

Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?

By ALISON TSAO*

Introduction

William Owen Dunson of Kansas City, Missouri came home on the evening of March 27, 1996, to find a phone bill that included \$281 in charges for 1-900 phone-sex calls.¹ When he yelled at his children and demanded to know who had made the calls, his twelve-year-old son said Dunson's pregnant daughter might have been responsible. In a fit of rage, William Dunson slapped his daughter's face, knocking her against a metal case, hit her leg with a croquet mallet, picked her up by the shoulders and shoved his knee into her abdomen.² He then went to play video games.³ His daughter was just thirteen years old and seven months pregnant. The fetus was pronounced dead the day after the beating.⁴ William Dunson was convicted on December 16, 1996, on numerous counts, including second degree fetal murder.⁵ The jury recommended a sentence of 103 years.⁶

On September 12, 1996, Airman Gregory Robbins of Ohio, came home to the military base housing complex he shared with his wife.⁷ He fought with his wife, Karlene, because "one of the couple's dogs had made a mess in the house and Robbins blamed his wife for the

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1. See Christine Vendel, *Death of Fetus is Ruled a Homicide; The Fatal Incident Last Month Involved Beating of Mother*, 13, KANSAS CITY STAR, Apr. 12, 1996, at C1; See also *Spotlight Story Missouri: Man Convicted of Fetal Murder*, 7 AM. POL. NETWORK 104, Dec. 17, 1996.

2. See Vendel, *supra* note 1, at C1.

3. See *id.*; see also *Spotlight Story Missouri*, *supra* note 1, at 104.

4. See Vendel, *supra* note 1, at C1.

5. *Id.*

6. See *Spotlight Story Missouri*, *supra* note 1.

7. See Janice H. Morse, *Fetal Verdict a First*, DAYTON DAILY NEWS, Dec. 10, 1996, at B1; see also *State Reports Ohio: Man Faces First Ohio Feticide Trial After Beating of Wife*, 7 AM. POL. NETWORK 144 (Feb. 25, 1997).

dog's behavior."⁸ He violently battered his wife, who as a result suffered a broken nose, a swollen eye, and a ruptured uterus. Karlene Robbins was nineteen-years-old at the time of the trial and thirty-four weeks pregnant. The fetus, which had been healthy and viable (fetuses generally are viable by the twenty-sixth week), died.⁹ Before Ohio passed a fetal homicide law in 1996, prosecutors could have charged Robbins only with assault. However, under the new Ohio feticide law, the killing or injury of a fetus—except through abortion—is prosecutable for murder, manslaughter or assault.¹⁰ Robbins pleaded guilty to assault, aggravated assault and involuntary manslaughter.¹¹ He was dishonorably discharged from the Air Force and sentenced to eight years in prison.¹²

Why have Missouri and Ohio, along with approximately half of the states, enacted fetal homicide (also known as feticide) laws? Under the common law and many homicide statutes, the intentional killing of a fetus did not constitute murder because murder requires live birth.¹³ In fact, the law viewed an assault resulting in fetal death and an assault on a non-pregnant woman as essentially the same crime. However, the new feticide laws may have the unintended, or perhaps intended, effect of undermining the right of a woman to an abortion.

In 1973, the United States Supreme Court's decision in *Roe v. Wade*¹⁴ established a constitutional right to abortion.¹⁵ Although the Court did not "resolve the difficult question of when life begins," it specifically stated that the Constitution applies the word "person" only post-natally.¹⁶ However, some commentators have argued that unborn children also have a right to life, liberty, and pursuit of happiness because they are members of "our Posterity," for whom the Con-

8. See Morse, *supra* note 7, at B1.

9. See *id.*

10. The new feticide statute is now incorporated into the criminal code, OHIO REV. CODE ANN. § 2903.09 (Anderson 1996).

11. Morse, *supra* note 7, at B1.

12. See *id.*

13. See *infra* notes 27-29.

14. 410 U.S. 113 (1973).

15. See *id.* at 153-54.

16. *Id.* at 158-59. The Constitution does not explicitly define "person." However, "person" is used in different parts of the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the provision outlining qualifications for the office of the President, Art. II, § 1, cl. 5, in the Extradition provisions, Art. IV, § 2, cl. 2, the superceded Fugitive Slave Clause 3; in the Fifth, Twelfth, Twenty-Second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. "[T]he use of the word [person] is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application. . . . [T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 157-59 (footnote omitted).

stitution specifically provides in the Preamble.¹⁷ Nevertheless, the Supreme Court in *Casey v. Planned Parenthood of Southeastern Pennsylvania*¹⁸ maintains that “viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”¹⁹ Arguably, the Court is reaffirming the state’s interest as protecting fetal life, and not establishing distinct legal rights for fetuses as “persons.”²⁰

Because a fetus is not a person under the Constitution, specifically for purposes of the Fourteenth Amendment, it can be legally and intentionally destroyed by the woman carrying the fetus, prior to viability, notwithstanding the state interest in maternal health and protecting potential human life.²¹ Thus, for state legislatures and courts to declare that it is murder when a person other than the mother kills that same fetus is arguably inconsistent with *Roe*. Indeed, some pro-choice advocates contend that criminal fetal-protection laws create a double standard for fetal rights and, in turn, come into tension with the right to an abortion.²² They reason that as the fetus is given more rights and status as a “person,” a woman’s right to abort it will become increasingly restrained.²³

Fetal murder of a non-viable fetus recognizes that what resides in the womb is a person. . . . If we are prosecuting a third party for killing an unborn child, it’s schizophrenic that a woman can choose an abortion for a child at the same date and we don’t call abortion murder.²⁴

However, fetal homicide statutes are not necessarily inconsistent with a woman’s right to an abortion. A defendant who assaults a pregnant woman and causes the death of her fetus is not similarly situated with the woman who aborts her fetus.²⁵ The woman has a constitutionally protected right to bodily autonomy, but the third party has no right to terminate the woman’s pregnancy. Moreover, society may achieve the broader social policy goals of curbing domestic violence and assault against pregnant women through use of feticide statutes. Supporters of feticide statutes argue that the focus is not on the fetus, but rather on the pregnant woman who has been “doubly harmed,

17. See James J. Lynch, Jr., *Posterity: A Constitutional Peg for the Unborn*, 40 AM. J. JURIS. 401, 403-04 (1995).

18. 505 U.S. 833 (1992).

19. *Id.* at 860 (reaffirming the central holding of the right to abortion established in *Roe v. Wade*).

20. *See id.*

21. *See Roe*, 410 U.S. at 162-63.

22. See Nina Schuyler, *Fetal Rights and Wrongs*, CAL. LAW., Mar. 1994, at 47-48.

23. *See id.*

24. *Id.* at 48 (quoting attorney Anne Kindt, Executive Director of the Right to Life League of Southern California).

25. *See State v. Merrill*, 450 N.W.2d 318, 321-22 (Minn. 1990).

. . . [as if] someone had been shot in the foot and in the process lost some of her toes."²⁶

Part I of this Note will discuss the traditional common law rule of a live-birth requirement for establishing legal personhood and the rationale for the recent enactment of feticide statutes. Part II will provide a broad overview of the different fetal homicide laws that have been enacted, as well as some that have failed to pass. Part III will outline the constitutional issues implicated by fetal homicide statutes. Part IV will briefly address the possible legal and social ramifications of vesting separate and distinct legal rights to preivable fetuses outside of the criminal context. Finally, Part V will propose a model uniform feticide statute to address the constitutional and policy concerns.

Part I: The Common Law Born Alive Rule

Under English common law, a child had to be born alive for homicide laws to apply. Sir Edward Coke enunciated the rule that emerged in the 17th century:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprison [i.e., misdemeanor], and no murder; but if the child be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.²⁷

Thus, if a "quickened"²⁸ fetus was killed, the offense was a "misprison," or misdemeanor. Live birth was required to prove that the child was alive in the womb at the time the injuries were inflicted.²⁹ Thus, only a child that was born alive and existed independently of its mother received protection under homicide laws.³⁰

American jurisdictions had adopted the English "born alive" rule by 1850.³¹ The primitive state of medicine during the common law period necessitated the "born alive" rule. First, the medical profession considered it impossible to determine whether a fetus was capa-

26. Schuyler, *supra* note 22, at 48 (quoting Christine Littleton, a UCLA law professor).

27. Sir Edward Coke, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 50 (1817).

28. "Quickening" is defined as the fetal movement felt by the mother. It occurs between the sixteenth and twentieth week of pregnancy. Margaret A. Miller, *Intentional Killing of Viable Fetus Not Murder*, 11 N. KY. L. REV. 213, 215 n.18 (1984).

29. See Katherine Folger, *When Does Life Begin . . . or End? The California Supreme Court Redefines Fetal Murder in People v. Davis*, 29 U.S.F. L. REV. 237, 239 (1994).

30. See *id.*

31. See Tony Hartsoe, *Person or Thing—In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 211 (1995).

ble of independent existence before the baby was born.³² Second, doctors could not accurately determine the cause of death of a fetus, thereby destroying the requisite causation element necessary to prove a murder.³³ In other words, a prosecutor could not prove that the death of the fetus was the result of a defendant's acts unless it was born alive and then subsequently died of injuries caused by the defendant. Only at birth, when a fetus was considered a person did it acquire separate legal rights, independent from its mother.³⁴ Although medical science has largely removed the rationale for the common law rule, today roughly half of the states still follow the traditional common law "born alive" rule.³⁵

Part II: Fetal Homicide Laws in the United States

Because the "born alive" rule was a consequence of the lack of sophistication of the medical profession, its erosion naturally came with advances in medical technology. Doctors can now determine with relative accuracy the exact stage of fetal development, and thus whether the fetus died as a result of injuries inflicted by third parties.³⁶ The common law "born alive" rule has thus been legislatively replaced with fetal homicide statutes in approximately half of the states.³⁷ A few states have judicially created feticide laws.³⁸ For example, the highest courts of South Carolina and Massachusetts created feticide laws pursuant to their power to declare substantive law.³⁹ States enacting feticide laws have done so in order to punish violent assaults against pregnant women and to protect the potential life of the fetus.⁴⁰ Some legislators also believe that feticide laws will decrease domestic violence, drunk driving, and child abuse.⁴¹

Although states are willing to protect the fetus from third parties, the degree of protection afforded to a fetus varies from state to state.

32. See Tracy A. Nelson, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119, 1122 (1984).

33. See *id.*

34. See *id.*

35. See Karen DeCrow, *The New Fetal Police: In the Fight Over the Fetus, Recent Cases Address Whether the State Can Control the Behavior of Expectant Mothers*, NAT'L L. J., Aug. 26, 1991, at 13.

36. See Wendy L. Schoen, *Conflict in the Parameters Defining Life and Death in Missouri Statutes*, 16 AM. J.L. & MED. 555, 562 (1990).

37. Pennsylvania recently passed a feticide bill, becoming the 26th state to adopt feticide legislation. See 1997 Pa. Legis. Serv. 44 (West 1997). See also Frank Reeves, *House Approves Bill to Penalize Killers of Unborn Children*, PITTSBURGH POST-GAZETTE, Sept. 23, 1997, at B8.

38. See DeCrow, *supra* note 35.

39. See *id.*

40. See, e.g., *supra* note 37.

41. See *infra* note 103.

Two commonly required elements of feticide are (1) the termination of a human pregnancy, and (2) the absence of consent by the pregnant woman.⁴² Some states require fetal viability; others do not.⁴³ Still others are silent on the question of viability.⁴⁴ This Note will analyze the feticide statutes according to the fetus' required stages of development, whether or not they require knowledge of the fetus and intent to kill, and the punishment they impose.

A. Fetal Development

1. Viability requirement

At least thirteen states require the fetus to be viable before it can be considered a homicide victim.⁴⁵ Their statutes specify a point in the pregnancy when the fetus becomes viable. For instance, Iowa's statute states that "[a]ny person who intentionally terminates a human pregnancy, . . . after the end of the second trimester of the pregnancy where death of the fetus results commits the crime of feticide."⁴⁶ Viability normally occurs between twenty-six and twenty-nine weeks gestation (at six to seven months), when the fetus has developed lungs that are capable of breathing air.⁴⁷ The states with viability requirements (including Iowa, New York, South Carolina, and Massachusetts) arguably adhere most closely to the *Roe* rationale, namely, that a fetus cannot be considered to have human qualities until it can survive independently outside of its mother's womb.⁴⁸

A number of states with viability requirements punish fetal homicide as manslaughter.⁴⁹ Under Georgia's feticide law, feticide is punishable by life imprisonment, as is murder.⁵⁰ In the case of Louisiana,

42. See discussion *infra* Parts II, A-B.

43. See *id.*

44. See *id.*

45. See generally DeCrow, *supra* note 35.

46. IOWA CODE ANN. § 707.7 (West Supp. 1997). See also N.Y. PENAL LAW § 125.00 (McKinney 1996) (defining homicide as including the killing of a "person or an unborn child with which a female has been pregnant for more than twenty-four weeks"); *State v. Horne*, 282 S.C. 444, 447 (1984) (creating a feticide law judicially instead of legislatively, using the state's highest court pursuant to its common law power to declare substantive criminal law, granted specifically by statute); *Commonwealth v. Lawrence*, 404 Mass. 378, 383-84 (1989) (rejecting the born alive rule in a murder case but not taking a position on the viability of the fetus).

47. See Schoen, *supra* note 36, at 565.

48. "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163.

49. See, e.g., FLA. STAT. ANN. § 782.09 (West 1996), MICH. COMP. LAWS ANN. § 750.322 (West 1996), MISS. CODE ANN. § 97-3-37 (1996), R.I. GEN. LAWS § 11-23-5 (1995).

50. See GA. CODE ANN. § 16-5-80 (1996).

if a person kills an "unborn child" intentionally or during the commission of listed felonies, then it is considered "first degree feticide," with a maximum penalty of fifteen years in prison.⁵¹

2. "Quickness" requirement

The "quickness" requirement is a remnant of the common law concept that a child achieves "animation" or a soul when it first moves.⁵² "Animation" was defined as "the infusion of a rational soul into the developing fetus," occurring some time between conception and birth.⁵³ Prior to this "quickening," or first fetal movement, the fetus was considered to be a part of the mother.⁵⁴ Presumably, states that have retained the quickness requirement reason that prior to the first movement of the fetus, a fetus has no life of its own, and thus cannot be considered an individual for purposes of being a homicide victim.⁵⁵

Approximately eight states have criminalized the killing of an "unborn quick child."⁵⁶ "Quickening," currently defined as the first sign of fetal movement felt by the mother, usually occurs between the sixteenth and twentieth weeks of pregnancy.⁵⁷ Seven of the eight states do not define "quick" in their feticide statutes.⁵⁸ Rhode Island alone defines "quick" as synonymous with viable.⁵⁹

3. No viability requirement

States more solicitous of fetal life have eliminated fetal viability requirements altogether. Their legislatures have declared that the killing of "a product of conception" is a criminal offense regardless of its gestational age. In certain states, this reasoning applies to zygotes⁶⁰—before the embryo has become a fetus.⁶¹ There, a person can

51. LA. REV. STAT. ANN. § 14:32.6 (West 1996). See also S.D. CODIFIED LAWS ANN. § 22-17-6 (1996), N.H. REV. STAT. ANN. § 631:1 subd. (1)(c) (1996). In South Dakota, a person is subject to 10 years imprisonment with a possible fine of \$10,000 if a person "intentionally kills a human fetus by causing injury to its mother." S.D. CODIFIED LAWS ANN. § 22-6-1 (1996). In New Hampshire, if a person "purposefully or knowingly causes injury to another resulting in a miscarriage or stillbirth" it is first degree assault, with imprisonment of not more than 15 years and a possible fine not greater than \$4000. N.H. REV. STAT. ANN. §§ 651.2(II)(a), 651.2 (IV)(a) (1996).

52. See Nelson, *supra* note 32, at 1121.

53. See *id.*

54. See *id.*

55. See *id.*

56. See *People v. Davis*, 872 P.2d 591, 621 (Cal. 1994) (Mosk, J., dissenting).

57. See Schoen, *supra* note 36, at 565.

58. *Davis*, 872 P.2d at 621 (Mosk, J., dissenting).

59. See R.I. GEN. LAWS § 11-23-5(c) (1995).

60. A zygote is the result of a sperm uniting with an ovum to form a single cell. See Schoen, *supra* note 36, at 563.

be criminally liable for destroying a mass of fertilized cells, even before the embryo has developed any discernible human organs. In Arizona, for example, the killing of an unborn child by injury to its mother is incorporated into the crime of manslaughter, without requiring that the fetus be viable.⁶² In Illinois, the crime is termed "the intentional homicide of an unborn child" and applies at any time from fertilization until birth.⁶³

Where viability is not a requirement, application of feticide statutes tracks not the life of the fetus, but the harm inflicted on the pregnant woman. For instance, Arizona groups the fetal homicide law with its manslaughter statutes and presumes culpability on injury to the mother of the fetus.⁶⁴ In contrast, Illinois requires that the defendant have knowledge of the woman's pregnant state.⁶⁵

4. *Statutes facially silent on issue of viability*

There are at least six states that proscribe the criminal killing of a fetus, but are silent on the issue of viability.⁶⁶ Some of these states require knowing intent to cause the death of the fetus.⁶⁷ Others prohibit feticide in the commission of listed felonies as part of their felony-murder statutes.⁶⁸ According to the dissent in *Davis*, California currently has the harshest fetal homicide law in the nation after the California Supreme Court handed down its decision interpreting California's murder statute in that case.⁶⁹ In 1970, the California Legislature had added the term "fetus" to its murder statute, which provides that "murder is the unlawful killing of a human being, or a fetus, with malice aforethought."⁷⁰ The *Davis* court held that the statute had no

61. See, e.g., ILL. COMP. STAT. ANN. ch. 38, para. 9-1.2(3)(b) (West 1996), MINN. STAT. ANN. §§ 609.266, 609.2661 (West 1996).

62. See ARIZ. REV. STAT. ANN. § 13-1103 A.5. (West Supp. 1994). Arkansas and New Mexico have similar statutes. See ARK. CODE ANN. §§ 5-13-201, 5-4-401 (Michie 1995), N.M. STAT. ANN. §§ 30-3-7, 31-18-15 (Michie 1996). When a person inflicts an injury on a pregnant woman in the commission of a felony that results in a miscarriage or stillbirth, it is first degree battery. See ARK. CODE ANN. § 5-13-201, N.M. STAT. ANN. § 30-3-7. In Arkansas, the punishment is no greater than twenty years imprisonment. See ARK. CODE ANN. § 5-4-401. In New Mexico, it is punishable by three years imprisonment with a possible fine of \$5,000. See N.M. STAT. ANN. § 31-18-15.

63. See ILL. REV. STAT. ch. 38, para. 9-1.2 subd. (b)(a)(3) (West 1996).

64. ARIZ. REV. STAT. ANN. § 13-1103 A.5. (West Supp. 1994).

65. See Ill. Comp. Stat. Ann. 5/9-1.2(3) (West 1996).

66. See *Davis*, 872 P.2d at 623 (Mosk, J., dissenting).

67. See generally UTAH CODE ANN. § 76-5-201, subd. (1)(a) (Michie Supp. 1997). See also IND. CODE ANN. § 35-42-6 (West 1996); N.H. REV. STAT. ANN. § 631-1(1)(c) (1995).

68. See generally LA. REV. STAT. ANN. § 14:32.6 (West 1996). See also S.D. CODIFIED LAWS § 22-16-1.1(c) (Michie 1996).

69. 872 P.2d at 621.

70. CAL. PENAL CODE § 187(a) (West Supp. 1998) (amended by 1970 Cal. Stats. Ch. 1311, § 1 at 2440).

viability requirement.⁷¹ The court based its decision based on the state's interest in protecting potential life, unhampered by a woman's constitutional privacy interest as in the case of therapeutic abortions.⁷²

Additionally, the dissent in *Davis* pointed out that the majority's interpretation of California Penal Code section 187(a) does not require that the defendant know of the existence of the fetus or intend to kill it.⁷³ In other words, the dissent's argument is that in California, a person can be prosecuted for the murder of a nonviable fetus even if the person did not know that the woman was pregnant. California is thus the only state in the United States where causing the death of a nonviable fetus that the actor neither knew or had reason to know existed can constitute a capital offense.⁷⁴

B. Intent/ Knowledge Requirement

Some states require that the defendant knew about the fetus and intentionally caused its demise before the defendant is charged with the crime of killing a fetus. For example, Nevada has enacted a law that states that the act of killing a fetus is criminal if "[a] person . . . willfully kills an unborn quick child, by any injury committed upon the mother of the child."⁷⁵ Other states, such as Florida, have placed some restrictions on the crime, stating that the act is criminal only if the unborn child is killed "by any injury to the mother of such child which would be murder if it resulted in the *death* of such mother."⁷⁶ A handful of states require that the offender must know that the woman was pregnant, in which case the crime is treated as first degree murder, but the death penalty would not apply.⁷⁷ In Minnesota, the crime attaches if there is premeditation or the act is committed "with intent to effect death of the unborn child or another" or

71. See 872 P.2d at 599.

72. See *id.* at 597.

73. See *id.* at 616.

74. See *Davis*, 872 P.2d at 615. Only first degree murder carries the death penalty, and it usually requires malice aforethought. In the felony-murder context (for example, a death that occurred in the course of a robbery), malice is implied. Other states require either fetal viability, intent/knowledge, or otherwise limit the punishment for a feticide conviction. See generally discussion Parts II, A-B.

75. NEV. REV. STAT. § 200.210 (1995). See also OKLA. STAT. ANN. tit. 21, § 713 (West 1996), WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West 1996).

76. FLA. STAT. ANN. § 782.09 (West 1996). See also GA. CODE ANN. § 16-5-80 (1996), MICH. COMP. LAWS ANN. § 750.322 (West 1996), MISS. CODE ANN. § 97-3-37 (1996), R.I. GEN. LAWS § 11-23-5 (1995).

77. See Ill Rev. Stat. ch. 38, para. 9-1.2, subd. (b)(a)(3) (1996). MINN. STAT. ANN. §§ 609.266, 609.2661 (West 1996), N.D. CENT. CODE §§ 112.1-17.1-01, 12.1-17.0-1-02, 12.1-32-01 (1996). In Minnesota and North Dakota, the crime of the "murder of an unborn child," where "unborn child" is defined as one that is "conceived, but not yet born," is also treated as first degree murder. *Id.*

while in the commission of certain enumerated felonies.⁷⁸ In Utah, feticide is a capital offense only if the actor caused the death of the unborn child "intentionally or knowingly."⁷⁹ This rule applies even in a felony-murder situation.⁸⁰ Otherwise, the punishment is at least five years imprisonment.⁸¹ In Indiana and Louisiana, the crime is called "feticide" where a person "knowingly or intentionally" terminates the pregnancy of another.⁸²

C. An Analysis of the Various Fetal Homicide Laws

Given this general overview of the different fetal homicide laws on the books in the several states, what are the attributes and flaws of these statutes?

The states that require viability argue that it is dictated by the logic of *Roe*. In *Roe*, the United States Supreme Court held that a woman had a constitutional right to abortion.⁸³ At issue was a Texas statute that prohibited unmarried pregnant women from getting abortions, with the state of Texas arguing that its statute's goal was to protect fetal life.⁸⁴ Based on the Due Process clause of the Fourteenth Amendment, the Court ruled that a woman's right to personal privacy encompassed the right to abort her nonviable fetus.⁸⁵ It also established the controversial trimester framework for legal abortions,⁸⁶ which was later set aside in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸⁷ Unlike the trimester framework, however, the distinction drawn in *Roe* between viable and non-viable fetuses re-

78. MINN. STAT. ANN. § 609.2661 (West 1996). Similarly, in North Dakota, if the unborn child is killed with express or implied malice or is killed in the commission of certain serious listed felonies, the crime also fits under the murder statute. N.D. CENT. CODE §§ 12.1-17.1-01, 12.1-17.0-1-02, 12.1-32-01 (1996). In both states the maximum penalty is life imprisonment. MINN. STAT. ANN. § 609.2661 (West 1996); N.D. CENT. CODE §§ 12.1-17.1-02, 12.1-32-01 (1996).

79. See UTAH CODE ANN. §76-5-201, subd. (1)(a) (Michie Supp. 1997).

80. See UTAH CODE ANN. §§ 76-5-202, 76-5-203 (Michie Supp. 1997).

81. See UTAH CODE ANN. § 76-5-203 (Michie Supp. 1997).

82. See IND. CODE ANN. § 35-42-1-6 (West 1996), LA. REV. STAT. ANN. § 14:32.6 (West 1996). In Indiana, the punishment is four years imprisonment, with a possible fine of no greater than \$10,000. See IND. CODE ANN. § 35-50-2-6 (West 1996). The Indiana Legislature passed a bill over Governor O'Bannon's veto to create stiffer penalties for feticide. Intentional killing of a viable fetus is now a Class A felony. Killing of a fetus during a crime involving aggravated battery carries a stronger penalty. See *Legislative Briefs: Senate Votes to Override Veto*, COURIER-J., Jan. 23, 1998, at B4.

83. See 410 U.S. at 154.

84. See *id.* at 150.

85. See *id.* at 152-53.

86. See *id.* at 164-65.

87. 505 U.S. 833, 870 (1992).

mains.⁸⁸ In the first trimester, the state cannot regulate abortion.⁸⁹ In the second, it can only regulate to protect the mother's health.⁹⁰ In the third trimester, however, after the fetus becomes "viable,"⁹¹ the state may proscribe abortions unless necessary to save the woman's life or health.⁹² Put differently, viability is the point at which the state's interest in the fetus becomes compelling. Only then is a fetus capable of "meaningful life outside the mother's womb," and state interference after viability has both "logical and biological justifications."⁹³

States with viability requirements for feticide laws are arguably most consistent with the constitutional significance of viability, as enunciated in *Roe* and remains relevant even after *Casey*. If a fetus obtains legal protection at viability, it is logical to conclude that this bright line applies in the criminal context as well. After all, it hardly seems fair for a pregnant woman to be allowed to abort her fetus legally prior to fetal viability and yet punish a third party who does essentially the same thing. This would give the fetus a different right to life depending on who attempted, or succeeded in, ending it. Lack of an intent requirement can accentuate this apparent inequity, for the pregnant woman who aborts intentionally terminates the life of the fetus, whereas a third party may have killed the fetus unintentionally or even accidentally (as in a vehicular manslaughter situation).

States that do not impose a viability requirement counter that abortion and criminal assault on a pregnant woman are different, and that comparison between them is irrelevant and unpersuasive.⁹⁴ With legalized abortion, the state must consider two competing constitutional interests: the privacy and liberty rights of the pregnant woman and the state's interest in protecting potential life.⁹⁵ There are no similar conflicting interests where a third party criminally attacks a pregnant woman; only the pregnant woman should control the destiny of the fetus, as she alone is carrying it to term and giving it life.⁹⁶ In addition, these states note that *Casey* diminished the importance of

88. "[T]he divergences from the factual premises of 1973 have no bearing on the validity of *Roe's* central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *See id.* at 860.

89. *See Roe*, 410 U.S. at 163.

90. *See id.* at 164.

91. The *Roe* Court defined "viability" as the point when the fetus is capable of sustaining existence outside the mother's womb. *See id.* at 164-65.

92. *See id.*

93. *Id.* at 163.

94. *See Davis*, 872 P.2d at 598.

95. *See Roe*, 410 U.S. at 162.

96. *See Wayne Johnson, Feticide Law Avenges Choice, Not Lives*, CHRISTIAN LEGAL SCI. Q., Fall 1994, at 12.

viability. The *Casey* Court held that “the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus” such that abortions can be regulated even prior to viability so long as this does not cause an “undue burden” on the woman seeking an abortion.⁹⁷ Otherwise, the state can protect potential life at all stages of pregnancy.⁹⁸

Ultimately, although the viability requirement fits within the abortion rights jurisprudence, it is not necessary due to the reduced importance of viability after *Casey*, the right of the woman to be free from violence, and the lack of any competing right in the attacker. Moreover, not requiring viability does not necessarily create enhanced rights in the fetus. Indeed, feticide laws may actually *reinforce* the right to abortion in that they protect the procreative choice of the woman to carry her fetus to term.⁹⁹

As opposed to states that enact feticide laws with or without a viability requirement, states that require that the criminal actor have knowledge of the existence of the fetus and intent to cause its demise contend that this requirement is more fair because it would be patently unjust to punish someone who attacked an “invisible” victim.¹⁰⁰ Since a large part of criminal law is premised on *mens rea*, or criminal intent, it goes against our notions of fundamental fairness to punish someone for the death of a fetus he neither knew or had reason to know existed.¹⁰¹

D. Current and Pending Legislation

There is a growing trend for states to give the fetus greater protection under criminal statutes,¹⁰² perhaps in part because domestic violence has reached our national consciousness in recent years, and feticide laws serve as a weapon to combat violence against women.¹⁰³ A wide variety of laws have been enacted, and a number of state legislatures are currently debating the passage of new or amended fetal homicide laws, though concerns about the potential conflict with le-

97. *Casey*, 505 U.S. at 846.

98. *See id.* at 877.

99. The California Supreme Court in *Davis* stated that “the state’s interest extends beyond the protection of human life. The state has an interest in punishing violent conduct that deprives a pregnant woman of her procreative choice.” 872 P.2d at 603 (Kennard, J., concurring).

100. *See Davis*, 872 P.2d at 615 (Mosk, J., dissenting).

101. *See id.*

102. *See supra* Parts II, A-B.

103. Attaching feticide amendments onto domestic violence bills, as in the cases of Wisconsin and Kentucky, suggests that perhaps legislators see feticide as occurring primarily in domestic abuse situations, which is in fact often the case. *See James K. Ribe et al., Blows to the Maternal Abdomen Causing Fetal Demise: Report of Three Cases and a Review of the Literature*, J. FORENSIC SCI., Sept. 1993, at 1092, 1092-96.

galized abortion remain.¹⁰⁴

In February 1995, a proposed bill would have changed Tennessee's existing feticide law, which requires viability,¹⁰⁵ to allow for murder charges where the embryo had a heartbeat, which occurs well before viability, within three to six weeks after conception.¹⁰⁶ The bill failed to pass.¹⁰⁷ In 1997, the Wisconsin Assembly passed a feticide bill as part of its omnibus domestic violence legislation bill in 1997.¹⁰⁸ The statute sets strict penalties for batterers who assault and kill women, with even stricter penalties if the woman is pregnant, and both she and her fetus die.¹⁰⁹ The statute explicitly does not criminalize abortion.¹¹⁰ In 1996, Ohio passed a comprehensive feticide law that is now incorporated into its murder, manslaughter, and assault statutes.¹¹¹ And the Pennsylvania Legislature passed a similarly comprehensive feticide law in September 1997, which Governor Ridge has signed into law.¹¹²

In contrast, two states, Virginia and Kentucky, have failed to pass fetal homicide bills in recent years. Although Virginia's bill was aimed only at viable fetuses, the legislation became hopelessly entangled in the abortion debate.¹¹³ In Kentucky, the legislature passed a domestic violence bill but did not pass the attached feticide amendment.¹¹⁴

Certain states are still reluctant to pass fetal homicide laws.¹¹⁵ Half of the states even maintain the antiquated born alive rule,¹¹⁶ which no longer has any significance given modern medical technol-

104. See, e.g., *Lawmakers in Three States to Propose Abortion Legislation*, WLN, Jan. 10, 1997, available in 1997 WL 14261.

105. See TENN. CODE ANN. § 39-13-214 (1997).

106. See Richard Locker, *Church Conservatives Study Political Strategy*, THE COMMERCIAL APPEAL, Feb. 14, 1995, at A1.

107. See *id.*

108. See Sharon Thelmer, *Fetal Homicide Bill Clears Assembly*, ASSOC. PRESS POL. SERV., June 11, 1997, available in 1997 WLN 2532146.

109. See David Callender, *Anti-Crime Bill on Fetuses Expected to Pass*, CAP. TIMES, June 24, 1995, at A8 (hereinafter Callender, *Anti-Crime Bill*); see also David Callender, *Reps Want Hurting Fetus to be Crime*, CAP. TIMES, June 29, 1995, at A3 (hereinafter Callender, *Reps Want Hurting Fetus*).

110. See Callender, *Reps Want Hurting Fetus*, *supra* note 109, at A3.

111. See OHIO REV. CODE ANN. §§ 2903.02, 2903.04 (Anderson 1996).

112. See *Ridge to Sign Fetal Homicide Bill*, INTELLIGENCER, Sept. 23, 1997, at A2. See also 1997 Pa. Legis. Serv. 44 (West 1997).

113. See Ellen Nakashima, *VA Debates Law on Fetal Homicide; Legislation Entangled With Abortion Issue*, WASH. POST, Feb. 26, 1996, at D1. See also Spencer S. Hsu, *Fetal Homicide Measure Falls in Virginia House; Parental Notification on Abortions Also Rejected*, WASH. POST, Mar. 5, 1996, at B4.

114. See Richard Wilson, *Domestic-Violence Bill Approved in Senate With No Amendments*, COURIER-J., Mar. 23, 1996, at A8.

115. See generally Nakashima, *supra* note 113 and Wilson, *supra* note 114.

116. See DeCrow, *supra* note 35, at 13.

ogy.¹¹⁷ Policy concerns, coupled with constitutional constraints, have made some state legislators and courts wary of giving fetuses greater protection in criminal statutes.¹¹⁸

Part III: Constitutional Implications and Public Policy Issues

Critics of fetal homicide laws view them as undermining abortion rights, as giving the fetus a legal status it does not now have.¹¹⁹ If we are to declare a nonviable fetus a “person” for purposes of criminal statutes, then presumably fetuses have a right to life under the Fourteenth Amendment, since no State can deprive “any person of life, liberty, or property, without due process of law.”¹²⁰ Abortion rights advocates fear that recognizing a fetus as a person in one context (criminal law) will naturally entail recognizing it as a person in the abortion context as well.¹²¹

On the other hand, supporters of feticide laws argue that the laws avenge choice, not lives.¹²² In the wake of *Davis*, Wayne Johnson addressed Justice Mosk’s argument that the decision, read in conjunction with California’s permissive abortion statutes, rendered a “distorted view of fetal life.”¹²³

Why should society punish someone who kills a fetus against the mother’s will? To ask the question is to answer it: because it is *against the mother’s will*. That is, the protected interest is the mother’s will, not the life of the fetus. . . . [Feticide laws] simply preserve the right of a pregnant woman to control the outcome of her pregnancy. . . . It protects pregnancy termination prerogatives. . . . By giving one individual the right to unilaterally end the existence of another human being (fetus or child) for any reason, we cannot say that the latter has any independent value.¹²⁴

This argument is not entirely satisfactory, however, because although it is persuasive to argue that feticide statutes reinforce a woman’s choice whether to carry her pregnancy to term, the fact remains that feticide statutes are generally criminal homicide statutes. The state prosecutes the defendant for ending the life of the fetus, not depriving a woman of her procreative choice. The state has also been described as vindicating the rights of potential *life*, not a woman’s

117. See Schuyler, *supra* note 22, at 48-49.

118. See generally Nakashima, *supra* note 113; Wilson, *supra* note 114.

119. See *id.*

120. U.S. CONST. amend. XIV, § 1.

121. See Callender, *Anti-Crime Bill*, *supra* note 109, at A8.

122. See Johnson, *supra* note 96, at 12.

123. *Id.*

124. *Id.*

choice.¹²⁵ Therefore, the troubling possibility remains, then, that defining a fetus as a person may infringe on the right to abortion.

A. Equal Protection

In *State v. Merrill*,¹²⁶ the Minnesota Supreme Court encountered an equal protection challenge to the state's 1988 feticide statute.¹²⁷ In *Merrill*, pregnant victim Gail Anderson died from gunshot wounds allegedly inflicted by the defendant Sean Merrill.¹²⁸ Ms. Anderson was carrying a twenty-seven or twenty-eight day old embryo that had yet to reach the fetal stage of development.¹²⁹ The coroner concluded that the embryo died due to the death of Anderson, as it was not viable.¹³⁰ It was unclear whether either Anderson or Merrill knew of Anderson's pregnancy when she was assaulted.¹³¹

The defendant in *Merrill* challenged the feticide statute on both equal protection and due process grounds. He claimed that he was unfairly treated under Minnesota's feticide statute, which exposed him to "serious penal consequences while others who intentionally terminate a nonviable fetus or embryo," namely, the mother and her doctor, are not subject to criminal sanctions.¹³² In other words, similarly situated persons, i.e., those that terminate the life of the fetus, are not treated similarly.¹³³ Pregnant women and their doctors can systematically abort fetuses while third parties are criminally prosecuted.¹³⁴

The Minnesota Supreme Court rejected Merrill's equal protection argument, reasoning that a third party attacker is not similarly situated with a pregnant woman and does not have the same constitutional rights with respect to the fetus.¹³⁵ A pregnant woman has a liberty and privacy interest in bodily autonomy and procreative choice.¹³⁶ The third party attacker, on the other hand, has no right to take that choice from the woman, nor does the state have any interest in protecting a third party who has harmed another person's fetus.¹³⁷ Supreme Court jurisprudence "does not hold that the state has no legitimate interest in protecting the fetus until viability. . . . [Rather, it]

125. See, e.g., *Davis*, 872 P.2d at 599.

126. 450 N.W.2d 318, 320 (Minn. 1990).

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.*

132. *Id.* at 321.

133. See *id.*

134. See *id.*

135. See *id.* at 321-22. The Minnesota Supreme Court's ruling is based on two questions certified to the court by the lower appellate court. See *id.* at 320.

136. See *id.* at 322.

137. See *id.* See also *Davis*, 872 P.2d at 597.

forbids the state's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent."¹³⁸ In situations where there is no conflict, the state has an interest in protecting potential life, and thus, to punish those that terminate that potential life.¹³⁹ Further, even if Ms. Anderson had intended to have an abortion, the defendant still has no right to kill her fetus, for a criminal statute should not turn on the fortuitous intent of the victim.

B. Due Process

As for the due process challenge in *Merrill*, the Minnesota Supreme Court held that the defendant could be criminally convicted of killing a one-month old embryo not yet at the fetal stage.¹⁴⁰ Like other state courts, the court rejected his fair warning argument and used the doctrine of "transferred intent,"¹⁴¹ i.e., if the defendant meant to harm the mother, his intent to harm could be transferred to her one month old embryo.¹⁴²

In states that do not require intent to kill or injure the fetus or knowledge that the woman is pregnant, however, feticide statutes may in fact run afoul of the Fourteenth Amendment's Due Process clause. If a defendant does not know the female victim is pregnant, for instance, the defendant has no warning of criminal liability for killing an invisible, non-viable fetus. In general, a law must give sufficient warning of prohibited behavior so that individuals may conduct themselves accordingly.¹⁴³ Critics of fetal homicide legislation therefore argue that a feticide statute with an indeterminate causation standard or without a meaningful intent requirement violates the Due Process clause of the Fourteenth Amendment due to vagueness and overbreadth, permitting the conviction of innocent people who have not engaged in criminal activity.¹⁴⁴

This view played some part in *Davis*, where the defendant tried to rob a woman emerging from a check cashing store. When she resisted, he shot her in the chest area.¹⁴⁵ She was five months pregnant and had a miscarriage due to the gunshot wound and loss of blood.¹⁴⁶

138. *Davis*, 872 P.2d at 597.

139. *See id.*

140. *See Merrill*, 450 N.W.2d at 323-24.

141. *Id.* at 323.

142. *See id.*

143. *See Rose v. Locke*, 423 U.S. 48, 50 (1975).

144. *See* Mark S. Kende, *Michigan's Proposed Prenatal Protection Act: Undermining a Woman's Right to an Abortion*, 5 J. GENDER & L. 247, 257-59 (1996). Broad feticide laws with no intent requirement resemble strict liability criminal statutes because it is irrelevant whether the wrongdoer knows if a woman is pregnant. *See id.* at 259.

145. *See id.*

146. *See id.*

The defendant claimed that he did not know that the woman was pregnant because she was overweight and that he had no intent to kill the fetus, as he had no knowledge of its existence.¹⁴⁷ In his dissent, Justice Mosk reasoned that to hold Davis criminally responsible for conduct that he could not reasonably anticipate would violate his right to due process under the Fourteenth Amendment.¹⁴⁸ The California Supreme Court rejected this argument, but the court conceded that although a person could be criminally charged for murder of a non-viable fetus, previous Courts of Appeals decisions had required viability, and their reading had expanded the scope of the statute to such an extent that it would be unjust to apply it to Davis *ex post facto*.¹⁴⁹

Due process concerns are also raised by the inherent difficulties with proving causation in alleged feticides. It has been argued that nonviable fetuses do not resemble human beings and are therefore unreasonably deemed murder victims.¹⁵⁰ Justice Mosk argued against enactment of feticide laws because the life of the nonviable fetus is very fragile.¹⁵¹ At seven weeks, the fetus is roughly the "size and weight of a peanut."¹⁵² Justice Mosk described a fetus of this age as "[a] being so alien to what we know to be human beings seems hardly worth being made the subject of murder."¹⁵³ Furthermore, scientific studies have indicated that many women have miscarriages, or "spontaneous abortions,"¹⁵⁴ in the first trimester of pregnancy, due to a variety of factors, including "genetic or developmental defects in the fetus, uterine abnormalities, maternal trauma, illness, or substance abuse, toxins in the fetal or maternal environment, etc."¹⁵⁵ Moreover, miscarriages occur much more frequently than is generally assumed, i.e., in at least 15% to 20% of all pregnancies, with substantial numbers "unreported or are very early and subclinical; some have estimated the true incidence to be as high as 50% to 78% [of all pregnancies]."¹⁵⁶ The natural fragility of the fetus makes it difficult to show causation.

147. The mother, Maria Flores, was 5 feet 1 inch tall, but weighed 191 pounds. Based on these dimensions, the perinatologist Thomas Moore testified that it was "'not likely' that on the date of the shooting a woman of Flores' stature would have showed her pregnancy when clothed and standing upright." See 872 P.2d at 615 (Mosk, J., dissenting).

148. See *id.*

149. See *id.* at 600.

150. See 872 P.2d at 614-15 (Mosk, J., dissenting).

151. See *id.* at 620.

152. *Id.* at 614.

153. *Id.* at 615 (quoting from Comment, *Is the Intentional Killing of an Unborn Child Homicide?*, 2 PAC. L.J. 170, 185 (1970)).

154. See *id.* at 620.

155. *Id.*

156. *Id.*

The issue will be particularly difficult in instances where the miscarriage does not occur until several hours or days after the mother has contact with the defendant, since natural complications could have intervened.¹⁵⁷

Such a showing, however, is a significant factor in proving that the defendant, and not some other unrelated factor, caused the death of a very immature fetus. Without proof of causation beyond a reasonable doubt, the conviction fails to satisfy due process.

C. Cruel and Unusual Punishment

The Eighth Amendment proscribes any "cruel and unusual punishment" for a criminal offense.¹⁵⁸ Judges and scholars hostile to fetal homicide statutes have therefore pointed out that where feticide constitutes murder, it could qualify as the "murder" for felony-murder purposes and result in a punishment of life without the possibility of parole or even death, an arguably disproportionate punishment for the crime.¹⁵⁹ In some states with the felony-murder rule, it is not necessary that the fetus be the target of the underlying felony.¹⁶⁰ Some fetal homicide statutes make no distinction between an intentional, unintentional or accidental killing of the fetus.¹⁶¹ Justice Mosk in his *Davis* dissent regarded the application of the felony-murder rule, where the murder victim is a fetus, as a "draconian" interpretation of the law.¹⁶² The felony-murder rule applies to a variety of unintended homicides resulting from

reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.¹⁶³

The defendant's state of mind with respect to the homicide is thus entirely irrelevant. In Justice Mosk's hypothetical,

an unarmed 18-year-old with no criminal record enters a store during business hours, intending to shoplift a can of spray paint; when a security guard accosts him, his nerve fails and he bolts for the door; in his haste he accidentally knocks a woman shopper to the floor; unknown to anyone the woman is 7 weeks pregnant, and the trauma of the fall causes her to miscarry.¹⁶⁴

157. *See id.* at 258.

158. U.S. CONST. amend. VIII, § 1.

159. *See* 872 P.2d at 617-18 (Mosk, J., dissenting).

160. *See id.*

161. *See id.* at 837.

162. *See* 872 P.2d at 618 (Mosk, J., dissenting).

163. *Id.* at 619 (quoting *People v. Dillon*, 668 P.2d 697, 719 (1983)).

164. *Id.*

Of course, this hypothetical goes to the extremes of the felony-murder rule as applied in a fetal homicide context, and the felony-murder rule is controversial even without the added dimension of making a fetus the subject of the murder. If criminal intent does indeed lie at the base of our criminal justice system, then a rule with such harsh consequences will be resisted when the defendant neither intended to kill the fetus nor knew of its existence.

D. State's Interests

In both the due process and the equal protection analysis, the state's interest is weighed against the interest of the individual.¹⁶⁵ Therefore, it is critical to determine exactly what state interests are served by fetal homicide laws. While some critics of feticide laws have regarded them as back-door attempts to undercut a woman's right to abortion by enhancing the rights of the fetus, supporters of feticide statutes have vehemently maintained that these laws address other important state objectives, such as honoring a woman's procreative choice and curbing domestic violence and drunk driving.¹⁶⁶ They argue that without the competing privacy concerns of the woman involved in the abortion context, the state has the unhindered interest of protecting potential human life and future citizens.¹⁶⁷ They argue that feticide laws actually preserve the pregnant woman's reproductive choice.¹⁶⁸ In a criminal assault context, a third party engages in conduct whereby a *wanted* pregnancy is terminated. While abortion is still a nationally divisive issue, it is difficult to dispute the fact that a third party has no constitutionally protected interest to kill someone else's unborn child.¹⁶⁹

Finally, some feticide statutes have been passed as part of a general scheme to combat domestic violence and drunk driving.¹⁷⁰ Increasingly state legislatures are amending domestic violence bills with fetal homicide laws, for very often, the party who kills the fetus is not a street mugger, but an ex-boyfriend, husband, or enraged father.¹⁷¹

Likewise, as drunk driving is increasingly condemned in our society, legislators have made vehicular homicide statutes stiffer by tack-

165. See *supra* discussion in Parts III, A-B.

166. See Thelmer, *supra* note 108; Richard E. Schroeder, *Society Must Punish Drunk Drivers*, ST. LOUIS POST-DISPATCH, Jan. 12, 1996, at C14.

167. See Johnson, *supra* note 96, at 12.

168. See *id.*

169. See Joy Powell, *Homicide Law Doesn't Cover Fetus in Crash*, OMAHA WORLD-HERALD, Feb. 20, 1997, at 1. See also Davis, 872 P.2d at 597.

170. See generally WIS. STAT. ANN. § 940.04 (West 1997).

171. See Vendel, *supra* note 1, at C1. See also Petula Dvorak, *Boyfriend Arrested in Woman's Killing*, NEW ORLEANS TIMES-PICAYUNE, Feb. 8, 1997, at B3.

ing fetal homicide provisions onto them.¹⁷² Courts, in turn, have been readily receptive to making a fetus a victim of vehicular homicide.¹⁷³ For example, on October 21, 1996, Frank Flores Cuellar was found guilty of manslaughter in the death of Krystal Zuniga, whose mother was seven and a half months pregnant at the time of the car crash.¹⁷⁴ He was sentenced to sixteen years in prison.¹⁷⁵

E. The Mother's Interest

Another difficult question arises when an expectant mother terminates the life of the fetus other than by legal abortion. For instance, a woman may ingest fatal drugs or consume a large quantity of alcohol, or more directly, shoot herself in the stomach.¹⁷⁶ In 1996, a Wisconsin trial judge approved a district attorney's request to give the state custody of an eight-month-old fetus.¹⁷⁷ The fetus' twenty-three year-old pregnant mother was a crack addict who refused to stop smoking the drug during her pregnancy and was ordered hospitalized until after the birth of her child.¹⁷⁸ Her baby was born healthy, but the woman continued to challenge the court's decision.¹⁷⁹ In 1997, the Wisconsin Supreme Court ruled that "the state had acted wrongfully in taking custody of a fetus by detaining a pregnant woman who was using drugs, . . . [because] a fetus is not a child under the state's welfare laws. . . ." ¹⁸⁰

Should a pregnant woman get more lenient treatment than a third party, or perhaps, no punishment at all, simply because it is her fetus nestling within her womb? Many courts have answered in the negative. For example, a Florida appellate court affirmed a manslaughter conviction against Kawana Ashley who in 1994 shot herself in the stomach while in the third trimester of her pregnancy.¹⁸¹ The shooting caused the baby's premature birth and subsequent death fif-

172. See Schroeder, *supra* note 166 at C14. See also Powell, *supra* note 169, at 1.

173. See, e.g., *Teenager Indicted for Murder of Fetus*, NATION, Oct. 6, 1995, at A7. See also *State Reports Ohio: Man Charged With Vehicular Homicide in Fetal Death*, 7 AM. POL. NETWORK 116 (Jan. 14, 1997).

174. See *Man Gets 16 Years for Death of Premature Baby Delivered After Crash*, DETROIT NEWS, Oct. 22, 1996, at 5A.

175. See *id.* See also *State Reports Ohio*, *supra* note 173.

176. See Stephanie Stone, *Court Affirms Manslaughter Conviction of Expectant Mom Who Shot Herself in Stomach*, WLN, Mar. 29, 1996, available in 1996 WL 2642.

177. See Alison Delsite, *When Does Life Begin?* SUNDAY PATRIOT-NEWS, Dec. 15, 1996, at F1.

178. See *id.*

179. See *id.*

180. Tamar Lewin, *Detention of Pregnant Woman for Drug Use is Struck Down*, N.Y. TIMES, Apr. 23, 1997, at A16.

181. See *id.* See also Stephanie Stone, *Court Affirms Manslaughter Conviction of Expectant Mom Who Shot Herself in Stomach*, Mar. 29, 1996, available in 1998 WLN 2642.

teen days later.¹⁸² In another case, nineteen-year-old Ayana Landon, desperate to end her pregnancy, illegally obtained and ingested a drug she knew could cause a miscarriage.¹⁸³ She sat on a toilet and gave birth to a one-pound, seven-ounce boy, watched his body wriggle, and then closed the lid.¹⁸⁴ “[T]he infant, whose viability was doubtful, was born alive but drowned. Landon was charged with homicide and awaits trial. . . .”¹⁸⁵

The foregoing cases of maternal-induced fetal homicide are deeply unsettling, legally as well as emotionally. Assuming that the fetuses were not viable, both women could have gotten a legal abortion at a clinic based on their constitutional right.¹⁸⁶ Yet they are charged with criminal fetal homicide for killing their fetuses by a non-state approved method. In effect, abortion becomes murder based simply on the means employed to reach the exact same end.

Not surprisingly then, many advocates of women’s rights vehemently oppose expanding the fetus’ rights fearing the measures intended to protect pregnant women could be used against them, exposing those who are alcoholics or drug addicts to prosecution and ultimately abolishing any right to abortion.¹⁸⁷ It is still too soon, however, to tell how the courts will answer the inevitable challenge by some women that their convictions infringe upon their right to abortion. Courts may very well decide that although a woman has a right to abort her previable fetus, she must do it in a safe and sanitary manner prescribed by the state.

After all, by regulating abortion, the state attempts in part to prevent “botched” abortions that may leave children alive but seriously impaired. Take, for instance, the case of Brenda Drummond, a Canadian woman who attempted to kill her child by inserting the muzzle of an air rifle inside herself and shooting the baby she had carried for nine months.¹⁸⁸ Baby Jonathan was born in Drummond’s bathroom and rushed to a hospital where doctors operated to remove the projectile.¹⁸⁹ At seven months, he appeared to be in good health, but doctors said it was too soon to tell if he sustained brain damage through his mother’s actions.¹⁹⁰ In other cases—of maternal drug abuse or neglect—the fetus may not die, but may be born a “crack baby,” for

182. *See id.*

183. *See Delsite, supra* note 177, at F1.

184. *See id.*

185. *Id.*

186. *See supra* Introduction.

187. *See id.*

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

189. *See id.*

190. *See id.*

example, with serious disorders. Thus, although a pregnant woman has a right to bodily autonomy, she presumably does not have a right to mutilate her child in utero. Even if she successfully terminates her pregnancy, the state still has a general interest in her and her child's health and safety.

Part IV: Other Social/Legal Implications

Aside from criminal fetal homicide laws, the fetus is gaining legal rights in other areas as well. For example, a number of states have given even non-viable fetuses legal status as beings to be compensated for in wrongful death actions.¹⁹¹ Also, feticide laws may have implications in unexpected areas. Selective reduction, for instance, is a medical practice of killing one or more fetuses, but not all, of a multiple pregnancy when a woman has elected in-vitro fertilization.¹⁹² Doctors systematically and routinely kill off multiple fetuses in this clinical context, since multiple pregnancy increases the health and sometimes life risks for the mother and often produces weaker babies.¹⁹³ Admittedly, the reasons involved in selective reduction are medical, and not moral in nature, but the procedure still involves termination of fetuses outside the generally approved parameters of legal abortion. It therefore remains to be seen if this practice will be challenged.

Feticide laws may have implications in still more areas, for example in the private lives of pregnant women generally. If courts can prohibit a pregnant woman from ingesting drugs or alcohol because it endangers her fetus, then presumably they could also forbid her from engaging in sexual activity or jogging for the same reason,¹⁹⁴ and function as a pregnancy police of sorts.¹⁹⁵ Likewise, beyond prohibiting conduct, if the law recognizes the fetus as a person, could the fetus then count as an extra person in a car pool lane?¹⁹⁶ Could parents who are expecting a child claim him/her on their tax returns? Thus, while feticide laws address a serious problem, their future to establish

191. See Frances A. McMorris, *Courts are Giving New Rights to Fetuses*, WALL ST. J., Sept. 4, 1996, at B1.

192. See David P.T. Price, *Selective Reduction and Feticide: The Parameters of Abortion*, 1988 CRIM. L. REV. 199.

193. See *id.* at 202. "Morbidity and mortality are increased in both mother and baby in multiple pregnancy. The mother faces a greater risk of developing polyhydramnios (excessive amniotic fluid), pre-eclampsia, hypertension, hemorrhage and a complicated labour." *Id.* at 204-05.

194. Granted, there is a distinction in terms of the level of risk involved.

195. See Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 613 (1986).

196. Some courts have already rejected this argument. See Tamar Lewin, *Detention of Pregnant Woman For Drug Use is Struck Down*, N.Y. TIMES, Apr. 23, 1997, at A16.

limits on how far a state may go in treating a fetus like a person could create a slippery slope of unexpected consequences.

Part V: Proposed Fetal Homicide Statute

Feticide laws should be separately enacted and should not be included in general homicide statutes because of a fetus' inherent fragility and the difficulty in proving causation. They should also require knowledge and intent to kill the fetus, making them consistent with other homicide statutes and obviating due process problems of notice to the defendant. Moreover, feticide should not be made part of felony-murder, in order to ensure that a defendant knows of the existence of the fetus and specifically intended to kill it.

The following model feticide statute would protect fetal life and pregnant women from criminal assault, yet vitiate the constitutional concerns of many feticide law critics, through its requirement of specific intent.

Model Feticide Act

A bill to define certain crimes against human fetuses, to prescribe penalties for such offenses and to allow certain exemptions.¹⁹⁷

Sec. 1 If a person knows or has reason to know that a woman is pregnant and maliciously or recklessly injures that woman by committing or attempting to commit a crime and that injury results in a miscarriage or serious physical injury to the fetus, the person is guilty of a felony and shall be imprisoned by not more than fifteen years. The imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the underlying crime or attempt to commit the crime.

(a) "Serious physical injury to the fetus" means an injury to the fetus' physical condition that results in or is likely to result in substantial bodily disfigurement to or seriously impairs the function of a body organ or limb of the child that develops from the fetus.

(b) As used in this act, "fetus" means the unborn offspring of a human being at the second trimester of fetal development or thereafter, i.e., the fetus is at least twelve weeks old.

Sec. 2 "Maliciously" means any of the following:

(a) With the intent to cause the death of the fetus or the fetus' mother

(b) With the intent to cause serious physical injury to the fetus or the fetus' mother

197. Portions of this proposed model feticide act are excerpted from Michigan's Senate Bill 515, "The Crimes Against the Unborn Child Act" and Michigan's House Bill 5531, also known as the Baird Alternative to Senate Bill 515, taken from Kende, *supra* note 144, at 263-65.

(c) In willful or reckless disregard of the likelihood that the natural tendency of the assault, infliction of injury, or other action taken will be to cause the death of, or serious physical injury to, the fetus or the fetus' mother.

Sec. 3

(a) Feticide as defined herein shall not be deemed murder for purposes of the felony-murder rule.

(b) Capital punishment shall not be imposed.

Sec. 4 Exemptions. This act does not apply to any of the following:

(a) An act committed by the mother of the fetus

(b) Good faith performance of medical practice. A medical procedure performed by a physician or other licensed medical professional at the request of the mother of a fetus or the mother's legal guardian or the lawful dispensation or administration of lawfully prescribed medication.

(c) An act committed in lawful self-defense or defense of another, or which is otherwise legally justified or excused.

Part VI: Conclusion

Fetal homicide regulation/criminalization varies among the states. Although critics argue that the laws are inconsistent with the right to abortion, legal abortion and protection for fetuses from criminal assault by third parties can coexist, as abortion and feticide are not synonymous. With legal abortion, the courts balance a woman's right to procreative choice with the state's interest in protecting potential life. Criminal assailants, on the other hand, have no protectable interest in killing the fetus of a woman who wants to carry it to term. Thus, protecting fetal life with feticide statutes need not undermine abortion rights, particularly if the statutes explicitly exempt abortion of the fetus by the pregnant woman and her doctor. Rather, feticide statutes cannot only punish the assailant for the criminal behavior, but actually protect the woman's procreative choice as well. Thus, fetal homicide laws, a growing trend among state legislatures, achieve the desirable social goals of punishing violent assaults, preserving a woman's procreative choice, protecting the potential life of the fetus, and curbing domestic violence, drunk driving, and even child abuse where the pregnant woman is very young.

Yet lost in all the legal wrangling over the status of a fetus are the voices of those who have lost their unborn children and grandchildren. No monetary compensation or jail sentence for the defendant can alleviate the sense of loss or bring back the life of an expected child. Nothing can console a woman who has become sterile due to her injury, forever barring her from ever having any children. Who can un-

derstand the loss of a child never born as the parents look at their baby's room, filled with tiny sleepers, booties, bottles, diapers, a crib, a car seat, and baby toys?¹⁹⁸

198. See Delsite, *supra* note 177, at F1.

