Filling the Void: Model Legislation for Fetal Homicide Crimes

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Society's understanding of fetal life has been evolving since the common law. The present constitutional protection for abortion, which Roe v. Wade *and its progeny recognizes, reflects the tenuous balance states have struck between their interests in protecting potential life and in protecting a woman's constitutional right to privacy. Given this background, states have enacted different statutes in response to "fetal homicide," or the unauthorized killing of a fetus typically occurring during an act of violence to the mother. This Note argues that the issues surrounding fetal homicide and abortion are distinct, and states need a framework to help them analyze crimes against pregnant women to create a more logical and just approach to punishing fetal homicide. Most states recognize some form of fetal homicide, but inexplicable gaps in protection provided by criminal laws plague many statutes. This Note offers model legislation to update the* Model Penal Code *so that states have more guidance in enacting laws that respond to society's current understanding of fetal life.*

I. INTRODUCTION

A drunk driver hit Maria Herrera — a pregnant woman — her four-year-old son, and her teenage sister while they were crossing the street in Brooklyn. He killed everyone, including Herrera's eight-month-old fetus.[1] Herrera was rushed to the hospital, where doctors prematurely delivered the fetus by caesarian section. The doctors "jump started" the child's heart with medica-

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1. People v. Gray, 736 N.Y.S.2d 856, 858 (Sup. Ct. 2002), *aff'd*, 778 N.Y.S.2d 291 (App. Div. 2004).

tion, and it continued to beat momentarily without aid before the baby was pronounced dead.[2] Since the child was able to independently maintain a heartbeat for a few moments and was therefore "born alive," the New York Supreme Court of Kings County in *People v. Gray* determined that the defendant could be indicted for manslaughter in the second degree and vehicular manslaughter of the fetus. New York follows the common-law "born alive" rule, meaning it defines the word "person" in its homicide laws as a "human being who has been born and is alive."[3] Therefore, the fact that the doctors were able to momentarily "jump start" the heart of the baby determined whether the defendant could be charged with a crime for causing the baby's death. Had the doctors not been able to momentarily resuscitate the baby after delivery, the eight-month-old unborn child would not qualify as a victim, and no criminal liability would attach to his death.

A third party can kill the fetus[4] of a pregnant woman against her wishes and escape criminal prosecution for homicide in sixteen states, including New York.[5] These states still rely on an antiquated and technical post-trauma determination to decide if a homicide has occurred: Was the fetus "born alive" outside of the mother's womb before death?[6] States uniformly adopted the common law "born alive" approach in the nineteenth century. However, the "born alive" rule is a remnant of an era when medicine was not advanced enough to establish causation if the fetus died before birth from a pre-birth injury.[7] In light of changed cul-

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2. *Gray*, 736 N.Y.S.2d at 859.

3. N.Y. PENAL LAW § 125.05(1) (McKinney 2009).

4. Unless otherwise indicated, for ease of reference, this Note will use the term "fetus" when referring to an unborn child at any stage of development, including the zygote, blastocyst, and embryo.

5. A key difference between abortion laws and fetal homicide laws is that the latter are designed to remedy a harm that occurs without the consent of the woman. Unlike with abortion, the actions taken against her and her fetus with fetal homicide are not done for her benefit and do not concern her constitutional right to privacy. Fetal homicide laws typically contemplate a third-party's violent actions against the pregnant woman, so that both the woman and her fetus are victims. As will be discussed, nine of these sixteen states do have explicit provisions criminalizing assaults against pregnant women; however, even when these assaults result in fetal death, they are neither classified as nor punished as homicides.

6. Michael Holzapfel, Comment, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL'Y 431, 434 (2002).

7. *See* Douglas S. Curran, *Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws*, 58 DUKE L.J. 1107, 1112-15 (2008).

tural notions about fetal life and advancements in medical technology, the question the "born alive" rule poses is now irrelevant. Recognizing this, a majority of states have rejected the common-law approach by criminalizing "fetal homicide." The majority approach to "fetal homicide" recognizes that when a person kills a pregnant woman, or injures a pregnant woman and kills her fetus, the two harms each warrant separate punishment.

This Note contends that the standard used in the common-law "born alive" rule bears no relationship to criminal culpability, whether judged from a retributive perspective of punishing criminals, from a utilitarian perspective focusing on deterrence and incapacitation, or from the perspective of renouncing society's abhorrence for these acts. Criminal liability should not be contingent on such a mechanical inquiry that is detached from the actual effects of the crime on the mother and her fetus.

This Note also addresses the disagreement among states regarding what effect abortion rights have on fetal homicide laws. A minority of the states require the fetus to have reached the stage of viability before the fetal homicide law applies, following the framework set out by *Roe v. Wade* and its progeny. However, fetal homicide laws explicitly exempt a pregnant woman's actions, including legal abortions. Such exemptions punish third-party actors who take illegal, unauthorized actions against a woman and her unborn child to protect her right to choose childbirth.[8] To date, although there have been numerous challenges, no court has overturned a fetal homicide law for violating the constitutional right to abortion.[9] As such, this Note argues that fetal viability should not be a prerequisite for fetal homicide.

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8. H.R. REP. NO. 108-420, pt. 1, at 3-4 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.

9. An example of one such challenge occurred regarding the Illinois fetal homicide statute, 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2009). The Appellate Court of Illinois, Fourth District, upheld the constitutionality of the fetal homicide statute in *People v. Ford*, 581 N.E.2d 1189, 1200, 1202 (Ill. App. Ct. 1991). The defendant claimed that since *Roe v. Wade* allows a woman to destroy her nonviable fetus, Illinois's fetal homicide law violates the Equal Protection Clause of the Federal Constitution. *Id.* at 1199. The defendant argued he was similarly situated to a pregnant woman, yet he was being treated dissimilarly because his actions were criminalized while a mother's same actions would not be criminal. *Id.* Applying rational basis scrutiny, the Court rejected this argument:

> Clearly, a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated. A woman consents to the abortion and has the absolute right, at least during the first trimester of the pregnancy, to choose to terminate the pregnancy. A woman has a privacy interest in terminating her pregnancy;

This Note proceeds in five parts. Following the introduction, Part II traces the development of the legal status of the fetus from the common law through laws recognizing the fetus as a unique victim, reviewing the divergent approaches to fetal homicide in state law. Part III reviews the debate surrounding the passage of the Federal Unborn Victims of Violence Act (UVVA) in 2004, which is relevant to analyzing the arguments of both supporters and opponents of laws criminalizing fetal homicide. Part IV critiques the spectrum of state laws that have addressed fetal homicide. Additionally, this part of the Note responds to the main objection to fetal homicide laws: How such laws can coexist with laws allowing abortion.

Finally, Part V proposes model legislation to replace the *Model Penal Code* provision to update and refine the approach taken toward fetal homicide. The proposed law will primarily seek to vindicate the particular harm done to a pregnant woman and her family when her pregnancy is terminated against her will. The Note concludes with a call to change the *Model Penal Code* by replacing the common law "born alive" rule with the proposed legislation so that states can adopt fetal homicide laws that are more rational, coherent, and consistent with the values society holds.

II. STATE ACTION AND FETAL HOMICIDE

A. THE COMMON-LAW "BORN ALIVE" RULE

The "born alive" rule has been part of the common law since the early 1300s.[10] This rule did not contain a concept of "fetal

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however, defendant has no such interest. The statute simply protects the mother and the unborn child from the intentional wrongdoing of a third party.

Id. For a more comprehensive review of other such challenges, *see* discussion *infra* Part III.C.1.

10. Hughes v. State, 868 P.2d 730, 732 (Okla. Crim. App. 1994). *But see* Bracton, THE LAWS AND CUSTOMS OF ENGLAND, *as reprinted in* Keeler v. Superior Court, 470 P.2d 617, 620 n.4 (Cal. 1970) ("If there be anyone who strikes a pregnant woman or gives her a poison whereby he causes an abortion, if the foetus [sic] be already formed or animated, and especially if it be animated, he commits homicide."); Michael S. Robbins, *The Fetal Protection Act: Redefining "Person" for the Purposes of Arkansas' Criminal Homicide Statutes*, 54 ARK. L. REV. 75, 77-78 (2001) (citing to Fleta, a contemporary of Bracton, who shared his understanding that prosecution for fetal homicide can occur even if the fetus is not born alive). No reported cases support Bracton's view. *Keeler*, 470 P.2d at 620 n.4. By

homicide," or the idea that a third party can be liable for the homicide of an unborn child in the womb.[11] The rule acknowledged criminal liability for homicide only if a third-party injured a pregnant mother against her will resulting in a child who was born alive, but subsequently died because of this pre-birth injury.[12] The requirement of a live birth proved "not only that the child had been healthy while in the mother's womb but also that the infant was able to survive the stressful and demanding event of the birth itself."[13] As such, the law did not recognize homicide committed against the fetus, primarily because there was no way to determine medically when an injury to the mother resulted in the death of the fetus prior to birth.[14]

The common law did recognize pre-birth harms that did not result in death as a misdemeanor, so long as the child was at the "quickening" phase.[15] Quickening precedes viability and tends to occur around the fourth or fifth month, at the time when the mother first feels fetal movement, while viability generally occurs near the sixth or seventh month.[16] Based on the common law un-

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the early fourteenth century, the "born alive" rule was firmly entrenched in the common law. Robbins, *supra*, at 78.

11. *See* Stephanie Ritrivi McCavitt, *The "Born Alive" Rule: A Proposed Change to the New York Law Based on Modern Medical Technology*, 36 N.Y.L. SCH. L. REV. 609, 612 (1991). Many states have since changed their laws regarding fetal homicide, so this Note updates McCavitt's research.

12. *See* Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 WM. MITCHELL L. REV. 767, 772 (2006).

13. Curran, *supra* 7, at 1114.

14. Sandra L. Smith, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1847 (1999); *see also Hughes*, 868 P.2d at 732 ("The born alive rule was necessitated by the state of medical technology in earlier centuries. In fact, as late as the nineteenth century, prior to quickening 'it was virtually impossible for either the woman, a midwife, or a physician to confidently know that the woman was pregnant, or, it follows, that the child in utero was alive.'" (quoting Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 573 (1987)) (citation omitted)); Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 460-461 (1997) ("The primitive state of medicine during the common law period necessitated the 'born alive' rule. First, the medical profession considered it impossible to determine whether a fetus was capable of independent existence before the baby was born. Second, doctors could not accurately determine the cause of death of a fetus, thereby destroying the requisite causation element necessary to prove a murder." (footnote omitted)).

15. *Keeler*, 470 P.2d at 631.

16. Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 846 (2007); Shannon M. McQueeney, *Recognizing Unborn Victims over*

derstanding of fetal development, "there was no evidence of life until quickening."[17] The seventeenth century writings of Sir Edward Coke explain that the killing of an unborn fetus was not murder, but could be a misdemeanor.[18] These writings distinguished the two crimes in the following way: "An abortional killing after quickening was a misdemeanor if the child died within the womb and was stillborn; the killing was murder only if the fetus (1) was quickened; (2) was born alive; (3) lived for a brief interval; and (4) died."[19] Fetal homicide — meaning death occuring in the womb can be homicide — did not fit within this model, and by the 1850s the "born alive" rule was well established in the states.[20]

The "born alive" rule had instrumental value for the scientific milieu in which it arose. One commentator argued that the "born alive" rule did not provide a substantive definition of human being or person.[21] Instead, the rule was a "blunt instrument" to make sure the government established causation before obtaining a homicide conviction.[22] As another commentator noted, the rule was "'an evidentiary principle that was required by the state of medical science of the day.'"[23]

B. PROBLEMS WITH THE "BORN ALIVE" RULE

For many states, the "born alive" rule proved unsatisfactory in a changing technological climate. States, beginning with Califor-

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Heightening Punishment for Crimes Against Pregnant Women, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 461, 464-65 (2005).

17. *Hughes*, 868 P.2d at 732.

18. Smith, *supra* note 14, at 1847.

19. McCavitt, *supra* note 11, at 612 (footnote omitted). The oft-quoted words of Sir Edward Coke, in the seventeenth century, illustrate the common law understanding of the intersection between the criminal law and actions taken to cause the death of a pregnant woman's fetus against her will: "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision (i.e., misdemeanor), and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, In rerum natura, when it is born alive." 3 Edward Coke, Institutes of the Laws of England 58 (1648), *as reprinted* in *Keeler*, 470 P.2d at 620 (footnote omitted), *superseded by statute*, CAL. PENAL CODE § 187(a) (West 2008).

20. *Id.* at 621.

21. Curran, *supra* note 7, at 1132.

22. *Id.*

23. Forsythe, *supra* note 14, at 586.

nia, started updating their laws in the 1970s to criminalize fetal homicide.[24] States have since been struggling with the classification, application, and punishment of this crime. To date, seven states and the District of Columbia still abide exclusively by the common-law "born alive" rule, and nine states do not recognize fetal homicide but penalize violence against pregnant women that results in fetal death.[25] Furthermore, the "born alive" rule is still the approach used in the Model Penal Code.[26]

Many legislatures and courts have found that the "born alive" rule is a relic of the understanding of fetal development from an earlier time. Medical advancements such as the ultrasound, fetal heart monitoring, in vitro fertilization, and fetoscopy have led to a better understanding of the development of unborn children,[27] and has enabled doctors to more accurately determine the cause of a fetus's death.[28] For example, the Oklahoma Court of Criminal Appeals in *Hughes v. State* acknowledged that "[a]dvances in medical and scientific knowledge and technology have abolished the need for the born alive rule."[29] Similarly, the Massachusetts Supreme Court rejected the current applicability of the "born alive" rule:

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24. In 1970, in *Keeler v. Superior Court*, the California Supreme Court resisted abandoning the "born alive" rule without evidence of the explicit legislative intent to include fetuses in the definition of "human being" in the state's murder statute. 470 P.2d at 618, 625-26. The California legislature responded almost immediately by eliminating the "born alive" rule. In *Keeler*, the victim was married to the defendant, although they were separated at the time. *Id.* at 618. She had been secretly living with another man and was in the third trimester of pregnancy when the defendant made this discovery and accosted her. *Id.* He blocked her car while she was driving on a narrow road and told her that he would "stomp it out" of her. *Id.* He proceeded to drive his knee into her abdomen, crushing the fetus's skull. *Id.* After a caesarian section, the fetus was delivered stillborn. *Id.* at 618-19. The court found that no criminal charges could be brought with respect to the dead fetus because the child was not born alive first. *Id.* at 628. In the same year as the decision, the California legislature responded to *Keeler* by changing the murder statute to explicitly include fetuses, becoming the first state to recognize fetal homicide. *See, e.g.*, People v. Carlson, 112 Cal. Rptr. 321, 325 (Ct. App. 1974) ("In response to the holding in *Keeler*, the Legislature subsequently amended section 187 to provide that [m]urder is the unlawful killing of a human being, [o]r a fetus, with malice aforethought.") (internal quotation marks omitted).

25. *See* discussion *infra* Part II.C.

26. MODEL PENAL CODE § 210.0(1) (1962).

27. H.R. REP. NO. 108-420, pt. 1, at 5 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.

28. Tsao, *supra* note 14, at 461.

29. 868 P.2d 730, 732 (Okla. Crim. App. 1994).

> The rationale offered for the rule since 1348 is that "it is difficult to know whether [the defendant] killed the child or not . . . ." That is, one could never be sure that the fetus was alive when the accused committed his act. . . . Medical science now may provide competent proof as to whether the fetus was alive at the time of a defendant's conduct and whether his conduct was the cause of death. . . . We do not consider . . . [fear of speculation] a sufficient reason for refusing to consider the killing of a fetus a homicide.[30]

Those states that have addressed the "born alive" rule recently overwhelmingly found that its purposes have been undermined.[31]

In addition to increases in medical technology that allow more sophisticated insight into the causes of fetal death, states are increasingly recognizing the seriousness of the problem that violence against pregnant women poses.[32] Studies within the last decade have revealed that homicide is the leading cause of death

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30. Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) (quoting Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Centurty Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 339 (1971)) (citations and footnotes omitted).

31. Other courts have similarly recognized that the basis for the "born alive" rule has been undermined but have deferred to the legislature to change the rule. For example, in 1987, the Tennessee Court of Criminal Appeal in *State v. Evans* recognized the argument that the "born alive" rule was a "rule of evidence mandated because the primitive nature of medicine at common law prevented proof that a child in utero was alive unless it was physically observed to be so outside the womb." 745 S.W.2d 880, 883 (Tenn. Crim. App. 1987). The court also noted the arguments presented by amicus curiae: "It is earnestly insisted that current advances in medical science have eliminated the only reason for which the 'born alive rule' was created and the rule no longer can be rationally applied. This argument is bolstered by references to a host of medical writings on the subject documenting the theory that the 'born alive rule' has outlived its usefulness." *Id.* at 883. After considering these arguments, ultimately the court upheld the "born alive" rule because "[w]hile it may be true, as Amici suggest, that medical evidence today can clearly establish the corpus delicti of the unborn child in this case, this is a matter which lends itself to action by the legislature." *Id.* at 884. By 1989, the Tennessee legislature changed the law to include viable fetuses as victims in the state's homicide laws. TENN. CODE ANN. § 39-13-214 (West 2009).

32. McQueeney, *supra* note 16, at 463. Before more sophisticated medical technology was available to monitor a fetus, it was almost impossible to determine when an unborn child died in the womb. "As a result, live birth was required to prove that the unborn child was alive and that the material acts were the proximate cause of death, because it could not otherwise be established if the child was alive in the womb at the time of the material acts." Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 575 (1987).

for pregnant women in Maryland, North Carolina, New York City, and Illinois.[33] Other studies have indicated that notwithstanding medical complications, "homicide is the leading cause of death among pregnant women" in the United States.[34] The "born alive" rule hampers efforts to combat the risk of serious domestic violence facing pregnant women. For example, public outrage following the highly publicized murder of Laci Peterson and her eight-and-a-half-month-old fetus, Conner, spurred many demands that the murderer be held liable for each death.[35] Although California had fetal homicide laws at the time, the possibility in other states that the perpetrator could literally "get away with murder" with respect to Conner caused many states to update their laws to include penalties for fetal homicide.[36]

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33. H.R. REP. NO. 108-420, pt. 1, at 4 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.. Although few cases make are widely publicized, many murders of pregnant women go unnoticed. The *Washington Post* ran a series of articles on the unbelievably high number of pregnant woman killed. For some reason there is great reluctance to address the problem of criminal acts against pregnant women in the news as well as in the law.

> Their killings produced only a few headlines, but across the country in the last decade, hundreds of pregnant women and new mothers have been slain. Even as Scott Peterson's trial became a public fascination, little was said about how often is [sic] happens, why, and whether it is a fluke or a social syndrome.

Donna St. George, *Many New or Expectant Mothers Die Violent Deaths*, WASH. POST, Dec. 19, 2004, at A01. Dr. Diana Cheng, the director of women's health at the Maryland Department of Health and Medical Hygiene, noted that, "[t]he reality is there are a lot more of these cases that either aren't reported in the news or we just don't know about . . . ." CNN.com Archive of CourtTVNews.com, *Laci Peterson Case: When Pregnancy Ends in Murder*, http://edition.cnn.com/2007/US/law/12/11/court.archive.peterson8/index.html (last visited Sept. 22, 2009). Along with Dr. Isabelle Horon in 2001, Dr. Cheng "conducted a study in Maryland to determine the leading cause of death among pregnant women from 1993 to 1998. Of the 247 women who died while pregnant, homicide was found to be the leading cause of death, accounting for about 20 percent of the cases." *Id.*

34. This finding was based on a study, which relied on data from the Pregnancy Mortality Surveillance System at the Centers for Disease Control and Prevention, published in the March 2005 edition of the *American Journal of Public Health*, that found "homicide was a leading cause of death among pregnant women in the United States between 1991 and 1999" and "the pregnancy-associated homicide ratio was 1.7 per 100,000 live births." Bryan Robinson, *Why Pregnant Women are Targeted*, ABC NEWS, Feb. 24, 2005, http://abcnews.go.com/US/LegalCenter/Story?id=522184&page=1.

35. In addition to Laci Peterson, the murders of Lisa Underwood (killed by her boyfriend) and Lori Hacking (killed by her husband) exemplify "what experts say is a growing, and disturbing, national trend: pregnant women being murdered. According to The Washington Post, more than 1,300 pregnant women and new mothers have been slain since 1990." Brian Dakss, *Murders of Pregnant Women Rising*, CBS NEWS, Feb. 23, 2005, http://www.cbsnews.com/stories/2005/02/23/earlyshow/main675945.shtml.

36. McQueeney, *supra* note 16, at 461-62.

Additionally, recent Supreme Court decisions demonstrate the substantial changes in the understanding of fetal life since the common law. The Supreme Court noted a state's interest in "protecting potential life" in *Roe v. Wade*.[37] While a fetus is not a "person" under the Constitution, in the context of abortion, the Court identified an interest in protecting "prenatal life" as well as safeguarding a woman's right to privacy.[38] After fetal viability, the state's interest in protecting potential life outweighs the mother's privacy interests and allows the state to regulate abortion.[39] At this point, the fetus "has the capability of meaningful life outside the mother's womb," and the state's "important and legitimate interest in potential life" becomes "compelling."[40]

States have an equally important and legitimate interest in potential life in the context of fetal homicide laws. However, since fetal homicide by definition does not interfere with a woman's constitutional privacy rights in choosing abortion, there is no countervailing right against which to weigh the state's interest in protecting potential life.[41] The state's interest in protecting prenatal life exists even before viability; the Court explained that this interest "[a]t some point in pregnancy" — determined to be viability — "become[s] sufficiently compelling to sustain the regulation of the factors that govern the abortion decision. The privacy right involved . . . cannot be said to be absolute."[42] Once again, when a woman does not have a privacy interest at stake, states have no clear reason for limiting the protection of potential life to viable fetuses. Most states have determined that *Roe* preserves a

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37. 410 U.S. 113, 154 (1973).

38. *Id.* at 150.

39. *Id.* at 163; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833-36 (1992) (maintaining viability as the relevant constitutional standard for determining a state's ability to regulate abortion).

40. *Roe*, 410 U.S. at 163.

41. Fetal homicide laws contain explicit exceptions for actions authorized by the pregnant woman, such as abortion or other medical procedures. An example is the South Carolina Unborn Victims of Violence Act of 2006:

> Nothing in this section may be construed to permit the prosecution under this section: (1) of a person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law; (2) of a person for any medical treatment of the pregnant woman or her unborn child; or (3) of a woman with respect to her unborn child.

S.C. CODE ANN. § 16-3-1083(B) (2009).

42. *Roe*, 410 U.S. at 154.

woman's privacy interests when her own right to terminate her pregnancy is at issue and that it is consistent with *Roe* to criminalize acts that fetal homicide laws target when the right to privacy is not implicated.[43] Therefore, many states have found no conflict between allowing abortion and also having laws against fetal homicide, and courts have overwhelmingly upheld the constitutionality of fetal homicide laws.[44]

C. CONTEMPORARY STATE APPROACHES TO FETAL HOMICIDE

States take three basic approaches to the criminalization of fetal death: (1) thirty-four states have fetal homicide laws,[45] (2) nine states have provisions explicitly targeting violence against pregnant women,[46] and (3) seven states and the District of Columbia have neither fetal homicide laws nor criminal laws specifically penalizing violence against pregnant women.[47] Of those states that have fetal homicide laws, twenty-three consider a fe-

43. *See, e.g.*, State v. Coleman, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997).

44. *See* discussion *infra* Part IV.A.

45. ALA. CODE § 13A-6-1 (2009); ALASKA STAT. § 11.41.150 (2009); ARIZ. REV. STAT. ANN. § 13-1102 (2009); ARK. CODE ANN. § 5-1-102(13)(B)(i)(a), (b) (West 2009); CAL. PENAL CODE § 187(a) (West 2009); FLA. STAT. ANN. § 782.09 (West 2009); GA. CODE ANN. § 16-5-80 (West 2009); IDAHO CODE ANN. § 18-4001 (2009); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2009); IND. CODE ANN. § 35-42-1-1 (West 2009); KAN. STAT. ANN. § 21-3452 (2009); KY. REV. STAT. ANN. § 507A.010 (West 2009); LA. REV. STAT. ANN. § 14:32.5 (2009); MD. CODE ANN., CRIM. LAW § 2-103 (West 2009); MICH. COMP. LAWS ANN. § 750.322 (West 2009); MINN. STAT. ANN. § 609.2661 (West 2009); MISS. CODE ANN. § 97-3-37 (West 2009); NEB. REV. STAT. §§ 28-388 to -394 (2009); NEV. REV. STAT. § 200.210 (2009); N.D. CENT. CODE §§ 12.1-17.1-01 to -08 (2009); OHIO REV. CODE ANN. §§ 2903.01-.08 (West 2009); OKLA. STAT. ANN. tit. 21, § 691 (West 2009); 18 PA. CONS. STAT. ANN. § 2604 (West 2009); R.I. GEN. LAWS § 11-23-5 (2009); S.C. CODE ANN. § 16-3-1083 (2009); S.D. CODIFIED LAWS § 22-16-1.1 (2009); TENN. CODE ANN. § 39-13-214 (West 2009); TEX. PENAL CODE ANN. § 1.07(49) (Vernon 2009); UTAH CODE ANN. § 76-5-201 (West 2009); VA. CODE ANN. §§ 18.2-32.2 (West 2009); WASH. REV. CODE ANN. § 9A.32.060 (West 2009); W. VA. CODE ANN. § 61-2-30 (West 2009); WIS. STAT. ANN. § 940.04(2), (6) (West 2009). The Supreme Court of Massachusetts rejected the common-law born-alive rule with respect to viable fetuses in *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984) and *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989).

46. COLO. REV. STAT. ANN. § 18-3.5-101 (West 2009); CONN. GEN. STAT. ANN. § 53a-59c (West 2009); DEL. CODE ANN. tit. 11, § 606 (2009); IOWA CODE ANN. § 707.8 (West 2009); ME. REV. STAT. ANN. tit. 17-A, § 208-C (2009); N.H. REV. STAT. ANN. § 631:1 (2009); N.M. STAT. ANn. § 30-3-7 (West 2009); N.C. GEN. STAT. ANN. § 14-18.2 (West 2009); WYO. STAT. ANN. § 6-2-502 (2009).

47. Hawaii, Missouri, Montana, New Jersey, New York, Oregon, Vermont, and the District of Columbia.

tus a victim of homicide without regard to gestational age.[48] The other eleven states recognize fetal victimhood only after the fetus attains a certain stage of development, such as the embryonic stage, quickening, or viability.[49]

California has been a leader in enacting fetal homicide laws. Since 1970, California has included fetuses in its murder statute, which says that murder is "the unlawful killing of a human being, or a fetus, with malice aforethought."[50] Perhaps in its most controversial decision on this topic, the California Supreme Court upheld the conviction of a defendant for second-degree implied-malice murder of the fetus, even though the defendant was unaware that the woman he killed was pregnant.[51] The court opined that "viability is not an element of fetal homicide under section 187, subdivision (a)," but that the state must nonetheless demonstrate "that the fetus has progressed beyond the embryonic stage of seven to eight weeks."[52] The victim, Patty Fansler, was the ex-girlfriend of the defendant, and after a violent struggle he shot her fatally in the head. During the autopsy it was discovered that she was between eleven and thirteen weeks pregnant and that her fetus had died because of her death.

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48. Alabama, Alaska, Arizona, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *See supra* note 45.

49. Arkansas, California, Florida, Indiana, Maryland, Massachusetts, Michigan, Nevada, Rhode Island, Tennessee, and Washington. *See supra* note 45.

50. CAL. PENAL CODE § 187(a). Interestingly, to date the legislature has not created the "crime of voluntary or involuntary manslaughter of a fetus . . . ." People v. Taylor, 86 P.3d 881, 886 (Cal. 2004).

51. *Taylor*, 86 P.3d at 881.

52. People v. Davis, 872 P.2d 591, 602 (Cal. 1994). *People v. Davis* was actually the first California case to hold that while viability was not an element of fetal homicide, the fetus must have progressed beyond at least seven to eight weeks. *Id.* As one commentator notes,

> The *Davis* court viewed the decision in *Roe* as very narrow and only applicable when a state's interest in protecting potential life is weighed against a mother's right to privacy. Therefore, the court held that 'when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide.' The *Davis* court found no such threat to a mother's right to privacy and thus eliminated the viability requirement that had been read into the statute.

Monica Mendes, *A Low Threshold of Guilt: Interpreting California's Fetal Murder Statute in* People v. Taylor, 39 LOY. L.A. L. REV. 1447, 1450-51 (2006) (quoting *Davis*, 872 P.2d at 599) (footnotes omitted). The interaction between abortion and fetal homicide statutes will be discussed in subsequent sections.

Five states require a fetus to be "quickened," and four states require a fetus to be viable before a prosecution for fetal homicide can occur.[53] These classifications had two distinct meanings at common law. "Quickness derives from the common law idea that when an unborn child first moves, it attains 'animation' or a soul."[54] Under the common law, quickening typically occurs around the sixteenth to eighteenth week, while viability occurs near the twenty-eighth week.[55] At common law, "it was no crime to procure the miscarriage of a woman with her consent, unless she was in that advanced state of pregnancy technically known as being 'quick with child.'"[56] Viability traditionally occurred later, when the lungs had developed sufficiently to breathe air, allowing the fetus to survive outside the womb.[57]

However, as medical technology advanced, the gap between quickening and viability narrowed to become almost irrelevant, considering that the earliest reported survival of a child outside the womb is twenty-one weeks.[58] Furthermore, even the states that explicitly set the statutory standard at "quickening" have adopted a standard that is identical to viability.[59]

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53. Florida, Michigan, Nevada, Rhode Island, and Washington require quickening. Indiana, Maryland, Massachusetts, and Tennessee require viability. *See supra* note 45.

54. McQueeney, *supra* note 16, at 464.

55. *Id.* at 464-65.

56. Eggart v. State, 25 So. 144, 145 (Fla. 1898). Similarly, a Washington statute in 1946 criminalized abortion for a quickened fetus: "It may be noted here that this reference to 'quick child' in the statute is an allusion to the common law rule that the embryo came within the protection of the law only when it quickened. This has nothing to do [with] an abortionist's criminal liability for the death of the mother." State v. Hart, 175 P.2d 944, 949 (Wash. 1946).

57. McQueeney, *supra* note 16, at 465; *see also* IND. CODE ANN. § 16-18-2-365 (West 2009) (defining viability for the purpose of feticide liability as the "ability of a fetus to live outside the mother's womb").

58. Matt Sedensky, *Tiny Baby to Leave Florida Hospital*, WASHINGTONPOST.COM, Feb. 19 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/02/19/AR2007021900848.html.

59. For example, Michigan in MICH. COMP. LAWS ANN. § 750.322 (West 2008) defines manslaughter as the "wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother . . . ." Yet the Supreme Court of Michigan interpreted the statute in the following way:

> We hold that the word child as used in M.C.L.A. § 750.322 . . . means a viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernably moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community.

This standard focuses on the harm caused to fetuses that are advanced enough in development to have an independent life interest, and it does not regard the culpability of a third-party in causing the death of a fetus before this point as worthy of criminal punishment. Some states have found viability to be a constitutionally required standard for fetal homicide laws after *Roe v. Wade*.[60]

Nine states recognize criminally caused fetal death by providing greater penalties for violent crimes against pregnant women that result in miscarriage.[61] For example, Iowa has an extremely comprehensive statute that classifies acts of violence resulting in the death of a mother's unborn child as a serious felony.[62] By contrast, Colorado offers less protection, but still acknowledges the harm to the pregnant woman when a third-party causes her to lose her child against her will.[63] These statutes focus solely on the harm done to the mother. Such classifications recognize one victim, regardless of viability or gestational age. Since most of the statutes classify fetal death as assault, the penalties are less severe than those that classify fetal death as homicide. These

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Larkin v. Cahalan, 208 N.W.2d 176, 180 (Mich. 1973). Rhode Island in R.I. GEN. LAWS § 11-23-5 (2009) and Florida in FLA. STAT. ANN. § 782.09(5) (West 2009) adopt nearly identical definitions of "quick child" as well.

60. For example, the Massachusetts Supreme Court makes the following argument in response to a defendant's claim that Roe precludes a state from including a fetus in its murder statute:

> [E]ven in the context of clinical abortion, in which the mother's right of privacy is implicated, *Roe v. Wade* permits a State to proscribe abortion after the third trimester except when the mother's life or health is in danger. Thus, *Roe v. Wade* does not support the defendant's contention that in these circumstances the death of a viable fetus caused by murdering the mother may not be punished as a crime.

Commonwealth v. Lawrence, 536 N.E.2d 571, 584 (Mass. 1989) (Abrams, J., concurring) (citation omitted).

61. These states are Colorado, Connecticut, Delaware, Iowa, Maine, New Hampshire, New Mexico, North Carolina, and Wyoming. *See supra* note 46.

62. Iowa has the most stringent statute protecting pregnant women from violence; instead of being classified under the chapter for "assault," the statute is classified under the chapter for "homicide and related crimes." It reads as follows: "A person who terminates a human pregnancy without the consent of the pregnant person during the commission of a forcible felony is guilty of a class 'B' felony." IOWA CODE ANN. § 707.8(1) (West 2009). The maximum sentence for a class B felony is twenty-five years. § 902.9.

63. A person can be convicted if, "with intent to terminate unlawfully the pregnancy of another person, the person unlawfully terminates the other person's pregnancy." COLO. REV. STAT. ANN. § 18-3.5-101 (West 2009). This is a class 4 felony, which has a range of 2 to 4 years in prison with one year of parole. § 18-1.3-401.

provisions offer comparatively less protection to the mother and the fetus, and they regard fetal death as a less serious harm.

III. UNBORN VICTIMS OF VIOLENCE ACT

The Peterson case[64] garnered support for a federal fetal homicide law, leading Congress to pass the Unborn Victims of Violence Act (UVVA), or "Laci and Conner's Law," in 2004.[65] At the Congressional hearings concerning the UVVA, Tracy Marciniak testified regarding her experiences that changed the law in Wisconsin, which now recognizes fetal homicide.[66] Her husband punched her twice in the stomach when she was four days away from delivering her son, and he refused to allow her to seek immediate medical care.[67] When he finally relented, her son was born by caesarian section but was already dead.[68] Since Wisconsin did not yet have a fetal homicide law, her husband was only convicted of assault. She testified:

> I know that some lawmakers and some groups insist that there is no such thing as an unborn victim and that the crimes like this only have a single victim. But this is callous, and it is wrong. Please don't tell me that my son was not a real victim of a real crime. We are both victims but only I survived . . . . I do not want to think of any surviving mother being told what I was told, that she did not really lose a baby, that nobody really died.[69]

When the mother is also a victim of a homicide, the harm done to the surviving family members can be equally great. Laci Peterson's mother, Sharon Rocha, sent a letter to Congress regarding the UVVA, which was on file with the House Judiciary Committee during consideration of the bill. She advocated against adopting an alternate version of the bill, the Motherhood Protection Act, which only increased punishment for crimes against

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64. *See* discussion *supra* Part II.B.
65. Pub. L. No. 108-212, 118 Stat. 568 (codified as amended at 10 U.S.C. § 919(a), 18 U.S.C. § 1848 (2006)). This will be discussed in greater detail below.
66. H.R. REP. NO. 108-420, pt. 1, at 21 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.
67. *Id.* at 9.
68. *Id.*
69. *Id.* at 4 n.4.

pregnant women.[70] According to her, this one-victim approach "would be a painful blow" to survivors of a "two-victim crime" because Congress "would be saying that Conner and other innocent unborn victims like him are not really victims — indeed, that they never really existed at all."[71] She testified that her grandson was a victim: "He had a name, he was loved, and his life was violently taken from him before her [sic] ever saw the sun."[72] Congress ultimately adopted the Act using the two-victim approach, and the UVVA was signed into law on April 1, 2004.[73]

A. UVVA STATUTORY FRAMEWORK

The controversy surrounding the passage of the UVVA generally tracked the major arguments on both sides of the debate about fetal homicide laws. Proponents focused on replacing the antiquated common-law "born alive" rule. They emphasized that most jurisdictions already allowed third-party tort actions for injury or death of an unborn child,[74] and they argued that this created a gap since federal law imposed no consequences on violent criminals who harm unborn children.[75] The new law, according to the house report, would fill the "current void" in federal law "by protecting a mother's constitutional right and interest in having a baby from unwanted intrusion by third parties."[76] The UVVA took a broad and unique approach to ameliorating this problem. It used the terms "unborn child" or "child in utero" to mean "a member of the species homo sapiens, at any stage of development, who is carried in the womb."[77] The UVVA provides the following protection to unborn children:

> Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the

70. *Id.*
71. *Id.*
72. *Id.*
73. "The House of Representatives approved the UVVA, 254-163, and the Senate approved it 61-38." McQueeney, *supra* note 16, at 462.
74. H.R. REP. NO. 108-420(I), at 5.
75. Congress in the House Report explains that this law provides "that an individual who injures or kills an unborn child during the commission of one of over sixty Federal crimes will be guilty of a separate offense." *Id.* at 13.
76. *Id.* at 4, 13.
77. 18 U.S.C. § 1841(d) (2006).

> death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.[78]

To obtain a conviction under the UVVA, the prosecutor must establish "beyond a reasonable doubt that a human being (1) already existed and (2) was carried in the womb."[79] Then the prosecution must prove that the defendant violated one of the sixty-eight federal crimes mentioned in the UVVA which, if committed against a pregnant woman, would trigger its protection for her unborn child. The government has to show "beyond a reasonable doubt that a defendant had criminal intent towards some victim, had violated one of the federal laws enumerated in the statute and that this criminal conduct caused the death of the unborn child."[80] The statute imposes the same punishment as if the defendant had committed the crime against the fetus's mother.[81]

The UVVA relies on the well-established criminal law doctrine of transferred intent to hold a defendant liable for the harm done to the fetus.[82] Under the doctrine of transferred intent, "an offender who intentionally acts to harm someone but ends up acci-

78. § 1841(a)(1).

79. McQueeney, *supra* note 16, at 473-74 (internal quotation marks omitted).

80. *Id.* at 474.

81. § 1841(a)(2)(A).

82. The Supreme Court recently approved of the doctrine of transferred intent in *Bradshaw v. Richey*, where the defendant was convicted under Ohio law for aggravated felony murder committed in the course of arson. 546 U.S. 74, 75 (2005). The defendant set fire to the apartment of his neighbor in an attempt to kill his ex-girlfriend and her new boyfriend who resided in the apartment below. *Id.* at 74 Both managed to escape, but the fire killed the neighbor's two-year-old daughter, Cynthia Collins. *Id.* at 74-75. At trial, it was established that the defendant had the specific intent to kill the ex-girlfriend and the new boyfriend, and undisputed forensic evidence established that the fire was started intentionally; but the prosecution presented no evidence of the defendant's specific intent to kill the two-year-old. *Id.* The Supreme Court deferred to the Ohio Supreme Court's interpretation of Ohio law, which included the doctrine of transferred intent. *Id.* at 78. The Court cited the relevant portion of the state court opinion that explained the doctrine of transferred intent as follows: "'[t]he fact that the intended victims escaped harm, and that an innocent child, Cynthia Collins, was killed instead, does not alter . . . [the defendant's] legal and moral responsibility.'" *Id.* at 76 (quoting *State v. Richey*, 595 N.E.2d 915, 925 (Ohio 1992)). Instead, the legislature's criminal scheme still applies where the defendant had formed a calculated decision to kill. *Id.* at 77. Additionally, the Court rejected the Sixth Circuit's holding that "evidence of direct intent was constitutionally insufficient to support conviction." *Id.* at 75. Since the statute "provided fully adequate notice of the applicability of transferred intent," the Court found that applying it did not violate the Due Process Clause "where the defendant's *contemplated* conduct was *exactly* what the relevant statute forbade . . . ." *Id*. at 76-77 (citation omitted).

dentally harming another is criminally liable as if the offender had intended to harm the actual victim."[83] The UVVA requires that the defendant had the requisite mens rea for the underlying federal crime. If the crime against the mother harmed or killed the fetus, the defendant is held responsible for a separate crime to the fetus on the basis of transferred intent. For example, if the defendant performed a "willful, deliberate, malicious, and premeditated killing" of a pregnant woman under 18 U.S.C. § 1111 (2006), then this intent would be transferred to a deceased fetus — even if the defendant did not know the woman was pregnant.

The UVVA, like other fetal homicide statutes, explicitly excludes legal abortion as well as the pregnant woman from liability. The exonerating provision is as follows:

> (c) Nothing in this section shall be construed to permit the prosecution —
>
> (1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;
>
> (2) of any person for any medical treatment of the pregnant woman or her unborn child; or
>
> (3) of any woman with respect to her unborn child.[84]

Congress made clear that the UVVA "specifically exempts abortion-related conduct from prosecution and the protection it affords to unborn children does not in any way interfere with or restrict a woman's right to terminate her pregnancy."[85] The legislation instead focuses on vindicating the mother's loss of her ability to choose to have her child, as well as on punishing the third party for criminally terminating the life interest of the fetus.[86]

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83. 21 AM. JUR. 2D *Criminal Law* § 120 (2009).
84. § 1841(c).
85. H.R. REP. NO. 108-420, pt. 1, at 19 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.
86. *Id.* at 3-4.

B. ARGUMENTS AGAINST THE UVVA

The opponents of the UVVA criticized the bill for potentially granting fetuses some level of legal personhood, contravening current abortion law, using the term "unborn child," and lacking a mens rea requirement. They argued that the UVVA unjustifiably and unprecedentedly assumes legal personhood for fetuses because the "application of the transferred intent doctrine only makes sense if the intent transfers to a 'person.'"[87] The doctrine "traditionally has been applied in 'bad aim' situations where a defendant, while intending to kill one person, accidentally kills an innocent bystander or another unintended victim."[88] They allege that the UVVA "forges new ground in attempting to recognize a zygote, blastocyst, embryo, and fetus as a person with the same legal status as the woman or anyone else who has been the victim of a crime, a proposition that is at odds with the rights of the pregnant woman under *Roe*."[89] They view the additional protection granted to the fetus in a zero-sum way as encroaching on the woman's own rights.

Opponents also feared that laws like the UVVA would promote the concept of a fetus having its own right to life and health, and, even if they did not directly undermine abortion rights, they would at least create situations where the government would increasingly interfere with the woman's freedom to assure the well-being of her fetus. They envisioned the UVVA paving the way for laws such as those holding the pregnant woman in custody if the government does not believe that she will make prudent decisions regarding the fetus, or perhaps even prosecuting her for actions that put the fetus at risk — like "for her decision to fly during pregnancy."[90] The woman, under these conceptions of fetal protection, would become just a means to an end for the rights of the fetus. The critics of fetal homicide laws in general, and of the UVVA in particular, believe that the UVVA does not actually seek to protect women in any capacity.[91] They assert that a ge-

87. *Id.* at 85.
88. 21 AM. JUR. 2D *Criminal Law* § 120 (2009).
89. H.R. REP. NO. 108-420, pt.1, at 82 (footnote omitted).
90. *Id.* at 86.
91. *See* Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 695 (2006).

nuine attempt to protect pregnant women does not require a two-victim approach.[92] Ultimately, the opponents feel that "Congress should stop playing abortion politics and act to protect women, children, and their families."[93]

C. RESPONSES TO THE ARGUMENTS AGAINST THE UVVA

The proponents of the UVVA respond to these criticisms by focusing on three issues: (1) the UVVA does not abridge or interfere with a woman's constitutional right to choose, (2) the UVVA is justified in using the term "unborn child," and (3) the UVVA does not lack a mens rea requirement.

1. *UVVA and Abortion Rights*

First, UVVA proponents reject the contention that the law is an assault on a woman's right to obtain an abortion. They draw attention to the UVVA's explicit exemptions for abortions and for pregnant women. It is unclear exactly why the opponents argue that the UVVA is "at odds with the rights of the pregnant woman under *Roe*,"[94] especially considering that one of the Act's goals is to give substance to a woman's right to choose to give birth to a healthy child.[95] The opponents admit that, with regard to infringing on the constitutional right to privacy, "the danger is prospective and theoretical . . . ."[96] Courts and the statute make clear that any protection of the fetus from harm is permissible only so long as the government also respects a woman's constitutional right to privacy.[97]

Additionally, the proponents of the UVVA cited extensive case law to support their argument that the constitutional right to abortion and fetal homicide statutes can be reconciled. For example, the Court of Appeals for the Eleventh Circuit, in *Smith v. Newsome*, held "that *Roe v. Wade* was 'immaterial . . . to whether

92. H.R. REP. NO. 108-420, pt.1, at 86.
93. *Id.* at 88.
94. *Id.* at 82.
95. *Id.* at 4.
96. *Id.* at 86.
97. *See* 18 U.S.C. § 1841 (2006). For a discussion of court decisions on this topic, see below.

a State can prohibit the destruction of a fetus' by a third-party."[98] Even *Roe* held that "unborn children can be recognized as persons for purposes other than abortion, such as inheritance and tort injury," thus leaving open the possibility that the fetus can receive other legal protections without being recognized as a full legal person.[99] The Supreme Court also recognized this possibility in *Webster v. Reproductive Health Services*.[100] In that case, Missouri enacted a statute stating that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being . . . ."[101] The Supreme Court reversed the Eighth Circuit, which found the law unconstitutional because "the Court's own decisions mean 'only that a State could not "justify" an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view about when life begins.'"[102] So long as abortion rights are protected, which the UVVA explicitly does, it seems that the Supreme Court does not recognize any constitutional problem with laws protecting the life interests of fetuses.

Furthermore, in *State v. Coleman* the Ohio Court of Appeals noted that "*Roe* protects a woman's constitutional right. It does not protect a third party's unilateral destruction of a fetus."[103] Similarly, in *State v. Holcomb* the Missouri Court of Appeals held that "[t]he fact that a mother of a pre-born child may have been granted certain legal rights to terminate the pregnancy does not preclude the prosecution of a third party for murder in the case of a killing of a child not consented to by the mother."[104] Further, in *State v. Merrill*, the Minnesota Supreme Court explained that

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98. H.R. REP. NO. 108-420, pt.1, at 19 (quoting 815 F.2d 1386, 1388 (11th Cir. 1987)).

99. *Id.* at 18. According to the Supreme Court,

> [S]ome States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem. . . . In short, the unborn have never been recognized in the law as persons in the whole sense.

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

100. 492 U.S. 490 (1989).

101. MO. ANN. STAT. § 1.205 (2009).

102. H.R. REP. NO. 108-420, pt.1, at 18 (quoting Webster, 492 U.S. at 491).

103. 705 N.E.2d 419, 421 (Ohio Ct. App. 1997).

104. 956 S.W.2d 286, 291 (Mo. Ct. App. 1997).

"*Roe v. Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."[105] The California Supreme Court echoed this view in *People v. Davis*, where it held that "*Roe v. Wade* principles are inapplicable to a statute . . . that criminalizes the killing of a fetus without the mother's consent."[106] The analysis for abortion rights — couched in terms of privacy — has been applied by courts in a completely different way than when an unauthorized third-party acts against a woman's wishes.[107]

The UVVA opponents' arguments have also failed to persuade the courts thus far. The Western District of Missouri, in 2007, upheld the constitutionality of the UVVA in a challenge to the application of federal statutes to fetuses as "persons" in violation of *Roe v. Wade*.[108] In that case, Bobbie Joe Stinnet's unborn daughter was cut from her uterus with a kitchen knife after she was strangled to death by a woman seeking to steal the infant to legitimate her own feigned pregnancy. The defendant challenged the aggravating factor of committing the crime with grave risk of death to an additional person — the unborn child.[109]

The court strongly rejected these challenges, explaining that "[i]n assessing the constitutionality of these statutory enact-

105. 450 N.W.2d 318, 322 (Minn. 1990) (holding that the Minnesota fetal homicide statute allowing prosecution for death of a twenty-eight-day-old fetus does not violate equal protection and is not unconstitutionally vague).

106. 872 P.2d 591, 597 (Cal. 1994) (citation omitted).

107. Constitutional scholars debate the connection between abortion, fetal homicide laws, and legal personhood for fetuses. Some, such as Judith Jarvis Thomson and Anita Allen, find it consistent to have criminal laws protecting fetal personhood and laws allowing abortion. Luke Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process*, 87 B.U. L. REV. 1177, 1179 (2007). Others, however, such as Ronald Dworkin and Jack Balkin, find that "a societal understanding of fetal personhood cannot be reconciled with a general right to abortion." *Id.* at 1179-80. Luke Milligan challenges the easy acceptance of a separate analysis for fetal personhood in the abortion context and in the fetal homicide context by asserting that the growing statutory recognition of fetal rights as an end-run around deeper societal and philosophical notions of justice. Milligan's analysis may be accurate, and deserves greater attention, but is beyond the scope of this Note. Courts and legislators have not expressed any problem with allowing these two visions of the fetus to co-exist, and given that many legal fictions are created for dealing with practical problems, it is politically feasible to allow such a schism to continue in the legal analysis of fetal homicide.

108. United States v. Montgomery, No. 05-6002-CV-SJ-GAF, 2007 WL 2711511 (W.D. Mo. Sept. 13, 2007).

109. "The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense." 18 U.S.C. § 3592(c)(5) (2006).

ments, courts have repeatedly recognized the distinction between the holding in *Roe* and a government's legitimate interest in protecting human life and unborn crime victims."[110] The court further noted that, "[w]hen the state's interest in protecting the life of a developing fetus is not counter-balanced against a mother's privacy right to an abortion, or other equivalent interest, the state's interest should prevail."[111] The court also quoted from a Seventh Circuit case to bolster its view, which pointed out that in most states killing a pregnant woman and her fetus makes the defendant guilty of fetal homicide, and *Roe v. Wade* "obviously" did not intend to privilege such conduct.[112] The Seventh Circuit held that states are free to punish fetal homicide so long as they do not punish a woman for exercising her constitutional right to abortion, or the physician, hospital, or other public facility for helping her exercise this right.[113] The courts' analysis thus far shows that the UVVA's punishment of unauthorized third-party actors has been interpreted as actually further protecting a woman's privacy right and does not interfere with access to abortion.

2. *Use of the Term "Unborn Child"*

Second, the proponents of the UVVA reference the way courts use the term "unborn child" to respond to the opponents' criticism that the statute should use a more neutral term. The proponents point out that courts, including the Supreme Court, have used "unborn child" and "fetus" interchangeably: "'The use of the term 'unborn child' by the Supreme Court can be illustrated by reference to *Roe v. Wade* itself, in which Justice Blackman [sic] used the term 'unborn children' as synonymous with 'fetuses.'"[114] The Court also "used the term 'unborn child' in *Doe v. Bolton*, the companion case to *Roe* in which the Court struck down Georgia's abortion statute," as well as in *City of Akron v. Akron Center for Reproductive Health* and *Webster v. Reproductive Health Servic-*

110. *Montgomery*, 2007 WL 2711511, at *2.
111. *Id.* at *3 (internal quotation marks omitted).
112. *Id.* (citing Coe v. County of Cook, 162 F.3d 491, 497 (7th Cir. 1998)).
113. *Id.*
114. H.R. REP. NO. 108-420, pt. 1, at 19 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533 (citing Roe v. Wade, 410 U.S. 113 (1973)).

es.[115] Numerous state and federal lower courts have also used the term "unborn child," and the term appears in criminal statutes in many states.[116] The proponents argue that even those in favor of abortion use the term "unborn child" in the legal context to show that this is neither an inherently polarizing term, nor an attempt to play "abortion politics" as the opponents of the UVVA argue.[117]

3. *Mens Rea Requirement*

Third, the proponents answer the criticism that the UVVA lacks a mens rea requirement by emphasizing the legitimacy of the doctrine of transferred intent. In the context of pregnancy, transferred intent applies in the following way:

> [W]hen one commits a violent crime against a pregnant woman, with criminal intent, and thereby injures or kills the victim's unborn child, the perpetrator is guilty of an additional offense, the punishment for which is the same as the punishment the defendant would have received had that same injury or death occurred to the unborn child's mother.[118]

As with any application of transferred intent, the mens rea requirement is satisfied when the defendant had the statutorily requisite criminal intent directed toward the original victim. This application requires the assumption that there are two separate victims; however, as the cases previously cited on the consistency between abortion laws and fetal homicide laws show, the courts have found that an "unborn child" can be offered protection under the criminal law so long as a woman's constitutional privacy interests are not implicated.[119] Thus, by relying on court deci-

115. *Id.* at 19-20 (citing Doe v. Bolton, 410 U.S. 179 (1973); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989)).

116. *See, e.g.*, FLA. STAT. ANN. § 782.09 (West 2009); State v. Coleman, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997).

117. H.R. REP. NO. 108-420, pt. 1, at 88.

118. *Id.* at 14.

119. *See, e.g.*, United States v. Montgomery, No. 05-6002-CV-SJ-GAF, 2007 WL 2711511, at *2 (W.D. Mo. Sept. 13, 2007).

sions and the text of the UVVA, the Act's proponents answer the substantive arguments against its passage.

IV. PROBLEMS WITH CURRENT STATE STATUTORY SCHEMES

In comparing New York's approach to fetal homicide with California's, contradictions emerge. In the *Gray* case, had the child not been able to sustain a heartbeat after the caesarian section, no homicide charges could have been brought against the defendant for the death of the child removed from the mother's womb.[120] New York classifies abortion in the first degree as the most serious charge possible, which requires the defendant to intend to cause the miscarriage of a woman over 24 weeks pregnant.[121] As a class D felony, the punishment cannot exceed seven years.[122] However, in California, the court in *People v. Taylor* found the defendant guilty of second-degree implied-malice murder for killing a fetus even though he did not know the woman was pregnant.[123] The penalty for second-degree murder in California is fifteen years to life in prison,[124] and the defendant was sentenced to 65 years to life in prison for both murders.[125] While many inconsistencies in state laws result from legitimate policy preferences, this vast discrepancy in the criminal law is unsustainable given the evolving legal and medical understanding of fetal life.[126] The next section shows the constitutionality of fetal

120. *See supra* Part I.

121. N.Y. PENAL LAW §§ 125.05(2), 125.45 (McKinney 2009). These crimes clearly target abortion much more readily than fetal homicide. Section 125.05(2) classifies an abortional act as: "an act committed upon or with respect to a female, whether by another person or by the female herself, whether she is pregnant or not, whether directly upon her body or by the administering, taking or prescription of drugs or in any other manner, with intent to cause a miscarriage of such female." Section 125.05(3) creates an exception for justifiable abortional acts, which occur "when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy." Section 125.45 at best awkwardly fits the situation of fetal homicide: "A person is guilty of abortion in the first degree when he commits upon a female pregnant for more than twenty-four weeks an abortional act which causes the miscarriage of such female, unless such abortional act is justifiable pursuant to subdivision three of section 125.05."

122. § 70.00(2)(d).

123. 86 P.3d 881 (Cal. 2004).

124. CAL. PENAL CODE § 190(a) (West 2009).

125. *Taylor*, 86 P.3d at 867.

126. Courts seem to be willing to recognize the protection of fetal life under the criminal law when the privacy interests of *Roe* are not implicated. Additionally, the current

homicide laws, their necessity for both retributive and deterrent purposes, and the ineffectiveness of the current approach under the Model Penal Code.

A. CONSTITUTIONALITY OF FETAL HOMICIDE LAWS

Because advances in medical technology have eradicated the original purpose for the "born alive" rule, the states that continue to follow it need to revisit the issue. Additionally, since the legal analysis of abortion and fetal homicide is quite distinct, states should not fear a conflict between respecting the privacy rights *Roe*, and subsequent abortion cases identified, while simultaneously punishing others under the criminal law for fetal homicide.

As explained in Parts II and III, courts have been receptive to the notion that abortion rights can coexist with fetal homicide laws so long as these laws do not abridge a woman's constitutional privacy rights. *Roe* reveals the basis for this distinction. Before viability, the Court made clear that the state's interest in protecting potential life exists and grows but is not strong enough to outweigh the mother's privacy interest at earlier stages of pregnancy.[127] The state "has still another important and legitimate interest in protecting the potentiality of human life. . . . [It] grows in substantiality as the woman approaches term and, at a point during pregnancy . . . becomes 'compelling.'"[128] Although this life interest exists for the fetus prior to viability, it is not strong enough to warrant protection when compared against the mother's privacy interest.[129] The Court made clear that a fetus is

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state of medical technology makes establishing causation in criminal fetal death cases possible, whereas in earlier times such a determination could not have been made.

It is true that drastic discrepancies exist in the criminal law from one state to another. For example, some states allow for reasonable mistake in defense of a third person, while other states do not. Therefore, in one state the conduct would be classified as murder while in another state the exact same behavior is not punished. These kind of policy decisions differ from refusing to recognize violent crimes against pregnant women and their fetuses as a class. In the former example, such a discrepancy applies in infrequent cases and is distinguishable from the latter case, which creates an absolute bar to recognizing a class of vulnerable victims. Given the disturbing prevalence of domestic violence and murders of pregnant women, women of childbearing age as a group need this additional protection.

127. Roe v. Wade, 410 U.S. 113, 162-63 (1973).

128. *Id.*

129. *Id.*

not a constitutional person, so a fetus has no fundamental rights or interests to outweigh a woman's fundamental right to privacy.[130] In the context of fetal homicide laws, however, no conflict exists between the mother's privacy rights and the state's interest in protecting potential life. Instead, a third party interferes in an unauthorized and illegal way with her right to carry her child to term, which is a problem that does not exist with abortion. In the case of fetal homicide, since the mother does not have a separate right to counterbalance the fetus's life interest before viability, there can be no conflicts of interest of the type *Roe* contemplated and prohibited.[131]

B. NECESSITY OF FETAL HOMICIDE LAWS

The majority of states have enacted fetal homicide laws for the retributive purpose of punishing the assailant as well as for deterring crimes against pregnant women generally. Some states have recognized, particularly after a heinous crime against a pregnant woman has been committed, that additional penalties should attach to those who kill the mother and the fetus, or to those who kill the fetus and only injure the mother.[132] The moral culpability of the criminal in terminating a pregnancy should depend on neither a technical "born alive" requirement nor a tech-

130. *See* Jeffrey Rosen, *A Viable Solution: Why It Makes Sense to Permit Abortions and Punish Those Who Kill Fetuses*, LEGAL AFF., Sept.-Oct. 2003, at 20-21 ("[O]nly the interests of a constitutional person are strong enough to overcome a woman's fundamental right to choose abortion.").

131. The California Supreme Court also found no conflict with abortion law in interpreting the word "fetus" in California's murder statute to exclude a viability requirement. People v. Davis, 872 P.2d 591, 597-600 (Cal. 1994). Contrary to the way the Supreme Court used the term in *Roe v. Wade*, the California Supreme Court believed "fetus" could be defined differently "when the mother's privacy interests are not at stake, [because] the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide." *Id.* at 599. The Davis Court explained,

> "The fetus is not a 'person' for purposes of the Fourteenth Amendment and has no constitutional rights that would outweigh the exercise of the woman's Fourteenth Amendment rights. The fetus' rights and the state's interest, or lack of interest, in protecting maternal health and in protecting the life of the fetus, were distinctly balanced against the woman's right to privacy in the context of consensual abortion." Thus, when the state's interest in protecting the life of a developing fetus is not counterbalanced against a mother's privacy right to an abortion, or other equivalent interest, the state's interest should prevail.

Id. at 597 (quoting Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 616 (1987)).

132. *See supra* note 24.

nical gestational-age requirement. Massachusetts was one of the first states to recognize the impulse underlying laws against fetal homicide, and it did so in the context of vehicular homicide in *Commonwealth v. Cass*.[133] There the court found that "conditioning a right of action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but is unjust as well."[134]

Fetal homicide presents an additional harm not contemplated by traditional homicide statutes, and retribution requires punishing the actor separately. Fetal homicide laws allowing culpability to turn on gestational age have been criticized for their moral arbitrariness:

> All such laws lack an objective standard to determine whether the defendant knows or should have known a woman is pregnant. Viability, however, is not a useful concept in the feticide context. Viability occurs at different points in different pregnancies and requires medical expertise to diagnose. . . . Except in the very last stages of pregnancy, no one other than a physician could be expected to know the fetus is viable.[135]

This principle applies a fortiori when science has advanced to make the additional fetal death provable because causation can be shown long before a live birth and even viability.

Furthermore, since pregnant women are particularly vulnerable to domestic violence, states should enact laws that protect the mother's interest in giving birth and the state's interest in potential life, thereby punishing third parties who interfere with these interests.[136] Such laws could also help deter violence against pregnant women. Tracy Marciniak, the woman whose husband punched her in the stomach days before she was to give birth, testified before Congress that her attacker said that "he would never have hit me if he had thought that he could be charged

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133. 467 N.E.2d 1324 (Mass. 1984).

134. *Id.* at 1325 (internal quotation marks omitted).

135. Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 136 (2006) (internal quotation marks omitted).

136. *See* Magnuson & Lederman, *supra* note 12, at 770-72.

with the killing of his child."[137] The states that offer the broadest protection to fetuses will be the most effective in deterrence and retribution. While some states approach this ideal in their fetal homicide laws, many states continue to irrationally condition the culpability of the attacker on the viability of the fetus and so are drastically underinclusive.[138] An even more pressing problem, though, is that some states lack fetal homicide laws altogether.

V. SOLUTION

Although state legislatures have increasingly recognized fetal homicide, it has slipped through the cracks in the American Law Institute's *Model Penal Code*. Startlingly, a provision regarding feticide or fetal homicide is absent from the Code. Instead, it seems to adopt the common-law "born alive" rule without reservation, sidestepping fetal victimhood completely. For criminal homicide, the Code will only recognize a potential victim who is a "human being," defined simply as "a person who has been born and is alive."[139] The vast majority of states continue to struggle with fetal homicide. To standardize a modern approach to this serious crime, the *Model Penal Code* requires a new framework to conceptualize fetal homicide and give states much needed guidance.

In light of the problems states encounter in rectifying fetal homicide, model legislation with uniform standards for states would assist them in framing the way they view and respond to the problem. The most obvious place to offer this proposed legislation is in the *Model Penal Code*. The basic thrust of the legislation should be retributive, recognizing the distinct harms caused to the fetus, by illegally terminating a potential life, and to the mother and her family, by illegally terminating her pregnancy. The law needs to focus on the culpable mental state of the actor to punish him commensurately. For this reason, the law should

137. H.R. REP. NO. 108-420, pt. 1, at 4 n.3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.

138. The mens rea requirements for the UVVA and in California are overinclusive with respect to murder, as they create a kind of strict-liability crime for murder of a woman of childbearing age because she could potentially be pregnant. Such behavior with respect to the fetus, which the attacker neither knew about nor should have reasonably known about, is more aptly punished as manslaughter.

139. MODEL PENAL CODE § 210.0(1) (1962).

apply without regard to gestational age because that harm is not contingent, constitutionally or morally, on the degree of development of the fetus.[140] The harm done to a family anticipating the birth of a non-viable fetus can be equivalent to that done to a family anticipating the birth of a more developed fetus. As Professor Michael Robbins notes, "once a woman decides to carry a child to term and give birth to that child, she will normally start treating that 'fetus' as a child . . . . She will want that child to be protected and will take steps to see that it is."[141] States should respond to these expectations and offer the mother and the fetus full protection under the criminal law.

Additionally, the law should seek to punish most seriously those offenders who knew or should have known that the woman was pregnant when they committed violence against her and the fetus. Once again, gestational age is irrelevant in this context; for example, Lori Hacking's husband killed her in 2004 immediately after they both learned she was five weeks pregnant. For the purpose of both retribution and deterrence, a person with specific knowledge of the pregnancy should be punished most severely regardless of the fetus's development.[142] For other types of

140. While theoretically gestational age should be irrelevant when applying the law, practically the prosecution still has to prove causation. In the earliest stages of pregnancy, this may be difficult to establish. However, the defendant should not be able to undercut causation by arguing that, although he killed the fetus, it had a medical condition that would have been fatal: "[m]urder is never more than the shortening of life . . . the law will not hear . . . [the defendant] say that his victim would thereafter have died in any event." People v. Valdez, 23 Cal. Rptr. 3d 909, 913 (Ct. App. 2005) (internal quotation marks omitted). The court in *Valdez* found that even though the fetus had a fatal medical condition and would not have survived past the second trimester, the defendant was still liable for murder because the legislature had the policy of protecting fetal life. *Id.* at 913-14. The Court held that "just as the state may penalize an act that unlawfully shortens the existence of a terminally-ill human being, it may penalize an act that unlawfully shortens the existence of a fetus which later would have perished before birth due to natural causes." *Id.* at 914.

141. Robbins, *supra* note 10, at 88.

142. *But see* Bicka A. Barlow, *Severe Penalties for the Destruction of "Potential Life" — Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 506 (1995) (proposing model legislation for fetal homicide that excludes all non-viable fetuses). The author repeatedly recognized that the Supreme Court has stated it has not decided when life begins; however, the author proceeds to draw the conclusion that the Court has held fetal life to be less valuable than the lives of those that have been born generally, placing, in particular, the lives of non-viable fetuses as of so little value that they should be excluded from fetal homicide statutes to remain consistent with *Roe*. *Id.* at 465-66, 506-07. The Supreme Court's stated agnosticism does not support this conclusion. The Court explicitly attempted to balance, by relative importance, the rights of the woman with the rights of the state in the potential life of the fetus in the context of abortion and did not authoritatively

homicide, the actor should be punished retributively, although not as seriously, even if he did not know the woman was pregnant. The fetus's life interest still warrants the state's protection under these circumstances, and the unwanted termination of the pregnancy must be separately recognized and vindicated. A crime that results in the death of a fetus, regardless of the specific knowledge of the actor, is objectively more traumatic and culpable than violence committed against a non-pregnant person because two separate harms result.

The proposed legislation divides the crimes into murder, manslaughter, and negligent homicide, which is consistent with the current categories generally accepted in criminal law. It also appropriately considers and weighs the harm caused and the mental state of the actor.[143] The proposed model fetal-homicide statutes below rely on the distinctions in mens rea established in the *Model Penal Code*.[144]

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decide, for constitutional purposes, the absolute value of fetal life. Roe v. Wade, 410 U.S. 113, 159-63 (1973).

143. This Note does not address sentencing specifically, deferring to the states' sentencing guidelines for the different categories of homicide.

144. MODEL PENAL CODE § 2.02:

> (2) Kinds of Culpability Defined.
> (a) Purposely.
> A person acts purposely with respect to a material element of an offense when:
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
> (b) Knowingly.
> A person acts knowingly with respect to a material element of an offense when:
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
> (c) Recklessly.
> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
> (d) Negligently.
> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material ele-

The murder statute includes depraved indifference murder, which is a crime in many states. The proposed model fetal-murder statute is as follows:

> Definition
>
> For the purposes of this section, "fetus" means a member of the species homo sapiens, at any stage of development, who is carried in the womb of a biological mother or a host womb.[145]
>
> Murder of a Fetus
>
> Whoever does any of the following is guilty of murder of a fetus:
>
> (1) A person commits murder of a fetus if he or she in committing an act or engaging in conduct that causes the death of a fetus, acts intentionally or knowingly to kill the fetus and/or the mother of the fetus where the person knew or should have known of the pregnancy.[146]
>
> (2) Causes the death of an unborn child under circumstances manifesting extreme indifference to the value of the life of the unborn child or the pregnant woman;[147]
>
> Except that in any prosecution, a person shall not be guilty under this subsection if he acted under the influence of ex-

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ment exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

145. Adapted from the UVVA, 18 U.S.C. § 1841 (2006). This definition excludes the issue of an embryo not yet implanted in the womb since the focus is on harm to both a pregnant woman and the fetus.

146. Adapted from the Nebraska fetal homicide statute, NEB. REV. STAT. §§ 28-388 to -394 (2009). The "should have known" standard should be judged from the perspective of a reasonable person in the defendant's position. This is to aid the prosecution in cases where, for example, the defendant claims he did not know the woman was pregnant when, in fact, she was in the third trimester and was visibly pregnant.

147. Adapted from the North Dakota fetal homicide statute, N.D. CENT. CODE §§ 12.1-17.1-01 to -08 (2009).

> treme emotional disturbance for which there was a reasonable explanation or excuse. Reasonableness is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter of a fetus or any other crime.[148]

The "knew or should have known" aspects of the mens rea for murder punishes those who had specific knowledge of the woman's pregnancy, like Lori Hacking's husband, or those who should have known of the pregnancy because a reasonable person who looked at the woman could determine that she was pregnant.

The subsequent provisions, manslaughter, negligent homicide, and vehicular homicide, do not require that the defendant "knew or should have known" of the pregnancy. For recklessness, the prosecution must prove that the defendant "consciously disregards a substantial and unjustifiable risk" that the woman he harms could be pregnant and that his conduct would terminate her pregnancy; for criminal negligence, the prosecution has to prove that the defendant "should be aware of a substantial and unjustifiable risk" that the woman he harms could be pregnant and that his conduct would terminate her pregnancy.[149] These provisions are as follows:

> Manslaughter of a Fetus
>
> Whoever does any of the following is guilty of manslaughter of a fetus:
>
> (1) With intent to cause serious physical injury to a fetus he causes the death of the fetus; or[150]
>
> (2) With intent to cause the death of a fetus he causes the death of a fetus under circumstances which do not

148. Adapted from the Kentucky fetal homicide statute, KY. REV. STAT. ANN. § 507A.020 (West 2009).

149. *See supra* note 144 and accompanying text.

150. *See supra* note 148 and accompanying text.

> constitute murder of a fetus because he acts under the influence of extreme emotional disturbance; or[151]
>
> (3) A person is guilty of manslaughter of a fetus if the person recklessly causes the death of a fetus.[152]

Negligent homicide of a Fetus

> A person is guilty of negligent homicide of a fetus if the person negligently causes the death of a fetus.[153]

Applying a presumption that a woman of childbearing age could be pregnant is one way to satisfy the requirements of recklessness and criminal negligence, as defined in the previous paragraph.[154] In some cases, this could operate the same way that the doctrine of transferred intent operates under the UVVA. For example, if a person recklessly kills a woman of childbearing age and had no idea she was pregnant, then applying the presumption that a woman of childbearing age is pregnant could be sufficient to prove manslaughter with respect to the fetus as well.[155]

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151. *Id.*

152. *See supra* note 144 and accompanying text.

153. *Id.*

154. Prosecutors can use this presumption to cover scenarios that might otherwise be prosecuted under a felony murder provision for fetuses — a provision that is noticeably absent from this proposed legislation. Some argue that felony murder cannot be justified retributively. *See* Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 778-79 (1999). This argument applies even more forcefully for holding a defendant liable for another murder if the woman he killed also happened to be pregnant. For states that recognize felony murder, the prosecution can charge the defendant with criminally negligent homicide for the death of a fetus. The presumption that a woman of childbearing age could be pregnant would apply to the "substantial and unjustifiable risk" that the actor failed to perceive. Utilizing the presumption, "[a] person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk" that the woman whose death he caused could be pregnant and will result in the death of the fetus. *See supra* note 144. Since this presumption does not rely on the doctrine of transferred intent, the defendant will not automatically be liable for an additional murder. Instead, the prosecution must undertake a separate analysis to ensure the punishment fits the actual mens rea.

155. At least one court has explicitly stated that such presumption is not unconstitutionally vague. The Minnesota Supreme Court held:

> The fair warning rule [of the Due Process Clause] has never been understood to excuse criminal liability simply because the defendant's victim proves not to be the victim the defendant had in mind.
>
> . . . .

The defendant can rebut this presumption with proof that he had specific knowledge that the woman was not pregnant. For example, if the victim told the defendant prior to her death that she was not pregnant, then he should not be held liable for manslaughter or criminally negligent homicide of the fetus.

The proposed model legislation would differ significantly from the UVVA. One of the criticisms of the UVVA's use of transferred intent is that it can be overinclusive: "[I]t is hard to apply the doctrine of 'transferred intent' if the proposed statute has absolutely no requirement that the defendant ever had . . . the knowledge necessary to harm a woman by reason of her pregnancy."[156] Under the UVVA, a defendant who murdered a pregnant woman with the specific intent to kill her would be liable for murder of the fetus as well, even though he was completely unaware of her pregnancy and her pregnancy was not apparent; however, the proposed model legislation would characterize the death of the fetus as a lower level of homicide because the defendant neither knew nor should have known of her pregnancy. Arguably, the doctrine of transferred intent applies to this scenario as well since the defendant does not need to have the requisite intent or knowledge with regard to the victim to whom the intent transfers. Therefore, even though the defendant did not know the fetus existed, his intent to kill the mother can be transferred to the fetus nonetheless.

The proposed model legislation, however, takes a different approach. The doctrine of transferred intent applies when the unintended harm "ensued as a natural and probable consequence"[157] of the harm to the original victim, but the proposed model legislation does not include this type of probabilistic harm within murder. Instead, it would be a more appropriate consideration for manslaughter or criminally negligent homicide, where both recklessness and criminal negligence imply probable risk. The proposed model legislation recognizes that there can be differences in applying transferred intent to unintended victims that are fetuses, and this might change the calculation of what constitutes a

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> . . . The possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude.

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

156. H.R. REP. NO. 108-420, pt. 1, at 85-86 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.

157. 21 AM. JUR. 2D *Criminal Law* § 120 (2009).

"probable consequence" when holding a defendant liable for intentional murder. It is sensible to classify the shooting of an innocent bystander as a "probable consequence" of trying to shoot a specific person in a crowd. However, "probable consequence" is stretched even further in a situation where a defendant shoots a woman that he had no reason to believe was pregnant and accidentally kills her fetus. The proposed model legislation is more in line with the goal of retribution by punishing the defendant in the latter situation for manslaughter or criminally negligent homicide with respect to the fetus.

Another problem with the UVVA's use of the doctrine of transferred intent is that in some situations it is underinclusive. For example, under the UVVA, if the defendant only intends to injure the mother, but also kills the fetus, there would not be requisite homicidal intent to transfer to the fetus. The UVVA only departs from the doctrine of transferred intent when the defendant had the specific intent to kill the fetus.[158] It is impossible to use the doctrine of transferred intent to charge the defendant with a more serious crime concerning the unintended victim if the defendant only met the mens rea requirement for a lesser crime concerning the intended victim.

In *Mordica v. State*, the District Court of Appeal of Florida found that transferred intent could not be used to convict the defendant, who accidentally hit an officer during an inmate fight, of battery of a law enforcement officer when he only had the mens rea to satisfy simple battery. The court stated that

> [T]he doctrine of transferred intent . . . is governed and limited by the intent operative as to the intended victim, not the unintended victim, and the severity of the offense predicated on the doctrine of transferred intent is that applicable had the intended victim been the one injured.[159]

For this reason, it would be difficult to convict the defendant of homicide under the UVVA if he did not have homicidal intent

158. "If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being." 18 U.S.C. § 1841(a)(2)(A)(C) (2006).

159. Mordica v. State, 618 So. 2d 301, 304 (Fla. Dist. Ct. App. 1993).

against the mother, whereas the proposed model legislation resolves the issue by analyzing the crimes against the mother and the fetus separately. This would likely be classified as either manslaughter or criminally negligent homicide, depending on the circumstances.

The proposed model legislation would also contain a provision for vehicular homicide of a fetus, as these situations are difficult to fit into traditional homicide schemes.[160] The punishments, in keeping with the majority of the states and the UVVA, should be equivalent to comparable crimes.[161] States can adapt these provisions so that they are in accordance with each state's sentencing scheme.

This model legislation uses separate provisions for fetal homicide, rather than simply incorporating fetuses into currently existing crimes. This approach simultaneously recognizes the separate harms done while also respecting the distinction between legal persons and fetuses.[162] Crimes against fetuses differ practically from crimes against persons that are born. For example, the crimes require different types of scientific evidence, such medical evidence that may be necessary to prove causation. The law should also distinguish crimes against fetuses to clarify that it does not grant full legal personhood to fetuses. Separate legislation is better equipped to deal with the problems, both concep-

160. For example: Vehicular Homicide of a Fetus — A person who causes the death of an unborn child unintentionally while engaged in the operation of a motor vehicle in violation of the vehicular laws of the state and operates the vehicle (1) in a grossly negligent manner or (2) in a negligent manner while under the influence of: (i) alcohol; (ii) a controlled substance. This formulation was adapted from the Nebraska vehicular homicide of an unborn child statute, *see* NEB. REV. STAT. §§ 28-388 to -394 (2009), and the Minnesota criminal vehicular homicide statute, MINN. STAT. ANN. § 609.21 (West 2009). Vehicular homicide statutes generally respond to highway accident frequency. 13 AM. JUR. *Trials* § 295 (2009). As such, they do not require that the defendant have any particular knowledge or specific intent with regard to how many passengers might be travelling in the vehicle with which he collides. Applying a similar principle, it should not be more difficult to obtain a conviction regarding a fetus killed in such a collision. It must be shown that the driver was both the legal and proximate cause of the death; as applied in this context, neither type of causation requires that the defendant have any knowledge or intent with regard to any particular victim. 7A AM. JUR. 2d *Automobiles* § 363 (2009).

161. For example: Punishment **—** The punishment for any offense listed in this section is the same as the punishment provided under comparable state law for that conduct had that death occurred to the fetus's mother. Nothing in this section is intended to preclude separate prosecution, conviction, and punishment of a person for actions taken against the fetus's mother. This formulation was adapted from the UVVA, 18 U.S.C. § 1841 (2006).

162. *But see* Curran, *supra* note 7, at 1139.

tual and practical, that may arise from trying to prosecute for fetal homicide under current homicide laws.

The proposed legislation also deliberately avoids use of the term "unborn child" or "child in utero," although many state fetal-homicide statutes and the UVVA use these terms. This makes the statute more neutral and palatable to those states that still have concerns about abortion and lack a gestational-age requirement. While it is far from clear that using the phrase "unborn child" makes the statute unconstitutional, not employing these words is one way to help separate the abortion debate from fetal homicide laws, which address completely different issues. Courts have overwhelmingly and unequivocally upheld the constitutionality of fetal homicide laws, reasoning that the constitutionally protected right to abortion has different goals and justifications, warranting different constitutional treatment.[163] Additionally, courts use the term "unborn child" freely in opinions.[164] However, to quell the concerns of those who fear restricting a woman's right to choose, a less charged term like "fetus" is likely to garner broader approval. For example, the ACLU lists as one of its six factors for new fetal homicide laws that "language used to describe the fetus should not include anti-choice terms such as 'preborn' or 'unborn child.'"[165] States would encounter less resistance

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163. *See supra* Part III.C.1.

164. *See supra* Part III.C.2.

165. Smith, *supra* note 14, at 1877. The other five factors are:

> First, the bill should define the woman alone as the victim, as opposed to the fetus alone, or both the woman and the fetus. If the state does not include such exceptions, then the proposal will probably be stiffly opposed by pro-choice activists who might view it as a threat to abortion rights, as well as by groups opposed to laws criminalizing maternal behavior during pregnancy. Second, in order to diffuse pro-choice opposition, the bill should have an exemption for abortions and the woman's conduct. . . . Fourth, to comport with due process, the bill should require adequate knowledge or intent to commit the crime. Fifth, the terms and prohibited conduct should be defined precisely to avoid vagueness concerns. Sixth, the penalties for causing fetal death should not be as severe as for killing a live person.

Id. at 1876-77 (footnotes omitted). The proposed model legislation comports with all of these requirements except the first and the sixth. The problems these two factors indentify concern the interaction between fetal homicide laws and abortion rights. As has been discussed throughout the Note, there is no reason to assume that there is a conflict between such laws and a woman's right to have an abortion, and punishing an assailant separately and severely for illegally terminating her pregnancy and interfering with the state's interest in potential life does not take away from a woman's constitutional zone of privacy with respect to her own body.

to adopting the model legislation without such potentially inflammatory terms.

The model legislation also explicitly exempts any acts the mother takes or any acts taken with her consent against the fetus. This protects against the use of the law as a tool to control pregnant women.[166] The proposed law should contain such an exemption, which could be stated as follows:

> Exceptions
>
> This section does not apply to acts that cause the death of a fetus if those acts were committed during any abortion, lawful or unlawful, to which the pregnant woman consented.[167] Under no circumstances does any section apply to acts committed by a pregnant woman against herself and her own fetus.[168]

The thrust of the law is to protect a woman's privacy and her right to give birth if she chooses, and, in this sense, the statute complements *Roe v. Wade*. When a woman's privacy interests are not at stake, there is no reason why any of her other rights must contradict the protection of her fetus from third-party assailants. Courts and legislatures acknowledge that the analysis of taking fetal life can radically vary in different contexts.[169] In the context of fetal homicide laws, the rights and privacy interests of the mother are not in any tension with the state's interest in the potential life of her fetus, and so the interests of both are expanded under these kinds of laws.

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166. For a thorough discussion regarding the few jurisdictions that apply fetal homicide laws for a mother's actions, and the potential constitutional problems such prosecutions raise, *see* Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43 (2008).

167. Adapted from the South Dakota fetal homicide statute, S.D. CODIFIED LAWS § 22-16-1.1 (2009).

168. Adapted from the Alaska fetal homicide statute, ALASKA. STAT. § 11.41.180 (2009).

169. *See supra* Part IV.A.

VI. CONCLUSION

The *Model Penal Code* must be updated to replace the common-law "born alive" rule. The "born alive" rule is an evidentiary requirement of the past that states no longer need to follow due to advances in medical technology. The proposed model legislation should be adopted in its place. This legislation provides an alternative way to view the interests involved: the state can fully protect both a woman's constitutional right to privacy and its own interest in protecting potential life. The legislation can never be applied against the woman, as it only offers protection to her fetus from a third-party's illegal acts. The proposed law ensures that crimes against pregnant women and their fetuses do not go unpunished. Further, it punishes the assailant according to clear mens rea requirements that respect the distinctions usually made in criminal law: intent, knowledge, recklessness, and criminal negligence. The adoption of this legislation will prevent the arbitrary determinations of criminal culpability in the "born alive" rule, as the *Gray* case illustrated, so that those who illegally terminate a woman's pregnancy against her wishes will no longer be able to escape liability for their actions.