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# Restructuring the Debate over Fetal Homicide Laws

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*The worst problems with the fetal homicide laws that have proliferated around the nation are quite different than the existing scholarship suggests. Critics often argue that the statutes, which criminalize the killing of a fetus by a third party other than an abortion provider, undermine a woman's right to terminate her pregnancy. This concern is overstated. Although supported by anti-abortionists, many of the fetal homicide laws embody the perspective of the so-called "abortion grays," who eschew the absolutism of the doctrinaire pro-choice and anti-abortion camps. This Article explores how a contextual view of life-taking allows us to reconcile legal abortion with murder liability for the third-party killer of a fetus. Pro-choice advocates ought to re-focus the abortion debate on the pregnant woman's defense of her bodily autonomy, rather than on the personhood or non-personhood of the unborn. However, despite their basic compatibility with women's rights, the fetal homicide laws, as drafted, do not offer a satisfactory approach to the problem of pregnancy violence under utilitarian or retributivist rationales. Extremely punitive measures may not be successful in deterring intimate abuse. Even more troubling, the mens rea provisions of many of the statutes fail to ensure fairness to defendants. This Article seeks to spark a dialogue about fetal homicide and, more generally, about violence against pregnant women that breaks free from the polarized rhetoric of the abortion debate.*

## I. INTRODUCTION

The federal government and the majority of American states have enacted laws that treat the killing of a fetus[1] by someone other than the

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[1] A human develops in a series of stages, each associated with a different medical term: zygote (at fertilization), blastocyte (at implantation), embryo (at about 2 weeks), and fetus (from 8 weeks until birth). *See* H.R. REP. NO. 108-420, pt. 1, at 83 (2004).

pregnant woman or an abortion provider as a criminal homicide.[2] These statutes seemingly pit the abortion right, which has been central to many women's political and scholarly agendas, against another feminist concern—that of preventing and punishing intimate abuse. However, contrary to the predominant view in the academic literature,[3] this Article contends that there is no unavoidable conflict between legal abortion and laws that criminalize the killing of the unborn by a third party, such as an abusive spouse. The deeper problem with the fetal homicide statutes, as currently drafted, is that they fulfill neither the goal of effectively deterring assaults on pregnant women, nor the imperative of upholding basic principles of justice for all criminal defendants, including those accused of horrific, gender-based violence.

The politics of the abortion debate have obscured the most serious shortcomings of the statutes from a criminal law perspective. The insistence of anti-abortionists that abortion is murder mirrors many pro-choice advocates' determination to show that it is not homicide of any kind.[4] These polarized camps stake out territory within a landscape that makes fetal

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However, for simplicity's sake this Article uses the word "fetus" to refer to all stages of prenatal development.

[2] *See infra* text accompanying notes 55–56 (discussing the proliferation of fetal homicide statutes).

[3] *See infra* text accompanying notes 17–24 (describing pro-choice opposition to the fetal homicide laws).

[4] The official Catholic position, for example, holds that abortion at any stage of pregnancy is wrong because it constitutes the taking of innocent human life. *See* Daniel Callahan, *The Roman Catholic Position, in* ABORTION: THE MORAL ISSUES 62, 63 (Edward Batchelor, Jr. ed., 1982). For a variety of anti-abortion views grounded in religion and natural law, see generally Paul D. Simmons, *Religious Approaches to Abortion, in* ABORTION, MEDICINE, AND THE LAW 712–28 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992); *see also* N.E.H. HULL AND PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 8 (2001) (describing the right-to-life credo to which Catholic and evangelical Christian opponents of abortion subscribe). There is a significant amount of disagreement among (and even within) religious faiths about the permissibility of abortion. *See infra* text accompanying notes 38–39. Moreover, without any appeal to religion, individuals may reach polar conclusions about whether killing a fetus amounts to the "wanton slaughter" of a full human being. Lisa H. Newton, *The Irrelevance of Religion in the Abortion Debate*, in ABORTION: THE MORAL ISSUES 3, 5. One medical argument favoring a woman's right to terminate her pregnancy holds that, although the fertilized egg contains the DNA information, it does not constitute a complete blueprint for an individual person. *See* Charles A. Gardner, *Is an Embryo a Person? in* ABORTION, MEDICINE, AND THE LAW 453–56 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) ("The embryo is not a child. It is not a baby. It is not yet a human being."). *Cf.* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 174, 184 (1984) (contrasting pro-choice and anti-abortion beliefs about the status of the fetus).

personhood or non-personhood the high ground on which the abortion debate supposedly will be lost or won.[5] However, both anti-abortionists and their pro-choice rivals exaggerate the ramifications for *Roe v. Wade*[6] of declaring fetus killing to be murder when it is perpetrated by a third party.

Fetal homicide statutes, which usually make exceptions for abortion and other types of maternal liability,[7] do not sound the death knell for reproductive rights. Although "pro-life"[8] groups support these statutes as part of their agenda of overturning *Roe*,[9] the laws themselves are not uniformly

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[5] *See* LUKER, *supra* note 4, at 5–6 (suggesting that recognition of fetal personhood would result in the re-criminalization of abortion); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1315 (1991) ("[T]he only point of recognizing fetal personhood, or a separate fetal entity, is to assert the interests of the fetus *against* the pregnant woman."); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1000 (1999) [hereinafter Paltrow, *Pregnant Drug Users*] ("If fetuses are recognized as full legal persons, then their right to life must, as a matter of constitutional law, be protected—and all abortions outlawed."); *see also* Katharine Folger, Note, *When Does Life Begin or . . . End? The California Supreme Court Redefines Fetal Murder in* People v. Davis, 29 U.S.F. L. REV. 237, 274 (1994) ("Terminating a pregnancy cannot be a constitutional right in one situation and murder in another."); Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 221 (2002) (stating that, according to critics of fetal homicide laws, the recognition of fetal personhood will destroy the constitutional foundation of reproductive rights). Outside academia, pro-choice activists have expressed similar concerns about the rise of fetal personhood. For example, Gloria Feldt, President of Planned Parenthood Federation of America, described the federal Unborn Victim's of Violence Act as "part of a deceptive anti-choice strategy to make women's bodies mere vessels by creating legal personhood for the fetus." Press Release, Planned Parenthood, Senate Passes Dangerous Unborn Victims of Violence Act: S. 1019 Poses a Direct Threat to *Roe v. Wade* (Mar. 25, 2004), *available at* http://www.plannedparenthoodnj.org/library/files/97_uvvasenate.doc.

[6] 410 U.S. 113 (1973).

[7] *See infra* text accompanying notes 55–56.

[8] This Article sometimes uses the term "pro-life" to refer to individuals or groups who oppose abortion. Such word choice does not indicate support for the views of anti-abortionists, nor does it endorse the idea that anti-abortionists value life more than pro-choice Americans do. Rather, the term "pro-life" is used because it is an appellation commonly associated with opposition to abortion and because it allows for more varied prose style.

[9] At the state level, fetal homicide laws were sometimes passed as part of a legislative package that included provisions placing restrictions on abortion. *See, e.g.*, Press Release, Okla. H.R., Years of Work Lead to Landmark Pro-Life Legislation (June 10, 2005), *available at* www.lsb.state.ok.us/house/news7661.html [hereinafter Okla. H.R. Press Release]; Press Release, Governor of Miss., Miss. Governor's Message: Governor Haley Barbour Caps Successful Pro-Life Agenda; Signs Four Bills (May 6, 2004) (on file with author) [hereinafter Miss. Governor's Message]. The federal Unborn Victims of Violence Act received support from several major anti-abortion groups. *See Family*

hostile to that landmark decision. Indeed, the position embodied in many criminal codes that feticide is murder in some circumstances and legal abortion in others[10] balances a pregnant woman's right to make a choice that affects her body and life in profound ways with the need to punish a third-party killer who has no legitimate interest in causing the death of the fetus. Analysis of fetal homicide statutes, and their implications for abortion jurisprudence, shows that the absolutism of the anti-abortion and pro-choice camps is out-of-step with the criminal law's nuanced approach to punishing homicide, as well as with the views of a majority of Americans.

Proponents of legal abortion have much to lose by agreeing to conduct the debate about reproductive rights within a framework that hinges on the status of the fetus and thus sidelines the threat to the pregnant woman's autonomy. The Supreme Court in *Roe* shaped the terms of the debate by focusing on stages of physiological development and asserting that a fetus is not a "person" under the Fourteenth Amendment.[11] Yet, many pro-choice scholars too hastily concede that if the fetus is declared to be a person, the battle is over, and *Roe* must be overruled.[12] Although dictum in *Roe* suggests this line of reasoning,[13] it is an imprudent position to take in the face of technology that suffuses our culture with human-like images of fetuses and

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*Members of Unborn Victims Go to Washington to Help Pass Bill*, NAT'L RIGHT TO LIFE NEWS (National Right to Life Committee, Washington, D.C.), Apr. 1, 2004, at 34, *available at* 2004 WLNR 16784455 (stating that the National Right to Life Committee urged families who lost fetuses in two-victim crimes to support the federal Unborn Victims of Violence Act); *see also* Douglas Johnson, *John Edwards Grows Deaf to the Voices of Unborn Victims*, NAT'L RIGHT TO LIFE NEWS (National Right to Life Committee, Washington D.C.), Aug. 1, 2004, at 8, 10, *available at* 2004 WLNR 12599680 (claiming that unborn victims "will speak through pro-life citizens across the nation"). *See generally, e.g.*, United States Conference of Catholic Bishops, Unborn Victims of Violence Act, http://www.usccb.org/prolife/issues/abortion/victims.htm (last visited Oct. 12, 2006) (documenting the support of the pro-life U.S. Conference of Catholic Bishops for the Unborn Victims of Violence Act). Many of these groups explicitly link their support for fetal homicide laws to their goal of getting *Roe v. Wade* overturned. *See* KRON 4 News, *Peterson Case Fuels Abortion Debate*, KRON 4, May 27, 2003, http://www.kron.com/global/story.asp?s=1296152&ClientType=Printable ("Pro-abortionists correctly point out that [the Unborn Victims of Violence Act is] really another step toward eroding *Roe v. Wade*.").

[10] *See infra* text accompanying notes 55–56.

[11] *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

[12] *See, e.g.*, LUKER, *supra* note 4, at 5–6; Paltrow, *Pregnant Drug Users, supra* note 5, at 1000.

[13] *Roe*, 410 U.S. at 157–58 n.54 (speculating that there could not be any exceptions to the Texas abortion ban "if the fetus . . . [were] a person who . . . [was] not to be deprived of life without due process of law").

makes viability possible at increasingly early stages of fetal development. The pro-choice camp would be better served by arguing that, although the fetus may be a human being (or even a person in some legal contexts), the choice to prevent it from being born still belongs to the woman, but not to her attacker.

That said, the statutory schemes in question leave much to be desired. An insidious problem with many fetal homicide laws, for example, inheres in their treatment of mens rea. The statutes entrench an expansive view of controversial doctrines like felony murder and transferred intent in cases where the defendant may have been totally unaware of fetal life, rather than culpably indifferent to it.[14] As a corollary, sentencing provisions often allow the double counting of the fetus and the mother for the purposes of imposing consecutive prison terms or the death penalty, although the prosecution has shown neither intent to kill the fetus, nor even subjective awareness that the mother was pregnant.[15] Thus, while the debate about fetal personhood continues to rage, courts around the nation quietly affirm an approach to homicide law that further erodes criminal intent (or at least extreme indifference to life) as the touchstone of murder.

I present my argument in three parts. First, Part II juxtaposes the polar views of the pro-choice and anti-abortion camps against the popularity of the fetal homicide statutes with the majority of Americans, who also support *Roe*. In addition, this Part offers a particularized examination of the myriad state and federal laws governing fetal homicide. Contrary to many observers' fears, these statutes do not provide an effective launching pad for an assault on *Roe*. Instead, close analysis shows that many of them were drafted to avoid conflict with abortion jurisprudence.

Second, Part III demonstrates the basic congruence between criminal law norms and the popular belief that legal abortion is compatible with the punishment of a third party for killing the unborn. This Part outlines the social problem of violence against pregnant women, relates the sense of loss that accompanies the nonconsensual termination of a desired pregnancy to advances in medical technology, and argues that there is a legitimate state interest in punishing some fetal deaths as murders. Exploring the contextual nature of life-taking under the criminal law facilitates an understanding of feticide that distinguishes a violent attack on a voluntary mother from a pregnant woman's difficult decision to abort an unwanted fetus.

Finally, Part IV identifies serious shortcomings of the fetal homicide statutes that have been eclipsed by the furor over fetal personhood. Chief among them are the due process and proportionality concerns triggered by the expansion of murder liability to cover *in utero* victims, as well as the

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[14] *See infra* Parts IV.B.2 & 3.

[15] *See infra* notes 248–49 and accompanying text.

dubious potential of such laws to deter violence against pregnant women. The mens rea provisions of many fetal murder statutes are not only unfair to defendants who did not know about the existence of the fetus; they also stereotype female victims in an undesirable way. By making would-be murderers run the risk that any female target might be pregnant, the statutes label all women as incubators.

Implacable hostility to fetal rights in all contexts, including domestic violence, ultimately may do more harm than good to the pro-choice agenda. However, balance is important on the other side of the equation, as well. Although third parties who knowingly kill the unborn without the consent of the mother deserve severe sentences for their crimes, the objective of punishing batterers and intimate killers must be constrained by dedication to due process and proportionality for all criminal defendants.

## II. PREGNANCY VIOLENCE AND THE ABORTION DEBATE

### A. *Polar Views of Fetal Personhood*

Despite an emerging consensus that violence against pregnant women constitutes a grave social problem,[16] feminist scholars and domestic-violence policymakers have rejected fetal homicide statutes as a solution.[17] These

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[16] *See* Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 670 (2006); *see also infra* notes 117–23, 288–98, and accompanying text (describing the problem of pregnancy violence).

[17] *See* Tuerkheimer, *supra* note 16, at 696–97, 709; Paltrow, *Pregnant Drug Users*, *supra* note 5, at 1014; *see also* Lisa McLennan Brown, *Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization*, 13 AM. U. J. GENDER SOC. POL'Y & L. 87, 87 (2005) (asserting that the propagation of fetal rights "is curtailing women's reproductive autonomy"); Amanda K. Bruchs, Note, *Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-exist Peacefully?*, 55 SYRACUSE L. REV. 133, 136, 159 (2004) (contending that the federal Unborn Victims of Violence Act conflicts with legal abortion); Kole & Kadetsky, *supra* note 5, at 216 (arguing that the federal Act will "serve ultimately to undermine abortion rights"). *But see* Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 480 (1998) (contending that fetal homicide statutes do not necessarily undermine reproductive rights if the statutes explicitly make exceptions for abortion). Battered women's advocates also opposed the Unborn Victims of Violence Act. For example, Juley Ann Fulcher, Public Policy Director of the National Coalition Against Domestic Violence ("NCADV"), testified against the Act at a congressional hearing in 2003. *See generally "The Unborn Victims of Violence Act" or "Laci and Conner's Law": Hearing on H.R. 1997, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 15-19 (2003), *available at* http://judiciary.house.gov/Hearings.aspx?ID=66 (Select "Hearing PDF (Serial No. 39)"

criminal provisions are seen as contributing to the anti-abortionists' wider campaign to make the fetus an autonomous entity with rights adversarial to those of its mother—a campaign linked to concomitant changes in tort, inheritance, and other laws.[18] By endowing the unborn with a panoply of legally cognizable interests from an early stage, the pro-life camp supposedly will succeed in its coercive agenda toward the female sex. It will not only be able to force women to bear unwanted children, but also to punish their failure to provide an optimal uterine environment, free from alcohol, nicotine, and drugs.[19] Or so many pro-choice feminists fear.

Critics of the fetal homicide laws cite two bases for their concern that criminal liability for fetus killing will result in the subordination of women and the end of reproductive rights. First, in their view, the statutes participate in the conservative Culture of Life, which unfairly casts ideological opponents in the role of purveyors of death.[20] This concern is heightened by the fact that fetal homicide provisions have sometimes been lumped together

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hyperlink) [hereinafter Hearing on H.R. 1997] (statement of Juley Ann Fulcher, Public Policy Director, National Coalition Against Domestic Violence).

[18] *See* Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 335 (1999) ("[O]ne facet of the longterm, end-game strategy of pro-life forces has included an attempt to have fetuses declared 'children' or 'persons' in as many legal contexts as possible, including child abuse laws, civil wrongful death actions, and criminal homicide and assault statutes."); Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 104–07 (2000) (alleging a similar strategy on the part of anti-abortionists); *see also* Brown, *supra* note 17, at 87–88; Paltrow, *Pregnant Drug Users*, *supra* note 5, at 1000–01, 1009.

[19] *See* Jean Reith Schroedel & Paul Peretz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL. POL'Y & L. 335, 349 (1994) (stating that legal and medical authorities "have helped legitimate a causal story that attributes adverse birth outcomes to women's lifestyle choices"). *Cf.* Lynn Paltrow, *'Fetal Abuse': Should We Recognize It as a Crime?*, 75 A.B.A. J., Aug. 1989, at 38, 39 ("Recognizing 'fetal abuse' moves us toward criminalizing pregnancy itself because no woman can provide a perfect womb.").

[20] *See* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 760–62, 785–87 (2006) (suggesting that Culture of Life proponents subscribe to a belief system that links the abandonment of infants with abortion and even with school shootings, such as the Columbine High School massacre in Colorado); *see also* Bruchs, *supra* note 17, at 133–34 (noting the explicit self-identification of the Bush administration with the Culture of Life). *Cf. Pope Attacks 'Culture of Death'*, MSNBC.COM, Jan. 8, 2006, http://www.msnbc.msn.com/id/10760901/ (describing an official speech by Pope Benedict in which he criticized, in general terms, a "culture of death" arising from irresponsible sex and the commodification of the body).

with abortion-restrictive legislation, such as informed consent laws[21] and laws that give health-care providers the right not to perform medical procedures that violate their consciences.[22] Second, the assertion of fetal autonomy (and the related depiction of the pregnant woman as a mere container for an independent person) has a long history associated with the nineteenth-century criminalization of abortion.[23] In the medical discourse of the mid to late 1800s, physicians described the embryo as "embryonic man" or as a suckling babe; but in both cases, they pursued the same goal: making abortion illegal.[24]

Anti-abortion rhetoric in the twentieth and twenty-first centuries continues to rely on the humanity or personhood of the fetus as the basis for claiming that abortion is murder. However, whereas physicians spearheaded the nineteenth-century campaign,[25] the current movement has a strong religious tone. According to a number of modern faiths, abortion constitutes the impermissible taking of innocent human life.[26] In 1980, for example, Pope John Paul II declared:

> It is necessary to state firmly once more that nothing and no one can in any way permit the killing of an innocent human being, whether a fetus or an

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[21] *See* Okla. H.R. Press Release, *supra* note 9 (describing a successful bi-partisan effort to pass "landmark pro-life legislation" in Oklahoma).

[22] *See* Miss. Governor's Message, *supra* note 9 (discussing "four pro-life bills," including a fetal homicide law, that the governor of Mississippi signed together).

[23] *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 288–92 (1992) (discussing the strategic depiction of the embryo as an autonomous life form by anti-abortion doctors in the nineteenth century). In the twentieth and twenty-first centuries, of course, doctors have tended to align with pro-choice forces. *See* HULL & HOFFER, *supra* note 4, at 6 (remarking on physicians' changing role in the abortion debate).

[24] *See* Siegel, *supra* note 23, at 289. Opponents of fetal homicide laws sometimes rely on this history. *See, e.g.*, Tuerkheimer, *supra* note 16, at 687 (citing Siegel's work to argue that "[l]egal recognition of fetal rights can best be understood as a powerful mechanism for enforcing societal notions of maternity and womanhood").

[25] *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1880–1900, at 147–70 (1978).

[26] Simmons, *supra* note 4, at 713, 717–19, 721, 724 (describing the official views of the Catholic, Southern Baptist, evangelical Christian, Orthodox, and Mormon churches, as well as the Hindu faith). The official Roman Catholic position holds that the unborn are infused with souls from conception, but also regards the proscription against abortion as a matter of natural law. *See id.* at 713. Some other faiths stress the genetic uniqueness of each human being as a reflection of God's image. *See id.* at 717 (discussing the views of the Southern Baptist Convention). In contrast, Muslims believe that abortion should be permitted during the first forty days of pregnancy, since the sayings of Muhammad describe the fetus at that early stage as merely a "seed." *Id.* at 725.

> embryo, an infant or an adult, an old person, or one suffering from an incurable disease, or a person who is dying.[27]

While the Pope eloquently puts pen to paper, anti-abortion protestors wave signs bearing graphic images of aborted late-term fetuses and employ other shock tactics to make the same point.[28]

Given this background, pro-choice concern about fetal homicide laws is understandable. There may be some danger that, even though the statutes do not directly implicate *Roe*, they will contribute to the pro-lifers' cultural message about the immorality of abortion.[29] However, an absolutist reaction that denies everything the statutes assert—that a fetus constitutes a human life; that killing it is, in some contexts, criminally wrong; and that the murder of a pregnant woman and the resultant death of her fetus amount to two losses, rather than one—risks corroborating, in the public mind, the allegation that pro-choicers espouse an extreme, anti-life position. Moreover, this approach impedes holding wrongdoers, such as abusive spouses, accountable for their actions.[30]

### B. *The American Middle Ground*

Fetal homicide laws enjoy widespread popular support. Opinion polls indicate that the vast majority of American adults believe that someone who attacks a pregnant woman should face additional charges for harming the "unborn child."[31] If the attack causes the death of the "unborn child," almost

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[27] Kevin D. O'Rourke, *Physician Assisted Suicide, A Religious Perspective*, 15 ST. LOUIS U. PUB. L. REV. 433, 442 (1996) (quoting Congregation for the Doctrine of the Faith, *Vatican Declaration on Euthanasia*, 10 ORIGINS 154–57 (1980)).

[28] *See* ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 338–39 (rev. ed. 1990); *see also* LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 309, 315 (3d ed. 2002) (describing similar tactics). Bishop Austin Vaughn, a member of Operation Rescue who was jailed briefly for trespassing at abortion clinics, compares himself to a clergyman confronting Hitler's concentration camps. In his view: "[N]o Catholic can responsibly take a prochoice stand when the choice in question involves the taking of innocent human life." Eileen McNamara, *Taking Stock of the Struggle: Abortion—An American Divide*, *reprinted in* THE ABORTION RIGHTS CONTROVERSY IN AMERICA: A LEGAL READER 237, 240 (N.E.H. Hull, Williamjames Hoffer & Peter Charles Hoffer eds., 2004) (quoting Bishop Vaughn).

[29] *See* Sanger, *supra* note 20, at 753, 760, 808.

[30] *See* Marjorie M. Shultz, *Abortion and Maternal-Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79, 81–83 (1992).

[31] Roper Ctr. for Pub. Opinion Research, Public Opinion Online, Gallup/CNN/USA Today Poll, Question ID: USGallup.01APL20 R35 (Apr. 25, 2001), *available at* LexisNexis, News Library, RPoll File (reporting that ninety-three percent of those polled

eighty percent of those questioned in one poll answered that the perpetrator should face separate murder charges.[32] Moreover, while public opinion exhibits greater divisions over whether killing a pre-viable fetus constitutes murder, the majority of those polled on this issue in 2003 favored murder liability.[33] Such data is subject to the usual limitations, including suggestive or misleading questions and relatively small survey populations,[34] but it nevertheless indicates an interesting pattern. The widely held view that third-party killers of fetuses should suffer serious criminal penalties contrasts with the public's enduring support for legal but limited access to abortion.[35] A Pew Research Center analysis conducted in 2005 indicates that the American public opposes overturning *Roe* by a ratio of two to one. [36] However, many

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shared this view); *see also* H.R. REP. NO. 108-420, pt. 1, at 5 (2004) (noting that "84% of Americans believe that prosecutors should be able to bring a homicide charge on behalf of an unborn child killed in the womb" by someone other than the pregnant woman or an abortion provider).

[32] Roper Ctr. for Pub. Opinion Research, Public Opinion Online, Fox News/Opinion Dynamics Poll, Question ID: USODFOX.080103A R34 (Aug. 1, 2003), *available at* LexisNexis, News Library, RPoll File.

[33] *Compare* Roper Ctr. for Pub. Opinion Research, Public Opinion Online, Newsweek Poll, Question ID: USPSRNEW.053103 R12 (May 31, 2003), *available at* LexisNexis, News Library, RPoll File (fifty-six percent of those polled thought the killing of a pregnant woman carrying a pre-viable fetus constituted murder), *with* Roper Ctr. for Pub. Opinion Research, Public Opinion Online, Fox News/Opinion Dynamics Poll, Question ID: USODFOX.080103A R35 (Aug. 1, 2003), *available at* LexisNexis, News Library, RPoll File (seventy percent of those polled believed that the death of an eight-month-old fetus due to an attack on a pregnant woman should be treated the same as the death of a three-month-old fetus).

[34] Note, for example, that many questions used the term "unborn child," which strongly suggests human life or personhood, instead of "fetus," which does not. Moreover, some survey questions implied that the Supreme Court's holdings assert an absolute right to abortion. *See, e.g.*, Roper Ctr. for Pub. Opinion Research, Public Opinion Online, CBS News Poll, Question ID: USCBS.080405 R56 (Aug. 4, 2005), *available at* LexisNexis, News Library, RPoll File (stating broadly that *Roe* "established a constitutional right for women to obtain legal abortions"). All of the surveys cited above targeted about a thousand people.

[35] Public support for abortion preceded the *Roe* decision; seventeen states had already decriminalized the procedure by 1973. GORDON, *supra* note 28, at 300; *see* HULL & HOFFER, *supra* note 4, at 163 (noting that growing pro-choice sentiment preceded *Roe*). *Cf.* LUKER, *supra* note 4, at 225 (stating that pro-choice activism increased support for legalized abortion between the 1960s and the 1970s). Opinion polls from the 1970s through the present day show little fluctuation in aggregate attitudes toward abortion, with a majority of Americans favoring legality. *See* GORDON, *supra* note 28, at 316–17.

[36] *See* Press Release, Pew Research Center, Abortion, the Court, and the Public (Oct. 3, 2005), *available at* http://www.pewtrusts.com/pdf/PRC_abortion_1005.pdf; *see also* Roper Ctr. for Pub. Opinion Research, Public Opinion Online, ABC News Poll,

of those polled disfavor late-term abortions except in narrow circumstances and support other restrictions, such as waiting periods and parental notification.[37]

Thus, although the warring camps depict a schism that supposedly admits no compromise, surveys of American attitudes reveal discomfort with absolutist thinking. Many Catholics hold more nuanced beliefs about the morality and legality of abortion than does the National Council of Catholic Bishops, which is dedicated to implementing the official pro-life position of the church.[38] Protestant groups also display varied opinions, including opposition to state regulation on the basis of freedom of conscience and support for terminating pregnancies in so-called hard cases.[39] Whether religious or not, ordinary Americans think in terms of context and circumstance; they think in terms of exceptions.

The doctrinaire pro-choice agenda of the Democratic Party seems to alienate twenty-first century voters who eschew the polar positions of complete legality or illegality with regard to abortion.[40] Dubbed "abortion grays" by think-tank strategists,[41] people occupying the middle ground between the hardcore pro-choice and pro-life trenches want to set the bounds of legality in different places. Although this Article does not endorse popular views about exactly where the line should be drawn,[42] it contends that the

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Question ID: USABC.090605 R29 (Sept. 6, 2005), *available at* LexisNexis, News Library, RPoll File (sixty percent of those polled want the Roberts Court to uphold *Roe*); Roper Ctr. for Pub. Opinion Research, Public Opinion Online, CBS News Poll, Question ID: USCBS.080405 R56 (Aug. 4, 2005), *available at* LexisNexis, News Library, RPoll File (noting that sixty percent of those polled describe the *Roe* decision as a "good thing"). *Cf. Poll: Majority Would Oppose Alito if He Would Overturn* Roe, CNN.COM, Jan. 5, 2006, http://www.cnn.com/2006/POLITICS/01/09/alito.poll/index.html (reporting that fifty-six percent of those polled would not support the nomination of Samuel Alito to the Supreme Court if they were convinced that he would overturn the landmark abortion decision).

[37] *See* Press Release, Pew Research Center, Abortion, the Court, and the Public, *supra* note 36; *see also* Harris Poll (Mar. 3, 2005), (on file with author) (showing substantially more than fifty percent of those polled believe that abortion should be legal in the first trimesters, but not in the second and third trimesters).

[38] *See* Simmons, *supra* note 4, at 716 (describing unofficial Catholic views).

[39] *See id.* at 716–22 (explaining the diversity of Protestant views).

[40] *See* Debra Rosenberg, Roe*'s Army Reloads*, NEWSWEEK, Aug. 8, 2005, at 24, 26–27.

[41] *Id.* at 27.

[42] For example, polls in the 1980s indicated that many Americans then opposed allowing abortions to facilitate women's educational or career advancement. *See* Siegel, *supra* note 23, at 328 (citing a New York Times poll conducted in 1989). Another source from that same decade also showed popular distaste for abortion due to financial inability to raise the child. *See* Roper Ctr. for Pub. Opinion Research, Public Opinion Online,

public is correct to take a contextual view of homicide and to recognize that abortion does not equate to fetal murder.

Legal philosopher Ronald Dworkin characterizes the views of "abortion grays" as incoherent and even disingenuous.[43] Criticizing anti-abortionists who nevertheless recognize narrow exceptions to their desired abortion ban, for example, he contends, "It is a very common view . . . that abortion should be permitted when necessary to save to the mother's life. Yet this exception is also inconsistent with any belief that a fetus is a person with a right to live."[44] Dworkin also implicitly rejects or denies the existence of a liberal "gray" belief that abortion should be mostly legal, even though the fetus has some protectable interest in life.[45] In Dworkin's eyes, it is impossible simultaneously to believe that abortion constitutes life-taking and also that in certain (or even most) circumstances, it should remain a pregnant woman's choice. Nevertheless, the poll data cited above indicates that is precisely what the majority of Americans believe.[46] Furthermore, many people apparently see no inconsistency between the delicate balance struck by the Supreme Court in *Planned Parenthood v. Casey*[47] and the conviction, and even capital punishment, of an individual who causes the death of a fetus by attacking its mother.[48]

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Yankelovich, Skelly, & White Poll, Question ID: USYANK.818348 R06AF (Sept. 18, 1981 – Sept. 25, 1981), *available at* LexisNexis, News Library, RPoll File (reporting that seventy-nine percent of respondents thought it should be illegal for a welfare mother who could not work to terminate her pregnancy).

[43] *See* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 30–35 (Alfred A. Knopf ed., 1993).

[44] *Id.* at 32.

[45] *See id.* at 34.

[46] *See supra* text accompanying notes 31–37.

[47] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (establishing undue burden standard and affirming *Roe*, but criticizing the 1973 decision for undervaluing the State's interest in potential life).

[48] The federal Unborn Victims of Violence Act ("UVVA") was renamed "Laci and Conner's Law" in honor of a woman and fetus killed by the woman's husband, Scott Peterson. H.R. REP. NO. 108-420, pt. 1, at 2 (2004). Laci's mother, Sharon Rocha, became a staunch supporter of legislation treating fetuses as separate victims of murder. In a public statement, Rocha attempted to persuade pro-choice Americans to support her cause, based on her apparently sincere conviction that such laws do not conflict with reproductive rights: "I fear that some senators have opposed Laci and Conner's law [i.e. the UVVA] because of misunderstandings. Laci and Conner's law has nothing to do with abortion." Press Release, Remarks Delivered by Mrs. Sharon Rocha, Mother of Laci Peterson on the Passage of "Laci and Conner's Law," Mar. 3, 2004, http://majoritywhip.house.gov/ (select News hyperlink; then scroll through News Releases to find Rocha's Mar. 3, 2004, remarks).

### C. *Fetal Homicide Laws and the "Abortion Grays"*

Despite the gloss they are given in the fiery rhetoric of the abortion debate, the fetal homicide statutes are surprisingly diverse. State legislatures passed many of them after the onset of the twenty-first century, but some have a long history. For example, California's amended Penal Code § 187 preceded *Roe*.[49] In 1970, the California Senate and Assembly voted almost unanimously to add fetal victims to the murder statute.[50] The amendment was passed in reaction to a judicial opinion that precluded the murder prosecution of a man who intentionally beat and kicked his pregnant wife, killing her eight-month-old fetus.[51] In 1970, the California Code already legalized therapeutic abortions, and the bill specifically exempted such procedures from its definition of murder.[52] There is no evidence that a desire to curtail reproductive rights had any bearing on the California amendment. In contrast, crime-control aims seem to be intertwined with pro-life activism in the passage of fetal homicide statutes within the past few years. Some states, such as Oklahoma, enacted these laws along with a bundle of abortion regulations.[53]

However, rather than rejecting the fetal homicide statutes out of hand due to their suspect genesis, it is preferable to analyze them closely to see if they provide an opportunity for pro-choice advocates to present a moderate face to

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[49] CAL. PENAL CODE § 187 (1999).

[50] *See* Enrolled Bill Memorandum to Governor of California re: Assembly Bill 816, Sept. 1970 (on file with the author).

[51] *See* Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970). Keeler kicked his estranged wife in the abdomen with openly declared intent to kill the fetus. *See id.* at 618. However, as a result of the California Supreme Court's ruling, Keeler could not be convicted of anything more serious than assault; *see also* text accompanying notes 294–95.

[52] *See* Draft Assembly Bill 816, California Legislature, Regular Session, Feb. 1970 (on file with the author).

[53] *See* Press Release, Okla. S., Lawler Praises Senate Panel for Passage of House Bill 1686 (Apr. 7, 2005), http://oksenate.gov (follow News hyperlink; then follow Press Releases hyperlink; then follow 2005 Senate Press Releases hyperlink; then follow April hyperlink; then follow Lawler Praises Senate Panel for Passage of House Bill 1686 hyperlink) (last visited Oct. 12, 2006). This Oklahoma Senate news release melds enthusiasm for informed consent laws with references to the sensational murder of a young pregnant woman, Laci Peterson, in California. Referring to the headline-grabbing California case, Oklahoma Senator Daisy Lawler, a pro-life Democrat, was quoted as saying: "We all watched the tragic events surrounding the death of Laci Peterson and her unborn child, Connor [sic] . . . . Making criminals pay for taking the life of a mother and her unborn child is commonsense legislation." *Id.*

"gray" voters.[54] This analysis shows that, despite receiving support from hardcore anti-abortion groups, many of the laws track the middle ground of public opinion, and the contextual approach to life-taking that they codify poses no serious threat to *Roe*.

### 1. *Abortion and Maternal Liability Exceptions*

The views reflected in poll data—those of the "abortion grays"—accord with the fetal homicide laws that Congress and legislatures across the nation have enacted. As of 2005, at least thirty-three states criminalized the killing of a fetus under regular homicide statutes, separate feticide laws, or judicial interpretations of the criminal code. Legislatures, rather than courts, have made most of the law in this area.

About seventy percent of the statutes explicitly contain an abortion exception, and more than half do not impose criminal liability on pregnant women for any harm they cause their fetuses.[55] The federal Unborn Victims of Violence Act ("UVVA") also exempts both pregnant women and abortion providers from prosecution.[56] As we shall see, such exemptions call into question claims that the laws adopt a coercive stance toward women.

States that have chosen to exclude the mother from liability under their fetal homicide statutes follow a nationwide trend toward disallowing the criminal prosecution of pregnant women for causing prenatal injury.[57] In the 1980s and 1990s, a spate of articles sounded the alarm about governmental efforts to control the behavior of pregnant drug users—especially ethnic minorities and the poor—by holding them criminally accountable, under

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[54] Although Kristen Luker might not share my view that it is impolitic for pro-choice activists to mount a strident campaign against fetal homicide laws, she did predict that "the future of the debate will belong to the side that most effectively captures the middle ground of opinion." LUKER, *supra* note 4, at 228.

[55] Database maintained by the author.

[56] 18 U.S.C.S. § 1841 (LexisNexis Supp. 2006).

[57] *See* David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 249 (2001); *see also* State v. Deborah J. Z., 596 N.W.2d 490, 494 n.5 (Wis. Ct. App. 1999) (indicating that only one state court of last appeal has held that maternal drug use during pregnancy can result in criminal prosecution and conviction). However, while most states now reject criminal law approaches, several have established avenues to involuntary civil confinement that might be considered sex-biased and offensive to principles of bodily autonomy. *See generally* De Ville & Kopelman, *supra* note 18 (criticizing amendments to Wisconsin's child protection laws affecting pregnant substance abusers); *see also* Brody & McMillin, *supra*, at 248–49 (discussing the greater success of civil confinement schemes, compared to criminal prosecutions, in such states as Minnesota, South Dakota, and Wisconsin).

existing child abuse and drug distribution laws, for exposing the unborn to illegal substances.[58] Observers warned of a link between fetal abuse prosecutions and "the beginning of the conservative pro-life movement's shift in strategy from a focus on opposing abortion to . . . [embracing] fetal rights."[59] However, with the exception of *Whitner v. State* [60] and its progeny in South Carolina,[61] courts generally have reversed pregnant drug users' convictions.[62] Due in part to the efforts of the ACLU and other amici, judges were persuaded that the criminal law approach to the "crack baby" problem might lead to disaster. Courts feared opening the floodgates to the prosecution of expectant mothers whose conduct ranged from smoking cigarettes, drinking alcohol, or driving their cars negligently to eating too much junk food.[63] Judges also worried that prosecuting pregnant substance

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[58] For example, in 1999, Lynn Paltrow expressed concern that prosecutors were disproportionately targeting low-income women of color for cocaine use during pregnancy, although minority women are not the only drug users and prenatal cocaine exposure arguably poses lower risks to the fetus than maternal alcohol and nicotine use. *See* Paltrow, *Pregnant Drug Users*, *supra* note 5, at 1019–24; *see also* Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 1009–11 (1988) (criticizing fetal abuse prosecutions and instead advocating education and funding related to prenatal care); Schroedel & Peretz, *supra* note 19, at 349 ("Out of a desire to coerce pregnant women into avoiding behaviors that might harm the fetus, prosecutors stretch child abuse laws to include the fetal exposure to drugs and alcohol while in utero.").

[59] Bryony J. Gagan, Note, Ferguson v. City of Charleston, South Carolina*: "Fetal Abuse," Drug Testing, and the Fourth Amendment*, 53 STAN. L. REV. 491, 495 (2000).

[60] Whitner v. State, 492 S.E.2d 777, 780 (S.C. 1997) (upholding a female defendant's conviction for criminal child neglect for ingesting cocaine during third trimester on grounds that it would be inconsistent to consider a fetus a "person" under homicide and wrongful death statutes but not under child abuse laws).

[61] The *Whitner* decision continues to be influential in South Carolina. *See, e.g.*, State v. McKnight, 576 S.E.2d 168, 173–74 (S.C. 2003) (citing *Whitner* to uphold homicide conviction and twenty-year prison term for a drug user who gave birth to a stillborn baby). However, the United States Supreme Court has struck down other aspects of the campaign against pregnant substance abusers in this southern state. In *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001), the Court held that Charleston's warrantless, nonconsensual drug-testing of pregnant women violated the Fourth Amendment.

[62] *See* State v. Aiwohi, 123 P.3d 1210, 1218 (Haw. 2005) (noting that "*Whitner* appears to contradict the trend of decisions issued by other jurisdictions"); *see also* State v. Dunn, 916 P.2d 952, 955 (Wash. Ct. App. 1996); Commonwealth v. Welch, 864 S.W.2d 280, 281–82 (Ky. 1993); State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992); State v. Gethers, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991); Jackson v. State, 833 S.W.2d 220, 223 (Tex. App. 1992).

[63] *See, e.g.*, Reinesto v. Superior Court, 894 P.2d 733, 736 (Ariz. Ct. App. 1995) (noting that "[m]any types of prenatal conduct can harm a fetus, causing physical or mental abnormalities in a newborn"); Sheriff of Washoe County v. Encoe, 885 P.2d 596,

abusers would cause them to shun prenatal care or drug treatment[64] and that incarcerating them "would needlessly destroy the family."[65] Hence, while a sound argument could be made that a woman assumes responsibility for her fetus when she decides not to have an abortion,[66] criminal punishment for her chemical dependency, carelessness, or ignorance has appeared unwise and counter-productive to many observers.

Indeed, despite ordinary Americans' disapproval of crack-addicted mothers,[67] the appellate bench is not alone in its resistance to convictions based on maternal liability for fetal harm. Efforts to criminalize prenatal substance abuse by passing new statutes have met little success in state legislatures.[68] Uncertainty about whether the fetus could be considered either a "child" or a "person" led many judges to reverse convictions in the 1990s,[69] but subsequently-enacted fetal homicide laws continued the trend against prosecuting pregnant women by expressly including exceptions for maternal liability.[70] Many states have exempted expectant mothers from prosecution, even after clarifying that their criminal codes cover fetal injury or death.

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598 (Nev. 1994) (opining that the prosecution of pregnant women for consuming harmful substances could lead to criminal charges against expectant mothers "who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins").

[64] *See, e.g.*, Johnson v. State, 602 So. 2d 1288, 1294 (Fla. 1992) (expressing this view).

[65] *Gethers*, 585 So. 2d at 1143 (quoting Brian C. Spitzer, Comment, *A Response to "Cocaine Babies"—Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 FLA. ST. U. L. REV. 865, 881 (1987)).

[66] *See* Daniel J.H. Greenwood, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559, 609 (1994) (book review) (arguing that once a woman decides to carry her future child to term, she must abstain from smoking and drinking); Moses Cook, Note, *From Conception Until Birth: Exploring the Maternal Duty to Protect Fetal Health*, 80 WASH. U. L.Q. 1307, 1339 (2002) (making a similar argument).

[67] *See, e.g.*, Schroedel, Fiber & Snyder, *supra* note 18, at 102 (citing various media reports on poll results relevant to this issue).

[68] *See, e.g.*, *Encoe*, 885 P.2d at 599 (discussing how a bill to provide statutory authority for such prosecutions died in committee); State v. Luster, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (stating that the legislature defeated two bills that would have amended Georgia law to create a new crime for distributing controlled substances to unborn children); *Gethers*, 585 So. 2d at 1142 (noting various unsuccessful attempts to criminalize giving birth to a drug-addicted infant).

[69] *See, e.g.*, State v. Dunn, 916 P.2d 952, 955 (Wash. Ct. App. 1996); Commonwealth v. Welch, 864 S.W.2d 280, 281–82 (Ky. 1993); *Luster*, 419 S.E.2d at 34.

[70] *See, e.g.*, KY. REV. STAT. ANN. § 507A.010(3) (West 2005).

In short, the fear that *Whitner* signaled a sea change toward the punitive treatment of pregnant women[71] has not become a reality. If the abortion and maternal liability exceptions to fetal homicide laws provide a valid indication, commentators overstate the danger that these statutes will be used directly to control women's bodies and behavior.[72] Furthermore, the prosecution of men who kill or otherwise harm *in utero* victims arguably addresses a perceived sexist focus on destructive maternal conduct.[73]

### 2. *Is a Fetus a "Person" Under the Fetal Homicide Laws?*

The statutes also do not provide clear evidence that the unborn are ubiquitously becoming "persons" under law. More than sixty percent of states with fetal homicide laws eschew designating the fetus as a "person," instead calling it a "human being"[74] or seeking to avoid the personhood issue altogether by making feticide a separate crime from murder and manslaughter.[75] Maryland counts a viable fetus as a "victim" but expressly provides, "Nothing in this section [defining murder and manslaughter] shall be construed to confer personhood or any rights on the fetus."[76] This language came from an amendment "apparently intended to provide additional assurance that the bill [would] not be used to erode the rights to

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[71] Paltrow, *Pregnant Drug Users*, *supra* note 5, at 1008–09. Through her tireless work for the ACLU and other organizations that submitted amicus briefs, Paltrow helped defeat the prosecutorial approach.

[72] For example, in her thoughtful article on pregnancy battering, Deborah Tuerkheimer mistakenly reports that "most state law analogues" to the federal UVVA do not contain a maternal liability exception. Tuerkheimer, *supra* note 16, at 696 n.154. In fact, about eighteen of thirty-three states that criminalize the killing of a fetus explicitly exempt pregnant women from such prosecutions in other contexts besides abortion. This data is contained in a database maintained by the author.

[73] *See* Schroedel, Fiber & Snyder, *supra* note 18, at 111 (contrasting "the state's disinterest when male actions harm or potentially harm the fetus with its aggressive stance toward similarly situated women"); *see also id.* at 112, 117. These authors err in seeing a pregnant woman and a third-party attacker as "similarly situated," however. *See infra* Parts III.C & III.D (contending that there is a vital difference between the two).

[74] Idaho and Mississippi are among the states that use this term. *See* IDAHO CODE ANN. §§ 18-4001, 18-4006, 18-4016 (2004) (human in utero); MISS. CODE ANN. § 97-3-37 (West 2005).

[75] States taking this approach include Illinois, Michigan, and North Dakota. *See* 720 ILL. COMP. STAT. ANN. 5/9-1.2, 5/9-2.1, 5/9-3.2 (West 2002); MICH. COMP. LAWS ANN. § 750.322 (West 2004); N.D. CENT. CODE §§ 12.1-17.1-01–12.1-17.1-06 (1997).

[76] MD. CODE ANN., CRIM. LAW § 2-103(g) (LexisNexis Supp. 2005).

abortion . . . or rights of maternal autonomy."[77] California and Indiana include fetal killing in their regular murder and manslaughter statutes, but establish the fetus as a distinct entity from live-born humans by referring to the "unlawful killing of a human being, *or* a fetus."[78]

The difference between human beings and persons constitutes more than formalistic hairsplitting. While a fetus developing within a woman's body seems indisputably human (as opposed to canine, bovine, etc.), it may lack attributes often associated with personhood, such as consciousness, reason, feelings experienced in relation to others, and the ability to communicate.[79] Although it is part of a life process, it arguably is not a full person in a social sense. This understanding of personhood contrasts with the official beliefs of several major religions that the growing organism possesses a soul, or is genetically perfect, from the moment of conception.[80] Some states that avoid the term "person" in describing fetal victims genuinely may embrace the more secular of these two positions—and the one that involves the least tension with the Supreme Court's terminology. Others probably seek conformity with abortion law for the purely pragmatic goal of surviving a constitutional challenge.

Furthermore, even when interpreting statutes that use the phrase "unborn child," courts have not found clear intent to confer personhood. A Pennsylvania court opined, for example:

> To have life, as that term is commonly understood, means to have the property of all living things to grow, to become. It is not necessary to prove, nor does the [Pennsylvania fetal homicide] statute [protecting the "unborn child" from "fertilization until live birth"] require, that the living organism in the womb in its embryonic or fetal state be considered a person or a

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[77] Letter from Kathryn M. Rowe, Assist. Att'y Gen. of Maryland, to the Honorable Charles R. Boutin (Feb. 17, 2005) (on file with author).

[78] CAL. PENAL CODE § 187(a) (West 1999) (emphasis added). *See* IND. CODE ANN. § 35-42-1-1(4) (West 2004) (establishing murder liability for a person who "knowingly or intentionally kills a fetus that has attained viability").

[79] A bitter debate revolves around the question of when a fetus can feel pain. A team of medical researchers who recently hypothesized that fetuses do not feel pain until the third trimester has butted heads with anti-abortionists, who want laws requiring abortion providers to give fetal pain information to patients in the twentieth week of pregnancy. *Fetal Pain Challenged by Scientific Review*, CNN.COM, Aug. 23, 2005 (on file with author). In January 2006, Wisconsin Governor Jim Doyle vetoed a bill requiring abortion providers to tell women that their five-month-old fetuses could suffer pain. *See Wisconsin Governor Vetoes Abortion Bill*, CNN.COM, Jan. 7, 2006 (on file with author). The U.S. House of Representatives considered similar legislation in the autumn of 2005. *See* Arthur Caplan, *Abortion Politics Twist Facts in Fetal Pain Laws*, MSNBC.COM, Nov. 30, 2005, http://www.msnbc.msn.com/id/10238840/ (criticizing the proposed bill).

[80] PETCHESKY, *supra* note 28, at 348.

> human being. People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires "personhood". These questions are entirely irrelevant to criminal liability under the statute.[81]

### 3. *Ignoring the Viability Threshold*

It is worth highlighting one area in which Congress and many state courts and legislatures have departed from the framework established by the Supreme Court in *Roe*.[82] A large minority of states reject viability—"the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb"[83]—as the earliest point that a criminal homicide can occur. This is often a matter of statutory law, but in at least eight states, the judiciary has determined the stage at which a human can be murdered.[84] Whereas eighteen states continue to follow the common-law "born alive" requirement for murder,[85] another eighteen now place the onset of criminal liability for killing the unborn at conception.[86] In keeping with this trend, the UVVA protects the "unborn child"—defined as a "child in utero . . . at *any state of development*, who is carried in the womb."[87] Two states specify the stage at which an embryo becomes a fetus,[88] and three use the historical term

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[81] Commonwealth v. Bullock, 868 A.2d 516, 523 (Pa. Super. Ct. 2005) (citation omitted).

[82] *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973) (establishing a trimester framework under which abortion would be legal during the first trimester; restricted on grounds related to maternal health in the second trimester; and restricted due to the state's interest in the potentiality of human life only after viability, with exceptions to preserve the woman's life or health).

[83] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

[84] People v. Davis, 872 P.2d 591, 599 (Cal. 1994) (seven to eight weeks); State v. Anon., 516 A.2d 156, 158 (Conn. Super. Ct. 1986) (born alive); State v. Trudell, 755 P.2d 511, 513 (Kan. 1988) (born alive); Commonwealth v. Lawrence, 536 N.E.2d 571, 575-76 (Mass. 1989) (viability); *In re* A. W. S., 440 A.2d 1144, 1145 (N.J. Super. Ct. App. Div. 1981) (born alive); State v. Beale, 376 S.E.2d 1, 4 (N.C. 1989) (born alive); State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (viability); State v. Oliver, 563 A.2d 1002, 1003–04 (Vt. 1989) (born alive).

[85] Database maintained by the author.

[86] Database maintained by the author.

[87] 18 U.S.C.S. § 1841(d) (LexisNexis Supp. 2006) (emphasis added).

[88] VA. CODE ANN. § 18.2-32.2 (2004) (creating a separate homicide crime in Virginia for the "killing of a fetus"); *Davis*, 872 P.2d at 599 (holding that California's murder statute applies to any unborn, human offspring at least seven or eight weeks after fertilization, regardless of viability).

"quickening," which refers to the moment when the pregnant woman first perceives fetal movement (usually at about sixteen to eighteen weeks).[89] Interestingly, only eight states use viability, the critical juncture that the Supreme Court identified in the abortion context. Thus, in addressing fetal homicide by a third party, many elected representatives have ignored the physiological threshold that the Court established for determining when "the independent existence of . . . [fetal] life can in reason and all fairness be the [overriding] object of state protection."[90]

Nevertheless, the federal government and the twenty-four states that punish fetal homicide prior to viability cannot be accused of waging a frontal assault on abortion jurisprudence. Fetal homicide laws in these jurisdictions do not actually upset the status quo. After *Roe*, the Supreme Court itself decided that the government's interest in potential life precedes viability, although at earlier stages of fetal development, the woman's interests in privacy and autonomy predominate.[91] Explaining its abrogation of the trimester framework, the Court in *Casey* criticized *Roe*'s "rigid prohibition on all previability regulation aimed at the protection of fetal life."[92] Legal concern for the well-being of pre-viable fetuses harmonizes with contemporary Supreme Court holdings, as well as with the beliefs of Americans occupying the ideological middle ground.[93]

Moreover, the viability line primarily has significance for balancing a pregnant woman's privacy and autonomy against the state's interest in potential life. When the law criminalizes the lethal conduct of a third-party attacker, there are no competing interests to weigh.[94] As we shall see, evidence about the stage of fetal development helps to clarify causation issues and to suggest whether the defendant was aware of the pregnancy.[95] But despite its relevance to determining the cause of death or the criminal defendant's mens rea, viability has no talismanic significance outside of abortion law.

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[89] GA. CODE ANN. § 16-5-80(a) (2005); NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2006); WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West 2000).

[90] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

[91] *Id.* at 860, 873.

[92] *Id.* at 873.

[93] *See supra* text accompanying notes 31–33 (noting public support for punishing third-party killers of early-term fetuses).

[94] *See infra* Parts III.C & III.D (discussing the distinction between third-party criminal liability and a woman's right qualified right to abortion under current law).

[95] *See infra* Part IV.C (discussing criminal knowledge and causation).

### 4. *Anti-Abortion Outliers*

The criminal codes of some states do announce a hostile view of abortion; they essentially set up "trigger" laws that will immediately criminalize the procedure if the Court overturns *Roe*. For example, Missouri's statutory scheme defines an "unborn child" as a "person" for the purposes of homicide, imposes severe penalties, including death, and does not contain an explicit exception for abortion.[96] Judge-made law achieves similar results in other states, such as South Carolina.[97]

Missouri has a long history of challenging reproductive rights with regulations that conflict with the Court's holdings.[98] Hence, it comes as no surprise that this state includes fetus killing in its general murder and manslaughter statutes without explicitly creating an abortion exception.[99] The preamble of the Missouri criminal code states:

> The life of each human being begins at conception . . . Unborn children have protectable interests in life, health, and well-being . . . [and] the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court . . . .[100]

This preamble seems to invite the Court to overturn *Roe*; yet, in *Webster v. Reproductive Health Services*,[101] a plurality of justices nonetheless

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[96] MO. ANN. STAT. §§ 1.205, 565.020 (West 2000).

[97] *See* State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (holding that a viable fetus is a "person" for the purposes of criminal homicide); S.C. CODE ANN. §§ 16-3-10–16-3-60 (2003).

[98] *See* Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 53 (1976) (declaring spousal consent and parental consent requirements to be unconstitutional); Danforth v. Rodgers, 414 U.S. 1035 (1973) (invalidating statutes criminalizing abortions except in cases where the pregnant woman's life was endangered).

[99] *See* MO. ANN. STAT. §§ 565.020–565.025 (West 2000). Interestingly, Missouri's homicide provisions do contain an exception for the woman's failure to get proper prenatal care or otherwise follow a sound health regimen during pregnancy. *See* MO. ANN. STAT. § 1.205 (West 2000). By contrast, South Carolina is also an outlier in its punitive treatment of pregnant drug users. *See supra* notes 60–70 and accompanying text (contrasting South Carolina's harsh policies and case law with more moderate approaches in other states).

[100] MO. ANN. STAT. § 1.205(1)-(2) (West 2000).

[101] Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (plurality).

declared it to be merely precatory.[102] The *Webster* plurality opinion further explained that states enjoy latitude to express value judgments favoring childbirth over abortion, as long as they do not impose impermissible regulations on a woman's choice or a doctor's medical practice.[103]

*Webster* was a controversial decision. In upholding Missouri's ban on the use of public employees and facilities for non-therapeutic abortions, it insisted on a troubling flip-side of autonomy from government interference—the inability to count on the state for help.[104] *Webster* and the abortion funding cases[105] seemed to take away the necessary preconditions for self-determination for many pregnant women, especially the poor.[106] But the *Webster* plurality opinion still has the power to moderate the fetal homicide debate in a constructive way. In *Roe*, the Court declined to impose its own view of when life begins.[107] *Webster* subsequently indicated that this question could be left to the democratic process, as long as the woman's right to terminate her pregnancy was not thereby overridden.[108] The case thus

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[102] *Id.* at 505–07; *see also id.* at 523 (O'Connor, J., concurring) (opining that the possible uses of the preamble to restrict abortion, contraception, or in vitro fertilization were "too hypothetical to support the use of declaratory judgment procedures and injunctive remedies").

[103] *Id.* at 506 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

[104] *See id.* at 507 (upholding the challenged provisions of the Missouri statute on the grounds that the Due Process clause confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests.") (quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989)).

[105] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977). Some scholars who have criticized the line of cases from *Maher* to *Rust* believe that they "are not a failure of privacy jurisprudence, but rather a failure to take privacy seriously." Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 138 (1992). Privacy does not have to be understood simply as noninterference; it could also be interpreted as a positive obligation of government to protect the autonomy and self-determination of the individual. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-2 (1st ed. 1978); *see also* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 996 (1991) ("In *Roe*, [Justice] Douglas expressed a vision of a privacy right as something far more tied to an affirmative concept of liberty than a right to be left alone . . . . ").

[106] *Cf.* Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 879 n.115 (1993) (discussing the abortion funding cases).

[107] *See* Roe v. Wade, 410 U.S. 113, 159–160 (1973).

[108] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989) (plurality).

establishes that the recognition of fetal personhood outside the parameters of the Constitution does not automatically conflict with the abortion right.[109]

To summarize: While critics of fetal homicide laws often depict them as a monolithic threat to reproductive freedom,[110] this broad-brush approach is more polemical than informative. In their diversity, American states have approached fetal homicide in ways that track available poll data, with the majority making it clear that their laws do not directly impinge on a woman's right to terminate her pregnancy or punish her lifestyle if she chooses to carry her fetus to term. The drafting of the outliers hints at the strength of a vocal minority—the twenty-nine percent of Americans who would like to see *Roe* overturned.[111] However, failing to perceive key differences between implacable anti-abortionists and the "grays," who support *Roe* but still accord the fetus some degree of humanity, could be a costly political mistake for the pro-choice camp to make. Since *Webster* and *Casey*, democratically elected legislatures have enjoyed significant authority over the details of abortion regulation.[112] Proponents of reproductive freedom thus need to speak a language that has moderate appeal.

## III. LIFE-TAKING IN CONTEXT

In contrast to a pro-choice agenda that completely denies fetal personhood, a contextual approach to life-taking allows us to reconcile the position of a voluntary mother whose fetus is killed with that of a woman who wants an abortion. The first woman and her family experience the

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[109] Courts have also rejected claims that fetal homicide laws which presume to identify the beginning of life at conception, or in the embryonic stage, violate the Establishment Clause of the First Amendment. "The imposition of criminal liability is generally a secular matter . . . . " State v. Bauer, 471 N.W.2d 363, 365 (Minn. Ct. App. 1991). The crimes of murder and manslaughter inevitably require a determination of whether human tissue is alive or dead. Thus, even if the fetal homicide statutes stem in part from religious beliefs, they still may satisfy the secular purpose test. *See id.* at 365. Indeed, courts have expressed a preference for legislative determinations of such deeply controversial matters. *See, e.g.*, Keeler v. Superior Court, 470 P.2d 617, 625 (Cal. 1970) ("Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature."). A full discussion of the possible conflict between the fetal homicide laws and the Establishment Clause lies beyond the scope of this Article. Suffice it to say that courts are disinclined to invalidate laws that have secular purposes or to embark on the difficult task of disentangling such secular purposes from impermissible, religious ones.

[110] *See, e.g.*, Paltrow, *Pregnant Drug Users, supra* note 5, at 1014 ("[R]egardless of intent, these [state laws] create an environment in which prosecutions of pregnant women seem reasonable and the right to abortion does not.").

[111] *See* Press Release, Pew Research Center, *supra* note 36, at 1.

[112] *See* McClain, *supra* note 105, at 172.

killing of the fetus at the hands of a third party not only as a death, but also as a criminal wrong. For the latter woman, on the other hand, the termination of fetal life constitutes a difficult but justifiable decision. The moral choice to bear and raise a child, or to prevent it from being born, belongs to the woman. Such a decision can never legitimately rest with her attacker.

This distinction is possible because not all killings, or even all intentional killings, constitute murder; it depends upon the context. Many aspects of our law and culture reveal beliefs about life-taking that are much less absolute than those of either the hardcore anti-abortion[113] or pro-choice camps. As a society, we impose capital punishment on designated offenders and deem homicide during war to be a patriotic duty, even when soldiers kill innocent non-combatants. Recently, the Supreme Court indicated support for a state statute that exempts physicians from criminal liability for prescribing lethal doses of drugs at the request of terminally-ill patients.[114] Indeed, from its origins, the criminal law has exculpated some individuals who kill under theories of justification or excuse. Rather than locating the decision to give or take life solely with a deity, our secular regime invests legislatures, prosecutors, judges, and juries with the authority to determine where a killer's conduct falls on a doctrinal continuum ranging from non-criminal homicide to capital murder.

No matter what legal status the fetus attains, the decision whether or not to prevent its birth is still best made by its mother. Although the fetal homicide laws do not directly threaten reproductive rights, proponents of legal abortion must insist vigorously on the differences between a woman who terminates her pregnancy and a third-party killer. Such an argument can be made under existing criminal law principles. To this end, this Part highlights the basic convergence of popular attitudes toward homicide and abortion with those found in legal doctrine. However, this Part also emphasizes the criminal law's need for a more complete understanding of the maternal-fetal relationship and the uniquely invasive burdens of pregnancy. Ultimately, it is the uniqueness of the relationship between the pregnant

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[113] A minority of anti-abortionists proclaim their own brand of "justifiable" homicide when they engage in lethal attacks on abortion providers. *See* GORDON, *supra* note 28, at 309–10 (discussing the violent tactics, including assassinations, used by some anti-abortionists). The perpetrators of these attacks rationalize them in Utilitarian terms (that is, killing one to save the lives of many) or as part of a holy war against baby-killers. *Cf. id.* at 309 (stating that anti-abortion assassins consider themselves "agents of holy work"). Claims by the violent fringe of the anti-abortion movement that abortion is murder thus have a particularly hypocritical ring.

[114] *See* Gonzales v. Oregon, 126 S. Ct. 904 (2006) (holding that the Federal Controlled Substances Act does not allow the Attorney General to prohibit doctors from prescribing drugs for use in physician-assisted suicide under an Oregon law that allows them to do so).

woman and her fetus, rather than its similarity to other situations, that makes abortion permissible, whereas other types of feticide constitute criminal wrongs.

### A. *The Problem of Violence Against Pregnant Women*

Fetal homicide laws target a variety of perpetrators, including robbers, who face felony murder liability for killing a fetus in at least seventeen states,[115] and drunk drivers, who can be charged with vehicular homicide for causing fetal death in about twelve states.[116] Yet, if prosecutorial activity tracks the most severe threat to pregnant women, a large percentage of defendants will be men who abuse their female intimates. Pregnancy violence constitutes a problem of significant proportions. Approximately four to eight percent of all pregnant women experience physical abuse.[117] Homicide ranks as the leading cause of pregnancy-associated fatalities and is

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[115] Information about felony murder liability for fetus killing is available in a database maintained by the author; *see also infra* Part IV(B)(3) (discussing felony murder liability).

[116] Information about these vehicular homicide laws is available in a database maintained by the author. Fetal homicide statutes have also been used to charge individuals who attempted to obtain a baby by attacking a pregnant woman and removing the fetus from her womb with a sharp object, such as scissors or a key. *See* Matthew T. Mangino, *When a Murder Victim is Pregnant: Prosecutors Confront Effect of Controversial 'Fetal Homicide' Laws*, 28 PA. L. WKLY 276, Mar. 7, 2005, at 8 (describing one of the first cases prosecuted under the UVVA and comparing it to similar killings).

[117] Judith MacFarlane, Barbara Parker, Karen Soeken & Linda Bullock, *Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 J.A.M.A. 3176, 3176 (1992); CENTERS FOR DISEASE CONTROL AND PREVENTION, KEY SCIENTIFIC ISSUES FOR RESEARCH ON VIOLENCE OCCURRING AROUND THE TIME OF PREGNANCY (1998). One group of researchers reports that such percentages equated to the abuse of between 152,000 and 324,000 pregnant women in 1998. *See* Julie Gazmararian, Ruth Peterson, Alison M. Spitz, Mary M. Goodwin, Linda E. Saltzman & James S. Marks, Commentary, *Violence and Reproductive Health: Current Knowledge and Future Research Directions*, 4 MATERNAL & CHILD HEALTH J. 79, 80 (2000). *But cf.* Richard J. Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, 50 J. MARRIAGE & FAM. 841, 845–46 (1988) (claiming that pregnant women are not particularly likely to be abused, but acknowledging that they "enjoy no special relief from the threat of violence either"). In at least one study, more teenage girls reported abuse during pregnancy than did adult women; however, while the incidence of abuse was higher for teenagers, adults reported more severe physical assaults. *See* Barbara Parker, Judith MacFarlane, Karen Soeken, Sarah Torres & Doris Campbell, *Physical and Emotional Abuse in Pregnancy: A Comparison of Adult and Teenage Women*, 42 NURSING RES. 173, 175–76 (1993).

responsible for about twenty percent of such deaths.[118] Studies indicate that the vast majority of pregnant women who suffer violent attacks know their assailants; most of these assailants are husbands or domestic partners.[119]

A man who assaults his pregnant partner often does so in a particularly vicious manner—striking the woman's abdominal region as a means of expressing his power over her, his anger at her altered physical state, or his jealousy toward the future child.[120] Blows to the belly may constitute a deliberate effort to control the woman by destroying something that is precious to her.[121] Yet, as we shall see, some attackers perpetrate more instrumental killings that show malice toward the fetus itself.[122]

Although the available figures may "grossly underestimate the number of women victimized by violence during pregnancy,"[123] legal scholarship related to the problem has focused on the threat to legal abortion that the fetal homicide statutes allegedly pose, rather than on the statutes' potential to deter and punish intimate killers. Indeed, so impassioned has been the negative response from the left to the UVVA and its state-law siblings that few law professors have considered the nature of the harm inflicted by the pregnant woman's attacker. The most thoughtful work on pregnancy violence by a legal scholar criticizes fetal homicide laws for "shrouding not only . . . the woman's injury, but . . . the woman herself."[124] According to Deborah Tuerkheimer:

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[118] Isabelle L. Horon & Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality—Maryland, 1993–1998*, 285 J.A.M.A. 1455, 1457 (2001).

[119] *See* Sandra L. Martin, Linda Mackie, Lawrence L. Kupper, Paul A. Buescher & Kathryn E. Moracco, *Physical Abuse of Women, Before, During, and After Pregnancy*, 285 J.A.M.A. 1581, 1582 (2001) (finding that sixty-seven percent of abused pregnant women in a North Carolina study suffered violence at the hands of husbands or partners and that fourteen percent of the aggressors were other family members); *see also* Hortensia Amaro, Lise E. Fried, Howard Cabral & Barry Zuckerman, *Violence During Pregnancy and Substance Use*, 80 AM. J. PUB. HEALTH 575, 576 (1990) (finding that ninety-four percent of women in a study of poor, inner-city, minority communities were acquainted with their attacker); MacFarlane et al., *supra* note 117, at 3177 ("[T]he perpetrator of the abuse was almost always someone the woman knew intimately.").

[120] *See* Schroedel & Peretz, *supra* note 19, at 344; *see also* Shari Roan, *A Dirty Secret*, L.A. TIMES, Dec. 5, 1995, at E1 (describing a young woman's thoughts about why her boyfriend battered her during her pregnancy).

[121] *Cf.* Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2138 (1993) (noting that batterers often engage in "deliberate, calculating behavior" such as "searching for and destroying a treasured object" belonging to their victims).

[122] *See infra* text accompanying notes 297–98.

[123] *See* Tuerkheimer, *supra* note 16, at 671.

[124] *Id.* at 668.

> What is different—and particularly pernicious—about this approach [*i.e.* the new criminal law framework recognizing fetal personhood] is that the pregnant woman, who has historically been subject to paternalistic regulations enforcing idealized notions of motherhood, has been rendered invisible. Whereas before the pregnant woman was simply a vessel for the fetus, now she is vanished.[125]

While Tuerkheimer's description is superficially persuasive from a feminist vantage, it fails to give an accurate assessment of the criminal law's impact on perpetrators of pregnancy violence. It may be true that the current law's separation of the pregnant woman and her fetus understates the fetus's physical reliance on the woman's body. Yet, at least in homicide cases, the outcome is often *not* the disappearance of the woman as victim, but rather the double counting of the woman *and* the fetus to heighten the criminal liability and punishment of the killer. The imposition of consecutive sentences[126] or even the death penalty, based on a "multiple murders aggravator,"[127] may result, and under narrow circumstances,[128] such severe punishments are just. In contrast, the alternative solutions that commentators like Tuerkheimer propose—recognizing a separate crime of "assault on a pregnant woman"[129] or providing a sentence enhancement for the killer based on his victim's pregnancy[130]—might result in overly lenient penalties for pregnancy violence, compared to the fetal homicide approach. For example, simply creating a special category of assault crimes fails to make a meaningful distinction between an attack on an expectant mother that causes her to lose her fetus and one that does not.

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[125] *Id.* at 695.

[126] *See, e.g.,* Commonwealth v. Bullock, 868 A.2d 516, 521 (Pa. Super. Ct. 2005) (stating that the defendant was sentenced to two consecutive prison terms for the murder of his girlfriend and the voluntary manslaughter of her fetus); State v. Holcomb, 956 S.W.2d 286, 288 (Mo. Ct. App. 1997) (noting that the defendant was sentenced to two consecutive life terms for the murders of his girlfriend and her fetus).

[127] *See infra* text accompanying notes 248.

[128] *See infra* text accompanying notes 288–98, 300–01 (discussing cases in which the defendant intentionally killed a pregnant woman and also intended to kill the fetus or at least knew of its existence).

[129] *See* Tuerkheimer, *supra* note 16, at 710.

[130] The House Report on the UVVA (renamed "Laci and Conner's Law") noted:

> Even assuming, however, that current Federal sentencing guidelines would permit a two-level sentence enhancement when the victim of a violent crime is pregnant, whether under the "bodily injury" or "vulnerable victim" provisions, such a trivial increase in punishment would not reflect the seriousness with which violent crimes against pregnant women and unborn children should be treated.

H.R. REP. NO. 108-420, pt. 1, at 8 (2004).

Because existing legal discussions of pregnancy violence are not satisfactory, this Article reopens the question with the goal of showing that a distinction between mother and fetus does not inevitably eclipse the mother's interests, nor does it always place her in an adversarial relation to her future child. Existing regimes for punishing pregnancy violence are seriously flawed, as this Article will show, but *not* because they designate the unborn as potential victims.[131] My contention is that if the fetal homicide laws were combined with other resources for abused women and more carefully drafted to uphold defendants' rights, they would have the capacity to provide fair protection for one aspect of reproductive choice. This choice is that of carrying a fetus to term.

Women and families who have elected to have a child experience a loss for which the state should be allowed to impose additional punishment—not as tort-like compensation but as a retributive, expressive, and potentially deterrent sentence.[132] Of course, the harm denounced by the criminal law is ideally conceived as a societal harm, not as a private injury to the bereaved family. In a similar vein, the interest in punishing fetal homicide lies with the state, which administers criminal justice, rather than the unborn. While victims' outrage and pain cannot justify the imposition of criminal punishment, a penal theory that values the expression and reinforcement of social norms[133] legitimately could count the death of the fetus in its assessment of criminal wrongdoing.

### B. *Voluntary Pregnancy, Fetal Personhood, and the Rise of Prenatal Medicine*

Although pro-choice scholars often argue strenuously against any formulation that presents mother and fetus as separate entities,[134] *Roe* itself depended on an understanding of potential life that was separate from, and

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[131] *See infra* Part IV.

[132] *See* Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641, 1643–44, 1676–77 (2003) (contrasting the goals of the criminal law with those of the tort regime).

[133] I envision some reciprocity between the preferences of the public and the educational influence of the criminal law. I have argued elsewhere that the criminal law need not always give voice to community values. Those values, in some instances, may be unjust. *See id.* at 1644, 1686–87. Nevertheless, the law loses much of its power to enforce anti-violence norms and otherwise discourage wrongdoing if it does not acknowledge public sentiment.

[134] *See supra* notes 18–24 and accompanying text, and *infra* notes 216–17 and accompanying text.

sometimes in opposition to, the pregnant woman's rights.[135] Writing for the majority in *Roe*, Justice Blackmun clearly stated that a fetus is not a person under the Fourteenth Amendment.[136] However, the *Roe* opinion recognized the value of potential life,[137] and it did not foreclose the possibility that courts or legislatures might recognize fetal interests outside the context of constitutional law.

The personhood (or at least the human status) of the fetus has grown more difficult to deny due to the advent of medical technology that essentially renders the contents of the womb visible and audible. The heartbeat usually can be detected by the sixth week of pregnancy,[138] and Web commerce now makes fetal heartbeat monitors available to expectant parents over the Internet.[139] These devices are touted as a comforting means for women facing risky pregnancies to verify fetal life.[140] Ultrasound imaging allows the doctor and the pregnant woman to see the unborn in real time; proud families can watch videos of the fetus moving its tiny limbs.[141] By the end of the third month, the fetus "has arms, hands, fingers, feet and toes and can open and close its fists and mouth."[142]

Feminist scholars have written extensively about the way in which technology frames the fetus "as a free-floating independent entity;" marginalizes the woman who gives it sustenance; and condemns her for any act or omission that causes prenatal harm, including the decision to terminate

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[135] Roe v. Wade, 410 U.S. 113, 154, 158–64 (1973) (balancing the pregnant woman's interest in privacy and autonomy against the state's interest in protecting potential life).

[136] *Id.* at 158. Blackmun also noted that, in 1973, the unborn were not "recognized . . . as persons in the whole sense" in other areas of law. *Id.* at 162 (explaining that wrongful death actions vindicate the interests of the parents and that, under inheritance law, "[p]erfection of the interests involved . . . has generally been contingent upon live birth").

[137] *Id.* at 154 (noting the state's interest in "protecting potential life"). This interest was further defined and emphasized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992); *see also supra* text accompanying notes 91–92.

[138] *See* WebMD Medical Reference, *Pregnancy: Your Baby's Growth and Development: Months 1 to 3*, WEBMD.COM, Nov. 2005, http://www.webmd.com/content/article/51/40829.htm (last visited Oct. 12, 2006).

[139] *See, e.g.*, Stork Radio, Fetal Heartbeat Monitor, http://www.storkradio.com/links.php?id=6 (last visited Oct. 12, 2006).

[140] *See id.*

[141] MacKinnon, *supra* note 5, at 1310–11 (discussing the effect of prenatal ultrasound imaging). *See* Schroedel, Fiber & Snyder, *supra* note 18, at 93 (same).

[142] *See* WebMD Medical Reference, *supra* note 138.

her pregnancy.[143] Similarly, advances in the care of premature infants push the point of viability earlier and earlier, blurring the distinction between a fetus and a baby.[144] Pro-choice advocates have observed these changes with anxiety, for while medical technology has made pregnancy, in some senses, less dangerous and frightening, it has also added fuel to the anti-abortion fire. Pro-lifers have appropriated fetal imagery to bolster their claims that abortion is murder.[145] Yet, outside of this debate, pictures of fetuses and descriptions of how they develop are also readily available to women whose pregnancies are desired.

The modern situation contrasts starkly with the cultural understanding of fetal life that existed until the mid-nineteenth century. Characterized by the invisibility of the fetus, this historical approach vested in the mother the authority to detect "quickening" or fetal movement. She (not the unborn) was the central figure in the pregnancy until the middle of the 1800s, when male medical professionals began to assert scientific and moral control over reproductive processes and relegate women to passivity.[146] Moreover, in the past, higher rates of infant and childhood mortality discouraged pregnant women from assigning value or personality to fetuses.[147] Finally, the modern religious position that the unborn have a right to life from conception is of relatively recent vintage; early Judeo-Christian writings associated the existence of life or a soul with fetal movement.[148]

Drawing on these precepts, English common law fixed the onset of criminal liability at the moment when the fetus "is able to stir in the mother's

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[143] MacKinnon, *supra* note 5, at 1310–11; *see also, e.g.*, PETCHESKY, *supra* note 28, at xii–xiv (describing how anti-abortionists have appropriated fetal imagery—in *The Silent Scream* video, for example—to drive home their message that abortion constitutes murder).

[144] PETCHESKY, *supra* note 28, at xv.

[145] *See id.* at 339.

[146] Siegel, *supra* note 23, at 292; *see also generally id.* at 280–323 (describing in detail the role of male doctors in establishing governmental and medical control over women's bodies and social roles).

[147] *Cf.* GORDON, *supra* note 28, at 23 (discussing high infant mortality rates in America in the late eighteenth century).

[148] *See* GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 151 (1957); HULL & HOFFER, *supra* note 4, at 17–18, 32. Pro-choice Catholics note: "For many centuries Catholic theologians, including Thomas Aquinas, held that infusion of the soul is possible only when the embryo begins to show human form, i.e., a point after conception." Brief for Catholics for a Free Choice et al. as Amici Curiae Supporting Appellees, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) *in* THE ABORTION RIGHTS CONTROVERSY IN AMERICA: A LEGAL READER 210 (N.E.H. Hull, Williamjames Hoffer & Peter Charles Hoffer eds., 2004).

womb."[149] The fact that killing it before quickening was not a crime for *any* perpetrator prior to the mid-nineteenth century was thus embedded in the medical, religious, and social understandings of that time. As Rosalind Petchesky reminds us, "prevailing ideas about morality are inevitably shaped by their historical and cultural contexts. This is as true of the concept of 'personhood' as it is of the concepts of 'murder' or 'maternal duty.'"[150]

However, the insight that fetal personhood is culturally constructed, rather than being an objective fact, cuts both ways. While the pro-choice movement can point to historical evidence that religious and social opposition to abortion is relatively new, it will be difficult, if not impossible, to put the genie of medical technology back into the bottle. The availability of fetal imagery makes the unborn seem more like persons, and for expectant mothers and families who can accept responsibility for a child, it becomes possible to choose gender-specific names and engage in other activities that make the new family member seem present and real. When a woman miscarries or bears a stillborn baby, she may feel grief that equals that experienced upon the death of a live-born child. Popular manuals designed to help families through their suffering often efface the boundaries between various stages of human development and give primacy to women's emotional experience, rather than scientific or religious definitions of life.[151] One could argue that an expectant mother whose pregnancy ends grieves "over the loss of the *prospect* of a child—not over the loss of a child."[152] But, culturally, the message is often that the mother has experienced her baby's death.

The unwanted destruction of the fetus by a third party thus may be perceived as a wrongful killing. Describing the loss of her daughter Laci's late-term fetus at the hands of her son-in-law, Scott Peterson, Sharon Rocha wrote to U.S. Senators: "When a criminal attacks a woman who carries a child, he claims two victims. I lost a daughter, but I also lost a grandson . . . ."[153] Rocha further explained her opposition to a proposed

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[149] WILLIAMS, *supra* note 148, at 152 (quoting Blackstone).

[150] PETCHESKY, *supra* note 28, at 331.

[151] *See, e.g.*, SHEROKEE ILSE, EMPTY ARMS: COPING AFTER MISCARRIAGE, STILLBIRTH, AND INFANT DEATH 3 (1982) ("The death of a 2 year-old is not necessarily harder than a stillbirth, a neonatal death is not worse than a miscarriage."); CHRISTINE MOULDER, MISCARRIAGE: WOMEN'S EXPERIENCES AND NEEDS 59–61 (1990) (stating that some women feel they have lost a baby when they miscarry).

[152] WILLIAMS, *supra* note 148, at 227 (emphasis added); *see* MacKinnon, *supra* note 5, at 1316 (contending that a fetus is only a person "born in the imagination . . . . not born in the world").

[153] H.R. REP. NO. 108-420, pt. 1, at 4 n.4 (2004) (quoting Letter from Sharon Rocha to United States Senators Mike DeWine, Lindsey Graham, Orrin Hatch and United

amendment to the UVVA which would have recognized an attack on a pregnant victim as a more serious crime than an attack on a non-pregnant victim, without according personhood to the fetus:

> I hope that every legislator will clearly understand that such a single victim amendment . . . would be a painful blow to those, like me, who are left alive after a two-victim crime, because Congress would be saying that Conner [i.e. the late-term fetus] and other innocent unborn victims like him are not really victims—indeed, that they never really existed at all. But our grandson did live. He had a name, he was loved, and his life was violently taken from him before he ever saw the sun.[154]

Such sentiments do not mandate fetal homicide laws or speak with authority as to their desirability or constitutionality. To some, Rocha's view may seem irrational and sentimental, compared to "hard" scientific facts that make the beginning of human life a process, rather than an event. Nevertheless, one cannot say that Rocha's sense that Peterson murdered her grandson is any *more* culturally constructed than the older, common-law view that a murder could not occur until the baby was born alive. Moreover, pragmatically, there is no need for pro-choice advocates to oppose Rocha and the many Americans who agree with her.

### C. *The Illegitimacy of the Third-Party Attacker's Conduct*

The pro-choice camp strays from the essential meaning of reproductive rights if it devotes as much energy to trivializing fetal life as it does to promoting the autonomy and equality of women in our society. Surely no reasonable person could argue that a man who kicks his pregnant girlfriend in the stomach,[155] a driver who engages in an act of road rage,[156] or an ex-boyfriend who shoots his estranged lover to death after she leaves him[157] had a legitimate interest in causing the death of the unborn. These criminal actors stripped their victims of the choice to become mothers, which denies female autonomy just as much as forcing women to carry unwanted pregnancies to term. Distinguishing consensual abortion from a violent actor's anti-social destruction of a fetus is thus fundamental to women's rights.

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States Congresswoman Melissa Hart (June 16, 2003) (on file with House Committee on the Judiciary)).

[154] *Id.*

[155] *See* State v. Coleman, 705 N.E.2d 419, 420 (Ohio Ct. App. 1997).

[156] *See* State v. Alfieri, 724 N.E.2d 477, 480–82 (Ohio Ct. App. 1998).

[157] *See* People v. Taylor, 86 P.3d 881, 882–83 (Cal. 2004).

Courts hearing Equal Protection challenges to fetal homicide laws have relied on this distinction. For example, in *State v. Merrill*,[158] the Minnesota Supreme Court considered a motion to dismiss murder charges against a defendant who allegedly shot a pregnant woman, killing both her and her 28-day-old fetus. The defendant claimed that, by not distinguishing between viable and non-viable fetuses, the murder provisions of Minnesota's criminal code exposed him "to conviction as a murderer of an unborn child during the first trimester of pregnancy, while others who intentionally destroy a nonviable fetus, such as a woman who obtains a legal abortion and the doctor who performs it, are not murderers."[159] The court rejected this argument. First, it noted that causing the death of a fetus without the mother's consent differs markedly from the decisions and actions of a pregnant woman and her doctor.[160] The constitutional right of a woman to terminate her pregnancy "does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."[161] Second, according to *Merrill*, the assertion in *Roe* that a fetus is not a person was limited by the Court's focus on deciding the abortion question under the Fourteenth Amendment.[162] Finally, the *Merrill* opinion stressed that, even in the abortion context, the state's interest in protecting potential life precedes viability.[163] For all of these reasons, "the viability of the fetus [was] 'simply immaterial' to an equal protection challenge" to the murder statutes under which the defendant was charged.[164] Other courts that have considered whether a third-party killer is similarly situated to a pregnant woman or her doctor have reached nearly identical conclusions.[165]

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158 450 N.W.2d 318 (Minn. 1990).

159 *Id.* at 321.

160 *See id.* at 322.

161 *Id.*

162 *See id.*

163 *See id.*

164 *Merrill*, 450 N.W.2d at 322.

165 *See, e.g.*, State v. Alfieri, 724 N.E.2d 477, 482 (Ohio 1998) (distinguishing the defendant in a vehicular homicide case from "a pregnant [woman] who elects to have her pregnancy terminated by one legally authorized to perform the act"); State v. Holcomb, 956 S.W.2d 286, 291–92 (Mo. 1997) (reasoning that Holcomb's case differed from abortion cases because he did not have the mother's consent to kill her and her fetus); State v. Black, 526 N.W.2d 132, 135 (Wis. 1994) (distinguishing between the termination of pregnancy and an intentional criminal act); People v. Ford, 581 N.E.2d 1189, 1199 (Ill. Ct. App. 1991) (observing that a pregnant woman who chooses to have an abortion and a defendant who intentionally murders a fetus are not similarly situated). *Cf.* Commonwealth v. Bullock, 868 A.2d 516, 524–25 (Pa. Super. Ct. 2005) (holding that Pennsylvania's fetal homicide statute was rationally related to the state's interest in protecting potential life and noting that the statute did not exempt all women, but only all

Courts addressing substantive due process challenges have also based their rulings on the contrast between a pregnant woman and her attacker. For example, rejecting the appellate argument of Wayne Coleman, who faced a manslaughter conviction for killing Olivia Williams's fetus during a domestic assault, an Ohio court stated: "*Roe* gave women a fundamental right to terminate a pregnancy; however, that right does not translate into a fundamental right of a third person to use violent conduct to deprive the pregnant woman of her choice."[166]

## D. *Abortion as Justifiable (or Excusable) Homicide*

While the illegitimacy of a third-party assault on an expectant mother may seem obvious, there is debate about whether abortion can remain legal if fetuses are deemed "persons" or even merely "humans." Some activists from both the pro-choice and anti-abortion camps have been quick to assume that the personhood issue determines abortion's legality.[167] However, the notion that all homicides constitute murder is neither mandated by the criminal law nor reflected in the thinking of the "abortion grays." As Judith Thomson observed, "the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly."[168]

### 1. *The Legal Status of the Fetus*

Exploration of abortion as justifiable homicide suggests several inquiries. First, it is necessary to consider whether declaring a fetus to be some kind of human being that can be murdered by a third party also makes abortion murder. Second, suppose that a fetus is not only human, but also a legal person. Does the personhood of the fetus change the analysis? I submit that it does not. Whether the fetus is called a person, a human being, or merely a victim, each of these terms indicates that it is capable of being murdered. However, none of them dictates criminal liability for abortion. Some states have declared fetuses to be persons under tort and probate law, and the

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pregnant women, from criminal liability); Ford, 581 N.E.2d at 1199 (making a similar ruling).

[166] State v. Coleman, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997) (citing People v. Davis, 872 P.2d 591 (1994)).

[167] *See supra* notes 5, 9, 12.

[168] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 57 (1971).

Supreme Court has indicated that a woman's right to terminate her pregnancy is not thereby jeopardized.[169]

Does it make sense to recognize fetal personhood for the purposes of criminal homicide, but not under the Constitution? Excluding some classes of persons from the protections of the Fourteenth Amendment is controversial, for it raises the specter of this country's past denial of full citizenship to live-born blacks and women. Yet, the exclusion of fetuses from constitutional protection is based not on an immutable, suspect category such as race or sex, but rather on the fact that they have not yet been born.[170]

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[169] *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989) (opining that the preamble to the Missouri law might be interpreted to offer fetal protection in tort, probate, or other areas of law, but not to restrict abortion).

[170] In *Roe v. Wade*, the Supreme Court noted that the word "person," as used to define "citizens" under the Fourteenth Amendment, was clearly limited to individuals "*born* or naturalized in the United States." Roe v. Wade, 410 U.S. 113, 157 (1973) (emphasis added). Other uses of "person" in the Constitution—to describe the qualifications for Representatives, Senators, and the President, for example—indicate applicability only to post-natal humans. *See id.* Going beyond the Supreme Court's sparse discussion of this matter, one could argue that fetuses are not constitutional persons because they appear to lack subjective feelings, self-consciousness, or reason. However, other constitutional persons, such as corporations, arguably do not possess these attributes either.

The constitutional personhood of the fetus undoubtedly would pose the greatest difficulty for the continued legality of abortion, but even under this scenario, the Court would not be bound to hold that the unborn's right to life outweighs a woman's rights to either privacy or sex equality. John Hart Ely rejected the privacy penumbra underpinning *Roe* and declared that the decision amounted to "bad constitutional law." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973). But even Ely opined that Justice Blackmun was wrong to assume that the constitutional personhood of the fetus automatically would preclude the right to abortion. *See id.* at 926 n.48. If a fetus were a person under the Fourteenth Amendment, the Court would have to weigh the competing rights of each person and determine which would prevail. Because state-compelled pregnancy requires a woman to give her body to the service of an invader, the Court could hold that the woman's right prevailed over that of the fetus. *See infra* Part III.D.3 (describing the burdens of pregnancy and child rearing).

Moreover, as Michael Dorf has noted, under the Constitution, some "persons" do not enjoy the same rights as others:

> [E]ven general constitutional language can be interpreted differently depending upon the context. Corporations, for example, are "persons" under the Fourteenth Amendment in the sense that their property cannot be taken without fair processes, but not in the sense that they are entitled to vote on equal terms with natural persons.

Michael C. Dorf, *How Abortion Politics Impedes Clear Thinking on Other Issues Involving Fetuses*, FINDLAW, May 28, 2003, http://writ.news.findlaw.com/dorf/20030528.html.

In any event, as this Article has shown, the vast majority of fetal homicide statutes do not suggest conferring Fourteenth Amendment personhood on the unborn, nor do they even use the term "person" to describe the fetal victim.[171] For this and other reasons, the Supreme Court is unlikely to use the statutes as a springboard to abrogate reproductive rights. The Court at least gives lip service to the importance of affirming controversial, landmark decisions like *Roe* and *Miranda v. Arizona*,[172] due to their deeply ingrained place in American popular culture. [173] Even without the centrist presence of Justice O'Connor, the Roberts Court probably will not accord fetuses constitutional personhood.[174] As Jeffrey Rosen opined in a 2003 editorial: "[N]o responsible justice could invoke the fetal homicide laws as evidence of the public's agreement that fetuses before viability should have rights indistinguishable from ... [other] human beings."[175] Indeed, many staunch anti-abortionists realize that raising fetuses to the status of persons under the Constitution almost certainly would require a constitutional amendment,[176] which both Congress and the public seem loath to support.[177]

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[171] *See supra* text accompanying notes 74–78; *see also, e.g.*, State v. MacGuire, 84 P.3d 1171, 1180 (Utah 2004) ("This statute's use of the term 'person' to refer to a fetal victim defines the crime of aggravated murder. It does not declare a fetus to be a person entitled to equal protection, nor does it restrict a woman's right to obtain an abortion.").

[172] 384 U.S. 436 (1966).

[173] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 869 (1992); *see also* Dickerson v. U.S., 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now ... . *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

[174] *See Casey,* 505 U.S. at 859 (discussing Americans' long reliance on the legality of abortion). Justice O'Connor opined that overturning *Roe* could only be done "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 869. The confirmation of a conservative to succeed O'Connor still leaves four dedicated votes for reproductive rights: Justices Breyer, Ginsburg, Stevens, and Souter. Although the swing voter, Justice Anthony Kennedy, opposed so-called "partial birth abortion" procedures in *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Kennedy, J., dissenting), he earlier voted to affirm *Roe* in *Casey*, 505 U.S.at 843. Moreover, he recently upheld the right of privacy in *Lawrence v. Texas*, 539 U.S. 558 (2003).

[175] Jeffrey Rosen, *A Viable Solution*, LEGAL AFF., Sept.–Oct. 2003, at 20.

[176] *See* PETCHESKY, *supra* note 28, at 261–62, 335.

[177] *See* Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 299–300 (1994) (reviewing BARBARA HINKSON & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS (1993)). Even if the Court overturned *Roe*, Congress might hesitate to pass a federal law banning abortion.

This Article thus focuses on the scenario that represents the most common position taken by state legislatures with regard to fetal homicide: Homicide is particularized to the species *homo sapiens*, but aside from recognizing a fetus as some kind of human being that can be wrongfully killed, the state's murder or manslaughter statutes do not confer on it any other rights or attributes of personhood.[178]

### 2. *Abortion and Black-Letter Criminal Law*

Even though the fetal homicide laws do not facially conflict with reproductive rights, one still might ask: Why is abortion a valid exception to the general rule that intentional killing, including the killing of a fetus, constitutes murder? Pro-choice Americans need to have an answer to this question.

Writing in the 1970s, several scholars compared abortion to various forms of homicide that the criminal law declines to punish and argued that, even if pro-choicers conceded the tenuous comparison of an acorn with an oak tree, abortion still was not legally or morally wrong.[179] For instance, Donald Regan and Judith Thomson invoked the Bad Samaritan principle under which an individual legally may fail to help someone in need, even if the needy person's death results.[180] According to this reasoning, the burdens imposed on a pregnant woman—the risk to her life, the physical pain and discomfort, as well as the lengthy time during which her body is commandeered for childbearing—weigh more heavily than those that other potential Samaritans can refuse to undertake.[181]

The pregnant woman's relationship to her fetus is also distinguishable from any relationship in which the law traditionally imposes a duty to act. Unlike the voluntary parent of a live-born child, a woman who seeks an abortion has not chosen to have a baby.[182] In cases of contraceptive failure or

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The Partial Birth Abortion Ban Act of 2003 arguably tracks the distaste of many "abortion grays" for late-term procedures, rather than revealing a more generalized hostility toward women's right to terminate their pregnancies. *See supra* text accompanying notes 36–37 (discussing poll data).

[178] *See supra* text accompanying notes 74–78.

[179] *See* Thomson, *supra* note 168, at 47–48 ("A newly fertilized ovum, a newly implanted clump of cells, is no more a person than an acorn is an oak tree.") However, Thomson proceeded to argue that, even if pro-lifers establish that the fetus is a person, they still must explain why abortion is impermissible. *See id.* at 48, 57.

[180] *See* Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1574–75 (1979); Thomson, *supra* note 168, at 56.

[181] *See* Regan, *supra* note 180, at 1579–83, 1589; Thomson, *supra* note 168, at 63.

[182] *See* Regan, *supra* note 180, at 1597–98.

coerced sex, she did not even decide to engage in unprotected intercourse.[183] Moreover, unlike an individual who legally must continue a rescue effort once she has begun it, a pregnant woman does not raise the unconscious fetus's psychological expectations of being saved. Indeed, she arguably leaves it no worse off than it would have been if she and her sexual partner had never conceived it.[184]

This argument has some appeal, particularly in its insight that the presence or absence of the choice to give birth, and thus to assume responsibility for the baby, distinguishes abortion from infanticide.[185] Ultimately, however, formalistic efforts to shoehorn abortion into the law of omissions prove less than satisfying. Whereas the Bad Samaritan principle applies to a failure to act,[186] the woman's decision to have an abortion and the doctor's conduct in performing it qualify as an action that removes and kills the fetus, rather than a mere refusal to nurture it.[187]

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[183] *Cf.* Greenwood, *supra* note 66, at 603–06 (indicating that, although anti-abortionists believe that one accepts a child into the family when one decides to have sex, proponents of legal abortion may view the fetus as a mistake that happened because of contraceptive failure). Thomson analogized contraceptive failure to a home invasion that occurs despite precautions taken by the homeowner:

> It would be . . . absurd to say [that I gave a burglar a right to use my house] if I had had bars installed outside my windows . . . to prevent burglars from getting in, and a burglar got in only because of a defect in the bars. It remains equally absurd if we imagine it is not a burglar, but an innocent person who blunders or falls in.

Thomson, *supra* note 168, at 59. Catharine MacKinnon has argued that "[w]omen often do not control the conditions under which they become pregnant." MacKinnon, *supra* note 5, at 1312. Although MacKinnon overstates the similarities between rape and all heterosexual sex, poverty and economic dependence do play a role in undermining meaningful consent to intercourse. *See id.* Faced with psychological pressure and other types of coercion, women (and especially inexperienced teenage girls) may not assert their preference for their partners to use a condom, thus risking unwanted pregnancy.

[184] *See* Regan, *supra* note 180, at 1599–1600.

[185] *See id.* at 1601 n.43; *see also* Greenwood, *supra* note 66, at 609 (proposing a "responsibility-centered" view of abortion under which a woman's duties toward the fetus begin when she decides to accept it into the family); Thomson, *supra* note 168, at 65.

[186] Defenders of the Bad Samaritan rule often explicitly base their view on the act/omission distinction, contending that "surely there is a moral difference between stabbing a victim to death, and failing to call the police or otherwise coming to the victim's aid." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 88 (2d ed. 1995).

[187] *See* Stenberg v. Carhart, 530 U.S. 914, 923–27 (2000) (providing graphic descriptions of abortion procedures, including "vacuum aspiration," "dilation and evacuation," and "dilation and extraction," which may result in the dismemberment of late-term fetuses). To rebut this objection, Regan contends that, if the fetus remains in the

Necessity, or choice-of-evils, offers another possible justification for abortion. According to this utilitarian doctrine, a person may violate the criminal law if, by doing so, she averts a greater harm. The doctrine most easily applies to less serious crimes than homicide—stealing a loaf of bread to prevent starvation, for example. But it can be used to justify homicide, as well. For example, the Model Penal Code's discussion of whether a mountain climber may cut the rope connecting him to a fellow climber who has tumbled over a cliff is apposite to a scenario in which a complicated pregnancy threatens the life of both the woman and her fetus.[188] If the mountaineer does not cut the rope, both he and his climbing partner will perish. If he cuts the rope, the criminal law justifies, or at least excuses, his decision.[189]

Despite a slightly uncomfortable fit,[190] the necessity defense was used to exculpate doctors who performed illegal abortions to preserve the life or sanity of pregnant women during the early twentieth century.[191] Extrapolating from the English case, *Rex v. Bourne*, in which a physician was acquitted,[192] Glanville Williams argued that "the mother's life must be considered in relation to its quality as well as to its duration."[193] In his view, the pregnant woman's physical pain and mental health were essential to a suitably broad understanding of life-preservation. However, both Williams and the *Bourne* court distinguished the life of "the unborn child" from "the yet more precious life of the mother"[194]—a distinction that becomes harder to make if the law treats a fetus's death the same as a woman's when punishing third-party offenders.

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mother's womb, it is automatically nourished at her expense. Removal is thus necessary to refuse aid. *See* Regan, *supra* note 180, at 1575.

188 *See* MODEL PENAL CODE § 3.02 cmt. 3.

189 *Id.*

190 The contours of the common-law necessity defense were quite narrow. It did not apply to homicide cases unless the killer faced imminent death and it was certain that the non-consenting victim would have died anyway. *See* Regina v. Dudley & Stephens, 14 Q.B. 273 (1884). Moreover, such harm-balancing often seemed to be a matter of numbers: one life could be taken to spare many. *See* WAYNE LAFAVE, PRINCIPLES OF CRIMINAL LAW 396 (2003). Such facts do not exist in the abortion context, unless one considers the social harm inflicted on the pregnant woman's live-born children if she dies in labor or cannot care for them due to the psychological and socioeconomic pressures of pregnancy.

191 *See* WILLIAMS, *supra* note 148, at 161–63, 166.

192 *Rex v. Bourne*, (1939) 1 K.B. 687 (Eng.).

193 *See* WILLIAMS, *supra* note 148, at 163.

194 *See id.* at 162 (quoting Justice Macnaghten's opinion in *Rex v. Bourne*).

A better way to contend that abortion is not murder, with reference to traditional criminal doctrines, looks to self-defense theory.[195] This approach is more convincing for three reasons. First, it applies to acts, as well as omissions. Second, it more clearly legitimizes killing in a one-on-one encounter between human beings than does the choice-of-evils doctrine. Finally, and perhaps most importantly, the self-defense approach describes the threatening, physical intrusion that the pregnant woman experiences.[196] As Eileen McDonagh puts it: "Even if the fetus [is] a person, a woman is justified in killing it because of what it does to her when it imposes wrongful pregnancy, whatever might be her personal reasons for doing so."[197]

A potential objection to this reasoning arises from the difficulty of analogizing a developing human to dominant cultural and legal conceptions of a weapon-wielding, homicidal intruder. The paradigmatic self-defense case involves an innocent person who kills to protect herself against a deadly threat from a willful assailant.[198] However, the criminal law sometimes permits an actor to cause death in self-defense even if the one killed did not intentionally seek to inflict harm.[199] Indeed, dating back to early English law, the use of deadly force against an aggressor has often been described as an excuse-based doctrine; "[i]n many cases...it is hard to argue convincingly that the aggressor is the 'bad' or dangerous person, and the defender is the 'good' or more socially desirable individual."[200] Regan offers a hypothetical in which two survivors of a shipwreck cling to each other in the open ocean. When one of them becomes delirious and starts to drag the other down, "[s]urely the one being clung to may disentangle himself and save himself if he can."[201]

Some anti-abortionists today are willing to accept self-defense rationales for terminating a pregnancy when it is literally necessary to save the mother

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[195] *See* EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 7 (1996).

[196] *See infra* text accompanying notes 210–11.

[197] MCDONAGH, *supra* note 195, at 10.

[198] *See, e.g.*, United States v. Peterson, 483 F.2d 1222, 1223 (D.C. Cir. 1973).

[199] For example, a woman would be acquitted of murder if she shot a very young child who pointed a loaded gun at her, even though the child was too young to form criminal intent. DRESSLER, *supra* note 186, at 197 (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 876 (5th ed. 1989)); *see also* Regan, *supra* note 180, at 1611 ("[I]t seems clear that the privilege of self-defense extends beyond a privilege to resist willful attacks.").

[200] DRESSLER, *supra* note 186, at 209; *see id.* at 208 (noting the long-standing formulation of the doctrine as an excuse).

[201] *See* Regan, *supra* note 180, at 1612.

from death.[202] However, for pro-choice advocates, as well as for many "grays," a scenario in which the pregnant woman will die if she carries the fetus to term does not define the full array of circumstances in which abortion should be legal. Moving beyond a physical threat to life necessitates arguing that the woman's existence would be so severely compromised by an unwanted pregnancy as to legitimate her self-defensive decision to "save" herself.[203] To support such a contention, a more complete legal understanding of the maternal-fetal relationship would be helpful.

### 3. *Understanding the Harms of Compelled Pregnancy*

As the discussion above suggests, abortion is roughly analogous to some forms of life-taking that Anglo-American law deems non-criminal. Yet, the relationship of the pregnant woman to her fetus differs in key respects from any other relationship with which the criminal codes must grapple. This is so because the fetus physically invades and resides inside the mother's body; medieval medical writings referred to it as a "parasite."[204] Its existence thus burdens her in a way that it never burdens a third party. Moreover, its dependence on her is not replicated in its position vis-à-vis anyone else.

Rather than adopting a formalistic approach that tries to force abortion into pre-existing doctrinal categories, it would be wiser to ask the criminal

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[202] The theory of the fetus as an "unjust aggressor" who threatens the pregnant woman seems to appeal to pro-lifers because it allows a narrow therapeutic exception without undermining the basic premise that the law must protect the lives of the unborn. *See* LUKER, *supra* note 4, at 232–33. Unusual scenarios, such as collateral damage to the fetus from cancer radiation, are often mentioned. *See* Callahan, *The Roman Catholic Position*, *supra* note 4, at 68–72 (explaining the Catholic doctrine of "double effect," which allows indirect killing during surgery or therapy performed on the mother). Yet the few life-threatening conditions whose remedies indirectly cause fetal death do not encompass the full spectrum of physical dangers to pregnant women, which range from blood clots to eclampsia. As a general matter, full-term pregnancy and childbirth pose greater risks of death to the mother than does early term abortion. *See* Roe v. Wade, 410 U.S. 113, 149 n.44 (1973).

[203] Abortions for rape victims are perhaps easiest to condone under this reasoning. Although a rape victim may not face a great risk of death if she carries her pregnancy to term, the growth of the fetus in her womb prolongs the violent invasion of the rape, thus exacerbating her physical and psychological injuries. However, this Article does not limit the analysis to pregnancies arising from rape. *See infra* text accompanying notes 211 & 214. (discussing the harms of compelled pregnancy for any woman who does not wish to bear a child).

[204] HULL & HOFFER, *supra* note 4, at 18 (discussing medieval views of abortion); *see also* Ellen Willis, *Abortion: Is a Woman a Person?*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 473 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (describing the fetus as an invader).

law to achieve greater insight into the maternal-fetal relationship. The paradigmatic associations of self-defense doctrine with male-on-male violence—the protection of family and property from an armed intruder, for example—are ill-suited to the task. Nor does the historical legitimization of female violence arising from abuse by men[205] provide an answer, except in cases of rape. Instead, the negative impact of forced pregnancy on women's self-determination over their bodies must be more fully explained to bolster a self-defensive theory of abortion—not merely in narrow therapeutic circumstances, but in a wider variety of cases. The harms that an unwanted pregnancy imposes on women do not evaporate simply because we recognize the human status of the unborn in some legal contexts. The pro-choice camp must assert the debilitating nature of those harms with renewed vigor and clarity so that abortion continues to be legal, regardless of the outcome of the personhood debate.

The burdens of pregnancy can be described as affecting both privacy and equality.[206] Requiring a woman to carry a fetus to term appropriates her body and labor, without consent or compensation, to transform a developing human into a live-born infant.[207] From an equality perspective, her reproductive capacities are used to sustain offspring in a way that men's are not, and this unequal, state-imposed burden is inextricably intertwined with impermissible stereotypes about the maternal role of the female sex.[208] From a privacy perspective, the state denies the woman control over her body in a society that generally places high value on bodily integrity, autonomy, and

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[205] *See* Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 105, 128, 139 (2006).

[206] The Court has neither analyzed abortion regulation under the Equal Protection Clause nor recognized pregnancy-related classifications as being facially sex-based. *See* Geduldig v. Aiello, 417 U.S. 484 (1974). However, it has implicitly acknowledged that the Equal Protection Clause might provide an alternate basis for the abortion right. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for example, Justice O'Connor indicated that abortion restrictions must not be used to consign women to traditional maternal roles. *See Casey*, 505 U.S. 833, 852, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

[207] *See* Siegel, *supra* note 23, at 348.

[208] Luker has demonstrated a strong linkage between anti-abortion beliefs and a traditional worldview that accords women primary responsibility for keeping house, raising children, and caring for the needs of their husbands. Many pro-lifers view motherhood as women's natural destiny, whereas economic independence, attained through employment outside the home is described as selfish. *See* LUKER, *supra* note 4, at 159–63.

self-determination.[209] Both theoretical frameworks have validity, but in the final analysis, a focus on privacy—understood to protect the values listed above—most persuasively supports the distinction between a woman who has an abortion and any third-party attacker, including the biological father.

The appropriation of the woman's body for childbearing has massive physical consequences. A woman may endure side effects including nausea and vomiting, headaches, shortness of breath, fatigue, constipation, gas, weight gain, breast discomfort, nasal congestion, nosebleeds, leg and back aches, insomnia, and irritability during the first trimester of a "healthy" pregnancy alone.[210] Labor pain is severe enough for local anesthesia, which comes with attendant risks, and if the doctor delivers the baby through Caesarean section, the mother must undergo the danger and discomfort of a major operation. No third party has to suffer any of these physical burdens. Nor does any man, including the father, ever endure them. Bearing a child at the behest of the state thus constitutes a form of involuntary, unpaid servitude for women. Andrew Koppelman has even equated it to slavery, and argued that legal precedents justify homicide as a means of escape, where slavery is not authorized by positive law.[211]

Both pro-choice advocates and the Supreme Court extend their arguments beyond the burdens of pregnancy to consider those of childcare as well. The *Roe* Court emphasized the potential physical and psychological harms stemming from the governmental imposition of this duty.[212] According to scholars who locate the abortion right under the Equal Protection Clause, a woman who has an unplanned pregnancy may have to

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[209] *See, e.g., In re* A.C., 573 A.2d 1235, 1243–44, 1251–52 (D.C. Cir. 1990) (holding that a court may not impose a Caesarean section on a terminally ill pregnant woman without obtaining her informed consent or ascertaining her decision through a "substituted judgment" procedure); McFall v. Shimp, 10 Pa. D. & C.3d 90 (Allegheny County Ct. 1978) (refusing to order Shimp to donate bone marrow to save his cousin).

[210] *See* Ann Douglas, *Ready or Not: The First Trimester*, WEBMD.COM, http://www.webmd.com/content/Article/88/99722.htm?pagenumber=1 (last visited Oct. 12, 2006).

[211] Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that the right to an abortion should be grounded in the Thirteenth Amendment). Koppelman cites *United States v. Amistad*, 40 U.S. (15 Pet.) 518 (1841), in which the Supreme Court recognized a right of resistance against unlawful slavery. *See* Koppelman, *supra*, at 511–13. Suggesting a close parallel between unwanted pregnancy and the conditions faced by enslaved African-Americans would be unpersuasive, and even racist. Except in cases of incest or rape, the level of brutality and coercion involved in forced childbearing is not literally equivalent to that suffered by black slaves. Nevertheless, compelled pregnancy can be characterized as a form of exploitation that lasts, depending on how the argument is framed, either nine months or much of a lifetime.

[212] *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

forego educational and employment opportunities—a deprivation that further entrenches her dependence on men and the state.[213] Discriminatory societal norms about good and bad parenting saddle women with greater responsibility for child welfare if they keep their babies and also constrain their freedom to give them up for adoption.[214]

Nevertheless, without considering the threat to bodily autonomy posed by the pregnancy itself, it is difficult to argue that a mother legally can abort her fetus, whereas a biological father who kills it to avoid paternal obligations is guilty of murder.[215] The most persuasive justification for abortion at criminal law thus inheres defending against the physical invasion

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[213] *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017 (1984); MacKinnon, *supra* note 5, at 1318; Siegel, *supra* note 23, at 375–77. Although most proponents of the equality approach shy away from the argument that abortion is justifiable homicide, *see, e.g.*, Law, *supra* at 1021, Cass Sunstein believes that a focus on sex discrimination allows us to acknowledge that "fetuses are in important respects human beings" and that destroying them is "morally problematic." Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1, 32 (1992). In his view, the undesirability of the Hobson's choice between involuntary motherhood and back-alley procedures, which endanger women without fully protecting fetuses, makes abortion permissible. *See id.* at 38.

[214] A potential problem with including forced childcare among the harms of illegal abortion is that it elides the adoption alternative. Making it unlawful for women to terminate their pregnancies does not necessarily mean that they have to raise unwanted offspring. They can give live-born infants up for adoption—an option that the pro-choice literature unduly neglects. However, adoption may provide less of an escape route than first meets the eye. Several commentators underscore the unequal social pressure on a pregnant woman to raise her child; they document the emotional trauma and guilt that she experiences if she chooses to abandon her flesh-and-blood to others' care. *See* DWORKIN, *supra* note 43, at 103–04; Naomi Cahn, *Birthing Relationships*, 17 WIS. WOMEN'S L.J. 163, 163 (2002); Siegel, *supra* note 23, at 371–72. Furthermore, among minorities, the fear that the baby will not be adopted by a permanent home arises from the realities of race-based adoption policies and the preferences of adoptive parents. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 881 (1998); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 936–37 (1994) (citing Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991)).

[215] Men have been convicted under fetal homicide statutes of instrumental killings designed to rid them of the burdens of fatherhood. *See, e.g.*, Bullock v. State, 111 S.W.2d 380, 382 (Ark. 2003) ("Because Bullock did not want to be a father, he hired three other men to beat [his girlfriend] Shiwona [Pace] so as to cause the miscarriage or stillbirth of Heaven Pace, an unborn fetus."); *see also infra* text accompanying note 297 (discussing the *Bullock* case). Outside the criminal context, courts also give the father little or no control over the woman's decision to have an abortion or carry the fetus to term. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 854 n.227 (2005).

of the pregnancy, with its attendant risks, discomforts, and limitations. This is, of course, a situation that the father does not face.

To insure abortion's continued legality (given popular, legislative, and judicial support for the view that a fetus is a human life capable of being wrongfully terminated), pro-choice Americans need to renew their emphasis on the autonomy-denying violation that unwanted pregnancy inflicts and reduce the significance they attach to the fetal personhood issue. Legal abortion protects against nothing less than the requisition of women's bodies to sustain offspring. If we return the spotlight to the infringement of the pregnant woman's bodily autonomy, it becomes possible to argue that abortion should remain legal, regardless of whether the fetus is a person, a human, or simply a blob of cells.

### E. *Maternal Interests Versus Fetal Interests?*

Some pro-choice advocates deny the humanity of the fetus and question the legitimacy of the state's interest in protecting potential life.[216] They object that recognizing the fetus as a human being or a person who can be murdered will be adversarial to women's interests.[217] In their view, autonomy appears threatening to the feminist agenda when it is applied to the unborn because it severs the intimate maternal-fetal connection, thus jeopardizing the woman's sovereignty over an entity that depends on and exists inside her.[218]

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[216] LUKER, *supra* note 4, at 184 (describing the arguments of pro-choice activists); Schroedel, Fiber, & Snyder, *supra* note 18, at 104 (describing the most extreme pro-choice position); *see also* Siegel, *supra* note 23, at 348 (criticizing the *Roe* Court's unexamined assumption that the state has an interest in protecting potential life).

[217] *See, e.g.*, Brown, *supra* note 17, at 92 ("Feminist theorists must take notice of this trend, as there is no way to equalize the rights of the fetus and the woman without undermining the liberty interests *Roe* granted women."); Bruchs, *supra* note 17, at 136 ("[T]he interests sought to be protected under 'Laci and Conner's Law' and those sought to be protected under abortion law are in conflict with one another, and . . . the two laws cannot possibly co-exist indefinitely without one acting as a detriment to the other."). *Cf.* Julia Epstein, *The Pregnant Imagination, Fetal Rights and Women's Bodies: A Historical Inquiry*, 7 YALE J.L. & HUMAN. 139, 160–61 (1995) (arguing that recognizing fetal rights as distinct from maternal rights violates pregnant women's bodily integrity).

[218] *See* MacKinnon, *supra* note 5, at 1314–15 (contending that fetal rights exist in "direct tension with sex equality rights" and that severing the connection between mother and fetus will strip the pregnant woman of decision-making power); *see also* Schroedel, Fiber, & Snyder, *supra* note 18, at 92 (stating that many feminists view the fetal rights movement as a "smokescreen for hiding broader political attacks aimed at undermining women's exercise of full citizenship").

Feminists also have been reluctant to theorize pregnancy in terms of the "connection thesis."[219] This strand of theory established by relational feminists, such as Robin West, associates women with care-giving in personal relationships.[220] The idea of connection has some power to aid our understanding of pregnancy violence. However, in the final analysis, relational feminism inadvertently may strengthen the anti-abortionists' position.

To its credit, the connection thesis helps explain an expectant mother's unique and growing bond with the unborn life in her body (and hence her injury if a violent attack causes her to miscarry). Tuerkheimer refers to a "woman's stake in her pregnancy."[221] Presenting a more complex and textured view of this relationship than West does, Tuerkheimer develops an integrated theory of the pregnant woman's multiplicitous self, which has interests in both autonomy and connection, to argue for special laws that criminalize pregnancy violence without establishing the fetus as a separate person under law.[222]

Relational feminism makes other contributions to the debate as well. Underscoring the pregnant woman's physical and emotional ties to the fetus, it helps distinguish her from a third-party attacker, who does not have the same bond. A focus on the connectedness of women's experiences also suggests a contrast between murder and the "morally responsible decision" to get an abortion so that "new life will be borne only if it will be nurtured and

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[219] Tuerkheimer notes that feminist theorists, as well as criminal law scholars, are reluctant to explore the maternal-fetal relationship, perhaps due to "the centrality of the abortion debate to the feminist agenda." Tuerkheimer, *supra* note 16, at 705 n.200.

[220] The "connection thesis" is associated with a school of thought known by the basically interchangeable labels "relational feminism," "cultural feminism," and "difference theory." Exemplifying this theoretical orientation, Robin West writes:

> Because women are fundamentally connected to other human life, women value and enjoy intimacy with others (just as because men are fundamentally separate from other human life men value and enjoy autonomy). Because women are connected with the rest of human life, intimacy with the "other" comes naturally. Caring, nurturance, and an ethic of love and responsibility for life is second nature.

Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 18 (1988). Elsewhere, she describes the "shared physical identity between woman and fetus" as a "counter-autonomous experience." Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 140 (1987). *See generally*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY IN WOMEN'S DEVELOPMENT (1982) (presenting the famous hypothetical of Jake and Amy to show that, while boys argue in terms of formal rights, girls are concerned with personal relationships).

[221] Tuerkheimer, *supra* note 16, at 706.

[222] *See id.* at 706–07.

loved."[223] Finally, relational feminism emphasizes that obligations to live-born children, spouses, and employers may outweigh competing duties to the unborn.[224] In short, it speaks in terms of responsibilities, rather than offering atomistic rights talk that might be construed as selfish.

Ultimately, however, the "connection thesis" does little to further sound policy in the reproductive context. The ethic of care can be faulted for promoting a view of women as maternal, self-denying, and responsible for the well being of others.[225] It inadvertently may bolster the social message that batterers, through their violence, seek to enforce—that the female partner is to blame for family troubles.[226] Hence, relational feminism risks opening the floodgates of maternal liability for fetal harm.[227]

Moreover, despite its aspiration to strengthen reproductive freedom by removing the stigma of irresponsibility from the decision to terminate a pregnancy,[228] relational feminism actually makes the defense of abortion more difficult.[229] The essentialist view that women give and preserve other human life, whereas men are less connected to it,[230] could easily be co-opted by anti-abortion groups. Misplaced emphasis on women's selfless nature conflicts, for example, with their basic rights to privacy and self-defense:

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[223] Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 83 (1990).

[224] *See id.* at 84–85.

[225] Relational feminists describe women's responsibility for feeding, protecting, and teaching young children as a "pre-legal" and "pre-patriarchal" condition. *See* West, *Jurisprudence and Gender*, *supra* note 220, at 25 (describing the views of Marilyn French). For those who see women's care-giving role as being socially constructed, however, the "connection thesis" threatens to facilitate the continued subordination of the female sex. *See, e.g.*, Karlan & Ortiz, *supra* note 106, at 895 (asking whether relational feminism resonates because "it reflects women's authentic nature or because it reflects the domesticated nature men have led women to adopt"); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED 32, 39 (1987) ("Women value care because men have valued us according to the care we give them . . . . Women think in relational terms because our existence is defined in relation to men.").

[226] *See* Fischer, Vidmar, & Ellis, *supra* note 121, at 2129–30. In the context of domestic violence, it may be especially dangerous for women to give up on autonomy and rights talk, due to the critical need to help victims of battering separate from their abusers.

[227] *See supra* text accompanying notes 63–65, 69 (discussing courts' reason for overturning the convictions of pregnant drug users).

[228] *See* West, *Taking Freedom Seriously*, *supra* note 223, at 84.

[229] *See generally*, Karlan & Ortiz, *supra* note 106; McClain, *supra* note 105, at 165–66.

[230] *See, e.g.*, West, *Jurisprudence and Gender*, *supra* note 220, at 14–16, 24.

> When a man's home, family, much less his body is intruded upon, our laws and our culture do not expect his response to be self-sacrifice . . . . The opposite is true for women, however, who are most often associated in our culture and our laws with self-sacrifice and giving norms rather than self-defense norms.[231]

Another way of looking at the problem—the one advocated by this Article—suggests that the mother's rights and the protection of fetal life may be aligned in some contexts, even if they are adversarial in others. The abortion right established in *Roe* and its progeny arises from a bifurcated understanding of mother and fetus.[232] It is hard to see how it could be otherwise, since the abortion procedure physically removes the fetus from the womb to prevent it from using the woman's body as a resource. But this does not mean that conceptualizing the fetus as, in some respects, distinct from the mother creates inherently oppositional interests. If a pregnant woman wants to have a child, a statute that criminalizes fetal homicide by a third party vindicates her decision, as well as punishing the wrongful killing of a nascent human. Fetal homicide statutes have the potential to support a right to choose—the right to carry a fetus to term without violent interference—that should not be viewed as antithetical to feminist goals.

## IV. FAIRNESS TO FETAL MURDER DEFENDANTS

Pro-choice advocates who vehemently oppose any hint of fetal rights miss an opportunity for dialogue with the "abortion grays" about protecting women's choices and, in particular, about the unique, sex-specific burdens that pregnant women face. Meanwhile, a myopic focus on the "personhood" issue obscures flaws in the fetal homicide statutes that signal deeper threats

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[231] McDonagh, *supra* note 195, at 19. McDonagh is also tempted by relational approaches. *See id.* at 186–90. As she puts it: "We can value care, but not *coerced* care." *Id.* at 187 (emphasis added). Unfortunately, this distinction may be difficult to enforce. Framing arguments for legal abortion in the essentialist idiom that relational feminists such as Robin West favor exacerbates the risk that the law will be used to make "deviant" or "selfish" women conform to their "natural" roles. For this reason, in my view, it is unwise to jettison autonomy principles.

[232] For a discussion of how the Court has viewed the fetus as distinct from the pregnant woman, see *supra* text accompanying notes 135–37. The undue burden standard established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), explicitly requires the balancing of competing interests. According to the *Casey* joint opinion: "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue." *Id.* at 876. The *Roe* Court itself warned: "The privacy right involved . . . cannot be said to be absolute." Roe v. Wade, 410 U.S. 113, 154 (1973).

to criminal justice and women's interests. This Article advocates restructuring the debate to gauge the fairness and utility of the statutes in targeting pregnancy violence, independent of their position on fetal personhood. It concludes that, under such an analysis, many of the laws currently suffer from serious defects.

Feminists may find fault with the stereotypical assumptions about women that are embodied in fetal homicide legislation.[233] But they also ought to be concerned that the statutes often do not provide adequate protection for defendants' rights. This latter type of critique is more often associated with liberals and civil libertarians who do not necessarily pursue feminist goals. Yet, in the final analysis, the campaign against intimate violence, including violence against pregnant women, will be stronger and more compelling if it also strives to uphold the substantive and procedural rights of the (predominantly male) defendants accused of such crimes.[234]

### A. *The Unfulfilled Goals of Deterrence and Retribution*

Many of the fetal homicide laws, as drafted, are ineffective and unjust tools for combatting pregnancy violence. First, analysis of state criminal codes reveals a bias toward punishing homicide, rather than preventing nonlethal attacks on pregnant women from occurring and escalating. While at least thirty-three states have some kind of statutory or judge-made fetal homicide law, only fourteen states provide for the prosecution of fetal assault, and twenty states allow offenders to be charged with a crime such as battery of a pregnant woman.[235] The remaining criminal codes thus participate in a long historical tradition of imposing harsh punishments for

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[233] *See infra* text accompanying notes 286–87.

[234] A student writer complains, for example:

> The need for critical examination of the legislative and judicial responses to domestic violence and their effect on defendants' rights is acute. Indeed, while the volume of literature concerned with documenting the enormity of the problem and suggesting an assortment of curative measures has markedly increased in the past decade, academic analysis of the impact these measures have on the domestic violent defendant is virtually nonexistent. What commentary has emerged has been mostly the work of students.

Comment, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 920 (1996). A similar need for balance exists in the context of rape law reform. *See, e.g.*, Angela P. Harris, *Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective*, *in* DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW 51, 60–61 (Leslie Francis, ed., 1996) (questioning how a reformed rape standard can be fair to male defendants if it only embodies a woman's conception of reasonableness).

[235] Database maintained by the author.

murder without deterring intimate-partner abuse before it escalates to that level.[236]

Second, the statutes may actually exacerbate the problem of underreporting. Some women who miscarry after an episode of intimate violence will not report the death of their fetuses due to fear that their abusers will be prosecuted for murder. This fear may stem from a desire to protect the abuser,[237] as well as from economic dependence upon him.[238] A battered woman may also worry about violent reprisals if the abuser is released.[239] However, any type of prosecutorial approach to domestic violence could backfire because the victim perceives disincentives to going to the police; this dilemma is not unique to the fetal homicide schemes discussed in this Article. Indeed, it is unclear that criminalizing "pregnancy battering" or using sentence enhancements in lieu of fetal homicide laws[240] would appreciably lessen the problem of underreporting. Punitive approaches to pregnancy violence cannot stand by themselves. Rather, they must be paired

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[236] *See* Ramsey, *Intimate Homicide, supra* note 205, at 165.

[237] Some victims of intimate violence continue to feel love for their batterers. *See* Deborah Epstein, Margret E. Bell, & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 479 (2003); *see also* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 22 ("A victim may say she still loves the perpetrator, although she definitely wants the violence to stop.").

[238] *See* Buel, *supra* note 237, at 20; Epstein, Bell, & Goodman, *supra* note 237, at 477. *Cf.* Ramsey, *Intimate Homicide*, *supra* note 205, at 171 (stating that, in the late nineteenth and early twentieth centuries, women were reluctant to report intimate abuse because they feared that their families would experience terrible economic hardship if their husbands were imprisoned for assault or attempted murder).

[239] *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1868 (2002); *see also* Epstein, Bell, & Goodman, *supra* note 237, at 476 (noting that victims in one study said "fear of the batterer" was "the number one reason they were unwilling to cooperate with the government"). A recent sociological study shows that one in five women whose intimate partners were arrested for a domestic violence-related crime experienced another attack by the assailant after arrest but before the case closed. *See* Ruth E. Fleury-Steiner, Deborah I. Bybee, Cris M. Sullivan, Joanne Belknap, & Heather C. Melton, *Contextual Factors Impacting Battered Women's Intentions to Re-Use the Criminal Legal System*, 34 J. OF COMM. PSYCHOL. 327 (2006). The women told interviewers that, as a result of this retaliatory violence, they would be less likely to involve the criminal justice system if the abuse continued. *See id.* Furthermore, as many as a third of the interviewees said that they had been assaulted by their assailants six months to one year after their cases closed. *See id.*

[240] *See supra* text accompanying note 129 (discussing the proposals of Tuerkheimer and others); *supra* note 130 (discussing federal sentencing enhancement provisions that existed prior to the UVVA).

with a web of preventive services that include fully funded battered women's shelters, legal and non-legal advocacy services, mental health support, job training, and education, as well as the enforcement of protection orders.[241]

The dubious deterrent value of the fetal homicide statutes in the absence of a broader safety net for battered women is all the more remarkable considering that many of the statutes cannot be defended on retributive grounds. The most famous fetal homicide case—that of Scott Peterson—was rather atypical. The Peterson case involved a defendant who clearly knew that his wife was eight months pregnant when he killed her.[242] Indeed, it is commonly believed that Peterson committed the instrumental murder of his wife, Laci, and their unborn son, Conner, so that he could romance his mistress, Amber Frey.[243] The facts of this case thus fit the cultural assumption that fetal homicide statutes target abusive men who fail to protect their wives and children. Peterson was depicted as a moral monster that knowingly killed his own offspring. One of the jurors who found him guilty of two counts of murder stated: "Scott Peterson was Laci's husband, Conner's daddy—the one person who should have protected them . . . . For me a big part of it was at the end—the verdict—no emotion. No anything. That spoke a thousand words—loud and clear." [244]

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[241] *See* Epstein, Bell, & Goodman, *supra* note 237, at 486–92; Epstein, *supra* note 239, at 1890–92; Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 514 (2003).

[242] The House Report on the UVVA ("Laci and Conner's Law") reports that Scott Peterson and his wife "had learned that they were having a boy and had named their son Conner." H.R. REP. NO. 108-420, pt. 1, at 8 (2004).

[243] *See* Dean E. Murphy, *Jury Says Scott Peterson Deserves to Die for Murder*, N. Y. TIMES, Dec. 14, 2004, at A20 (reporting that evidence about defendant's affair with another woman "in the weeks leading up to Laci Peterson's disappearance" not only turned his hometown against him, but also constituted "a big piece of the puzzle" at trial). A letter to *USA Today* accused Peterson of killing his wife and unborn child because "he was selfish and was always looking for greener pastures." Letter to the Editor, *Jurors Do 'The Right Thing' in Urging Death for Scott Peterson,* USA TODAY, Dec. 17, 2004, at 14A, *available at* 2004 WLNR 14277048.

[244] *What Makes the Death Penalty OK?*, GREEN BAY PRESS-GAZETTE, Dec. 15, 2004, at 6A; *see also* Mark Sappenfield, *Growing Role of Emotion in Jury Verdicts*, CHRISTIAN SCI. MONITOR, Dec. 15, 2004, at 2, *available at* 2004 WLNR 14015441 ("[T]ime and again, several [jurors] have returned to one crucial point: Throughout the trial, Peterson never showed the slightest hint of grief, remorse, or sadness."). Despite the jury's belief that he richly deserved capital punishment, Peterson will be an anomaly on death row, which is mostly populated by cop killers, serial killers, and those convicted of committing murders during other violent crimes. *See* Ramsey, *Intimate Homicide*, *supra* note 205, at 143 & n.220 (citing Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the post*-Furman *Era*, 49 SMU L. REV.

However, many fetal homicide statutes go beyond the paradigm of a man who attacks his wife or girlfriend with full knowledge that she is carrying a fetus. During jury selection in the Peterson case, for example, the California Supreme Court held, in *People v. Taylor*, that a defendant could be convicted of second-degree murder for killing a fetus without evidence that he knew the woman he assaulted was pregnant.[245] The legal doctrine at issue in *Taylor* was implied malice.[246] But transferred intent and the felony murder rule also allow fetal murder convictions. Ironically, the medical visibility of the fetus via ultrasound and other technologies of prenatal care[247] encroaches the rights of a class of individuals to whom the unborn may be totally invisible—third-party attackers. An offender who assaults a pregnant woman, or even commits a felony in her vicinity, runs the risk that, unbeknownst to him, she is in the early stages of pregnancy. If the death of her fetus results, the state is relieved of the burden of showing that he intended to kill it or even that he was particularly indifferent to the value of its life.

Paired with capital aggravators, such as the "multiple murders" provision on the books in California and twelve other states that criminalize fetal homicide,[248] the implied malice, transferred intent, and felony murder doctrines allow an individual to suffer the death penalty for killing a fetus that he had no reason to know existed. In other circumstances, the state may imprison him for life.[249] Such severe outcomes, without proof of a

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1507, 1517 tbl.2 (1996)). Yet, interestingly, the outcome of his case harmonizes with an older tradition, dating back to the nineteenth century, of executing men for domestic murders. *See id.* at 101–03, 141, 144–56, 158 tbl.4, & apps. C & D (presenting research on the severe treatment, including capital punishment, of men who killed their intimates in the late nineteenth and early twentieth centuries); *see also* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1366–83 (2002) (suggesting that prosecutors and juries in late nineteenth century New York were less reluctant to seek the death penalty for men who killed their female intimates than for other types of murder defendants).

[245] *See* People v. Taylor, 86 P.3d 881, 882 (Cal. 2004); *see also* Bob Egelko, *Broad Ruling on Murder of Fetus: Charge Can Apply Before Pregnancy Visible, Court Finds*, S.F. CHRON., Apr. 6, 2004, at B3, *available at* 2004 WLNR 7652297 (noting that this ruling was issued during jury selection in the Peterson case).

[246] *See Taylor*, 86 P.3d at 883.

[247] *See supra* text accompanying notes 138–42.

[248] CAL. PENAL CODE § 190.2(a)(3) (2006). Data on the twelve other states with multiple murders provisions is available in a database maintained by the author.

[249] For example, in *People v. Davis*, 872 P.2d 591, 593 (Cal. 1994), the defendant was sentenced to life imprisonment without the possibility of parole after being found guilty of murdering a fetus in the course of a felony, assault with a firearm, and robbery, with the special circumstance that he personally used a firearm during the commission of each offense. He received an additional five years in prison for use of the firearm. *See id.*

sufficiently culpable mental state, offend both due process and proportionality. As a general matter, due process requires that the prosecutor prove mens rea for each material element of a serious, non-regulatory crime and that no material element can be irrebuttably presumed.[250] Proportionality—an essentially retributive principle that has been undercut from a variety of angles, including habitual offender laws[251]—demands that the punishment not exceed the gravity of the offense. As explained below, current approaches to fetal murder often violate both principles.[252]

## B. *The Offender's Lack of Awareness of the Pregnancy*

### 1. *Implied Malice*

In 1999, Harold Wayne Taylor fatally shot his former girlfriend, Patty Fansler. Although Fansler was at least eleven weeks pregnant when he killed her, Taylor was unaware of this fact. Not only did the defendant lack subjective awareness of the existence of fetal life;[253] the examining pathologist also reported that he "could not discern that Fansler, who weighed approximately 200 pounds, was pregnant just by observing her on the examination table."[254] In other words, a reasonable person would not have appreciated the risk that Fansler carried a fetus in her womb.

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250 *See* Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 460–63 (1985) (challenging the felony murder rule on such grounds).

251 *See* David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 562–67 (2000) (summarizing the trend in Supreme Court cases away from invalidating habitual offender statutes on proportionality grounds). Justice Scalia has gone as far as suggesting that the Eighth Amendment does not necessarily protect a right to proportional sentencing. *See* Harmelin v. Michigan, 501 U.S. 957, 985 (1991). However, this view is not widely shared. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 679 n.16 (2005) (noting that Scalia and Thomas were the only Justices on the Rehnquist Court to question the existence of a proportionality guarantee).

252 The imposition of vehicular manslaughter liability for individuals who cause the death of a fetus during auto accidents raises a slightly different set of concerns, which this article will not discuss.

253 Reversing Taylor's conviction, the California Court of Appeals noted, "There is not an iota of evidence that [defendant] knew his conduct endangered fetal life." People v. Taylor, 86 P.3d 881, 883 (Cal. 2004) (quoting the California Court of Appeals). Although the California Supreme Court reversed this judgment, it did not disturb the basic finding that Taylor lacked knowledge of Fansler's pregnancy.

254 *Id.*

Nevertheless, the California Supreme Court held that, to obtain a second-degree murder conviction under an implied malice theory, the prosecution only had to show that the defendant engaged in inherently dangerous conduct and that he did so with conscious disregard for life. The latter element—the mental component—did not need to be demonstrated with regard to a specific victim.[255] The prosecution was simply required to prove that Taylor "acted with knowledge of the danger to and conscious disregard for life in general."[256] The court accepted the Attorney General's hypothetical example of a gunman who "walked down the hall of an apartment building and fired through the closed doors"; the gunman "would be liable for the murder of all victims struck by his bullets . . . ."[257] Anyone in that building, or at least in all apartments along that hall, would be in the zone of harm, whether the gunman specifically knew of her presence or not.

The zone-of-harm theory does not apply as readily to pregnancy violence as the *Taylor* court believed, however. A defendant is said to have implied malice toward all persons in the vicinity of his primary victim; classic examples include using a bomb or a hail of bullets to kill a single person.[258] Under a similar formulation, depraved heart murder, the defendant is deemed indifferent to the value of human life when he engages in extremely dangerous conduct,[259] such as firing his gun into a crowd or throwing rocks from an overpass onto the busy highway below. Despite the *Taylor* court's reasoning, these scenarios differ in important respects from a killer's attitude toward a fetus whose presence is unknown to him.

In each scenario other than the fetal killing, the offender knows that he potentially is using a deadly weapon on a multiplicity of people. When the gunman fires indiscriminately through closed apartment doors, in the hypothetical raised during the *Taylor* oral arguments, he knows that each apartment might contain one or more occupants. Thus, even though he does not select a specific victim, he knows that he may be placing many lives at risk. According to Wayne LaFave, "[i]t is what the defendant should realize to be the degree of risk, *in light of the surrounding circumstances which he knows*, which is important, rather than the amount of risk as an abstract proposition of the mathematics of chance."[260] By contrast, under the actual facts of *Taylor*, the only person of whom the defendant reasonably was aware

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[255] *See id.* at 884–85.

[256] *Id.* at 884.

[257] *Id.*

[258] *See id.* at 889 (Kennard, J., dissenting) (citing People v. Bland, 48 P.3d 1107 (Cal. 2002); *see also* Ford v. State, 625 A.2d 984, 1000 (Md. 1993).

[259] *Cf.* LAFAVE, *supra* note 190, at 572 (discussing depraved heart murder and providing examples).

[260] *See id.* at 571 (emphasis added).

was his former girlfriend, Patty Fansler. Unless we assume that any woman's body, like any apartment, may be occupied by one or more individuals besides herself, Taylor did not display a conscious disregard of life in general.[261] States that apply the implied malice or depraved heart formulation to accidental feticides authorize this unjust result.

### 2. *Transferred Intent*

In many states, fetal murder liability is premised on the legal fiction that the defendant's intent to kill transfers from the mother to the fetus. The typical fact pattern to which the transferred intent doctrine applies goes like this: *A* intends to kill *B*. *A* shoots at *B*, but due to his poor aim, the bullet hits and instead kills *C*, a visible bystander. *A* is found guilty of *C*'s murder because *A*'s intent transfers from *B* to *C*. [262] Although a few theorists reject the doctrine of transferred intent,[263] its paradigmatic application enjoys widespread acceptance under Anglo-American law.[264] However, fetal murder statutes that rely on transferred intent present nonstandard examples in which punishing the defendant for murder seems unjust, or at least dubious.

For instance, suppose that the defendant intends to kill a woman who is not visibly pregnant, and he has no other knowledge of the fetus's existence. If he fails to kill his intended target, but attacks her with such violence that she miscarries or gives birth to a stillborn infant, imposing murder liability for the inadvertent killing may violate ordinary notions of justice. Some commentators have rejected the use of transferred intent in such a scenario, where the offender did not even display negligence toward the actual victim.[265] Others, like Douglas Husak, admit that the invisibility of the victim makes for a hard case,[266] but conclude that because the defendant

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[261] *See Taylor*, 86 P.3d at 889–90 (Kennard, J., dissenting).

[262] *See* Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 65 (1996).

[263] *See id.* at 69–71 (describing the views of "purists" who believe that *A* should be convicted of the lesser offenses of manslaughter and attempted murder for killing *C* and attempting to kill *B*). Others would convict *A* of murdering *C* on the ground that murder does not require the intent to kill a specific human being. *See* DRESSLER, *supra* note 186, at 109.

[264] *See id.* at 107.

[265] *See* Husak, *supra* note 262, at 81 (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 133 (2d ed. 1961)).

[266] *See id.*

intended to kill *someone*, he and an intentional murderer are equally culpable.[267]

The use of the transferred intent doctrine seems even more troubling when the defendant kills the pregnant woman, as intended, in addition to unintentionally killing the unborn. In a well-known fetal homicide case, Sean Patrick Merrill allegedly shot Gail Anderson with intent to kill her.[268] Although Anderson was pregnant with a twenty-seven- or twenty-eight-day-old embryo of approximately four to five millimeters in length, the record did not show that either Anderson or Merrill was aware of this fact at the time of the assault.[269] Nevertheless, the Minnesota Supreme Court concluded that Merrill's intent to kill Anderson was transferable to the non-viable embryo and thus that he could be charged with two murders. The fetal homicide statute in question provided fair warning, according to the court, because "[t]he possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude."[270]

In a similar case, Willis Bailey pled guilty to two counts of first-degree murder for fatally stabbing his girlfriend and also causing the death of her three-month-old fetus.[271] Unlike Merrill, Bailey was aware of his adult victim's pregnancy; however, the prosecution presented no evidence that he deliberately killed her fetus.[272] Punishing a defendant like Bailey for a double first-degree murder violates the principle of proportionate sentencing because he is less culpable than a killer who consciously desired to cause two deaths.[273] Greater injustice results in a case like *Merrill* where the defendant does not know about the pregnancy of a woman he fatally assaults. Nevertheless, the outcome of the *Bailey* case also pushed the boundaries of the transferred intent doctrine by conflating awareness of fetal life with intent to destroy it.

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[267] *See id.* at 94–95.

[268] State v. Merrill, 450 N.W.2d 318, 323 (Minn. 1990).

[269] *See id.* at 320.

[270] *Id.* at 323.

[271] *See* Bailey v. State, 191 S.W.3d 52, 53 (Mo. Ct. App. 2005).

[272] *See id* at 54.

[273] *See* Husak, *supra* note 262, at 94; *see also* People v. Birreuta, 208 Cal. Rptr. 635, 639 (Cal. Ct. App. 1984) (reversing murder conviction of defendant for inadvertently killing his wife immediately after he intentionally shot his neighbor to death), *abrogated by* People v. Bland, 48 P.3d 1107, 1115 (Cal. 2002). The proportionality principle explains the injustice of imposing murder liability for both the intentional and inadvertent killings in a less artificial way than does the argument that killing the primary target exhausts the defendant's intent. *But see* DRESSLER, *supra* note 186, at 108 (arguing that the intent is "used up" by the first killing).

### 3. *The Felony Murder Rule*

At least seventeen states make a defendant guilty of murder if he causes the death of a fetus during the commission of or flight from an inherently dangerous felony. In a few jurisdictions, such as South Dakota and Ohio, killing the unborn must be the knowing[274] or purposeful[275] result of the defendant's conduct. But in others, like California, the prosecutor "may obtain a fetal murder conviction . . . without proving malice" or even conscious risk-taking towards an invisible, pre-viable entity that is no bigger than a peanut.[276]

The arguments for and against the felony murder doctrine are well-known.[277] Detractors contend that the state cannot deter unintended acts by punishing them as murder and that, to devise an appropriately retributive sentence, the culpability for the killing must be analyzed separately from the culpability for the predicate felony.[278] This Article does not seek to enter the larger debate about felony murder, for indeed, there is little new ground to cover. However, it does suggest that the application of this doctrine to the killing of pre-viable fetuses will have irrational and unjust results.

In *People v. Davis*, an armed robber was convicted of murdering his pregnant victim's fetus[279] even though the jury found that he could not reasonably have known that the twenty-three or twenty-five-week-old fetus existed.[280] This was because the pregnant woman in this case, as in *Taylor*, was heavy-set.[281] Moreover, the California Supreme Court held in *Davis* that the murder statute applied to any unborn, human offspring at least seven or eight weeks after fertilization, regardless of viability.[282] At least thirteen

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[274] South Dakota makes it a crime, defined as "fetal homicide," for a person to cause the death of a fetus "if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant." S.D. CODIFIED LAWS § 22-16-1.1 (Supp. 2006).

[275] OHIO REV. CODE ANN. § 2903.01(b) (West Supp. 2006); S.D. CODIFIED LAWS § 22-16-1.1 (Supp. 2006).

[276] People v. Davis, 872 P.2d 591, 616 (Cal. 1994) (Mosk, J., dissenting).

[277] *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60 n.1 (2004) (collecting scholarly critiques); *see also id.* at 208 (arguing that "we have inherited from our nineteenth-century forebears a defensible tradition of aggravating liability for culpable homicides committed in the pursuit of depraved motives").

[278] *See, e.g.*, Roth & Sundby, *supra* note 250, at 451, 454–59.

[279] *See Davis*, 872 P.2d at 593.

[280] *See id.* at 616 (Mosk, J., dissenting).

[281] *See id.* at 615 (Mosk J., dissenting).

[282] *See id.* at 600 n.2.

states that allow fetal murder convictions under a felony murder theory do so before the fetus has a chance of living outside the womb.[283]

The lengths to which prosecutors might push such laws are troubling. Although the *Davis* opinion did not discuss the applicability of the felony murder rule when "the death of the fetus is caused by some agency other than a defendant's direct assault on the mother,"[284] the outcome would be the same. If a female robbery victim whose early pregnancy was not evident died of a heart attack precipitated by the terror of being robbed at gunpoint[285] and lost her fetus, as well as her own life, the robber could be convicted of two first-degree murders. This would be true simply because he used the gun as a threat, regardless of whether he intended to fire it at anyone.

When applied to fetal homicide, the implied malice and transferred intent doctrines at least have the virtue of targeting deaths that arise from extreme violence. By contrast, the generalized risk of death posed by the defendant's conduct may be much less in the context of felony murder. Hence, the application of the felony murder rule to fetal homicide cases has the potential to result in severe punishments for accidental killings that bear no relation to the goal of punishing pregnancy violence.

Laws that do not require that the defendant was subjectively aware of the pregnancy stretch to the breaking point general principles making intent, or at least extreme risk-taking, a material element of murder. They also stereotype women in an unacceptable way. The cases discussed above announce that an individual who engages in dangerous behavior runs the risk that any woman he victimizes may be pregnant. On its face, this announcement may seem to make society safer by providing an additional deterrent to the felon's harmful behavior. But on closer scrutiny, it reduces women to a common denominator—their presumed ability to bear children. Thus, in an insidious way, a substantial number of fetal homicide laws participate in the social construction of what it means to be female—linking the sex of the only visible victim to her supposed biological destiny, without taking into account her fertility or the social choices she has made.

Legislative history clearly demonstrates that some lawmakers behind fetal homicide legislation hold this stereotypical view of women. For example, in the debate over the passage of Kentucky's fetal homicide laws, one state senator rationalized the application of the transferred intent doctrine to the killing of a pre-viable fetus by arguing that an offender "must presume

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[283] Database maintained by the author.

[284] *Davis*, 872 P.2d at 600 n.2.

[285] *See* People v. Stamp, 82 Cal. Rptr. 598 (Cal. Ct. App. 1969) (upholding felony murder conviction for the death of an obese man with a history of heart disease, who died of cardiac arrest during an armed robbery).

the fertile octogenarian rule."[286] According to Senator Williams, one should not inflict violence on women "because they might be pregnant."[287] This statement ties the value of women's lives, and the right not to suffer pain, to child-bearing and, correspondingly, punishes assailants for failing to make a stereotypical assumption about their victims' maternal roles.

## C. *Re-Discovering Knowledge and Causation*

### 1. *Knowledge of Pregnancy*

Prosecution under fetal homicide laws does not always strain basic principles of criminal justice. Indeed, such statutes have been used in an appropriate manner to charge defendants who intentionally attacked a woman they knew to be pregnant. For example, Barry Holcomb threw his girlfriend, Laura Vaughn, against a fireplace, threatening to kill both her and her fetus.[288] Tragically, Vaughn continued to associate with Holcomb, who finally murdered her when the fetus had reached the gestational age of twenty-six to twenty-eight weeks.[289] The State's evidence indicated that Holcomb premeditated the killings and that he felt no remorse.[290] He was convicted of two counts of first-degree murder.[291] Similarly, the defendant in *State v. MacGuire* "learned, several days prior to the murder, that [his ex-wife] Ms. MacGuire was engaged and expecting a baby."[292] After confirming this information with a phone call to his former father-in-law, he walked into his ex-wife's workplace and shot her four times, killing both her and her fetus.[293] Finally, in the gruesome California case that prompted the amendment of the California Penal Code section 187 to include fetal victims, Robert Keeler accosted his estranged wife on a rural road, verified that she was pregnant, and then carried out his threat to "stomp" the fetus out of her belly.[294] Keeler's ex-wife subsequently delivered a stillborn baby.[295]

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[286] Video: *Kentucky General Assembly Live, Hearing on H.B. 108 Before the Judiciary Committee,* 2004 Leg., 2004 Regular Session (Ky. 2004), *available at* http://www.ket.org/legislature/archives.php?session=wgaos+005 (select Feb. 12 Senate Judiciary hyperlink) (statement of Sen. Williams).

[287] *Id.*

[288] State v. Holcomb, 956 S.W.2d 286, 288 (Mo. Ct. App. 1997).

[289] *Id.*

[290] *Id.*

[291] *Id.* at 289.

[292] State v. MacGuire, 84 P.3d 1171, 1173 (Utah 2004).

[293] *See id.*

[294] *See* Keeler v. Superior Court, 470 P.2d 617, 618 (Cal. 1970).

Although battered women's advocates often emphasize that pregnancy violence is intended to "cause physical and emotional injury to the woman and establish undeniably . . . [the batterer's] power to control her,"[296] some men do exhibit express malice toward the fetal victim. One goal in such cases seems to be the elimination of a future child. In Arkansas, Erik James Bullock hired three men to beat his girlfriend so severely that she miscarried her nine-month-old fetus; the court found that he did not want to shoulder the obligations of paternity.[297] A California man killed his best friend's pregnant wife to rid the friend "of the encumbrance of a wife *and* a child so . . . [h]e could pursue a ministerial career."[298] These killings appear to have been instrumental, rather than expressive of a desire to inflict pain on the pregnant woman.

This Article contends that intent to kill a fetus or at least knowledge of its existence, accompanied by extremely reckless behavior, ought to be requisite to fetal murder liability. States can easily satisfy fairness and proportionality concerns by including knowledge of pregnancy as a material element of their murder statutes, as Illinois has done.[299] This Article has also indicated some discomfort with the basic concept of felony murder. Yet, despite the oft-described flaws of the felony murder doctrine, no additional injustice occurs when it is applied to an individual who perpetrates a dangerous felony with subjective awareness that a pregnant woman is in the zone of harm. The *Davis* dissenting opinion correctly distinguished that case from *People v. Henderson*,[300] in which the defendant "must have been well aware" that his female victim, with whom he had resided for six weeks, was carrying a late-term fetus when he robbed and strangled her.[301] Viewed in this light, the four states that allow a defendant to be convicted of felony murder only if the fetus was viable at the time of the offense erect fewer impediments to fair process because, after viability, the attacker is more likely to be aware of the pregnancy.[302]

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[295] *See id.* Because the legislature had not made clear that the state homicide statute applied to the unborn, Keeler could not be convicted of murder. *See id.*

[296] *See* Hearing on H.R. 1997, *supra* note 17.

[297] *See* Bullock v. State, 111 S.W.3d 380, 382 (Ark. 2003).

[298] People v. Smith, 234 Cal. Rptr. 142, 152 (Cal. Ct. App. 1987).

[299] *See* 720 ILL. COMP. STAT. 5/9-1.2(a)(3) (2005).

[300] 275 Cal. Rptr. 837 (Cal. Ct. App. 1991).

[301] People v. Davis, 872 P.2d 591, 617 (Cal. 1994) (Mosk, J., dissenting).

[302] Those states are Florida, Massachusetts, South Carolina, and Tennessee. FLA. STAT. §§ 782.09(1)(a), 782.09(5) (2005); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); State v. Horne, 319 S.E.2d 703 (S.C. 1984); TENN. CODE ANN. §§ 39-13-202, 39-13-214(a) (West 2003).

### 2. *Cause of Death*

Giving the state an incentive not to prosecute early-term fetal deaths as murder, due to the difficulty of proving mens rea, might have the additional benefit of reducing doubt about causation. Total strangers are unlikely to know that a woman is carrying a fetus until it reaches a fairly advanced stage of development. Similarly, while intimate partners may attack their female victims in the early term, reports indicate that such violence more often occurs later.[303] Proof of causation also bears some relation to fetal age. In the first trimester, it is often difficult to determine whether the fetus died from injuries that the defendant inflicted or was spontaneously aborted due to genetic defects, uterine abnormalities, substance abuse, or other toxic exposure.[304]

This Article has shown that imposing murder liability on a third party who kills a pre-viable fetus involves no inherent conflict with the Supreme Court's abortion jurisprudence. Viability does not automatically constitute a bright line for assessing the state's interest in fetal life, outside the context of a woman's right to terminate her pregnancy.[305] Nevertheless, forcing the prosecutor to prove both knowledge of the pregnancy and causation of death beyond a reasonable doubt would reduce the number of murder cases brought against defendants who allegedly killed early-term fetuses.

## V. CONCLUSION

The politics of the abortion debate have impeded rational discussion of solutions to the problem of violence against pregnant women. The pro-life camp's persistent refrain that abortion is murder ignores contextual understandings of homicide that resonate in American law and culture. Many ordinary Americans who think that the violent, nonconsensual termination of a pregnancy should be considered a criminal homicide also support *Roe v. Wade*. Far from being inconsistent, their views can be justified by legal principles.

By agreeing to do battle on the anti-abortionists' turf—a rhetorical space in which the fetus's status as a person or non-person is believed to determine the legality of abortion—the pro-choice camp also misplaces its emphasis. Instead, pro-choicers ought to insist that there are significant differences between a woman who makes an autonomous decision to continue, or to

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[303] *See* Gelles, *supra* note 117, at 844 (stating that women are more likely to experience violence during the second half of their pregnancies); Roan, *supra* note 120 at E1 (reporting similar patterns).

[304] *See Davis*, 872 P.2d at 620 (Mosk, J., dissenting).

[305] *See supra* Part III.C.3.

terminate, her pregnancy and an anti-social actor who violently wrests that decisional power from her. Clearing the smoke of the abortion battle from the field allows for reasoned analysis of the fetal homicide laws. Despite receiving support from implacable foes of reproductive rights, most of these statutes contain provisions that keep them in line with the Supreme Court's abortion jurisprudence.

Nevertheless, their drafting reveals sloppy thinking about the challenges of preventing intimate violence and disregard for basic principles of fairness to defendants. The chief failing of the fetal murder statutes inheres in their approach to mens rea. Ignoring the invisibility of a pre-viable fetus to many offenders, as well as the undesirability of stereotyping all female victims as potentially pregnant, the laws assign murder liability to killings that show neither criminal intent nor culpable indifference to fetal life.

Pro-choice advocates appear callous when they insist that the unborn can never be murdered; pragmatically, such an approach may alienate "abortion gray" voters over an issue that does not seriously threaten *Roe*. However, those concerned about the fair administration of the criminal law, and particularly the fit between offense definitions and punishment goals, have grounds to urge the legislatures that passed many of the fetal murder statutes to go back to the drawing board and start again.