ABANDONMENT AND RECONCILIATION: ADDRESSING POLITICAL AND COMMON LAW OBJECTIONS TO FETAL HOMICIDE LAWS

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ABSTRACT

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.

Although most states have recognized the crime of fetal homicide, fourteen have not. This is largely the result of two independent obstacles: (judicial) adherence to the born-alive rule and (legislative) concern that fetal homicide laws could erode constitutionally protected reproductive rights.

This Note explores a variety of fetal homicide laws that states have adopted, demonstrating that popular opinion has shifted toward recognizing this crime. It then directly confronts the objections that have prevented other states from adopting such laws: it first reviews the literature suggesting that the born-alive rule should be abandoned, as it is an obsolete evidentiary standard; it then argues that constitutionally protected reproductive liberties can be reconciled with, and in fact augmented by, punishing the killing of a fetus as a homicide.

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INTRODUCTION

> *It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.*[1]

The question of whether killing a fetus constitutes a homicide has been considered and debated for centuries. History's legal giants have weighed in on the issue,[2] countless law review articles and notes have tackled it,[3] and politicians at all levels have struggled with it.[4]

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1. Oliver Wendell Holmes, Justice of the Supreme Judicial Court of Mass., The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 469 (1897).

2. *E.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES *125–26 ("For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor."); 2 HENRY DE BRACTON, THE LAWS AND CUSTOMS OF ENGLAND 341 (Samuel E. Thorne trans., Belknap Press 1968) (1257) ("If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus be already formed or quickened, and especially if it be quickened, he commits homicide."); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (London, Clarke & Sons 1809) ("[I]f a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder . . . .").

3. *E.g.*, Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 392 (2007) (addressing the legal personhood of fetuses); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 625 (1987) (comprehensively surveying the historical treatment of feticide and arguing that the born-alive rule was purely evidentiary); 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, 237 (1995) ("It is difficult to say what the status of the fetus is in North Carolina. While there is some case law and several statutes on the subject, there is an overall paucity of law—case or statutory—that defines the legal status of the fetus."); Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 WM. MITCHELL L. REV. 767, 777 (2007) ("The criminal law, at least in recent years, has been moving briskly toward the recognition of the personhood of the unborn."); Luke M. Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process*, 87 B.U. L. REV. 1177, 1178 (2007) ("If you take a hard look around, you might get the sense that our society is drifting toward a bifurcated narrative of the human fetus. One line of the fetal narrative is epitomized by the restructuring of criminal codes in order to protect fetuses from acts of violence. . . . [T]here is, of course, another line of the fetal narrative. This is the fetus's near-absolute subordination to maternal liberty . . . ."); Laura E. Back, Note, *Improperly Performed Abortion as Fetal Homicide: An Uneasy Coexistence Becomes More Difficult*, 18 HASTINGS WOMEN'S L.J. 117, 119 (2007) (observing that "someone who assists a woman in terminating a pregnancy can be charged with murder" and exploring the "constitutional bases for challenging such a result"); Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY

Historically, largely because of technological limitations, the consensus[5] was that a fetus could not be killed (in the legal sense) unless it was first born alive.[6] In the twentieth century, though, medical technology advanced significantly,[7] and this consensus began to erode.[8] Beginning in the 1970s, American jurisdictions have gradually moved toward a new consensus, and, as of 2009, thirty-six states punish killing a fetus as a form of homicide.[9]

Analytically, this topic is a difficult one—on one hand, it is hardly controversial to take the position that a fetus is a human organism[10] (though the legal personhood of a fetus is hotly debated[11]) and that, consequently, the killing of a fetus should not go entirely unpunished. But, on the other hand, those advocates of constitutionally protected reproductive rights balk at classifying all unborn children[12] as "human beings" for the purposes of homicide statutes.[13] The challenge, then, becomes appropriately protecting pregnant mothers and their unborn children while still maintaining reproductive freedoms.

L. REV. 1845, 1880 (2000) ("State legislatures interested in creating fetal homicide statutes should focus on the pregnant woman as victim, rather than on the fetus itself.").

4. *See infra* notes 157–59 and accompanying text.

5. *See Cass*, 467 N.E.2d at 1328 ("The rule [that the destruction of a fetus in utero is not a homicide] has been accepted as the established common law in every American jurisdiction that has considered the question.").

6. *E.g.*, White v. State, 232 S.E.2d 57, 57 (Ga. 1977) ("In order to convict for the murder of a newly born baby it is incumbent upon the State to prove that the child was born alive and had an independent and separate existence from its mother, and that it was slain by the accused." (quoting Logue v. State, 32 S.E.2d 397, 397 (Ga. 1944))).

7. *See infra* note 176 and accompanying text.

8. *See, e.g.*, State v. Soto, 378 N.W.2d 625, 631 (Minn. 1985) (Yetka, J., dissenting) ("Medical science certainly has progressed to the point of making the 'born alive' rule obsolete.").

9. Nat'l Right to Life, State Homicide Laws that Recognize Unborn Victims, http://www.nrlc.org/Unborn_victims/Statehomicidelaws092302.html (last visited Feb. 22, 2009).

10. *Cass*, 467 N.E.2d at 1325 ("An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb.").

11. *See, e.g.*, Melissa Boatman, *Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce*, 37 U. BALT. L. REV. 285, 299–303 (2008) (discussing the debate regarding the personhood of human embryos).

12. This Note uses "unborn child" and "fetus" interchangeably; no moral or ethical import is intended to attach to either term.

13. *See, e.g.*, Tara Kole & Laura Kadetsky, *Recent Developments: The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 235 (2002) ("[W]hile the Act may not legally affect the right to abortion, its rhetoric will likely color the abortion debate and the legal battles of the next century.").

This issue was thrust back into the public discourse with the 2007 death of Jenna Nielsen, a North Carolina mother of two.[14] Nielsen was eight months pregnant when she was murdered, and her unborn son perished soon after.[15] Because North Carolina does not recognize the killing of an unborn child as a homicide, Nielsen's murderer could not be charged for the death of the fetus.[16] The story gained traction, the community held vigils, and the public called for legal change.

In the aftermath of Nielsen's death, Kevin Blaine, Nielsen's father, used this public clamor to lead a fight to reform the North Carolina homicide statute.[17] Blaine sought an amendment to the statute that would recognize unborn children as potential victims of homicide,[18] and state representatives and senators ultimately introduced bills to this end.[19] If the legislature passed such an amendment and enacted a new law, North Carolina would become the thirty-seventh state to recognize this crime, leaving only thirteen others that have not done so.[20]

But the legislature must weigh very carefully a countervailing concern: the potential erosion of constitutionally protected reproductive freedoms. Many pro-choice advocates understandably worry that fetal homicide laws encroach on reproductive freedoms and could ultimately result in the outlawing of abortion altogether.[21] Couched in these terms, it is unsurprising that many oppose the passage of a fetal homicide law, not because they do not wish to protect the life of a fetus, but because the issue implicates the politics of reproductive rights.[22]

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14. *Jenna Nielsen Murder Investigation*, WRAL.COM, June 22, 2007, http://www.ncwanted.com/ncwanted_home/story/1525864.

15. *Id.*

16. *See infra* note 23.

17. Erin Coleman, *Pregnant Mom's Slaying Could Help Change Fetal Homicide Law*, WRAL.COM, June 29, 2007, http://www.wral.com/news/local/story/1547056.

18. *Id.*

19. *Id.*

20. Marisol Bello, *Slain Woman's Family Wants N.C. Fetal Homicide Law*, USA TODAY, July 8, 2007, http://www.usatoday.com/news/nation/2007-07-08-carrier_N.htm.

21. *See, e.g.*, *id.* ("Janet Crepps, a staff attorney for the Center for Reproductive Rights, says fetal homicide laws are part of a broader agenda by abortion opponents to create legal rights for a fetus in order to set precedents that will help them ban the procedure.").

22. *See, e.g.*, Kole & Kadetsky, *supra* note 13, at 235 ("While the [Unborn Victims of Violence] Act disclaims its power to affect abortion rights, the substance of the UVV appears to contradict the fundamental premises of abortion law . . . .").

Similar to this political objection to legislative recognition of fetal homicide, the judiciary faces an obstacle of its own. Interpreting homicide statutes to exclude the killing of a fetus generally results from applying the common law "born-alive" standard.[23] Under this standard, as its name indicates, a child is not capable of being killed, in the legal sense, unless it has first been born alive.[24] A rule of necessity in previous centuries,[25] the standard reflects the mystery that surrounded pregnancy and the child's development in the womb.[26] The courts that have extended the scope of homicide statutes to reach the killing of a fetus have had to address and overcome this common law hurdle.[27]

Two distinct obstacles thus work in concert to frustrate the institution of fetal homicide laws: the first is the political concern that treating feticide[28] as homicide would erode constitutionally protected reproductive freedoms; the second is judicial reluctance to abandon the born-alive standard. Though fetal homicide is a morally and philosophically complex issue, this Note operates on a more practical level by confining itself to addressing only these two fundamental obstacles.

After synthesizing states' various approaches to these impediments,[29] this Note lays out methods and rationales for overcoming these hurdles. First, relying on Clarke D. Forsythe's oft-cited work,[30] this Note addresses the judicial, common law obstacle by showing that the born-alive standard was never intended to substantively define the term "human being."[31] In so doing, it argues that this standard, properly understood, should not prevent a

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23. *See, e.g.*, State v. Beale, 376 S.E.2d 1, 4 (N.C. 1989) ("We conclude that defendant may not be prosecuted under N.C.G.S. § 14–17, as it now exists, for the killing of a viable but unborn child.").

24. *See infra* Part I.B.

25. Forsythe, *supra* note 3, at 575 ("[T]he health of the child *in utero* could not be established unless and until the child was observed outside the womb."); *see also infra* Part I.B.

26. *See infra* Part I.A.

27. *See, e.g.*, Hughes v. State, 868 P.2d 730, 735–36 (Okla. Crim. App. 1994) ("Oklahoma, by means of this decision, joins a minority of two states whose courts have expressly rejected the ancient, yet obsolete, born alive rule.").

28. Throughout this Note, "feticide" refers to the killing of an unborn human child, irrespective of how the law treats that killing. "Fetal homicide" refers to treating this killing similarly to a traditional homicide.

29. *See infra* Parts II–III.

30. Forsythe, *supra* note 3, at 625.

31. *See infra* Part IV.A.

homicide statute from reaching the killing of a fetus. Second, this Note argues that fetal homicide laws do not meaningfully encroach on constitutionally protected reproductive rights but rather complement and even augment those rights.[32] Accordingly, the desire to protect a woman's constitutional right to an abortion should not counsel opposition to fetal homicide legislation.

This Note proceeds as follows: Part I briefly explores the historical treatment of feticide, including both the meaning of "quickening" and the born-alive standard. This Note then discusses the treatment of feticide in the states: Part II explores the laws of a variety of states that recognize feticide as homicide, and Part III then considers the laws of those states that do not. Finally, Part IV confronts the rationales discussed in Part III, explaining, first, why the born-alive standard should be abandoned and, second, why fetal homicide laws do not impinge on reproductive freedoms.

I. HISTORICAL TREATMENT OF FETICIDE

Historically, feticide was governed entirely by the born-alive standard: a fetus that was never born alive could not have been killed in the legal sense.[33] This Part first considers the medical circumstances that produced this standard and then explores how the law has treated feticide historically.

A. Medical Standards

In the sixteenth and seventeenth centuries, when the born-alive standard became entrenched in the criminal law, medicine was still in its infancy.[34] Much of the human body's operation was simply beyond the scientific understanding of the day. As a result, in the context of pregnancy and fetal development, physicians relied exclusively on

32. *See infra* Part IV.B.

33. State v. Beale, 376 S.E.2d 1, 2 (N.C. 1989) ("[T]he common law rule [is] that a viable fetus cannot be the subject of murder unless it was born alive and subsequently died of injuries inflicted prior to birth."). For a comprehensive survey of the historical developments of feticide and the born-alive standard, see generally Forsythe, *supra* note 3. Courts considering the born-alive rule have frequently relied on Forsythe. *E.g.*, State v. Trudell, 755 P.2d 511, 513 (Kan. 1988); Commonwealth v. Morris, 142 S.W.3d 654, 657 (Ky. 2004); Hughes v. State, 868 P.2d 730, 732 (Okla. Crim. App. 1994).

34. *See* Forsythe, *supra* note 3, at 571 (discussion the "primitive" state of medicine at the time the born-alive standard developed).

external observations[35] to verify the vitality of the unborn child.[36] Thus, without external signs of life, it was presumed that the fetus was not living.[37]

Although doctors of the time generally understood how a woman became pregnant, they were at a loss to determine at an early stage whether a given woman was in fact pregnant.[38] Doctors could observe external signs that manifest in the first few months of pregnancy, including the ceasing of periodic discharge and the firming of the breasts, but these observations were indefinite.[39] Without proof of the existence of the fetus itself, it was impossible to determine that these signs were not caused by an unrelated occurrence—illness of the mother, for instance.[40]

Because medicine could not explore or understand the body's internal functioning, a woman was not unequivocally "pregnant" until the existence of the fetus was ascertainable externally.[41] This occurred when the fetus "quickened"; that is, when the mother could feel the fetus move, usually in the fourth or fifth month of pregnancy.[42] It was only with this observable animation that medicine—and the law—deemed the child to be living.[43] In an age of primitive medicine, this fetal movement was the first significant event of a pregnancy.

Though quickening provided proof that the fetus was alive, it remained impossible to ascertain how healthy the child was while still in utero.[44] In this age, pregnancies by no means guaranteed successful births or healthy infants. Complications were commonplace and

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35. *See id.* (explaining that fetal movement, halfway through gestation, is the "most undoubted" sign of pregnancy).

36. *See id.* at 573 (discussing, specifically, fetal movements and heartbeat).

37. *See* State v. Holcomb, 956 S.W.2d 286, 291 (Mo. Ct. App. 1997) ("The high rate of stillborn deliveries and miscarriages in earlier times created a presumption that an unborn child would die in the process of childbirth.").

38. *See id.* ("[U]ntil recent advances in medical technology, there was no way to determine, prior to the point of 'quickening' (when the baby is felt to move), whether the fetus was alive in the womb.").

39. Forsythe, *supra* note 3, at 571 (quoting VALENTINE SEAMAN, THE MIDWIVES MONITOR AND MOTHERS MIRROR 25 (New York, Isaac Collins 1800)). Indeed, it was not until the early twentieth century that modern pregnancy tests were developed. *Id.*

40. *Id.*

41. *Id.* at 573.

42. *Id.* at 571.

43. *Id.* at 573.

44. *Id.* at 575.

miscarriages were much more frequent than in modern times.[45] Accordingly, one could not declare with any certainty that a specific child was healthy until that child was born.[46] A live birth demonstrated not only that the child had been healthy while in the mother's womb but also that the infant was able to survive the stressful and demanding event of the birth itself. Once born alive, the mystery shrouding the child's in utero development and health faded, and the baby had successfully navigated the perils of pregnancy.

B. The Treatment of Feticide

The imprecise and undeveloped medical knowledge of pregnancy was reflected in the homicide laws of the time. If a pregnant woman was battered and the fetus was then miscarried or stillborn, there was no way to prove that the unborn child died as a result of the battery rather than from natural causes.[47] The legally required but-for causation was lacking: because physicians could not say that the fetus would have survived but for the assailant's attack, no homicide could ever be proved.

The requirement of live birth thus became central to charging the homicide of an unborn child. The birth demonstrated that the child was alive and healthy and capable of surviving outside of the mother's womb.[48] Sir Edward Coke, writing in the seventeenth century, provided one of the most oft-cited statements of the born-alive rule. Coke wrote:

> 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 dieth in her body, and she is delivered of a dead childe, this is a great misprision [misdemeanor], and no murder: but if the childe be born alive and dieth 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.[49]

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45. *See* State v. Holcomb, 956 S.W.2d 286, 291 (Mo. Ct. App. 1997) (discussing a "high rate of stillborn deliveries and miscarriages").

46. *See* Forsythe, *supra* note 3, at 575 (discussing common complications arising during pregnancy that rendered it difficult to determine that a fetus was alive).

47. *Id.* at 576.

48. *See id.* at 575 ("[L]ive birth was required to prove that the unborn child was alive and that the material acts were the proximate cause of death, because it could not otherwise be established if the child was alive in the womb at the time of the material acts.").

49. COKE, *supra* note 2, at 50.

Thus, if an assailant battered a pregnant woman who then gave birth to an injured—but living—child, the assailant could be prosecuted for murder if the child died because of the injuries it had suffered as a result of the assailant's attack.[50] This was the case even if the infant lived only for a moment after birth before succumbing to its injuries. The fact that the child was alive when born was sufficient to provide the otherwise lacking causation: because the live birth retroactively demonstrated that the child was healthy when attacked, it could then be determined that the child would have lived but for the assailant's battery.

Thus, the born-alive standard was necessary, in the absence of advanced medical knowledge and technological innovation, to prove that a criminal act ended an otherwise viable life.[51] It is this standard that U.S. courts and legislatures inherited[52] and that still is upheld in some jurisdictions.[53]

II. THE LAWS OF STATES THAT RECOGNIZE FETICIDE AS HOMICIDE

Killing a fetus[54] is punishable as a homicide in the majority of American jurisdictions,[55] a result that states have reached through judicial decisions, legislation, or both. Although the practical results of the states' approaches may be similar, the variations in the laws suggest how states that have not criminalized fetal homicide might prohibit and penalize it. Moreover, exploring the issues that arise within the context of existing feticide laws demonstrates that criminalizing feticide is not an all-or-nothing proposition; rather, judges and legislators can tailor the crime to best fit the political and moral views of the state's citizens.

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50. *Holcomb*, 956 S.W.2d at 291.

51. Forsythe, *supra* note 3, at 579 ("[T]hroughout the period of the common law, both the quickening doctrine and the born alive doctrine related entirely to *evidence* of life." (emphasis added)).

52. *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) ("The rule [that the destruction of a fetus in utero is not a homicide] has been accepted as the established common law in every American jurisdiction that has considered the question.").

53. *See infra* Part III.

54. These laws do not apply to abortions. *See infra* notes 186–87 and accompanying text.

55. *See* Nat'l Right to Life, *supra* note 9 (indicating that thirty-six states recognize fetal homicide).

A. Criminalizing Feticide through Judicial Decision

In some states, the killing of a fetus has been classified as homicide through judicial interpretation of the general homicide statutes. Reaching such a result requires state high courts to interpret the term "person" or "human being" in homicide statutes in such a way that includes an unborn child.[56] Although this definition may seem broad from a historical viewpoint, such an interpretation indicates that the courts are striving to interpret the laws in a way that accurately reflects modern scientific understanding.[57]

The born-alive standard was the common law rule for centuries, and every American jurisdiction that considered the issue accepted it.[58] Accordingly, to interpret the term "human being" in a homicide statute in a way that includes an unborn child requires courts to specifically abandon the born-alive standard. Some American courts, including Oklahoma's high criminal court, have adopted this interpretation, and have thus recognized the obsolescence of the rule.

The Oklahoma Court of Criminal Appeals, in *Hughes v. State*,[59] confronted the born-alive standard in a manslaughter case involving a drunk driver.[60] While intoxicated, the defendant drove into oncoming traffic, collided with another vehicle, and killed the victim's unborn child.[61] At the time of the accident, the victim was nine months pregnant; the fetus was just four days shy of the due date.[62] The defendant was found guilty of first-degree manslaughter and, on appeal, argued that because the child was not born alive[63] she could not be charged with criminal homicide.[64]

The court first set the stage for its holding by noting that it "has the right and duty to develop the common law of Oklahoma to serve

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56. *See, e.g.*, Hughes v. State, 868 P.2d 730, 734 (Okla. Crim. App. 1994) ("Thus, the term 'human being' in Section 691—according to its plain and ordinary meaning—includes a viable human fetus.").

57. *E.g.*, *id.* at 732 ("Advances in medical and scientific knowledge and technology have abolished the need for the born alive rule.").

58. Commonwealth v. Cass, 467 N.E.2d 1324, 1328 & n.4 (Mass. 1984).

59. Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994).

60. *Id.* at 731.

61. *Id.*

62. *Id.*

63. The child was delivered via emergency cesarean section and had a faint heartbeat at the time of delivery, though the child had neither blood pressure nor brain activity. *Id.* at 732. The court dismissed the argument that the faint heartbeat satisfied the born-alive rule and instead confronted the rationale of the rule directly. *Id.*

64. *Id.* at 731.

the evolving needs of [the] citizens" and that it would thus construe the homicide statute consistent with this duty.[65] Because "[t]he purpose of [the homicide statute] is, ultimately, to protect human life," the court explained, and because "a viable human fetus is nothing less than human life," the term "human being" in the Oklahoma homicide statute, according to its "plain and ordinary meaning," necessarily includes a viable human fetus.[66] The court thus looked to the terms of the statute and assigned to them their plain meaning as understood in light of modern reason and knowledge. The judges discarded the centuries-old born-alive rule, even though courts had long applied it.[67]

In *Hughes*, the court deemed the unborn victim "viable,"[68] meaning that it was capable of surviving independently outside of the mother's womb.[69] Thus, although the *Hughes* court had no occasion to specifically determine whether the viability of the fetus was a required element of the term "human being" in the Oklahoma statute, viability was nevertheless an important factor in the court's analysis.[70]

The Kentucky Supreme Court reached a similar holding in *Commonwealth v. Morris*,[71] another case involving a viable unborn child.[72] Although observing that "there [was] no need for [the born-alive rule]" because the fetus's viability was provable,[73] the *Morris* court noted the "definite medical distinction" between an embryo and a viable fetus.[74] Thus, like in *Hughes*, the *Morris* court considered the fetus's viability when holding that the death of the unborn child came within the scope of Kentucky's general homicide statute.[75]

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65. *Id.* at 733.

66. *Id.* at 734.

67. *Id.* at 736 ("[W]e reject the born alive rule and hold that a viable human fetus is a 'human being' against whom a homicide as defined in Section 691 may be committed.").

68. *Id.* at 732.

69. *See* BLACK'S LAW DICTIONARY 1597 (8th ed. 2004) (defining "viable" to mean "capable of living, especially outside the womb").

70. *See Hughes*, 868 P.2d at 731 ("We now abandon the common law approach and hold that whether or not it is ultimately born alive, an unborn fetus that was viable at the time of injury is a 'human being' which may be the subject of a homicide . . . .").

71. Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004).

72. *Id.* at 659.

73. *Id.*

74. *Id.* at 660.

75. *Id.* The court further noted that it would likely never have the occasion to specifically consider whether a previable fetus was also included in the term "person" in the Kentucky

Although the *Hughes* and *Morris* courts both included viability as a factor in determining whether a fetus was within the limits of the homicide statute, other courts have considered viability entirely irrelevant. In *Bailey v. State*,[76] the Missouri Court of Appeals considered whether the defendant's first-degree murder conviction for killing the unborn child of a woman who was three months pregnant could be sustained.[77] The fetus was unquestionably previable,[78] and the defendant was aware of the woman's pregnancy.[79] The Missouri court held that, because of a state statute declaring that all life begins at conception,[80] the court could not "base [its] interpretation of the term 'person' in the homicide statutes on the viability of the unborn child."[81] Accordingly, Missouri law considers an unborn child of any gestational age a person under the homicide statute, regardless of viability.[82]

The Missouri legislature's finding that "[t]he life of each human being begins at conception"[83] and its command that "the laws of [the] state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons"[84] provided the authority that compelled the *Bailey* court to hold that the state's homicide statutes protect a previable fetus.[85] Though this statute ultimately broadened the reach of the homicide laws to include the killing of a fetus, the legislatures of other states have been even more explicit about their intent to expand their homicide statutes.

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homicide statute because the state's feticide law, which makes any fetus from conception onward a potential victim of homicide, took effect nine days after the oral arguments in this case. *Id.* at 661.

76. Bailey v. State, 191 S.W.3d 52 (Mo. Ct. App. 2005).

77. *Id.* at 53.

78. "A fetus generally becomes a viable child between the sixth and seventh month of its existence . . . ." *Morris*, 142 S.W.3d at 660 (quoting Mitchell v. Couch, 285 S.W.2d 901, 905 (Ky. 1955)).

79. *Bailey*, 191 S.W.3d at 53. In fact, the woman was pregnant with the defendant's child. *Id.*

80. MO. ANN. STAT. § 1.205 (West 2000).

81. *Bailey*, 191 S.W.3d at 55.

82. *Id.*

83. MO. ANN. STAT. § 1.205.1(1).

84. *Id.* § 1.205.2.

85. *Bailey*, 191 S.W.3d at 55.

B. Criminalizing Feticide through Legislation

In several states, legislatures have addressed the criminal treatment of feticide rather than relying on courts to resolve the issue through the construction of general homicide statutes. This movement is relatively new, with many such statutes taking effect in the 1980s or later.[86]

1. *Motivations for Enactment.* Legislatures often criminalize feticide as a form of homicide in response to court decisions that held, by applying the born-alive rule, that a fetus could not be a victim under the general homicide laws. For instance, in 1986 the Minnesota legislature enacted a statute that imposes a mandatory sentence of life in prison for anyone who murders an unborn child in the first degree.[87] The legislature specifically enacted the statute to overturn a then-recent Minnesota Supreme Court decision that adopted the born-alive rule.[88] In that decision, *State v. Soto*,[89] the court held that the unborn child victim—who was just two weeks short of full term—was not a human being within the meaning of the Minnesota homicide provisions.[90]

Additionally, legislatures have also enacted fetal homicide laws as a result of public outcry following particularly heinous crimes involving the death of unborn children. One well-known instance of this legislative reaction is the federal Unborn Victims of Violence Act of 2004,[91] popularly known as Laci and Conner's Law.[92] Named in memory of Laci Peterson and her unborn son, Conner, this federal fetal homicide statute provides that causing the death of or injury to an unborn child constitutes a separate offense under a variety of federal criminal laws.[93]

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86. *See infra* note 213 and accompanying text.

87. MINN. STAT. ANN. § 609.2661 (West 2003).

88. State v. Merrill, 450 N.W.2d 318, 324 (Minn. 1990); Forsythe, *supra* note 3, at 564.

89. State v. Soto, 378 N.W.2d 625 (Minn. 1985).

90. *Id.* at 630.

91. 18 U.S.C. § 1841 (2006).

92. *See* Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, § 1, 118 Stat. 568, 568 (codified at 18 U.S.C. § 1841 note (2006)) ("This Act may be cited as . . . 'Laci and Conner's Law.'").

93. 18 U.S.C. § 1841(a)(1). Scott Peterson, Laci's husband and Conner's father, was convicted of killing both his wife and unborn child in 2004, *Peterson Guilty of Murder*, CNN.COM, Dec. 14, 2004, http://www.cnn.com/2004/LAW/11/12/peterson.verdict, and was subsequently sentenced to death under California law, *Peterson Sentenced to Death for Wife's Slaying*, CNN.COM, Mar. 17, 2005, http://www.cnn.com/2005/LAW/03/16/peterson.case.

2. *Fetal Homicide Statutes*. Just as legislators' motivations for enacting fetal homicide statutes are varied, so too are the forms the statutes take and their respective levels of specificity. Some statutes are painstakingly specific in defining exactly which potential homicide victims the law protects,[94] whereas others are vague,[95] leaving the bulk of the definitional task to the state courts.[96] The various methods state legislatures have employed demonstrate the variety of legislative approaches available and the ability of lawmakers to tailor legislation to reflect the political and moral attitudes of their constituents.

a. Comprehensive Regime. In overruling *State v. Soto*, the Minnesota legislature enacted a comprehensive statutory regime to criminalize fetal homicide.[97] The statute begins by defining an "unborn child" as "the unborn offspring of a human being conceived, but not yet born,"[98] and then defines in detail specific crimes involving either injury to or the death of an unborn child.[99] This exhaustive legislative approach to fetal homicide leaves little, if any, substantive role for the courts to play in construing and applying the statute.

The statute's comprehensive nature prevailed in the courts: five years after *Soto* and four years after the enactment of these fetal homicide laws, the Minnesota Supreme Court upheld the new statutory scheme against equal protection and vagueness challenges.[100] As a result of that case, which involved the death of a twenty-eight-day-old embryo,[101] the same court that had previously held that a viable fetus of eight-and-a-half gestational months was not a victim of homicide[102] validated statutory language making it murder to kill an

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Although the federal law, enacted in 2004, was conceived prior to Laci and Conner's deaths in 2002, the intense media coverage and the public's general disgust at the murders helped to inspire renewed congressional interest in enacting a fetal homicide statute. *Bush Signs 'Laci and Conner's Law*,' FOXNEWS.COM, Apr. 2, 2004, http://www.foxnews.com/story/0,2933,115825,00.html. Similarly, following the death of his daughter, Kevin Blaine and others pressured the North Carolina legislature to amend the state's homicide statutes to include unborn children as potential victims. Bello, *supra* note 20; *see also supra* notes 14–20 and accompanying text.

94. *See infra* notes 97–111 and accompanying text.

95. *See, e.g.*, CAL. PENAL CODE § 187 (West 2006) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.").

96. *See infra* notes 112–23 and accompanying text.

97. 1986 Minn. Laws ch. 388 (codified at MINN. STAT. §§ 609.266–.2691 (2006)).

98. *Id.* § 609.266(a).

99. *Id.* §§ 609.2661–.269.

100. State v. Merrill, 450 N.W.2d 318, 320 (Minn. 1990).

101. *Id.* at 324.

102. State v. Soto, 378 N.W.2d 625, 630 (Minn. 1985).

embryo of less than one gestational month.[103] Though the court opined that the legislature "has enacted very unusual statutes which go beyond traditional feticide, both in expanding the definition of a fetus and in the severity of the penalty imposed,"[104] it ultimately acknowledged that "the role of the judiciary is limited to deciding whether a statute is constitutional, not whether it is wise or prudent legislation. . . . [The justices] do not sit as legislators with a veto vote . . . ."[105]

Texas has adopted an approach similar to Minnesota's by defining an "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."[106] The legislature further defines homicide as "caus[ing] the death of an individual."[107] By explicitly identifying which fetuses are protected (in this case, all), the legislature effectively eliminates the need for judicial interpretation of the statute.[108]

Like the Minnesota court in *Merrill*, a Texas court of appeals upheld a defendant's murder conviction under this statute for causing the death of a four-to-six-week-old fetus.[109] Answering the defendant's contention that the statute was unconstitutionally vague for not distinguishing between a viable and nonviable fetus, the Texas court stated, "The Texas legislature . . . chose not to incorporate fetal viability in the capital murder statute . . . . When a woman's privacy interests are not implicated, the legislature may determine whether, and at what point, the life of her unborn child should be protected."[110] The implication is that the legislature had in fact made that determination, and, so long as the statute was constitutional, the court would not judge the lawmakers' wisdom.[111]

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103. *Merrill*, 450 N.W.2d at 324.

104. *Id.*

105. *Id.* at 321.

106. TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon Supp. 2008).

107. *Id.* § 19.01(a).

108. *See* Lawrence v. State, 211 S.W.3d 883, 891 (Tex. Ct. App. 2006) (applying the plain language of the statute and noting that it "clearly states a fetus is an individual from the moment of fertilization, placing no limitation on the stage of development of the fetus").

109. *Id.* at 885.

110. *Id.* at 892. These rights were implicated in *Roe v. Wade*, 410 U.S. 113, 163 (1973), in which the Supreme Court did distinguish between viable and nonviable fetuses in the abortion context, *id.* at 160. The Texas court in *Lawrence* distinguished between the mother herself ending the life of a fetus through legal abortion and a third party ending the life of a fetus through homicide. *Lawrence*, 211 S.W.3d at 892.

111. *See Lawrence*, 211 S.W.3d at 890 (deferring to the policy judgments of the legislature).

b. Statutory Imprecision. Although states like Texas and Minnesota have relatively specifically defined which unborn children are protected by the state's homicide laws, other legislatures have enacted imprecise statutes that necessarily rely on the judiciary to construe and apply them. In striking contrast to the Minnesota legislature's fetal homicide regime that consists of several specific offenses spread across multiple sections of the state's penal code,[112] California's fetal homicide law consists merely of a three-word amendment to the state's general homicide statute.[113] In 1970, in response to the California Supreme Court's adherence to the born-alive rule in *Keeler v. Superior Court*,[114] the California legislature inserted the words "or a fetus" into the state's general homicide statute,[115] which reads, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."[116]

Although this amendment expressly indicated the legislature's intent for the homicide statute to reach the killing of *some* unborn children, it fell to the California courts to determine *which* unborn children were covered by the term "fetus."[117] Considering this issue in 1976, the California Court of Appeal, Second District, held that section 187 applied only to viable fetuses, despite the lack of any explicit reference to viability in the statute itself.[118] But, seventeen years later, the California Court of Appeal, Fourth District, directly contradicted the Second District.[119] The Fourth District held that,

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112. MINN. STAT. ANN. §§ 609.266–.2691 (West 2003).

113. *See* CAL. PENAL CODE § 187 historical and statutory notes (West 2008) (explaining that the 1970 amendment added the phrase "or a fetus" after "human being" in defining murder). The amendment also added two subsections to prevent the feticide law from reaching cases of legal abortion, *id.*, and thus was actually longer than three words.

114. Keeler v. Superior Court, 470 P.2d 617, 624 (Cal. 1970) (en banc).

115. People v. Davis, 872 P.2d 591, 594 (Cal. 1994) (en banc).

116. CAL. PENAL CODE § 187.

117. *See* People v. Smith, 129 Cal. Rptr. 498, 501–02 (Ct. App. 1976) ("[S]ection 187, as amended, does not define fetus nor is it consistent with other parts of the Penal Code in which it is located. . . . In view of the gaps and inconsistencies on both sides of the issue, we rely on general legal principles interpreted in the light of the factual situation with which the statute purportedly deals."), *abrogated by Davis*, 872 P.2d at 591.

118. *Id.* at 502. ("Legally and factually, a non-viable fetus does not possess the capability for independent existence and has not attained the status of independent human life. Logically, one cannot destroy independent human life prior to the time it has come into existence. . . . We, therefore, construe section 187 as making its protection coextensive with the capability for independent human life, a concept embraced within the term *viability*.").

119. People v. Davis, 19 Cal. Rptr. 2d 96, 104 (Ct. App. 1993) ("The courts may not restrict the application of the fetal murder statute to limit the mother's interest in continuing her

although an unborn child must have progressed beyond the embryonic stage, thus satisfying the plain meaning of the term "fetus," the child need not be viable.[120] It was not until 1994, almost a quarter century after section 187 was amended to include the term "fetus," that the Supreme Court of California finally resolved the issue. In *People v. Davis*,[121] the Supreme Court of California adopted the decision of the Fourth District, holding, "[T]he Legislature [can] criminalize murder of the postembryonic product without the imposition of a viability requirement" so long as "the unborn offspring [is] in the postembryonic period . . . . [that] occurs in humans seven or eight weeks after fertilization."[122]

Thus, it took California courts nearly two-and-a-half decades to precisely define which unborn children are protected under the homicide statute. This timeline stands in stark contrast to the Minnesotan experience, in which the state supreme court, just four years after it had adopted the born-alive rule, affirmed a statutory scheme that made it murder to kill a twenty-eight-day-old embryo.[123]

3. *The Role of Knowledge and Intent.* Finally, when drafting fetal homicide statutes, legislators must address the problematic issues of knowledge and intent. Because a pregnant woman is not always obviously pregnant, one can imagine a scenario in which a criminal defendant charged with the homicide of an unborn child could deny knowing—or could actually not know—that the woman was pregnant.[124] For these situations, legislators must determine whether to impose something akin to strict liability on defendants, or instead to require intent to harm the fetus as an element of the crime. As with other feticide issues, states have come down on both sides.

In Illinois, for instance, the fetal homicide statute incorporates an actual-knowledge requirement, and courts apply the requirement strictly. Initially, Illinois's fetal homicide statute required only that

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pregnancy and the state's interest in protecting fetal life to include only viable fetuses. We respectfully reject *Smith*'s requirement that a fetus be viable in order to be [murdered].").

120. *Id.* The embryonic stage lasts until the seventh or eighth gestational week. *Id.*

121. People v. Davis, 872 P.2d 591 (Cal. 1994) (en banc).

122. *Id.* at 599 (internal quotation marks omitted).

123. *See supra* note 101 and accompanying text.

124. *See, e.g.*, State v. Merrill, 450 N.W.2d 318, 323 (Minn. 1990) (considering the defendant's contention that "it is unfair to impose on the murderer of a woman an additional penalty for murder of her unborn child when neither the assailant nor the pregnant woman may have been aware of the pregnancy").

the defendant "knew, or reasonably should have known under all the circumstances, that the mother was pregnant."[125] In 1986, the legislature replaced the statute's part-subjective, part-objective measure of knowledge with the more stringent requirement that the defendant "knew that the woman was pregnant" at the time of the crime.[126] Thus, the Illinois legislature determined that actual knowledge of the woman's pregnancy should be a required element of the crime of "Intentional Homicide of an Unborn Child."[127]

The Appellate Court of Illinois recognized and applied this actual-knowledge requirement in *People v. Gillespie*.[128] In that case, the prosecution neglected to definitively prove that the defendant had actual knowledge of the victim's pregnancy,[129] despite the fact that the mother was seven months pregnant and the defendant was the father of the child.[130] Accordingly, the appellate court reversed the defendant's conviction for intentional homicide of an unborn child,[131] explaining, "The defendant's knowledge of pregnancy is an essential element of the offense. The [1986] change in the statute reflects legislative concern that something less than actual knowledge would be used to convict someone of this serious crime."[132]

Contrary to the fairly rigorous requirement that the Illinois legislature imposed, the Minnesota statute demands somewhat less than actual knowledge, as *State v. Merrill* demonstrates.[133] In Minnesota, "[m]urder of an unborn child in the first degree," punishable by a mandatory life sentence,[134] requires only that the

125. People v. Gillespie, 659 N.E.2d 12, 15 (Ill. App. Ct. 1995) (emphasis omitted) (quoting 38 ILL. REV. STAT. § 9-1.1 (1981)).

126. 720 ILL. COMP. STAT. ANN. 5/9-1.2(a)(3) (West 2002).

127. *Id.* Lesser crimes, including voluntary manslaughter of an unborn child, *id.* at 5/9-2.1, and involuntary manslaughter and reckless homicide of an unborn child, *id.* at 5/9-3.2, do not require actual knowledge of the mother's pregnancy.

128. People v. Gillespie, 659 N.E.2d 12, 15 (Ill. App. Ct. 1995).

129. *Id.* at 16 ("In short, there is a failure of proof. . . . Taking the State's evidence in its most favorable light, we do not see how it can be said the defendant's knowledge of Cook's pregnancy was proved beyond a reasonable doubt.").

130. *Id.* at 15.

131. *Id.* at 16.

132. *Id.* at 15.

133. *See* State v. Merrill, 450 N.W.2d 318, 323 (Minn. 1990) ("The possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude.").

134. MINN. STAT. ANN. § 609.2661 (West 2006) ("Whoever does any of the following is guilty of murder of an unborn child in the first degree and must be sentenced to imprisonment for life . . . .").

defendant act with the "intent to effect the death of the unborn child or of another."[135] The *Merrill* court upheld the constitutionality of this statute, despite the defendant's contention that "it is unfair to impose on the murderer of a woman an additional penalty for murder of her unborn child when neither the assailant nor the pregnant woman may have been aware of the pregnancy."[136] The court explained,

> The fair warning rule [of the Due Process Clause] has never been understood to excuse criminal liability simply because the defendant's victim proves not to be the victim the defendant had in mind. . . . The possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude.[137]

Thus, in Minnesota, so long as the defendant intended to kill *someone*, the courts can sustain a conviction for the first-degree murder of a fetus.

* * *

Despite taking a variety of approaches, each of the states discussed in this Part, and states like them, treat the wrongful killing of an unborn child as a homicide. A minority of American jurisdictions, however, have not similarly reformed their laws.

III. THE LAWS OF STATES THAT DO NOT RECOGNIZE FETICIDE AS HOMICIDE

Though the majority of American states consider the killing of a fetus to be a homicide, fourteen do not.[138] Historically, the failure to criminalize feticide was often a result of judicial interpretation of "person" or "human being" in the relevant homicide statute: by staying faithful to the born-alive rule, courts declined to extend the coverage of homicide laws to fetuses. To illustrate these decisions' underlying rationale, Section A explores representative cases.

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135. *Id.* § 609.2661(1).

136. *Merrill*, 450 N.W.2d at 323.

137. *Id.*

138. These states are Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Vermont, and Wyoming. *See* Nat'l Right to Life, *supra* note 9 (listing the thirty-six states that have some form of fetal homicide laws).

But no matter how the judiciary interprets and applies the common law, the legislature can always codify new standards and definitions. Accordingly, any failure to criminalize feticide is equally a result of legislative inaction. Section B thus examines and critiques legislative rationales for not enacting fetal homicide laws.

A. Judicial Justifications for Continued Adherence to the Born-Alive Rule

Several courts, most prominently the Supreme Court of California in *Keeler v. Superior Court*,[139] have held that a fetus does not fall within the scope of a state's general homicide statute. In *Keeler*, the defendant was charged with murder after he attacked his pregnant ex-wife and purposefully killed her unborn child.[140] The defendant's intention to kill the child was undisputed, evidenced by his declaring that he was "going to stomp [the fetus] out of [her]."[141] Doctors confirmed that the attack caused the unborn child's death.[142]

Despite the defendant's intention to kill the unborn child, the California court determined the defendant's actions did not constitute murder under the homicide statute.[143] The court examined the legislative history and noted that the legislature intended the statute to encapsulate the "settled common law meaning" of the term "human being" at the time the statute was enacted in 1850.[144] Because, according to the court, the common law definition of "human being" was "a person who had been born alive," the legislature "did not intend the act of feticide . . . to be an offense under the laws of California."[145]

The court explained that only the legislature, not the courts, had the power to deviate from the common law definition of "human being": "For a court to simply declare, by judicial fiat, that the time has now come to prosecute under section 187 one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise

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139. Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970) (en banc).

140. *Id.* at 619. The defendant's ex-wife was between seven and eight-and-a-half months pregnant. *Id.* at 619 n.1.

141. *Id.* at 618.

142. *Id.* As a pathologist determined, the fetus died from severe fracturing of the skull and the consequent cerebral hemorrhaging. *Id.*

143. *See id.* at 624 (holding that California's homicide law does not prohibit "killing an unborn fetus").

144. *Id.* at 622.

145. *Id.*

of construing it."[146] Thus, the common law born-alive rule persevered, and the defendant could not be prosecuted for the homicide of the unborn child.[147]

As discussed, *Keeler* was overruled by a legislative amendment to section 187 less than one year after the case was decided.[148] Nevertheless, this case provides a salient example of a court's reasoning, made all the more striking by the extreme nature of the facts. Moreover, the reasoning the Supreme Court of California employed in *Keeler* is typical of other courts that have considered the issue and have upheld the born-alive rule.[149]

B. Political Justifications for Declining to Enact Fetal Homicide Legislation

The endurance of the born-alive standard is equally a result of legislative inaction as it is of judicial reluctance to modify the scope of homicide statutes. The political arguments against fetal homicide laws reflect a concern that criminalizing fetal homicide is the first step down a slippery slope that will ultimately lead to the banning of a woman's right to a legal, controlled abortion.[150] Opponents worry that

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146. *Id.* at 625–26.

147. The California court also held that, even if it were inclined to hold that "human being" included a fetus, the state could not charge the defendant in this case with murder because applying the definition retroactively would violate the Due Process Clause. *See id.* at 626–30 (explaining that retroactive implementation would run afoul of the Due Process Clause's traditional notice requirement).

148. *See supra* note 114–116 and accompanying text.

149. One similar decision that does continue to operate as controlling precedent is the North Carolina case *State v. Beale*, 376 S.E.2d 1 (N.C. 1989). In that case, the Supreme Court of North Carolina held that the state homicide statute did not actually define "murder." *Id.* at 1–2 ("Murder under [that statute] is murder as defined at common law."). Referencing the historical discussion in *Keeler*, the court then asserted that, because "[i]t is beyond question that . . . the killing of a viable, but unborn child was not murder at common law," neither was it murder under the North Carolina statute. *Id.* at 2. Like their California counterparts, the North Carolina judges held that altering the scope of the homicide statute was purely the prerogative of the legislature. *Id.* at 4.

Other states have also employed this sort of reasoning. *See, e.g.*, State v. Trudell, 755 P.2d 511, 516 (Kan. 1988) ("[I]f it is the desire of the people in Kansas to give the same protection to a fetus as it gives to a human being, it is the legislative branch which is the proper forum to resolve the issue."); People v. Guthrie, 293 N.W.2d 775, 780–81 (Mich. Ct. App. 1980) (per curiam) ("Although we find that the 'born alive' rule is archaic and should be abolished in prosecutions brought under the negligent homicide statute, the abolition of the rule is a matter for action by the Legislature.").

150. *E.g.*, Am. Civil Liberties Union, *What's Wrong with Fetal Rights*, (July 31, 1996) http://www.aclu.org/reproductiverights/gen/16530res19960731.html ("[The ACLU has] serious reservations about legislation designed to protect fetuses, because it can endanger women's

recognizing fetuses as potential homicide victims is a step toward imbuing fetuses with full legal personhood, which would necessarily curtail a woman's reproductive liberties.[151] This Section describes these arguments and their supporting logic, and Part IV.B then offers a response.

Many abortion rights advocates, although recognizing the need to punish feticide, object to the implications of statutes that criminalize these killings to the same degree as other homicides.[152] They maintain that granting the unborn child personhood in the homicide context[153] would necessarily strengthen the fetus's legal rights in the abortion context. These rights would be strengthened, they argue, despite the fact that feticide statutes often specifically disclaim the ability to impinge on abortion rights.[154] Various commentators have advanced such an argument in response to the federal Unborn Victims of Violence Act of 2004,[155] including the following:

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rights by reinforcing claims of 'fetal rights' in the law. Anti-choice organizations have long promoted fetal protection legislation as one prong of their campaign to eliminate the right to choose. . . . Passage of fetal protection laws gives anti-choice forces a propaganda coup and a launching pad for arguments to restrict abortion."); *Do Fetal Rights Limit Mothers' Rights?*, STATE LEGISLATURES, June 2002, at 6, http://www.ncsl.org/programs/health/SLJune2002p6.pdf ("Those on the other side fear that laws to protect a fetus could infringe on a woman's right to choose an abortion. Pro-choice advocates say such laws grant a fetus legal status distinct from the pregnant woman—possibly creating an adversarial relationship between a woman and her baby."); NARAL Pro-Choice Mont., HB 730: The Fetal Homicide Act, http://www.prochoicemontana.org/voting_hb730.html (last visited Feb. 22, 2009) ("If the goal is to more severely punish crimes against pregnant women, there are better ways. . . . There is no need, aside from undermining *Roe v. Wade*, to define the fetus as separate from the woman."); Nat'l Conference of State Legislatures, Fetal Homicide, http://www.ncsl.org/programs/health/fethom.htm (last visited Feb. 22, 2009) ("Those on the other side feel that laws to protect a fetus could become a 'slippery slope' that could jeopardize a woman's right to choose an abortion.").

151. *Cf.* Roe v. Wade, 410 U.S. 113, 164–65 (1973) ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion . . . .").

152. *See* sources cited *supra* note 150.

153. Not all statutes actually grant fetuses personhood. California's homicide statute, for instance, specifically distinguishes between a human being and a fetus: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE § 187 (West 2008).

154. For example, the Minnesota statute separates feticide from abortion: "Sections 609.2661 to 609.268 [the sections defining the crimes against the unborn] do not apply to any act described in section 145.412 [the section defining legal abortion]." MINN. STAT. ANN. § 609.269 (West 2003).

155. 18 U.S.C. § 1841 (2006).

> While the Act disclaims its power to affect abortion rights, the substance of the UVV appears to contradict the fundamental premises of abortion law—that the Fifth and Fourteenth Amendments do not include fetuses in the definition of "person"—by punishing violence against fetuses by third parties as harshly as violence against human beings. . . . [W]hile the Act may not legally affect the right to abortion, its rhetoric will likely color the abortion debate and the legal battles of the next century.[156]

Several members of Congress who opposed the Unborn Victims of Violence Act echoed this concern. During a Senate floor debate in March 2004, Wisconsin Senator Russ Feingold stated,

> I will oppose H.R. 1997, The Unborn Victims of Violence Act . . . . I join with . . . the supporters of this bill in condemning acts of violence against women, including pregnant women. . . . I believe that acts of violence against pregnant women are deplorable and should be punished severely. Congress has taken and should continue to take steps to protect women from violence and prosecute those who attack them. But I am concerned that by recognizing the fetus as an entity against which a separate crime can be committed, the Unborn Victims of Violence Act may undermine women's reproductive rights as set forth by the Supreme Court in *Roe v. Wade*.[157]

Similarly, after President Bush signed the act into law in April 2004, a spokesman for Senator John Kerry responded:

> John Kerry strongly supports making it a federal crime to commit an act of violence against a pregnant woman. He agrees with the vast majority of Americans who want tough punishment for anyone who would commit such heinous crimes and know we can do so without undermining a woman's right to choose.[158]

In addition to concerns regarding the potential of fetal homicide laws to undermine a woman's constitutionally protected right to an abortion, opponents of these laws have argued that focusing on the harm to the fetus wrongly detracts attention from the harm to the mother.[159] Similarly, some have argued that imbuing a fetus with full

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156. Kole & Kadetsky, *supra* note 13, at 235.

157. 150 CONG. REC. S3149 (daily ed. Mar. 25, 2004) (statement of Sen. Feingold).

158. *Bush Signs 'Laci and Conner's Law*,*' supra* note 93.

159. Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 128 (2006).

legal personhood necessarily reduces the personhood of the mother.[160] For instance, condemning calls for fetal homicide laws in Canada, one Canadian pro-choice activist asserts, "If we give any legal rights to a fetus, we must automatically remove some rights from women, because it's impossible for two beings occupying the same body to enjoy full rights."[161] She continues, "If we try to 'balance' rights [of the unborn child and the mother], it means the rights of one or both parties must be compromised . . . ."[162] Faced with such arguments defending mothers' constitutional rights and legal personhood, legislative reluctance to enact comprehensive fetal homicide statutes seems reasonable.

IV. THE CASE FOR FETAL HOMICIDE LAWS

The principal purposes of homicide laws are to prevent and punish the extreme antisocial behavior that is the taking of another's life for no justifiable cause. To be effective, these laws should classify taking a human life as a homicide even if the victim is unborn. Criminalizing feticide would not only hold accountable those who end the life of a fetus but would also augment the reproductive freedoms guaranteed to women. Setting out this argument, Section A addresses the born-alive rule and Section B then responds to concerns of the opponents of fetal homicide laws.

A. Why States Should Abandon the Born-Alive Rule

Several courts have invoked Sir Edward Coke's statement of the born-alive rule[163] to support the proposition that, at common law, a child was not a human being unless and until it had been born alive.[164] But this understanding of the born-alive rule is misguided, as one

160. *E.g.*, Elizabeth Spiezer, Comment, *Recent Developments in Reproductive Health Law and the Constitutional Rights of Women: The Role of the Judiciary in Regulating Maternal Health and Safety*, 41 CAL. W. L. REV. 507, 509 (2005) ("[T]o protect the rights of all women, American laws must prioritize each woman's autonomous interests above a historically determined maternal role.").

161. Joyce Arthur, Abortion Rights Coalition of Canada, The Case Against a "Fetal Homicide" Law, http://www.arcc-cdac.ca/fetal_homicide_law.html (last visited Feb. 22, 2009).

162. *Id.*

163. *See supra* note 49 and accompanying text.

164. *See, e.g.*, Keeler v. Superior Court, 470 P.2d 617, 622 (Cal. 1970) (en banc) (holding that the murder statute only applies to children born alive); *see also* Forsythe, *supra* note 3, at 603 ("Throughout [the *Keeler* opinion], the court assumed that the rule was a substantive element at common law, which designated the unborn child as non-human.").

scholar, Clarke D. Forsythe, convincingly demonstrates.[165] As Part I.B illustrates, the born-alive rule was *evidentiary* in nature, adopted to address the problems of proving causation when the victim of the homicide was an unborn child; it was not intended to be a *substantive* definition of "human being."[166] As Forsythe explains, "[A]t common law, the rule was entirely an evidentiary standard, mandated by the primitive medical knowledge and technology of the era . . . the rule in its origin was never intended to represent any moral judgment on the criminality of killing an unborn child *in utero*."[167]

Nevertheless, Sir Coke's rule has persevered and is often considered *the* expression of the common law view on the homicide of unborn children.[168] But, in the thirteenth century, well before Sir Coke's time, another English jurist, Henry de Bracton, published quite a different statement regarding fetal homicide: "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus be already formed or quickened, and especially if it be quickened, he commits homicide."[169] In direct contradiction of Coke's statement, Bracton's view supports the contention that the born-alive rule was merely an evidentiary standard. Although Bracton's view may have been abandoned because it proved practically infeasible,[170] its mere existence demonstrates that, as long ago as the 1200s, at least one major jurist considered an unborn child to be a potential victim of homicide from the time of conception, not just from the time of birth.

That the born-alive rule was adopted for evidentiary purposes does not, as some modern courts have held,[171] define an unborn child

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165. *See generally* Forsythe, *supra* note 3 (demonstrating the evidentiary nature of the born-alive rule).

166. *Id.* at 564.

167. *Id.*

168. *See, e.g.*, *Keeler*, 470 P.2d at 620 ("Perhaps the most influential statement of the 'born alive' rule is that of [Coke]. . . . [T]he common law accepted [Coke's] views as authoritative.").

169. 2 DE BRACTON, *supra* note 2, at 341.

170. *See* Commonwealth v. Morris, 142 S.W.3d 654, 656 (Ky. 2004) ("The reason for the [born-alive] rule was '*non constat* [it could not be established], whether the child were living at the time of the batterie or not, or if the batterie was the cause of death.'" (second alteration in original) (quoting Sims's Case, (1601) 75 Eng. Rep. 1075 (K.B.))).

171. *E.g.*, People v. Smith, 129 Cal. Rptr. 498, 502 (Ct. App. 1976) ("Legally and factually, a non-viable fetus does not possess the capability for independent existence and has not attained the status of independent human life. . . . Until the capability for independent human life is attained, there is only the expectancy and potentiality for human life."), *abrogated by* People v. Davis, 872 P.2d 591 (Cal. 1994).

as something other than a human life.[172] As the Supreme Judicial Court of Massachusetts explained, "An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb."[173] The Court of Criminal Appeals of Oklahoma agreed: "[P]roblems in proving causation do not detract from the personhood of the victim."[174]

The born-alive rule was thus intentionally underinclusive—the killers of some unborn children who deserved punishment went free in the interest of protecting others from being wrongfully convicted. The rule was a blunt instrument, but in the absence of more advanced medical understanding, it was a necessary protection.[175] In the modern world of ultrasounds, endoscopes, and deeper knowledge of human development and causes of death, however, the protections of the born-alive standard are no longer necessary.[176] The rule is obsolete.[177]

Because the born-alive rule was not intended to be a substantive definition of "human being," it can be abandoned without altering the scope of existing homicide statutes. Evidence shows that the term "human being," from the time of Bracton, included those who had yet to be born.[178] Fetuses that were not born alive were only exempted as victims under the common law murder statutes because of evidentiary obstacles to proving the cause of an unborn child's death, not because they were outside the definition of "human being."

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172. This interpretation is different from arguing that an unborn child should enjoy the same protections as every other human being. The point is simply that an unborn human child is, in fact, a human life, whether or not it has been born.

173. Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984).

174. Hughes v. State, 868 P.2d 730, 732 (Okla. Crim. App. 1994) (quoting *Cass*, 467 N.E.2d at 1325). The Massachusetts and Oklahoma courts discussed fetal personhood in the context of construing the relevant homicide statutes; whether the courts intended these statements regarding personhood to extend beyond the feticide context is immaterial for this Note's purposes. The point is merely that an evidentiary standard does not affect the underlying substantive definition.

175. *Id.* ("The born alive rule was necessitated by the state of medical technology in earlier centuries.").

176. *See id.* ("Advances in medical and scientific knowledge and technology have abolished the need for the born alive rule.").

177. *E.g.*, State v. Soto, 378 N.W.2d 625, 631 (Minn. 1985) (Yetka, J., dissenting) ("Medical science certainly has progressed to the point of making the 'born alive' rule obsolete."); *Hughes*, 868 P.2d at 735–36 ("Oklahoma, by means of this decision, joins a minority of two states whose courts have expressly rejected the ancient, yet obsolete, born alive rule."); *see also* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) ("[T]he antiquity of a rule is no measure of its soundness.").

178. *See supra* text accompanying note 169.

Thus, if the major obstacle to classifying feticide as homicide was the inability to prove causation,[179] and the advance of medical technology has since removed that obstacle,[180] it stands to reason that fetuses are, in fact, potential victims under existing homicide statutes, even if those statutes are based on the common law. Claiming that the method of proving the causal link between the *actus reus* and the injury affects the definition of the crime itself is not reasonable. Considering fetuses to fall within the scope of a common law homicide statute does not impermissibly extend the scope of the statute, but rather gives fuller effect to the original language. Applying a statute more fully and accurately does not, as some courts have asserted,[181] constitute judicial creation of a new crime.

One response to this argument is that, whatever the common law definition of "human being" actually was, if a legislature enacted a homicide statute with the understanding that a fetus was not a "human being," then that statute should not include a fetus in its scope. But, to the extent legislative intent is pertinent—and that intent was to incorporate the common law—courts should construe the statute to actually reflect the common law at the time, rather than give effect to the individual legislators' misunderstanding of the common law.

One telling example is the California Crimes and Punishments Act of 1850. Because this act was the California legislature's first attempt to codify common law crimes, the act's "precedents were necessarily drawn from the common law."[182] When construing the state's homicide statute, the California Supreme Court relied on this common law foundation to support its assertion that feticide was

179. Forsythe, *supra* note 3, at 576.

180. *Hughes*, 868 P.2d at 732 ("Advances in medical and scientific knowledge and technology have abolished the need for the born alive rule.").

181. *See, e.g.*, Keeler v. Superior Court, 470 P.2d 617, 625–26 (Cal. 1970) (en banc) ("For a court to simply declare, by judicial fiat, that the time has now come to prosecute under section 187 one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it."); State v. Anonymous, 516 A.2d 156, 159 (Conn. Super. Ct. 1986) (declining to "redefin[e] . . . the word 'person' [because such task] must be left to the legislature, which has the primary authority to define crimes"); People v. Guthrie, 293 N.W.2d 775, 778 (Mich. Ct. App. 1980) (per curiam) (choosing to not recognize fetal homicide because "the Legislature had the opportunity to include unborn fetuses in the statute, but did not do so"); State v. Soto, 378 N.W.2d 625, 630 (Minn. 1985) (rejecting a proposed expansion of the "common law definition of 'person' or 'human being'" in the homicide statute to encompass the fetus).

182. *Keeler*, 470 P.2d at 619.

beyond the scope of the statute because the common law definition of human being did not include fetuses.[183]

But because the born-alive requirement was not an element of the substantive common law definition of human being, the desire to exclude a fetus from the protection of the homicide statute should not be imputed to the legislature. As the court itself explained, "It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form."[184] Thus, regardless of individual legislators' understanding of the common law definition of human being, courts should presume that the legislature as a whole intended to codify the *actual* common law definition.

B. Why Fetal Homicide Laws Do Not Curtail Reproductive Rights

Many who oppose feticide legislation do so out of the concern that recognizing unborn children as human beings in the homicide context will undermine a woman's constitutional right to an abortion.[185] Although this concern is not entirely unfounded, it is largely misplaced. Because of the sensitive nature of the legal rights of unborn children, legislatures—without exception—have specifically provided that the fetal homicide statutes are not to be construed to in any way obstruct a woman's right to a legal abortion.[186] Additionally, some state legislatures have exempted the mother of the unborn child from liability under the statute altogether.[187] Accordingly, not only are these statutes inapplicable in the abortion context, but many are inapplicable to *any* action taken by the mother whatsoever.

In addition to the express protections legislatures have given in the statutes, courts have recognized that the consent of the mother is the crucial element that distinguishes feticide from abortion. For instance, in *State v. Holcomb*,[188] the defendant, convicted of murdering a woman and her unborn child, argued that "all intentional

183. *Id.* at 622; *see also supra* note 145 and accompanying text.

184. *Keeler*, 470 P.2d at 619.

185. *See supra* Part III.B.

186. *See supra* note 154.

187. *E.g.*, MINN. STAT. ANN. § 609.266(b) (West 2006). This statute reads, "Definitions . . . (b) 'Whoever' does not include the pregnant woman." *Id.*

188. State v. Holcomb, 956 S.W.2d 286 (Mo. Ct. App. 1997).

and unjustified killings of pre-born children must be treated the same," and thus his killing of the unborn child should be treated as an abortion rather than a homicide.[189] The Missouri Court of Appeals rejected this argument outright because "the mother did not consent to the actions."[190] Although this holding may seem unexceptional, it offers women an additional layer of protection because, in the end, it is the subjective intention of the mother that actually controls.

Consequently, the regime created by enacting fetal homicide statutes is one in which the personhood of the fetus is determined entirely by the mother's subjective intent.[191] If the mother intends to terminate her pregnancy with a legal and controlled abortion, then the law would not consider her fetus a person, and the pregnancy could be legally ended.[192] If, however, the mother desires to carry her pregnancy to term, then the law would consider her fetus a person, and the protections of the homicide statutes would apply. Though a legal fiction, the regime is nevertheless workable.

So, although fetal homicide laws may seem antithetical to a woman's ability to secure a legal abortion, these statutes actually augment a woman's power to control her reproductive capacity and to choose the course of her pregnancy. In the absence of a fetal homicide statute, events such as those in *Keeler*—in which a third party intentionally ends a woman's pregnancy by attacking her unborn child—could go unpunished. Thus, fetal homicide laws operate as the mirror image to a woman's right to an abortion: while the right to an abortion protects a woman's choice to end an unwanted pregnancy, fetal homicide laws protect a woman's choice to carry a wanted pregnancy to term. In this way, fetal homicide laws and abortion rights work as complements, not adversaries.

Further, the more nebulous argument that the rhetoric of fetal homicide laws "will likely color the abortion debate and the legal

189. *Id.* at 292.

190. *Id.*

191. This may lead to some interesting situations, but is still logically consistent. *See, e.g.*, Milligan, *supra* note 3, at 1178 ("Imagine, for instance, a pregnant woman who approaches an abortion clinic with the intention of terminating her pregnancy. In one scenario, she is mugged at the entrance, and, due to the ensuing trauma, has a miscarriage. The law holds that a 'person' was 'murdered,' and it punishes the perpetrator with a life sentence in jail. In the second scenario, the woman evades the mugger, enters the clinic safely, and undergoes a successful abortion procedure. Here the law holds that no crime was committed.").

192. This determination would still be subject to the limitations of *Roe v. Wade*.

battles of the next century"[193] is simply not a strong enough concern to justify denying women and unborn children the protection of feticide statutes. Many staunchly pro-choice scholars agree with this position, including Professor Walter Dellinger,[194] who has stated, "I don't think [fetal homicide statutes] undermine *Roe v. Wade* . . . . The legislatures can decide that fetuses are deserving of protection without having to make any judgment that the entity being protected has freestanding constitutional rights."[195] This observation reflects the key attribute making fetal homicide and abortion entirely analytically distinct: fetal homicide laws govern conduct by third parties *against* the fetus, whereas the right to an abortion governs the relationship *between* a mother and her own unborn child.[196] Though both fetal homicide and abortion involve the law's treatment of unborn human beings—an emotional topic to be sure—the similarity ends there; the law can punish feticide and still protect abortion rights.

The argument can be cast in terms of cost-benefit analysis: the benefits created by protecting a mother's interest in carrying her pregnancy to term, weighed against the costs imposed by the potential of fetal homicide laws to (inappropriately) affect the abortion debate. But, though a mother's interest in giving birth to her

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193. Kole & Kadetsky, *supra* note 13, at 235.

194. Professor Dellinger is a partner at O'Melveny & Myers LLP, a professor of law at Duke University School of Law, a former Acting Solicitor General and White House adviser to President William Clinton, and a long-time NARAL supporter.

195. Anne Blythe, *A Question of Rights*, NEWS & OBSERVER (Raleigh, N.C.), July 13, 2003, at A21.

196. In *Lawrence v. State*, the Texas court observed,

> The rights and interests addressed by the *Roe* Court, however, are not the same as those at issue in this case. In *Roe*, the Court was attempting to balance the privacy rights of a woman seeking to terminate her pregnancy with the state's interest in protecting the woman's health as well as the life of her unborn child. In this case, appellant murdered Smith and her unborn child. Obviously, appellant has no constitutional right to murder a pregnant woman. The State's interest in this case is in protecting its citizens and their unborn children from murder and imposing maximum criminal liability on individuals such as appellant who, by his own criminal conduct, terminated Smith's pregnancy at the same time he ended Smith's life. Thus, the individuals' and states' interests at issue in the two cases are clearly distinguishable.

Lawrence v. State, 211 S.W.3d 883, 891–92 (Tex. Ct. App. 2006). Similarly, the California court noted,

> [A] defendant who assaults a pregnant woman, causing the death of her fetus, and a pregnant woman who chooses to terminate her pregnancy are not similarly situated. "A woman has a privacy interest in terminating her pregnancy; however, defendant has no such interest. The statute simply protects the mother and the unborn child from the intentional wrongdoing of a third party."

People v. Davis, 19 Cal. Rptr. 2d 96, 103–04 (Ct. App. 1993) (quoting People v. Ford, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991)).

child is fundamental and very real—and the benefits derived from protecting that interest are substantial—the costs imposed by fetal homicide laws are more speculative in nature. Proponents of the slippery slope argument have not described *how* fetal homicide laws affect abortion rights, but instead point to the potential for these laws to "color" the abortion debate.[197] But, importantly, though the earliest fetal homicide statutes were enacted decades ago, nothing indicates that they have altered the abortion debate in any significant way.

In the broad sense that both fetal homicide and abortion involve the termination of a pregnancy, the concern that abortion rights could be undermined may seem reasonable. But given the benefits of and protections provided by fetal homicide laws, it is imprudent to lump them together with abortion rights and to fear that the public cannot discern the widely divergent contexts in which the issues arise.

Finally, although the decision to terminate a pregnancy is constitutionally protected, the decision to carry a child to term does not enjoy such uniform protection. To fully preserve a woman's ability to *choose*, rather than just her ability to terminate a pregnancy, that woman's choice to give birth should be granted every protection afforded to her choice to abort. If the mother's choice should control, the laws of the state should be nothing other than neutral toward her decision. If the state protects one choice more completely than the other, then the mother's decision is influenced, and she loses some power to choose.

When a woman elects to have an abortion, the Constitution protects her choice against governmental interference—the most powerful protection an individual can possess against the state. To be consistent, then (if the goal is truly to protect a woman's right to control her pregnancy), it is reasonable to afford a woman who chooses to give birth to her unborn child the most powerful protection that an individual can possess against *other individuals* because those individuals are the ones who could potentially curtail her right to carry the fetus to term.[198] That most powerful protection, then, is to punish the killing of the fetus as homicide.

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197. *See, e.g.*, Kole & Kadetsky, *supra* note 13, at 235 ("[W]hile the Act may not legally affect the right to abortion, its rhetoric will likely color the abortion debate and the legal battles of the next century.").

198. This is not to suggest that the law should impose homicide to punish a third party for violating a mother's constitutional right to choose. Rather, the benefit comes from granting a woman the ability to determine, solely through her subjective intent, that her fetus is a "person" for the purposes of the homicide statute. *See supra* notes 188–92 and accompanying text. Once a

In sum, fetal homicide laws can be harmoniously reconciled with a woman's right to an abortion because the mother's consent is the determining factor. As such, because the mother has the complete prerogative to determine whether she wants the pregnancy, her reproductive freedoms remain firmly in her hands. Fetal homicide laws allow for greater protection against criminal acts without requiring the mother to forfeit any rights at all.

C. Ideal Legislative Framework

The most complete approach to addressing feticide is through a comprehensive regime of fetal homicide laws that specifically define the crimes against the unborn and expressly indicate the punishments for the offenses. The Minnesota statutes illustrate this approach well.[199] Although judicial abandonment of the born-alive rule should be encouraged—because doing so would bring unborn children within the meaning of "human being" in states' general homicide statutes—legislative action enables a state to create a comprehensive system of feticide-specific laws. Moreover, legislators also can include explicit protections in an effort to allay concerns that feticide statutes will infringe on women's constitutional rights.[200]

Additionally, given the rationale for classifying the killing of an unborn child as homicide, it is arbitrary for lawmakers to distinguish between those fetuses that are viable and those that are not. To fully protect pregnant mothers and unborn children, fetal homicide laws must apply at every stage of gestation. A nonviable fetus is as much a human organism as is a viable fetus, and the mother has the same interest in protecting the life of her unborn offspring regardless of the child's gestational age. Thus, to be fully effective and theoretically sound, the ideal fetal homicide regime should punish equally the murder of a previable unborn child and the murder of a full-term unborn child.

The ideal legislative framework for addressing feticide would combine the Minnesota and Texas approaches. Minnesota's approach

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mother makes this determination, a third party who kills the fetus can be punished for homicide because the third party ended a life that the law treats as a person. For more on the justifications for the severity of the punishment, see *infra* Part IV.D.

199. MINN. STAT. ANN. § 609.266–.2691 (West 2006).

200. Legislators can, for example, include a provision indicating that the state cannot apply the fetal homicide statute in the context of a controlled, legal abortion. *E.g.*, *id.* § 609.269 ("Sections 609.2661 to 609.268 [the sections defining the crimes against the unborn] do not apply to any act described in section 145.412 [the section defining legal abortion].").

benefits from treating feticide comprehensively, as it includes provisions that specifically immunize the mother from liability and that make the statutes inapplicable in the abortion context. This exhaustive treatment helps to assuage fears raised by abortion rights advocates.

But the Minnesota regime is nevertheless imperfect because it defines fetal homicide in separate statutes from the general homicide provisions.[201] This organization emphasizes the separateness of the offenses, even though, as to third parties, the law should not treat feticide differently than other homicides. For the sake of theoretical soundness, as well as simplicity, the state's general homicide statute should address feticide.

Texas takes this approach but errs in the opposite direction: it defines an "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth," but it does so in the general definitions section that applies to the entire penal code.[202] Although it is possible to confine this definition to only the homicide context by careful use of the term "individual," this approach is also more likely to reach unwanted results by inadvertently including the term in an unrelated provision. Thus, to reduce the likelihood of errors, statutes should define "individual" or "human being" to include a fetus only in those statutory provisions—like homicide—in which the legislature desires this definition.

Accordingly, feticide would ideally be covered in a general homicide statute that begins by defining "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."[203] The statute would then define the crime of homicide in its various degrees. It would also include provisions that immunize mothers from liability and make the statute inapplicable to legal, controlled abortions.

D. What about Defendants?

Thus far, this Note has focused almost exclusively on the victims of feticide—the pregnant women and their unborn children. For a more complete picture, this Section briefly considers how fetal homicide laws affect defendants.

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201. *See id.* § 609.18–.22 (homicide); *id.* § 609.2661 (feticide).

202. TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon Supp. 2008).

203. *Id.*

Treating feticide as homicide is a significant judgment that likely has severe consequences for defendants. The severity of the punishment is primarily justified by the legal personhood bestowed on the fetus through the mother's subjective intent.[204] When she alone decides that the pregnancy is wanted, fetal homicide laws protect the fetus (though the fetus would continue to have no legal personhood for any other purpose—specifically, the fetus would not have any additional rights *against the mother* beyond those already granted in *Roe v. Wade*[205]). Because the fetus's personhood is tied to the mother's intent, the fetal homicide context remains analytically distinct from other instances in which the state seeks to protect important interests. Thus, charging a defendant with homicide for killing an unborn child is logically sound, even though the penalty could be severe.

Moreover, determining that feticide is legally equivalent to homicide would not preordain the punishment for any specific defendant. The same gradations of severity that apply in the homicide context would continue to apply when the victim is a fetus.[206] The severity of the punishment would correspond to the defendant's *mens rea*—thus, sentences would vary depending on whether the defendant purposely or knowingly caused the death of the fetus (analogous to murder),[207] recklessly caused the death of the fetus (analogous to manslaughter),[208] or only negligently caused the death of the fetus (analogous to negligent homicide).[209]

This result is intuitive: the defendant's lack of knowledge of the woman's pregnancy should prevent the defendant from being charged with the most severe fetal homicide crime—the fetal homicide

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204. *See supra* notes 188–92 and accompanying text.

205. Roe v. Wade, 410 U.S. 113 (1973).

206. This discussion is based on the Model Penal Code definitions of *mens rea*: "Purposely. A person acts purposely with respect to a material element of an offense when . . . it is his conscious object to engage in conduct of that nature or to cause such a result," MODEL PENAL CODE § 2.02(a) (1985); "Knowingly. A person acts knowingly with respect to a material element of an offense when . . . if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such result," *id.* § 2.02(b); "Recklessly. A person acts recklessly with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct," *id.* § 2.02(c); "Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct," *id.* § 2.02(d).

207. *Id.* § 210.2.

208. *Id.* § 210.3.

209. *Id.* § 210.4.

equivalent of murder. But lack of knowledge should not entirely exonerate the defendant from all criminal liability because the defendant did, nevertheless, cause the death of the fetus.[210] The best approach, then, is that the defendant's level of culpability *as to the fetus* should determine the severity of the fetal homicide crime with which the defendant is charged.

For instance, if the defendant intentionally kills the mother but is unaware that she is pregnant, the defendant should be liable for murder as to the mother and for manslaughter or negligent homicide as to the fetus, depending on whether the facts of the case demonstrate that the defendant consciously disregarded the possibility of the woman's pregnancy.[211] If the defendant knew that the woman was pregnant prior to purposely killing her, the defendant should be liable for the most severe crime of homicide as to both the mother and the fetus because the defendant knowingly caused both deaths.[212]

Finally, legislatures can also use sentencing provisions to fine-tune a fetal homicide punishment depending on the factors that they deem relevant. For instance, a legislature could determine that a defendant who merely knowingly kills a fetus should be punished less harshly than one who purposely does so. Thus, given the potential for flexibility, legislatures can enact a functional and fair fetal homicide regime using *mens rea* gradations that are already in place.

CONCLUSION

Fetal homicide laws provide powerful protections to both the mother and the unborn child without undermining the constitutional rights of the mother. By protecting the mother's decision to bring the fetus to term, these laws give fuller effect to the woman's right to

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210. Because the fetus in this statutory regime would possess personhood for fetal homicide purposes, *see supra* notes 191–92 and accompanying text, the defendant cannot end that fetus's life with immunity.

211. *Cf.* MODEL PENAL CODE §§ 210.2–.4. Section 210.2 explains that "criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." *Id.* § 210.2. Section 210.3 explains that "[c]riminal homicide constitutes manslaughter when: (a) it is committed recklessly." *Id.* § 210.3. And section 210.4 explains that "[c]riminal homicide constitutes negligent homicide when it is committed negligently." *Id.* § 210.4. Thus, the severity of the defendant's crime depends on the defendant's mental state regarding the victim's pregnancy.

212. *See id.* § 210.2 ("[C]riminal homicide constitutes murder when . . . it is committed purposely or knowingly . . . .").

choose. In this way, fetal homicide laws and the constitutionally protected right to an abortion are not adversaries; rather, they are complements that can be harmoniously reconciled.

Moreover, the born-alive rule serves no purpose in the modern law other than to blindly imitate the past. The rule has simply outlived both its necessity and utility, and states should accordingly abandon it. Those states that continue to apply the rule and decline to extend the scope of homicide statutes to include a fetus as a potential homicide victim do their citizens—both born and unborn—an injustice.

In 1970, when the California legislature amended the state homicide statute to include the term "fetus," the state was a maverick, blazing a trail away from the accepted notion that homicide laws did not apply to the unborn. Over the following decades, other courts and legislatures followed suit until, in 1990, feticide was regarded as a homicide in nineteen states.[213] In that year, however, legislative creation of a comprehensive statutory regime to address fetal homicide was still seen as "most unusual."[214] As of 2009, thirty-six states have classified the killing of an unborn child as homicide. The fourteen others that have not ought to bring their laws in line with modern understandings of justice by adopting a comprehensive, internally consistent statutory regime that incorporates feticide into traditional homicide laws. Only in this manner can the law fully protect both a mother and her unborn child.

213. State v. Merrill, 450 N.W.2d 318, 321 (Minn. 1990).

214. *Id.*