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## Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application

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## FETAL HOMICIDE: WOMAN OR FETUS AS VICTIM? A SURVEY OF CURRENT STATE APPROACHES AND RECOMMENDATIONS FOR FUTURE STATE APPLICATION

On June 7, 1998, Sabrina Adkinson was walking across Mercury Boulevard in Hampton, Virginia.<sup>1</sup> At the time, she was eight months pregnant with her seventh child, a daughter to be named Destiny.<sup>2</sup> Traveling between sixty-five and sixty-eight miles per hour in a forty-mile per hour zone, an apparently drunk driver plowed into, and killed, both Ms. Adkinson and the fetus.<sup>3</sup> The driver had been convicted of driving under the influence (DUI) in 1996 and was charged with involuntary manslaughter in Ms. Adkinson's death.<sup>4</sup> He could not be charged in the death of the fetus because Virginia law does not allow separate prosecutions for fetal homicides unless the fetus is first born alive, nor does Virginia law provide increased penalties for vehicular homicides involving pregnant women.<sup>5</sup>

The Virginia General Assembly first considered a feticide bill in the 1996 session<sup>6</sup> and considered a similar measure in 1998.<sup>7</sup> The proposed 1996 bill provided that a fetus is a person for laws related to murder.<sup>8</sup> The General Assembly eventually passed legislation that increased penalties for murdering pregnant women and amended the aggravated malicious wounding statute to include miscarriage as a serious bodily injury.<sup>9</sup> The proposed

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1. See Kelli Caplan, *Pregnant Woman, Fetus Die After Being Hit by Car: Driver Charged with Drunken Driving*, DAILY PRESS (Newport News, VA), June 9, 1998, at A1.

2. See *id.*

3. See *id.*

4. See Kelli Caplan, *Man Faces Charges in Death: Pregnant Woman Killed; Suspect's 2nd DUI Charge*, DAILY PRESS (Newport News, VA), June 10, 1998, at C1. The defendant pleaded guilty to aggravated involuntary manslaughter and was sentenced to eighteen years in prison (four years suspended, leaving fourteen years to serve). See William H. McMichael, *Driver Will Serve Years for Death of Woman*, DAILY PRESS (Newport News, VA), Sept. 1, 1999, at C1. The trial judge noted that the defendant was on probation for a previous DUI conviction at the time of the instant offense, and called Ms. Adkinson's death "a very tragic, horrific case." *Id.*

5. See Caplan, *supra* note 4, at C1.

6. See S.B. 495, 1996 Reg. Sess. (Va.).

7. See S.B. 198, 1998 Reg. Sess. (Va.).

8. See Va. S.B. 495.

9. See VA. CODE ANN. §§ 18.2-31(11), -32.1, -51.2 (Michie 1996 & Supp. 1999).

1998 bill, sponsored by State Senator Forbes, from Chesapeake, established the crime of feticide for the murder of an unborn viable fetus, but the bill was not carried over to the next legislative session.<sup>10</sup>

This Note explores the topic of fetal homicide statutes and their application in Virginia and other states. The first section provides an overview of the approaches taken by states on the issue of fetal homicide statutes. The second section examines the dimensions of fetal homicide laws, noting important trends among the state statutes. Most significantly, the states tend to diverge with respect to who is the victim protected in homicide statutes: the fetus or the pregnant woman. The third section suggests ways that states can take a balanced stance on the issue of fetal homicide, regardless of which dominant approach is chosen, and submits that the optimal strategy should focus on the woman as the victim, thereby satisfying societal concerns while avoiding the brunt of opposition by pro-choice advocates. Finally, this Note proposes a Virginia statute that would penalize persons who drive under the influence of alcohol and injure pregnant women.

#### OVERVIEW OF APPROACHES TAKEN BY STATES

States take various approaches to punishing harm caused to pregnant women. Generally, states can be divided into those adopting a born alive rule, those punishing harm inflicted upon a fetus, and those punishing harm to the woman. Each of these approaches will be discussed in turn.

##### *The Born Alive Rule*

This subsection focuses on the born alive rule<sup>11</sup> and the changes to the rule adopted or considered by many states. The treatment begins with a historical discussion of the born alive rule and then surveys those states that subscribe to this rule.

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10. See Va. S.B. 198.

11. See generally Allison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457 (1998) (discussing various state approaches to fetal homicide statutes).

The common law born alive rule originated in England, based on the medical knowledge of the sixteenth century.<sup>12</sup> Under this rule, live birth, regardless of the actual gestational age, was the point at which life could be observed clinically.<sup>13</sup> In cases of fetal death, it was difficult to distinguish between death from natural causes, or injuries inflicted in utero.<sup>14</sup> Determining if "material acts" caused the death required the fetus to be born alive.<sup>15</sup> Sir Edward Coke reflected the seventeenth-century common law view that the homicide of an unborn fetus was not murder, but some lesser crime,<sup>16</sup> which Sir William Blackstone reiterated in the eighteenth century.<sup>17</sup> The rule "is recognized to be an evidentiary principle that was required by the state of medical science of the day."<sup>18</sup> Jurisdictions in the United States adopted the born alive rule, and several states maintain the rule either through express statutes or court interpretation.<sup>19</sup>

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12. See Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 571 (1987) (providing an excellent reference for a detailed history of the born alive rule and its application in common law and in American jurisdictions).

13. See *id.* at 568. Life may be observed clinically "[w]henver the infant at or after birth breathes spontaneously or shows any other sign of life such as heart beat or definite spontaneous movement of voluntary muscles . . . ." *Id.* (quoting JACK PRITCHARD ET AL., WILLIAMS OBSTETRICS 2 (17th ed. 1985)).

14. See *id.* at 575.

15. See *id.*

16.

If a woman be quick with childe, and by a Potion or otherwise killeth 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 misprison, 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.

*Id.* at 583 n.92 (quoting SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (photo. reprint 1986) (1797)).

17.

[I]f 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 the modern law doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanor.

Stephanie Rittrivi McCavitt, *The "Born Alive" Rule: A Proposed Change to the New York Law Based on Modern Medical Technology*, 36 N.Y.L. SCH. L. REV. 609, 612 (1991) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*129-\*130).

18. Forsythe, *supra* note 12, at 586.

19. See *id.* at 596 n.161.

The case most widely cited for a discussion of the born alive rule is *Keeler v. Superior Court*.<sup>20</sup> In *Keeler*, the defendant blocked his ex-wife's car on a narrow mountain road and forced her out of the car.<sup>21</sup> At the time his ex-wife was pregnant with a viable fetus, later determined to have a seventy-five to ninety-six percent chance of survival if born uninjured.<sup>22</sup> The defendant had warned her of the consequences if she were pregnant with another man's child.<sup>23</sup> After realizing that she was pregnant,<sup>24</sup> the defendant threatened "I'm going to stomp it out of you," and then "pushed her against the car, shoved his knee into her abdomen, and struck her in the face."<sup>25</sup> The woman survived, but the fetus was stillborn and the defendant was charged with murder.<sup>26</sup> Writing for the majority, Justice Mosk discussed the history of the born alive rule extensively and evaluated the legislature's intent in enacting the state's murder statute.<sup>27</sup> The majority determined that the legislature "did not intend the act of feticide—as distinguished from abortion—to be" a crime.<sup>28</sup>

Currently, a total of eighteen states still subscribe to the born alive rule, either by express statutory language or through judicial interpretation.<sup>29</sup> In eight of these eighteen states, criminal statutes explicitly define "person," "individual" or "human being" as one who is born and alive.<sup>30</sup> Eight other states have definitions of "person" or "human being" in their statutes or refer to

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20. 470 P.2d 617 (Cal. 1970).

21. *See id.* at 618.

22. *See id.* at 619.

23. *See id.* at 618.

24. *See id.*

25. *Id.*

26. *See id.* at 619.

27. *See id.* at 619-22; *see also* Forsythe, *supra* note 12, at 603-04 (recounting Justice Mosk's discussion in *Keeler* of the history behind the born alive rule).

28. *Keeler*, 470 P.2d at 622.

29. *See infra* notes 30-44 and accompanying text.

30. *See* ALA. CODE § 13A-6-1(2) (1994); ALASKA STAT. § 11.41.140 (Michie 1998); COLO. REV. STAT. ANN. § 18-3-101(2) (West 1999); HAW. REV. STAT. ANN. § 707-700 (Michie 1993); MONT. CODE ANN. § 45-2-101(28) (1999); NEB. REV. STAT. ANN. § 28-302(2) (Michie 1995); OR. REV. STAT. § 163.005(3) (1990); TEX. PENAL CODE ANN. § 1.07(26) (West 1994). Additionally, Idaho and Maine define "person" as "human being" in their statutes, but their state courts have been silent on the issue of whether "persons" or "human beings" include fetuses. *See* IDAHO CODE §§ 18-101, 4001, 4006 (1997); ME. REV. STAT. ANN. tit. 17-A, §§ 2(20), 201 (West 1983).

persons or human beings in their homicide statutes;<sup>31</sup> their courts have held explicitly that the definitions of these statutes do not encompass fetuses.<sup>32</sup>

North Carolina considered application of the born alive rule in *State v. Beale*.<sup>33</sup> The grand jury indicted the defendant with the murder of his wife and unborn child,<sup>34</sup> specifically charging that he fired a "shotgun with intent to destroy the unborn child."<sup>35</sup>

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31. See CONN. GEN. STAT. ANN. § 53a-3(1) (West 1994); KY. REV. STAT. ANN. § 507-010 (Banks-Baldwin 1990); MD. ANN. CODE, art. 27, § 407 (1996); N.J. STAT. ANN. §§ 2C:1-14, :11-2 (West 1995); N.Y. PENAL LAW §§ 125.00, 125.05 (Consol. 1998); N.C. GEN. STAT. § 14-17 (1993); VT. STAT. ANN. tit. 13, § 5301(4) (1998); W. VA. CODE § 61-2-1 (1997).

32. See *Williams v. State*, 550 A.2d 722 (Md. 1988) (sustaining the common law rule, but also holding that homicide includes deaths of fetuses born alive, but injured before birth); *In re A.W.S.*, 440 A.2d 1144 (N.J. 1981) (holding that an unborn fetus was not a person within the criminal homicide provision); *People v. Vercelletto*, 514 N.Y.S.2d 177 (1987) (holding that manslaughter in the second degree did not extend to an unborn fetus injured in a car accident, although the court also held that a pregnant victim's loss of a fetus was a "serious physical injury" for purposes of the second-degree vehicular assault statute); *People v. Joseph*, 496 N.Y.S.2d 328 (1985) (holding that the homicide statute did not include nonabortional homicides of viable fetuses); *State v. Beale*, 376 S.E.2d 1 (N.C. 1989); *State v. Oliver*, 563 A.2d 1002 (Vt. 1989) (holding that a viable fetus was not a person within the meaning of "person" in the state's death by motor vehicle statute); *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807 (W. Va. 1984) (holding that a viable unborn child was not a victim within the murder statute).

Kentucky sustained the born alive rule in 1983 in *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983). The defendant was indicted for murder after he told his wife he did not want a baby, and forced his hand up her vagina intending to destroy the fetus. See *id.* at 61. The defendant's actions killed the viable fetus. See *id.* at 61-62. The Supreme Court of Kentucky ultimately held that the fetus was not a person for purposes of the murder statute. See *id.* at 62-65. See generally Perry Mack Bentley, *Feticide: Murder in Kentucky?*, 71 KY. L.J. 933 (1982) (analyzing the court's decision and proposing a feticide statute); Margaret A. Miller, *Criminal Law-Murder-Intentional Killing of Viable Fetus Not Murder*, 11 N. KY. L. REV. 213 (1984) (analyzing the court's decision and the born alive rule); Tracy A. Nelson, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119 (1984) (discussing the *Hollis* decision, the need to eliminate the born alive rule, and proposing legislative reform).

33. 376 S.E.2d 1 (N.C. 1989). See generally 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 (1995) (examining the legal status of a fetus under North Carolina law in the areas of wrongful death, prenatal injury, criminal law, wrongful birth, and wrongful conception); Gary V. Perko, *State v. Beale and the Killing of a Viable Fetus: An Exercise in Statutory Construction and the Potential for Legislative Reform*, 68 N.C. L. REV. 1144 (1990) (analyzing the court's decision and the born alive rule).

34. See *Beale*, 376 S.E.2d at 1.

35. *Id.*

The Supreme Court of North Carolina held that the definition of a victim under the murder statute did not include an unborn viable fetus.<sup>36</sup> Despite the court's precedent recognizing a viable fetus as a person within the state's wrongful death statute,<sup>37</sup> the court distinguished the legislative actions and histories between the wrongful death and murder statutes.<sup>38</sup> The court relied upon *DiDonato v. Wortman*,<sup>39</sup> a case concerning the wrongful death of a stillborn child, in which the court reasoned that, because the state's statutes provided for tort claims by children to recover for fetal injuries, the legislature would also want to allow recovery for a viable fetus's death.<sup>40</sup> The court in *DiDonato* held that the term "person" in the wrongful death statute included a viable fetus.<sup>41</sup> In *Beale*, however, the court listed specific occasions in which the legislature could have amended criminal statutes to include fetuses as victims, but did not.<sup>42</sup> The court strictly construed the criminal statutes to exclude the fetus as a victim.<sup>43</sup>

Courts in Alabama, Kentucky, Maryland, New Jersey, New York, and Texas, though maintaining the born alive rule, have held that if fetuses are injured before birth, are born alive, and then die, their deaths can be prosecuted as homicides.<sup>44</sup>

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36. *See id.* at 4.

37. *See id.* at 2 (citing *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987)).

38. *See id.*

39. 358 S.E.2d 489 (N.C. 1987).

40. *See id.* at 491.

41. *See id.*

42. *See Beale*, 376 S.E.2d at 4.

43. *See id.*

44. *See Clarke v. State*, 23 So. 671 (Ala. 1898) (upholding the defendant's conviction for second-degree murder of a fetus after the defendant beat the mother); *Jones v. Commonwealth*, 830 S.W.2d 877 (Ky. 1992) (upholding a conviction for second-degree manslaughter during the operation of a motor vehicle); *Williams v. State*, 550 A.2d 722 (Md. 1988) (upholding a conviction for manslaughter by bow and arrow); *State v. Anderson*, 343 A.2d 505 (N.J. 1975) (upholding a conviction for the murder of twin fetuses); *People v. Hall*, 557 N.Y.S.2d 879 (N.Y. App. Div. 1990) (upholding a conviction for second-degree manslaughter); *Cuellar v. State*, 957 S.W.2d 134 (Tex. Crim. App. 1997) (upholding a conviction for intoxication manslaughter); *see also* McCavitt, *supra* note 17, at 609 (comparing New York law with fetal homicide laws of other states and suggesting the state adopt similar laws based on viability); Annissa R. Obasi, Note, *Protecting Our Vital Organs: The Case for Fetal Homicide Laws in Texas*, 4 TEX. WESLEYAN L. REV. 207 (1997-98) (supporting the intermediate appellate court's decision in *Cuellar v. State* and recommending that Texas formally adopt the limited revision of the born alive rule); *Court Refuses to Hear Appeal in Case Involving Fetus Death*, SAN ANTONIO EXPRESS-NEWS, Apr. 23, 1998, at B2, available in

*States Criminalizing Actions Against Fetuses*

In contrast to those maintaining the born alive rule, twenty-four states criminalize actions against the fetus. This approach recognizes the fetus as the victim of the aggressor's actions. As will be seen, however, these states differ with respect to the threshold at which criminal culpability attaches—some states will punish the offender only if the harmed fetus has reached a certain stage of development. This section surveys the states according to fetal gestational age.

*Viability*

Modern medical jurisprudence refers to "viability" as an important stage in fetal development.<sup>45</sup> The Supreme Court defined viability in *Roe v. Wade*<sup>46</sup> as that period at the end of the second trimester of pregnancy when the fetus is capable of surviving outside the womb.<sup>47</sup> The Court determined that when balanced against a woman's right to privacy, a fetus was not a "person" with rights under the Fourteenth Amendment.<sup>48</sup> States, however, have an interest in protecting "potential life" when the fetus reaches viability, usually at twenty-eight weeks of pregnancy, but theoretically as early as twenty-four weeks.<sup>49</sup> The Court in *Roe* limited its discussion to actions taken by the mother and her physicians, not actions taken by a third party to terminate the pregnancy without the woman's consent.<sup>50</sup>

Six states criminalize homicides of viable fetuses by statute or judicial interpretation.<sup>51</sup> Three of these states protect fetuses

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1998 WL 5088854 (describing the Texas Court of Criminal Appeals' refusal to hear an appeal of an intoxication manslaughter case).

45. See Forsythe, *supra* note 12, at 569.

46. 410 U.S. 113 (1973).

47. See *id.* at 162-64.

48. See *id.* at 155-59.

49. See *id.* at 162-64.

50. See *id.* at 163-65.

51. See IND. CODE ANN. §§ 35-42-1-1(4), -42-1-6 (Lexis 1998 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990); MICH. COMP. LAWS ANN. § 750.322 (West 1991); OKLA. STAT. ANN. tit. 21, §§ 105, 711 (West 1983); S.C. CODE ANN. § 16-3-10 (Law Co-op. 1976); TENN. CODE ANN. § 39-13-214 (1997).



with homicide statutes.<sup>52</sup> For example, Indiana originally enacted

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52. See IND. CODE ANN. §§ 35-42-1-1(4), -42-1-6; MICH. COMP. LAWS ANN. § 750.322; TENN. CODE ANN. § 39-13-214.

The Michigan statute provides penalties for the manslaughter or willful killing of an "unborn quick child," see MICH. COMP. LAWS ANN. § 750.322, but curiously the state's supreme court has held that the word "child" in this statute and the abortion statutes refer to a viable child. See *Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973). *Larkin* defines a child as:

A viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community.

*Id.* at 180.

In 1980, however, the Michigan Court of Appeals decided that the state's vehicular homicide statute did not include viable fetuses as victims. See *People v. Guthrie*, 293 N.W.2d 775 (Mich. Ct. App. 1980). Subsequently, the legislature considered a bill that would provide penalties for harming a fetus, with a possible penalty of life in prison for "intentionally causing a miscarriage or stillbirth." Karen Schulz & Ed Golder, *Bill Gives Rights to Unborn Fetuses; Some Fear the Legislation, Which Gov. Engler Is Expected to Sign, Is a Step Toward Ending a Woman's Right to Choose Abortion*, GRAND RAPIDS PRESS, June 14, 1998, at A1, available in 1998 WL 12600004. An opponent responded that "[i]t doesn't overtly say fetuses are people. . . . But in a backhanded fashion, it creates a situation where an embryo or a fetus is a person." *Id.* The bill did not become law. See generally Mark S. Kende, *Michigan's Proposed Prenatal Protection Act: Undermining a Woman's Right to an Abortion*, 5 AM. U. J. GENDER & L. 247 (1996) (examining Senate Bill 515, introduced in the 1995 session of the Michigan Legislature, and its alternative).

Tennessee originally subscribed to the born alive rule. See Forsythe, *supra* note 12, at 596 n.161. For example, in *State v. Evans*, 745 S.W.2d 880 (Tenn. Crim. App. 1987), the court held that a viable fetus was not a person within the state's vehicular homicide statute. See *id.* at 882. In *Evans*, the defendant collided with another vehicle while driving drunk, killing the pregnant passenger's fetus, which was in its eighth month of development. See *id.* at 880. The court noted that the same state senator sponsored both the state's wrongful death statute and vehicular homicide statute, and that the legislature passed both measures during a single legislative session. See *id.* at 882. The court reasoned that the legislature intended that viable fetuses not be included in the homicide statute because the wrongful death statute included viable fetuses as victims, while the vehicular homicide statute did not. See *id.*

Two years after *Evans*, the Tennessee legislature expanded the definition of "another" and "another person" to include a viable fetus as a victim of homicides and assaults. See TENN. CODE ANN. § 39-13-214. The state demonstrated its resolve to apply the newly expanded law by prosecuting a drunk driver who was sentenced to two six-year prison terms for the vehicular homicide deaths of a pregnant woman and her eight-month fetus in the first conviction under the new law. See Bob Fowler, *Man Petitions Court for Relief from Vehicular Homicide Terms; Moore Has Been Denied Parole at 3 Hearings*, KNOXVILLE NEWS-SENTINEL, Apr. 18, 1994, at BC1, available in 1994 WL 7916394. A year later, the Tennessee Court of Criminal Appeals went one step further and upheld the defendant's conviction of vehicular homicide in *State v. Williamson*, 919 S.W.2d 69 (Tenn.

a "feticide" statute that criminalized knowing or intentional termination of another's pregnancy, with exceptions for abortion, and mandated a maximum eight-year penalty.<sup>53</sup> In *Baird v. State*,<sup>54</sup> the Supreme Court of Indiana held that the legislature intended this statute to punish those who "knowingly terminated a human pregnancy," even without the specific intent to kill the fetus.<sup>55</sup> Despite the defendant's argument that the statutory language required a specific intent to kill the fetus, the court reasoned that the language was used specifically to exempt from prosecution two intentional actions by physicians.<sup>56</sup> Yielding to popular support for a more effective feticide law,<sup>57</sup> the Indiana legislature, over the governor's veto, enacted sweeping legislation criminalizing acts against pregnant women and fetuses.<sup>58</sup> The most significant provision of these new laws established murder of a pregnant woman that results in the intentional death of a viable fetus as an aggravating circumstance for a death sentence or life imprisonment without parole.<sup>59</sup> The Indiana law also includes penalties for crimes against viable fetuses and pregnant women ranging from murder to aggravated battery.<sup>60</sup>

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Crim. App. 1995). In *Williamson*, the defendant was a vehicle owner who let a friend drive while intoxicated. The intoxicated driver subsequently collided with another car killing herself and the other car's occupant, a pregnant woman carrying a fetus in its thirty-eighth week of gestation. See *id.* at 73. The *Williamson* case became "one of the first in Tennessee to hold the owner of a car—not just the driver—responsible for the death of a fetus in a traffic accident." Gina Fann, *Car Owner Jailed for DUI Deaths*, NASHVILLE BANNER, Dec. 22, 1995, at A12, available in 1995 WL 1278764.

53. See IND. CODE ANN. §§ 35-42-1-6, -50-2-5.

54. 604 N.E.2d 1170 (Ind. 1992).

55. *Id.* at 1190.

56. See *id.* at 1189-90.

57. See Jennifer E. Smith, *Grieving Families Seek Law Change*, INDIANAPOLIS STAR, June 28, 1995, at E01, available in 1995 WL 3069616 (reporting the case of an Indiana couple who criticized the low penalties in the state's feticide law after they had been shot and injured as they sat on their porch, killing her eight-month-old fetus).

58. See Editorial, *A Vote for the Unborn's Worth*, INDIANAPOLIS STAR, Jan. 24, 1998, at A8, available in 1998 WL 8306412 (reporting the governor's concern that physicians could be prosecuted for late-term abortions, even though the legislation exempted legal abortions).

59. See IND. CODE ANN. § 35-50-2-9.

60. See *id.* § 35-42-1-1 (murder); *id.* § 35-42-1-3 (voluntary manslaughter); *id.* § 35-42-1-4 (involuntary manslaughter); *id.* § 35-42-2-1.5 (aggravated battery).

In the remaining three states that recognize viability as the threshold for criminal culpability, the courts, as opposed to the legislatures, have taken the lead. Although their statutes are silent on the meaning of "person" for the purposes of homicide,<sup>61</sup> the courts of Massachusetts,<sup>62</sup> South Carolina,<sup>63</sup> and Oklahoma<sup>64</sup> have held that viable fetuses are indeed persons under these

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61. See MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990); OKLA. STAT. ANN. tit. 21, §§ 105, 711 (West 1983); S.C. CODE ANN. § 16-3-10 (Law Co-op. 1976).

62. Massachusetts first addressed the question of a viable fetus as a victim of homicide in *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984), and later applied the same standard in a different setting in *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989). In *Cass*, the defendant struck a female pedestrian while operating an automobile. See *Cass*, 467 N.E.2d at 1325. The collision killed the victim's eight-and-one-half-month-old fetus and resulted in the driver's prosecution for violating the vehicular homicide statute. See *id.* Although it applied the rule prospectively, the Supreme Judicial Court of Massachusetts held that the legislature contemplated that the term "person" would be construed to include viable fetuses in the homicide statutes. See *id.* See generally Roselee Price, *Commonwealth v. Cass: Criminal Liability for the Death of a Viable Fetus Under the Massachusetts Vehicular Homicide Statute*, 21 NEW ENG. L. REV. 147 (1985) (analyzing the court's rejection of the born alive rule).

In *Lawrence*, the defendant was charged with first-degree murder of a sixteen-year-old girl and involuntary manslaughter of her viable fetus. See *Lawrence*, 536 N.E.2d at 573. As it had in *Cass*, the high court held that a viable fetus could also be considered a "person" in the common law crime of homicide. See *id.* Subsequently, a man was convicted of two counts of involuntary manslaughter for shooting and killing his girlfriend and her viable fetus. See *Dorchester Man Convicted in Death of Woman, Fetus*, BOSTON GLOBE, Apr. 19, 1991, available in 1991 WL 7410428. The supreme court upheld the conviction, see *Commonwealth v. Crawford*, 629 N.E.2d 1332 (Mass. 1994), and the superior court later rejected the defendant's contention that the two convictions and consecutive sentences violated double jeopardy. See *Commonwealth v. Crawford*, No. CRIM. A. 089011-12, 1997 WL 184429 (Mass. Super. Ct. Feb. 27, 1997), *aff'd* 722 N.E.2d 960 (Mass. 2000).

63. See *infra* notes 65-74 and accompanying text.

64. Oklahoma cases follow the approaches taken in Massachusetts and South Carolina. For example, in *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994), the court considered the case of a defendant who, while intoxicated, drove her vehicle into oncoming traffic and collided with another vehicle. See *Hughes*, 868 P.2d at 731. The driver of the other vehicle was nine months pregnant and due to deliver in four days. See *id.* An emergency caesarian section was performed, but the fetus was stillborn. See *id.* The Oklahoma Court of Criminal Appeals, agreeing with the courts in *Cass* and *Horne*, expressly rejected the born alive rule and held that a viable fetus could be the victim of a homicide. See *id.* The court, however, decided to apply the rule prospectively and reversed the manslaughter conviction. See *id.* at 704. The court observed that its decision was consistent with its decision in *Hooks v. State*, 862 P.2d 1273 (Okla. Crim. App. 1993), in which it upheld the defendant's conviction under a manslaughter statute. See *id.*; see also OKLA. STAT. ANN. tit. 21, § 713 (West 1983). The court made it clear that the new status of the fetus under the criminal law would not affect abortion. See *Hughes*, 868 P.2d at 734-35.

laws. The situation in South Carolina is illustrative. South Carolina abrogated the born alive rule in 1984 in *State v. Horne*.<sup>65</sup> In *Horne*, the defendant was convicted of assault and battery with intent to kill and involuntary manslaughter.<sup>66</sup> Horne had stabbed his estranged wife, who survived, but her full-term viable fetus died.<sup>67</sup> The court determined that the fetus was the victim of the defendant's transferred intent toward the mother and held that a viable fetus was a "person" within the state's statutory definition of murder.<sup>68</sup>

In *State v. Ard*,<sup>69</sup> the Supreme Court of South Carolina upheld a defendant's death sentence for the murders of his girlfriend and their viable unborn son.<sup>70</sup> The *Ard* court ruled that a viable fetus is a "person" or "child" in terms of statutory aggravating circumstances, making the defendant eligible for the death penalty.<sup>71</sup> The court recognized that when the legislature added the appropriate aggravating circumstance to the murder statute, it was aware of the court's decision in *Horne* and could have decided to exempt fetuses from the definition.<sup>72</sup> South Carolina thus became the first state to "allow the death penalty for someone convicted of murdering a viable fetus."<sup>73</sup> The state's attorney general emphasized that the decision "does not mean doctors who illegally perform third-trimester abortions can be sent to Death Row."<sup>74</sup>

### *Quickening*

Quickening is the period prior to viability when the mother first feels the fetus move in the womb, normally between the sixteenth and eighteenth week of pregnancy.<sup>75</sup> At common law, this

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65. 319 S.E.2d 703 (S.C. 1984).

66. *See id.*

67. *See id.* at 704.

68. *See id.*

69. 505 S.E.2d 328 (S.C. 1998).

70. *See id.* at 331.

71. *See id.* at 330.

72. *See id.* at 331.

73. *Death Penalty Upheld for Killing Viable Fetus*, POST & COURIER (Charleston, SC), Sept. 17, 1998, at B6, available in LEXIS, News Library, SCNEWS File.

74. *Id.* (quoting South Carolina Attorney General Charlie Condon).

75. *See Forsythe, supra* note 12, at 567.

was the period when the fetus was first considered alive.<sup>76</sup> In *Roe v. Wade*,<sup>77</sup> Justice Blackmun described quickening as the "confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins."<sup>78</sup> Since the advent of modern medical techniques, quickening has "little medical or legal significance in understanding pregnancy."<sup>79</sup> At common law, killing a "quickened" fetus was homicide, but not murder.<sup>80</sup>

Six states criminalize actions against "quick" fetuses. Florida, Mississippi, Nevada, Rhode Island, and Washington all punish willfully or intentionally and unlawfully killing an unborn quick child as manslaughter;<sup>81</sup> Georgia punishes such an action as feticide.<sup>82</sup> The states vary with respect to punishment.<sup>83</sup> The courts in these states have applied these statutes on numerous occasions.<sup>84</sup>

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76. See *id.* at 568.

77. 410 U.S. 113 (1973).

78. *Id.* at 133.

79. Forsythe, *supra* note 12, at 567.

80. See McCavitt, *supra* note 17, at 612.

81. See FLA. STAT. ANN. § 782.09 (West 1992); MISS. CODE ANN. § 97-3-37 (1998); NEV. REV. STAT. ANN. § 200.210 (Michie 1997); R.I. GEN. LAWS § 11-23-5 (1994); WASH. REV. CODE ANN. § 9A.32.060 (West 1988 & Supp. 1999).

82. See GA. CODE ANN. § 16-5-80 (1999).

83. Georgia and Washington have maximum sentences of life imprisonment. See GA. CODE ANN. § 16-5-80 (1997); WASH. REV. CODE ANN. § 9A.32.060 (West Supp. 1999); *id.* § 9A.20.021 (West 1988). Florida's punishment is a term not greater than 15 years, Mississippi's sentence is 2 to 20 years, and Rhode Island's punishment is a term not greater than 30 years. See FLA. STAT. ANN. § 775.082(3)(c) (West 1992 & Supp. 1999); MISS. CODE ANN. § 97-3-25; R.I. GEN. LAWS § 11-23-3. Georgia extends criminal liability further by providing penalties for feticide by vehicle. See GA. CODE ANN. § 40-6-393.1 (1997).

84. See, e.g., *Brinkley v. State*, 322 S.E.2d 49 (Ga. 1984) (holding that the description "quick" in the state's feticide statute was not unconstitutionally vague and noting that the term had been used in criminal provisions in English law since 1803); *State v. Willis*, 457 So. 2d 959, 960 (Miss. 1984) (holding, in a case of first impression, that manslaughter of a fetus did not merge with the charge of murder of the mother, and the defendant could be charged with murder in the mother's death and manslaughter in the fetus's death); *State v. Amaro*, 448 A.2d 1257, 1259-60 (R.I. 1982) (holding that the state's homicide statute did not apply to fetuses in light of the state feticide statute that specifically punished the "wilful killing of an unborn quick child"). Compare *Anne Koch et al., Killer's Life Influenced Jurors: Blackwell Avoids Death Penalty; Jury Splits Decision*, SEATTLE TIMES, June 19, 1996, at B1, available in 1996 WL 3668913 (describing a brutal killing for which the defendant was convicted of three counts of aggravated first-degree murder and fetal manslaughter, and was sentenced to life imprisonment without the possibility of parole), with *Julie Emery, Six-Month Sentence for Driver of Car that Killed Unborn Baby*, SEATTLE TIMES, Dec. 10, 1987, at E11, available in 1987 WL 5386126 (de-

Florida provides a useful example of how a state's criminal law protecting fetuses can develop in the context of the abortion debate. Typically, Florida rarely prosecuted violations of the state's fetal manslaughter statute.<sup>85</sup> In a notable case, however, a defendant who stabbed his ex-wife was charged with fetal manslaughter, along with first-degree murder.<sup>86</sup> The case attracted a great deal of attention from both sides of the abortion debate.<sup>87</sup> The jury ultimately convicted the defendant for manslaughter of the woman, but the court dismissed the manslaughter charge for the fetus.<sup>88</sup> The judge said that according to the 100-year-old statute, the defendant "could be convicted of manslaughter in the death of the fetus only if he had been found guilty of murdering" the woman, rather than for the lesser charge of manslaughter.<sup>89</sup>

Recently, Florida enacted a vehicular homicide law that makes it a crime to kill a viable fetus in a car accident.<sup>90</sup> Florida enacted this law in reaction to intense lobbying on behalf of a woman whose daughter and grandson were killed in a car accident along with the daughter's unborn child.<sup>91</sup> The original bill, first proposed in 1997, was caught up in controversy between pro-choice and antiabortion forces.<sup>92</sup> One pro-choice lobbyist, however, said that although she opposed permitting separate

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scribing a case in which the defendant was convicted of vehicular assault, rather than vehicular homicide, because the applicable statute did not apply to fetuses as victims).

85. See Henry Pierson Curtis, *When Fetus Died, Trial Got Complicated; An Orlando Baker Is Charged with Killing His Ex-Wife, Who Was 6 Months Pregnant*, ORLANDO SENTINEL, Aug. 25, 1991, at B1, available in LEXIS, News Library, Orsent File.

86. See *id.*

87. See *id.* (noting that both abortion supporters and opponents believed a conviction could affect the right to abortion).

88. See Purvette A. Bryant, *Fetus Slaying Charge Dropped However, Michael Garner Faces Up to 30 Years in Prison for Killing His Pregnant Ex-Wife, Angelica*, ORLANDO SENTINEL, Oct. 30, 1997, at D1, available in 1997 WL 13302070.

89. *Id.*; see also FLA. STAT. ANN. § 782.09 (West 1992) ("The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother . . .").

90. See FLA. STAT. ANN. § 782.071 (West Supp. 1999).

91. See Mary Lou Pickel, *Gardens Woman's Crusade Wins in Legislature*, PALM BEACH POST, May 2, 1988, at 3B, available in LEXIS, News Library, Pbpst File.

92. See Dina Nelson, *Bill to Punish Motorists Who Kill Fetuses Caught in Abortion Debate*, PALM BEACH POST, Apr. 25, 1997, at 6B, available in LEXIS, News Library, Pbpst File.

convictions for killing a fetus, she could support increased penalties for those who kill pregnant women and their fetuses.<sup>93</sup> The bill's sponsor, an abortion opponent, claimed that "[t]his has nothing—repeat nothing—to do with abortion."<sup>94</sup> He then changed the proposed legislation to restrict prosecutions to those involving viable fetuses, and the legislature passed the revised version.<sup>95</sup> The new law has been criticized because it could lead to conflicts in future cases regarding the issue of whether the affected fetus was viable.<sup>96</sup>

### *Twelve Weeks of Fetal Development*

Arkansas recently established the culpability threshold at twelve weeks of development. Arkansas originally subscribed to the born alive rule, reinforcing this rule in *Meadows v. State*.<sup>97</sup> In *Meadows*, the defendant drove recklessly while intoxicated and struck an oncoming car.<sup>98</sup> The driver of the other car was killed, along with the viable fetus of a passenger in the defendant's car, and the defendant was convicted of two counts of manslaughter.<sup>99</sup> The Supreme Court of Arkansas held that the fetus was not a "person" for purposes of the manslaughter statute.<sup>100</sup> The court determined that such a decision should be made by the legislature; to do otherwise would create a new common law crime.<sup>101</sup>

Later in 1987, the Arkansas legislature responded to *Meadows* by enacting a statute enlarging the crime of battery to include

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93. *See id.*

94. *Id.*

95. *See* Pickel, *supra* note 91, at 3B.

96. *See Unfathomable Grief, Inappropriate Laws*, PALM BEACH POST, June 7, 1998, at 2E, available in LEXIS, News Library, Pbpst File.

97. 722 S.W.2d 584 (Ark. 1987).

98. *See id.* at 585.

99. *See id.*

100. *See id.* at 587; *see also* ARK. CODE ANN. §§ 5-1-102(13), -10-104 (Michie 1997). *See generally* John T. Shannon, Note, *A Fetus Is not a "Person" as the Term Is Used in the Manslaughter Statute: Meadows v. State*, 10 U. ARK. LITTLE ROCK L.J. 403 (1987-88) (analyzing the court's decision and the born alive rule).

101. *See Meadows*, 722 S.W.2d at 587.

injuries to pregnant women resulting in miscarriage.<sup>102</sup> The resulting sentence may not be less than five years or more than twenty years.<sup>103</sup> As a further reaction to the *Meadows* decision, the Arkansas legislature recently enacted a comprehensive fetal protection act and amended the Arkansas Code to expand the definition of "person" to include fetuses at twelve weeks of development.<sup>104</sup> Accordingly, Arkansas is unique because it has laws protecting both women and fetuses.

### *Seven to Eight Weeks of Fetal Development*

California also draws a unique line in determining what fetal crimes are punishable under its criminal law. Although California's murder statute extends protection to the unborn, the law does not specify the applicable stage of development.<sup>105</sup> In the landmark case of *People v. Davis*,<sup>106</sup> the California Supreme Court determined that fetal viability was not an element of fetal murder, but established seven to eight weeks of development as the threshold for criminal culpability.<sup>107</sup> In *Davis*, the defendant

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102. See ARK. CODE ANN. § 5-13-201(5). An article in *The Arkansas Gazette* explained that the prior "[e]xisting law makes it impossible to file a criminal charge, for example, when a drunk driver causes the death of a fetus in a wreck." *Legislative Calendar*, ARK. GAZETTE, Feb. 25, 1987, at 9A, available in 1987 WL 5677861.

103. Compare ARK. CODE ANN. § 5-4-401 (providing a sentence of not less than 5 years or more than 20 years for battery), with VA. CODE ANN. §§ 18-2.51.2, -10 (Michie 1996 & Supp. 1999) (providing a sentence of 20 years to life for aggravated malicious wounding).

104. See ARK. CODE ANN. § 5-1-102(13)(B) (Supp. 1999); see also James Jefferson, *Senate OKs Measure to Protect the Unborn*, A.P. NEWSWIRE, Apr. 7, 1999, available in WESTLAW, APWIRE Database (describing efforts to pass the Arkansas legislation). Four defendants recently were charged with capital murder in the state's first test of the fetal homicide laws. See Kristin Everett, *Innocent Pleas Entered to Murder Charges in Death of Fetus*, A.P. NEWSWIRE, Sept. 3, 1999, available in WESTLAW, ARNEWS Database. One defendant has been accused of offering to pay the other three defendants to beat up his girlfriend who was nine-months pregnant. See *id.* The beating killed the fetus. See *id.*

105. See CAL. PENAL CODE § 187 (West 1999).

106. 872 P.2d 591 (Cal. 1994).

107. See *id.* at 591. See generally Julie N. Qureshi, Note, *People v. Davis: California's Murder Statute and the Requirement of Viability for Fetal Murder*, 25 GOLDEN GATE U. L. REV. 579 (1995) (analyzing the court's decision and suggesting that California enact separate feticide legislation).



shot a pregnant woman in the course of a robbery.<sup>108</sup> The woman survived, but her nonviable fetus died.<sup>109</sup> The court's opinion reviewed the legislative history of the state's murder statute,<sup>110</sup> noting that the legislature had amended the law to include fetuses in response to a supreme court holding<sup>111</sup> that a fetus was not a "human being" for purposes of the murder statute.<sup>112</sup> The *Davis* court held that viability is not a requirement for fetal murder "as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks."<sup>113</sup> The court, however, also decided that the decision would apply prospectively.<sup>114</sup>

Reaction to *Davis* was widespread.<sup>115</sup> Abortion rights activists claimed that the decision "moved the law in a 'very troubling direction.'"<sup>116</sup> Since the *Davis* ruling, there have been several convictions under the fetal murder statute, with fetal developments ranging from fifteen weeks to eight months.<sup>117</sup> The California courts, however, have limited the application of fetal ho-

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108. See *Davis*, 872 P.2d at 592.

109. See *id.*

110. See CAL. PENAL CODE § 187; *Davis*, 872 P.2d at 594-96.

111. See *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970).

112. See *Davis*, 872 P.2d at 607 (discussing the California legislature's reaction to *Keeler*).

113. *Id.* at 602.

114. See *id.* at 600. Justice Mosk, the sole dissenting judge, vigorously disagreed with the majority's view and believed the legislature intended to limit the murder statute's application to the murder of a viable fetus. See *id.* at 607 (Mosk, J., dissenting).

115. See, e.g., Maura Dolan, *Assault Causing Miscarriage Can Be Murder Case*, L.A. TIMES, May 17, 1994, at 1, available in 1994 WL 2166085.

116. *Id.* (quoting Abby Leibmen, executive director of California Woman's Law Center).

117. See Jim Mikles, *Drunk Driver Who Killed Fetus Gets 21 Years to Life*, SACRAMENTO BEE, May 19, 1995, at B1, available in 1995 WL 4119840 (reporting the case of a woman convicted of second-degree murder in the death of an eight-month-old fetus in a drunken driving accident where the driver was driving on a suspended license and previously had been convicted eight times of drunken driving); Tim O'Leary, *27 Years in Death of Fetus. Temecula Man Sentenced for Beating Family Members Including His Pregnant Wife Who Miscarried*, PRESS-ENTERPRISE (Riverside, CA), May 8, 1998, at B1, available in 1998 WL 12001057 (reporting the defendant's second-degree murder conviction for beating his wife, causing a miscarriage in the final weeks of her pregnancy); *Teen Sentenced in Fetus Slaying; Fresnan Convicted in Shooting that Led to the Death of 15-Week-Old Fetus*, FRESNO BEE, July 15, 1995, at B3, available in 1995 WL 7419741 (reporting the defendant's second-degree murder conviction and sentence of twenty years to life in prison for shooting and killing his ex-girlfriend's fifteen-week-old fetus).

micide measures to charges of murder.<sup>118</sup> In 1998, the California Supreme Court upheld the first-degree murder and second-degree fetal murder convictions of a defendant who had asked for an instruction on fetal manslaughter and was refused.<sup>119</sup> The court held that the crime of fetal manslaughter does not exist in California.<sup>120</sup>

### *Fertilization or Conception*

The last stage of fetal development that states have used as the basis for criminalizing actions against fetuses is fertilization or conception.<sup>121</sup> Seven states penalize harm inflicted upon the unborn at fertilization or conception: Missouri,<sup>122</sup> Pennsylv-

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118. See *People v. Brown*, 42 Cal. Rptr. 2d 155 (Ct. App. 1995).

119. See *People v. Dennis*, 950 P.2d 1035 (Cal.), cert. denied, 525 U.S. 912 (1998).

120. See *id.* at 1058. The court also held that the second-degree murder conviction, along with first-degree conviction in the mother's death, made the defendant eligible for the death penalty under the state's multiple-murder special circumstance. See *id.* at 1059-60.

121. Most medical authorities equate the two terms. See Forsythe, *supra* note 12, at 620 n.338.

122. Courts in Missouri have interpreted their statutes to include the fetus as a victim for specified crimes. See *State v. Knapp*, 843 S.W.2d 345, 346 (Mo. 1992); *State v. Holcomb*, 956 S.W.2d 286, 290-91 (Mo. Ct. App. 1997). The Missouri statute specifies that the term "unborn child" includes human offspring from the moment of conception until birth. See MO. ANN. STAT. § 1.205.3 (West 1969 & Supp. 1999). The Missouri Supreme Court held that this definition applied to both the state's involuntary manslaughter statute and first-degree murder statute. See *Knapp*, 843 S.W.2d at 346 (Mo. 1992). In *Knapp*, the defendant drove across the highway center line while intoxicated and collided with a car driven by a woman who was six-months pregnant. See *id.* at 346. The mother survived, but the viable fetus died prior to birth from injuries sustained in the accident. See *id.* The court determined that the definition in section 1.205.3 applied to the involuntary manslaughter statute. See *id.* at 349; see also MO. ANN. STAT. § 565.024 (West 1999). The court noted that the legislature passed both statutes on the same day and that the statutes must be read together. See *Knapp*, 843 S.W.2d at 347.

In *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997), the defendant was found guilty of murdering his girlfriend and her unborn fetus. See *id.* at 288. The court, consistent with *Knapp*, held that an unborn child was a "person" for the purposes of the first-degree murder statute. See *id.* at 290; see also MO. ANN. STAT. § 565.020 (West 1999). The court distinguished between the mother's right to obtain an abortion and the killing of the fetus by a third party without the mother's consent. See *Holcomb*, 956 S.W.2d at 291. The defendant contended that his actions were equivalent to an illegal abortion and should have been prosecuted as such (with a less severe penalty), rather than as first-degree murder. The court reviewed the point, despite the defendant's failure to preserve it for appeal, and concluded that criminal abortion laws "assume the actual or apparent consent of the mother." *Id.* at 292. The court indicated that its result was consistent with

nia,<sup>123</sup> Louisiana,<sup>124</sup> North Dakota,<sup>125</sup> Illinois,<sup>126</sup> Minnesota,<sup>127</sup> and

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those reached by courts in other states. *See id.*

123. *See* 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998). In 1997, Pennsylvania passed the chapter, "Crimes Against Unborn Child," which established penalties for murder, manslaughter, and assault. *See id.* The statute's expansive definition of "unborn child," which includes fetuses at any stage of development, *see id.* § 3203 (West 1983), created great controversy. *See, e.g., Bill to Punish Fetal Homicide Poorly Done*, ALLENTOWN MORNING CALL, Sept. 28, 1997, at A26, available in 1997 WL 11127446. Pro-choice activists were concerned that defining the "unborn child" separately from the mother created an artificial conflict between mother and fetus, and the Pennsylvania Coalition Against Domestic Violence disagreed with the law's focus on the fetus instead of the mother. *See Pennsylvania: Feticide Bill Close to Becoming Law*, ABORTION REP., Aug. 8, 1997, available in LEXIS, News Library, Wire Service Stories File.

124. *See* LA. REV. STAT. ANN. §§ 14:2, 32.5 (West 1997). This feticide statute specifies three degrees of feticide that are comparable to murder, manslaughter, and criminally negligent homicide, including those inflicted by vehicle. *See id.* §§ 14:32.5 to .8. The fetus is protected from the point of fertilization until birth. *See id.* § 14:2. In *State v. Smith*, 676 So. 2d 1068 (La. 1996), the Supreme Court of Louisiana upheld the statute. *See id.* (holding that the defendant's convictions for manslaughter and feticide did not violate double jeopardy in the strangulation death of his girlfriend and the subsequent death of her fetus); *see also Jarvis DeBerry, Slidell Man Denied Driver's License, Fetus Was Killed in DWI Crash*, NEW ORLEANS TIMES-PICAYUNE, Jan. 28, 1999, at B1, available in 1999 WL 4390991 (describing a feticide conviction of a defendant who, while driving intoxicated, crossed the highway center line and slammed head-on into a pickup truck carrying a couple on the way to the hospital for their unborn child's birth; the unborn child was killed in the accident).

125. *See* N.D. CENT. CODE §§ 12.1-17.1-01 to -06 (1997). North Dakota's statutes include a chapter entitled "Offenses Against Unborn Children," with offenses ranging from murder to assault. *See id.* §§ 12.1-17.1-01 to -07. The statute protects the fetus from conception to birth. *See id.* § 12.1-17.1-01.

126. *See* 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 1993). Illinois enacted its feticide legislation in response to the state supreme court's ruling in *People v. Greer*, 402 N.E.2d 203 (Ill. 1980) (upholding the born alive rule). The initial feticide statute contained a viability requirement. *See People v. Ford*, 581 N.E.2d 1189, 1200 (Ill. App. Ct. 1991). In 1986, the legislature repealed the 1981 statute and enacted laws specifying several intentional crimes against "unborn children." 720 ILL. COMP. STAT. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (applying to the fetus at any stage of development); *see also Bruce Kirkham, State Senate OKs Bill Making Harm to Fetus a Crime*, CHI. SUN-TIMES, May 14, 1986, at 12, available in 1986 WL 3795970 (stating that the proposed offenses would range from homicide to battery). Subsequent cases have upheld both the validity of the statute and its penalties. *See People v. Shultz*, 682 N.E.2d 446 (Ill. App. Ct. 1997) (holding that the penalties under the feticide statute were not disproportionate when compared to penalties for illegal abortion); *Ford*, 581 N.E.2d at 1201 (holding that the statute was constitutional even though it did not distinguish between viable and nonviable fetuses).

127. *See* MINN. STAT. ANN. §§ 609.266, .2661-.2665, .267-.2672, .268 (West 1987 & Supp. 1999).

Wisconsin.<sup>128</sup>

As Minnesota illustrates, a state's fetal homicide legislation often develops in response to a high profile incident or a controversial court decision. In 1985, the Supreme Court of Minnesota held in *State v. Soto*<sup>129</sup> that an unborn viable fetus was not a "human being" for the purposes of the state's vehicular homicide statute.<sup>130</sup> In *Soto*, the defendant struck another car while driving intoxicated, resulting in the death of an eight-month-old fetus.<sup>131</sup> The court emphasized that only the legislature had the power to expand the statute to include fetuses.<sup>132</sup> In response to strong public sentiment in the wake of this decision,<sup>133</sup> the state legislature enacted a chapter entitled "Crimes Against Unborn Children," which criminalized several forms of fetal violence, including murder, manslaughter, injury or death in the commission of a crime, vehicular homicide, and assault.<sup>134</sup> These stat-

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128. See 1998 Wis. Legis. Serv. 295 (West). In 1998, Wisconsin enacted fetal homicide legislation in response to a jury's refusal to convict a man of killing a fetus under a criminal abortion statute. See *id.*; Richard P. Jones & Mike Johnson, *Cocaine Mom, Feticide Bills Ok'd, Debate Turns Emotional Over Measures Aimed at Protecting Fetuses*, MILWAUKEE J. SENTINEL, May 2, 1998, at 1, available in 1998 WL 6320568; see also WIS. STAT. ANN. § 940.04(2)(a) (West 1996) (defining abortion as "[i]ntentionally destroy[ing] the life of an unborn quick child"). The Wisconsin Supreme Court, upon certification from the trial court, had held that the defendant could be charged under the criminal abortion statute and remanded the case for trial. See *State v. Black*, 526 N.W.2d 132, 133 (Wis. 1994). At trial, however, the prosecution could not prove the requisite intent, and the jury acquitted. See Jones & Johnson, *supra*, at 1. The new statute dispenses with the requirement of intent for many offenses. See Alan J. Borsuk, *Wisconsin Law Makes Injuring Fetus a Criminal Act*, CLEV. PLAIN DEALER, June 18, 1998, at 17A, available in 1998 WL 4140874.

129. 378 N.W.2d 625 (Minn. 1985).

130. See *id.* at 629.

131. See *id.* at 626.

132. See *id.* at 630. The court noted that Minnesota is a "code" state as opposed to a "common law" state. See *id.* at 627; cf. *supra* notes 61-74 and accompanying text (discussing three "common law" states, Massachusetts, South Carolina, and Oklahoma, and their state courts' decisions to read their statutes expansively in the absence of legislative direction).

133. See *Lawmakers React to Ruling on Fetus*, CHI. TRIB., Dec. 8, 1985, at 20, available in 1985 WL 2566887 (noting predictions that abortion would be an issue in a renewed legislative debate); *Minnesota Court Rules Unborn Child Not Person*, CHI. TRIB., Dec. 6, 1985, at 24, available in 1985 WL 2566369 (discussing the Minnesota Supreme Court ruling that prompted legislative action).

134. See MINN. STAT. ANN. §§ 609.266, .2661-.2665, .267-.2672, .268, 609.21 (West 1987 & Supp. 1999).

utes subsequently withstood equal protection and vagueness challenges in the courts.<sup>135</sup>

### *Statutes with No Specified Gestational Age*

Finally, of the states that criminalize harmful actions against a fetus, three do not specify a threshold stage of fetal gestation: Arizona,<sup>136</sup> South Dakota,<sup>137</sup> and Utah.<sup>138</sup> For example, Arizona's

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135. See, e.g., *State v. Merrill*, 450 N.W.2d 318, 322-24 (Minn. 1990). In *Merrill*, the defendant was charged in the shooting death of his girlfriend and her twenty-eight-day-old embryo. See *id.* at 320. The decision was controversial because it was unclear whether the defendant knew that the woman was pregnant, because of the embryo's early gestational age, and because the statute did not distinguish between viable and nonviable fetuses. See *id.* at 321; Donna Halvorsen, *Court Upholds State Fetal Death Laws, Leaves Questions on When Life Begins*, STAR TRIB. (Minneapolis, MN), Jan. 19, 1990, at 1A, available in 1990 WL 5390274. The defendant based his equal protection claim on the fact that he stood to be punished for actions that, if taken by a person aborting a nonviable fetus, would not result in punishment. See *Merrill*, 450 N.W.2d at 321. The court found the disparity to be valid, reasoning that one who terminates a woman's pregnancy without her consent is not similarly situated with a woman who elects to have a legal abortion. See *id.* at 321-22. The court also rejected the defendant's argument that the statute was void for vagueness because it "fail[ed] to give fair warning to a potential violator," particularly when neither the violator nor the pregnant woman knows about the pregnancy. *Id.* at 323.

The reaction to the *Merrill* decision was mixed. Abortion opponents were pleased with the court's decision upholding crimes against the fetus. See Donna Halvorsen, *Both Sides Find Reason to Like Ruling on Fetal Homicide Law*, STAR TRIB. (Minneapolis, MN), Jan. 20, 1990, at 4B, available in 1990 WL 5390139. Conversely, abortion rights activists appreciated the court's distinction between abortion and the actions of third parties who kill fetuses without the mother's consent, although the activists were still concerned about the state considering fetuses as persons. See *id.* The U.S. Supreme Court denied certiorari, see *Merrill v. Minnesota*, 496 U.S. 931 (1990), and the defendant ultimately pleaded guilty to two counts of second-degree murder. See Jill Hodges, *Fetus Law Challenge Fails; Murder Trial Can Proceed*, STAR TRIB. (Minneapolis, MN), June 12, 1990, at 1B, available in 1990 WL 5386310; *Man Says He Killed Woman, Embryo*, STAR TRIB. (Minneapolis, MN), Sept. 15, 1990, at 4B, available in 1990 WL 5344690.

136. See ARIZ. REV. STAT. ANN. § 13-1103 (West 1989 & Supp. 1998).

137. See S.D. CODIFIED LAWS §§ 22-1-2(50A), -16-1, -1.1 (Michie 1998). South Dakota passed fetal homicide legislation in 1995. See *South Dakota: Fetal-Homicide Bill Awaits Gov's Signature*, ABORTION REP., Feb. 21, 1995, available in LEXIS, News Library, Wire Service Stories File. The statutes include the "unborn child" in the definition of homicide and provide protection in specific homicide and assault statutes. See S.D. CODIFIED LAWS §§ 22-16-1, -1.1, -20, -41, -42, 22-18-1.2, -1.3.

138. See UTAH CODE ANN. § 76-5-201 (1995 & Supp. 1998). The Supreme Court of Utah previously held that an unborn fetus was not a "person" within the vehicular homicide statute. In 1996, a defendant was charged with two counts of capital murder in the stabbing death of his girlfriend and her nonviable fetus and pleaded guilty to one count.

manslaughter law includes "knowingly or recklessly causing the death of an unborn child at any stage of its development."<sup>139</sup> One prosecution under this law was for the 1997 shooting of a pregnant woman by her ex-boyfriend.<sup>140</sup> The woman survived, but her four-month-old fetus was killed.<sup>141</sup> The case ignited debate on abortion, with antiabortion activists using the case as an example of the need to change abortion laws, and pro-choice activists maintaining that the case was about a criminal act, not women's rights.<sup>142</sup>

### *Crimes Against Pregnant Women*

Several states, including Virginia, that subscribe to the born alive rule in their homicide statutes, nevertheless penalize actions against pregnant women that result in miscarriage, or in some states, injury to the fetus.<sup>143</sup> These states include New Mexico,<sup>144</sup> Wyoming,<sup>145</sup> New Hampshire,<sup>146</sup> Kansas,<sup>147</sup> Iowa,<sup>148</sup>

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*See State v. Larsen*, 578 P.2d 1280, 1282 (Utah 1978).

139. ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (West Supp. 1998).

140. *See* Susie Steckner, *Fetal-Killing Case Provides Fuel for Abortion Debate*, ARIZ. REPUBLIC, Apr. 13, 1997, at B1, available in 1997 WL 8355886.

141. *See id.*

142. *See id.* In another case, the court sentenced a man to 20 years for stabbing his ex-girlfriend, resulting in the deaths of both the woman and her six-week-old fetus. *See Joe Salkowski, Ex-Wrangler Gets 20 Years in '92 Stabbing Death of Pregnant Girlfriend*, ARIZ. DAILY STAR, June 8, 1993, at 2B, available in 1993 WL 5746738. Another man was convicted of felony murder, subject to the death penalty, for killing his ex-girlfriend's sister and eight-month-old fetus. *See Pila Martinez, Man, 44, Convicted in Deaths of Ex-Girlfriend's Sister, Fetus*, ARIZ. DAILY STAR, Apr. 10, 1996, at 2B, available in 1996 WL 4983644. The Arizona Supreme Court, however, reversed a defendant's manslaughter conviction because of a faulty jury instruction regarding transferred intent, even though it upheld his first-degree murder conviction for killing the mother. *See State v. Amaya-Ruiz*, 800 P.2d 1260, 1280-81, 1291 (Ariz. 1990) (finding that the statute does not provide for transferred intent, but rather requires mental states for the crimes against both the mother and fetus).

143. *See infra* notes 144-50, 153-75 and accompanying text.

144. *See* N.M. STAT. ANN. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie 1998). The statutes entitled "Injury to pregnant woman" and "Injury to pregnant woman by vehicle," provide harsher penalties for injuries caused while driving under the influence. *See id.* § 66-8-101.1 (Michie 1998). These statutes do not specify any fetal gestational age. *See id.* § 66-8-101.1 (Michie 1998); *id.* § 30-3-7 (Michie 1994). In 1996, a drunken driver ran a red light, resulting in the deaths of two women, one of them pregnant. *See DWI Deaths Get Man 8 Years in Prison*, ALBUQUERQUE J.-TRIB., Dec. 5, 1996, at A3, available in WESTLAW, ALBQ-JTRIB Database. The defendant pleaded guilty to charges including

Ohio,<sup>149</sup> and Delaware,<sup>150</sup> which consider the pregnant woman

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vehicular homicide, injury to a pregnant woman by vehicle, and driving while intoxicated (DWI). *See id.* He was sentenced to serve eight years in prison. *See id.*

145. *See* WYO. STAT. ANN. § 6-2-502(a)(iv) (Lexis 1999) (providing penalties for aggravated assault and battery that cause bodily injury to a pregnant woman). The state also provides increased penalties for persons who cause miscarriages while driving under the influence of alcohol. *See id.* § 31-5-233(h).

146. New Hampshire specifically exempts the fetus from protection under its homicide statutes. *See* N.H. REV. STAT. ANN. § 630:1(IV) (1996). In 1991, however, the legislature considered legislation that would include the fetus in the vehicular homicide statute. *See New Hampshire: No Vote Taken on Fetal Homicide Bill*, ABORTION REP., Mar. 1, 1991, available in LEXIS, News Library, Wire Service Stories File. One pro-choice advocate recommended that the proposed law "focus on the 'mother as victim rather than the fetus.'" *Id.* (quoting Susan Arnold from the National Abortion and Reproductive Rights Action League). The legislature eventually enacted laws that would allow a felony prosecution for an assault on a pregnant woman that "[p]urposely or knowingly causes injury" resulting in miscarriage, without specifying the fetus's gestational age. N.H. REV. STAT. ANN. §§ 631:1(I)(c), :2(I)(e) (1999).

147. *See* KAN. STAT. ANN. § 21-3440, -3441 (1995). For further discussion on this statute, *see infra* notes 153-75 and accompanying text.

148. Iowa enacted a statute in 1996 criminalizing "[n]onconsensual termination—serious injury to a human pregnancy." IOWA CODE ANN. § 707.8 (West Supp. 2000). The law covers both intentional and unintentional terminations, and the fetus's gestational age is not specified. *See id.* The statute was the result of intense lobbying by two families who lost viable fetuses as a result of reckless drivers. *See* Roos Jonathan, *House Approves Pregnancy Bill*, DES MOINES REG., Feb. 20, 1996, at 6, available in 1996 WL 6227249. "Any time a woman chooses to become pregnant, she should have the right to continue that pregnancy," said one of the mothers. *Id.* The bill's floor manager said "it provides justice to parents with shattered dreams." *Id.* In April 1998, a man was charged in accordance with the new law for the beating death of his girlfriend and her unborn fetus. *See Metro Iowa*, DES MOINES REG., Apr. 8, 1998, at 4, available in 1998 WL 3203235.

149. In 1996, Ohio legislators passed legislation in response to the death of a woman and her eight-month-old fetus in a reckless driving incident, when the driver could not be charged with the fetus's death. *See* Laura Goldberg, *Protection Bill Signed for Fetus, Law Stems from Local Traffic Death*, CIN. ENQUIRER, June 7, 1996, at C1, available in 1996 WL 2245181; *Hands Off: Ohio "Feticide" Bill Jeopardized by Abortion Meddling in the House*, CIN. ENQUIRER, Apr. 23, 1996, at A6, available in 1996 WL 2239572; Randy Ludlow, *Ohio Lawmakers Pass "Feticide" Bill, Death of Unborn by Crime Punishable*, CIN. POST, May 30, 1996, at 8A, available in 1996 WL 5062237. *See generally* David M. Henry, Comment, *Feticide: Time to End Ohio's Blind Imitation of the Past*, 17 OHIO N.U. L. REV. 659 (1991) (proposing changes to Ohio statutes that would include feticide). The legislature modified existing homicide statutes to add the phrase "unlawful termination of another's pregnancy." OHIO REV. CODE ANN. §§ 2903.01-.07 (West 1997 & Supp. 1999). The legislation also defined "another's unborn" as a victim in various types of assault, adopting a two-pronged approach to punishment for fetal injuries or death. *See id.* § 2903.08, .11, .14 (West 1997). The laws cover fertilization until birth. *See id.* § 2903.09. A military court convicted an Air Force member of involuntary manslaughter, assault, and aggravated assault for beating his wife and causing her miscarriage. *See* Major Michael

the victim of the criminal act, rather than the fetus. In so doing, avoid the issue of whether the fetus is a "victim" or a "person."<sup>151</sup> The potential exists for the resulting criminal penalties to be substantially the same or greater than statutes that criminalize actions against the fetus, depending on the way the legislatures craft the statutes.<sup>152</sup>

Several states that seek to protect the woman have developed fetal homicide statutes in response to specific homicide incidents or court decisions. Having changed its approach to fetal homicide several times since 1985, the state of Kansas provides a useful illustration of such development. The Kansas Supreme Court appeared to abrogate the born alive rule in 1985 in *State v. Burrell*.<sup>153</sup> It subsequently reinforced the rule in 1988, however, in *State v. Trudell*<sup>154</sup> and again in 1989, in *State v. Green*.<sup>155</sup> In *Burrell*, the defendant ran a stop sign and struck another car.<sup>156</sup> A passenger was thrown from the car, killing the passenger and her viable fetus.<sup>157</sup> The defendant was charged with two counts

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J. Davidson, *Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law*, ARMY LAW., July 1998, at 23 (describing the *Robbins* case and also providing an excellent overview of fetal crimes in the military context); *Ohio: Airman Sentenced to 8 Years for Fetal Homicide*, ABORTION REP., Dec. 11, 1996, available in LEXIS, News Library, Wire Service Stories File. This was the first test of the new law. See *id.* Other persons have been convicted of aggravated vehicular homicide under the new laws for causing fetal deaths on the road. See Kristen Delguzzi, *Driver Guilty in Death. Juror: Fetus Law Didn't Sway Verdict*, CIN. ENQUIRER, May 3, 1997, at A1, available in 1997 WL 5448835 (reporting the conviction of a woman in a "road rage" incident); Mark Gillispie, *Driver Sentenced to Prison for Role in Fatal Car Crash*, CLEV. PLAIN DEALER, Aug. 20, 1998, at 1B, available in 1998 WL 4150017 (reporting the conviction of a man in a drunk driving incident).

150. See DEL. CODE ANN. tit. 11, §§ 222(22), 605-06, 612(a)(9) (Supp. 1999). Delaware enacted laws making it a felony to abuse or assault pregnant women. See *Judge Sentences Waterman to Life in Prison for Killing Pregnant Wife*, A.P. NEWSWIRE, Dec. 3, 1999, available in WESTLAW, APWIRE Database. The legislature acted in response to the case of a defendant who strangled his wife two days before she was to give birth. See *id.*

151. See, e.g., N.M. STAT. ANN. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie 1998).

152. See VA. CODE ANN. §§ 18.2-31(11), -32.1, -51.2(B) (Michie Supp. 1999). Under the capital murder statute in Virginia, for example, a defendant can receive the death penalty for the premeditated intentional murder of a pregnant woman.

153. 699 P.2d 499 (Kan. 1985).

154. 755 P.2d 511 (Kan. 1985).

155. 781 P.2d 678 (Kan. 1989).

156. See *Burrell*, 699 P.2d at 500.

157. See *id.*



of involuntary manslaughter.<sup>158</sup> The court, without comment, appeared to abandon the born alive rule by reversing, on other grounds, the trial court's dismissal of the two charges, and remanding the case.<sup>159</sup>

In 1988, the *Trudell* court considered the case of a defendant charged with aggravated vehicular homicide.<sup>160</sup> The court noted that Kansas had a feticide statute in effect from 1855 to 1969, but that the state criminal code enacted in 1969 did not include an equivalent law.<sup>161</sup> The court considered as dicta a statement in *Burrell* that referred to the mother and fetus as "two human beings."<sup>162</sup> One year later in *Green*, the court considered the case of a defendant charged with the first-degree murder of his former girlfriend and her unborn fetus.<sup>163</sup> The court applied its rationale from *Trudell* and held that the viable fetus was not a person for purposes of the murder statute.<sup>164</sup>

In 1995, the Kansas state legislature responded to these cases with new fetal homicide legislation.<sup>165</sup> The two new laws provided penalties for injuries to pregnant women.<sup>166</sup> The first statute relates to injuries caused to a pregnant woman in the commission of a felony or misdemeanor resulting in miscarriage.<sup>167</sup> The other statute relates to miscarriage-producing injuries caused by a vehicle, with more severe penalties for injuries caused while driving under the influence of alcohol or drugs.<sup>168</sup> Originally, the bill was drafted to define a "preborn human being" as "a human being in existence from fertilization until birth."<sup>169</sup> Abortion-rights advocates said "the bill went too far," because "abortion could become first-degree murder."<sup>170</sup> The legislature revised the

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158. *See id.*

159. *See id.* at 503.

160. *See State v. Trudell*, 755 P.2d 511, 512 (Kan. 1988).

161. *See id.* at 513.

162. *Id.* at 514 (quoting *Burrell*, 699 P.2d at 502).

163. *See State v. Green*, 781 P.2d 678, 681 (Kan. 1989).

164. *See id.* at 683.

165. *See KAN. STAT. ANN.* §§ 21-3440, -3441 (1995).

166. *See id.*

167. *See id.* § 21-3440.

168. *See id.* § 21-3441.

169. Judy Lundstrom Thomas, *Panel Sets Wording of Fetal Death Measure*, WICHITA EAGLE, Jan. 31, 1995, at 1D, available in WESTLAW, WICH-EAGLE Database.

170. *Id.*

proposal and modeled it after New Mexico's laws penalizing those who cause miscarriages by injury to the woman.<sup>171</sup> Additionally, like the New Mexico statutes, the Kansas statute does not specify the fetus's gestational age.<sup>172</sup> Pro-choice and pro-life activists were pleased with the final result.<sup>173</sup> Peggy Jarman, pro-choice lobbyist said, "[s]ounds OK." . . . "As I said before, there's a way to do this right. Sounds to me like they've figured out how to do that."<sup>174</sup> Abortion opponent Senator Don Sallee, sponsor of the original measure, said, "[y]ou did what I asked." . . . "You didn't throw it in the trash, and you're trying to make it work. It appears to me like you're doing what I set out to do."<sup>175</sup>

### THE DIMENSIONS OF FETAL PROTECTION LAWS

#### *Identifying the Victim*

The preceding survey demonstrates that state legislatures and courts can choose between two approaches to penalizing fetal homicide depending on their definition of the crime victim.<sup>176</sup>

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171. *See id.*

172. *See id.*

173. *See id.*

174. *Id.*

175. *Id.*

176. Several states have considered fetal homicide legislation in the past few years. *See* A.B. 722, Reg. Sess. (Cal. 1999-2000) (proposed DUI manslaughter bill); S.B. 249, Reg. Sess. (Ky. 1998) (1998 proposal to define human being from fertilization to death); HILL, 805, 119th Leg., Reg. Sess. (Me. 1999) (proposed laws on crimes against unborn children); H.B. 4476, 89th Leg., Reg. Sess. (Mich. 1997) (injury to pregnant woman bill); S.B. 21, 89th Legis., Reg. Sess. (Mich. 1997) (pregnant woman and prenatal protection act); L.B. 111, 96th Leg., 1999 Reg. Sess. (Neb.) (proposed bill defining "unborn child" and redefining "person" in homicide laws); A. 2524, 208th Leg., Reg. Sess. (N.J. 1998) (feticide bill); S.B. 2171, 222d Reg. Sess. (N.Y. 1999) (proposed laws on fetal death and injury); H.B. 920, 1999 Reg. Sess. (N.C.) (proposed statute on injury to pregnant woman by vehicle); S.B. 188, 76th Leg., Reg. Sess. (Tex. 1999) (proposed laws on injury to pregnant woman); H.B. 357, 65th Biennial Sess. (Vt. 1999) (proposed statutes on crimes against fetuses); *see also* Peggy Fikac, *Senate Passes Bill Toughening Sanctions for Assaulting Pregnant Women*, A.P. NEWSWIRE, Mar. 31, 1999, available in WESTLAW, APWIRE Database (describing Texas's proposed statutes on assaults against pregnant women); Joseph Gerth, 1998 *Kentucky General Assembly; House Backs Bill to Protect Fetuses, Sponsor Calls It a Step Toward Ban On Abortions*, COURIER-J. (Louisville, KY), Feb. 21, 1998, at 1A, available in 1998 WL 2098128 (describing efforts in Kentucky to

Either the fetus or the pregnant woman can be considered the victim of a crime that results in fetal death or injury. Several factors potentially impact a state's decision concerning which approach will best suit its needs, as well as provide laws that will be feasible politically. The predominant factor is the impact of the proposed legislation on abortion. In addition, there are structural considerations for state legislatures creating new laws. States choosing to criminalize actions against fetuses or pregnant women can either modify existing statutes or create new statutes to include fetuses or pregnant women as victims.

Among the states that treat fetuses as victims, five state legislatures modified existing statutes to include fetuses as victims of crime,<sup>177</sup> whereas sixteen state legislatures created new statutes to cover crimes against the fetus.<sup>178</sup> If a state wants to classify the fetus as victim, there are several advantages to creating separate statutes specifically covering criminal actions against the fetus rather than merely expanding the definition of "victim" or "person" to include the fetus in existing homicide and assault statutes. One major concern expressed during the Virginia feticide bill hearings was that establishing the fetus as a person in the homicide laws would lead to attempts to classify the fetus as a person in other laws, such as wrongful death laws.<sup>179</sup> Crafting

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enact fetal protection legislation); Terrence Stutz, *Bill Would Make It a Felony to Injure Pregnant Women*, DALLAS MORNING NEWS, Mar. 31, 1999, at 23A, available in 1999 WL 4111254 (describing Texas's proposed legislation); Robynn Tysver, *Lawmakers Debate When Life Begins*, OMAHA WORLD-HERALD, Mar. 5, 1999, at 15, available in 1999 WL 4490657 (describing Nebraska's debate over fetal homicide law).

177. See ARIZ. REV. STAT. ANN. § 13-1103.A.5 (West 1989); ARK. CODE ANN. § 5-1-102(13)(B) (Michie Supp. 1999); CAL. PENAL CODE § 187 (West 1999); TENN. CODE ANN. § 39-13-214 (1997); UTAH CODE ANN. § 76-5-201 (1995 & Supp. 1998).

178. See FLA. STAT. ANN. § 782.09 (West 1992); GA. CODE ANN. § 16-5-80 (1999); 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (West 1993); IND. CODE ANN. §§ 35-42-1-1(4), -42-1-6 (Michie 1998); LA. REV. STAT. ANN. §§ 14:2(7)(11), :32.5, :32.9 (West 1997 & Supp. 1999); MICH. COMP. LAWS ANN. § 750.322 (West 1998); MINN. STAT. ANN. §§ 609.266, .2661-.2665, .267-.2672, .268 (West Supp. 1999); MISS. CODE ANN. § 97-3-37 (1999); MO. ANN. STAT. § 1.205.3 (West 1969 & Supp. 1990); NEV. REV. STAT. ANN. § 200.210 (Michie 1997); N.D. CENT. CODE § 12.1-17.1-01, -02 to -06 (1997); 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998); R.I. GEN. LAWS § 11-23-5 (1994); S.D. CODIFIED LAWS §§ 22-1-2(50A), -16-1, -16-1.1 (Michie 1998); WASH. REV. CODE ANN. § 9A.32.060 (West 1988 & Supp. 1999); 1998 Wis. Legis. Serv. 295 (West).

179. See Ellen Nakashima, *Va. Debates Law on Fetal Homicide; Legislation Entan-*

separate laws for crimes against the fetus would segregate those laws from laws protecting the already born, and a state could identify the fetus as a victim or person solely for the laws specifically related to the fetus. Another major concern, particularly from the perspective of pro-choice advocates, is that defining fetuses as victims or persons within existing statutes would increase the threat to a woman's right to choose.<sup>180</sup> Pro-choice advocates believe that if enough states specifically declare fetuses as victims or persons, even with exceptions for legal abortions, the Supreme Court might use the declarations as evidence to overturn *Roe*.<sup>181</sup> One author also expressed his belief that it "would be more difficult to protect potential human life fully" with fetal protection scattered throughout the state's criminal code.<sup>182</sup> In addition, having a separate section of the law for crimes against the fetus allows the legislature to craft separate penalties for such crimes, instead of necessarily having the same penalties as for living persons who are later killed.<sup>183</sup>

States that focus on the pregnant woman as the victim also have crafted either separate legislation or identified the pregnant woman as victim in existing statutes. Kansas, New Mexico, and Iowa crafted separate legislation to cover injuries to preg-

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gled with Abortion Issue, WASH. POST, Feb. 26, 1996, at D1. See generally Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933 (1995) (detailing state statutes regarding wrongful deaths of fetuses).

180. See, e.g., Peter Baker & Spencer S. Hsu, *Virginia Assembly Focuses on Abortion, House Passes Notification Bill; Senate Seeks to Outlaw Feticide*, WASH. POST, Feb. 14, 1996, at C3 (describing the criticism of pro-choice activists that passing the feticide bill could result in a "slippery slope" that could end up limiting abortion rights).

181. See Klasing, *supra* note 179, at 966 (explaining the conflict between a woman's right to terminate her pregnancy and a wrongful death act on behalf of the same fetus) (citing *Toth v. Goree*, 237 N.W.2d 297, 301 (Mich. Ct. App. 1975)); see also *What's Wrong with Fetal Rights: A Look at Fetal Protection Statutes and Wrongful Death Actions on Behalf of Fetuses* (last modified July 1996) <<http://www.aclu.org/issues/reproduct/fetal.html>> [hereinafter *Fetal Rights*] (providing a list of factors, devised by the ACLU, to be considered when drafting fetal protection legislation).

182. Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 136 n.169 (1985).

183. See Bicka A. Barlow, *Severe Penalties for the Destruction of "Potential Life"—Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 502-03 (1995).

nant women resulting in miscarriage.<sup>184</sup> The other states identifying the pregnant woman as a victim, including Virginia, identified the crimes in existing statutes in the criminal code, generally in separate paragraphs or sections.<sup>185</sup> Either approach is effective because the focus is on the pregnant woman alone as victim. No conflicts arise between the rights of the mother and fetus if the fetus is lost through actions of a third party causing miscarriage, because the two entities are treated as one. Resulting statutes avoid the problems of encroaching on abortion rights or attempting to include the fetus in other areas of law, such as wrongful death.

One disadvantage of identifying the pregnant woman as victim, however, has been expressed by family members of victims who believe that the accused should be charged with two separate crimes, one for the woman and one for the fetus.<sup>186</sup>

### *Scope of the Legislation*

Another important consideration for states enacting fetal homicide statutes is the scope of the legislation. The state must decide how broadly its law will sweep, and, in particular, whether the statute will cover only homicide or include offenses causing fetal injury. The state statutes focusing on the fetus as victim vary widely in scope. Twelve states only penalize some form of homicide (murder, feticide, or manslaughter),<sup>187</sup> whereas nine

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184. See IOWA CODE ANN. § 707.8 (West 1993), amended by § 707.8 (West Supp. 1999); KAN. STAT. ANN. §§ 21-3440, -3441 (1995); N.M. STAT. ANN. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie 1998).

185. See ARK. CODE ANN. § 5-13-201(5)(A)-(C) (Michie 1997); DEL. CODE ANN. tit. 11, §§ 222(22), 605-06, 612(a)(9) (Supp. 1999); OHIO REV. CODE ANN. §§ 2903.01-.08, .11, .14 (West 1997); VA. CODE ANN. §§ 18.2-31, -32.1, -51.2 (Michie Supp. 1999); WYO. STAT. ANN. § 6-2-502(a)(iv) (Michie 1999).

186. See Joy Powell, *Homicide Law Doesn't Cover Fetus in Crash*, OMAHA WORLD-HERALD, Feb. 20, 1997, at 1, available in 1997 WL 6293299 (describing parents and grandparents as upset that a drunken driver would not be penalized separately for causing the death of a fetus in a motor vehicle accident).

187. See ARIZ. REV. STAT. ANN. § 13-1103.A.5 (West 1989); ARK. CODE ANN. § 5-1-102 (Supp. 1999); CAL. PENAL CODE § 187 (West 1999); FLA. STAT. ANN. § 782.09 (West 1992); GA. CODE ANN. § 16-5-80 (1999); IND. CODE ANN. §§ 35-42-1-1(4), -1-6 (Michie 1998); LA. REV. STAT. ANN. § 14:32.5 (West 1997); MICH. COMP. LAWS ANN. § 750.322 (West 1991); MISS. CODE ANN. § 97-3-37 (1999); NEV. REV. STAT. ANN. § 200.210 (Michie 1997); R.I. GEN. LAWS § 11-23-5 (1994); UTAH CODE ANN. § 76-5-201 (1995 & Supp.

states cover both death and injury to the fetus.<sup>188</sup> Generally, the comprehensive statutes were written in response to specific incidents, and the legislatures intended to respond to any possible crimes against the fetus. As a result, the statutes also have widely varying intent requirements.<sup>189</sup> The most common problem identified with statutes including injury to the fetus is determining causation.<sup>190</sup>

Statutes focusing on the woman as victim also vary in scope. Iowa's statute includes "nonconsensual termination or serious injury to a human pregnancy" during the commission of various crimes, and includes acts that unintentionally terminate or "injure" the pregnancy.<sup>191</sup> Similarly, Ohio's laws cover crimes against the pregnant woman ranging from murder to assault.<sup>192</sup> The other state laws that focus on the woman as victim are narrower in scope and center on death or injury to the woman rather than injury to the fetus.<sup>193</sup>

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1998).

188. See 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (West 1993) (including intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery, and aggravated battery); MINN. STAT. ANN. §§ 609.266, .2661-.2665, .267-.2672, .268 (West Supp. 1999) (including first, second and third-degree murder, first and second-degree manslaughter, injury or death in the commission of a crime, and assault); MO. ANN. STAT. § 1.205.2 (West Supp. 1999) (declaring that the fetus is considered a person for the purposes of all state statutes); N.D. CENT. CODE § 12.1-17.1-01, -02 to -06 (1997) (including murder, manslaughter, negligent homicide, aggravated assault and assault); 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998) (including first, second and third-degree murder, voluntary manslaughter and aggravated assault); S.D. CODIFIED LAWS §§ 22-1-2(50A), -16-1, -16-1.1, -16-20, -16-41 to -42 (Michie 1998) (including fetal homicide, second-degree manslaughter, vehicular homicide and vehicular battery); TENN. CODE ANN. § 39-13-214 (1997) (including homicide and assault); WASH. REV. CODE ANN. § 9A.32.060 (West Supp. 1999) (including manslaughter); *id.* § 9A.36.021 (including assault); 1998 Wis. Legis. Serv. 295 (West) (including crimes similar to that covered in Minnesota).

189. See Barlow, *supra* note 183, at 485-89.

190. See *id.* at 482-84 (citing *People v. Campos*, 592 N.E.2d 85 (Ill. App. Ct. 1992)). The court determined that a causal link existed between a gunshot wound to the mother and the resultant deaths of both mother and fetus. See *id.*

191. IOWA CODE ANN. § 707.8 (West 1993 & Supp. 1999).

192. See OHIO REV. CODE ANN. §§ 2903.01-.08, .11, .14 (West 1997). Ohio Code sections 2903.11 and 2903.14, discussing assault, include assault against both "another and another's unborn." *Id.* §§ 2903.11, .14.

193. See DEL. STAT. ANN. tit. 11, § 222(22), 605-06, 612(a)(9) (1995) (including abuse of a pregnant female and recklessly or intentionally causing physical injury to a pregnant female); KAN. STAT. ANN. §§ 21-3440, -3441 (1995) (including injury and injury by

*Gestational Age Protected*

States choosing to focus on either the fetus or pregnant woman as victim should be concerned about the gestational age protected. Statutes focusing on the fetus as victim, however, encounter different problems than those focusing on the woman. In statutes focusing on the fetus, the fetal gestational age chosen for protection depends in large measure on the level of the accused's intent. Where the accused knows that the woman is pregnant and intends to harm her or terminate the pregnancy, gestational age should not matter. Conversely, when the accused does not know the woman is pregnant, protecting all fetuses from fertilization becomes more problematic.

The "quickening" standard, although used by several states, is currently a vague standard with little medical significance.<sup>194</sup> Likewise, imposing liability beginning as early as conception presents problems due to fetal fragility and miscarriage.<sup>195</sup> A large percentage of pregnancies spontaneously terminate before the woman knows she is pregnant.<sup>196</sup> Consequently, an accused could be convicted of homicide during the period when there is a high rate of termination from forces other than the accused's actions.<sup>197</sup> Justice Mosk expressed this concern in *People v. Davis*,<sup>198</sup> in which the California Supreme Court held that fetal viability was not a requirement for a homicide conviction, and that a seven-week-old fetus could be covered under the murder statute.<sup>199</sup> Justice Mosk's primary concern was that a defendant conceivably could be convicted of felony (capital) murder for causing the death of something "roughly the size and weight of a

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vehicle); N.H. REV. STAT. ANN. §§ 631:1.I.(c), :1.II., :2.I.(e), :2.II. (1996) (including first and second-degree assault); N.M. STAT. ANN. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie 1998) (including injury and injury by vehicle); VA. CODE ANN. §§ 18.2-31, -32.1, -51.2 (Michie Supp. 1999) (including capital murder, murder, and aggravated malicious wounding); WYO. STAT. ANN. § 6-2-502(a)(iv) (Michie 1999) (including aggravated assault and battery).

194. See Barlow, *supra* note 183, at 498.

195. See *id.* at 499.

196. See *id.* at 493.

197. See *id.*

198. 872 P.2d 591, 602-20 (Cal. 1994) (Mosk, J., dissenting).

199. See *id.* at 602.

peanut."<sup>200</sup> He also hypothesized that if an unarmed individual shoplifts, and in his haste to escape knocks a woman to the floor, causing her to miscarry (even if she does not know she is pregnant), the defendant could be charged and convicted of felony murder.<sup>201</sup> He noted that in cases concerning early pregnancies, causation might be more difficult to prove because a high percentage of such pregnancies end in spontaneous abortion.<sup>202</sup> It might be difficult to prove whether the defendant's actions caused fetal death, or the death was the result of natural causes.<sup>203</sup>

On the other hand, viability can be determined by objective medical standards.<sup>204</sup> As a result of *Roe*, the standard is well established, such that a statute drawing the line at viability would protect fetuses that have a high potential of independent life.<sup>205</sup> In addition, state laws establish processes for abortions after viability.<sup>206</sup> Specifically, performing abortions or causing miscarriages are lawful after the second trimester only if "the continuation of the pregnancy is likely to result in the death of the woman or substantially and irretrievably impair the mental or physical health of the woman."<sup>207</sup> In addition, the attending physicians are required to have life support available and use it if there is "clearly visible evidence of viability."<sup>208</sup> Such conditions lend further support to establish the threshold for criminal liability at viability, because at that point the state has an established interest in protecting "potential life" per *Roe*.<sup>209</sup> Unfortunately, the states defining the fetus as victim have specified only one gestational age, regardless of the level of intent required for the offense.

Statutes that define the pregnant woman as the victim have the same gestational age concerns, depending on the intent required for conviction. The states currently focusing on the

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200. *Id.* at 614 (citing 20 *ENCYCLOPEDIA BRITANNICA* (15th ed. 1990)).

201. *See id.* at 619.

202. *See id.* at 620.

203. *See id.*

204. *See* Barlow, *supra* note 183, at 498.

205. *See id.* at 498-99.

206. *See, e.g.*, VA. CODE ANN. § 18.2-74 (Michie 1996).

207. *Id.* § 18.2-74(b).

208. *Id.* § 18.2-74(c).

209. *See Roe v. Wade*, 410 U.S. 113, 162 (1973).



pregnant woman as victim either do not specify fetal gestational age, meaning convictions at any gestational age are possible, or specify gestational age at fertilization.<sup>210</sup> These states run the same risks as those who focus on the fetus as victim, and thus states considering focusing on the woman as victim should also consider varying the fetal gestational age with different levels of intent. Currently Virginia has limited culpability to those who intentionally kill or injure women that they know are pregnant, and therefore gestational age should not matter in those specific intent situations.<sup>211</sup> As a result, under revised Virginia laws, a court conceivably could punish perpetrators such as those in *Keeler v. Superior Court*,<sup>212</sup> *Hollis v. Commonwealth*,<sup>213</sup> and *State v. Beale*,<sup>214</sup> who could not be punished under their states' existing laws.

### *ACLU Factors*

A predominant consideration for any state contemplating fetal homicide legislation is the impact the legislation will have on a woman's right to choose. The ACLU has been active in scrutinizing proposed fetal protection legislation. This scrutinization has been to ensure that the proposals (1) do not infringe on a woman's right to choose, (2) discourage the "policing" of pregnancy, and (3) do not violate due process rights.<sup>215</sup> To that end, they devised a list of six factors for legislators and pro-choice activists to consider when drafting and evaluating such legislation. First, the bill should define the woman alone as the victim, as opposed to the fetus alone, or both the woman and the fetus.<sup>216</sup> If the state does not include such exceptions, then the proposal will probably be stiffly opposed by pro-choice activists who might

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210. See *supra* notes 144-50 and accompanying text.

211. See VA. CODE ANN. § 18.2-31, -32.1, -51.2 (Michie Supp. 1999).

212. 470 P.2d 617 (Cal. 1970); see *supra* text accompanying notes 20-28.

213. 652 S.W.2d 61 (Ky. 1983); see *supra* note 32.

214. 376 S.E.2d 1 (N.C. 1989); see *supra* text accompanying notes 33-43.

215. See *Fetal Rights*, *supra* note 180.

216. See *id.*

view it as a threat to abortion rights,<sup>217</sup> as well as by groups opposed to laws criminalizing maternal behavior during pregnancy.<sup>218</sup> Second, in order to diffuse pro-choice opposition, the bill should have an exemption for abortions and the woman's conduct.<sup>219</sup> Statutes that characterize the pregnant woman as victim do not share the same problems because they penalize actions of others against pregnant women, rather than the fetus and do not focus on the potential actions of the pregnant woman. Third, the language used to describe the fetus should not include anti-choice terms such as "pre-born" or "unborn child."<sup>220</sup> Fourth, to comport with due process, the bill should require adequate knowledge or intent to commit the crime.<sup>221</sup> Fifth, the terms and prohibited conduct should be defined precisely to avoid vagueness concerns.<sup>222</sup> Sixth, the penalties for causing fetal death should not be as severe as for killing a live person.<sup>223</sup> Aligning proposed legislation with these factors can help avoid conflicts with pro-choice advocates.

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217. If states specify the fetus as victim, any proposed legislation should include specific exceptions for legal abortion and the conduct of the mother. For example, North Dakota's statute has the following exception regarding abortion:

This chapter does not apply to acts or omissions that cause the death or injury of an unborn child if those acts or omissions are committed during an abortion performed by or under the supervision of a licensed physician to which the pregnant woman has consented, nor does it apply to acts or omissions that are committed pursuant to usual and customary standards of medical practice during diagnostic or therapeutic treatment performed by or under the supervision of a licensed physician.

N.D. CENT. CODE § 12.1-17.1-07 (1997). Similarly, Missouri's statute includes the following exception regarding conduct of the pregnant woman: "Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." MO. ANN. STAT. § 1.205.4 (West Supp. 1999). The problems of maternal abuse are beyond the scope of this Note.

218. See *Fetal Rights*, *supra* note 181.

219. See *id.*

220. See *id.*

221. See *id.*

222. See *id.*

223. See *id.*

## RECOMMENDATIONS

*All States*

State legislatures enacting fetal homicide statutes should consider all of the dimensions and factors discussed previously. Specifically, if focusing on the fetus as the victim, state legislatures should refer to the Illinois statutes because they offer comprehensive treatment of fetal homicide and identify appropriate levels of intent without being too broad.<sup>224</sup>

Illinois defines a fetus as an "unborn child" from fertilization until birth.<sup>225</sup> Only in the involuntary manslaughter and reckless homicide statutes is the definition potentially problematic. In all other relevant offenses the accused must act intentionally or knowingly.<sup>226</sup> The laws exempt lawful abortion, although they do not specifically exempt other actions of the pregnant woman.<sup>227</sup> Illinois courts have upheld these statutes.<sup>228</sup> In *People v. Ford*,<sup>229</sup> the court held that "[c]learly, a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated."<sup>230</sup> The court said that even though the statute defined "unborn child," it did not need to determine when human life begins because the statute only required proof that the "entity" was alive, and that it died due to the defendant's actions.<sup>231</sup>

Another Illinois court considered the causation issue in *People v. Campos*.<sup>232</sup> The defendant shot his wife, who was pregnant with a five-month-old fetus.<sup>233</sup> For eight days, the woman was in

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224. See 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (West 1993). The statutes include intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery, and aggravated battery.

225. See 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2, 5/12-3.1.

226. See 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4.

227. See *id.*

228. See generally Craig O. Smith, *Legal Murder: The Intentional Killing of the Unborn*, 11 CRIM. JUST. J. 423 (1989) (describing judicial review of feticide statutes and generally addressing the issue of fetal homicide).

229. 581 N.E.2d 1189 (Ill. App. Ct. 1991).

230. *Id.* at 1199.

231. See *id.* at 1201.

232. 592 N.E.2d 85 (Ill. App. Ct. 1992).

233. See *id.* at 89.

a coma and brain dead, and the fetus was stillborn shortly before the woman was pronounced dead.<sup>234</sup> The bullet the defendant fired at the woman did not injure the fetus directly, but the medical examiner determined that the fetus was stillborn due to the woman's lack of oxygen.<sup>235</sup> The defendant claimed that his act did not cause the fetus's death, but the court inferred that the trauma to the woman ultimately caused the fetus's death, and thus the causal link was established.<sup>236</sup>

Evaluating the Illinois statutes in light of the ACLU factors,<sup>237</sup> the only areas where the statutes do not align with the ACLU factors are the terms used to characterize the victim ("unborn child" as opposed to "fetus"), and the penalties for killing a fetus are essentially the same as those for killing live persons, except that the death penalty is not available for intentional homicide. Crafting legislation based on the Illinois statutes, with several changes, might more easily satisfy pro-choice activists. Suggested changes include using the term "fetus" instead of "unborn child," establishing viability as the gestational age for the involuntary manslaughter and reckless homicide provisions, specifically exempting actions of the pregnant woman, and possibly crafting lesser penalties for crimes against the fetus than for crimes against living persons.

State legislatures focusing on the pregnant woman as victim have two promising alternatives. The Kansas and New Mexico statutes cover a wide range of offenses,<sup>238</sup> but could be improved by specifying viability as the appropriate gestational age for offenses involving reckless or negligent conduct where the defendant does not know that the victim is pregnant. The Virginia statutes are targeted more specifically at defendants who kill the pregnant woman with the intent to terminate the pregnancy, or intentionally harm the woman knowing she is pregnant.<sup>239</sup> These statutes cover the vast majority of cases considered by other jurisdictions evaluated in this Note, particularly those

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234. See *id.*

235. See *id.* at 96.

236. See *id.*

237. See *Fetal Rights*, *supra* note 181; *supra* text accompanying note 218.

238. See KAN. STAT. ANN. § 21-3440 to -3441 (1995); N.M. STAT. ANN. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie Supp. 1998).

239. See VA. CODE ANN. § 18.2-31, -32.1, -51.2 (Michie Supp. 1999).

involving domestic violence. The Kansas, New Mexico, and Virginia statutes appear to satisfy the ACLU factors regarding fetal protection<sup>240</sup> and would also protect the woman's right to choose abortion or to carry to term without interference from a third party.

State legislatures interested in creating fetal homicide statutes should focus on the pregnant woman as victim, rather than on the fetus itself. State legislatures that have focused on the pregnant woman as victim generally have met with less opposition from pro-choice activists, and also have met with support from groups concerned about domestic violence.<sup>241</sup> These states, thus, are able to satisfy concerns from groups representing various perspectives, while punishing those who commit crimes against women that result in miscarriages.

### Virginia

As noted above, Virginia has enacted laws to protect pregnant women.<sup>242</sup> Vehicular homicide is the one crime among these

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240. See *Fetal Rights*, *supra* note 181; *supra* text accompanying note 218.

241. See, e.g., *supra* notes 170-75 and accompanying text.

242. See *supra* note 239 and accompanying text. The current Virginia law originated on January 22, 1996, with the introduction of Virginia Bill 495 by former State Senator, and current Virginia attorney general, Mark L. Earley. See S.B. 495, 1996 Reg. Sess. (Va.). The bill provided that "a fetus is considered a person and can be the victim of a murder." *Id.*

Earley proposed the bill in response to the murder of a pregnant woman and her unborn child. See Mike Allen, *'Feticide' Could Be Outlawed, Legal Abortion Would Be Exempt*, RICH. TIMES-DISPATCH, Feb. 12, 1996, at A1, available in 1996 WL 2290309 [hereinafter Allen, *Outlawed*]. Earley said that "[t]he family was distraught, and the intensity of their loss was exacerbated when they learned that no additional punishment would be imposed on the offender for killing the victim's fetus." *Id.* The Senate Committee for Courts of Justice amended the bill to allow the killer of an unborn to be subject to the charge of first or second-degree murder, depending on the absence or presence of premeditation.

The proposal received vigorous debate in the General Assembly and the press. Alexandria's commonwealth attorney, John E. Kloch, was concerned with where the bill would lead, stating, "[i]f a fetus, by this statute, is now a person, can this fetus inherit property? Do social services have an obligation to support it? . . . This starts on a philosophical train [and] we don't know where it goes." Nakashima, *supra* note 179, at D1. The debate also centered around the bill's potential impact on a woman's right to choose to have an abortion, despite its specific exclusion from the bill. See Baker & Hau, *supra* note 180, at C3. In support of the law, Virginia's chief medical examiner remarked:

I have never had a homicide of a mother go to court where it was permitted

existing laws that, if amended, would further protect the right of pregnant women to carry to term.

Currently, Virginia law does not provide penalties for persons causing miscarriages in drunken driving incidents. Of the twenty-four states focusing on the fetus as a victim, sixteen provide penalties for some form of vehicular homicide either by statute or judicial interpretation.<sup>243</sup> Of the eight states that focus on the

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to say she was pregnant, and that the infant was killed. It's a free homicide. How would you feel if you were sitting there examining a baby that was perfect and had a bullet through its brain, and know that this was not a crime?

Allen, *supra*, at A1 (concluding that "for any battered woman in this commonwealth, we ought to send a loud and clear message that you cannot beat on pregnant women and not get a stiffer charge"). The main opposition to the feticide bill came from pro-choice forces. Although the bill would have exempted legal abortion, as Planned Parenthood lobbyist Karen Raschke told Virginia senators, "[i]f you call a fetus a person for the purpose of the homicide statutes, it makes it arguable that a fetus is a person for the purposes of abortion." *Id.* Adding fuel to the fire was the fact that admittedly antiabortion state senators sponsored the bill. See Kerry Dougherty, Editorial, *Do We Really Need a Feticide Bill?*, VIRGINIAN-PILOT, Feb. 24, 1996, at A11, available in 1996 WL 5986302. They were accused of having a secret agenda: Have the Commonwealth acknowledge a viable fetus as a person, with the intent of opening the door to restricting abortions. See Mike Allen, *Subpanel Rejects 'Feticide' Bill, Full House Panel Debates It Today*, RICH. TIMES-DISPATCH, Mar. 4, 1996, at A1 [hereinafter Allen, *Rejects*]; Susie Dorsey, Editorial, *Honest Talk Still Needed on Abortion*, DAILY PRESS (Newport News, Va.), Mar. 17, 1996, at H3.

Ultimately, the feticide bill failed when an alternative measure passed in 1997 that focused on the pregnant woman as the victim, rather than the fetus. See Allen, *Rejects supra*, at A1; Nakashima, *supra* note 179, at D1. The legislation, which modified the state's capital murder, murder, and aggravated malicious wounding statutes, see VA. CODE ANN. §§ 18.2-31, -32.1, -51.2 (Michie Supp. 1999), enjoyed the strong support of Planned Parenthood of Virginia. See David M. Poole, *House Panel Nixes 'Feticide' as Separate Murder Charge, Raises Prison Term 5 Years Instead*, ROANOKE TIMES, Nov. 26, 1996, at C3, available in 1996 WL 6060830 (quoting Karen Raschke, "We are recognizing the horrible injury suffered by these women").

243. See ARK. CODE ANN. § 5-13-201 (Michie 1997); FLA. STAT. ANN. § 782.071 (West Supp. 1999); GA. CODE ANN. § 40-6-393.1 (1997); ILL. COMP. STAT. ANN. 5/9-3.2 (West 1993); IND. CODE ANN. § 35-42-1-4 (Michie 1998); LA. REV. STAT. ANN. § 14:32.8 (West 1997); MINN. STAT. ANN. § 609.21 (West Supp. 1999); MO. ANN. STAT. § 565.024 (West 1999); N.D. CENT. CODE § 12.1-17.1-04 (1997); S.D. CODIFIED LAWS § 22-16-41 (Michie 1998); TENN. CODE ANN. § 39-13-213(a)(2) (1997); UTAH CODE ANN. § 76-5-201 (1995); 1998 Wis. Legis. Serv. 295 (West). Massachusetts, Oklahoma, and South Carolina have included viable fetuses in vehicular homicide laws by judicial interpretation. In addition, Pennsylvania's voluntary manslaughter of an unborn child statute includes negligent or reckless conduct, and thus possibly covers vehicular homicide. Of the eight states that do not include vehicular homicide, only seven penalize crimes against the fetus as manslaughter, while California only punishes fetal murder. See generally James J. Dietrich,

pregnant woman as victim, Iowa, Kansas, New Mexico, Ohio, and Wyoming include vehicular homicide or drunken driving accidents that result in miscarriage as an offense.<sup>244</sup> One way to punish this conduct under the Virginia Code would be to include it in section 8.2-51.4, which pertains to maiming that results from driving under the influence (DUI).<sup>245</sup> Punishment for this offense, a class six felony, is defined in section 18.2-10(f), with a maximum punishment of one to five years imprisonment.<sup>246</sup> Although the penalty is not as severe as for similar crimes in other states, this proposal would recognize the involuntary termination of a woman's pregnancy as a punishable offense. The Virginia Code could also be modified in section 18.2-36.1, linking DUI manslaughter with maiming.<sup>247</sup> The statute should draw

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*Problems and Charging Choices in Prosecuting Vehicular Fatalities*, PROSECUTOR, Jan.-Feb. 1997, at 32 (describing prosecutors' options regarding vehicular homicide and traditional homicide); Alan Hersh, *Tragedy Behind the Wheel: Understanding Manslaughter by Culpable Negligence, Vehicular Homicide, and DUI Manslaughter*, FLA. B.J., Dec. 1992, at 46 (describing the three most common motor vehicle homicide charges).

244. See IOWA CODE ANN. § 707.8 (West 1993); KAN. STAT. ANN. § 21-3441 (1995); N.M. STAT. ANN. § 66-8-101.1 (Michie Supp. 1998); OHIO REV. CODE ANN. § 2903.04 (West 1997); WYO. STAT. ANN. § 31-5-233 (Lexis 1999).

245. The Virginia Code currently states:

Any person who, as a result of driving while intoxicated in violation of §18.2-266 or any local ordinance substantially similar thereto in a manner so gross, wanton and culpable as to show a reckless disregard for human life, unintentionally causes the serious bodily injury of another person resulting in permanent and significant physical impairment shall be guilty of a Class 6 felony.

VA. CODE ANN. § 18.2-51.4(A) (Michie Supp. 1999).

Under the suggestion offered here, the following language would be added: For the purposes of this section, the involuntary termination of a woman's viable pregnancy shall be deemed a serious bodily injury resulting in permanent and significant physical impairment.

246. The Virginia Code currently states:

For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.

VA. CODE ANN. § 18.2-10(f) (Michie 1996).

247. The Virginia Code currently states: "Any person who, as a result of driving under the influence in violation of subdivision (ii), (iii), or (iv) of § 18.2-266, unintentionally causes the death of another person, shall be guilty of involuntary manslaughter." *Id.* § 18.2-36.1. The following language could be added to link DUI manslaughter with maiming: If, in addition, the victim was a pregnant woman, and the involuntary termination of her viable pregnancy resulted from her death, any person subject to prosecution under this section shall also be subject to prosecution under § 18.2-51.4.

the gestational age line at viability. If enacted, the proposal would punish a drunken driver for causing the miscarriage of a viable fetus regardless of whether the pregnant woman survived. Linking DUI manslaughter and maiming would not result in prosecuting someone for two crimes with the same elements. A demonstration of this principle occurred when the Court of Appeals of New Mexico upheld that state's injury to pregnant woman by vehicle statute in 1987 in *State v. Begay*.<sup>248</sup> The defendant in *Begay* was charged with vehicular homicide and injury to a pregnant woman as a result of a head-on collision while driving under the influence.<sup>249</sup> The victim and her unborn fetus were both killed, along with another woman.<sup>250</sup> The defendant asserted the two charges should merge because "vehicular homicide of the pregnant woman necessarily includes injury to a pregnant woman."<sup>251</sup> The court disagreed, concluding that "either offense can be committed without committing the other offense."<sup>252</sup> The court noted that "the legislative intent in enacting the two statutes is to punish a person who violates the two statutes under the provisions of both,"<sup>253</sup> and went on to hold that the two statutes did not merge.<sup>254</sup>

Similarly, the proposed changes to Virginia law would result in prosecuting a drunken driver for actions resulting in a pregnant woman's death or miscarriage. This policy would be in general alignment with continuing movement toward greater liability for those who drive while under the influence of alcohol and cause death or injury as a result.<sup>255</sup> If these statutes were in effect in 1998, the driver who hit Sabrina Adkinson could have been prosecuted for causing both Sabrina's and Destiny's deaths.

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248. 734 P.2d 278 (N.M. Ct. App. 1987).

249. See *id.* at 279.

250. See *id.*

251. *Id.* at 282.

252. *Id.*

253. *Id.*

254. See *id.*

255. See generally Hersh, *supra* note 243 (describing the three most common motor vehicle homicide charges).



## CONCLUSION

States have adopted fetal homicide legislation in various forms over the past fifteen years, often in response to specific situations when pregnant women have been killed or suffered miscarriages at the hands of third parties. Additionally, states considering fetal homicide legislation have several choices and can adopt proposals focusing on either the fetus or pregnant woman as victim. Proposed statutes focusing on the fetus as victim are prone to opposition from pro-choice advocates who view the proposals as threats to a woman's right to choose abortion. For a variety of reasons, statutes focusing on the pregnant woman as victim are suggested as the preferred approach. Proposals using this alternative focus have received less opposition from pro-choice advocates, and, if the statutes are crafted carefully, will likely enjoy support from both pro-choice and anti-abortion advocates, as well as groups concerned about the effects of domestic violence. Although these laws would not result in separate prosecutions for fetal deaths or injuries, they would provide a greater level of comfort for victims' families than laws in states that do not punish third-party harms to fetuses.

Virginia's current laws illustrate this preferred focus on the pregnant woman as victim. With the addition of laws punishing drunk drivers who cause miscarriages, Virginia could protect not only pregnant women in situations such as those including domestic violence, but women like Sabrina Adkinson, who, along with their unborn children like Destiny, are helpless victims of individuals who choose to drink and drive.

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