

# Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law

Major Michael J. Davidson  
LL.M. Candidate, George Washington University

## Introduction

Criminal laws that prohibit the killing of a fetus have existed since the ancient Persian empire,<sup>1</sup> and the topic of fetal crime has evoked legal commentary since at least the 1200's.<sup>2</sup> Currently, the American justice system is seeing an increased effort to criminalize injuries inflicted on the unborn. These efforts have cast a wide net, targeting abusive spouses and boyfriends,<sup>3</sup> drunk and reckless drivers,<sup>4</sup> and pregnant women who abuse alcohol or drugs.<sup>5</sup> In 1996, approximately 200 criminal cases were brought against those who had allegedly killed or injured a fetus.<sup>6</sup> One of those criminal actions was an Air Force court-martial that resulted in the conviction of Airman Gregory L. Robbins for fetal manslaughter.<sup>7</sup>

This article examines the common law approach to fetal crimes, particularly feticide, and then compares fetal-related prosecutions in the state, federal, and military criminal systems. Finally, the article examines the cognizability of fetal prosecutions under the Uniform Code of Military Justice (UCMJ), examining several potential defenses to such efforts.

## Common Law

At common law, the killing of an unborn child was not a homicide,<sup>8</sup> but possibly constituted some form of lesser crime.<sup>9</sup> Before the defendant could be convicted of any type of homicide, the government had to prove that the victim had been born alive and then died as a result of prenatal injury.<sup>10</sup> In his *Com-*

---

1. See Louise B. Wright, *Fetus vs. Mother: Criminal Liability For Maternal Substance Abuse During Pregnancy*, 36 WAYNE L. REV. 1285, 1291 (1990) ("In the ancient Persian Empire, criminal sanctions for fetal abortion were severe."). In contrast, the criminal laws of the Greek and Roman Empires did not criminalize killing a fetus, "except possibly when the father's rights to the child had been violated." *Id.* However, early Roman law did require that upon the death of a pregnant woman, her fetus had to be removed and given a chance to live before the woman could be buried. ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* 12 (1970).

2. Thirteenth century English jurist Henry Bracton posited that acts or injury to a fetus that caused its death after an incident of fetal movement constituted homicide. Wright, *supra* note 1, at 1292.

3. Brent Whiting, *Killer of Unborn Child Gets 7 1/2 Years*, ARIZ. REPUBLIC, Jan. 14, 1995, at B1 (reporting that an Arizona man pleaded guilty to manslaughter after punching his pregnant girlfriend, causing a stillborn delivery). National studies indicate that a quarter of all battered women receiving medical attention in emergency rooms are pregnant. Angela Rabago-Mussi, *Pregnant Women Often Abused, Hospital Says*, ARIZ. REPUBLIC, July 23, 1994, at B1.

4. See Cuellar v. State, 957 S.W.2d 134, 136 (Tex. Ct. App. 1997) (involving a drunk driver who was convicted of intoxication manslaughter after hitting a car driven by a woman who was seven and one-half months pregnant); *Man Gets 3 1/2 Years in Feticide Case*, SATURDAY ST. TIME/MORNING ADVOC. (Baton Rouge, La), Oct. 26, 1996, at 3B (reporting that a driver hit a car driven by an eight-month pregnant woman, killing the fetus).

5. See Tony Mauro, *Abortion Battle, Medical Gains Cloud Legal Landscape*, USA TODAY, Dec. 12, 1996, at 1A. See also Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (reversing the conviction of a Florida woman who delivered cocaine to her newborn child through her unsevered umbilical cord immediately after birth; noting that courts in Michigan, Kentucky, and Ohio had ruled similarly); Don Terry, *Mom Tried to Kill Fetus Charge Says*, ARIZ. REPUBLIC, Aug. 17, 1996, at A1 (reporting that a Wisconsin woman was charged with attempted murder after giving birth to a baby whose blood-alcohol level measured 0.199, twice the legal limit for intoxication); *Prenatal Drug Use Is Ruled Child Abuse*, NY TIMES, July 17, 1996, at A8 (reporting that an appellate court upheld the child abuse conviction of a South Carolina woman who smoked crack while pregnant). But see Pamela Manson, *Court: Actions That Harm Fetus Not Child Abuse*, ARIZ. REPUBLIC, May 7, 1995, at B1 (reporting an unsuccessful attempt to prosecute a woman under state child abuse law for using heroin while pregnant). In 1992, approximately 222,000 babies were born to women who used illegal drugs during pregnancy. *220,000 Births to Moms Who Used Drugs*, ARIZ. REPUBLIC, Sept. 13, 1994, at D3. A survey by the Center of Disease Control and Prevention indicated that as many as 140,000 pregnant women nationwide were heavy drinkers, consuming seven or more drinks a week or five or more drinks at one time during the previous month. *As Pregnant Women Drink More, Fetal Risk is Rising, Study Says*, ARIZ. REPUBLIC, Apr. 25, 1997, at A12.

6. See Don Feder, *Fetal Homicide Should be a Crime*, BOSTON HERALD, Jan. 3, 1997, at 29.

7. James Hannah, *Airman Becomes First Test of Ohio Fetus-Homicide Law*, PLAIN DEALER (Cleveland, Ohio), Dec. 10, 1996, at 5B.

8. See ROLLIN M. PERKINS AND RONALD N. BOYCE, *CRIMINAL LAW* 49 (3rd ed. 1982) (citation omitted). See also Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) ("Since at least the fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide."). Jewish criminal law did not view a fetus as a person for purposes of homicide. Daniel B. Sinclair, *The Interaction Between Law and Morality in Jewish Law in the Areas of Feticide and Killing a Terminally Ill Individual*, 11 CRIM. JUST. ETHICS 76 (1992).

9. English jurists Cooke and Blackstone opined that acts that caused fetal death "constituted a significantly lesser crime, if a crime at all, than homicide." Wright, *supra* note 1, at 1292.

10. See *id.*; PERKINS AND BOYCE, *supra* note 8, at 50 (citation omitted). See also State v. Ashley, 670 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1996), *quashed in part*, 701 So. 2d 338 (Fla. 1997); Jones v. Commonwealth, 830 S.W.2d 877, 879 (Ky. 1992); State v. Hammett, 384 S.E.2d 220, 221 (Ga. App. 1989).

*mentaries on the Laws of England*, Sir William Blackstone stated:

To kill a child in its mothers womb, is now no murder, but a great misprison: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the greater opinion, to be murder in such as administered or gave them.<sup>11</sup>

However, the definition of “born alive” varied over time and by jurisdiction.<sup>12</sup>

Early in common law, to be considered a homicide victim, the baby “must have been fully extruded, have had an existence independent of its mother in that it possessed an independent circulation of its own and derived none of its power of living through any connection with her.”<sup>13</sup> Additionally, many courts required that the child have survived for some period of time after the umbilical cord was severed.<sup>14</sup> The latter requirement was largely abandoned in England by the early 1800s, but the courts in the United States remained split over the issue.<sup>15</sup>

The common law rationale for the born alive rule was based on the difficulty of proving the fetus’ cause of death.<sup>16</sup> The difficulty in proving causation was a function of the primitive level of medical knowledge.<sup>17</sup> Until the late 1800’s, a woman and her physician or midwife could not conclusively determine the existence of the pregnancy until the fetus moved within the

womb, and the health of the fetus could not be established until birth.<sup>18</sup>

Although the born alive rule existed since at least 1348, the rationale for the rule became firmly rooted in English, and subsequently American, common law after it was embraced by Lord Chief Justice Cooke in the 1600s.<sup>19</sup> Every American jurisdiction to consider the issue on the basis of common law, rather than a specific feticide statute, followed some form of the born alive rule until 1984, when the Supreme Judicial Court of Massachusetts extended its vehicular homicide statute to a viable fetus.<sup>20</sup>

In *Commonwealth v. Cass*,<sup>21</sup> the defendant struck an eight and one-half month pregnant pedestrian, killing her viable fetus.<sup>22</sup> In holding that the term “person” included a viable fetus for purposes of the Massachusetts vehicular homicide statute, the court strained to find supporting legislative intent for its holding. First, the court reasoned that since the criminal statute was enacted after Massachusetts courts had determined that a fetus was a person for civil wrongful death purposes, the legislature (being presumably aware of the prior holding) must have intended a like definition of person for the subsequent criminal statute.<sup>23</sup> Second, the court opined that a “person” was synonymous with a “human being,” and the offspring of a human being is a human being itself, both inside and outside the womb.<sup>24</sup>

The court’s third and final argument in support of its decision bears the most relevance to feticide prosecution under mil-

11. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 944 (3rd ed. 1903).

12. See *United States v. Gibson*, 17 C.M.R. 911, 923 (A.F.B.R. 1954) (“The term ‘born alive’ has been subject to varying interpretations in England and the state courts of this country . . .”).

13. *Id.* at 923 (citations omitted). “The early view was that to be born alive the infant must be fully expelled from the body of the mother and have established a separate circulation.” PERKINS AND BOYCE, *supra* note 8, at 50.

14. *Gibson*, 17 C.M.R. at 923 (citations omitted); PERKINS AND BOYCE, *supra* note 8, at 50 (citations omitted).

15. *Gibson*, 17 C.M.R. at 923-24. See PERKINS AND BOYD, *supra* note 8, at 50.

16. See *Commonwealth v. Cass*, 467 N.E.2d 1324, 1328 n.5 (Mass. 1984).

17. See Bicka A. Barlow, *Severe Penalties for the Destruction of ‘Potential Life’—Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 467 (1995). Prior to the development of modern medicine, the cause of fetal death was difficult to determine, and, in many instances, medical authorities were unable to determine if a woman was pregnant. *Id.*

18. See *Hughes v. State*, 868 P.2d 730, 732 (Okla. Crim. App. 1994).

19. See *Cass*, 467 N.E.2d at 1328 n.5; *Williams v. State*, 561 A.2d 216, 218-19 (Md. 1988).

20. See *Cass*, 467 N.E.2d at 1325, 1328 n.5; Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. REV. 599, 602 (1986). In *Cass*, the Massachusetts court acknowledged that up until that point “the rule that a fetus cannot be the victim of a homicide is the rule in every jurisdiction that has decided the issue, except those in which a different result is dictated by statute.” *Cass*, 467 N.E.2d at 1329. Interestingly, in a 1947 California case, the court extended the born alive rule to viable children who were in the process of being born, but not yet completely separate from their mothers. *People v. Chavez*, 176 P.2d 92 (Cal. Dist. Ct. App. 1947).

21. 467 N.E.2d 1324 (Mass. 1984).

22. *Id.* at 1325.

23. *Id.* (stating that “[t]he legislature is presumed to have had knowledge of the decisions of this court”).

itary law. The court opined that, even if the legislature had never considered the issue, the court could interpret the statute's terms "by reference to established and *developing* common law."<sup>25</sup> Two additional nonfeticide codal states, Oklahoma and South Carolina, have joined Massachusetts in extending homicide laws by judicial decision to encompass the killing of a viable fetus, rejecting the born alive rule.<sup>26</sup> Significantly, the military judiciary has indicated that it too may be receptive to similarly reasoned advancements in the law.<sup>27</sup>

## Case Law

### State

Although the states are almost equally divided on the issue,<sup>28</sup> the legal trend has been to adopt feticide statutes that make the killing of a fetus a crime.<sup>29</sup> Slightly less than half of the states still follow the born alive rule.<sup>30</sup> However, even in states that follow the born alive rule, a defendant may be prosecuted for prenatal injuries that cause the subsequent death of a child after birth.<sup>31</sup>

In *Jones v. Commonwealth*,<sup>32</sup> an alcoholically impaired driver injured a thirty-two weeks pregnant woman, causing a premature delivery of the baby, who died fourteen hours later.<sup>33</sup> The driver was convicted under Kentucky's manslaughter statute, which is triggered when the defendant "wantonly causes the death of another person."<sup>34</sup> Affirming the conviction, the Supreme Court of Kentucky reasoned that a viable fetus is not considered a person for purposes of criminal homicide under common law, but, once the fetus is born, it becomes a person protected by the criminal statutes.<sup>35</sup> The common law only requires "person" status at the time of death, not at the time the precipitating injuries occur.<sup>36</sup>

The fetal homicide statutes that do not follow the born alive rule vary widely among states. One variance concerns the requisite stage of development before fetal death can be considered a crime. For example, Ohio follows the majority rule, which only criminalizes death or injury to a "viable" fetus.<sup>37</sup> A viable fetus is one who is capable of surviving outside the womb,<sup>38</sup> which usually occurs in approximately the twenty-fourth to twenty-eighth week of pregnancy.<sup>39</sup> Florida, Georgia, Michigan, Mississippi, and Rhode Island criminalize the willful kill-

24. *Id.*

25. *Id.* at 1326 (emphasis added).

26. See Alison Delsite, *When Does Life Begin?*, HARRISONBURG PATRIOT AND EVENING NEWS (Pa.), Dec. 15, 1996, at F1. See also *Hughes v. State*, 868 P.2d 730, 731 (Okla. Crim. App. 1994); *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984).

27. See *United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1983), *petition denied*, 17 M.J. 22 (C.M.A. 1984).

28. See Mauro, *supra* note 5, at 1A-2A. The growth of feticide statutes is largely in response to the failure of the common law to punish fetal crime. See ROBERT H. BLANK, *MOTHER AND FETUS* 69 (1992).

29. In October 1997, Pennsylvania was added to the ranks of states that have enacted a feticide statute. *Ridge Signs New Law on Murder of Fetus*, HARRISONBURG PATRIOT AND EVENING NEWS, Oct. 3, 1997, at B5. An attempt to enact a feticide statute was defeated in Virginia. Spenser S. Hsu, *Fetal Homicide Measure Falls in Virginia House; Parental Notification on Abortions also Rejected*, WASH. POST, Mar. 5, 1996, at B4.

30. See Aaron Epstein, *Medicine Changing Legal View of Fetuses*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 4, 1996, at A23. "At least 30 states allow prosecutions for criminally causing death or injury to someone else's unborn child." *Id.* North Carolina follows the born alive rule. "[T]he so-called 'born alive' rule is still in effect in roughly half the states." Mauro, *supra* note 5, at 2A.

31. In Texas, a drunk driver was convicted under the state's intoxication manslaughter statute for hitting a pregnant woman and causing the premature birth and subsequent death of her child. Bruce Tomaso, *Jurors Find Man Guilty in Fetus Case*, DALLAS MORNING NEWS, Oct. 18, 1996, at A1. North Carolina courts hold that a fetus "cannot legally be considered a murder victim unless it was born alive and subsequently died of injuries inflicted before birth." Epstein, *supra* note 30, at A23. Applying a common law analysis, a driver who hit a pregnant woman and caused her child to survive only eleven hours may be prosecuted for vehicular homicide. *State v. Hammett*, 384 S.E.2d 220 (Ga. App. 1989).

32. 830 S.W.2d 877 (Ky. 1992).

33. *Id.* at 878.

34. *Id.* at 877.

35. *Id.* at 879.

36. *Id.* at 879-80.

37. See *Airman May Face Fetus-Homicide Charge*, CINCINNATI ENQUIRER, Sept. 19, 1996, at B06. Most state fetal crime statutes require that the fetus be viable. See Epstein, *supra* note 30, at A23.

38. BLACK'S LAW DICTIONARY 1404 (5th ed. 1979); Epstein, *supra* note 30, at A23.

ing of an unborn “quick” child, which requires that the fetus be able to move within the mother’s womb.<sup>40</sup> The “quickening” usually occurs in the fourth month of pregnancy.<sup>41</sup>

The fetal crime statutes of a handful of states extend to the early stages of development. The South Dakota criminal statute protects an “unborn child,” beginning at “fertilization.”<sup>42</sup> The Supreme Court of California interpreted its feticide law to cover a fetus who survived past the embryonic stage.<sup>43</sup> Some states, like Arizona, graduate the level of culpability with the age and viability of the fetus. The Arizona manslaughter statute extends to a fetus “at any stage of its development,”<sup>44</sup> but the first-degree homicide statute continues to follow the born alive rule.<sup>45</sup> Under Minnesota law, a defendant was convicted of murdering a twenty-eight-day-old embryo.<sup>46</sup>

Feticide statutes are not uniform in the treatment of who may be convicted of killing a fetus. Most states, including Minnesota, Pennsylvania, North Dakota, and Louisiana, preclude prosecution of the mother; other states do not.<sup>47</sup> Some statutes

require that the defendant have knowledge that the woman was pregnant.<sup>48</sup> Additionally, in many states, feticide is defined as a lesser form of homicide or is subjected to a lesser degree of punishment.<sup>49</sup>

Seeking to expand the parameters of state criminal codes beyond homicide, prosecutors have attempted to use criminal law to punish women who endanger or injure their own unborn children through substance abuse.<sup>50</sup> In 1997, South Carolina became the first state to have its highest appellate court uphold the conviction of a woman for endangering the health of her own fetus.<sup>51</sup> The trial court convicted the woman, Cornelia Whitner, of child abuse for using crack cocaine during her third trimester.<sup>52</sup> Conversely, a Florida appellate court reversed the conviction of a woman for delivering illegal drugs to her unborn child through her umbilical cord immediately after birth.<sup>53</sup>

39. See Epstein, *supra* note 30, at A23.

40. See Susie Speckner, *Fetal-killing Case Provides Fuel for Abortion Debate*, ARIZ. REPUBLIC, Apr. 13, 1997, at B4. A “quick child” is defined as “[o]ne that has developed so that it moves within the mother’s womb.” BLACK’S LAW DICTIONARY, *supra* note 38, at 1122 (citing *State v. Timm*, 12 N.W.2d 670, 671 (Wis. 1944)). See *Brinkley v. State*, 322 S.E.2d 49, 53 (Ga. 1984).

41. See Epstein, *supra* note 30, at A23. See also BLANK, *supra* note 28, at 25.

42. See *Wiersma v. Maple Leaf Farm*, 543 N.W.2d 787, 790 (S.D. 1996).

43. See Epstein, *supra* note 30, at A23.

44. See Speckner, *supra* note 40, at B3. See also ARIZ. REV. STAT. ANN. § 13-1103(A)(1)(5) (West 1997). In 1995, Darrin Love was sentenced to seven and one-half years in prison for manslaughter after killing the fetus of his eight-months pregnant girlfriend by punching her repeatedly in the abdomen. The fetus was delivered stillborn. Whiting, *supra* note 3. Louisiana’s feticide statute covers an unborn child “from fertilization and implantation until birth.” Kristen King, *Baton Rouge Police Apply Feticide Law*, BATON ROUGE ADVOC., Mar. 6, 1996, at 7B.

45. See Judi Villa, *Unborn Baby Dies: Mom Was Shot in Head*, ARIZ. REPUBLIC, Aug. 19, 1994, at B1. Cf. *State v. Brewer*, 826 P.2d 783 (Ariz.), *cert. denied*, 506 U.S. 872 (1992) (holding that the Arizona fetal manslaughter statute precluded the state from charging the defendant for the first degree murder of his girlfriend’s unborn child).

46. See *United States v. Merrill*, 450 N.W.2d 318, 320 (Minn.), *cert. denied*, 496 U.S. 931 (1990).

47. See Delsite, *supra* note 26, at F1; Heidi Russell, *House Sends Ridge Fetus Murder Bill*, YORK DAILY REC., Sept. 23, 1997, at 2 (“Pregnant women who engage in behavior harmful to their fetuses also would not be prosecuted.”). See also LA. REV. STAT. ANN. § 14:32.5 (West 1996) (“Feticide is the killing of an unborn child by the act, procurement, or culpable omission of a person *other than the mother* of the unborn child.” (emphasis added)); N.D. CENT. CODE § 12.1 through 17.1-01 (Supp. 1997) (providing that the statute “does not include the pregnant woman”).

48. See *People v. Shultz*, 682 N.E.2d 446, 448 (Ill. App. Ct. 1997) (finding that the Illinois feticide statute requires “knowledge the woman is pregnant”); Speckner, *supra* note 40, at B3 (noting that the Arizona manslaughter statute requires knowledge of pregnancy). *But see State v. Merrill*, 450 N.W.2d 318 (Minn.), *cert. denied*, 496 U.S. 931 (1990) (Neither the defendant nor the mother need know of the pregnancy under the Minnesota feticide statutes.).

49. See Delsite, *supra* note 26, at F1; see also *Brewer*, 826 P.2d at 805 (noting that feticide is punished as a form of manslaughter in Arizona).

50. See Epstein, *supra* note 30, at A23. “The Center for Reproductive Law and Policy estimates that at least 200 women in more than 30 states have been criminally charged with using drugs or engaging in other allegedly harmful conduct during their pregnancies.” *Id.* “The heightened frequency of crack and cocaine abuse by women of child-bearing age, combined with the legal trends toward defining a maternal responsibility for fetal health, has led to a number of [criminal] actions against pregnant women for drug use.” BLANK, *supra* note 28, at 83.

51. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

52. *Id.* at 778-79.

53. See *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992). See also *People v. Hardy*, 469 N.W.2d 50 (Mich. 1991) (involving the transfer of cocaine to a baby through the umbilical cord).

An apparent inconsistency in the law arises when state feticide statutes co-exist with statutes that permit elective abortion during the same or similar period of fetal development. This apparent inconsistency reaches its zenith when the killer or injurer of the fetus is not a third-party, but the mother herself, and a viable fetus is killed in a state that permits partial birth abortions not premised on medical necessity.<sup>54</sup> Indeed, in some cases, defendants have challenged feticide prosecutions based upon the Supreme Court's determination in *Roe v. Wade*<sup>55</sup> that a nonviable fetus was not a "person" in the eyes of the law.<sup>56</sup>

In cases where a third party kills a fetus, states have little difficulty in distinguishing between feticide and abortion.<sup>57</sup> *Roe v. Wade* focuses on a woman's constitutionally protected privacy right to terminate the pregnancy without state interference, until the state's interest in fetal protection overrides that of the woman, which is normally at viability.<sup>58</sup> The Supreme Court of California reasoned that *Roe* only prohibits a state from protecting a nonviable fetus when the interests of the mother and fetus conflict.<sup>59</sup> Reasoning in a similar vein, the Supreme Court of Minnesota opined that *Roe* recognized the state's interest in protecting a fetus and, by extension, the state's right to protect "the woman's interest in her unborn child and her right to decide whether it shall be carried *in utero*."<sup>60</sup> Significantly, *Roe*

did not confer upon a criminal defendant "a third-party unilateral right to destroy the fetus."<sup>61</sup>

When a government seeks to prosecute the mother for feticide, the law is unclear. The government's position appears weak, if not untenable, when a feticide statute is applied against the mother for killing her fetus during the first trimester of pregnancy, when she enjoys an almost unrestricted right to abortion.<sup>62</sup> Conversely, in the third trimester, when the state's interest in protecting the fetus is at its peak, a feticide prosecution enjoys its greatest chance of success.<sup>63</sup>

### Federal

Fetal crime issues have made few appearances before the federal judiciary. In *United States v. Spencer*,<sup>64</sup> the only published case on point, the United States Court of Appeals for the Ninth Circuit upheld a murder conviction for fetal infanticide under 18 U.S.C. § 1111. The defendant beat a pregnant woman and stabbed her in the abdomen.<sup>65</sup> An emergency Caesarean was performed to save the fetus, but it died ten minutes after birth.<sup>66</sup>

---

54. See Julia Duin, *Hickey, Lawmaker Join Foes of Partial-Birth Abortions*, WASH. TIMES, Sept. 9, 1996, at A5. Senator Daniel Patrick Moynihan, a pro-choice advocate, referred to partial-birth abortions as being "as close to infanticide as anything I have come upon." Steve Wilson, *Effort to Ban 'Partial Birth' Abortions Wins by Losing*, ARIZ. REPUBLIC, Sept. 27, 1996, at A2.

55. 410 U.S. 113 (1973).

56. See, e.g., *People v. Davis*, 872 P.2d 591 (Cal. 1994); *State v. Merrill*, 450 N.W.2d 318, 321 (Minn.), cert. denied, 496 U.S. 931 (1990).

57. During the recent enactment of the Pennsylvania feticide statute, the governor's spokesman distinguished feticide from abortion by stating, "[i]t's different because abortion is about a woman's choice. This is about life being taken by a third party . . ." Russell, *supra* note 47.

58. See *Merrill*, 450 N.W.2d at 332. In *Roe*, the Supreme Court recognized the state's interest in protecting "potential life" as compelling at the point of viability. *Roe*, 410 U.S. at 163. A state could prohibit abortion of a viable fetus unless "it is necessary to preserve the life or health of the mother." *Id.* at 163-66.

59. See *People v. State*, 872 P.2d 591 (Cal. 1994).

60. *Merrill*, 450 N.W.2d at 322. See *People v. Campos*, 592 N.E.2d 85, 97 (Ill. App. Ct.) ("The statute simply protects the mother and the unborn child from the intentional wrongdoing of a third party by imposing criminal liability."), cert. denied, 602 N.E.2d 460 (Ill. 1992); *Brinkley v. State*, 322 S.E.2d 49, 53 (Ga. 1984) ("[H]ere we deal with the interest of the state in protecting both the mother and the fetus from the intentional wrongdoing of a third party who can claim no right for his actions."). In *Roe*, the Supreme Court acknowledged the state's "important and legitimate interest in protecting the potentiality of human life." *Roe*, 410 U.S. at 162.

61. *Merrill*, 450 N.W.2d at 322. *Accord* *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 791 (S.D. 1996).

62. See *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting) ("The court's opinion decides that a state may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy.") At common law, the expectant mother could not be convicted of abortion, even self-abortion, because she was considered the victim of the offense. *State v. Ashley*, 670 So. 2d 1087, 1090-91 (Fla. Dist. Ct. App.), *quashed in part*, 701 So. 2d 338, 340 (Fla. 1997).

63. See *Roe*, 410 U.S. at 163 (noting that a state's interest in protecting potential human life becomes "compelling" in the third trimester and that the state can prohibit abortion in the absence of medical necessity). In Wisconsin, a nine-month pregnant woman was charged with attempted murder after she drank excessive amounts of alcohol, attempting to kill her fetus. Don Terry, *Mom Tried to Kill Fetus Charge Says*, ARIZ. REPUBLIC, Aug. 17, 1996, at A1. The circuit court denied the preliminary motion to dismiss. *State v. Zimmerman*, No. 96-CF-525, 1996 WL 858598 (Wis. Cir. Sept. 18, 1996).

64. 839 F.2d 1341 (9th Cir. 1988).

65. *Id.* at 1342.

66. *Id.*

The federal statute defines murder as “the unlawful killing of a human being with malice aforethought.”<sup>67</sup> In holding that fetal infanticide fell within the definition of murder, the *Spencer* court relied on congressional intent that the federal murder statute reflect the state and common law definition of murder.<sup>68</sup> Since at least 1908, the court posited, it was well established at common law and among the various states “that an infant born alive that later died as a result of fetal injuries was a human being.”<sup>69</sup>

### Military

In 1954, the military court system first confronted the issue of fetal crime in *United States v. Gibson*.<sup>70</sup> Lieutenant Elizabeth Gibson, an Air Force nurse stationed in Alaska, was convicted of unpremeditated murder after strangling her baby immediately after its birth.<sup>71</sup> As part of its review, the United States Air Force Board of Review had to determine whether the victim was a legally cognizable human being for purposes of Article 118 of the UCMJ. However, the evidence was unclear as to whether the child died before or after Gibson severed the umbilical cord.<sup>72</sup> After an extensive review of the common law definition of “human being” and of the “born alive” rule, the court determined that the evidence adduced at trial established that the child had lived for at least a few moments, satisfying the test of separate existence.<sup>73</sup> Significantly, the court held that severance of the umbilical cord was not required to meet this test.<sup>74</sup>

Not until 1990 did a military appellate court have another opportunity to review the status of a fetus in military law. In *United States v. Foreman*,<sup>75</sup> an Air Force staff sergeant pleaded guilty to using cocaine, in violation of Article 112a, and to child neglect, in violation of Article 134(2).<sup>76</sup> Addressing the second charge, the Air Force Court of Military Review found that the specification was proper and that the offense was generally viable under Article 134(2) as service discrediting, but held that the specific factual basis for the plea was insufficient to sustain the conviction.<sup>77</sup> Significantly, one basis for the child neglect conviction was the accused’s use of cocaine during her final month of pregnancy.<sup>78</sup> In reviewing that misconduct, the court stated:

As to prenatal drug use, we can find no legal basis, absent specific statutory authority, to suggest that an unborn fetus was intended as a potential victim of criminal neglect under Article 134, nor do we choose to create such a basis at this time, particularly where the fetus, once born, shows no discernible injury from the alleged neglect.<sup>79</sup>

In 1995, the United States Navy-Marine Corps Court of Criminal Appeals suggested that a fetus was a human being for some purposes. In *United States v. Thomas*,<sup>80</sup> the accused challenged the government’s use, without adequate notice, of the pregnancy of his victim/spouse as an aggravating factor in a capital case.<sup>81</sup> The factor at issue provided “[t]hat the offense

---

67. 18 U.S.C. § 1111(a) (1994).

68. *Spencer*, 839 F.2d at 1343.

69. *Id.* A federal court’s interpretation of what constitutes a human being for purposes of a murder prosecution is significant in the military context. Absent a definition of human being in the UCMJ, “the next best source for determining what Congress means when it uses a word is to examine the same word in a similar context elsewhere in the United States Code.” *United States v. Omick*, 30 M.J. 1122, 1124 (N.M.C.M.R. 1989).

70. 17 C.M.R. 911, 919 (A.F.B.R. 1954).

71. *Id.* at 919. The baby was discovered in a paper bag in Gibson’s footlocker, with pajamas wrapped around the baby’s neck. *Id.*

72. *Id.* at 923.

73. *Id.* at 926-27. The court adopted the position of *People v. Hayner*, 90 N.E.2d 23 (N.Y. 1949), which did not require severance of the umbilical cord as a condition precedent to being recognized as a separate human being for purposes of murder. *Id.* at 926.

74. *Id.* The court reserved for future courts whether the military should embrace the rule that a fetus was a “human being” once in the process of being born. *Id.* at 925, 927.

75. No. ACM 28008, 1990 WL 79309 (A.F.C.M.R. May 25, 1990).

76. *Id.*

77. *Id.*

78. The remaining two bases were the accused’s failure to bathe and to change the diapers of her newborn daughter and the accused’s failure to clean her government quarters. *Id.*

79. *Id.* at 1-2.

80. 43 M.J. 550, 610 (N.M. Ct. Crim. App. 1995) (en banc), *aff’d in part and rev’d in part*, 46 M.J. 311 (1997).

was committed in such a way or under such circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered.”<sup>82</sup>

After determining that the trial counsel had not used pregnancy as an aggravating factor, the Navy-Marine Corps court gratuitously opined that “had the prosecution considered the fetus a person for the purpose of the aggravator, it would have been logical to have charged the appellant separately for the murder of the unborn fetus.”<sup>83</sup> While the court did not address the issue further, the comment suggests that the intermediate military court was at least receptive to the proposition that a fetus was a person for the purposes of Article 118 and for purposes of determining the existence of an aggravating factor under Rule for Courts-Martial 1004.<sup>84</sup>

In December 1996, in a case of first impression for the armed forces, an airman at Wright-Patterson Air Force Base pleaded guilty to the involuntary manslaughter of a fetus.<sup>85</sup> Airman Gregory L. Robbins punched his eight-months pregnant wife in the abdomen, rupturing her uterus and killing the fetus.<sup>86</sup> Originally charged with murdering the fetus, Robbins was convicted of involuntary manslaughter under Ohio’s fetus-homicide law, which the government assimilated pursuant to Article 134.<sup>87</sup>

## Cognizability as an Offense Under Military Law

### *Homicide: Articles 118, 119, and 134*

Prior to the Civil War, Army courts-martial lacked jurisdiction over the offense of murder, except if prosecuted as conduct prejudicial to good order and discipline.<sup>88</sup> In 1863, Congress expanded the Army’s jurisdiction to include serious civil crimes, such as murder, that military personnel committed in time of war.<sup>89</sup> In 1916, Congress expanded court-martial jurisdiction again to include murders committed in time of peace if committed outside the United States.<sup>90</sup> However, because such crimes were not defined by military law, they were interpreted in light of common law.<sup>91</sup> In his authoritative treatise, *Military Law and Precedents*, Colonel William Winthrop noted that the murder victim under common law was legally limited to “a living being (not an unborn child).”<sup>92</sup>

The current military homicide laws were enacted in 1951 as part of the UCMJ. Articles 118 and 119 were derived largely from the common law definitions of murder and manslaughter, respectively,<sup>93</sup> and were designed to clarify these crimes under military law.<sup>94</sup> Since the enactment of the UCMJ, military courts have used common law to interpret provisions of the

81. *Id.* at 610.

82. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004(c)(4) (1995) [hereinafter MCM] (emphasis added).

83. *Thomas*, 43 M.J. at 610.

84. MCM, *supra* note 82, R.C.M. 1004.

85. *Hannah*, *supra* note 7. Ironically, the court-martial conviction was the first conviction of any kind under the Ohio statute, which became effective in September 1996, the same month Robbins assaulted his wife. *Id.*

86. *Id.*

87. *Id.* Additionally, Robbins pleaded guilty to assault and aggravated assault. *Id.*

88. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 1032 (2d ed. 1896). Early court-martial jurisdiction has been the subject of some debate. Compare *O’Callahan v. Parker*, 395 U.S. 258 (1969) (holding that court-martial jurisdiction is limited to prejudicial common law crimes), with *Solorio v. United States*, 483 U.S. 435 (1987) (noting that early jurisdiction may have been broader).

89. See WINTHROP, *supra* note 88, at 1033.

90. See JAMES SNECDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* 796 (1953). From 1800 until 1945, naval court-martial jurisdiction over murder was limited to “a person belonging to a United States public vessel” for conduct occurring outside the territorial jurisdiction of the United States. *Id.* See also *COMPILATION OF NAVY AND OTHER LAWS* 16 (1875) (stating that Article 6 of the Articles for the Government of the Navy provided: “If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death.”).

91. See WINTHROP, *supra* note 88, at 1040. See also *United States v. Wells*, 55 B.R. 207, 218-19 (1945) (holding that the court should look to common law to interpret a murder charge pursuant to Article 92 of the Articles of War).

92. WINTHROP, *supra* note 88, at 1041.

93. See *INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE* 1237-38 (1950) [hereinafter UCMJ HISTORY] (*Uniform Code of Military Justice, Hearing Before a Subcommittee of the House of Representatives Committee on Armed Services*, 81st Cong. (1949) (referencing the testimony of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense)). The Army’s Articles of War generally followed the common law definitions for civil crimes, particularly the common law of Maryland. The Articles for the Government of the Navy provided no such definitions, but the naval courts and boards followed either federal statutory definitions or common law definitions. *Id.* at 1238.

UCMJ, including those punitive articles that address homicide.<sup>95</sup>

Both Article 118 (murder) and Article 119 (manslaughter) make the killing of a “human being” illegal, but the term “human being” is not defined in the *Manual for Courts-Martial (MCM)*. Article 134 (negligent homicide) refers to the killing of a “person,” which is also undefined, but which appears to be synonymous with “human being.”<sup>96</sup> Should the courts follow, or seek guidance from, established common law, an accused could not be convicted of fetal homicide under these punitive articles, but could be convicted of fetal infanticide, the killing of a newborn, caused by prenatal injuries.

However, a compelling argument can be made for the military courts to reject the common law’s born alive rule and permit feticide prosecutions. As state courts in Massachusetts, Oklahoma, and South Carolina have posited, the advancement in medical technology effectively eviscerates the rationale for this archaic legal precept<sup>97</sup> and justifies judicial efforts to “develop” the common law.<sup>98</sup> Medical personnel can diagnose

a pregnancy early, can see the fetus through the use of ultrasound and fetoscopy,<sup>99</sup> and can usually determine the cause of a fetus’ death.<sup>100</sup> Indeed, medical technology has advanced to the point that operations are successfully performed on fetuses.<sup>101</sup> As stated by the Supreme Judicial Court of Massachusetts:

[T]he antiquity of a rule is no measure of its soundness. “It is revolting to have no better reason for a rule of reason than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>102</sup>

The military judiciary alters and interprets military law to reflect evolving common law. In *Gibson*, the court’s determination that severance of the umbilical cord was not required to prove the baby’s separate existence reflects the “modern advancement in medical knowledge of human physiology.”<sup>103</sup> Contrary common law decisions had relied on the erroneous

94. See *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979).

95. See, e.g., *United States v. Wilson*, 26 M.J. 10, 13 n.1 (C.M.A. 1988); *United States v. Harrison*, 37 C.M.R. 104, 105 (C.M.A. 1967) (noting that “Congress intended that [manslaughter] be construed with reference to the common law”); *United States v. Gibson*, 17 C.M.R. 911, 923-27 (A.F.B.R. 1954). Pursuant to the military’s hierarchical system of rights, duties, and obligations, a military court should look to the plain language of the UCMJ itself or guidance found in the *MCM* before turning to the common law. Cf. *United States v. Romano*, 46 M.J. 269, 274 (1997). “Normal rules of statutory construction provide that the highest source authority will be paramount.” *United States v. Marrie*, 43 M.J. 35, 37 (1995). See *United States v. Lopez*, 35 M.J. 35, 39 (1992).

96. See *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325 (Mass. 1984) (holding that “[i]n keeping with approved usage, and giving terms their ordinary meaning, the word ‘person’ is synonymous with the term ‘human being’”).

97. See *Delsite*, *supra* note 26. “Judges in those states overturned the born-alive rule, saying it was written into England’s common law as early as 1400 and simply accepted as law in the United States, for reasons now contradicted by modern medicine.” *Id.*

98. See *Hughes v. State*, 868 P.2d 730, 733 (Okla. Crim. App. 1994) (noting that “[t]his court also has the right and duty to develop the common law of Oklahoma to serve the evolving needs of our citizens”). See also *Cass*, 467 N.E.2d at 1326 (stating that “we may assume that the legislature intended for us to define the term ‘person’ by reference to established and developing common law”); *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984) (finding that “[t]his court has the right and the duty to develop the common law of South Carolina to better serve an everchanging society as a whole”). Cf. *Vo v. Superior Court*, 836 P.2d 408, 413-14 n.4 (Ariz. Ct. App. 1992) (declining to address the wisdom of the common law born alive rule in light of medical advances “because we are statutorily restrained from construing our criminal statutes based on evolving common law”); *United States v. Gomez*, 15 M.J. 954, 960 (A.C.M.R. 1983) (reviewing the military judge’s rejection of the common law definition of death in favor of one reflecting medical advances, the court noted that the “military judge correctly guided the “evolution of military law” (emphasis added)), *petition denied*, 17 M.J. 22 (C.M.A. 1984).

99. Ultrasound involves “high-frequency, nonionizing, nonelectromagnetic sound waves directed into the abdomen of the pregnant woman to gain an echo-visual image of the fetus, uterus, placenta, and other inner structures.” *BLANK*, *supra* note 28, at 109. “Fetoscopy is an application of fiber optics technology that allows a direct view of the fetus *in utero*.” *Id.* at 110. See *Vo*, 836 P.2d at 415 n.7 (noting that “[p]hysicians can now determine the existence and approximate age of a live fetus by fetal heart monitoring, sonography, and other methods”).

100. See *Delsite*, *supra* note 26. “Medical science now may provide competent proof as to whether the fetus was alive at the time of a defendant’s conduct and whether his conduct was the cause of death.” *Cass*, 467 N.E.2d at 1328. “The cause of a fetal death can often be determined to a medical certainty.” *Vo*, 836 P.2d at 415 n.7. *But cf.* *Tamar Lewin, When the Death of a Fetus is Murder*, N.Y. TIMES, May 20, 1994, at B20 (noting that because many women miscarry early in their pregnancies, proving causation would be difficult, at least in that early stage).

101. See *Baby Cured of Rare Disease While in Womb*, ARIZ. REPUBLIC, Dec. 12, 1996, at A9 (reporting that a four-month-old fetus received a bone marrow transplant); *David Cannella, A New Miracle: Pair Welcome Baby Girl After Risky Procedure*, ARIZ. REPUBLIC, June 12, 1995, at A1 (reporting that a baby was born two months after doctors delivered its twin). The first reported successful fetal surgery occurred in April 1981 when a polyethylene catheter was inserted into the bladder of a thirty-one-week-old fetus to relieve a blocked urinary tract. *BLANK*, *supra* note 28, at 116.

102. *Cass*, 467 N.E.2d at 1328 (quoting *Address by O.W. Holmes*, 10 HARV. L. REV. 457, 469 (1897)). See *Hughes*, 868 P.2d at 733-34 (referring to the born alive rule as “an obsolete, antiquated common law rule”).

103. *United States v. Gibson*, 17 C.M.R. 911, 924, 926 (A.F.B.R. 1954).

belief that a child was incapable of independent circulation until the umbilical cord was cut.<sup>104</sup>

In *United States v. Gomez*,<sup>105</sup> the accused challenged his premeditated murder conviction on the basis that his victim, whom the accused had bludgeoned into unconsciousness, was legally alive, albeit brain dead, at the time he was removed from a respirator. Gomez argued that the act of removing the respirator was an intervening cause of death, which relieved the accused of criminal responsibility.<sup>106</sup> Under common law, a person was considered dead when the heart and lungs were inoperative. If the heart and lungs continued to function, the common law considered the person to be alive, even if the brain and other bodily functions had ceased.<sup>107</sup>

Upholding Gomez's conviction, the United States Army Court of Military Review rejected the common law's definition of death for purposes of Article 118. Significantly, the court considered the impact of advances in medical technology on the common law rule<sup>108</sup> and opined that the common law definition of death could evolve.<sup>109</sup> In logic equally applicable to the issue of fetal homicide, the court posited: "In our view, the common law is sufficiently flexible and broad to take into account the technological advances in the area . . . and military law should be equally adaptable."<sup>110</sup> The court then held that the definition

of "death" in a military homicide case was "the common law definition of death *in its modern form*."<sup>111</sup>

One potential problem associated with developing common law for the military is the failure of the UCMJ to place the accused on notice that feticide is a criminal act. A statute is void for vagueness if an accused "could not reasonably understand that his contemplated conduct is proscribed"<sup>112</sup> or if a statute's "wording leaves doubt as to which persons fall within the scope of the law."<sup>113</sup> Ultimately, the void for vagueness doctrine is concerned about basic fairness.<sup>114</sup> Similarly, an unforeseeable enlargement of the military's homicide articles by the courts may constitute an *ex post facto* violation if applied retroactively.<sup>115</sup> Arguably, the lack of such notice may render the military's homicide statutes, as applied to the killer of a viable fetus, void for vagueness.<sup>116</sup>

Military law has never previously defined a human being or person to include a fetus within the ambit of its homicide articles. Further, common law has not historically recognized a fetus as a human being until it existed independently of the mother.<sup>117</sup> While on notice that the infliction of harm to a pregnant woman is criminal, an accused would not have fair warning that the death of a fetus is criminal and would subject him to additional convictions and punishment.<sup>118</sup> To circumvent the problem of insufficient notice, after a judicial determination

---

104. *Id.* at 924. Medical authorities had established that a child's pulmonary circulation started as soon as it began to breathe. *Id.*

105. 15 M.J. 954 (A.C.M.R. 1983), *petition denied*, 17 M.J. 22 (C.M.A. 1984). *Accord* *United States v. Taylor*, No. ACM 28572, 1991 WL 125274 (A.F.C.M.R. Apr. 23, 1991).

106. *Gomez*, 15 M.J. at 958.

107. *Id.*

108. "Indeed the [common law] rule itself envisions an evolutionary process of death as advances in medical technology and the learning of physicians explore the realities of life and death." *Id.* at 959. The military judge "was not required to ignore scientific fact." *Id.* at 960.

109. *Id.* at 958-59.

110. *Id.* at 959 (citation omitted).

111. *Id.* (emphasis added).

112. *United States v. Boyett*, 42 M.J. 150, 153 (1995), *cert. denied*, 116 S. Ct. 308 (1995). *See* *United States v. Brown*, 45 M.J. 389, 394 (1996).

113. *State v. Merrill*, 450 N.W.2d 318, 322 (Minn.), *cert. denied*, 496 U.S. 931 (1990) (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

114. *United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1972) (citing *Colten v. Kentucky*, 407 U.S. 104 (1972)).

115. *See* *Hughes v. State*, 868 P.2d 730, 735 (Okla. Crim. App. 1994) (citing *Bouie v. Columbia*, 378 U.S. 347, 353-54 (1964)).

116. However, if the government charged the accused with violating an assimilated state feticide statute under Article 134, the notice argument should fail. Further, if a feticide conviction is not sustainable elsewhere, a court might still uphold the conviction as service discrediting or prejudicial to good order and discipline, in violation of Article 134, pursuant to the closely-related offense doctrine. *See* *United States v. Brown*, 45 M.J. 389, 395 (1996); *United States v. Epps*, 25 M.J. 319, 323 (C.M.A. 1987); *United States v. Eischeid*, 36 M.J. 561, 562 (N.M.C.M.R. 1992).

117. Because common law recognizes fetal infanticide as a form of murder, a void for vagueness challenge to a prosecution based on the born alive rule should fail. *See* *United States v. Spencer*, 839 F.2d 1341, 1343 (9th Cir. 1988) (noting that "[t]his court has held that the common law meaning of a common law term used in a federal criminal statute is a source of statutory precision in determining whether a statute is impermissibly indefinite" (citation omitted)).

118. *Hughes*, 868 P.2d at 736 (citing *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984)).

that common law had evolved to encompass feticide as a cognizable crime, state courts have limited application of their holdings to crimes committed after the date of the decision.<sup>119</sup> Appellate military courts have placed service members on notice that certain conduct was proscribed in a similar fashion and could do so for purposes of feticide.<sup>120</sup>

Even if the military's homicide articles follow the common law's born alive rule, the UCMJ permits prosecution for the killing of a child whose death results from the infliction of prenatal injuries. This crime is cognizable at common law,<sup>121</sup> including the common law of Maryland,<sup>122</sup> and is consistent with the reasoning in *Gibson*; although, military courts will still be required to define what constitutes a legal birth.<sup>123</sup> Some support for this position is found in the *MCM*. Albeit failing to address this specific factual scenario, the *MCM* does explain that an accused can be convicted of killing a human being as a result of a previously inflicted injury.<sup>124</sup> What is legally significant for purposes of homicide law under common law is the sta-

tus of the victim at the time that death occurs, not the status of the victim at the time of the injury.<sup>125</sup>

### *Transferred Intent*

When an accused injures or kills a pregnant woman, he may be held accountable for the resultant death of the woman's born alive fetus under the doctrine of transferred intent.<sup>126</sup> In *United States v. Willis*,<sup>127</sup> the United States Court of Appeals for the Armed Forces posited that "where there is . . . an intent to kill and an act designed to bring about the desired killing, the defendant is responsible for all natural and probable consequences of the act, regardless of the intended victim."<sup>128</sup>

In *United States v. Black*,<sup>129</sup> the accused deliberately shot a member of his unit, Private Lewis, in the chest, but the bullet passed through Lewis and struck an innocent bystander, Private

119. See *id.* (stating that "today's ruling will apply wholly prospectively to those homicides which occur after this date"). "A viable fetus is a 'person' for purposes of the vehicular homicide statute as applied to homicides occurring after the date of this decision." *Cass*, 467 N.E.2d at 1330. "From the date of this decision henceforth, the law of feticide shall apply in this state." *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984).

120. See, e.g., *United States v. Clarke*, 25 M.J. 631, 635 (A.C.M.R. 1987), *aff'd on other grounds*, 27 M.J. 361 (C.M.A. 1989).

Because of the uncertainty concerning notice, we believe the interests of justice dictate that the finding of guilty of the offense in question be set aside. In the future, however, the noncommissioned officers are on notice that fraternization with enlisted subordinates is an offense punishable under the provisions of Article 134, UCMJ.

*Id.*

121. See *Jones v. Commonwealth*, 830 S.W.2d 877, 879 (Ky. 1992); *State v. Hammett*, 384 S.E.2d 220, 221 (Ga. App. 1989); *Williams v. State*, 561 A.2d 216 (Md. 1988). "Appellate courts in other jurisdictions which have reviewed the issue of whether an individual can be convicted of homicide for injuries inflicted on a fetus that lead to the death of the child after it was born alive have, virtually without exception, decided this question in the affirmative." *People v. Hall*, 557 N.Y.S.2d 879, 884 (N.Y. App. Div. 1990). See also *supra* notes 10, 11, 31 and accompanying text.

122. See *Williams v. State*, 561 A.2d 216, 219 (Md. 1989) (noting that "it was indeed the law of Maryland in 1776"). The UCMJ's murder and manslaughter articles were derived from common law, particularly the common law of Maryland. See UCMJ HISTORY, *supra* note 93, at 1238. See also *United States v. Romano*, 46 M.J. 269, 274 (1997); *United States v. Harris*, 8 M.J. 52, 55 (C.M.A. 1979).

123. An "advanced view" of common law considers a fetus to be born alive once the birth process begins. PERKINS AND BOYCE, *supra* note 8, at 50 (citations omitted). See *United States v. Gibson*, 17 C.M.R. 911, 926 (A.F.B.R. 1954) (citing *People v. Chavez*, 176 P.2d 92 (Cal. Dist. Ct. App. 1947)). The Court of Criminal Appeals of Oklahoma held that a fetus who was born with a weak heartbeat, but was braindead, lacked blood pressure, and exhibited no respiration, was not born alive. *Hughes*, 868 P.2d at 732. The Supreme Court of Kansas determined that a baby who, after ten minutes of resuscitation, developed a faint heartbeat for a short period of time, was not "born alive." *State v. Green*, 781 P.2d 678 (Kan. 1989). However, the Court of Appeals of Wisconsin held that a baby born with some brain stem activity and who had "not suffered an irreversible cessation of circulatory and respiratory functions" was born alive. *State v. Cornelius*, 448 N.W.2d 434, 436 (Wis. Ct. App. 1989).

124. *MCM*, *supra* note 82, pt. IV, ¶ 43c(1). "Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission." *Id.*

125. "Murder and manslaughter are criminal acts that result in the death of a 'person' . . . and neither the common law nor our statutes require 'person' status at the time the act occurred." *Jones*, 830 S.W.2d at 878-80. "[I]t is not the victim's status at the time the injuries are inflicted that determines the nature of the crime . . . but the victim's status at the time of death which is the determinative factor." *Hammett*, 384 S.E.2d at 221.

126. See *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984). "When an accused with premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim." *MCM*, *supra* note 82, pt. IV, ¶ 43c(2)(b). At common law, it was understood that "if A by malice aforethought strikes at B and, missing him, strikes C whereof he dies, tho he never bore any malice to C yet it is murder, and the law transfers the malice to the party slain." PERKINS AND BOYCE, *supra* note 8, at 922 (citing Lord Hale and Blackstone). "When an assault is committed with the intent to murder a certain person, and another person is killed thereby, it is murder." LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 265 (5th ed. 1949). See Stephanie Stone, *Maryland High Court Rules Transferred Intent Applies When Intended Victim is Hurt and a Bystander Killed*, WEST'S LEGAL NEWS, 1996 WL 258535, Feb. 15, 1996, at 785.

127. 46 M.J. 258 (1997).

128. *Id.* at 260.

Kirchner, in the abdomen.<sup>130</sup> Both soldiers died of their wounds, and Black was convicted of the premeditated murder of Lewis and the unpremeditated murder of Kirchner. In affirming both convictions, the United States Court of Military Appeals held that “one who kills a person in a malicious effort to kill another is guilty of murder” and opined that the accused could have been charged with Kirchner’s premeditated murder despite the absence of any ill-will, animosity, or intent to kill Kirchner.<sup>131</sup>

To achieve a conviction for fetal infanticide or fetal homicide, should the courts recognize such a crime, the government need not prove that the accused knew that the victim was pregnant.<sup>132</sup> The transferred intent doctrine is not premised on knowledge of a second person (for example, the mother or her fetus) being present.<sup>133</sup> In *State v. Merrill*,<sup>134</sup> the defendant was convicted of two murders after he shot and killed a woman who was carrying a twenty-seven or twenty-eight-day-old embryo.<sup>135</sup> The prosecution never established that the defendant knew that the woman was pregnant.<sup>136</sup> On appeal, the defendant argued that the intent to kill the woman should not transfer to the fetus because the harm to each was not the same.<sup>137</sup> The Supreme Court of Minnesota rejected this argument and found the harms substantially the same.<sup>138</sup> The court stated that “[t]he possibility that a female homicide victim of childbearing

age may be pregnant is a possibility that an assault may not safely exclude.”<sup>139</sup>

### Article 134

As the Air Force court-martial of Airman Gregory Robbins illustrates, assimilation of a state criminal statute to prosecute fetal crimes remains a viable option for military prosecutors. The Federal Assimilative Crimes Act<sup>140</sup> permits the military to prosecute a service member under Article 134 for a violation of state law committed within an area of exclusive or concurrent federal jurisdiction, as long as “federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed.”<sup>141</sup> Feticide is neither specifically defined by federal law nor made punishable by any enactment of Congress.

Assuming that reliance on the common law definition of a person or human being prevents the use of Articles 118 and 119 to prosecute feticide, the government must contend with a preemption doctrine challenge to the use of Article 134.<sup>142</sup> This doctrine precludes the use of Article 134 to charge an offense that is otherwise covered by Articles 80 through 132.<sup>143</sup> The

129. 11 C.M.R. 57 (C.M.A. 1953).

130. *Id.* at 59.

131. *Id.* at 61 (citation omitted). See *United States v. Corey*, 11 C.M.R. 461, 466 (A.B.R.), *petition denied*, 12 C.M.R. 204 (C.M.A. 1953) (holding that “[i]n military law, it is premeditated murder when an accused kills one person in a premeditated attempt to kill another”).

132. As a general rule, “a perpetrator of illegal conduct takes his victims as he finds them.” *People v. Hall*, 557 N.Y.S.2d 879, 885 (N.Y. App. Div. 1990) (holding that the defendant was properly convicted of fetal infanticide after missing the intended target and shooting a pregnant bystander). See *Cuellar v. State*, 957 S.W.2d 134, 136 (Tex. Ct. App. 1997).

133. See *Hall*, 557 N.Y.S.2d at 885 (ruling that “it is entirely irrelevant whether [the] defendant actually knew or should have known that a pregnant woman was in the vicinity and that her fetus would be wounded as a result of her actions”). See also *Barlow*, *supra* note 17, at 500 (stating that “[t]raditional transferred intent does not consider the defendant’s knowledge of the victim’s presence”).

134. 450 N.W.2d 318 (Minn.), *cert. denied*, 496 U.S. 931 (1990).

135. *Id.* at 320.

136. *Id.*

137. *Id.* at 323.

138. *Id.*

139. *Id.*

140. 18 U.S.C. § 13 (1994).

141. MCM, *supra* note 82, pt. IV, ¶ 60c(4)(c)(ii).

142. In the only case addressing feticide under Article 134, the Air Force Court of Military Review opined that, absent specific legislative authority, no legal basis exists to treat an unborn fetus as a person for purposes of a child neglect prosecution under Article 134(2). *United States v. Foreman*, No. ACM 28008, 1990 WL 79309 (A.F.C.M.R. May 25, 1990). Despite the court’s dicta in the unpublished *Foreman* case, clauses one and two of Article 134 remain a relatively unchartered alternative basis for prosecution. However, prosecutorial efforts under these two provisions would be subject to similar challenges under the void for vagueness and preemption doctrines.

143. MCM, *supra* note 82, pt. IV, ¶ 60c(5).

doctrine's rationale "is that, if Congress has covered a particular kind of misconduct in specific articles of the Uniform Code, it does not intend for such misconduct to be prosecuted under the general provisions of Article 133 or 134."<sup>144</sup> Congress and the courts are unwilling "to permit prosecutorial authorities 'to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.'"<sup>145</sup> Congress is deemed to have occupied the field "if it 'intended for one punitive article of the Code to cover the type of conduct concerned in a comprehensive . . . way.'"<sup>146</sup>

Although military courts have not created a "bright line" test for the applicability of the preemption doctrine,<sup>147</sup> they have articulated a two-pronged test to determine whether the preemption doctrine applies. First, did Congress intend "to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific areas of the Code."<sup>148</sup> The first prong asks "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code."<sup>149</sup> In other words, has Congress "occupied the field?"<sup>150</sup> The second prong is whether the charged offense is "composed of a resid-

uum of elements of a specific offense and asserted to be a violation of one of the general articles?"<sup>151</sup>

Applying the preemption doctrine's basic rationale to fetal homicide, one could argue that the doctrine precludes the assimilation of a state feticide statute. The defense position would be that the UCMJ's homicide articles do not recognize a fetus as a human being<sup>152</sup> and that these articles cover the field in the area of homicide.<sup>153</sup> The Assimilative Crimes Act is inoperative "when 'any enactment of Congress' speaks to the conduct charged"; state criminal offenses may be assimilated only "when *nothing* in the federal criminal code [speaks] to the allegedly criminal conduct."<sup>154</sup> If the "generic" conduct (for example, homicide) is covered by *any* federal statute, the court lacks jurisdiction over an assimilated state offense; "otherwise, the Act would simply be a device enabling prosecutors a wider choice."<sup>155</sup> *United States v. Williams*<sup>156</sup> provides support for this argument.

In *Williams*, the United States Supreme Court reversed a conviction for the statutory rape of a sixteen year old girl that was based on the assimilation of an Arizona statute that criminalized sexual intercourse with a woman under eighteen. The

144. *United States v. Reichenbach*, 29 M.J. 128, 136-37 (C.M.A. 1989). See *United States v. Ventura*, 36 M.J. 832, 834 (A.C.M.R. 1993). A trial counsel "is not allowed to utilize the Assimilative Crimes Act as a means to apply local law which differs from federal criminal statutes applicable to the same conduct." *United States v. Irvin*, 21 M.J. 184, 188 (C.M.A.), *on remand*, 22 M.J. 559 (A.F.C.M.R.), *aff'd in part, dismissed in part*, 22 M.J. 342 (C.M.A.), *cert. denied*, 479 U.S. 852 (1986).

145. *United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992) (quoting *United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953)).

146. *McGuinness*, 35 M.J. at 151 (quoting *United States v. Maze*, 45 C.M.R. 34, 36 (C.M.A. 1972)). See *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) (noting that for preemption to apply "it must be shown that Congress intended for the other punitive article to cover a *class* of offenses in a complete way" (emphasis added)). Cf. *Reichenbach*, 29 M.J. at 136-37.

147. See *United States v. Taylor*, 23 M.J. 314, 316 (C.M.A. 1987); *United States v. Ventura*, 36 M.J. 832, 834 (A.C.M.R. 1993).

148. *McGuinness*, 35 M.J. at 151 (noting that the doctrine applies only if both questions are answered affirmatively). See *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978); *Ventura*, 36 M.J. at 834 (citations omitted).

149. *Wright*, 5 M.J. at 110-11.

150. *McGuinness*, 35 M.J. at 152.

151. *Id.* at 151 (noting that the doctrine applies only if both questions are answered affirmatively). See *Wright*, 5 M.J. at 110-11; *Ventura*, 36 M.J. at 834 (citations omitted).

152. The existence of a "human being" is a vital element for the crime of murder under Articles 118 and 119, and the existence of a "person" is a necessary prerequisite to a conviction for negligent homicide. MCM, *supra* note 82, pt. IV, ¶¶ 43, 44, 85.

153. See *United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953) (stating that when Congress has "covered the entire field" with a particular article, an offense containing less than the elements of the specified article may not be punished under Article 134). See also *United States v. Taylor*, 23 M.J. 314, 316 (C.M.A. 1987) (noting that "[t]he Court [in *Norris*] perceived a danger in allowing Article 134 to be used as a basis for punishing conduct which was similar to that proscribed by specific articles but which lacked some element required by those articles").

154. *United States v. Narciso*, 446 F. Supp. 252, 274 (E.D. Mich. 1977) (emphasis in original). *But cf.* *Lewis v. United States*, 118 S. Ct. 1135, 1146 (1988) (noting that the language of the Assimilative Crimes Act should not be read too literally).

155. *Narciso*, 446 F. Supp. at 274-75.

156. 327 U.S. 711 (1946). See Captain John B. Garver III, *The Assimilative Crimes Act Revisited: What's Hot, What's Not*, ARMY LAW., Dec. 1987, at 12, 17. "Some courts have interpreted *Williams* as being 'primarily concerned not with whether the *precise acts* [have] been made penal, but with the discernment of the intent of Congress to punish the *generic* conduct in question.'" *Id.* (quoting *United States v. Butler*, 541 F.2d 730, 735 (8th Cir. 1976)). The Court's holding in *Williams* "applies fully to cases tried by court-martial." *United States v. Irvin*, 21 M.J. 184, 188 (C.M.A.), *on remand*, 22 M.J. 559 (A.F.C.M.R.), *aff'd in part, dismissed in part*, 22 M.J. 342 (C.M.A.), *cert. denied*, 479 U.S. 852 (1986).

applicable federal carnal knowledge statute required proof that the victim was under sixteen years old.<sup>157</sup>

The Supreme Court held, in part, that the Assimilative Crimes Act did not make the state statute applicable because the same offense, statutory rape, had already been defined and prohibited by the federal statute.<sup>158</sup> The United States could not assimilate a state statute to redefine and to enlarge the crime, even though the federal offense resulted in a narrower scope for the offense.<sup>159</sup> Similarly, if the military definitions of murder, manslaughter, and negligent homicide do not include the death of a fetus, the government should not be permitted to enlarge the scope of the military's definitions of homicide by assimilating a state feticide statute.<sup>160</sup>

The government could argue that the military's homicide statutes simply do not address feticide at all, that there is no military feticide offense that preempts state law. By focusing on the specific conduct or precise acts involved (killing a fetus), rather than on the generic offense (murder), the preemption doctrine is inapplicable. Indeed, several military and federal cases that apply the Assimilative Crimes Act follow this line of reasoning.<sup>161</sup>

In at least one case, the United States Court of Military Appeals opined that the legislative history of Articles 118 and 119 did *not* indicate “a clear intent to cover all homicides.”<sup>162</sup> In *United States v. Kick*,<sup>163</sup> the court held that negligent homicide was a cognizable offense under Article 134 and rejected the accused's argument that Congress intended that only murder and manslaughter be prosecuted as homicides under the UCMJ.<sup>164</sup> However, unlike feticide, negligent homicide had previously been prosecuted as a violation of the 96th Article of War prior to enactment of the UCMJ, a fact that the court assumed Congress knew of when it created the UCMJ.<sup>165</sup>

The second prong of the preemption doctrine asks “whether the offense charged is composed of a residuum of elements of a specific offense.”<sup>166</sup> Little interpretive guidance exists to assist in the application of this prong, but this portion of the test fails when an accused is charged with the violation of a “specific penal statute,” such as a state feticide statute.<sup>167</sup> Because case law indicates that *both* prongs must be satisfied for the preemption doctrine to apply,<sup>168</sup> prosecution of an assimilated state feticide statute should not be preempted.<sup>169</sup>

### Double Jeopardy

---

157. *Williams*, 327 U.S. at 715-16.

158. *Id.* at 717.

159. *Id.* at 717-18. “The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the state, does not mean that the congressional definition must give way to the state definition.” *Id.* *Cf. Lewis*, 118 S. Ct. at 1142 (holding that “assimilation may not rewrite distinctions among the forms of criminal behavior that Congress intended to create”).

160. *See Irvin*, 21 M.J. at 188. The Assimilative Crimes Act may not redefine a crime, enlarge the definition of a crime, or serve “as a means to apply local law which differs from federal criminal statutes applicable to the same conduct.” *Id.* “It may not be used to extend . . . the scope of existing federal criminal law.” *United States v. Jones*, 5 M.J. 579, 580 (A.C.M.R. 1978) (quoting *United States v. Picotte*, 30 C.M.R. 196 (1961) (Ferguson, J., concurring)).

161. *See Picotte*, 30 C.M.R. at 196 (holding that “the doctrine of preemption is not involved in the instant case because Congress has not made the *precise criminal conduct* of the accused punishable by Article 97 or any other specific article as distinguished from the general Article of the Code” (emphasis added)). *See also* *United States v. Wright*, 5 M.J. 106, 111 (C.M.A. 1978) (ruling that the Texas statute prohibiting burglary of automobiles is not preempted by Articles 129 and 130); *United States v. Kaufman*, 862 F.2d 236, 237 (9th Cir. 1988) (distinguishing between federal and state offenses on the basis of the “precise act” made penal); *United States v. Eades*, 633 F.2d 1075, 1077 (4th Cir. 1980) (holding that the state statute is not preempted when the federal statute does not proscribe the defendant's specific conduct). *Accord Lewis*, 118 S. Ct. at 1142 (noting that the “difference in the kind of wrongful behavior covered . . . will ordinarily indicate a gap for a state statute to fill”). *See generally* Garver, *supra* note 156, at 17-18 (discussing the split between the precise acts and generic conduct approaches). *But cf. Lewis*, 118 S. Ct. at 1146 (Scalia and Thomas, J.J., concurring) (noting that the precise acts test “in practice is no test at all but an appeal to vague policy intuitions”).

162. *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979).

163. *Id.*

164. *Id.* at 84-85.

165. *Id.* at 85. *See, e.g., United States v. Rhimes*, 69 B.R. 123 (1947); *United States v. Groat*, 34 B.R. 67 (1944).

166. *United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992). *See Wright*, 5 M.J. at 111.

167. *See McGuinness*, 35 M.J. at 152 (upholding the Federal Espionage Act prosecuted as a violation of Article 134(3), which is not preempted by Article 92).

168. *Id.* at 151. *See Wright*, 5 M.J. at 110.

169. While subject to debate, this prong may be answered affirmatively in prosecutions under the first two articles of Article 134 because the government would essentially eliminate a vital element required by the homicide articles—the death of a legally cognizable person—and punish the remaining homicide elements as an offense under the general article. Phrased in this way, the charge would violate the underlying basis for the preemption doctrine. *See McGuinness*, 35 M.J. at 152.

Double jeopardy concerns arise when an accused who has killed both the pregnant mother and the fetus she carried is subject to prosecution and punishment for both deaths. The issue would arise in cases in which the accused, as a result of the same conduct, is either convicted or acquitted of killing one victim and then subsequently tried for killing the other or is convicted and punished in a single court-martial for killing both the mother and the fetus.

The Double Jeopardy Clause of the Fifth Amendment provides: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .”<sup>170</sup> This constitutional prohibition against double jeopardy provides three forms of protection: “[1] against a second prosecution for the same offense after acquittal . . . [2] against a second prosecution for the same offense after conviction . . . [and] [3] against multiple punishments for the same offense.”<sup>171</sup>

The military’s double jeopardy statute, Article 44 of the UCMJ, merely prohibits multiple trials for the same offense.<sup>172</sup> However, R.C.M. 907(b)(3) permits the dismissal of a multiplicitous specification. The *MCM* explains that a specification is multiplicitous “if it alleges the same offense, or an offense necessarily included in the other,” or if the two specifications “describe substantially the same misconduct in two different

ways.”<sup>173</sup> Case law has amplified this body of law to prohibit conviction or punishment twice for the same offense in a single trial, unless permitted by Congress.<sup>174</sup>

Ultimately, the question posed under any of the three scenarios mentioned above is whether the two killings constitute the same offense.<sup>175</sup> When the misconduct is charged under the same punitive provision,<sup>176</sup> the courts may query whether Congress intended for the two charged offenses to be treated as a “continuous course-of-conduct offense or an individual offense.”<sup>177</sup> Assuming that a fetus is a human being for purposes of the military’s homicide articles, or if the fetus is born alive, it seems clear that when a single act results in the death of two or more people, the accused may be convicted of separate homicides.<sup>178</sup>

When determining what constitutes the same offense when the prosecution is based on two separate punitive provisions, military courts apply the *Blockburger-Teters* test.<sup>179</sup> This test would be applied if the mother’s murder were prosecuted pursuant to a traditional homicide article and a feticide statute were assimilated and charged under Article 134. The *Blockburger-Teters* test applies even when separate specifications, including an assimilated state statute, are each charged under Article 134, rather than under two distinctly separate punitive articles.<sup>180</sup>

---

170. U.S. CONST. amend. V.

171. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

172. “No person may, without his consent, be tried a second time for the same offense.” UCMJ art. 44(a) (West 1995).

173. *MCM*, *supra* note 82, R.C.M. 907(b)(3), discussion.

174. *See United States v. Neblock*, 45 M.J. 191, 195 (1996).

175. The inquiry assumes the existence of two legally cognizable human beings. Accordingly, the scenario is presumed on either the born alive rule being satisfied or the military courts rejecting the common law and holding that a fetus, either viable, quick, or embryonic, is a person for purposes of the UCMJ. If the courts determine that a fetus is not a legally recognized human being, and if such a fetus is not “born alive,” an accused could only be charged with killing the mother.

176. For example, an accused is charged with one specification of killing the mother (in violation of Article 118) and one specification of killing the fetus (in violation of Article 118).

177. *Neblock*, 45 M.J. at 197.

178. *See, e.g.*, *United States v. Sheffield*, 20 M.J. 957 (A.F.C.M.R. 1985) (ruling that a drunk driver who killed two persons riding on a single motorcycle was properly convicted of two specifications of involuntary manslaughter because there is a distinct societal interest in the preservation of life which supports multiple convictions); *United States v. Black*, 11 C.M.R. 57 (C.M.A. 1953) (holding that although the accused fired one shot, the bullet killed two people and the government could have charged the accused with two specifications of premeditated murder); *United States v. Brett*, 25 M.J. 720, 721 (A.C.M.R. 1987) (stating that “in the case of offenses against the person, each homicide . . . against a different victim is a separately punishable crime”); *United States v. Corey*, 11 C.M.R. 461 (A.B.R.), *petition denied*, 12 C.M.R. 204 (C.M.A. 1953) (holding that an accused who fired into a small hut and killed two people was properly convicted of two specifications of premeditated murder). *Cf. Gardner v. Norris*, 949 F. Supp. 1359, 1373 (E.D. Ark. 1996) (upholding convictions for separate murders committed during an “extended killing spree”); *Williams v. State*, 561 A.2d 216 (Md. 1989) (ruling that a defendant who hit a pregnant woman with an arrow was properly convicted of two counts of manslaughter); *Ogletree v. State*, 525 So. 2d 967 (Fla. Dist. Ct. App. 1988) (holding that a defendant who fired a single shot into a room containing nine people was properly convicted of nine counts of attempted murder). *Accord People v. Shum*, 512 N.E.2d 1183, 1202 (Ill. 1987) (holding that “separate victims require separate convictions and sentences”), *cert. denied*, 484 U.S. 1079 (1988).

179. The *Blockburger-Teters* test derives its name from the Supreme Court case that created the test and the military case that adopted the test for the armed forces. *See United States v. Blockburger*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994). *See also Neblock*, 45 M.J. at 195 n.6; *United States v. Oatney*, 45 M.J. 185, 190 (1996) (Crawford and Gierke, J.J., concurring); *United States v. Albrecht*, 43 M.J. 65, 67 (1995).

180. *See United States v. Wheeler*, 40 M.J. 242 (C.M.A. 1994).

At least two intermediate appellate courts have suggested the following *Blockburger-Teters* methodology.<sup>181</sup> First, do “the coupled offenses arise out of the same act or course of conduct?”<sup>182</sup> Clearly, when the accused attacks a woman and concomitantly kills her fetus, the first prong of the test is satisfied. Second, did Congress intend that the accused “be subject to conviction and sentencing for the two different violations arising from the same course of conduct?”<sup>183</sup> This prong is satisfied if the evidence fails to show that Congress intended one single conviction or punishment for the different offenses.<sup>184</sup> Absent a clear expression of contrary legislative intent, the court will presume that Congress intended separate convictions and punishments if each charged offense requires proof of an element that the other does not.<sup>185</sup>

Since there is no indication that Congress considered feticide as a UCMJ offense at all, a court must compare the elements of the two offenses to determine legislative intent. Articles 118, 119, and 134 (negligent homicide) require the existence of a human being or person; a feticide statute requires only that the fetus existed or that a pregnancy was improperly terminated. This supports a determination that the two offenses may be separately prosecuted and punished.<sup>186</sup>

All the state courts to address such issues have held that homicide and feticide convictions do not violate double jeopardy.<sup>187</sup> However, in each case, the respective state legislatures had enacted a separate feticide statute, making the legislative

intent on the issue relatively easy to ascertain. Absent specific legislative action to add some form of feticide punitive provision to the UCMJ, military courts must continue to rely on the *Blockburger-Teters* test, and double jeopardy is not found under that test.

## Conclusion

The court-martial of Airman Robbins may be only a harbinger of future military feticide prosecutions. With the increase in state feticide statutes, the “development” of the common law, and the increased recognition of feticide as a potentially cognizable crime under the UCMJ, military courts will see a concomitant increase in feticide prosecutions.

The military justice system will eventually be required to elect between established or evolving common law to interpret its homicide articles, and the courts must determine if the preemption doctrine precludes the assimilation of state feticide statutes pursuant to Article 134. The latter question remains an open issue. However, in light of the extensive medical advances seen since the formation of the common law’s born alive rule, a compelling argument exists for military courts to reject this antiquated legal maxim and bring viable fetuses within the ambit of the UCMJ’s homicide articles.

---

181. *United States v. Britcher*, 41 M.J. 806, 809-10 (C.G. Ct. Crim. App. 1995); *United States v. Neblock*, 40 M.J. 747, 749 (A.F.C.M.R. 1994), *decision set aside on other grounds*, 45 M.J. 191 (1996).

182. *Britcher*, 41 M.J. at 809.

183. *Id.* at 810.

184. *See Wheeler*, 40 M.J. at 245, 247.

185. *Id.* at 246-47 (citing *United States v. Teters*, 37 M.J. 370, 376-77 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994)).

186. *Cf. Baird v. State*, 604 N.E.2d 1170, 1190 (Ind. 1992), *cert. denied*, 510 U.S. 893 (1993) (noting that “[t]he element of ‘termination of a human pregnancy’ that is necessary to a feticide conviction, however, is not alleged in the murder information, although we do not dispute that appellant did cause the termination of his wife’s pregnancy by strangling her”); *People v. Shum*, 512 N.E.2d 1183, 1202 (Ill. 1987), *cert. denied*, 484 U.S. 1079 (1988) (stating that there are different elements in the murder and feticide statutes).

187. *See State v. Smith*, 676 So. 2d 1068 (La. 1996) (considering the issue under both the United States and Louisiana constitutions); *Ward v. State*, 417 S.E.2d 130, 137 (Ga. 1992) (ruling that the defendant was properly convicted of murdering both a mother and a fetus), *cert. denied*, 113 S. Ct. 1061 (1993); *Baird v. States*, 604 N.E.2d 1170 (Ind. 1992), *cert. denied*, 510 U.S. 893 (1993) (upholding the defendant’s convictions of strangling his pregnant wife and killing her fetus); *Shum*, 512 N.E.2d at 1201-02 (upholding the defendant’s convictions of killing both the mother and her fetus).