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# Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries

Marka B. Fleming\*

## I. Introduction

An examination of crimes committed throughout the country within the last few years reveals a recognizable wave of criminal offenses resulting in the deaths of unborn children or fetuses.<sup>1</sup> For instance, on February 15, 2008, Bobby Cutts, a Canton, Ohio policeman, was convicted of the 2007 murder of his girlfriend Jessie Marie Davis and aggravated murder of the unborn girl that Davis had planned to name Chloe.<sup>2</sup> Two months later, on April 22, 2008, in Indiana, a masked gunman entered an Indianapolis bank, jumped over the counter, and shot teller Katherine Shuffield, who was five months pregnant with twins.<sup>3</sup> Shuffield survived, but her twin girls did not.<sup>4</sup>

Similarly, over the last two years in North Carolina, at least a half-dozen pregnant women have been killed in acts of

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1. The author in no way attempts to express any opinion on the abortion issue by using the terms “children” or “fetus” to connote the unborn. Further, for simplicity, the term “fetus” will be used to refer to all stages of prenatal development. See Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Law*, 67 OHIO ST. L.J. 721, 721 (2006) (citing H.R. REP. NO. 108-420, pt. 1, at 83 (2004) (“A human develops in a series of stages, each associated with a different medical term: zygote (at fertilization), blastocyte (at implantation), embryo (at about two weeks), and fetus (from 8 weeks until birth).”).

2. Chloe’s slaying, which jurors found occurred during the commission of another crime, could have made Cutts eligible for the death penalty. See ‘Sorry’ Killer’s Life in the Jury’s Hands, CNN, Feb. 27, 2008, <http://www.cnn.com/2008/CRIME/02/26/cutts.trial/index.html>; see also Laura Johnson, *Mom Reflects on Life Without Jessie*, PLAIN DEALER, June 14, 2008, at A1.

3. See Deanna Martin, *Tragic Cases Often Spur Fetal Homicide Laws*, ASSOCIATED PRESS STATE & LOCAL WIRE, June 30, 2008, available at <http://www.wsbt.com/news/regional/22698184.html>.

4. *Id.*

violence.<sup>5</sup> Three of these deaths that have gained widespread attention since June 2007 are: (1) the murder of Jennifer Nielsen, who was eight months pregnant when she was killed on June 15, 2007; (2) the murder of Maria Lauterbach, a twenty-year old soldier, who was eight months pregnant when she was killed in December 2008; and (3) the murder of Megan Lynn Touma, a twenty-three year old soldier, who was seven months pregnant when she was found dead on June 21, 2008.<sup>6</sup>

The aforementioned cases are only a few of the many examples of violence perpetrated against pregnant women.<sup>7</sup> One of the most well-known instances of such violence occurred in 2002 when Scott Peterson murdered his wife Laci, who was then eight months pregnant with Conner.<sup>8</sup> In response to Laci's and Conner's deaths, Congress enacted legislation making it a separate crime to harm a fetus during an assault on the mother. Most state legislatures have also passed laws against fetal homicide, or feticide. However, states have utilized different

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5. See Marion Walker, *Under Proposed Bill, Killing an Unborn Child Would Carry Penalty*, NEWS & OBSERVER, June 15, 2008, at A9.

6. See Mike Baker, *Pregnant Soldier is Slain*, ASSOCIATED PRESS, July 1, 2008, available at <http://www.wjla.com/news/stories/0708/532565.html>; see also, Marion A. Walker, *Grieving Family Spurs Search for Killer*, NEWS & OBSERVER, June 15, 2008, at A1.

7. See, e.g., *Counts Added in Shooting Death*, THE ADVOCATE, July 1, 2008, at 5 (man arrested for allegedly shooting his pregnant wife in the back of the head at the couple's home); *Fetus' Death is Homicide, Coroner Says: The Unborn Child's Mother, Rachel Roos was Eight Months Pregnant*, NEWS-SENTINEL, Apr. 4, 2008 (twenty-three year old woman's unborn child was shot to death, and shooting was ruled a homicide); *Louisville Man Charged with Fetal Homicide*, ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 24, 2004 (Louisville, Kentucky man charged under Kentucky's fetal homicide law with killing his unborn child after allegedly hitting his pregnant wife six to eight times in the head and stomach); Lydia McCoy, *Preston Taylor Pleads Guilty to Murder, Feticide*, COURIER PRESS, June 3, 2008 (man pled guilty to the charges of murder and feticide for the death of a pregnant woman); Allen Powell II, *Man Faces Feticide Charge After Woman Wounded; Three Other Shootings, Stabbing Probed in Jeff*, TIMES PICAYUNE, May 6, 2008, at 1 (man accused of accidentally shooting a woman who was twenty-two weeks pregnant, resulting in the fetus's death); John Taylor, *Fetal Homicide Charge Still Possible in Shooting*, JOURNAL WORLD, Feb. 2, 2008 (man charged with first-degree murder for the January shooting death of pregnant woman).

8. On December 24, 2002, Laci Peterson disappeared from her home in Modesto, California. At the time of her murder, she was eight months pregnant. A few months later, the bodies of Laci and her unborn baby, who was to be named Conner, were discovered on the shore of San Francisco Bay. See Brian Skoloff, *Monetary Motive Proposed in Peterson Case*, ASSOCIATED PRESS ONLINE, June 18, 2004.

methods for implementing these feticide laws. Furthermore, in some states, there have been recent appeals to modify existing feticide laws. In other states, although the feticide laws have been in place for the last few years, these laws are just now being applied or have not yet been applied.<sup>9</sup>

This article will examine: (1) the development of feticide legislation; (2) the divergent approaches currently utilized throughout the country in addressing feticide; (3) the specific applications of feticide legislation that have led to calls for reform; and (4) some of the constitutional challenges surrounding this legislation. Finally, the article concludes with an analysis of the quandary that is created by feticide legislation that protects the fetus from its mother.

## II. The Common Law “Born Alive” Rule

Feticide is defined as “[t]he act . . . of killing a fetus, usually by assaulting and battering the mother . . . .”<sup>10</sup> Under English common law, a defendant could not be convicted of feticide unless the government could prove that the victim was “born alive” and then died as a result of prenatal injury.<sup>11</sup> This “born alive” rule was a result of the then unsophisticated state of medical technology, which made it difficult to determine whether the fetus was alive in the womb, what its cause of

9. For example, Maryland applied its feticide law to the first case ever in March 2008. See Danny Jacobs, *First Use of Maryland’s Fetal-Death Law Sets Standard*, DAILY RECORD, Apr. 14, 2008.

10. Kirsten Rabe Smolensky, *Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 41, 58 n.79 (2006) (quoting BLACK’S LAW DICTIONARY 636 (7th ed. 1999)).

11. See Maj. Michael Davidson, *Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law*, 1998 ARMY LAW. 23 (1998); see also *State v. Ashley*, 670 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1996), *quashed in part*, 701 So. 2d 338 (Fla. 1997) (stating that the “born alive” doctrine “remains viable and has been applied to a wide variety of circumstances throughout the United States”); *State v. Hammett*, 384 S.E.2d 220, 221 (Ga. Ct. App. 1989) (“[I]t is not the victim’s status at the time the injuries are inflicted that determines the nature of the crime . . . but the victim’s status at the time of death which is the determinative factor.”); *Jones v. Commonwealth*, 830 S.W.2d 877, 879 (Ky. 1992) (noting that state courts which have applied the common law rule in similar situations have uniformly applied the “born alive” rule); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984) (holding that a viable fetus was within the ambit of the term “person” as used in Massachusetts’ vehicular homicide statute).

death was, and at what time it died.<sup>12</sup> The “born alive” rule resolved the difficulty of establishing the required causal link between the death of the fetus and the third party’s conduct.<sup>13</sup>

Sir Edward Coke enunciated the rule that emerged in the seventeenth century:

“If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body and she is delivered of a dead childe, this is a great misprison [i.e., misdemeanor], and no murder, but if the child be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.”<sup>14</sup>

In other words, “only a child that was born alive and existed independently of its mother received protection under [common law] homicide laws.”<sup>15</sup>

Over time, the definition of “born alive” varied by jurisdiction.<sup>16</sup> For example, in early common law, for a baby to be a victim of a homicide, he or she “must have been fully extruded, have had an existence independent of its mother in that it possessed an independent circulation of its own and derived none of its power of living through any connection with her.”<sup>17</sup> Additionally, many courts required that the child survive for some period of time after the umbilical cord was severed in order to be a homicide victim.<sup>18</sup>

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12. See Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 460-61 (1998) (citing Tony Hartsoe, *Person or Thing—In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 211 (1995)).

13. See *id.* at 461.

14. *Id.* at 460 (quoting SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1817)).

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

16. Davidson, *supra* note 11, at 24 (quoting *United States v. Gibson*, 17 C.M.R. 911, 923 (A.F.B.R. 1954) (“The term ‘born alive’ has been subject to varying interpretations in England and the state courts of this country . . . .”).

17. *Id.* (quoting *Gibson*, 17 C.M.R. at 923).

18. *Id.*

By 1850, the “born alive” rule was widely adopted in the United States’ legal system.<sup>19</sup> Moreover, “[e]very American jurisdiction to consider the issue [of fetal homicide] on the basis of common law, rather than a specific feticide statute, followed some form of the born alive rule until 1984, when the Supreme Judicial Court of Massachusetts extended its vehicular homicide statute to a viable fetus.”<sup>20</sup>

In *Commonwealth v. Cass*,<sup>21</sup> the defendant was convicted of vehicular homicide after he struck an eight and a half month pregnant pedestrian, thereby killing her viable fetus.<sup>22</sup> The court held that the legislature, in enacting the vehicular homicide statute, contemplated that the term “person” would be construed to include viable fetuses.<sup>23</sup> This conclusion, the court reasoned, was supported by legislative intent. Since the vehicular homicide statute was enacted after Massachusetts courts had determined that a fetus was a “person” for civil wrongful death purposes, the legislature presumably “had knowledge of this decision” and, therefore, must have intended a similar definition of “person” for the succeeding criminal statute.<sup>24</sup> Legislative intent also supported the court’s holding that a “person” was synonymous with a “human being,” and the offspring of a human being is a human being, both inside and outside of the womb.<sup>25</sup> Finally, even if the legislature had never considered the issue, the court assumed that the legislature intended for

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19. Tsao, *supra* note 12, at 460-61.

20. Davidson, *supra* note 11, at 24 (citing *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325, 1358 n.5 (Mass. 1984)).

21. 467 N.E.2d 1324.

22. *Id.* at 1325. The defendant was charged with MASS. GEN. LAW ch. 90, § 24G(b) (2001), which provides, in pertinent part, that:

Whoever . . . operates a motor vehicle while . . . under the influence of intoxicating liquor, or of marijuana, narcotic drug, depressants, or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle . . . .

*Id.*

23. *Id.* at 1326.

24. *Id.* at 1325.

25. *Id.*

courts to define the term “‘person’ by reference to established and developing common law.”<sup>26</sup>

Presently, a minority of states still follow the common law “born alive” rule.<sup>27</sup> Application of this rule was demonstrated in *State v. Oliver*,<sup>28</sup> a case in which the defendant was charged with careless and negligent operation of a motor vehicle resulting in the death of an in utero fetus at a gestational age of thirty-four to thirty-five weeks.<sup>29</sup> The Vermont Supreme Court affirmed the trial court’s refusal to find probable cause for the charge, on the grounds that a fetus was not a person within the meaning of the statute governing negligent operation of a motor

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26. *Id.* at 1326.

27. The twelve states that still follow the common law “born alive” rule are Colorado, Connecticut, Delaware, Hawaii, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Vermont, and Wyoming. *See, e.g.*, COLO. REV. STAT. § 18-3-101(2) (2004) (“‘Person’, when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.”); DEL. CODE ANN. tit. 11, § 222 (2008) (“‘Person’ means a human being who has been born and is alive . . . .”); OR. REV. STAT. § 163.005 (2008) (“‘Human being’ means a person who has been born and was alive at the time of the criminal act.”); *State v. Anonymous*, 516 A.2d 156, 158 (Conn. Super. Ct. 1986) (“[A]lmost every state court that has had a homicide statute, similar to Connecticut’s, that did not define ‘human being’ explicitly to include a fetus have [sic] held the words ‘person’ or ‘human being’ would not include the unborn child or fetus.”); *State v. Aiwohi*, 123 P.3d 1210, 1213 (Haw. 2005) (stating that for the purposes of Hawaii’s statute governing criminal offenses against a person, the term “person” is defined as a human being who has been born and is alive); *State v. Elliott*, 43 P.3d 279, 284 (Mont. 2002) (defining a human being as “a person who has been born and is alive”); *Wallace v. Wallace*, 421 A.2d 134, 137 (N.H. 1980) (“No independent cause of action for wrongful death lies on behalf of a nonviable fetus that never achieves live birth.”); *In re A.W.S.*, 440 A.2d 1174 (N.J. Juv. & Dom. Rel. Ct. 1980), *aff’d*, 440 A.2d 1144 (N.J. Super. Ct. App. Div. 1981) (finding that a fetus was not within the protected class under New Jersey’s homicide law); *State v. Willis*, 652 P.2d 1222, 1224 (N.M. Ct. App. 1982) (holding that a viable fetus is not a “human being” within the meaning of the vehicular homicide statute and noting that under the common law, “until born alive there was no human being”); *State v. Beale*, 376 S.E.2d 1, 4 (N.C. 1989) (“We do not discern any legislative intent to include the act of killing a viable fetus within the murder statute.”); *State v. Oliver*, 563 A.2d 1002, 1003 (Vt. 1989) (stating that under the common law, one could not be charged with the murder of a fetus unless the child was born alive and then died); *State v. Osmus*, 276 P.2d 469, 476 (Wyo. 1954) (finding that in order to convict an accused of infanticide, the state must prove beyond a reasonable doubt that the infant was born alive, and, if the infant was born alive, that death was caused by the criminal agency of the accused).

28. 563 A.2d 1002.

29. *Id.* at 1002.

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vehicle.<sup>30</sup> Further, the court held that the legislature did not intend for a fetus to be protected under this statute.<sup>31</sup> The court explained that the “born alive” rule was in effect at the time the negligent operation of a motor vehicle statute’s predecessor statute was first enacted, and neither the negligent operation of a motor vehicle statute nor its predecessor expressly changed this common law rule.<sup>32</sup>

### III. The Status of Federal and State Feticide Legislation

Notwithstanding the minority of states that follow the common law rule, the federal government and the majority of states have abandoned this approach in lieu of feticide laws that protect the unborn—from the age of conception or from a later time of development.<sup>33</sup>

#### A. *Federal Legislation: The Unborn Victims of Violence Act of 2004*

The federal Unborn Victims of Violence Act,<sup>34</sup> also known as Laci’s and Conner’s Law, was prompted by the murder of

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30. *Id.*

31. *Id.* at 1003-04.

32. *Id.*

33. See Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 140 (2006).

34. 18 U.S.C. § 1841 (2004). The Act provides in pertinent part that:

(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 [18 U.S.C. § 1365]) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother.

(B) An offense under this section does not require proof that—

(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title [18 U.S.C. §§ 1111, 1112, and 1113] for intentionally killing or attempting to kill a human being.



Laci and Conner Peterson in 2002.<sup>35</sup> President Bush signed the act into law on April 1, 2004, thereby creating a separate crime for harming a fetus during an assault on the mother.<sup>36</sup>

This act amended the United States Code and the Uniform Code of Military Justice for purposes of “protecting unborn children from assault and murder and for other purposes.”<sup>37</sup> For the most part, the law confers upon the federal government the authority to prosecute, for a separate offense, those who, during the commission of a federal crime, “cause[ ] the death of, or bodily injury to, a child, who is in utero at the time the conduct takes place . . . .”<sup>38</sup> As defined in the act, “the term ‘unborn child’ means a child in utero,” which, in turn, “means a member of the species homo sapiens, at any stage of development, who is carried in the womb.”<sup>39</sup> Hence, the act provides protection for the unborn during all stages of development.

Under the act, the punishment for the offense of injuring or killing an unborn child “is the same as the punishment provided under Federal law for that conduct had the injury or death occurred to the unborn child’s mother.”<sup>40</sup> However, the act does

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(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

. . . .

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) As used in this section, the term “unborn child” means a child in utero, and the term “child in utero” or “child, who is in utero” means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

*Id.*

35. Antonia Zerbisias, *Killings Reopen Debate on Rights of Fetuses*, THE TORONTO STAR, Oct. 10, 2007, at L 01, available at 2007 WLNR 19824237.

36. See Martin, *supra* note 3.

37. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified as amended at 18 U.S.C. § 1841 (2004)). See also Amy Lotierzo, Comment, *The Unborn Child, A Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279, 282 (2006).

38. 18 U.S.C. § 1841.

39. *Id.*

40. *Id.*

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not allow the government to seek the death penalty for an offense against an unborn child.<sup>41</sup> Likewise, the act exempts from prosecution: (1) conduct by any person “relating to an abortion for which the consent of a pregnant woman . . . has been obtained . . .”; (2) “medical treatment of the pregnant woman or her unborn child . . .”; or (3) any conduct “of any woman with respect to her unborn child.”<sup>42</sup>

### B. *State Feticide Legislation*

Similar to the the Unborn Victims of Violence Act, the story of Laci and Conner Peterson prompted the passage of more expansive feticide laws in many states.<sup>43</sup> As a matter of fact, roughly half of the forty states that currently have established criminal penalties for fetal homicide<sup>44</sup>—either through separate criminal offenses for killing a fetus or criminal offenses for acts

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41. *Id.*

42. *Id.*

43. See Jacobs, *supra* note 9.

44. The forty states that have enacted laws that punish a third party for causing harm or killing a fetus include: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nebraska, Nevada, New Hampshire, New York, North Carolina North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. See Ala. Code § 13A-6-1 (2008); Alaska Stat. § 11.41.150 (2008); Ariz. Rev. Stat. Ann. § 13-1103(A)(5) (2008); Ark. Code. Ann. § 5-1-102 (2008); Cal. Penal Code § 187(a) (West 2008); Fla. Stat. § 782.09(1) (2008); Ga. Code. Ann. § 16-5-80(b) (2008); Idaho Code Ann. § 18-4001 (2008); 720 Ill. Comp. Stat. 5/9-1.2 (2008); Ind. Code § 35-42-1-1 (2004); Iowa Code § 707.8 (2003); Kan. Stat. Ann. § 21-3452 (2007); Ky. Rev. Stat. Ann. § 507A.010 (West 2008); La. Rev. Stat. Ann. §§ 14:32.5-14:32.9 (2007); Me. Rev. Stat. Ann. tit. 17-A, § 208-C (2006); Md. Code Ann., Crim. Law § 2-103 (West 2008); Mich. Comp. Laws Ann. § 750.322 (2004); Minn. Stat. §§ 609.266, 609.2661-609.2691 (2003); Miss. Code Ann. § 97-3-37 (2008); Mont. Code Ann. § 45-5-102, 45-5-201, 45-5-212 (2008); Neb. Rev. Stat. §§ 28-388 to- 394 (2007); Nev. Rev. Stat. 200.210 (2007); N.H. Rev. Stat. Ann. § 631:1(I)(c) (2008); N.M. Stat. § 30-3-7 (1978); N.Y. Penal Law § 125.00 (McKinney 2004); N.C. Gen. Stat. § 14-18.2 (2008); N.D. Cent. Code §§ 12.1-17.1-01 to- 08 (2007); Ohio Rev. Code. Ann. §§ 2903.01-2903.09 (West 2008); Okla. Stat. tit. 21, § 691 (2007); 18 PA. Cons. Stat. §§ 2601-2609 (2008); R.I. Gen. Laws § 11-23-5 (2008); S.C. Code Ann. § 16-3-1083 (2007); S.D. Codified Laws § 22-16-1 (2008); Tenn. Code Ann. § 39-13-214 (2008); Tex. Penal Code Ann. § 1.07 (Vernon 2003); Utah Code Ann. § 76-5-201 (2008); Va. Code Ann. § 18.2-32.2 (2008); Wash. Rev. Code § 9A.32.060 (2000); W. Va. Code § 61-2-30 (2008); Wis. Stat. § 940.04(2) (2005). See also Commonwealth v. Cass, 467 N.E.2d 1324, 1324 (Mass. 1984).

of violence committed against a pregnant woman—were passed in response to Laci’s and Conner’s murders.<sup>45</sup>

Although the majority of states have now criminalized the killing of a fetus through specific statutory reform measures,<sup>46</sup> these states have taken different approaches in implementing such laws.<sup>47</sup> For instance, some states have chosen not to enact separate crimes for fetal homicide. Instead, these states have limited their focus to the harm caused against the pregnant woman when a fetus is killed.<sup>48</sup> An example of such a state is New Hampshire, which has a statute decreeing a person guilty of first degree assault if he or she “[p]urposely or knowingly causes injury to another resulting in miscarriage or stillbirth . . . .”<sup>49</sup> In essence, New Hampshire has established a specific crime for a third party’s actions of “purposely” or “knowingly” harming a pregnant woman in a manner that causes the death of her fetus.

North Carolina’s approach to addressing fetal homicide presents another alternative for enacting criminal penalties that limit the focus to the harm committed against the pregnant woman. This state’s law declares that “[a] person who in the commission of a felony causes injury to a woman, knowing the woman to be pregnant, which injury results in a miscarriage or stillbirth by the woman is guilty of a felony that is one class higher than the felony committed.”<sup>50</sup> Thus, North Carolina has chosen to enact a statute that increases the sentence given to a

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45. See Jacobs, *supra* note 9.

46. Massachusetts’ law covers the crime of fetal homicide. However, unlike the majority of states with fetal homicide laws, Massachusetts has distinctively established its fetal homicide laws through case law rather than through legislation. See, e.g., *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1973) (affirming the conviction for murder of a woman and involuntary manslaughter of her 27-week-old fetus); see also *Cass*, 467 N.E.2d at 1324.

47. See Brobst, *supra* note 33, at 135.

48. The three states that merely focus on the harm to a pregnant woman when a third party kills a fetus are New Hampshire, New Mexico, and North Carolina. See N.H. REV. STAT. ANN. § 631:1(I)(c); N.M. STAT. § 30-3-7 (the crimes of assault and battery include injuries to a pregnant women, which “consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing her to suffer a miscarriage or stillbirth as a result of that injury. . . . Whoever commits injury to [a] pregnant woman is guilty of a third degree felony . . . .”); N.C. GEN. STAT. § 14-18.2.

49. N.H. REV. STAT. ANN § 631:1(I)(c).

50. N.C. GEN. STAT. § 14-18.2.

third party when he or she harms a pregnant woman resulting in the death of the fetus.

Those states—like New Hampshire and North Carolina—that have limited their focus to the harm committed against the pregnant woman when a third party kills a fetus, still follow the common law “born alive” rule.<sup>51</sup> This policy is demonstrated by *State v. Beale*,<sup>52</sup> where a defendant was indicted for the murder of a woman and her viable but unborn child.<sup>53</sup> The North Carolina Supreme Court held that the unlawful, willful, and felonious killing of a viable but unborn child was not murder within the meaning of the statutes governing first degree and second degree murder.<sup>54</sup> To support its holding, the court pointed to the fact that nothing in any of the statutes or amendments showed a clear legislative intent to change the common law rule precluding an unborn child from being a murder victim.<sup>55</sup>

Other states have enacted feticide laws that veer away from the common law “born alive” rule and focus directly on the harm to the fetus. In so doing, these states have expanded the definition of a murder victim to include fetuses or have defined the terms “person” or “human being” in their homicide statutes to include unborn children.<sup>56</sup> One such state is Idaho, which defines “murder” as: “the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being.”<sup>57</sup>

Alternatively, some states, such as Georgia, Nebraska, and Pennsylvania, have enacted separate feticide statutes that specifically protect the unborn.<sup>58</sup> Georgia’s feticide statute provides:

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51. See, e.g., *Wallace v. Wallace*, 421 A.2d 134, 137 (N.H. 1980); *State v. Willis*, 652 P.2d 1222, 1224 (N.M. Ct. App. 1982); see also *Brobst*, *supra* note 33, at 140.

52. 376 S.E.2d 1, 4 (N.C. 1989).

53. *Id.* at 1.

54. *Id.* at 2.

55. *Id.*

56. See IDAHO CODE ANN. § 18-4001 (2008); IND. CODE § 35-42-1-1 (2007); N.Y. PENAL LAW § 125.00 (McKinney 2004); OKLA. STAT. tit. 21 § 691 (2006); TEX. PENAL CODE ANN. § 1.07 (Vernon 2003); UTAH CODE ANN. § 76-5-201 (2008).

57. IDAHO CODE ANN. § 18-4001.

58. See, e.g., KY. REV. STAT. ANN. §§ 507A.010-507A.060 (West 2008); NEB. REV. STAT. §§ 28-388 to- 394 (2007).

[A] person commits the offense of feticide if he or she willfully and without legal justification causes the death of an unborn child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, or if he or she, when in the commission of a felony, causes the death of an unborn child. . . . A person convicted of the offense of feticide shall be punished by imprisonment for life.<sup>59</sup>

Nebraska and Pennsylvania refer to their feticide statutes as the “Homicide of the Unborn Child Act”<sup>60</sup> and the “Crimes Against the Unborn Child Act,”<sup>61</sup> respectively.

With reference to the circumstances under which a third party will be held criminally liable for directly harming a fetus, state feticide laws are generally placed into one of three classifications based on the degree of protection afforded to the fetus.<sup>62</sup> The first classification includes feticide laws that have a viability requirement.<sup>63</sup> These statutes provide that a fetus is a legal victim of a third party killing only if the fetus has reached the point of viability—the point at which the fetus can exist independently from the mother.<sup>64</sup> Maryland’s feticide statute contains a viability requirement and provides that a person may be prosecuted for murder or manslaughter if he or she: “(1) in-

59. GA. CODE ANN. § 16-5-80 (2008).

60. NEB. REV. STAT. §§ 28-388 to- 394.

61. 18 PA. CONS. STAT. §§ 2601-2609 (2008).

62. Lotierzo, *supra* note 37, at 287.

63. The five states that have a viability requirement for their feticide statutes are Indiana, Iowa, Maryland, Massachusetts, and Tennessee. *See* IND. CODE § 16-18-2-365 (2004) (“‘Viability,’ for purposes of IC 16-34, means the ability of a fetus to live outside the mother’s womb.”); IOWA CODE § 702.20 (2003) (“‘Viability’ is that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is a matter of responsible medical judgment.”); MD. CODE ANN., HEALTH-GEN § 20-209 (West 2008) (“‘Viable’ means that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus’s sustained survival outside the womb.”); TENN. CODE ANN. § 39-13-214 (2008) (“For purposes of this part, [the terms] ‘another’ and ‘another person’ include a viable fetus of a human being, when any such term refers to the victim of any act made criminal by the provisions of this part.”); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1324 (Mass. 1984) (stating that a viable fetus is a “person” for purposes of the state’s vehicular homicide statute).

64. *See* Lori K. Mans, Note, *Liability for the Death of a Fetus: Fetal Rights or Women’s Rights?*, 15 U. FLA. J.L. & PUB. POL’Y 295, 306 (2004).

tended to cause the death of the viable fetus; (2) intended to cause serious physical injury to the viable fetus; or (3) wantonly or recklessly disregarded the likelihood that the person's actions would cause the death of or serious physical injury to the viable fetus."<sup>65</sup> Maryland defines "viable" as "that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the womb."<sup>66</sup>

The second classification includes feticide laws that require some minimum time period of gestation that falls short of viability before a third person can be held liable for killing a fetus.<sup>67</sup> Some of these laws, such as those adopted in Rhode Island and Washington, have a "quickness" prerequisite in addition to a minimum time period requirement.<sup>68</sup> A "quick" fetus is one whose movement in the womb can be felt.<sup>69</sup> Other states that use the minimum time period approach require only a specific time period and do not consider the quickening of the fe-

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65. MD. CODE ANN., CRIM. LAW § 2-103 (West 2008).

66. MD. CODE ANN., HEALTH-GEN § 20-209 (West 2008).

67. Lotierzo, *supra* note 37, at 287.

68. The five states that have a "quickness" requirement for their feticide statutes are Florida, Michigan, Nevada, Rhode Island, and Washington. See FLA. STAT. § 782.09 (2008) ("The unlawful 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, shall be deemed murder . . ."); MICH. COMP. LAWS ANN. § 750.322 (2004) ("The wilful 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, shall be deemed manslaughter."); NEV. REV. STAT. § 200.210 (2007) ("A person who willfully kills an unborn quick child, by any injury committed upon the mother of the child, commits manslaughter and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than \$10,000."); R.I. GEN. LAWS § 11-23-5 (2008) ("The willful killing of an unborn quick child by any injury to the mother of the child, which would be murder if it resulted in the death of the mother; the administration to any woman pregnant with a quick child of any medication, drug, or substance or the use of any instrument or device or other means, with intent to destroy the child, unless it is necessary to preserve the life of the mother; in the event of the death of the child; shall be deemed manslaughter."); WASH. REV. CODE § 9A.32.060 (2000) ("A person is guilty of manslaughter in the first degree when: . . . [h]e intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.").

69. Mans, *supra* note 64, at 302.

tus.<sup>70</sup> For example, in New York, feticide of an unborn child can occur “when a female has been pregnant for more than twenty-four weeks.”<sup>71</sup>

The third classification includes feticide laws that punish a third party for killing a fetus at any stage of development.<sup>72</sup>

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70. Three states, Arkansas, California and New York, require that the fetus reach a specific developmental stage before criminal liability for direct harm to the unborn can arise. *See* ARK. CODE ANN. § 5-1-102 (2008) (“[U]nborn child’ means a living fetus of twelve (12) weeks or greater gestation.”); N.Y. PENAL LAW § 125.00 (McKinney 2004) (“Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree.”). California courts have interpreted the point at which liability attaches to be seven to eight weeks. *See* *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994) (rejecting viability requirement and interpreting the term “fetus” in section 187 of California’s Penal Code to mean postembryonic period occurring at seven to eight weeks after fertilization).

71. N.Y. PENAL LAW § 125.00 (McKinney 2004).

72. The twenty-four states that impose criminal liability for killing a fetus at any stage of development are Alaska, Alabama, Arizona, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *See* ALA. CODE § 13A-6-1 (2008) (“The term [person], when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability.”); ALASKA STAT. § 11.81.900 (2008) (“[U]nborn child’ means a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb.”); ARIZ. REV. STAT. ANN. § 13-1103(B) (2008) (“One commits manslaughter by: . . . [k]nowingly or recklessly causing the death of an unborn child by any physical injury to the mother.”); GA. CODE ANN. 16-5-28(a) (2008) (“[U]nborn child’ means a member of the species *homo sapiens* at any stage of development who is carried in the womb.”); IDAHO CODE ANN. § 18-4001 (2008) (“Murder is the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being.”); 720 ILL. COMP. STAT. 5/9-1.2 (2008) (“An ‘unborn child’ shall mean any individual of the human species from fertilization until birth . . . .”); KAN. STAT. ANN. § 21-3452 (2007) (“‘Unborn child’ means a living individual organism of the species *homo sapiens*, in utero, at any stage of gestation from fertilization to birth.”); KY. REV. STAT. ANN. § 507A.010 (West 2008) (“‘Unborn child’ means a member of the species *homo sapiens* in utero from conception onward, without regard to age, health, or condition of dependency.”); LA. REV. STAT. ANN. § 14:2 (2007) (“‘Unborn child’ means any individual of the human species from fertilization and implantation until birth.”); MINN. STAT. § 609.266 (2003) (“‘Unborn child’ means the unborn offspring of a human being conceived, but not yet born.”); MISS. CODE ANN. § 97-3-37 (2008) (“[H]uman being’ includes unborn child at every stage of gestation from conception until live birth, and . . . ‘unborn child’ means a member of the species *homo sapiens*, at any stage of development, who is carried in the womb.”); MONT.

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These statutes usually refer to a fetus as an “unborn child.”<sup>73</sup> An illustration of this variation in feticide laws is Alabama’s criminal homicide or assault statute’s definition of “person,” which includes “an unborn child in utero at any stage of development, regardless of viability.”<sup>74</sup> This category of state feticide legislation is more akin to the federal feticide legislation than the other two approaches, because it criminalizes harm to an unborn child at any stage of development and provides the most protection to the unborn.<sup>75</sup>

When feticide laws are considered, a question may arise as to whether the defendant must have knowledge of the fetus’s

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CODE ANN. § 50-20-303 (2008) (“‘Unborn child’ means the offspring of human beings from conception until birth.”); NEB. REV. STAT. § 28-389 (2007) (“Unborn child means an individual member of the species *Homo sapiens*, at any stage of development in utero, who was alive at the time of the homicidal act and died as a result thereof whether before, during, or after birth.”); N.D. CENT. CODE § 12.1-17.1-01 (2007) (“‘Unborn child’ means the conceived but not yet born offspring of a human being, which, but for the action of the actor would beyond a reasonable doubt have subsequently been born alive.”); OHIO REV. CODE ANN. § 2919.16 (West 2008) (“‘Unborn human’ means an individual organism of the species *homo sapiens* from fertilization until live birth.”); OKLA. STAT. ANN. tit. 63, § 1-730 (2007) (“‘Unborn child’ means the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus.”); 18 PA. CONS. STAT. § 3203 (2008) (“‘Unborn child’ and ‘fetus’ . . . shall mean an individual organism of the species *homo sapiens* from fertilization until live birth.”); S.C. CODE ANN. § 16-3-1083 (2007) (“‘[U]nborn child’ means a child in utero, and . . . ‘child in utero’ or ‘child who is in utero’ means a member of the species *homo sapiens*, at any state of development, who is carried in the womb.”); S.D. CODIFIED LAWS § 22-1-2 (2008) (“‘Unborn child,’ an individual organism of the species *homo sapiens* from fertilization until live birth.”); TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon 2003) (“‘Individual’ means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.”); UTAH CODE ANN. § 76-5-201(1)(a) (West 2008) (“A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of its development.”); W. VA. CODE § 61-2-30 (2008) (“‘Embryo’ means the developing human in its early stages. The embryonic period commences at fertilization and continues to the end of the embryonic period and the beginning of the fetal period, which occurs eight weeks after fertilization or ten weeks after the onset of the last menstrual period. ‘Fetus’ means a developing human that has ended the embryonic period and thereafter continues to develop and mature until termination of the pregnancy or birth.”); WIS. STAT. § 940.04 (2005) (“‘[U]nborn child’ means a human being from the time of conception until it is born alive.”).

73. Mans, *supra* note 64, at 304.

74. ALA. CODE § 13A-6-1.

75. Mans, *supra* note 64, at 304.



existence to be culpable for its death. Some states have answered this question in the affirmative.<sup>76</sup> For instance, to violate Indiana's feticide law, a person must "knowingly or intentionally kill[ ] a fetus that has attained viability . . . ."<sup>77</sup> In addition to having knowledge of the pregnancy, the issue may arise as to whether there must be an intentional act on the defendant's part in order for him or her to be charged with the crime of killing a fetus.<sup>78</sup> Nevada is one of those states that has enacted a feticide law requiring that the defendant act intentionally or willfully before he can be charged for the act of killing a fetus. Its feticide law states, "A person who willfully kills an unborn quick child, by any injury committed upon the mother of the child, commits manslaughter . . . ."<sup>79</sup>

### C. *Contemporary Applications of State Feticide Laws*

Interestingly, some states, like Maryland, have only recently applied their feticide laws to actual legal cases.<sup>80</sup> Although Maryland passed its fetal homicide law in 2005, it was not employed until March 2008.<sup>81</sup> The case where Maryland's feticide law was first utilized involved David Lee Miller, who was convicted in the Baltimore County Circuit Court for the June 2007 killing of his pregnant girlfriend, Elizabeth Walters.<sup>82</sup> On September 9, 2008, Miller was sentenced to life in prison without the possibility of parole, making Miller the first person to be sentenced for feticide in Maryland.<sup>83</sup>

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76. Tsao, *supra* note 12, at 465-66.

77. IND. CODE § 35-42-1-1 (2004).

78. See, e.g., GA. CODE ANN. § 16-5-80(b) (2008); IND. CODE § 35-42-1-1; NEV. REV. STAT. § 200.210 (2007); UTAH CODE ANN. § 76-5-201 (2008); VA. CODE ANN. § 18.2-32.2 (2008); WASH. REV. CODE § 9A.32.060 (2000).

79. NEV. REV. STAT. § 200.210.

80. See MD. CODE ANN., CRIM. LAW § 2-103 (West 2008); see also *Louisville Man Pleads Guilty to Fetal Homicide*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 13, 2005 (a Louisville, Kentucky man pled guilty to fetal homicide, "possibly becoming the first person charged and convicted since Kentucky established it as a crime in February 2004").

81. Jacobs, *supra* note 9; see also Jennifer McMenamin, *Sentencing Postponed in Slaying of Fetus; Pre-Sentence Probe Found Unfinished*, BALTIMORE SUN, June 8, 2008, at 6B, available at 2008 WLNR 12782816.

82. McMenamin, *supra* note 81, at 6B.

83. *Id.*

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In other states, of late, there have been urges to reform feticide laws.<sup>84</sup> At least one of these calls for reform—that made in Kansas—has been successful. On May 9, 2007, Kansas’s governor signed a law that gave prosecutors the right to charge a person who has intentionally harmed a fetus with murder, manslaughter, or battery.<sup>85</sup> Prior to the enactment of this feticide law, which took effect on July 1, 2007,<sup>86</sup> Kansas followed the common law “born alive” rule.<sup>87</sup> Moreover, when a fetus was killed before this law was enacted, the only criminal penalties imposed against the assailant were for the harm committed against the pregnant woman. In particular, the state law prior to July 1, 2007, in pertinent part provided:

a) Injury to a pregnant woman is injury to a pregnant woman by a person other than the pregnant woman in the commission of a felony or misdemeanor causing the pregnant woman to suffer a miscarriage as a result of that injury.

....

(c) Injury to a pregnant woman in the commission of a felony is a severity level 4, person felony.<sup>88</sup>

Essentially, this statute was parallel to North Carolina’s statute, in that it contained sentencing enhancements for a third party when he or she harmed a pregnant woman and killed her fetus.<sup>89</sup>

The current feticide law in Kansas is named “Alexa’s Law” after the fetus of Chelsea Books, a fourteen year old pregnant

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84. There have been outcries for reform in the following states: Indiana, Kansas, and North Carolina. See John Milburn, “Alexa’s Law” Among Several Bills Signed by Sebelius, ASSOCIATED PRESS STATE & LOCAL WIRE, May 9, 2007, available at 5/9/07 AP Alert KS 22:40:23 (Westlaw); see also *Robbery Inspires Push For New Feticide Law*, UNITED PRESS INTERNATIONAL, Apr. 30, 2008; Walker, *supra* note 5, at A9.

85. Milburn, *supra* note 84.

86. Danny Jacobs, *Baltimore County Circuit Court Judge Imposes Maximum Term on Man Who Killed Girlfriend, Fetus*, THE DAILY RECORD, Sept. 9, 2008.

87. See *State v. Trudell*, 755 P.2d 511 (Kan. 1988); see also Milburn, *supra* note 84.

88. KAN. STAT. ANN. § 21-3440 (2007), repealed by Alexa’s Law of 2007, ch. 169, § 4 (codified as amended at KAN. STAT. ANN. § 21-3452 (2007)); see also N.C. GEN. STAT. § 14-18.2 (2008).

89. See KAN. STAT. ANN. § 21-3440; N.C. GEN. STAT. § 14-18.2.

girl from Wichita, Kansas, who was slain in 2006.<sup>90</sup> The law allows prosecutors to charge an assailant with a crime against the woman and a separate crime against the fetus when the assailant attacks a pregnant woman.<sup>91</sup> The law states that “[u]nborn child” means a living individual organism of the species *homo sapiens*, in utero, at any stage of gestation from fertilization to birth.”<sup>92</sup> By enacting this feticide law, which defines a fetus as a “human being,” Kansas joined the majority of states that have abandoned the common law “born alive” rule.

One state that still follows the common law “born alive” rule, in the face of immediate calls for statutory reform, is North Carolina.<sup>93</sup> Under North Carolina law, a fetus is not a “person” within the meaning of its constitution.<sup>94</sup> But, outcries from the family of Jennifer Nielsen have spurred the most recent pleas for modification of North Carolina’s law to allow prosecutors to charge an assailant separately for the offense of fetal homicide.<sup>95</sup> Nielsen, a pregnant mother of two, was killed on June 14, 2007, while she was delivering *USA Today* newspapers in Raleigh, North Carolina.<sup>96</sup> As the law currently stands in North Carolina, Nielsen’s killer could not be charged separately for killing her eight month old male fetus.<sup>97</sup>

The movement to enact a law in North Carolina that would make it a separate criminal offense to kill a fetus has gained widespread attention, as Nielsen’s family has continued to push for such legislation.<sup>98</sup> This, however, is not the first time that

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90. See KAN. STAT. ANN. § 21-3440; see also Dion Lefler, *Mothers Testify for Alexa’s Law*, WICHITA EAGLE, May 16, 2007, available at 2007 WLNR 4960075.

91. Milburn, *supra* note 84.

92. KAN. STAT. ANN. § 21-3452.

93. Walker, *supra* note 5, at A9.

94. Stam v. State, 275 S.E.2d 439, 441 (N.C. 1981) (“[A] human fetus is not a ‘person’ pursuant to N.C. CONST. Art. I, §§ 1, 19”).

95. Marisol Bello, *Slain Woman’s Family Wants N.C. Fetal Homicide Law*, USA TODAY, July 8, 2007, available at [http://www.usatoday.com/news/nation/2007-07-08-carrier\\_N.htm](http://www.usatoday.com/news/nation/2007-07-08-carrier_N.htm).

96. *Id.*

97. Nielsen’s male fetus, to be named Ethen, was to be delivered on July 8, 2007. Amanda Lamb, *Victim’s Family Makes High-Tech Push for Fetal Homicide Law*, WRAL.COM, Feb. 13, 2008, <http://www.wral.com/news/local/story/2433919/>.

98. Notably, Senate Bill 295 and House Bill 263 are two fetal homicide bills that have stalled in committees in North Carolina, but these bills “could get new life” following the North Carolina General Assembly’s reconvening in May, 2008. Lamb, *supra* note 97. As of February 13, 2008, “sixty-four lawmakers supported

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the issue of whether to enact such a feticide statute in North Carolina has been raised. For the state legislature, the choice of whether to enact a feticide law that establishes a separate criminal offense for a fetus's death has been an issue since the 1980s, when it was first considered.<sup>99</sup>

Even those states that have abandoned the common law "born alive" rule are not immune to calls for reform of their feticide laws. In particular, states that have feticide statutes requiring either viability or a time period shorter than viability, such as the quickening requirement, may be more susceptible to criticisms. Indiana is an example of a state where a fetus must be viable in order for a defendant to be prosecuted for the separate offense of killing the fetus.<sup>100</sup> In Indiana, viability is defined as "the ability of a fetus to live outside the mother's womb."<sup>101</sup>

The limitation of Indiana's viability requirement is evident from the previously mentioned case of the Indiana bank robber who shot Katherine Shuffield, resulting in the death of her twin fetuses on April 22, 2008.<sup>102</sup> At present, the feticide law in Indiana only carries a penalty of two to eight years for killing a fetus not yet viable.<sup>103</sup> This means that the suspected triggerman in the bank robbery can only face four to sixteen years in prison if convicted on two counts of killing a fetus.<sup>104</sup> As a result, there has been a push to reform Indiana's feticide law to cover the death of any fetus, regardless of whether it can survive outside the womb.<sup>105</sup>

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giving prosecutors the option to charge someone with two counts of murder for killing a pregnant women." *Id.* "Various versions of the bill have failed to pass the General Assembly" for the past decade." *Id.*

99. *Id.*

100. *See* IND. CODE § 35-42-1-1 (2004).

101. IND. CODE § 16-18-2-365 (2004).

102. *See* Martin, *supra* note 3.

103. *See* IND. CODE § 16-18-2-365.

104. *Id.*

105. Rick Callahan, *Prosecutor Proposes Changes to State's Murder Law*, ASSOCIATED PRESS STATE & LOCAL WIRE, Apr. 30, 2008, available at 4/30/08 AP Alert Political 22:50:25 (Westlaw).

#### IV. Constitutional Challenges of State Feticide Legislation

State feticide laws, like those adopted in Kansas and Indiana, have not been enacted without opposition. These laws have frequently been opposed on the basis that they are inconsistent with a woman's legal right to obtain an abortion. Moreover, feticide legislation has confronted other constitutional challenges involving due process and equal protection concerns.

##### A. *Roe v. Wade* Challenges

Opponents of feticide legislation have argued that these laws could be a backdoor way of creating legal rights for a fetus in order to set precedents that will help ban abortions.<sup>106</sup> These critics assert that feticide laws undermine abortion rights and give the fetus a legal status that it does not have.<sup>107</sup> A universal constitutional challenge of feticide laws involves the argument that these laws conflict with the U.S. Supreme Court's ruling in *Roe v. Wade*,<sup>108</sup> which legalized abortion.

In 1989, the Supreme Court addressed this issue in *Webster v. Reproductive Health Services*.<sup>109</sup> In *Webster*, the Court refused to invalidate a Missouri statute, which stated: (1) "[t]he life of each human being begins at conception;" (2) "[u]nborn children have protectable interests in life, health, and well-being" and (3) "that state laws be interpreted to provide unborn children with 'all the rights, privileges, and immunities available to other persons, citizens, and residents of this state,' subject to the Constitution and this Court's precedents."<sup>110</sup> Essentially, the Court held that a state is free to enact laws that recognize unborn children, so long as the state does not include abortion restrictions forbidden by *Roe*.<sup>111</sup>

Two years before the Supreme Court addressed the issue of whether a state's feticide law conflicted with *Roe*, the United States Court of Appeals for the Eleventh Circuit confronted the

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106. See Bello, *supra* note 95.

107. See Ellen Nakashima, *Va. Debates Law on Fetal Homicide; Legislation Entangled with Abortion Issue*, WASHINGTON POST, Feb. 26, 1996, at D01.

108. 410 U.S. 113 (1973).

109. 492 U.S. 490 (1989).

110. *Id.* at 504-05 (quoting MO. REV. STAT. § 1.205 (2008)).

111. *Id.* at 491.

same issue in *Smith v. Newsome*.<sup>112</sup> In that case, Richard James Smith, Sr. was convicted of “aggravated assault, four counts of armed robbery, and violating Georgia’s feticide statute.”<sup>113</sup> The court rejected Smith’s argument that the feticide statute was unconstitutional and explained that “[t]he proposition that Smith relies upon in *Roe v. Wade*—that an unborn child is not a ‘person’ within the meaning of the Fourteenth Amendment—is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus.”<sup>114</sup>

Like the *Newsome* court, the Texas Court of Criminal Appeals, in *Lawrence v. Texas*,<sup>115</sup> unanimously rejected a convicted murderer’s claims that the 2003 Prenatal Protection Act—the applicable feticide statute—was unconstitutional for various reasons, including being inconsistent with *Roe v. Wade*. In *Lawrence*, Terrence Chadwick Lawrence shot his girlfriend, Antwonnya Smith, three times, killing her and causing the death of her four-to-six week old embryo.<sup>116</sup> Consequently, Lawrence was convicted of “capital murder,” defined under Texas law as “intentionally or knowingly” causing the death of “more than one person . . . during the same criminal transaction.”<sup>117</sup>

The *Lawrence* court explained that states may protect human life “from the outset of the pregnancy,” and “[i]n the absence of a due process interest triggering the constitutional protections of *Roe*, the Legislature is free to protect the lives of those whom it considers to be human beings.”<sup>118</sup> The court further articulated that the *Roe* framework “has no application to a statute that prohibits a third party from causing the death of the woman’s unborn child against her will.”<sup>119</sup>

Despite the fact that *Roe v. Wade* arguments are frequently used to challenge feticide laws, none of these laws have yet been

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112. 815 F.2d 1386 (11th Cir. 1987).

113. *Id.* at 1387.

114. *Id.* at 1388.

115. 240 S.W.3d 912 (Tex. Crim. App. 2007).

116. *Id.* at 914.

117. *Id.* at 914-15 (quoting TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03(a)(7)(A) (Vernon 2003)).

118. *Id.* at 917-18 (quoting *Gonzales v. Carhart*, 127 S. Ct. 1610, 1624 (2007)).

119. *Id.* at 917.

struck down on this basis.<sup>120</sup> Moreover, the federal government,<sup>121</sup> along with many states,<sup>122</sup> has specifically exempted abortions from feticide prosecution. A model of such an exemption is Alabama's feticide statute, which provides that "[n]othing in this section shall make it a crime to perform or obtain an abortion that is otherwise legal."<sup>123</sup>

### B. *Due Process Challenges*

In addition to *Roe v. Wade* challenges, feticide legislation has been challenged on due process grounds.<sup>124</sup> Specifically, these laws have been objected to on the basis that they are void for vagueness. A statute is void for vagueness if it fails to define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>125</sup>

The issue of whether a feticide statute is unconstitutionally vague has been raised in those states, such as Minnesota, where feticide can be committed without the defendant having any knowledge of the fetus's existence. In *State v. Merrill*,<sup>126</sup> the Supreme Court of Minnesota faced the question of whether Sean Patrick Merrill could be convicted of fetal homicide after shooting and killing Gail Anderson, who was pregnant with a twenty-seven or twenty-eight day old embryo.<sup>127</sup>

Merrill's due process argument was that it would be unfair to charge an assailant with the murder of an unborn child when

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120. Christine Vestal, *States Expand Fetal Homicide Laws*, ALTERNET, Aug. 22, 2006, <http://www.alternet.org/story/40676/>.

121. The Unborn Victims of Violence Act specifically exempts abortion from prosecution. See 18 U.S.C. § 1841 (2004).

122. See, e.g., ALA. CODE § 13A-6-1 (2008).

123. *Id.*

124. See, e.g., *Brinkley v. State*, 322 S.E.2d 49, 52 (Ga. 1984) (quoting *Commonwealth v. Parker*, 9 Met. 263 (Mass. 1845)) ("This distinction, between a woman being pregnant and being quick with child . . . is well known and recognized in the law."); *Commonwealth v. Bullock*, 913 A.2d 207, 213 (Pa. 2006) (holding that the state feticide statute did not violate the void-for-vagueness doctrine); *Lawrence v. Texas*, 240 S.W.2d. 912, 916 (Tex. Crim. App. 2007) (holding that the state feticide statute left no ambiguity as to what conduct was proscribed).

125. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *Lawrence*, 240 S.W.2d. at 915.

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

127. *Id.* at 320.

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neither the assailant nor the pregnant woman may have been aware of the pregnancy.<sup>128</sup> In response, the court explained that “[t]he fair warning rule has never been understood to excuse criminal liability simply because the defendant’s victim proves not to be the victim the defendant had in mind.”<sup>129</sup> Transferring Merrill’s intent to kill Anderson to the embryo, the court rejected Merrill’s due process argument and held that the feticide statute provided the requisite fair warning.<sup>130</sup> In addition, the court stated that “[t]he possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude.”<sup>131</sup>

In *Commonwealth v. Bullock*,<sup>132</sup> the defendant argued the void-for-vagueness doctrine on the basis that the state feticide law did not require either the fetus’s viability or that the fetus reach some minimum time period of gestation.<sup>133</sup> Here, Matthew Bullock strangled his girlfriend, Lisa Hargrave, who was twenty-two to twenty-three weeks pregnant.<sup>134</sup> After being sentenced to consecutive terms of imprisonment of fifteen to forty years for Hargrave’s murder and five to twenty years for voluntary manslaughter of her unborn child, Bullock challenged Pennsylvania’s feticide statute.<sup>135</sup>

Bullock asserted that since the state’s feticide statute did not require that the fetus be viable at the time of its death, the statute failed to provide fair warning of precisely what conduct was prohibited.<sup>136</sup> His logic for this argument was that until a fetus is viable, it cannot actually be alive and cannot suffer death.<sup>137</sup> Rejecting this argument, the court held that the statute did not violate the void-for-vagueness doctrine as a fetus’s “viability outside of the womb is immaterial to . . . the question of whether the statute is vague in proscribing the killing of an unborn child.”<sup>138</sup> In reaching this holding, the court reasoned:

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128. *Id.* at 323.

129. *Id.*

130. *Id.*

131. *Id.* at 323.

132. 913 A.2d 207 (Pa. 2006).

133. *Id.* at 212.

134. *Id.* at 210-11.

135. *Id.* at 211.

136. *Id.* at 212.

137. *Id.*

138. *Id.* at 213.



[T]o accept that a fetus is not biologically alive until it can survive outside of the womb would be illogical, as such a concept would define fetal life in terms that depend upon external conditions, namely, the existing state of medical technology (which, of course, tends to improve over time).<sup>139</sup>

Even when state feticide statutes require either viability or a minimum time period, a defendant, like the defendant in *Smith v. Newsome*,<sup>140</sup> may still claim that the statute is unconstitutionally vague. In *Newsome*, the defendant argued that the Georgia feticide statute was unconstitutionally vague, because a jury was required to arbitrarily determine and apply each member's understanding of the term "quick."<sup>141</sup> In rejecting this due process argument, the Court found that Georgia case law had long adopted the common law understanding of "quick" as the time when the fetus was so developed as to be capable of movement within the womb.<sup>142</sup>

### C. Equal Protection Challenges

Constitutional inquiries into the validity of state feticide laws have included questions concerning whether enforcement of these laws violates a defendant's right to equal protection. To be successful on an equal protection argument in this area, the defendant must prove that the feticide law treats similarly situated people differently.<sup>143</sup>

In *Newsome*, the defendant unsuccessfully attempted to make this argument. Particularly, he claimed that the feticide charge violated his equal protection rights by creating two arbitrary and capricious classifications between Georgia's feticide

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139. *Id.*

140. 815 F.2d 1386 (11th Cir. 1987).

141. *Id.* at 1387. Although Georgia's current feticide statute provides protection for a fetus at any stage of development, when Smith committed the feticide, the statute stated that "[a] person commits the offense of feticide if he willfully kills an unborn child so far developed as to be ordinarily called "quick" by any injury to the mother of such child, which would be murder if it resulted in the death of such mother." See GA. CODE ANN. § 16-5-80(a) (1982), amended by GA. CODE ANN. § 16-5-80(b) (2008).

142. *Newsome*, 815 F.2d at 1387.

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

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statute and its criminal abortion statute.<sup>144</sup> When the defendant committed the feticide, Georgia's criminal abortion statute punished the offense of criminal abortion with imprisonment for not less than one year or more than ten years, while the state's feticide statute imposed a life sentence.<sup>145</sup> The defendant contended that the offense perpetrated by the individual performing a criminal abortion would be synonymous with the offense of feticide if the unborn child was determined to be quick when the feticide occurred.<sup>146</sup> The court denied Smith's equal protection argument and held that the difference in sentences required by Georgia's feticide statute and state criminal abortion statute was rationally related to a legitimate governmental purpose.<sup>147</sup>

Similarly, in *Commonwealth v. Bullock*,<sup>148</sup> the defendant argued that enforcement of Pennsylvania's feticide statute infringed upon his equal protection rights.<sup>149</sup> This argument was premised on the fact that the feticide statute, in effect, exempted a mother who voluntarily aborted her own unborn child while it held the natural father criminally responsible.<sup>150</sup> Specifically, he asserted that natural fathers who kill their unborn children were not treated the same as natural mothers who aborted their fetuses.<sup>151</sup>

In response, the court found that the Pennsylvania General Assembly had a legitimate reason for treating the mother and everyone else differently.<sup>152</sup> The court reasoned that a mother is not similarly situated to everyone else in that she is the only one who is carrying the unborn child.<sup>153</sup> Thus, the court held that the statute's exemption for voluntary abortion was reasonably related to a legitimate state purpose.<sup>154</sup>

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144. See *Newsome*, 815 F.2d at 1388 (citing GA. CODE ANN. § 16-12-140 (2008)).

145. *Id.*

146. *Id.*

147. *Id.*

148. 913 A.2d 207 (Pa. 2006).

149. *Id.* at 215; see also 18 PA. CONS. STAT. § 2609 (2008).

150. See *Bullock*, 913 A.2d at 215.

151. *Id.*

152. *Id.* at 216.

153. *Id.*

154. *Id.*

## V. The Predicament of Feticide Legislation Encompassing the Mother's Actions

Besides constitutional challenges, a dilemma that has surfaced in the area of feticide legislation is whether the laws should include the acts of the expectant mother when she terminates the life of the fetus in a manner other than by legal abortion. These anticipated acts of the mother include actions such as ingesting fatal drugs, consuming a large amount of alcohol, or shooting herself in the stomach.<sup>155</sup> Careful scrutiny of media reports will demonstrate that these scenarios are not unlikely. One such case is that of Theresa Lee Hernandez, an Oklahoma City woman, who, on September 21, 2007, pled guilty to second-degree murder for the April 2004 death of her baby.<sup>156</sup> Evidently, the baby's stillborn birth was caused by Hernandez's methamphetamine use during her pregnancy.<sup>157</sup>

### A. *Applications of Feticide Legislation and the Issue of Protecting the Fetus from Its Mother*

Generally, most jurisdictions have declined to extend feticide legislation to apply to the acts of the unborn child's mother.<sup>158</sup> For example, the Florida Supreme Court faced this issue in *State v. Ashley*,<sup>159</sup> a case in which Kawana Ashley, an

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155. See Tsao, *supra* note 12, at 476.

156. Hernandez's supporters argued that prosecuting her would discourage drug-dependent women from seeking health care during pregnancy and would negatively affect both the health of the mother and the baby. See Murray Evans, *Woman Enters Plea in Death of Baby*, ASSOCIATED PRESS & LOCAL WIRE, Sept. 21, 2007, available at 9/21/07 AP Alert MO 23:38:37.

157. *Id.*

158. See *Reinesto v. Superior Court*, 894 P.2d 733, 734 (Ariz. Ct. App. 1995) (holding that defendant mother could not be prosecuted under the child abuse statute for prenatal conduct that resulted in harm to the subsequently born child); *People v. Morabito*, 580 N.Y.S.2d 843, 846-47 (Crim. Ct. 1992) (holding that the defendant mother could not be charged with endangering the welfare of a child based upon prenatal acts endangering an unborn child); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (holding that a parent may not be prosecuted for child endangerment for prenatal substance abuse); *State v. Dunn*, 916 P.2d 952, 956 (Wash. Ct. App. 1996) (dismissing the second degree criminal mistreatment of a child charge and holding that a fetus was not a child within the meaning of the criminal mistreatment statute); *State v. Deborah J.Z.*, 596 N.W.2d 490, 496 (Wis. Ct. App. 1999) (holding that defendant mother's fetus was not a human being for the purposes of the attempted first degree intentional homicide and first degree reckless injury statutes).

159. *State v. Ashley*, 701 So. 2d 338 (Fla. 1997).

unmarried pregnant teenager in her third trimester, shot herself.<sup>160</sup> “The fetus, which had been struck on the wrist by the bullet, was removed during surgery and died fifteen days later due to immaturity.”<sup>161</sup> Because of the fetus’s death, Ashley was charged with murder and manslaughter—“the underlying felony for the murder charge being criminal abortion.”<sup>162</sup> Both the State and Ashley appealed after the trial court dismissed the murder charge and retained the manslaughter charge.<sup>163</sup>

“The State argue[d] that Ashley was properly charged with both murder and manslaughter . . . .”<sup>164</sup> The court disagreed and explained that at “common law, while a third party could be held criminally liable for causing injury or death to a fetus, the pregnant woman could not . . . .”<sup>165</sup> Essentially, courts “differentiated between those actions taken upon oneself and those taken by a third party.”<sup>166</sup> Further, the court explained that since none of the statutes under which Ashley was charged stated that they altered the common law doctrine conferring immunity on the pregnant woman, this doctrine still remained in effect.<sup>167</sup>

Although the majority of jurisdictions follow *Ashley* in finding that the mother is immune from feticide prosecution, a small number of jurisdictions do not adhere to this rule. In other words, these jurisdictions have extended their feticide laws to cover the mother’s acts against the fetus beyond a legal abortion. One such jurisdiction is South Carolina.<sup>168</sup> In *McKnight v. State*,<sup>169</sup> Regina McKnight gave birth to a nearly full-term, stillborn girl on May 15, 1999.<sup>170</sup> An autopsy of the child

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160. *Id.* at 339.

161. *Id.*

162. *Id.* at 339-40.

163. *Id.* at 340.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 341.

168. See *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) (allowing the prosecution of a mother for causing her baby to be born with cocaine metabolites in its system by reason of the mother’s ingestion of crack cocaine during the third trimester of her pregnancy).

169. *McKnight v. State*, 576 S.E.2d 168 (S.C. 2003).

170. *Id.* at 170.

revealed inflammations and the presence of a cocaine by-product.<sup>171</sup>

McKnight was subsequently charged with homicide by child abuse.<sup>172</sup> This South Carolina statute provides that a person is guilty of homicide by child abuse if he or she “causes the death of a child under the age of eleven while committing child abuse or neglect . . . under circumstances manifesting an extreme indifference to human life.”<sup>173</sup> McKnight was convicted at trial and sentenced to twenty years, eight of which were suspended, thereby requiring her to serve twelve years in prison.<sup>174</sup>

On appeal, McKnight contended, among other things, that application of the homicide by child abuse statute violated her constitutional rights of privacy and autonomy.<sup>175</sup> The South Carolina Supreme Court rejected this argument and held that prosecuting a mother for abuse and neglect of a viable fetus due to the mother’s ingestion of cocaine does not violate any fundamental right.<sup>176</sup>

Subsequently, on May 13, 2008, the court overturned McKnight’s conviction, finding that there was no clear connection between the baby’s death and the mother’s use of cocaine.<sup>177</sup> However, it should be noted that McKnight’s conviction was not overturned on the theoretical basis that a mother could not be held liable for the death of her fetus.<sup>178</sup> Thus, an expectant mother in South Carolina can be prosecuted for the acts she commits, with the exception of a legal abortion, that causes the death of her fetus.

Similarly, in October 2007, a St. Louis, Missouri judge denied Sherri Lohnstein’s motion to dismiss an involuntary manslaughter charge for the September 9, 2006 death of her

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171. *Id.*

172. *Id.* at 171.

173. *Id.* at 172-73 (quoting S.C. CODE ANN. § 16-3-85(A) (2007)).

174. *Id.* at 171.

175. *Id.* at 176.

176. *Id.*

177. See *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008); see also Kelly Marshall Fuller & Janelle Frost, *Rebecca McKnight Trial: High Court Overturns Mother’s Conviction, Woman in Prison for Killing Unborn Child to Get a New Trial*, MYRTLE BEACH SUN NEWS, May 13, 2008, at C1, available at 2008 WLNR 8964790.

178. *McKnight*, 661 S.E.2d at 365.

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newborn daughter, Zreanna.<sup>179</sup> Lohnstein had a blood-alcohol level of 0.18 percent when she delivered Zreanna and had allegedly been advised during her pregnancy to stop drinking, but had refused to do so.<sup>180</sup> Zreanna, who was born at twenty-nine weeks and weighed two pounds, was pronounced dead fifteen minutes after her birth.<sup>181</sup> Zreanna had a blood-alcohol level of 0.17 percent, well over the 0.08 percent required to find a driver legally intoxicated in Missouri.<sup>182</sup> The medical examiner determined that the mother's acute intoxication caused Zreanna's death.<sup>183</sup> In December 2007, Lohnstein pled guilty to involuntary manslaughter.<sup>184</sup>

The judge's refusal to dismiss the charges against Lohnstein shows that, as in South Carolina, Missouri's law does not completely ban the prosecution of a mother for committing certain acts that result in her fetus's death. In another Missouri case, a twenty-seven year old St. Louis woman was charged in January 2008 with first-degree involuntary manslaughter for allegedly using drugs during her pregnancy, resulting in the 2006 stillborn birth of her baby.<sup>185</sup> Nevertheless, involuntary manslaughter<sup>186</sup> was the only charge available to prosecutors, because in September 2007, the Missouri Court of Appeals for the Western District held that a woman could not be charged with child endangerment for using drugs before her baby was born.<sup>187</sup>

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179. Tim Bryant, *Guilty Plea Weighed in Death of Baby*, ST. LOUIS POST-DISPATCH, Oct. 19, 2007, at D16.

180. *Id.*

181. *Id.*

182. *Id.*

183. 183. *Id.*

184. *Id.*

185. See Heather Ratcliffe, *Mother Who Delivered Stillborn Meth Baby is Charged*, ST. LOUIS POST-DISPATCH, Jan. 10, 2008, at B5.

186. In Missouri, a "person commits the crime of involuntary manslaughter in the first degree if he or she . . . recklessly causes the death of another person." MO. REV. STAT. § 565.024 (2008).

187. See *State v. Wade*, 232 S.W.3d 663, 665 (Mo. Ct. App. 2007) (holding that when mothers' addictive behaviors indirectly harmed their unborn children, they could not be prosecuted criminally for child endangerment, which involves knowingly acting in a manner that created a substantial risk to a child under seventeen years old).

B. *The Difficulty of Feticide Legislation that Protects the Fetus from Its Mother*

Advocates supporting feticide legislation that encompasses certain acts of the fetus's mother have drawn upon a line of reasoning similar to that articulated by the *McKnight* court and have argued that a pregnant woman's use of alcohol, tobacco, and illicit drugs are not fundamental rights under the Constitution.<sup>188</sup>

Nonetheless, the arguments against feticide legislation encompassing a mother's actions seem to have a stronger footing. One such argument is that criminally prosecuting mothers for their prenatal acts may work to discourage certain mothers, like those dependant on drugs and alcohol, from seeking health care during their pregnancy, which can negatively impact the health of both the mother and the baby.<sup>189</sup> Another rationale is that it would be difficult to determine what types of prenatal misconduct would be subject to prosecution.<sup>190</sup> To allow a mother to be prosecuted for feticide could possibly lead to mothers being prosecuted for acts such as smoking, not maintaining a proper and sufficient diet, avoiding proper and available prenatal medical care, or failing to wear a seatbelt while driving.<sup>191</sup>

Moreover, if a mother is prosecuted for feticide, it could potentially infringe upon her constitutional right to privacy. From time to time, cases described as protecting privacy have implicated at least two different kinds of interests: "the individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions."<sup>192</sup> Feticide legislation that covers the mother's acts

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188. See *State v. McKnight*, 576 S.E.2d 168, 176 (S.C. 2003); see also Moses Cook, Note, *From Conception until Birth: Exploring the Maternal Duty to Protect Fetal Health*, 80 WASH. U. L.Q. 1307, 1329 (2002) (citing JUDITH LARSEN et al., DRUG EXPOSED INFANTS AND THEIR FAMILIES: COORDINATING RESPONSES OF THE LEGAL, MEDICAL AND CHILD PROTECTION SYSTEM 45 (1990)).

189. See Evans, *supra* note 156.

190. *Id.*

191. See *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006) (holding that the state legislature did not intend for the state's reckless endangerment statute to be applied to prenatal drug ingestion by a pregnant woman).

192. *Whalen v. Rose*, 429 U.S. 589, 599-600 (1977); see also James Drago, Note, *One for My Baby, One More for the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol*, 7 CARDOZO WOMEN'S L.J. 163, 166 (2001).

could potentially contravene a woman's privacy interests of independence in making important decisions about her body.<sup>193</sup> Such laws could also invade a woman's constitutional right to be free of unwanted governmental intrusions into the fundamental decision of whether to have children.<sup>194</sup>

Finally, allowing feticide statutes to cover a mother's acts outside of an abortion could destroy the logical distinction between a third party and the fetus's mother for equal protection purposes. As the court in *Bullock* clarified, because these parties are not similarly situated, charging a third party for feticide while exempting mothers who perform legal abortions does not violate the third party's equal protection rights.<sup>195</sup> If the distinction between a third party and a mother is invalidated, this could possibly open the door to an argument that even the mother's actions of exercising her choice to have a legal abortion should be banned.

## VI. Conclusion

While a few states still follow the common law "born alive" rule, which requires that a fetus be born alive before a third party can be prosecuted for feticide, the federal government and the majority of states have abandoned this approach. Instead, federal and most state legislation have expanded feticide laws to criminally punish a third party for the separate and distinct offense of killing a fetus. The circumstances under which these penalties exist differ among jurisdictions. Some states follow the federal model and offer the most protection by permitting criminal prosecution of a third party for killing a fetus at any stage of development. On the other side of the spectrum, some states require that the fetus reach viability before a third party can be prosecuted for feticide.

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193. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that there was no rational reason for the different treatment of married and unmarried people and that the right of privacy to be free of unwanted intrusions and the fundamental decision of whether to have children was the same for married and unmarried alike); *Pacific Railway v. Botsford*, 141 U.S. 250, 251 (1891) (holding that a person has constitutional rights to "the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

194. See *Eisenstadt*, 405 U.S. at 444.

195. *Commonwealth v. Bullock*, 913 A.2d 207, 215 (Pa. 2006).



Admittedly, feticide legislation is a controversial issue that has been the source of both contemporary calls for reform of existing law and constitutional challenges. The efficacy of a number of these state feticide laws has yet to be seen as these laws have only recently been applied or have not yet been applied. Also, the difficulty of whether to expand feticide laws to cover the acts of the fetus's mother, outside of a legal abortion, has been a hotly contested issue. Accordingly, the application of feticide laws will almost certainly continue to spur future debates about the consequences of enacting and enforcing these laws.