

# POLICING PREGNANCY LOSS: MISUSE OF ABUSE OF A CORPSE LAWS

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1007
II.	AN OVERVIEW OF ABUSE OF A CORPSE LAWS.....	1012
	A. Historical Origins of the Duty to Provide for the Dead and the Intended Use of Abuse of a Corpse Laws.....	1012
	B. Abuse of a Corpse Laws Defined Generally.....	1013
	C. Abuse of a Corpse Laws Defined Within the Model Penal Code.....	1014
	D. An Example of Abuse of a Corpse Statute: Ohio’s Abuse of a Corpse Statute.....	1015
III.	ABUSE OF A CORPSE LAWS AS PART OF A LARGER CULTURAL AND LEGAL STRATEGY TO PROSECUTE PREGNANT PERSONS FOR PREGNANCY LOSS.....	1017
	A. Feticide Laws.....	1021
	B. Fetal Assault Laws.....	1022
IV.	USE OF ABUSE OF A CORPSE LAWS TO PROSECUTE PREGNANT PERSONS FOR PREGNANCY LOSS.....	1023
	A. Examples of Abuse of a Corpse Laws Used to Prosecute Women for Pregnancy Loss.....	1023
V.	LEGAL VIOLATIONS.....	1029
	A. Abuse of Corpse Statutes as Violations of Statutory Interpretation.....	1030
	B. Void for Vagueness Concerns.....	1032
VI.	CONCLUSION.....	1038

## I. INTRODUCTION

The act of regulating pregnancy, reproductive healthcare, and sexuality in the United States dates back to the seventeenth century, when pregnant persons were charged for crimes like “concealing a

birth” and could be detained and jailed for their pregnancy outcomes.<sup>1</sup> By the early twentieth century, “thirty-two states passed eugenic-sterilization laws,” resulting in an estimated seventy thousand people being sterilized.<sup>2</sup> Just as recently as 2019, Utah criminalized sex between unmarried people.<sup>3</sup> State statutes that keep “women in line,”<sup>4</sup> including criminal statutes, such as abuse of a corpse laws, which this note will specifically examine, wrongly prosecute and charge pregnant persons for various forms of pregnancy loss. They are also a result of the structural racism<sup>5</sup> and social inequities that pregnant people experience, while attempting to access reproductive healthcare within the United States.<sup>6</sup> The use of these laws are part of a larger legal trend by states in their continued attempt to block access to reproductive care<sup>7</sup> by using various forms of intimidation tactics, which in turn impede pregnant persons from asserting control over their own bodies.<sup>8</sup>

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<sup>1</sup> *How My Stillbirth Became a Crime*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html> (last visited Apr. 4, 2021).

<sup>2</sup> Andrea DenHoed, *The Forgotten Lessons of the Eugenics Movement*, THE NEW YORKER (Apr. 27, 2016), <https://www.newyorker.com/books/page-turner/the-forgotten-lessons-of-the-american-eugenics-movement>.

<sup>3</sup> Sasha Ingber, *Utah Repeals 1973 Law That Criminalized Sex Outside of Marriage*, NPR (Mar. 29, 2019), <https://www.npr.org/2019/03/29/708042810/utah-repeals-1973-law-that-criminalized-sex-outside-of-marriage>.

<sup>4</sup> Sara Boboltz, *8 Laws to Keep Women in Line That Are Somehow Still on the Books*, THE HUFFINGTON POST, (Mar. 14, 2014), [https://www.huffpost.com/entry/state-laws-women\\_n\\_4937387](https://www.huffpost.com/entry/state-laws-women_n_4937387).

<sup>5</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 6 (1998).

<sup>6</sup> Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1199-1200 (2017) (“Because of poor women’s perceived deviation from prevailing gender norms and the expectations of motherhood, they are subjected to heightened forms of scrutiny by medical staff and more often referred to law enforcement for investigation.”).

<sup>7</sup> *State Attacks on Sexual and Reproductive Healthcare*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/state-attacks> (last visited Apr. 4, 2021).

<sup>8</sup> Catherine Trautwein, *After Abortion Ban Attempt in Alabama, a Flood of Confusion and Phone Calls*, PBS (Aug. 27, 2019), <https://www.pbs.org/wgbh/frontline/article/alabama-abortion-ban-clinic/> (Residents in Alabama were confused and called the Reproductive Health Services asking about the legality of abortion in the state after Gov. Kay Ivey signed into law the Alabama Human Life Protection Act,

It can be argued that this backlash by states was in response to the paramount decision of *Roe v. Wade*, which established women's constitutional right to access a legal abortion in the United States.<sup>9</sup> Since that landmark decision, and arguably as a consequence of it, individual states have repeatedly attempted to curtail this right by subjecting pregnant persons to these increasingly draconian laws.<sup>10</sup> These laws obstruct abortion access<sup>11</sup> and, in turn, lead to an increase in the "deprivation[] of [] liberty in its most concrete sense: physical liberty."<sup>12</sup> As evidenced by the closely followed and even more closely decided case of *June Medical Services L.L.C. v. Russo*,<sup>13</sup> abortion in the United States remains a hotly contested issue. With a "six-justice conservative

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which aimed to outlaw abortions in all cases except when the mother's life was at risk).

<sup>9</sup> *Roe v. Wade*, 410 U.S. 113 (1973) (The Supreme Court held that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional; that prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician, subsequent to approximately the end of the first trimester the state may regulate abortion procedure in ways reasonably related to maternal health, and at the stage subsequent to viability the state may regulate and even proscribe abortion except where necessary in appropriate medical judgment for preservation of life or health of mother).

<sup>10</sup> *An Overview of Abortion Laws*, GUTTMACHER INST. (Jan. 1, 2020), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

<sup>11</sup> *See State Policies Protecting or Restricting Legal Status of Abortion*, KFF (May 1, 2019), <https://www.kff.org/womens-health-policy/state-indicator/state-policies-protecting-or-restricting-legal-status-of-abortion/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>; *see also* Elizabeth Nash, *Unprecedented Wave of Abortion Bans is an Urgent Call to Action*, GUTTMACHER INST. (May 31, 2019), <https://www.guttmacher.org/article/2019/05/unprecedented-wave-abortion-bans-urgent-call-action> (Between January 1, 2011 and May 31, 2019, 479 abortion restrictions were enacted in 33 states, accounting for more than a third (37.7%) of the 1,271 abortion restrictions enacted since *Roe v. Wade* was decided in 1973).

<sup>12</sup> *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y L. 300 (2013) ("Our study examines cases in which a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of her liberty in its most concrete sense: physical liberty.").

<sup>13</sup> *See generally* *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (The Supreme Court ruled on the constitutionality of a Louisiana law that requires doctors who perform abortions to have the right to admit patients at a nearby hospital, finding that the privileges requirement imposed an undue burden on a woman's constitutional right to choose to have an abortion).

supermajority” currently on the bench,<sup>14</sup> supporters of the right to reproductive healthcare are justifiably concerned about the retention of the right to abortion.

Within this context, laws, such as abuse of a corpse laws, continue this trend.<sup>15</sup> Women are being prosecuted by the application of these arcane statutes,<sup>16</sup> which generally “make it a criminal offense to mistreat or wrongfully dispose of a dead body prior to its lawful interment.”<sup>17</sup> At common law, “any disposal of a dead body which was contrary to common decency” is considered an offense.<sup>18</sup> Abuse of a corpse laws are used to regulate undertakers, grave-robbers, desecration or mutilation of graves, tombstones, or monuments, wrongful autopsies,<sup>19</sup> and various other criminal offenses within the context of cemeteries, burial lots, and tombstones.<sup>20</sup> Some statutes penalize acts of necrophilia.<sup>21</sup>

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<sup>14</sup> Nina Totenberg, *Supreme Court's New Supermajority: What It Means for Roe v. Wade*, NPR (Dec. 31, 2020), <https://www.npr.org/2020/12/31/951620847/supreme-courts-new-supermajority-what-it-means-for-roe-v-wade>.

<sup>15</sup> Nina Liss-Schultz, *Women Who Face Prosecution for Home Abortions Finally Have a Number to Call*, MOTHER JONES (Oct. 30, 2018), <https://www.motherjones.com/crime-justice/2018/10/self-induced-abortion-diy-home-prosecution-legal-help-1/> (“These laws [abuse of a corpse] were not written with abortion in mind, but prosecutors have been testing them.”).

<sup>16</sup> *When Prosecutors Jail a Mother for a Miscarriage*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html> [hereinafter *When Prosecutors Jail a Mother for a Miscarriage*].

<sup>17</sup> John S. Herbrand, *Validity, Construction, and Application of Statutes Making it a Criminal Offense to Mistreat or Wrongfully Dispose of Dead Body*, 81 A.L.R. 3d 1071 (1978).

<sup>18</sup> *Id.*

<sup>19</sup> *Rakow v. State*, 854 N.Y.S.2d 844, 914 (Ct. Cl. 2007) (Daughter brought an action against defendant State for damages resulting from an allegedly unauthorized autopsy performed on the daughter’s father. The Court held that “emotional harm is recoverable where it is due to the negligent mishandling of the body of a close relative.”).

<sup>20</sup> *Constitutionality, Construction and Application of Criminal Statutes Specifically Denouncing Offenses Affecting Cemeteries, Burial Lots, Tombstones, and the Like*, 132 A.L.R. 557 (1941) (“The criminal statutes and ordinances considered in this annotation may be generally characterized as those designed to penalize the desecration of places of burial, tombstones, markers, and other indicia of the last resting place of the human dead.”).

<sup>21</sup> Tyler T. Ochoa & Christine Newman Jones, *Defiling the Dead: Necrophilia and the Law*, 18 WHITTIER L. REV. 539 (1997) (discussing that “some states have held or suggested that an abuse of corpse statute should not be construed to include sexual intercourse with a victim killed by the perpetrator, but that such acts should be prosecuted as rape or sodomy. Other states, however, have reached the opposite

Aside from these commonly accepted uses of abuse of a corpse laws, a number of prosecutors have exploitatively gone beyond these policy purposes and have brought charges against women for abuse of a corpse as a result of pregnancy loss. Examples, which will be discussed in greater detail later in this note, include the prosecutions of Brooke Skylar Richardson, who buried her fetus in her parent's backyard; Kalandra Lacy who had a miscarriage in the bathroom of her workplace and who placed the remains of her fetus in the alley located behind the restaurant where she worked; and Keysheonna Reed whose stillborn twins were found on the side of a road in a suitcase. These cases illustrate the continued trend of prosecutorial overreach to bring criminal charges against those who experience pregnancy loss, which has entrenched itself within the realm of reproductive access.<sup>22</sup>

This note considers the ways in which abuse of a corpse laws are just one tool that prosecutors use to charge pregnant persons for pregnancy loss, when more serious charges might fail. As this note will argue, abuse of a corpse statutes are just one way in which the government uses its power to oppress and subordinate women. First this note provides an overview of abuse of a corpse statutes and explains the historical origins of the duty to provide for the dead, in addition to noting the intended use of these laws. This Section will also define abuse of a corpse statutes, both generally and within the Model Penal Code, while giving an example of an abuse of a corpse statute in effect in Ohio—which happens to be a repeat offender in these cases. The note then proceeds to showcase how these laws are only one of the ways in which pregnant persons continue to be targeted within the criminal legal system, as these laws are part of a larger trend in which women are found criminally liable for allegedly causing the death of their own fetus.<sup>23</sup> These laws will be contextualized with others

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conclusion. In Kentucky, for example, legislative commentary makes it clear that acts of necrophilia are punished as abuse of corpse, and not rape.”).

<sup>22</sup> Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (And Other Countries Don't)*, 18 COLUM. J. GENDER & L.J. 647 (2009) (“For more than three decades, American prosecutors have been bringing criminal prosecutions against pregnant women based on their use of drugs while pregnant, with charges ranging from child abuse or neglect to murder. Almost all of these women are poor, and the vast majority are also women of color—many with histories of childhood sexual or physical abuse and mental disability.”).

<sup>23</sup> Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 850 (2014).

including the use of criminalizing pregnant women for drug use,<sup>24</sup> the use of sterilization laws,<sup>25</sup> and the use of fetal homicide laws. This note will examine the previously mentioned examples of abuse of a corpse cases and how the problem of using these statutes to prosecute for pregnancy loss remains much larger than the few examples illustrated in this note. It will then proceed to outline possible significant legal concerns that such charges might raise, including void for vagueness and statutory arguments. The note will conclude by proposing that prosecutors pledge to not use policies that criminalize women for pregnancy loss, making a case for “deliberate inaction” within the criminal legal system when it comes to using abuse of a corpse statutes for pregnancy loss.

## II. AN OVERVIEW OF ABUSE OF A CORPSE LAWS

### *A. Historical Origins of the Duty to Provide for the Dead and the Intended Use of Abuse of a Corpse Laws*

In the United States, there is a long observed “duty of the living . . . to provide for the dead.”<sup>26</sup> Both common law and statutory law reflect the widely held belief that “the first duties of the living [are] to see that the dead are properly interred.”<sup>27</sup> The rights of the deceased to a “decent funeral. . . and complete their final wishes” are protected and communicated via living wills, last wills and testaments, advanced directives, and medical powers of attorney.<sup>28</sup> It is clear how the role of posthumous rights, not only allows for certain legal protections and obligations, but also permits for the retention of the “role of dignity” within the process.<sup>29</sup>

One of the intended uses of an abuse of a corpse statute includes a focus on curbing necrophilia and providing a legal recourse when a

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<sup>24</sup> *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in America*, AMNESTY INT'L. (2017), <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf>.

<sup>25</sup> See generally Andrea DenHoed, *supra* note 2.

<sup>26</sup> Khushbu Solanki, *Buried, Cremated, Defleshed by Buzzards? Religiously Motivated Excaratory Funeral Practices are Not Abuse of Corpse*, 18 RUTGERS J. L. & RELIGION 350, 361 (2017).

<sup>27</sup> *Lay v. Lay*, 255 S.W. 1054, 1055 (Ky. 1923).

<sup>28</sup> Khushbu Solanki, *supra* note 26, at 362.

<sup>29</sup> *Id.* at 363.

murderer mutilates a body.<sup>30</sup> These statutes are therefore premised on our society's overarching concern and respect for the dead.<sup>31</sup> This concept is certainly not new, dating back to the use of Egyptian pyramids to house the bodies of pharaohs.<sup>32</sup> In the United States, it has equally been established that we, as a society, are legally obligated to treat the dead with "dignity and respect."<sup>33</sup> A violation of that respect is deemed as contrary to "the basic mores of society" and "cause(s) great suffering to the surviving families of the deceased."<sup>34</sup>

Considering the characterization of these statutes as criminal laws, it can be understood how certain actions, such as cadaver trafficking,<sup>35</sup> would be viewed as adverse to the "basic mores [of] society,"<sup>36</sup> necessitating some form of criminal penalization.<sup>37</sup> The codification of the duty to protect the deceased in American law is therefore not surprising.<sup>38</sup> Such laws are seemingly inherent tenets of civilized society. This premise arises from common law, which criminalizes the mistreatment of a corpse by throwing it into water, mutilation with a knife, or disposal in a "disrespectful fashion," which could include posing the corpse as a prop and taking photographs.<sup>39</sup> This note will try to examine how this intended use has been distorted and instead implemented within the context of reproductive rights.

### B. Abuse of a Corpse Laws Defined Generally

Legally, a corpse is defined as "the dead body of a human being."<sup>40</sup> Abuse of a corpse laws have been defined as laws which

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<sup>30</sup> Ochoa & Newman Jones, *supra* note 21, at 542-543 ("Our own culture has rules governing the treatment of corpses, including many enforced by law, which are based primarily on widespread horror at corpse desecration.").

<sup>31</sup> *Id.* at 542.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 543.

<sup>34</sup> *Id.*

<sup>35</sup> Traci McKee, *Resurrecting the Rights of the Unclaimed Dead: A Case for Regulating the New Phenomenon of Cadaver Trafficking*, 36 STETSON L. REV. 843, 848 (2007).

<sup>36</sup> See generally Herbrand, *supra* note 17, at 543.

<sup>37</sup> This note does not propose to examine this premise, it is solely used to make a distinction between the intended use of abuse of a corpse laws and their use as tools to punish women for pregnancy loss.

<sup>38</sup> See Ochoa & Newman Jones, *supra* note 21, at 543.

<sup>39</sup> See *State v. Condon*, 789 N.E.2d 696, 700 (Ohio App. 1st Dist. 2003) (The Defendant used "corpses as models for his photographic art, taking pictures of them, some of which he posed with props.").

<sup>40</sup> BLACK'S LAW DICTIONARY (2nd ed., 1910).

prohibit “violating the peace of the dead.”<sup>41</sup> This violation can range from acts such as corpse mutilation and rape, to corpse storage, or mere exploitation.<sup>42</sup> Generally, abuse of a corpse laws prohibit “physically mistreating” a corpse.<sup>43</sup> Although a *corpse* usually refers to that of a deceased *human corpse*,<sup>44</sup> there is a tension within this definition, as some scholars perceive a corpse as *both* a person and thing.<sup>45</sup> As stated by Professor Ellen Stroud, such a viewpoint might itself be a result of how we as a society view the dead, as “a dead human body is a material object—a messy, maybe dangerous, perhaps valuable, often useful, and always tangible thing.”<sup>46</sup>

### C. Abuse of a Corpse Laws Defined Within the Model Penal Code

More definitively, Section 250.10 of the Model Penal Code states that “except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor.”<sup>47</sup> Jurisdictions have largely modeled their statutes after the Model Penal Code and have made the abuse of a corpse a criminal offense.<sup>48</sup> The Model Penal Code illustrates various examples of prohibited conduct.<sup>49</sup> The official comments to the Model

<sup>41</sup> Katherine Ramsland, *Abuse of Corpse*, PSYCHOLOGY TODAY (Nov. 27, 2012), <https://www.psychologytoday.com/us/blog/shadow-boxing/201211/abuse-corpse>.

<sup>42</sup> *Id.*

<sup>43</sup> PAUL H. ROBINSON & MICHAEL CAHILL, ASPEN TREATISE FOR CRIMINAL LAW 654 (2017).

<sup>44</sup> *Corpse*, MERRIAM WEBSTER.COM, <https://www.merriam-webster.com/dictionary/corpse> (last visited Apr. 4, 2021).

<sup>45</sup> Ellen Stroud, *Law and the Body: Is a Corpse a Person or a Thing?* 14 ANREVLSS 115 (2018) (“The central puzzle of the law of the dead is that a corpse is both a person and a thing.”).

<sup>46</sup> *Id.*

<sup>47</sup> MODEL PENAL CODE § 250.10 (1962).

<sup>48</sup> See MODEL PENAL CODE § 250.10 (1980) (“The common law regarded indecent treatment of a corpse as an indictable offense. It covered such matters as dissection or other mutilation, unauthorized disinterment or removal, and sale of a corpse. . . . Any possible problems of indeterminacy and lack of notice to the actor are resolved by the requirement of knowledge with respect to the outrageous character of his conduct. Thus, the person who is not aware that his acts would offend family sensibilities does not commit an offense under this section, even though precisely that reaction obtains. Of course, the actor’s idiosyncratic view of what is outrageous does not matter. The standard is objective; It does not vary either to exculpate on the basis of the actor’s unusual callousness or to condemn for outraging an excessively delicate relative of the deceased.”).

<sup>49</sup> *Id.* at 421 (This phrasing includes sexual indecency but is not so limited. It also reaches physical abuse, mutilation, gross neglect, or any other sort of outrageous



Penal Code explain that prohibited acts are not limited to only sexual intercourse with dead bodies—this aims to avoid “piecemeal legislation with regard to various types of corpse desecration.”<sup>50</sup> The conduct is described broadly, so as to “cover any legislative gaps.”<sup>51</sup> However, though many states follow the Model Penal Code quite closely, adopting a “generic approach” to defining the proscribed conduct that would be outrageous or offensive to ordinary sensibilities, many have included a more specific description of the kind of conduct that may be punished.<sup>52</sup> Though the Model Penal Code categorizes the abuse of a corpse as a misdemeanor,<sup>53</sup> many states have opted to impose felony sanctions for such acts.<sup>54</sup> Additionally, “an exception for treatment authorized by law excludes from all the lawful acts that may be done to a corpse, such as [for the use] of embalming, autopsy, scientific research, and medical education.”<sup>55</sup>

*D. An Example of Abuse of a Corpse Statute: Ohio’s Abuse of a Corpse Statute*

The Ohio abuse of a corpse statute, which resembles Model Penal Code, reads as follows:

2927.01 Offenses against human corpse

(A) No person, except as authorized by law, shall treat a human corpse in a way that the person knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

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treatment of a corpse. The overarching purpose is to protect against outrage to the feelings of friends and family of the deceased. For that reason, the offense is stated here rather than in the article on sexual offenses, where the principal concern was to deter various degrees of sexual aggression).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> MODEL PENAL CODE § 250.10 424 (1980) (Misdemeanors are punishable by an ordinary maximum term of one year).

<sup>54</sup> *Id.*

<sup>55</sup> PAUL H. ROBINSON & MICHAEL CAHILL, *supra* note 43 at 654.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fifth degree.<sup>56</sup>

The Ohio statute creates two offenses involving the mistreatment of a corpse, which includes the harsher distinction of “gross abuse of a corpse.”<sup>57</sup> Abuse of a corpse statutes like Ohio’s, generally do not clearly define terms such as “corpse,” “dead body,” or “outrage,” nor the legal standard “reasonable community sensibilities,” which, as will be later examined, may lead to legal concerns such as void for vagueness.<sup>58</sup> Although a culpable state of mind is sometimes expressed within these statutes, for example Ohio’s statute defines the *mens rea* within subsection (A) of the statute,<sup>59</sup> by merely claiming that the “person knows [the conduct] would outrage reasonable family sensibilities,”<sup>60</sup> without further clarifying what constitutes reasonable family sensibilities.<sup>61</sup> Regarding subsection (B) of the Ohio statute, which is classified as gross abuse of a corpse, the mental element is not clearly specified.<sup>62</sup> Many statutes, however, generally, omit a clear definition of what might actually “outrage ordinary family sensibilities” or more specifically, what defines a corpse. Rather, the Model Penal Code states that the “actor’s idiosyncratic view of what is outrageous does not matter.” The standard is objective, “it does not vary

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<sup>56</sup> OHIO REV. CODE ANN. § 2927.01 (West 1996) (The Legislative Service Commission states: “This section prohibits treating a human corpse in a way the offender knows would produce righteous and reasonable outrage among members of the family. It covers conduct formerly prohibited by specific prohibitions against grave robbing and unlawful dissection of a corpse. It also includes other kinds of conduct, such as copulating with or otherwise mistreating a corpse. The section does not include conduct authorized by law, such as mandatory autopsy or the exhumation of a dead body on court order.”).

<sup>57</sup> See R.C. § 2927.01, OH ST § 2927.01 creates two offenses involving mistreatment of a human corpse. § 2927.01 (Division (A) prohibits treating a corpse “in a way that that the person knows would outrage reasonable family sensibilities.” Division (B), often distinguished as “gross abuse of a corpse,” prohibits treating a corpse “in a way that would outrage reasonable community sensibilities.”); see also Lewis R. Katz, John Martin & Jay Macke, *Miscellaneous Crimes*, Baldwin’s Oh. Prac. Crim. L. § 113:2 (3d ed.).

<sup>58</sup> See *State v. Glover*, 479 N.E.2d 901, 904 (Ohio Ct. App. 1984).

<sup>59</sup> OHIO REV. CODE ANN. § 2927.01 (West 1996).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* (Ohio courts have seemingly construed this provision to require the State to prove that the defendant acted with at least the mental state of “recklessly”); see also *State v. Glover*, 479 N.E.2d 901, 904 (Ohio Ct. App. 1984).

either to exculpate on the basis of the actor's unusual callousness, or to condemn for outraging an excessively delicate relative of the deceased."<sup>63</sup>

### III. ABUSE OF A CORPSE LAWS AS PART OF A LARGER CULTURAL AND LEGAL STRATEGY TO PROSECUTE PREGNANT PERSONS FOR PREGNANCY LOSS

Abuse of a corpse state statutes that target and punish vulnerable pregnant persons can be seen as a legal and a cultural tactic to perpetrate both oppression and misogyny. The manner in which prosecutors have enforced these laws, by criminally charging women for pregnancy loss, has amplified this bad policy choice.<sup>64</sup> Abuse of a corpse statutes are being used to prosecute pregnant persons, when, for example, the possibility of a charge for aggravated murder or involuntary manslaughter of the fetus, is unsuccessful.<sup>65</sup> When other laws, such as those criminalizing abortion, do not permit criminal charges against a pregnant person, prosecutors employ laws similar to abuse of a corpse statutes as a back door to punish those who have had a self-induced abortion, miscarriage, or a stillbirth.<sup>66</sup>

This trend of prosecuting pregnant persons is not premised on the use of abuse of a corpse laws alone. Rather, as stated, the use of these laws is only one such tool used by prosecutors and the criminal legal system. Other means of criminally punishing women for pregnancy

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<sup>63</sup> See MODEL PENAL CODE § 250.10 cmt. at 422 (1980).

<sup>64</sup> See generally *infra* SECTION IV. USE OF ABUSE OF A CORPSE LAWS TO PROSECUTE WOMEN FOR PREGNANCY LOSS.

<sup>65</sup> Indictment of Brooke Skylar Richardson, 2017 WL 11455377 (Ct. of Common Pleas 2017) ("Defendant was charged with: Aggravated Murder, Involuntary Manslaughter, Endangering Children, Tampering with Evidence, and Abuse of a Corpse. Ms. Richardson was found not guilty of the first four charges, but was charged with Abuse of a Corpse.").

<sup>66</sup> See generally Farah Diaz-Tello, Melissa Mikesell & Jill E. Adams, *Roe's Unfinished Promise, Decriminalizing Abortion Once and For All*, IFWHENHOW 1 (Nov. 28, 2017), <https://www.ifwhenhow.org/resources/roes-unfinished-promise/>.

loss include the use of feticide laws,<sup>67</sup> substance abuse statutes,<sup>68</sup> coerced and forced medical treatment statutes, physician only rules,<sup>69</sup> targeted restrictions on abortion providers or TRAP laws,<sup>70</sup> and laws relating to HIV transmission and pregnancy laws.<sup>71</sup> The list is not exhaustive. The punishment of pregnant persons is additionally showcased by the rising number of criminal charges<sup>72</sup> filed against women for pregnancy loss, generally under the abovementioned laws. As examined by the leading reproductive rights organization, *If/When/How*, such laws are meant to “criminalize acts that cause the death of a pregnant woman’s fetus by either increasing the criminal penalties for

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<sup>67</sup> National Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women* (May 1, 2018), <https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (“Fetal homicide laws criminalize killing a fetus largely to the same extent as killing any other human being. Historically, the common law did not generally recognize feticide as a crime, but this was because of the evidentiary “born-alive” rule, not because of the substantive understanding of the term “human being.” As medicine and science have advanced, states have become increasingly willing to abandon this evidentiary rule and to criminalize feticide as homicide.”).

<sup>68</sup> *Regulation of Pregnancy*, IF/WHEN/HOW, <https://www.ifwhenhow.org/resources/regulation-of-pregnant-women/> (last visited Mar. 15, 2021) [hereinafter *Regulation of Pregnancy*] (“A 2003 study published in the Journal of the American Medical Association found that the criminal prosecution of pregnant people generally falls into three categories: (1) child endangerment or abuse; (2) illegal drug delivery to a minor; or (3) fetal murder or manslaughter. Drug use by itself is not typically a crime. However, in 2014, Tennessee became the first state to specifically criminalize drug use during pregnancy with the passage of SB 1391.”).

<sup>69</sup> *Id.* at 6. (“Physician only laws require abortions to be performed by a physician” . . . “Although well-intentioned, these laws pose numerous threats to those who seek access to abortions. First, when physicians are the only health providers permitted to provide medication for abortion (as opposed to nurses or other health assistants), a pregnant person may have to delay abortion care for long periods of time or travel long distances to visit a clinic with a licensed physician. Furthermore, prosecutors have attempted to charge people who self-induce abortions with the violation of state physician-only statutes.”).

<sup>70</sup> *What are Trap Laws?*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/trap-laws> (last visited Mar. 15, 2021) (“TRAP laws are designed to close down abortion providers rather than to make them safer for women. Examples of this include: down to the inch dimensions of exam rooms, hallways and janitors’ closets, and medically unnecessary requirements for doctors. They force abortion providers to deliver private medical information to the state government, such as descriptions of the patients themselves, data on the types of abortions provided, and patients ‘ultrasound images.’”).

<sup>71</sup> *Regulation of Pregnancy*, *supra* note 68, at 9.

<sup>72</sup> Lynn M. Paltrow & Jeanne Flavin, *supra* note 12, at 321 (“In 86 percent of the cases [] the efforts to deprive pregnant women of their liberty occurred through the use of existing criminal statutes intended for other purposes.”).

violent acts against pregnant women or by defining the fetus as a separate person and victim in the crime.”<sup>73</sup>

Though many prosecutors’ cases may fall apart due to evidentiary difficulties, the initial invocation of such laws can have long lasting collateral consequences on the women being charged. For example, Jennie McCormack was criminally charged under an Idaho statute that made it a crime to “knowingly submit to an abortion not authorized under the statute, or purposely self-terminating a pregnancy.”<sup>74</sup> The law, which “makes it illegal to obtain abortion pills from out of state doctors over the Internet” is known as a fetal pain statute; it “shorten[s] the window of time in which a women can legally abort a fetus.”<sup>75</sup> Ms. McCormack safely terminated her pregnancy with pills that her sister purchased for her online from another state,<sup>76</sup> which offered a consultation with a doctor who subsequently sent the pills to Ms. McCormack.<sup>77</sup> However, the police in Idaho believed that the fetus was older than fourteen weeks, and though the Idaho law criminalized abortions past nineteen weeks, Ms. McCormack was found to have run “afoul of a 1972 law that says abortions must be performed by a doctor. . . . [t]hat law was interpreted by prosecutors to mean that only Idaho-licensed physicians were authorized to dispense abortion pills.”<sup>78</sup>

The prosecuting attorney’s own comments appear to be an example of prosecutorial overreach. Prosecutor Mark L. Hiedeman claimed that “it just felt like it fit the statute,” and “this wasn’t the first time this has happened. She’s had abortions before, and miscarriages. I mean, she was obviously getting pregnant time and time again and not protecting the unborn fetus.”<sup>79</sup> In this case Ms. McCormack was charged with a felony even though there was no physical evidence, and her lawyer, who was also a doctor, took “the unusual step of entering the case as a plaintiff himself, a tactic he hopes will allow him

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<sup>73</sup> *Regulation of Pregnancy*, *supra* note 68, at 5.

<sup>74</sup> See IDAHO CODE § 18-606 (2020); *see also* Kim Murphy, *Idaho Woman Case Marks a Key Abortion Challenge*, L.A. TIMES (June 16, 2012), <https://www.latimes.com/archives/la-xpm-2012-jun-16-la-na-idaho-abortion-20120617-story.html> (“Ms. McCormack had run afoul of a 1972 law that says abortions must be performed by a doctor—and, in the case of second-trimester abortions, in a hospital. That law was interpreted by prosecutors to mean that only Idaho-licensed physicians were authorized to dispense abortion pills.”).

<sup>75</sup> *Id.* (In Idaho “the window of time in which a woman can legally abort a fetus is to nineteen weeks.”).

<sup>76</sup> Murphy, *supra* note 74.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

to also challenge the ‘fetal pain’ law and other statutes that might hold doctors criminally liable for prescribing abortion drugs.”<sup>80</sup> Although the charges were dropped due to insufficient evidence,<sup>81</sup> as a result of the charge, Ms. McCormack’s reputation was severely damaged and she had to quit her job at a dry cleaner because customers refused to let her handle their dirty laundry.<sup>82</sup>

Such scare tactics by government agents<sup>83</sup> impede pregnant people from asserting control over their own bodies and deters them from seeking medical attention in instances of dire need, which arguably doesn’t discourage any real “crime.”<sup>84</sup> Additionally, such treatment also bolsters the arguments of the personhood movement,<sup>85</sup> which seeks “to have fertilized eggs, embryos and fetuses recognized as completely separate constitutional persons under the law.”<sup>86</sup> In turn, states that abide by such laws quash a woman’s right “to self-sovereignty, work, and due process”<sup>87</sup> by “argu[ing] that the word ‘child’ [found

<sup>80</sup> *Id.*

<sup>81</sup> *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015).

<sup>82</sup> *Murphy*, *supra* note 74 (Ms. McCormack stated that “my neighbors gave me nasty looks when I’d go out in public. They’d get all whispery: ‘That’s her,’” she said. “My kids, they have friends that say stuff to them, and my older two, I feel that they’re a little bit ashamed. And that’s hard.”).

<sup>83</sup> *Paltrow & Flavin*, *supra* note 12, at 335 (“Far from being a scare tactic, our findings confirm that if passed, personhood measures not only would provide a basis for recriminalizing abortion, they would also provide grounds for depriving all pregnant women of their liberty.”).

<sup>84</sup> *Diaz-Tello, Mikesell & Adams*, *supra* note 66, at 2 (“In fact, the evidence shows us that criminalizing abortion actually puts people at risk. Threatening people with jail for ending their own pregnancies may frighten some people from getting important medical care. If someone has decided to self-induce abortion, they need to have accurate information and be able to seek medical care if they need it without fear of arrest.”).

<sup>85</sup> *Paltrow & Flavin*, *supra* note 12, at 300 (“The study found 413 criminal and civil cases where law enforcement intervened in the lives of pregnant women between 1973—the year the Supreme Court ruled in *Roe v. Wade*—and 2005.”).

<sup>86</sup> *Terry Gross, Personhood in The Womb: A Constitutional Question*, NPR: FRESH AIR (Nov. 21, 2013, 3:54 PM), <https://www.npr.org/2013/11/21/246534132/personhood-in-the-womb-a-constitutional-question>.

<sup>87</sup> *CYNTHIA R. DANIELS, AT WOMEN’S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* (2009) (“The notion that the fetus has rights, as a patient and a citizen, separate from the pregnant woman’s has generated a deep crisis in reproductive relations in the United States. A deep crisis which throws into question women’s rights to self-sovereignty, to work, and to due process under the law.”).

within these laws] ought to be interpreted as giving the state power over pregnant women from the moment they conceive.”<sup>88</sup>

### A. Feticide Laws

The use of federal and state feticide laws, including the Unborn Victims of Violence Act (“UVVA”) makes it a crime to kill or injure a fetus during the commission of a crime against a pregnant woman.<sup>89</sup> Though feticide laws are written with the intent to protect pregnant women from domestic violence, they have instead been used to criminalize pregnant persons for the outcomes of their pregnancies. As examined by Sangitha Palaniappa, Franziska Schroder, and Lauren Wiefels—at the time of the UVVA’s passing in 2004, twenty-six states “had already passed homicide laws that recognized unborn victims.”<sup>90</sup> Many of these states recognized the idea of personhood, finding that “unborn children [were] victims regardless of the stage of prenatal development.”<sup>91</sup> For example, in the case of Bei Bei Shuai, an Indiana feticide statute was used to charge Ms. Shuai with murder, after she “terminated her pregnancy through a suicide attempt.”<sup>92</sup> After two and a half years of legal proceedings, which included a trial and jailtime for Ms. Shuai, she “pled guilty to the Class B misdemeanor of ‘criminal recklessness’ [and] was immediately freed.”<sup>93</sup> The case of Ms. Shuai showcases the consequential severity of the use of such laws—which oftentimes results in arduous litigation and jailtime.

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<sup>88</sup> Gross, *supra* note 86 (“State feticide laws that are passed, usually in the wake of extreme violence against pregnant women, they’re passed saying that it will provide protection to pregnant women and their unborn children, and then it’s turned around and used by prosecutors to justify the arrest of pregnant women themselves.”).

<sup>89</sup>18 U.S.C.A. § 1841.

<sup>90</sup> Sangitha Palaniappa, Franziska Schroder & Lauren Wiefels, *Abortion*, 17 *GEO. J. GENDER & L. REV.* 3, 20 (2016); *see also* Julia Rovner, *Woman Who Tried to Commit Suicide While Pregnant Gets Bail*, NPR (May 18, 2012, 4:16 PM), <https://www.npr.org/sections/health-shots/2012/05/18/153026015/bail-granted-for-indiana-woman-charged-in-attempted-feticide> (“The facts of the case are not much in dispute. In December 2010, Shuai, then 33 weeks pregnant, was devastated when her boyfriend abandoned her. She left a suicide note saying she intended to take her own and her baby’s life, then ate rat poison.”).

<sup>91</sup> *Id.* at 20-21.

<sup>92</sup> *Id.* at 25.

<sup>93</sup> *Thank You! Bei Bei Shuai Is Free and More!*, NAPW (Aug. 6, 2013), <https://www.nationaladvocatesforpregnantwomen.org/thank-you-bei-bei-shuai-is-free-and-more/>.

### B. Fetal Assault Laws

Similarly, drug laws dubbed “fetal assault laws” authorize criminal assault charges against women who “give birth to a child showing symptoms related to exposure to a narcotic drug if the drug was used illegally during pregnancy.”<sup>94</sup> For example, a Tennessee law makes it a misdemeanor if a child is “born addicted to or harmed by the narcotic drug and the addiction or harm is a result of [the mother’s] illegal use of a narcotic drug taken while pregnant.”<sup>95</sup> The law therefore criminalizes a mother if her infant is born addicted to or harmed by the narcotic she ingested.<sup>96</sup>

Critics of such laws have been aware of their widely disproportionate enforcement that targets pregnant women of color. Such disparate application partly arose as a result of the “war on drugs” and the myth of the “crack baby” of the 1980s and 1990s.<sup>97</sup> For example, the highly regarded advocate and scholar on gender and race, Dorothy Roberts, author of the seminal work *Killing the Black Body*,<sup>98</sup> has examined the relationship between the prosecution of women and the rise of using these types of laws to prosecute Black mothers for smoking crack while pregnant.<sup>99</sup> Robert’s book examines how the basis of a prosecutor’s use of such statutes, is ultimately rooted in years of oppression tied to America’s history of slavery,<sup>100</sup> as well as how “regulating Black women’s reproductive decisions has been a central aspect of racial oppression in America.”<sup>101</sup> Today, states are using these laws to implicate modern fetal and prenatal personhood definitions,<sup>102</sup> in

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<sup>94</sup> AMNESTY INT’L, *supra* note 24, at 27.

<sup>95</sup> TENN. CODE ANN. § 39-13-107(c)(2) (2015).

<sup>96</sup> *Id.*

<sup>97</sup> See Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 685–87 (2003).

<sup>98</sup> ROBERTS, *supra* note 5, at 5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 33 (“Black women in bondage were systematically denied the rights of motherhood.”).

<sup>101</sup> *Id.* at 6.

<sup>102</sup> *Rights at Risk: The Truth About Prenatal Personhood*, CRR (2012), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/crr\\_PersonhoodPapers\\_BriefingPaper.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_PersonhoodPapers_BriefingPaper.pdf) (“Prenatal personhood measures attempt to secure legal rights for fertilized eggs, embryos, and fetuses by defining life as beginning at the moment of “fertilization” or “conception.” Some prenatal personhood measures have been proposed as state constitutional amendments that would provide that “person” means “every human being from the moment of fertilization, cloning, or the functional equivalent thereof.” Other prenatal personhood



prosecuting pregnant persons as a consequence of pregnancy loss.<sup>103</sup> As written about by Lynn M. Paltrow, the founder of the organization *National Advocates for Pregnant Women*, “[i]n the name of fetal rights, over 200 pregnant women or new mothers in approximately twenty states have been arrested. . . . [m]ost of [these women] have been low-income women of color.”<sup>104</sup> Paltrow documents how through a combination of the war on drugs, “legal arguments of the anti-choice movement, and attacks on low-income women of color” that “pregnant women became an appealing target for law enforcement officials.”<sup>105</sup> As a result, the prosecution of pregnant persons “represent[s] a significant threat to reproductive freedom.”<sup>106</sup>

#### IV. USE OF ABUSE OF A CORPSE LAWS TO PROSECUTE PREGNANT PERSONS FOR PREGNANCY LOSS

This section outlines various cases in which a number of women were charged and, in some instances, convicted of abuse of a corpse violations. Their stories and their backgrounds—including their race, socio-economic status, and age—differ. However, what they share in common is that they were all charged, prosecuted, and in many instances, publicly shamed for their acts. Based on the previously outlined rise in legal and cultural trends used to prosecute women for pregnancy loss, and as evidenced by the examples in this section, the problem is likely much greater than what the initial research shows.

##### A. *Examples of Abuse of a Corpse Laws Used to Prosecute Women for Pregnancy Loss*

The case of Brooke Skylar Richardson was a media sensation.<sup>107</sup> The story of a young cheerleader from a small-town in Ohio, was broadcasted live on Court TV.<sup>108</sup> Ms. Skylar Richardson, was eighteen

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measures have been proposed as laws that would insert a similar definition of “person” into a state’s criminal code.”).

<sup>103</sup> *When Prosecutors Jail a Mother for a Miscarriage*, *supra* note 16.

<sup>104</sup> Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1049 (1999).

<sup>105</sup> *Id.* at 1004, 1018.

<sup>106</sup> *Id.* at 1005.

<sup>107</sup> A Google search of “Brooke Skylar Richardson” includes a myriad of news articles, videos, and court documents. Ms. Richardson has been featured in publications such as *Cosmopolitan*, *USA Today*, *People*, *The Daily Mail*, *ABC News*, *Teen Vogue*, *WLWT*, *CBS*, *NBC News*, *Huffington Post*, *The Daily Beast*, among others.

<sup>108</sup> *Ohio v. Richardson*, COURT TV (2019), <https://www.courtstv.com/trials/ohio-v-richardson-2019/>.

years old when she gave birth in the upstairs bathroom of her family's home,<sup>109</sup> just eleven days after she was informed of her pregnancy.<sup>110</sup> Ms. Skylar Richardson was criminally charged with aggravated murder, involuntary manslaughter, endangering children, tampering with evidence, and abuse of a corpse.<sup>111</sup> As previously noted, Ohio also defines abuse of a corpse as gross abuse of a corpse, which is a fifth degree felony in Ohio.<sup>112</sup> Both Ms. Skylar Richardson and her attorneys claimed that the fetus was stillborn upon delivery, a fact disputed by the prosecution.<sup>113</sup> Ms. Skylar Richardson named and buried "Annabelle" in her parent's backyard, placing flowers on the makeshift grave that she made.<sup>114</sup> Throughout the eight-day trial, she remained "mostly silent" and "repeatedly apologized" for what she had done.<sup>115</sup> During the lengthy trial she was painted by the prosecution as a cheerleader who was obsessed with her looks and wanted to keep her perfect life.<sup>116</sup> The prosecution even showed the jury a photograph of the fetus' skeletal remains after they were dug up from the family's yard. In

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<sup>109</sup> Jennifer Smith, *Ohio Cheerleader Skylar Richardson, 21, Says She 'Just Wants to Feel Normal Again' As She is Relieved of Probation Two Years Early - a Year After Being Cleared of Murder for Burying Her Baby in Her Parents' Back Yard*, THE DAILY MAIL (Nov. 17, 2020), <https://www.dailymail.co.uk/news/article-8958415/Ohio-cheerleader-Skylar-Richardson-relieved-probation-early.html>.

<sup>110</sup> COURT TV, *supra* note 108 (explaining that the doctor told Ms. Richardson that she had around 10 weeks to deliver the baby, but eleven days later, she gave birth at around 3:00 AM in her family home).

<sup>111</sup> State v. Richardson, 121 N.E.3d 730, (Ohio Ct. App. 2018).

<sup>112</sup> OHIO REV. CODE ANN. § 2927.01 (1996).

<sup>113</sup> *Id.* (The fact of whether the baby was stillborn was disputed in the case. Ms. Richardson was questioned by police twice. In one of the instances, she thought that she her the baby "gurgle" or thought that she may have squeezed it too hard and therefore killed it. However, this was later retracted and disputed by her defense team who claimed the confession was coerced and that the umbilical cord was not attached to the fetus upon birth and that the baby was still born).

<sup>114</sup> Jennifer Smith, *Moment Cheerleader Who Buried Her Newborn Baby in Her Backyard Breaks Down in Tears as She is Found Not Guilty of Murder*, THE DAILY MAIL (Sept. 12, 2019), <https://www.dailymail.co.uk/news/article-7456865/Brooke-Skylar-Richardson-NOT-GUILTY-murder-manslaughter.html>.

<sup>115</sup> Cameron Knight, *Mother Accused of Killing Newborn Sentenced to Time Served, Gets to Go Home*, USA TODAY (Sept. 13, 2019), <https://www.usatoday.com/story/news/nation/2019/09/13/brooke-skylar-richardson-sentence/2311546001/>.

<sup>116</sup> Smith, *supra* note 114.

the end, a jury acquitted her of all the charges except for the gross abuse of a corpse charge.<sup>117</sup>

Ms. Skylar Richardson faced up to a year in prison for this conviction.<sup>118</sup> During sentencing and after deliberating for three hours, the jury returned with two questions for the court, asking if they could “please have a simplified definition of abuse of a corpse” and if it was “against the law to bury a body in your yard without knowledge,”<sup>119</sup> showcasing the jury’s own confusion about the statute’s flimsy definitions. Rather than answer simply, Judge Donald Oda, took the opportunity to opine about how Ms. Skylar Richardson had acted with “grotesque disregard for life.”<sup>120</sup> Judge Oda also stated that the [abuse of a corpse law] “restricted the sentence he could pass down.”<sup>121</sup> Adding that, “in all of this mess that we have in this, what often gets overlooked is how precious life is,” [and that] “it should be protected.”<sup>122</sup> “It should be guarded.”<sup>123</sup> He concluded by saying that “some people may say, ‘this is America, we kill unborn babies every day,’ but I don’t consider it that way.”<sup>124</sup> Ultimately, as she had no prior convictions and because she had already served seven days in prison, she was released with the equivalent of time served and probation.<sup>125</sup>

Usually, the facts that give rise to abuse of a corpse “crimes” take place while women are living their day-to-day lives. For example, Kalandra Lacy plead guilty to a charge of abuse of a corpse<sup>126</sup> after testifying to having a miscarriage in the bathroom of her workplace.<sup>127</sup> Ms. Lacy stated that, after giving birth, the baby did not move or

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<sup>117</sup> WLWT Digital Staff, *Jury Finds Skylar Richardson Not Guilty on 3 of 4 Charges*, WLWT (Sept. 12, 2019), <https://www.wlwt.com/article/jury-finds-skylar-richardson-not-guilty-on-3-of-4-charges/29017690>; see also Smith, *supra* note 109.

<sup>118</sup> Pilar Melendez, *Ohio Cheerleader Found Not Guilty of Murdering Her Newborn Baby*, THE DAILY BEAST (Sept. 13, 2019), <https://www.thedailybeast.com/brooke-skylar-richardson-ohio-cheerleader-found-not-guilty-of-murdering-her-newborn-baby>.

<sup>119</sup> Smith, *supra* note 114.

<sup>120</sup> Knight, *supra* note 115.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Knight *supra* note 115; see also Melendez, *supra* note 118 (“That belly was her child,” Knippen [the prosecutor] said, referencing Ms. Richardson’s texts. “That belly was her daughter with fingers and toes and hair on her head. A child she tossed in the dirt.”).

<sup>126</sup> TENN. CODE ANN. § 39-17-312 (West 2006).

<sup>127</sup> State v. Lacy, 2017 WL 1969764, at \*1 (Tenn. Crim. App. May 12, 2017).

produce any sounds, adding that it was “pretty small.”<sup>128</sup> The fetus’ remains were found by a motorist in an alley located behind the restaurant where Ms. Lacy worked.<sup>129</sup> The body, which was found inside a plastic bag, did not have an umbilical cord attached to it and looked like it had been run over by a vehicle.<sup>130</sup> Ms. Lacy, in her own words, “put the baby in the bag and put it in the dumpster,”<sup>131</sup> but denied running the body over with a car, though the prosecution claimed she had.<sup>132</sup> In their expert opinion, the medical examiners were unable to determine if the birth was live or not.<sup>133</sup> As they were unable to medically confirm whether the fetus had been born alive, Ms. Lacy was not charged with homicide and instead, was charged with abuse of a corpse, which was the only charge the State could have proven in this case.<sup>134</sup> In her defense, Ms. Lacy asked the trial court to “grant judicial diversion so that the offense would not prevent her from obtaining a good job, so that she could provide for her other children. She said that she knew that what she did was wrong.”<sup>135</sup>

Ms. Lacy’s request was denied by the trial court, as such, she appealed her Shelby County Criminal Court guilty-pleaded conviction of abuse of a corpse, arguing that the trial court erred by denying her bid for judicial diversion.<sup>136</sup> As a result of the trial court’s “failure to consider on the record all the factors relevant to the denial of judicial diversion as well as the trial court’s consideration of irrelevant factors,” the Court of Criminal Appeals concluded that Ms. Lacy was

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<sup>128</sup> *Id.* at \*4.

<sup>129</sup> *Id.* at \*1.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *State v. Lacy*, 2017 WL 1969764, at \*1 (Tenn. Crim. App. May 12, 2017) (The record suggests that animals removed the body from the dumpster, and, importantly, no evidence suggests that the defendant was responsible for the damage inflicted on the body after she placed it in the dumpster).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (“The Medical Examiner’s Office of course examined the infant and they could not determine cause of death. They could not determine whether this was a live birth or not. There was no way to say medically whether the infant had been born alive. The defendant is not charged with homicide but abuse of a corpse which was the charge that the State could have proven in this case.”).

<sup>135</sup> *Id.* at \*1, \*3 (“Following a determination that the defendant is eligible for judicial diversion, the trial court must consider “(a) the accused’s amenability to correction, (b) the circumstances of the offense, (c) the accused’s criminal record, (d) the accused’s social history, (e) the accused’s physical and mental health, and (f) the deterrence value to the accused as well as others. The trial court should also consider whether judicial diversion will serve the ends of justice—the interests of the public as well as the accused.”).

<sup>136</sup> *Id.* at \*1.

entitled to judicial diversion.<sup>137</sup> The court examined both the facts of the case and how the trial court reviewed for judicial diversion, finding that the “trial court did not mention any of the applicable factors and focused exclusively on the circumstances of the offense and its own concerns about the potential of future harm to the defendant's children.”<sup>138</sup> Secondly, the trial court “indicated that it had conducted ‘independent research’ and had weighed this research heavily in the decision to deny judicial diversion. Consequently, the ruling of the trial court is not entitled to a presumption of reasonableness, and the abuse of discretion standard of review is not appropriate.”<sup>139</sup> The Court of Criminal Appeals focused on the trial court’s use of “outside research” in this “same type of offense, indicating, perhaps, the need for deterrence to the defendant and others,” which the appellate court found “wholly improper.”<sup>140</sup>

This outside research conducted by the trial court stemmed in part from its “very, very deep concern . . . for the safety of her children that she has now, any children she may have in the future” further stating that it “want[ed] to make sure that the records were accessible and not in terms of diversion, there was no mention of any of this.”<sup>141</sup> The trial court further claimed that:

There is a huge number, in terms of the increase of the number of women who are being prosecuted exactly for this same type of offense. And they are not going as far as we went on this case. They have a woman who has recently had a baby, or a miscarriage, or was pregnant and if they can find the fetus, or the baby, they are prosecuting murder one, across this country, in numbers that you would not believe. And I do not want the same thing to happen to her.<sup>142</sup>

The Court of Criminal Appeals stated that though the trial court was able to “take into account matters that are of common knowledge to every person” it may not “base [its] decisions on the existence or nonexistence of facts according to [its] personal beliefs or experiences.”<sup>143</sup> This kind of judicial “outside research” as demonstrated by

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<sup>137</sup> State v. Lacy, 2017 WL 1969764, at \*1 (Tenn. Crim. App. May 12, 2017).

<sup>138</sup> *Id.* at \*4.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at \*5.

<sup>141</sup> *Id.* at \*2.

<sup>142</sup> State v. Lacy, 2017 WL 1969764, at \*1, \*2 (Tenn. Crim. App. May 12, 2017).

<sup>143</sup> *Id.* at \*5.

the trial court, illustrates the kind of intimidation that the use of abuse of a corpse statutes may expose a defendant to. Individuals like Ms. Lacy are seemingly subjected to judicial overreach, so that their cases can serve as examples, at their personal expense. As for Ms. Lacy herself, ultimately, the judgement of the trial court denying judicial diversion was reversed<sup>144</sup> and she was resentenced to one year of probation.<sup>145</sup> However, as showcased by the Court of Criminal Appeals own decision, the concern for advocates is that any leniency in such matters is subjective and results from the cooperation of the defendant. For example, as noted by the court, Ms. Lacy did not:

[A]ttempt to conceal her pregnancy either before or after the offense. When she went to the hospital for treatment, she told doctors that she had suffered a miscarriage. Then, when contacted by police, the defendant immediately admitted what she had done. She testified that she understood and accepted responsibility for the wrongfulness of her actions.<sup>146</sup>

Furthermore, many abuse of a corpse cases remain in the headlines. The case of Ms. Keysheonna Reed is one such example. Ms. Reed's case has been exceedingly reported on since she was first charged with two counts of abuse of a corpse in Arkansas.<sup>147</sup> Arkansas's "concealment of a corpse" statute, under which Ms. Reed was charged in 2018, repeatedly uses the term "in a manner offensive to a person of reasonable sensibilities" which includes "dismembering, submerging, or burning of a corpse."<sup>148</sup> The statute does not define a corpse.<sup>149</sup> Ms. Reed unexpectedly went into labor and gave birth in her bathroom tub in December 2017.<sup>150</sup> A medical examiner later determined that the twins Ms. Reed delivered were born dead.<sup>151</sup> Ms. Reed, who was twenty-four years old at the time, was in a "state of panic," placed the bodies in a suitcase, got into her car, and "began to pray

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<sup>144</sup> *Id.* at \*6.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at \*5.

<sup>147</sup> *When Prosecutors Jail a Mother for a Miscarriage*, *supra* note 16.

<sup>148</sup> ARK. CODE ANN. § 5-60-101 (Michie 1987).

<sup>149</sup> *Id.*

<sup>150</sup> P.R. Lockhart, *A Shooting Ended Marshae Jones's Pregnancy. Police say it's Her Fault*, VOX (June 27, 2019), <https://www.vox.com/identities/2019/6/27/18761652/marshae-jones-alabama-miscarriage-shooting-indictment>.

<sup>151</sup> *When Prosecutors Jail a Mother for a Miscarriage*, *supra* note 16.

and just drove”—ultimately leaving the suitcase on the side of a road.<sup>152</sup>

Following an investigation, the Cross County Sheriff’s Office identified the newborn twins as being approximately thirty-two to thirty-four weeks in the gestation period.<sup>153</sup> It was frequently reported that “there were no drugs in the twins’ systems” and that they died in the womb.”<sup>154</sup> After Ms. Reed turned herself in, she was charged with two counts of abuse of a corpse, a felony which carries a minimum sentence of three years and up to possibly a decade in prison.<sup>155</sup> A judge set her bail at \$50,000, “a sum more than twice the per capita income for Cross County.”<sup>156</sup> As evidenced by the previous examples, there is a fear of overreach, by figureheads of the criminal legal system who are oftentimes in charge of investigating these cases. For example, in the case of Ms. Reed, Detective Sergeant Jeff Nichols was one of the first to respond to the scene, and claimed to be “disturbed by it,” further stating, “when you have kids of your own, it really bothers you.”<sup>157</sup>

## V. LEGAL VIOLATIONS

Each of these women in the cases discussed above was criminally charged after experiencing a pregnancy loss—an event that can be traumatizing in its own right. As noted by Dr. Monica McLemore, an Associate Professor in the Family Health Care Nursing Department at the University of California, San Francisco and a clinician-scientist at Advancing New Standards in Reproductive Health (“ANSIRH”), “you have a living, breathing pregnant person who’s had a loss and is now

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<sup>152</sup> *Id.*

<sup>153</sup> *Arkansas Woman Arrested After Babies’ Bodies Found in Suitcase*, KATV (March 22, 2018), <https://katv.com/news/local/arkansas-woman-arrested-after-babies-bodies-found-in-suitcase>.

<sup>154</sup> *Woman Charged With Abuse After Stillborn Twins’ Bodies Found in Suitcase*, N.Y. POST (Mar. 23, 2018), <https://nypost.com/2018/03/23/woman-charged-with-abuse-after-stillborn-twins-bodies-found-in-suitcase/>; see also P.R. Lockhart, *A Shooting Ended Marshae Jones’s Pregnancy. Police say it’s Her Fault*, VOX (June 27, 2019), <https://www.vox.com/identities/2019/6/27/18761652/marshae-jones-alabama-misscarriage-shooting-indictment>.

<sup>155</sup> *When Prosecutors Jail a Mother for a Miscarriage*, *supra* note 16.

<sup>156</sup> *Id.*

<sup>157</sup> Greg Hanlon, *Stillborn Twins Found in Suitcase Along Arkansas Road, Woman Arrested*, PEOPLE (Mar. 23, 2018), <https://people.com/crime/stillborn-twins-suitcase-arkansas-road-woman-arrested/>.

being treated as a criminal.”<sup>158</sup> Rather than being given the proper time to grieve and process the traumatic experience, these women are ostracized, sensationalized, and, most egregiously, punished by the criminal legal system. As echoed by Dr. McLemore, “women facing criminal charges for the outcome of their pregnancies isn’t new and is part of a broader, dangerous trend that disproportionately impacts women of color and black women, in particular.”<sup>159</sup> As such, expanding abuse of a corpse statutes to reach pregnancy loss can and should be rendered unconstitutional.

### *A. Abuse of Corpse Statutes as Violations of Statutory Interpretation*

Criminal laws are required to state explicitly and definitely what conduct is punishable, in order to adequately put citizens under their jurisdiction on notice.<sup>160</sup> Corollary to this, the rule of lenity, which is “identified as one of the oldest and most ‘venerable’ canons of statutory interpretation,”<sup>161</sup> states that “statutory construction. . . requires a court to resolve statutory ambiguity in favor of a criminal defendant, or to strictly construe the statute against the state.”<sup>162</sup> Criminal statutes must therefore assist the accused<sup>163</sup> and are required to state explicitly and definitely what conduct is punishable.<sup>164</sup> However, these legal pillars are in tension with the broad language of abuse of a corpse statutes.<sup>165</sup>

The first step in statutory interpretation is to look to the plain language of the statute. The “plain meaning” rule dictates that “where the

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<sup>158</sup> Kylie Cheung, *How Antiabortion Laws Put Women Who Miscarry in Their Crosshairs*, POPSUGAR (Oct. 9, 2019), <https://www.popsugar.com/news/can-you-be-charged-with-crime-for-miscarrying-46695250>.

<sup>159</sup> *Id.*

<sup>160</sup> *Alonso v. State*, 228 So.3d 1093 (Ct. Crim. App. 2016).

<sup>161</sup> Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 TOLEDO L. REV. 511, 512 (2002).

<sup>162</sup> David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523 (2018).

<sup>163</sup> *State v. Trudell*, 243 Kan. 29, 755 P.2d 511 (1988) (“A criminal statute, with its punitive effect, must be strictly construed against the State and in favor of the accused.”).

<sup>164</sup> *Alonso v. State*, 228 So.3d 1093 (Ct. Crim. App. 2016).

<sup>165</sup> The Revised Comment to the MODEL PENAL CODE § 250.10 (1980) (The Revised Comment to the Model Penal Code § 250.10 (1980), argues that “this formulation is sufficiently broad to preclude gaps in coverage and yet sufficiently precise in its statement of the ultimate question to provide a meaningful standard of decision.”).



language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”<sup>166</sup> Because abuse of a corpse statutes are only enacted at the state level, their language inexorably varies. Many statutes, however, contain the seemingly broad language adopted from the Model Penal Code, which states that “except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities.”<sup>167</sup> Additionally, as previously explained, many statutes do not define the terms “corpse” or “dead body.” The use of such broad language results in the expansive inclusion of women as victims of pregnancy prosecution, a “crime” that these statutes were not meant to codify, and which should be prohibited by the plain language of the laws.

In comparing abuse of a corpse statutes to other challenged laws based on their plain meaning that are used to criminally charge women for pregnancy loss, one can clearly see the parallels. Examples include the case of Katherine Nicole Dellis, who was charged with concealing a dead body in violation of Virginia’s Code § 18.2-323.02 after she suffered a placental abruption that resulted in the death of her unborn fetus.<sup>168</sup> She wrapped the fetus in a bathmat, placed it in two trash bags, and later disposed of it.<sup>169</sup> Nonetheless, Ms. Dellis was charged and found guilty of “concealing a dead body.”<sup>170</sup> Ms. Dellis moved for dismissal based on the disputed statutory definition of a “dead body.”<sup>171</sup> She argued that “when reading the entirety of Code § 32.1-249, the language distinguishes a dead body from a fetus by defining ‘dead body,’ ‘fetal death,’ and ‘live birth,’ as separate terms, and by identifying them separately when defining a ‘final disposition,’” further stating that because a fetus “was never alive. . . . it cannot be dead.”<sup>172</sup> Similarly, abuse of a corpse statutes repeatedly use the term “corpse,” however legislatures do not readily define the term, making it unclear if it encompasses a fetus that died in the womb.<sup>173</sup> Given

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<sup>166</sup> Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation In the “Modern” Federal Courts*, 75 COL. L. REV. 1299 (1975).

<sup>167</sup> MODEL PENAL CODE § 250.10 (1980).

<sup>168</sup> *Dellis v. Commonwealth*, 2018 WL 1915460, at \*1 (Ct. App. 2018).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at \*2.

<sup>173</sup> *See generally* OHIO REV. CODE ANN. § 2927.01 (1996).

this, the law does not address the plain meaning of the term corpse. Courts have a duty to construe legislation in harmony with the state constitution, if permitted by the statute's language.<sup>174</sup> For example, the Supreme Court of Arkansas held that a trial court could not, "through construction of a statute, create a criminal offense that is not in express terms created by the Legislature."<sup>175</sup>

While for prosecutors it may seem reasonable to apply abuse of a corpse statutes in instances when the fetus is born alive and then dies, and whose body is then hidden in a manner meant to be permanent; expanding the scope beyond what is reasonable can lead to absurd consequences. In state statutes where the terms "corpse" or "dead body" are not defined, the expansion of their use to encompass self-induced abortion, stillbirth, or a miscarriage, is all the more dangerous and contrary to the purpose and meaning of the statutes at hand. As will be argued, such an interpretation of the law would render many of these statutes unconstitutionally vague and in violation of the due process right to fair notice. Because the standard of specificity for a criminal act is inherently stricter, when a statute's vagueness "threatens to inhibit the exercise of constitutionally protected rights"<sup>176</sup> it may be rendered unconstitutional. Therefore, abuse of a corpse laws that are too broad should be voided or discarded as tools to prosecute pregnant people.

### B. *Void for Vagueness Concerns*

There have also been a number of legal challenges regarding the vagueness of abuse of a corpse statutes. The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>177</sup> As stated in one of the leading cases discussing the doctrine of void-for-vagueness, *Kolender v. Lawson*, "the doctrine focuses both on actual notice to citizens and arbitrary enforcement . . . ."<sup>178</sup> In *Kolender*, the Supreme Court found that the

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<sup>174</sup> *Hobbs v. Jones*, 2012 Ark. 293, 8, 412 S.W.3d 844, 850 (2012) ("Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. Moreover, when interpreting statutes, we make a de novo review, as it is for this court to decide what a statute means.").

<sup>175</sup> *Arms v. State*, 2015 Ark. 364, 8, 471 S.W.3d 637, 642–43 (2015).

<sup>176</sup> *Colautti v. Franklin*, 439 U.S. 379, 391 (1979).

<sup>177</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

<sup>178</sup> *Id.*

criminal statute at issue, which required individuals stopped by police to provide “credible and reliable” identification, was “unconstitutionally vague on its face because it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.”<sup>179</sup> That is, it failed to state with sufficient particularity what type of identification would pass police muster or not. As such, a law that fails to provide such clarity violates fundamental guarantees of due process.<sup>180</sup> The Supreme Court has held that “[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”<sup>181</sup>

As related to the realm of reproductive rights and abortion, vagueness challenges are “subject to a stricter standard since. . . the right to an abortion is a constitutionally protected right.”<sup>182</sup> In *City of Akron v. Akron Center for Reproductive Health, Inc.* the Supreme Court determined that an Akron ordinance, which required physicians who performed abortions to “insure that the remains of the unborn child are disposed of in a humane and sanitary manner,” was unconstitutionally vague.<sup>183</sup> The state in *Akron* maintained that the purpose of the ordinance was to “preclude the mindless dumping of aborted fetuses on garbage piles.”<sup>184</sup> However, the Supreme Court affirmed the Court of Appeals ruling, stating that the law violated the Due Process Clause because “the phrase ‘humane and sanitary’ . . . does not suggest a possible intent to mandate some sort of ‘decent burial’ of an embryo at the earliest stages of formation.”<sup>185</sup> The Court also refused to sever the term “humane” from the statute finding that “[t]he uncertain meaning

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<sup>179</sup> *Id.* at 359–62.

<sup>180</sup> See generally *Kolender v. Lawson*, 461 U.S. 352 (1983).

<sup>181</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>182</sup> Joseph E. Bauerschmidt, *Mother of Mercy—Is This the End of RICO—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO Pattern*, 65 NOTRE DAME L. REV. 1106, 1116 (1990).

<sup>183</sup> See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (overruled on other grounds by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), invalidated a provision of an Ohio city ordinance requiring that all abortions performed after the first trimester of pregnancy be performed in a hospital); see also *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 552 (7th Cir. 2019) (dissent finding that “The majority writes that *Akron* was “overruled” by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), but *Casey* did not overrule any portion of *Akron* dealing with the vague criminal statute on fetal remains.”).

<sup>184</sup> *City of Akron* at 451.

<sup>185</sup> *Id.*

of the phrase 'humane and sanitary' leaves doubt as to whether the city would have enacted [the statute] with the word 'sanitary' alone" and that the city could therefore "enact more carefully drawn regulations."<sup>186</sup> As the ordinance failed to give the doctors "fair notice that his contemplated conduct is forbidden," the Court ruled that "this level of uncertainty is fatal where criminal liability is imposed."<sup>187</sup>

Turning to abuse of a corpse laws, challenges have been mounted against the element of the statutes, which impose criminal liability depending on if the individual's acts outrage "reasonable community sensibilities."<sup>188</sup> In the case *State v. Glover*, such a challenge failed. In *Glover*, the trial court found the Ohio abuse of a corpse statute, which charged the defendant with gross abuse of a corpse as unconstitutionally vague.<sup>189</sup> The trial court determined that "due process requires the courts to subject R.C. 2927.01(B), heightened scrutiny for clarity because it imposes strict liability."<sup>190</sup> On appeal, the Court of Appeals of Ohio ruled that the trial court erred in its conclusion, finding that even though the trial court may have reached its determination "because [the] statutory offense fails to identify a culpable mental state as an element of the crime. . . . the absence of such language does not necessarily determine whether the statute imposes strict liability for its violation."<sup>191</sup> It reasoned that just because the definition of the statute, which as previously mentioned R.C. 2927.01(B) "impliedly requires proof that the accused recklessly treat[ed] a human corpse in a way that would outrage reasonable community sensibilities" did not lack an "ascertainable standard measured against reasonable community sensibilities. . . .determined by the trier of fact."<sup>192</sup> The court further declared that the words "treat," "human corpse," "way," "outrages," and "sensibilities" are commonly understood by persons of "common intelligence."<sup>193</sup> The court determined that "in the area of obscenity, courts have consistently approved legislation that required a factfinder to apply contemporary community standards, the *Glover* court [therefore] concluded that the Ohio statute was not unconstitutionally vague."<sup>194</sup>

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<sup>186</sup> *Id.* at 452.

<sup>187</sup> *Id.* at 451.

<sup>188</sup> See OHIO REV. CODE ANN. § 2927.01 (1996).

<sup>189</sup> *State v. Glover*, 479 N.E.2d 901, 902-903 (Ohio Ct. App. 1984).

<sup>190</sup> *Id.* at 902.

<sup>191</sup> *Id.* at 902-03.

<sup>192</sup> *Id.* at 902.

<sup>193</sup> *Id.* at 904.

<sup>194</sup> *Dougan v. State*, 912 S.W.2d 400, 403-04 (Sup. Ct. Ark. 1995).

The court in *State v. Glover* based its ruling in part on the premise that “a criminal statute is not void for vagueness simply because it requires persons to conform to imprecise but comprehensible normative standards. A statute is vague because it specifies no standard of conduct at all.”<sup>195</sup> However, as the Ohio abuse of a corpse statute intrudes on the fundamental liberty and privacy rights of persons who have recently given birth, the statute’s vagueness should be scrutinized under a heightened standard. Though the *Glover* court determined that the standard was commonly understood, they did not address the statute’s lack of notice, nor its applicability to situations such as pregnancy loss.<sup>196</sup> Because of this failure, innocent persons suffer needlessly and are forced to face the criminal legal system.

The effects of this failure—to define the terms—was evidenced in the case of Ms. Amy Detlor, who gave birth to a baby boy in her grandmother’s home. After giving birth, Ms. Detlor proceeded to wrap the baby up in a towel and drove the baby to her parents’ home, during which she stopped to get food. Upon getting to her parents’ home, she realized the baby had stopped breathing and she disposed of the body.<sup>197</sup> Thereafter, in *State v. Detlor*, Ms. Detlor was charged with twelve months in prison under a conviction of gross abuse of a corpse in Ohio; her prison term totaled five years for all of the charges.<sup>198</sup> In the case of *Commonwealth v. Smith*, the issue before the Pennsylvania Superior Court was “whether a person who knowingly leaves a corpse to rot, without making proper arrangements for a proper burial has ‘treat[ed] a corpse in a way that [s]he knows would outrage ordinary family sensibilities.’”<sup>199</sup> The case is unique, as it deals with the application of an abuse of a corpse statute in regard to a fully formed three-year old child rather than a fetus. The plaintiff, Clarice Smith, was characterized by the court as a “habitual user of cocaine [who] had a history of neglecting her three-year-old daughter, who died of malnutrition. . . .” whose “decomposed and mummified body of the girl was found in a kneeling position at the foot of her bed with her head laying over her folded hands on the bed.”<sup>200</sup> Ms. Smith stated that she concealed her daughter’s body because she was “afraid and

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<sup>195</sup> *Id.* (“For this statutory offense, R.C. 2901.22(C) defines the implied element of recklessness.”).

<sup>196</sup> *See generally* *State v. Glover*, 479 N.E.2d 901, 902-903 (Ohio Ct. App. 1984).

<sup>197</sup> *State v. Detlor*, 2007 WL 1390654, at \*1 (Ct. of App. Ohio May 14, 2007).

<sup>198</sup> *Id.* at \*1-2.

<sup>199</sup> *Commonwealth v. Smith*, 567 A.2d 1070, 1073 (Pa. Super. Ct. 1989).

<sup>200</sup> *Id.* at 1071.

confused.”<sup>201</sup> The Superior Court found Ms. Smith guilty for abuse of a corpse and the Pennsylvania Court of Appeals affirmed Ms. Smith’s conviction, noting that “the purpose of drafting the statute in a very broad and general language was to insure that offenses such as concealing a corpse came within the purview of the statute.”<sup>202</sup>

Regarding vagueness, it is therefore possible to argue that the statutes are so vague that they do not give a “person of common intelligence” fair warning of what conduct might be prohibited.<sup>203</sup> For example, the “reasonable community sensibilities” can be construed in a myriad of ways depending on one’s own “reasonable,” “community,” “sensibilities”—the standard for abuse of a corpse in some states. Within the legal field, most understand the term *reasonable* to be defined within the reasonable person standard, which is a legal standard used in negligence cases.<sup>204</sup> The standard “reasonable community sensibilities,” has been referred to by courts using seemingly expansive definitions such as:

[c]ommunity mores concerning the proper treatment of a corpse are not . . . esoteric or otherwise difficult to discern. Irrespective of one’s religious views, and even if one is an atheist or an agnostic, it is almost universally understood that the bodies of the dead are to be treated with the utmost respect and in a manner that will not inflict any more emotional pain upon the wounded hearts of friends and mourners.<sup>205</sup>

These terms and definitions are seemingly discretionary, leading to a number of possible determinations by prosecutors and courts, as well as opportunity for misapplication.

Additionally, the conduct in these statutes can sometimes lack a definition and is at times based on a “communal” understanding of

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<sup>201</sup> *Id.* at 1073.

<sup>202</sup> *Id.*; see also *Dougan v. State*, 912 S.W.2d 400, 404 (Sup. Ct. Ark. 1995) (“The *Smith* court reasoned that by concealing the corpse, Smith allowed it to be eaten by rodents and become mummified, and that her conduct constituted an outrage to ordinary family sensibilities.”).

<sup>203</sup> *State v. Glover*, 479 N.E.2d 901, 904 (Ohio Ct. App. 1984) (“A criminal statute is not void for vagueness simply because it requires a person to conform to an imprecise but comprehensible normative standard. A statute is vague because it specifies no standard of conduct at all.”).

<sup>204</sup> CORNELL LAW SCHOOL DICTIONARY (“The hypothetical reasonable person behaves in a way that is legally appropriate. Those who do not meet this standard—that is, they do not behave at least as a reasonable person would—are considered negligent and may be held liable for damages caused by their actions.”).

<sup>205</sup> *Condon v. Wolfe*, 310 Fed. App’x. 807, 822 (6th Cir. 2009).

values—which within the realm of reproductive access, varies widely. One can argue that these terms are “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,”<sup>206</sup> as such, they violate due process of law.<sup>207</sup> The right to choose how one gives birth, including how to handle the body, should be based on an individual’s own values—without the obstructive intrusion from the government, as the Court held that “it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>208</sup> Yet, by not addressing the need for the higher scrutiny, there appears to be acceptance of imposing government intrusion post-birth, without those specified standards. Instead, the courts apply a seemingly too deferential, and an almost subjective standard, about what is right and wrong within the context of childbirth when taking into account the defendant’s behavior regarding remorse and previous history. For example, in the case of Ms. Detlor, the trial court opined about she “lack[ed] remorse for her actions, as well as Detlor’s admitted, albeit *uncharged past drug abuse*, which was documented in a pre-sentencing investigation report.”<sup>209</sup>

Although Ohio’s abuse of a corpse statute has so far been upheld against claims that it is unconstitutionally vague or overbroad,<sup>210</sup> because the application of the law is not clearly defined, prosecutors are afforded great leeway in determining how and when to use such laws to punish individuals for pregnancy loss.<sup>211</sup> This lack of specificity has unquestionably added to the confusion surrounding the utilization of these laws to prosecute pregnant people, leading states to have to wrestle with how to penalize those who treat the dead with what they deem is disrespectful. This, along with a number of other statutes that are

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<sup>206</sup> *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939).

<sup>207</sup> *Id.*

<sup>208</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 847, 849 (1992).

<sup>209</sup> *State v. Detlor*, 2005 WL 3455139, at \*5 (Ct. of App. Ohio Dec. 19, 2005) (emphasis added).

<sup>210</sup> *State v. Hopfer*, 679 N.E.2d 321, 328-29 (Ohio App. 2d 1996).

<sup>211</sup> Sady Doyle, *When a Miscarriage Becomes a Crime*, ELLE (Apr. 17, 2017), <https://www.elle.com/culture/career-politics/a44552/when-a-miscarriage-becomes-a-crime/> (“Increasingly, states are dredging up antiquated laws, often laws intended to punish illegal abortion providers or penalize abusers for causing miscarriages, to investigate and sometimes jail women whose pregnancies ended under suspicious circumstances.”).

used to penalize women for their reproductive choices, perpetuates a pro-life movement and narrative.<sup>212</sup>

## VI. CONCLUSION

As stated, the application of abuse of a corpse statutes to cases of pregnancy loss will often lead to absurd consequences. Within the limits of the criminal legal system, in order to reform, an option would be to follow the lead of state prosecutors who have made public pledges in response to the abortion bans in states across the United States, including in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Utah.<sup>213</sup> These figures have all taken a sort of “vow” toward the goal of “deliberate inaction.” For example, in Michigan, Attorney General Dana Nessel pledged should *Roe v. Wade* be overturned, and the ban on abortion be once again in effect, that “she would not prosecute a woman for having one or her doctor for providing one.”<sup>214</sup>

Additionally, the District Attorney of Salt Lake County, Sam Gill, has said that he would not enforce the state’s eighteen week ban on abortion and a collective forty-two prosecutors released a statement, which claimed that “laws that revictimize and retraumatize victims are unconscionable. It is a prosecutor’s obligation to protect and seek justice on behalf of all members of our community, including victims who are often the most vulnerable and least empowered.”<sup>215</sup> This was in response to the state’s continued assault on abortion bans and determination to uphold both the Constitution of the United States, their own states, and to “not prosecute women who obtain abortions and health care professionals who provide treatment is not predicated on these concerns alone.”<sup>216</sup> If the view of these prosecutors regarding

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<sup>212</sup> *Punishing Women for Their Behavior During Pregnancy*, CRR, [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub\\_bp\\_punishing-women.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub_bp_punishing-women.pdf) (last visited Mar. 15, 2021) (“Pregnant women are being civilly committed or jailed, and new mothers are losing custody of their children even when they would be capable parents. Meanwhile, state legislators have repeatedly introduced substance abuse and child welfare proposals that would penalize only pregnant women with addiction problems.”).

<sup>213</sup> See Cynthia Greenlee, *Meet the Prosecutors Resisting America’s Frightening New Abortion Bans*, THE NATION (Dec. 3, 2019), <https://www.thenation.com/article/archive/prosecutors-abortion-roe/>.

<sup>214</sup> *Id.*

<sup>215</sup> *Joint Statement From Elected Prosecutors*, FAIR AND JUST PROSECUTION (June 2019), <https://fairandjustprosecution.org/wp-content/uploads/2019/06/Joint-Statement-from-Elected-Prosecutors-on-Abortion-Laws-FINAL.pdf>.

<sup>216</sup> *Id.*



abortion is that they should not criminalize “the healthcare decisions” of persons and to “protect[] the health and safety of all members of our community. . . .”<sup>217</sup> the same standard should apply in all aspects of reproductive healthcare.

As Jill Adams, the Executive Director of *If/When/How* noted, “more people who lose their pregnancies will be treated with suspicion . . . especially people of color, low-income people, and LGBTQ+ people.”<sup>218</sup> Prosecutors, district attorneys, and legislatures alike should therefore use their power, not only to change the statutes to clarify their meaning, but to provide certain guidelines for those made subject to the proscriptions of prosecutors. More importantly, they should pledge that the same policy changes apply within the realm of abuse of corpse statutes, so that the criminalization and prosecution of pregnant persons is minimized.

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<sup>217</sup> *Id.*

<sup>218</sup> Kylie Cheung, *How Antiabortion Laws Put Women Who Miscarry in Their Crosshairs*, POPSUGAR (Oct. 9, 2019), <https://www.popsugar.com/news/can-you-be-charged-with-crime-for-miscarrying-46695250>.