they are born. Applying the Eighth Circuit's interpretation of the BAIPA goes against the intentions of the drafters. The opponents of the Act foresaw that it would likely be misconstrued by noting that the Congressional Budget Office (CBO) stated that "[b]ecause the words 'person, human being, child, and individual' are used frequently throughout the United States Code, CBO cannot determine how the new definitions

112. *Id.* § 8(b).

113. United States v. Flute, 929 F.3d 584, 590 (8th Cir. 2019).

114. *Id.* at 591 (Colloton, J., dissenting).

115. H.R. REP. NO. 107–186, at 2–3 (2001), *reprinted in* 2002 U.S.C.C.A.N. 620, 620–22, 2001 WL 873624.

116. *Id.* at 12, 2002 U.S.C.C.A.N. at 631.

117. *Id.* at 13, 2002 U.S.C.C.A.N. at 632.

could be interpreted in all situations."[118] This interpretation of the Eighth Circuit is exactly what the opponents of the BAIPA feared. The Eight Circuit applied the Act in a way likely not foreseen by Congress, due to the expansive application of the Act to all federal law. The BAIPA was directed at criminal conduct *after* birth. The Eight Circuit's interpretation of this Act, however, inappropriately expanded it to cover criminal conduct before birth.

The legislative history of a subsequent act makes clear that Congress has no intention for the FIMA to apply to a mother's action against her child in utero. Two years after the enactment of the BAIPA, the Unborn Victims of Violence Act was passed. The Unborn Victims of Violence Act further clarified that Congress never intended the BAIPA to apply to actions against an infant in utero. The Unborn Victims of Violence Act criminalizes anyone who "engage[d] in conduct that violate[d] any of the provisions of law listed in subsection (b) and thereby cause[d] the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct t[ook] place . . . ."[119] Involuntary manslaughter is one of the specific offenses listed in subsection (b) of the Act, but it explicitly states that it should not be construed to "permit the prosecution . . . of any woman with respect to her unborn child."[120] Additionally, legislative history notes that the Act sought to abolish the now-medically unnecessary born alive rule.[121] The Act instead "ensures that Federal prosecutors are able to punish those who injure or kill unborn children during the commission of violent Federal crimes, whether or not the child is fortunate enough to survive the attack and be born alive."[122]

The Unborn Victims of Violence Act alone specifically criminalizes acts against a child in utero. The Act abolished the born alive rule and makes clear that Congress did not intend to criminalize the acts of mothers with respect to their unborn child, even if the language of FIMA and the BAIPA seemingly point to the contrary. Congress did not foresee the Eighth Circuit's interpretation when it broadly applied the new definition of "human being" to all federal legislation. The Unborn Victims of Violence Act clearly shows Congress did not intend the BAIPA to apply in the manner prescribed by the Eighth Circuit.

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118. *Id.* at 16, 2002 U.S.C.C.A.N. at 634.

119. 18 U.S.C. § 1841(a)(1).

120. *Id.* § 1841(c).

121. H.R. REP. NO. 108-420, pt. 1, at 6–7 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 536–37, 2004 WL 314074.

122. *Id.* at 7, 2004 U.S.C.C.A.N. at 537.

Finally, policy considerations support the interpretation of the FIMA adopted by the district court, rather than the Eighth Circuit. Although policy considerations should not be the driving factor of statutory interpretation,[123] they may be considered if they point to ways in which the plain meaning of the statute is inconsistent with the intent of the drafters.[124] The interpretation of the Eighth Circuit would allow women to be prosecuted under the FIMA for many different actions when those actions cause the prenatal harm and later death of their "born alive" infant.[125] Under the Eighth Circuit's interpretation, a pregnant woman who caused a car accident through negligent driving, "use[d] chemotherapy to treat cancer," or neglected prenatal care that resulted in the injury or death of her unborn child, could all likely be prosecuted for involuntary manslaughter.[126] There is no evidence that Congress intended any such instances to be considered involuntary manslaughter; to apply the Act this broadly would start down a "very slippery slope."[127]

Congress never intended for the FIMA to be extended to criminalize the prenatal actions of a pregnant woman that cause the death of her child, even if that child is born alive. The strict reading of the FIMA and the BAIPA goes against Congress' intent, as evidenced by legislative history and subsequent acts. In addition, it goes against precedent as this is a conviction of first impression at the federal level. Lastly, the Eighth Circuit's strict reading goes against policy as it would have sweeping adverse effects on pregnant women; one distinct policy consideration reflected in the particular facts of *Flute* is that the interpretation adopted by the Eighth Circuit will have a disproportionate effect on Native American women. Because of the many unfortunate circumstances Native American women are disproportionately exposed to, they will also be more likely to find themselves in Flute's position.

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123. *See* Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws . . . . We refuse to sit as a superlegislature to weigh the wisdom of legislation . . . ." (internal quotation marks and citation omitted)).

124. *Cf.* United States v. Ron Pair Enters., 489 U.S. 235, 242–43 (1989) (holding that because there was no evidence of contradictory legislation, contradictory federal or state interests, contradictory legislative history, nor compelling policy reasons of the statute at hand, the statute must be interpreted strictly by the language rather than the intentions of the drafters.).

125. *See* United States v. Flute, No. 1:17-CR-10017-CBK, 2017 WL 5495170, at *3 (D.S.D. Nov. 14, 2017), *rev'd and remanded*, 929 F.3d 584 (8th Cir. 2019).

126. *Id.*

127. *Id.*

B. The Disproportionate Effects of the Flute *Decision on Native American Women*

The Eighth Circuit's holding in *Unites States v. Flute* will disproportionately affect Native American women. Native American women are exposed to limited access to women's healthcare, heightened rates of addiction, and infant mortality at a much higher rate than non-Indian women.[128] These conditions make it more likely that a Native American woman would be adversely affected by the holding. Particularly, Native American women struggling with addiction, like Samantha Flute, may face criminal prosecution under the FIMA more frequently than non-Indian women due to the unavailability of abortion services within the Indian Health Service, caused by the Hyde Amendment.

Many Native Americans view healthcare provided by the United States as a right created by treaties rather than a privilege.[129] Healthcare, through the Indian Health Service, was a stipulation in many of the treaties by which the United States took land from Native Americans.[130] Due to the high rate of poverty in Native American communities, private healthcare is rare.[131] Thus, the Indian Health Service is the primary healthcare provider for most Native Americans.[132] Despite this service, Native Americans experience low access rates to adequate healthcare.[133] Native American women, in particular, do not have access to reproductive healthcare services that are available to most of the American population. These inaccessible

128. Brief for National Advocates for Pregnant Women & Other Experts in Medicine, Public Health & Policy as Amici Curiae Supporting Defendant-Appellee's Petition for Rehearing En Banc at 19, United States v. Flute, 929 F.3d 584 (8th Cir. 2019) (No. 17-3727), 2019 WL 4132202, at *12 [hereinafter Amicus Brief] ("Native people are disproportionately impacted by poverty, lack access to adequate healthcare and have much higher rates of infant mortality . . . ."); Fusselman, *supra* note 25, at 407 (explaining the shortage of health professionals on reservations and the Indian Health Service's failure to "adequately address the health needs of local Native Americans."); *id.* at 406 ("Nearly nineteen percent of Native Americans ages twelve and older reported using illegal drugs compared to just under twelve percent of the general U.S. population.").

129. Leslie Logan, *Abortion: Native Women Respond to Onslaught of Laws and Restrictions Across the Country*, INDIAN COUNTRY TODAY (June 3, 2019), https://newsmaven.io/indiancountrytoday/news/abortion-native-women-respond-to-onslaught-of-laws-and-restrictions-across-the-country-V0qDwW-tZ0mY1q3KZozxAw.

130. *Id.*

131. *See id.*

132. *Id.*

133. Fusselman, *supra* note 25, at 407 (explaining the shortage of health professionals on reservations and the Indian Health Service's failure to "adequately address the health needs of local Native Americans").

reproductive services include "access to . . . abortion[s], emergency contraception, and sometimes even condoms."[134]

After the Hyde Amendment was applied to the Indian Health Service, Native American women could no longer receive abortions in this setting unless their health was in danger.[135] "The law's impact is particularly devastating to poor women and discriminates against women who often need [these] abortion services the most: those who have reduced access to family planning, and experience higher rates of sexual victimization."[136] Although the Hyde Amendment applies broadly to all federally funded healthcare, it disproportionately affects Native American women; federally funded healthcare through the Indian Health Service is often their only access to healthcare.[137]

Even with permissible abortions under the Hyde Amendment, such as when the mother's health is in danger or in cases where the pregnancy was caused by rape or incest, Native American women often are not given abortion services that could be legally provided by the Indian Health Service.[138] A survey of Indian Health Service units showed that, specifically in cases where the mother's health was "endangered by the pregnancy," 62% of the units surveyed "do not provide either abortion services or funding."[139] In Flute's home state of South Dakota, a 2003 report stated that it was difficult for a woman to obtain abortion services outside of the Indian healthcare system.[140] At the time of the report, there was only one private abortion clinic in South Dakota.[141] Because of the Hyde Amendment and inadequate healthcare provided by the Indian Health Service, Native American women are less likely to get the reproductive healthcare treatment they need.

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134. Logan, *supra* note 129.

135. Health and Human Services Appropriations Bill, Pub. L. No. 94–439, sec. 209, 90 Stat. 1418, 1434 (1976); Act of Oct. 1, 1980, Pub. L. No. 96-369, sec. 110, 94 Stat. 1351, 1356 (providing continuing appropriations for the fiscal year of 1981).

136. Logan, *supra* note 129.

137. *Id.*

138. KATI SCHINDLER ET AL., NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT 5 (2002), http://prochoice.org/pubs_research/publications/downloads/about_abortion/indigenous_women.pdf ("[S]urvey findings showed that 85% of the surveyed Service Units were noncompliant with the official IHS abortion policy and thus in violation of the Hyde Amendment.").

139. *Id.*

140. Logan, *supra* note 129.

141. *Id.*

Most likely due to the inadequacy of reproductive healthcare on reservations, Native American women are "more likely to experience . . . neonatal loss."[142] Native American women face a much higher rate of infant mortality—"9.4 per 1,000 live births"—compared "to the overall national [infant mortality] rate of 5.8" per 1000 live births.[143] Although the cause of infant mortality may vary, these high rates are yet another factor that makes it more likely that Native American women will be disproportionately affected by the *Flute* holding.

In addition to having low access to adequate healthcare, Native Americans face a higher rate of drug addiction than the population at large.[144] A 2012 National Survey on Drug Use and Health report found that 17.5% of American Indians and Alaskan Natives were in need of alcohol or illicit drug use treatment, compared to only 9.3% for other races and ethnicities.[145] Additionally, data collected by the Indian Health Service reported that, in 2009, the death rate of American Indians and Alaskan Natives for drug-related deaths was 22.7%.[146] This number is compared to a drastically smaller number of drug-related death rates of all races—12.6%—in the United States.[147] Even in the face of addiction, Native American women do not have access to abortions because of the Hyde Amendment. Native American women who suffer with addiction, much like Flute, have little to no option other than to carry their pregnancy to term and increase the likelihood that they will be subject to prosecution under the FIMA as a result of the *Flute* decision.

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142. Amicus Brief, *supra* note 128.

143. *Id.* (citing *Infant Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (Sept. 10, 2020)).

144. Fusselman, *supra* note 25, at 406 ("Nearly nineteen percent of Native Americans ages twelve and older reported using illegal drugs compared to just under twelve percent of the general U.S. population.")

145. Substance Abuse & Mental Health Servs. Admin., *Need for and Receipt of Substance Use Treatment Among American Indians or Alaska Natives*, NSDUH REPORT, Nov. 2012, https://www.samhsa.gov/data/sites/default/files/NSDUH120/NSDUH120/SR120-treatment-need-AIAN.htm.

146. U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., TRENDS IN INDIAN HEALTH 192 (2014 ed.), https://www.ihs.gov/sites/dps/themes/responsive2017/display_objects/documents/Trends2014Book508.pdf.

147. *Id.*

V. Conclusion

The Eighth Circuit's extension of the FIMA—to include the negligent actions of pregnant mothers where those actions later caused the death of their "born alive" child—is inconsistent with Congress' intentions for the Act. The Eighth Circuit turned a blind eye to both Congress' intentions of the FIMA that were at odds with its reading of the FIMA and to the drastic implications of its decision.

The Eighth Circuit erroneously ignored the broad consequences the holding will have on women. Although policy considerations cannot be the driving force in interpretation, the Eighth Circuit refused to consider the implication of its holding at all. The holding in *United States v. Flute* puts many women at risk for prosecution for negligent actions. But, in particular, the holding will disproportionately affect Native American women because of the conditions they are inherently exposed to. Native American women already face inadequate and meager women's reproductive healthcare, high rates of addiction, and high rates of infant mortality. If the FIMA is applied in accordance with the Eighth Circuit's holding throughout the country, many women will face prosecutions for actions that have not previously been criminalized.

The *Flute* decision increases the many barriers that women face because of their reproductive health. These barriers are even greater for Native American women who have experienced deep-rooted oppression. This oppression contributes to the disproportionate effect of the *Flute* decision on Native American women and the oppressions are further solidified by the decision itself. This oppression is something that neither society nor the courts and legislature should support.

United States v. Flute is more than just an incorrectly decided case. It jeopardizes the future of all women—especially Native American women.