

## Senate Judiciary Committee

*Jennifer Horgan 271-3092*

**SB 66-FN**, including a viable fetus in the definition of "another" for purposes of certain criminal offenses.

**Hearing Date:** January 26, 2017

**Time Opened:** 11:08 a.m.

**Time Closed:** 12:10 p.m.

**Members of the Committee Present:** Senators Carson, Lasky, French, Gannon and Hennessey

**Members of the Committee Absent :** None

**Bill Analysis:** This bill provides that a viable fetus shall be included in the definition of "another" for the purposes of first and second degree murder, manslaughter, negligent homicide, and causing or aiding suicide.

**Sponsors :**

Sen. Birdsell

Sen. Avar

Sen. Carson

Sen. Bradley

Sen. Innis

Sen. Ward

Sen. French

Sen. Reagan

Sen. Gannon

Sen. Gray

Rep. Hoelzel

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**Who supports the bill:** Senator Birdsell; Senator Ward; Senator Carson; Senator Avar; Senator Gannon; Senator Avar; Honorable Bob Letourneau; Meredith Cook, Roman Catholic Diocese of Manchester; Shannon McGinley, Cornerstone; Deana Crucitti

**Who opposes the bill:** Senator Feltes; Representative Gould; Representative Cordelli; Representative True; Representative Wuelper; Representative Christie; Representative Comtois; Representative McNally; Representative Scully; Representative Testerman; Representative Pearl; Representative Scruton; Representative Beaudoin; Representative Hoell; Representative Murotake; Representative Wells; Representative Pearson; Representative Moore; Representative Souza; Representative Itse; Rev. Christian Tutor, NH Right to Life; Katherine Prudhomme-O'Brien, NH Right to Life; Devon Chaffee, ACLU; Julie Gabrielson; Linda Griebisch;

**Who is neutral on the bill:** Honorable Leon Rideout; Mary Bidgood-Wilson, NH Nurse Practitioner's Association

**Summary of testimony presented in support:**

**Senator Birdsell**

- This is for Deana Crucitti and it has been requested by the Supreme Court.
- It protects pregnant women and their unborn children, when that pregnant woman has chosen to take their child to term, against those who would do harm to the woman or her child.
- California, Colorado, Maine, Maryland, Massachusetts, and Rhode Island all have

fetal homicide laws at viability and they are not conservative states

- Illinois, Minnesota, Ohio, Pennsylvania, Wisconsin, and Idaho all have fetal homicide laws at the early stages of pregnancy.
- Indiana has a similar viability law that has had some cases that have been adjudicated.

**Meredith Cook** (Roman Catholic Diocese) (provided written testimony)

- All human life has a dignity from conception to death.
- More than 30 states have these law and Roe v Wade has not been eroded.
- Roe v. Wade does not protect a third party's right to destroy a baby.

**Deana Crucitti** (provided written testimony)

- Shared the story of her daughter, Sarah Rose.
- Was two weeks overdue and scheduled to have a C-section.
- Was in a head on collision and Sarah did not make it out of the womb taking a breath of fresh air. Sarah drowned in the fluid.
- Following Sarah's death, they were informed that they could not receive a birth or death certificate because Sarah did not take a breath of fresh air.
- Former Senator Pierce did attempt to help on this issue.
- Eventually, they were able to receive a document indicating that they were in an accident, but it did not include Sarah's name, a birth date, or death date.
- Not sure how you can look at Sarah and say she did not exist.
- This is a family issue and not a women's or man's issue.
- Senator Gannon asked if they are happy with the term "viable fetus".
  - Wants to see a bill in place that will support unborn children. Had no idea this would be a pro-life/pro-choice issue, just wants Sarah recognized. In thinking about all NH families, would love to see eight weeks, but does not think NH is ready for that.
- Senator Lasky asked if they can receive a death certificate now.
  - They still do not offer death certificates without a birth certificate.

**Honorable Bob Leturnau**

- This is a NH story with a tragic ending.
- This is not about abortion; it is about criminal activity and justice for families.
- This bill is crafted very carefully after several attempts of the fetal homicide bill.
- Would ask to have it be named Sarah's Law.

**Summary of testimony presented in opposition :**

**Representative Comtois**

- Read a letter from a mother who lost their child at 13 weeks: *opposes this bill as it will prohibit some families from getting fair justice at the loss of a family member. Viability should have no place here and the age of the child does not mitigate the pain of losing them. SB66 is the worst kind of bill, offering a surface solution that will result in an expensive court battle. Asks the Committee support a fair fetal homicide bill.*
- Viability is very difficult to prove.
- If a woman has a tough time getting pregnant and loses their child due to a criminal act, asking them to go to court to prove viability seems like an injustice.

**Representative Souza** (provided written testimony)

- NH badly needs a fetal homicide bill, which has passed in previous sessions, but was vetoed.
- Thinks now is the right opportunity to pass a fetal homicide bill.

- Families that have lost children to someone else's criminal behavior are really suffering.
- How can we say to a woman that their child did not live long enough to qualify and the law does not recognize their child?
- This will be hurting more people than it is helping.
- To go to court to argue viability is difficult, as it is not a precise measurement.
- 30 states recognize this problem and offer protection all through the gestational process.

**Devon Chaffee** (ACLU of NH) (provided written testimony)

- Supports the proper punishment for violence against pregnant women that causes the loss of their fetuses
- Such loss can result in serious physical and emotional injury that is rightfully recognized by current NH statute.
- This bill is unnecessary and inconsistent with existing law.
- NH has considered measures like this over a dozen times in the last two decades and has repeatedly rejected it.
- In 1990, a series of bipartisan negotiations resulted in recognizing the severe harm the death of a fetus causes and provides for enhanced penalties under RSA 631:1 and 631:2, including First and Second Degree Assault.
- SB66 takes a very different approach by recognizing a fetus as a person who can be an independent victim of a crime with legal rights that are distinct from the woman who was harmed.
- This threatens to pit the rights of the fetus against the rights of the mother and creates the legal basis for depriving women of their status as full persons under the law.
- In 2013, a study published in the *Journal of Health and Politics* found 413 cases where laws intended to protect the fetus were used to prosecute women. This includes states where there are explicit protections against a woman being prosecuted for her own conduct.
- This advances a larger agenda aimed at eroding reproductive rights.
- Although it holds a provision for abortion, if passed, it would further the strategy to establish the framework for overturning *Roe v. Wade*.
- There has been reference to the fact that the NH Supreme Court did highlight that there is an area of the law where if the woman dies in a homicide and the fetus is lost, that loss is not necessarily recognized under NH law.
- If the legislature wants to address that issue, the law could be amended to create enhanced penalties for those types of homicides.
- Would be happy to provide language for that.
- Would urge against a type of amendment that would contain an eight week limit, as that creates concerns for due process, enforcement, and protecting a woman's health in an emergency situations.
- Senator Gannon asked if there is any point prior to birth that the ACLU would support recognizing.
  - Thinks the current law recognizes the value of a fetus and the injury of the loss. Thinks there are other ways to recognize that loss further if the legislature wanted to move in that direction. The Study referenced earlier explains how these types of laws have been used to prosecute pregnant women. Doesn't want to go down the road of pitting fetal rights with women's rights

**Katherine Prudhomme -O'Brien (Right to Life) (provided written testimony)**

- This is a watered down version of a truly fair fetal homicide law.
- Viability is an unfair barrier to families who have lost their loved one through a criminal act.
- Alaska, Arizona, California, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia all have no viability standard.
- The laws in those states include the terms “unborn”, “any state of gestation”, “conception”, “fertilization” and “fetus”.
- Two states use the language “quick child”, one with 12 weeks and one with “outside the womb viability”.
- Massachusetts’ law is established by case law and is for 27 weeks.
- The majority of states have this simple and fair law.
- Offering justice should be the main thrust of this.

**Julie Gabrielson**

- Senior at UNH whose mother miscarried in 1995.
- According to the Constitution, to become a citizen, a person must be born a citizen and yet a fetus is not already born.
- Therefore, a fetus cannot be considered a citizen and they should not be offered the same protection under the law if it is not legally a citizen.
- Enforcing this law would be in direct violation of the Constitution.
- Determining the viability of an infant that is already dead may be impossible and therefore it would be unreasonable to enforce this law.

**Neutral Information Presented:**

**Mary Bidgood-Wilson (NH Nurse Practitioner Association) (provided written testimony)**

- Requesting a clarification on the bill.
- Section 2, V.(a)(3) lists “physician or other medical professional” and requests that, that be changed to “a licensed healthcare provider”.
- Many pregnant women in NH receive their care from nurse midwives and nurse practitioners.

**Honorable Leon Rideout**

- In 2009, there was a NH Supreme Court case, NH v. Lamy
- Mr. Lamy had been driving intoxicated and slammed into a taxi cab. The cab was driven by Brianna Emmonds who was seven months pregnant. Her passenger died of her injuries and Brianna was brought to the hospital. Dominic Emmonds had a heart beat when he arrived at the hospital, but by the time he was delivered he showed no spontaneous breathing and no detectable heartbeat. After 9.5 minutes doctors were able to stimulate his heart and put on a respirator. After two weeks he was removed from life support and died of his injuries, while never showing the ability to breathe on his own.
- The defense made a motion during the case to dismiss the case for Dominic, because it was not proven that Dominic had been born alive and the trial judge denied the motion. The defense appealed and successfully got the charge overturned because NH does not include the term “fetus” in the definition of “another”.
- NH also has the born alive rule that originally came about in the 1400s.
- 38 states have abandoned the born alive rule.

- The NH Supreme Court stated in part of their ruling “Should the legislature find the result in this case as unfortunate as we do, it should follow the lead of many other states and revisit the homicide statutes as they pertain to a fetus.”
- NH should pass a fetal homicide law because a law from the 1400s is not acceptable today.
- A child becomes a member of the family before birth.
- Nothing in this law criminalizes a miscarriage.
- The current law prevents families from getting any justice for their child.
- The mothers don’t want justice for themselves; they want justice for their child.
- This is a family issue
- Shared the story of his daughter Ashland, whose car was hit by a negligent driver. Her son, Griffin, was born alive via emergency C-section, but succumbed to his injuries.
- There are strong ironclad exclusions usually included in these bills for abortion.
- This has everything to do with a women’s right to choose to carry their child to term.
- These laws have already been challenged on the federal level and none of those challenges have been successful if abortion exclusions were included.
- There are claims that there have been injustices because of these laws, but they never actually claim those injustices involve the fetal homicide law.
- Often, the unborn child is the intended victim in a domestic violence.
- Would prefer an 8 week start, as research shows that spontaneous miscarriages occur mostly in the first seven weeks.
- Some would say this would interfere with in-vitro, but with eight weeks there would be no conflict.
- The 38 states with fetal homicide laws all have in-vitro clinics.
- California begins at eight weeks and is the oldest fetal homicide law in the country.
- California’s law was used in the Scott Peterson case and because of it, he was able to be sentenced to death because it was a double homicide.
- These states are protecting their unborn.
- Senator French asked if he is in favor of the bill as it is.
  - Doesn’t know if eight weeks is the appropriate thing. Would like to see a meeting in middle. Doesn’t think this bill as written would make it through the House. It needs some more work.

**Future Action:** Pending