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A Crisis for Women's Rights: Surveying Feticide Statutes for Content, Coverage, and Constitutionality

Keywords

Abortion, Age, Constitutional law, Gender, Homicide, Legislation, Reproduction, Statutes, Women

**A CRISIS FOR WOMEN'S RIGHTS?
SURVEYING FETICIDE STATUTES FOR CONTENT, COVERAGE, AND
CONSTITUTIONALITY**

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INTRODUCTION

In March of 2015, 26 year-old Michelle Wilkins, who was about 8 months pregnant, went to the Longmont, Colorado home of Dynel Lane who had placed a Craigslist ad offering baby clothes for sale.¹ There Lane beat, stabbed, and choked Wilkins and removed her fetus with a kitchen knife by making a cut similar to a caesarean delivery.² Wilkins survived this gruesome, bizarre attack, but her child-to-be died in the attack prior to birth.³ Lane has been charged with attempted murder of Wilkins, assault with a deadly weapon, and unlawful termination of a pregnancy, and faces more than 100 years in prison if convicted.⁴ However, Lane does not face a murder charge for killing Wilkins' fetus because Colorado law requires a child to be born alive in order to be a victim of murder.⁵ Nevertheless, Colorado law does recognize a crime against Wilkins separate from the attempt on her life, the unlawful termination of pregnancy, which carries a substantial sanction.⁶

In June of 2015, 23 year-old Kenlissia Jones was 22 weeks pregnant when she used misoprostol, a medication that induces uterine contractions, to abort herself after obtaining the drug online.⁷ She subsequently delivered a child who died some 30 minutes after being born.⁸ A hospital social worker reported these events to police, and she was arrested on charges of malice murder and possession of a dangerous drug.⁹ The murder charge was dropped when the district attorney determined that Georgia law does not allow prosecution of a woman for terminating her own pregnancy.¹⁰ The Georgia Court of Appeals has held that the criminal abortion statute "is written in the third person, clearly indicating that at least two actors must be involved" and therefore "does not criminalize a pregnant woman's actions in securing an abortion, regardless of the means utilized."¹¹

The Wilkins case ignited a furious debate over the absence of a feticide statute in Colorado that would recognize her fetus as a separate victim and permit the State to pursue murder charges for that killing. Critics of the State's inability to pursue murder charges, many of whom are also opposed to abortion, made statements such as, "There were two victims, but one of the victims won't receive justice" and "If this isn't a clear case of murder, nothing is.

¹ Jason Molinet, *Colorado Woman Who Cut Fetus from Mom's Womb Faces 100 Years in Prison, State Lawmakers Reconsider Rights of Unborn*, N. Y. DAILY NEWS (Mar. 28, 2015, 3:02 AM), <http://www.nydailynews.com/news/crime/woman-cut-fetus-womb-faces-100-years-prison-article-1.2165365>.

² Melissa Chan, *Colorado Woman — Unaware Baby was Cut from Womb — Bravely Willed Herself to Live to Save Unborn Child: Officer*, N. Y. DAILY NEWS (Mar. 21, 2015, 8:50 am), <http://www.nydailynews.com/news/national/woman-scarred-evil-attacker-cuts-fetus-womb-article-1.2157790>.

³ *Id.*

⁴ Molinet, *supra* note 1.

⁵ *Id.*

⁶ COLO. REV. STAT. ANN. §§ 18-1.3-401(1)(a)(V)(A), 3.5-103(2), 1.3-406(1)(a)(2)(a)(1)(k) (West 2015) (imposing imprisonment of 8-24 years for an intentional violation).

⁷ Breana Noble, *Kenlissia Jones Murder Charge Dropped; Woman Who Induced Abortion Is Free* (Jun. 10, 2015, 1:14 PM) NEWSMAX.COM, <http://www.newsmax.com/TheWire/kenlissia-jones-murder-charge-abortion/2015/06/10/id/649815/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Abby Phillip, *Murder Charges Dropped Against Georgia Woman Jailed for Taking Abortion Pills*, WASH. POST, June 10, 2015, <http://www.washingtonpost.com/news/morning-mix/wp/2015/06/10/woman-charged-with-murder-didnt-have-any-money-to-get-an-abortion-the-legal-way-brother-says/>.

¹¹ *Hillman v. State*, 503 S.E.2d 610, 610-11 (Ga. Ct. App. 1998). According to the State, Ms. Hillman allegedly shot herself in the abdomen with the intent of ending her pregnancy; according to her, it was a botched suicide attempt. *Id.* at 611, 613 n.10.

It's not debatable."¹² Opponents of feticide laws, many of whom are pro-choice, have argued that designating fetuses as a distinct class of victims gives them rights that could be used not only to undermine women's abortion rights, but also to allow the State to interfere otherwise in the lives of pregnant women.¹³ Consequently, the question of whether unborn human beings—whom I will hereafter call prenatal humans¹⁴—ought to be considered separate victims when they die during an attack on the women who gestate them is entangled in the messy politics and ethics of abortion.

The Jones case raises the related questions of whether women should be held criminally responsible for feticide by ending the lives of their own prenatal humans outside of a legal abortion,¹⁵ and whether the Constitution permits such prosecutions. Although Ms. Jones was not prosecuted for her self-abortion, several women have been.¹⁶ For example, Purvi Patel was recently convicted of “feticide” and felony child neglect, and was sentenced to twenty years in prison for an illegal self-abortion using medication obtained online and for knowingly failing to provide care for her newborn.¹⁷ Other women have been prosecuted for feticide for intentionally or negligently ending the lives of their prenatal humans.¹⁸

This Article addresses a variety of legal and ethical issues raised by the destruction of prenatal humans by third-party assailants and by pregnant women who end the lives of their own unborn outside of a legal abortion. In this Article “feticide” means the killing of an unborn human at any point in gestation expressly made criminal by statute.¹⁹ Part I comprehensively surveys the content and scope of feticide statutes and includes a discussion of

¹² Jack Healy, *Colorado Furor Erupts over Charges Filed, and Not Filed, in Grisly Attack on Pregnant Woman*, N.Y. TIMES (April 3, 2015), <http://www.nytimes.com/2015/04/04/us/colorado-furor-erupts-over-charges-filed-and-not-filed-in-grisly-attack-on-pregnant-woman.html>.

¹³ *Id.*

¹⁴ The term “prenatal human” refers to all human entities gestating within a female’s body from their implantation in the womb to birth. I use this term rather than “fetus” which is often inaccurately (or by stipulation) used to identify all unborn humans, given that embryology commonly defines “fetus” to refer to the human organism at 8 weeks of development to birth. However, as explained *infra*, some feticide statutes encompass—problematically—unborn humans prior to the start of gestation. See *Prenatal Form and Function – The Making of an Earth Suit*, THE ENDOWMENT FOR HUMAN DEVELOPMENT, http://www.ehd.org/dev_article_intro.php (last visited Nov. 7, 2015).

¹⁵ Intentionally ending a pregnancy and intentionally ending the life of the prenatal human are distinct issues because not all induced abortions necessarily end the lives of the unborn. Nondestructive post-viability induced abortions can result, though rarely, in live births. See Michele Frishman, *Wisconsin Act 110: When an Infant Survives an Abortion*, 20 WIS. WOMEN’S L.J. 101 (2005); Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1457 (1984).

¹⁶ Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 317 (2013).

¹⁷ Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES (April 1, 2015), <http://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html>. The “feticide” statute Patel was charged under reads: “A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide.... This section does not apply to an abortion performed in compliance with ... [the statutes regulating abortion] ...” IND. CODE ANN. § 35-42-1-6 (West 2015). This is not a feticide statute as defined in the present Article because the death of the prenatal human is not an element of the crime, i.e., if the termination occurred postviability, a violation of this statute would have occurred, but the prenatal human would not necessarily be dead. The penalty of imprisonment for violation of this statute is 3 to 16 years. *Id.* § 35-50-2-5(b). However, if the termination intentionally kills a viable fetus, the perpetrator faces a murder charge and a prison sentence of 45 to 65 years. *Id.* § 35-50-2-3. Given the literal meaning of “feticide” (fetus + -cide/killing) and the fact that at live birth, a fetus becomes a person/child, it is important to distinguish the killing of prenatal humans and failing to provide life-saving aid to a living child.

¹⁸ Paltrow & Favin, *supra* note 16, at 321-22.

¹⁹ Because the unborn are not constitutional persons, there can be no common law feticide. Gestation as used here starts at the point of implantation and ends at live birth. If a human is born alive and subsequently dies as a result of a criminal act committed while that human was in utero, the perpetrator should be charged with traditional criminal homicide of a person and not feticide. Feticide also does not include—and this Article does not address—other non-homicide crimes, such as battery, that could be committed against the unborn.

the statutory exemption from feticide liability that pregnant women may receive for ending the lives of their own unborn.²⁰ This survey shows that the law of feticide is by no means uniform or consistent across jurisdictions. An act other than a legal abortion that kills a prenatal human in one state may not be a crime at all in another, while an act that kills both a pregnant woman and her unborn may in some states be a special circumstance that triggers the death penalty. While most states exempt pregnant women from feticide liability, a few do not. Furthermore, some states exempt women from some, but not all, forms of feticide. These variations in the content and reach of feticide statutes can create proverbial traps for the unwary among both pregnant women and third-party defendants as they can be at no risk of criminal liability in one state and at serious risk in another. Some feticide statutes raise major constitutional problems as well.

Part II surveys and discusses the litigation challenging the constitutionality of feticide statutes generally and of the statutory exemption from feticide liability pregnant women receive in most jurisdictions. This discussion illuminates the conceptual difference between the criminal acts of third-party assailants that kill the unborn and those of pregnant women, clarifies the legal status of prenatal humans and why the State can properly make them the victims of lethal criminal acts. It also explains why pregnant women may legally end the lives of their prenatal humans in an abortion and why assailants may not.

Part III analyzes four constitutional problems with feticide statutes: (1) their distinctly unequal treatment of the unborn; (2) the misapplication of assumed implications of feticide in other legal contexts; (3) their application to extracorporeal human embryos; and (4) their application to pregnant women who cause or contribute to the deaths of their own prenatal humans outside of a constitutionally protected abortion. The most serious questions about the constitutional propriety of feticide laws have to do with their applicability to extracorporeal human embryos (EHes, i.e., embryos existing outside a woman's body)²¹ and to the non-intentional acts of pregnant women who may kill their own unborn. The Article argues that the progenitors' right to reproductive liberty ought to shield them from feticide liability for disposing of their own embryos and that broadly worded negligent or reckless feticide laws cannot be constitutionally applied to pregnant women. It also concludes that the Constitution does not appear to bar the State from imposing feticide liability on pregnant women who intentionally end the lives of their own prenatal humans outside the confines of legal abortion, such as women who self-abort with medication obtained over the Internet.

Part IV delves into the controversy raised by the Wilkins case over whether legislation making prenatal humans separate victims of feticide is justifiable and whether enhancing the punishment of a defendant who kills a prenatal human or making the killing of the unborn a separate crime against the woman as Colorado has done is the preferable course of action. I claim that good reasons support the enactment of feticide statutes *and* that they do not legally undermine abortion rights, but concede that enhancement statutes modeled on hate crime legislation and "unlawful termination of pregnancy" laws are not unreasonable means for the State to adopt to recognize the harm done when a child-to-be's life is wrongfully taken.

²⁰ See Naomi Wolf, *Our Bodies, Our Souls*, 213 THE NEW REPUBLIC 16, 26 (1995) ("[W]e need to contextualize the fight to defend abortion rights within a moral framework that admits that the death of a fetus is a real death . . .").

²¹ These are embryos created using in vitro fertilization and existing outside of a woman's body; they are almost always created for the purpose of being implanted in the womb of the female progenitor and resulting in the birth of a child.

PART I: SURVEY OF FETICIDE STATUTES AND EXEMPTIONS

Legislatures typically enact feticide statutes in response both to judicial rulings that prenatal humans cannot be victims of traditional criminal homicide due to the common law “born alive” rule and to deliberate, often brutal, killings of the unborn.²² For example, Teresa Keeler was about 7 or 8 months pregnant when her ex-husband blocked the road in front of her, walked to her vehicle, and informed her “You sure are [pregnant]. I’m going to stomp it out of you” and then proceeded to do so.²³ After the California Supreme Court applied the common law rule and held he could not be accountable for the murder of her prenatal human, “[t]he Legislature reacted to . . . *Keeler* . . . by amending the murder statute . . . to include within its proscription the killing of a fetus.”²⁴ Furthermore, legislative action has almost surely been influenced by conservative politics and by support from pro-life groups who perceive feticide bans as advancing their respect for human life and opposition to abortion.²⁵

Thirty-six states²⁶ and the federal government²⁷ have statutes that expressly recognize prenatal humans as individual victims of at least one category of traditional criminal homicide or of the separate offense of feticide.²⁸ The highest court of one state has ruled that, even in the absence of a statute, viable prenatal humans can be the victims of criminal homicide.²⁹ Fourteen states as well as the District of Columbia do not have feticide statutes.³⁰ Twenty-nine states and the federal UVVA prohibit the killing of the unborn at a very early stage of development³¹ while seven make them victims of feticide at a particular point later in development.³²

²² Douglas Curran, *Abandonment and Reconciliation: Addressing Potential Common Law Objections to Fetal Homicide Laws*, 58 DUKE L.J. 1107, 1119 (2009).

²³ *Keeler v. Superior Court*, 470 P.2d 617, 618 (Cal. 1970), *superseded by statute*, CAL. PENAL CODE § 187 (West 2015), *as recognized in* *People v. Chui*, 325 P.3d 972 (Cal. 2014).

²⁴ *People v. Davis*, 872 P.2d 591, 595 (Cal. 1994).

²⁵ *See, e.g.*, NAT’L RIGHT TO LIFE COMM’N, *Key Facts on the Unborn Victims of Violence Act*, NRLC (April 1, 2004), <http://www.nrlc.org/federal/unbornvictims/keypointssuva/> (“The National Right to Life Committee strongly supported enactment of [the Unborn Victims of Violence Act] because it achieved other pro-life purposes that are worthwhile in their own right: The protection of unborn children from acts of violence *other than* abortion . . .”).

²⁶ Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 864, 877 app. tbl.1 (2014). These states are Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

²⁷ Unborn Victims of Violence Act (UVVA), 18 U.S.C.A. § 1841 (West 2015) (effective April 1, 2004) (recognizing prenatal humans as separate victims if they are killed during the commission of any federal crime of violence).

²⁸ States in the former category include unborn humans as victims under their traditional criminal homicide statutes in addition to persons, for example, CAL. PENAL CODE § 187 (West 2015). Those in the latter category have created separate criminal statutes that apply specifically to prenatal humans typically called “unborn children”. I will refer to these collectively as “feticide statutes.”

²⁹ In *Commonwealth v. Cass*, 467 N.E.2d 1324, 1324-25 (Mass. 1984), the Supreme Judicial Court of Massachusetts held that the term “person” applied to a viable fetus for the purposes of vehicular manslaughter and in *Commonwealth v. Lawrence*, 536 N.E.2d 571, 575-76 (Mass. 1989), ruled that a viable fetus was a “person” for purposes of the common law of murder. The argument that both rulings should be considered invalid because the judiciary has no constitutional authority to recognize prenatal humans as victims of any common law crime is discussed further in Part III (B) *infra*.

³⁰ Colorado, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, and Wyoming. However, Colorado has created a separate set of crimes against pregnant women for assailants who kill the unborn called “unlawful termination of pregnancy.” COLO. REV. STAT. ANN. § 18-3.5-101(6) (West 2015). Maine law provides for a crime of “elevated” assault against a pregnant woman if the assailant’s attack ends her pregnancy. ME. REV. STAT. ANN. tit. 17, § 208-C (2015). California, CAL. PENAL CODE § 12022.9 (West 2015), and Indiana, IND. CODE ANN. § 35-50-2-16 (West 2015), also have enhancement statutes for killing the unborn in certain circumstances.

³¹ Murphy, *supra* note 26, at app. tbl.1. The states are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Carolina,

The content and scope of existing feticide statutes, as well as the existence and nature of exemption from liability for pregnant women with respect to their own prenatal humans, varies dramatically. Thirty-one states criminalize the deliberate killing of a prenatal human with malice aforethought, or what is otherwise considered first-degree murder of constitutional persons.³³ Twenty criminalize second-degree murder of the unborn, while only three states criminalize what could be classified as feticide in the third-degree, analogous to the unusual criminal classification of third-degree murder.³⁴

With respect to lesser crimes of feticide, voluntary manslaughter is the crime proscribed by the largest number of states, thirty-three,³⁵ but only fourteen criminalize the involuntary manslaughter of prenatal humans.³⁶ Eleven states have enacted laws to punish criminally negligent feticide,³⁷ six outlaw reckless feticide,³⁸ fourteen criminalize vehicular feticide,³⁹ and sixteen separately criminalize vehicular feticide while under the influence of drugs or alcohol.⁴⁰

North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. Due to changes in legislation, Mr. Murphy's table incorrectly indicates that Arkansas feticide law encompasses only prenatal humans at twelve weeks of gestation and Florida's laws apply only at viability. The former's feticide laws apply to "an unborn child in utero at any stage of development," ARK. CODE ANN. § 5-1-102(13)(B)(i)(a) (West 2015), while the latter's feticide laws apply to "a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb," FLA. STAT. ANN. § 775.021(5)(e) (West 2015).

Unlike Mr. Murphy, I consider IOWA CODE ANN. § 707.8 (West 2015), to be a feticide statute which encompasses the unborn at a very early stage of development because it prohibits the nonconsensual termination of a human pregnancy, the killing of a prenatal human terminates a pregnancy, and "[p]regnancy is established when a fertilized egg has been implanted in the wall of a woman's uterus." Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, THE GUTTMACHER REP. ON PUB. POL'Y, 7, at 7 (2005). Implantation "takes place 6 or 7 days after fertilization." F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS, 48 (23d ed. 2010). Indiana's murder statute, IND. CODE ANN. § 35-42-1-1(4) (West 2015), applies only to a viable fetus, while its so-called feticide statute, IND. CODE ANN. § 35-42-1-6 (West 2015), is violated by the intentional termination of any pregnancy regardless of whether the prenatal human dies as a result.

³² Murphy, *supra* note 26, at app. tbl. 1. These states are California (fetus), Maryland (viable fetus), Michigan (quick fetus), Nevada (unborn quick child), Rhode Island (unborn quick child), Virginia (fetus), and Washington (unborn quick child). "Quickening" is said to occur when movements of the fetus are first sensed or observed, and ordinarily takes place between the 16th and 18th week of pregnancy. [M]uch of the history of the law of abortion and abortifacient homicide revolves around this concept Keeler v. Superior Court, 470 P.2d 617, 620 n.5 (Cal. 1970). In Rhode Island and Michigan the definition of "quick" means "viable." R.I. GEN. LAWS ANN. § 11-23-5 (West 2015); Larkin v. Cahalan, 208 N.W.2d 176, 180 (Mich. 1973).

³³ Murphy, *supra* note 26, at app. tbl. 1.

³⁴ *Id.*

³⁵ *Id.* While it is a difficult statute to construe, R.I. GEN. LAWS ANN. § 11-23-5(a) (West 2011) apparently deems "the willful killing of an unborn quick child by any injury to the mother of the child" to be manslaughter only if both mother and unborn die. Some of these states use the term "first-degree" instead of "voluntary" to classify this type of manslaughter, though the elements remain the same.

³⁶ *Id.* Some states use the term "second degree" instead of "involuntary" in defining this crime, though the elements remain roughly the same.

³⁷ *Id.*

³⁸ Kentucky (KY. REV. STAT. ANN. § 507A.050 (West 2015)), Ohio (OHIO REV. CODE ANN. § 2903.041(A) (West 2015)), Missouri (MO. ANN. STAT. § 565.024(1)(1) (West 2015)), Tennessee (TENN. CODE ANN. § 39-13-215(a) (West 2015)), Texas (TEX. PENAL CODE §§ 1.07(a)(26), 19.04(a) (West 2015), and Wisconsin (WIS. STAT. ANN. § 940.06(2) (West 2015)).

³⁹ Murphy, *supra* note 26, at app. tbl. 1; MICH. COMP. LAWS ANN. § 750.90d (West 2015); TENN. CODE ANN. § 39-13-213(a)(1) (West 2015).

⁴⁰ TENN. CODE ANN. § 39-13-213(a)(1) (West 2015); ARK. CODE ANN. § 5-10-105(a)(1) (West 2015); FLA. STAT. ANN. § 316.193(3)(c)(3) (West 2015); IOWA CODE ANN. §§ 707.6A(1) (West 2015), 707.8(4); KAN. STAT. ANN. § 21-3452(d), 21-3442 (West 2015); MICH. COMP. LAWS ANN. §§ 750.90D, 257.625(4) (West 2015); MO. REV. STAT. ANN. § 565.024(1) (West 2015); TENN. CODE ANN. § 39-13-213(a)(2) (West 2015); UTAH CODE ANN. §§ 76-5-207(2)(a), 76-5-201(1)(a) (West 2015)).

Feticide statutes also vary significantly with respect to the immunity pregnant women⁴¹ have from criminal liability for the unlawful killing of their own prenatal humans. About two-thirds of the jurisdictions with feticide laws exempt pregnant women from all criminal liability for feticide, twenty-three percent provide no explicit exemption, and ten percent provide exemption only from certain types of feticide.⁴² Consequently, women cannot assume that the immunity from feticide prosecution to which they are entitled in one jurisdiction will exist in another they may be in.

Twenty-five states expressly exempt pregnant women from all feticide crimes with respect to their own pregnancies.⁴³ California, for example, prohibits the murder of a "fetus," but this prohibition does not apply "to any person who commits an act that results in the death of a fetus if . . . [t]he act was solicited, aided, abetted, or consented to by the mother of the fetus."⁴⁴ Texas's exemption is equally straightforward: "This chapter [on criminal homicide] does not apply to the death of an unborn child if the conduct charged is . . . committed by the mother of the unborn child . . ."⁴⁵ Virginia exempts the pregnant woman from liability for killing her own prenatal human by specifying that "any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another is guilty of a . . . felony."⁴⁶ The federal UVVA states "Nothing in this section shall be construed to permit the prosecution...of any woman with respect to her unborn child."⁴⁷

Three states exempt pregnant women from some, but not all, forms of feticide. Minnesota exempts pregnant women from liability for first, second, and third-degree murder as well as for first-degree manslaughter, and death of an unborn child in the commission of

⁴¹ The term "pregnant women" is used uniformly in this Article to refer to women who may be defendants in feticide prosecutions and to avoid the emotionally loaded word "mother" employed by some statutes and commentators. Of course these women are pregnant only when the possibly unlawful killing of their own prenatal human takes place and not when charged.

⁴² Oklahoma's statute is left uncategorized. "Homicide is the killing of one human being by another." OKLA. STAT. ANN. tit. 21, § 691(A) (West 2015). "Human being" includes "the unborn offspring of human being from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo, and fetus." *Id.* § 691(B); OKLA. STAT. ANN., tit.63, § 1-730(4) (West 2015). Oklahoma's murder statute provides that "[a] person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being." OKLA. STAT. ANN. tit. 21, § 701.7(A) (West 2105). Consequently, the plain language of the murder statute encompasses a pregnant woman who "unlawfully and with malice aforethought" causes the death of her prenatal human at any stage of gestation. However, Oklahoma law also provides: "Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child." *Id.* § 691(D). The literal meaning of this provision is baffling: it appears to exempt pregnant women from illegally killing their own "unborn child" unless they illegally kill their unborn child.

⁴³ ALA. CODE § 13A-6-1(d) (2015); ALASKA STAT. ANN. § 11.41.180(3) (West 2015); ARIZ. REV. STAT. ANN. § 13-1105(C)(3) (2015) (same exemption in ARIZ. REV. STAT. ANN. §§ 13-1104(B)(3), 13-1103(B)(3), 13-1102(B)(3)); ARK. CODE ANN. § 5-1-102(13)(B)(iii) (West 2015); CAL. PENAL CODE § 187(b)(3) (West 2015); FLA. STAT. ANN. § 775.021(5)(d)(3) (West 2015); GA. CODE ANN. § 16-5-80(f)(3) (West 2015); IDAHO CODE ANN. § 18-4016(2)(c) (West 2015); 720 ILL. COMP. STAT. ANN. 5/9-1.2(b) (West 2015); IOWA CODE ANN. § 707.8(12)(a) (West 2015); KAN. STAT. ANN. § 21-5419(b)(1) (West 2015); KY. REV. STAT. ANN. § 507A.010(3) (West 2015); LA. STAT. ANN. § 14:32.5(A) (2015); MD. CODE ANN., CRIM. LAW § 2-103(f) (West 2015); NEB. REV. STAT. ANN. § 28-390(1) (West 2015); N.C. GEN. STAT. ANN. § 14-23.7(3) (West 2015); N.D. CENT. CODE ANN. § 12.1-17.1-01(2) (West 2015); OHIO REV. CODE ANN. § 2903.09(C)(2) (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 2608(a)(3) (West 2015); S.C. CODE ANN. § 16-3-1083(B)(3) (2015); TENN. CODE ANN. § 39-13-214(c) (West 2015); TEX. PENAL CODE ANN. § 19.06(1) (West 2015); VA. CODE ANN. § 18.2-32.2(A) (West 2015); W. VA. CODE ANN. § 61-2-30(d)(5) (West 2015); WIS. STAT. ANN. § 939.75(2)(b)(3) (West 2015).

⁴⁴ CAL. PENAL CODE § 187(b)(3) (West 2015).

⁴⁵ TEX. PENAL CODE ANN. § 19.06(1) (West 2015).

⁴⁶ VA. CODE ANN. § 18.2-32.2(A) (West 2015) (emphasis added).

⁴⁷ 18 U.S.C.A. § 1841(c)(3) (West 2015).

crime.⁴⁸ However, it apparently does hold them liable for second-degree manslaughter and criminal vehicular homicide.⁴⁹ Consequently, a pregnant woman who drives while drunk in Minnesota and causes an accident that kills her prenatal human (or someone else's, for that matter) could be sentenced to ten years in prison and fined \$20,000,⁵⁰ but if her prenatal human was killed in the course of her committing an armed robbery or she ended its life intentionally, she would not be liable for feticide—a very odd result. South Dakota exempts pregnant women for feticide liability if the acts “which cause the death of an unborn child . . . were committed during any abortion, lawful or unlawful, to which the pregnant woman consented,” but, similar to Minnesota, does not exempt them for vehicular homicide of their unborn.⁵¹

The third state, Utah, includes “an unborn child at any stage of its development” as a “human being” who can be the victim of criminal homicide.⁵² However, it exempts pregnant women in two different (and unique among the states) ways. First, Utah declares that a “person is not guilty of criminal homicide of an unborn child if the sole reason for the death . . . is that the person . . . refused to consent to . . . medical treatment . . . or . . . a cesarean section . . . or . . . failed to follow medical advice.”⁵³ Second, Utah law holds that “[a] woman is not guilty of criminal homicide of her own unborn child if the death . . . is caused by a criminally negligent act or reckless act of the woman; and is not caused by an intentional or knowing act of the woman.”⁵⁴

Eight states have no express exemption for pregnant women from the reach of any of their feticide statutes. The plain language of the feticide statutes in four of these states includes pregnant women as potential offenders.⁵⁵ Indiana law states that “a person who . . . knowingly or intentionally kills a fetus that has attained viability . . . commits murder . . .”⁵⁶ In *Shuai v. State*, the Indiana Court of Appeals ruled that the plain language of this statute applied to the defendant’s action of ingesting rat poison to intentionally kill both herself and her viable fetus and rejected her argument that the statutory language must exclude pregnant women “explicitly because the relationship between a mother and the fetus she carries is unique and ‘fundamentally and profoundly different from third-party attacks on pregnant women’”.⁵⁷

⁴⁸ MINN. STAT. ANN. § 609.266 (West 2015) provides that the word “whoever” as it appears in the specified sections of its Criminal Code devoted to crimes against unborn children “does not include the pregnant woman,” and all of the statutes for the crimes listed here use “whoever” to identify the perpetrator of the crime.

⁴⁹ *Id.* §§ 609.2665, 609.2114. Both statutes identify the perpetrator as a “person” who causes the death of an unborn child and do not use “whoever.” It is impossible to be faithful to the plain language of these statutes and to contend that the legislature intended to extend the exemption to these crimes—as odd as this conclusion may seem at first glance.

⁵⁰ *Id.* § 609.2114(1). The same punishment would apply to anyone who killed a prenatal human while driving drunk.

⁵¹ S.D. CODIFIED LAWS §§ 22-16-1.1, 22-16-41 (2015).

⁵² UTAH CODE ANN. § 76-5-201(1)(a) (West 2015).

⁵³ *Id.* § 76-5-201(3). This exemption likely was inspired by Utah’s very controversial (and almost surely unconstitutional) prosecution of Melissa Rowland for murder after one of her twins was stillborn as an alleged result of her refusal of cesarean delivery recommended by her physician.

⁵⁴ *Id.* § 76-5-201(4).

⁵⁵ Indiana, Mississippi, Missouri, and South Dakota (Except for abortions. See *supra* note 26).

⁵⁶ IND. CODE ANN. § 35-42-1-1(4) (West 2015). Viability is “the . . . point at which the fetus becomes . . . potentially able to live outside the mother’s womb, albeit with artificial aid.” *Roe v. Wade*, 410 U.S. 113, 160 (1973).

⁵⁷ 966 N.E.2d 619, 627-29 (Ind. Ct. App. 2012) (denying defendant’s motion to dismiss). Because the court found that the plain language applied to her, it declined to address her claim that the murder and feticide statutes were unconstitutional as applied to her. *Id.* at 629 n.15. In early August 2013, Ms. Shuai accepted the prosecutor’s offer to plead guilty to the misdemeanor of criminal recklessness in return for the prosecutor dropping the feticide and murder charges, and she was immediately released. Dave Stafford, *Shuai Pleads Guilty of Lesser Charge, is Freed*, THE IND. LAW. (Aug. 2, 2013), <http://www.theindianlawyer.com/shuai-pleads-guilty-to-lesser-charge-is-freed/PARAMS/article/32079>.

Mississippi law states that the term “‘human being’ includes an unborn child at every stage of gestation from conception until live birth” as a potential victim of all forms of criminal homicide.⁵⁸ Given the various criminal homicide statutes prohibit the killing of a “human being” by anyone and the absence of any statutory exemption for pregnant women, the plain language of the Mississippi homicide statutes encompasses the behavior of pregnant women.

Missouri has decided that its laws “shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to others persons,”⁵⁹ and consequently its courts have ruled that unborn children can be victims of its criminal homicide statutes.⁶⁰ Similar to Mississippi, South Dakota defines five types of criminal homicide as the “killing of one human being, including an unborn child, by another” and lacks an across-the-board exemption.⁶¹

Four states with feticide statutes have no explicit exemption for pregnant women, but their language cannot be properly interpreted to apply to them. Nevada law provides that “a person who willfully kills an unborn quick child, by any injury committed upon the mother of the child, commits manslaughter”⁶² Washington law defines manslaughter as when “[an individual] intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.”⁶³ Rhode Island and Michigan deem manslaughter “[t]he willful killing of an unborn quick child by any injury to the mother of the child, which would be murder if it resulted in the death of the mother.”⁶⁴ As the language and syntax of all these statutes assumes a difference between the perpetrator and the injured parties (the pregnant woman and her unborn quick child), they seem intended to apply only to third-party attackers and not to pregnant women.

Thus, the great majority of states with feticide laws expressly exempt pregnant women from their reach with respect to ending the lives of their own prenatal humans. These states may have done so in order to avoid any claim that feticide laws were an effort to curtail abortion rights, to prevent litigation over the constitutionality of such laws when applied to pregnant women’s behavior, to make clear that the primary purpose of such laws is to deter and punish third parties who violently end a woman’s pregnancy, and to protect the woman herself as the sole agent in determining the maintenance of her pregnancy. Exemption also may well have made passage of feticide laws more politically palatable to those in favor of abortion rights.

It is difficult to ascertain whether Minnesota clearly intended to exempt pregnant from five types of feticide while making them potentially liable for two other forms, although these are less serious crimes. In contrast, it is plain that Utah carefully crafted its feticide statutes to exclude pregnant women as perpetrators of the crimes that raise very serious constitutional problems and to include them as those who could commit other crimes. In short, legislatures seem quite aware of when and how to exempt pregnant women from feticide—as well as when and how to include them as possible perpetrators of feticide.

⁵⁸ MISS. CODE ANN. § 97-3-37(1) (West 2015).

⁵⁹ MO. ANN. STAT. § 1.205(2) (West 2015).

⁶⁰ State v. Holcomb, 956 S.W.2d 286, 288 (Mo. Ct. App. 1997) (first-degree murder); State v. Rollen, 133 S.W.3d 57, 58 (Mo. Ct. App. 2003) (second degree felony murder); State v. Knapp, 843 S.W.2d 345, 346 (Mo. 1992) (en banc) (involuntary manslaughter).

⁶¹ S.D. CODIFIED LAWS § 22-161-1 (2015) (murder, manslaughter, excusable homicide, justifiable homicide, vehicular homicide, but exemption for consensual abortions).

⁶² NEV. REV. STAT. ANN. § 200.210 (West 2015).

⁶³ WASH. REV. CODE ANN. § 9 A.32.060(1)(b) (West 2015).

⁶⁴ R.I. GEN. LAWS ANN. § 11-23-5(a) (West 2015); MICH. COMP. LAWS ANN. § 750.322 (West 2015).

As for the four states that lack any exemption, two of them have already prosecuted pregnant women for feticide. Indiana prosecuted Bei Bei Shuai for murder and attempted feticide after she ingested rat poison with what the State alleged was the intent to kill both herself and her (in this case, viable) prenatal human.⁶⁵ Mississippi has charged Rennie Gibbs with “depraved heart murder” for allegedly causing the death of her prenatal human by using crack cocaine during her pregnancy.⁶⁶ No reports of feticide prosecutions in Missouri or South Dakota could be located.

The constitutional permissibility of prosecuting and convicting women of the feticide of their own prenatal humans is discussed in the next section. The reasons for making them eligible for such prosecution or exempt from it are discussed in Section III (D) below.

PART II: CONSTITUTIONALITY OF FETICIDE STATUTES AND EXEMPTIONS

Two categories of defendants in feticide prosecutions exist that need to be distinguished for purposes of constitutional analysis: first, third-party assailants of pregnant women, and second, pregnant women who cause the deaths of their own unborn outside of a legal abortion. Serious, if not fatal, constitutional objections can be properly raised against the application of at least some types of feticide statutes to the latter group while the former can advance very few, if any, legitimate arguments against the application of feticide statutes to them.⁶⁷ First, this Article will consider the constitutional objections of third-party assailants as they have been litigated extensively and are largely unproblematic.

A. CHALLENGES FROM THIRD-PARTY ASSAILANTS

A significant number of third-party defendants have attacked the constitutionality of the feticide statutes under which they were convicted, but none have yet succeeded. The most common challenges are that such statutes: (1) violate the Equal Protection Clause of the Fourteenth Amendment by protecting the lives of prenatal humans as persons with respect to third parties but not with respect to pregnant women who are allowed to end their lives by means of abortion; (2) exceed the authority of the State to protect the unborn as established by *Roe*⁶⁸ or otherwise violate Due Process if they encompass the killing of nonviable prenatal humans; (3) violate the Due Process Clause of the Fourteenth Amendment by being

⁶⁵ Shuai v. State, 966 N.E.2d 619, 627-30 (Ind. Ct. App. 2012). Her case has been extensively discussed elsewhere. Murphy, *supra* note 26, at 854-58; Geneva Brown, *Bei Bei Shuai: Pregnancy, Murder, and Mayhem in Indiana*, 17 J. GENDER RACE & JUST. 221, 224-228 (2014).

⁶⁶ The murder charge was dismissed by a trial judge in April 2014, but the prosecutor was reported to be considering seeking a new manslaughter charge from a grand jury. Laura Huss, *Mississippi Murder Charge Against Pregnant Teen Dismissed*, NAT'L ADVOCS. FOR PREGNANT WOMEN (Apr. 4, 2014), http://advocatesforpregnantwomen.org/blog/2014/04/mississippi_murder_charge_agai.php.

⁶⁷ Although a full discussion of these arguments is beyond the scope of this Article, those with the most traction have to do with the lack of notice that an unborn victim is present (*People v. Davis*, 872 P.2d 591, 614 (Cal. 1994) (Mosk, J., dissenting) (“But I cannot believe the Legislature intended to make it murder ... to cause the death of an object the size of a peanut.”)), problems with applying the doctrine of transferred intent (*WAYNE R. LAFAVE*, CRIM. L. 357-62 (5th ed. 2010)), uncertainties as to the application of the felony murder rule (*Id.* at 785-807), and specific statutory requirements for capital murder (*Lawrence v. Texas*, 240 S.W.3d 912, 919 (Tex. Crim. App. 2007) (Johnson, J., concurring) (to avoid due process and void for vagueness objections, State must prove that defendant knew that the woman “was carrying an unborn child” and that he “intended to kill that unborn child.”)). Existing Supreme Court jurisprudence on the death penalty seems to rule out its applicability as punishment for the death of a nonperson. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“[C]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”) (citations and internal quotation marks omitted)).

⁶⁸ *Roe v. Wade*, 410 U.S. 113, 129 (1973).

excessively vague; (4) violate the Eighth Amendment by imposing disproportionately severe sentences for the killing of a nonperson, or, to use *Roe*'s infelicitous phrase, "the potentiality of human life;"⁶⁹ and (5) run afoul of the Establishment Clause by including the unborn as victims of criminal homicide.

Feticide defendants have raised several different types of Equal Protection arguments. The primary claim is that feticide statutes impermissibly discriminate between pregnant women who are allowed to kill their fetuses and all others who are not allowed to kill a fetus. The defendant in *State v. Merrill*⁷⁰ killed both Gail Anderson and her 28-day old embryo with a shotgun blast and was indicted for first- and second-degree murder of them both.⁷¹ He claimed the feticide statute violated Equal Protection by treating similarly situated persons dissimilarly: he was punished for intentionally destroying an unborn child while others (pregnant women and those performing women's abortions) could do so without criminal sanction.⁷² The Court correctly found the two groups to be fundamentally dissimilar.

The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act. In the case of abortion, the woman's choice and the doctor's actions are based on the woman's constitutionally protected right to privacy. This right encompasses the woman's decision whether to terminate or continue the pregnancy without interference from the state *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.⁷³

A Georgia defendant advanced a different type of Equal Protection argument by asserting that in a state which has statutes prohibiting both criminal abortion and feticide and which imposes a much less severe sentence for a violation of the former than the latter, Equal Protection is violated because such a scheme "creates two classifications that are arbitrary and capricious."⁷⁴ The court correctly rejected the claim by pointing out that the two offenses are distinct.

First, the criminal abortion statute does not require the actual destruction of a fetus. Secondly, the feticide statute requires an act that would constitute murder if resulting in the death of the other. This requirement changes the entire character of the offense. States ordinarily distinguish offenses and vary the severity of sentences according to the degree of mental culpability

⁶⁹ *Id.* at 161-63.

⁷⁰ 450 N.W.2d 318 (Minn. 1990).

⁷¹ In Minnesota, the traditional murder statutes and the separate set of homicide statutes pertaining to "unborn children," defined as "the unborn offspring of a human being conceived, but not yet born," were then (and still are) identical, except that "unborn child" is substituted for "person." MINN. STAT. ANN. § 609.266(a) (West 2015); *Cf.* MINN. STAT. ANN. § 609.2661 (West 1986), and MINN. STAT. ANN. § 609.185 (West 2014).

⁷² *Merrill*, 450 N.W.2d at 321.

⁷³ *Id.* at 321-22; *accord*, *State v. Coleman*, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997) ("*Roe* protects a woman's constitutional right [to terminate her pregnancy]. It does not protect a third-party's unilateral destruction of a fetus."); *State v. Alfieri*, 724 N.E.2d 477, 482 (Ohio Ct. App. 1998) (rejecting claim that the statute "impermissibly exempts pregnant women from prosecution . . . in violation of the Equal Protection Clause" because pregnant women and assailants are not similarly situated); *People v. Ford*, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991); *People v. Campos*, 592 N.E.2d 85, 97 (Ill. App. Ct. 1992); *Commonwealth v. Bullock*, 913 A.2d 207, 215-216 (Pa. 2006); *United States v. Boie*, 70 M.J. 585, 590-91 (A.F. Ct. Crim. App. 2011); *People v. Shum*, 512 N.E.2d 1183, 1199-1200 (Ill. 1987).

⁷⁴ *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir. 1987).

inherent in the offenses. Retribution is a legitimate goal of the criminal law. The distinction between the sentences...are [sic] thus rationally related to legitimate governmental purposes.⁷⁵

A Missouri defendant similarly claimed that his Equal Protection and Due Process rights were violated when the State prosecuted him for first-degree murder of a fetus when the penalty for performing an illegal abortion was much less severe.⁷⁶ In rejecting his argument that all intentional and unjustified killings of the unborn must be treated the same, the court distinguished abortion and feticide by noting that “abortion statutes assume the actual or apparent consent of the mother” and that the legislature never intended abortion regulation to treat an “unconsented (by the mother) killing of a pre-born infant, in the context of a physical assault on the mother, as anything other than a murder of the infant.”⁷⁷

Third-party assailant defendants have advanced several arguments that feticide statutes violate their substantive Due Process rights. One is that feticide statutes are “unconstitutional because there is no unlawful taking of a human life”⁷⁸ when a prenatal human is killed. In other words, feticide laws violate Due Process by criminalizing the killing of a being lacking constitutional personhood, i.e., a being other than a live-born person, because *Roe v. Wade* held that unborn humans are not constitutional persons.⁷⁹ However, *Roe*’s holding on personhood “is simply immaterial . . . to whether a state can prohibit the destruction of a fetus” given there “is no constitutional impediment unique to the prohibition of conduct that falls short of the taking of a [person’s] human life.”⁸⁰ The State may also protect “the woman’s interest in her unborn child and her right to decide whether it shall be carried *in utero*,”⁸¹ and “there has never been any notion that a third-party . . . has a fundamental liberty interest in terminating another’s pregnancy.”⁸²

Similarly, several defendants have unsuccessfully argued that “the state cannot define the termination of an unborn child as a homicide unless the unborn is viable”⁸³ without violating Due Process. These defendants were focusing on “viability because the Supreme Court has held that prohibitions on abortion before viability lack a ‘compelling state interest’ and are thus unconstitutional.”⁸⁴ However, *Roe* and *Casey* grant women who want to terminate their pregnancies constitutional protection from State interference and do not limit the State’s

⁷⁵ *Id.* (footnote omitted).

⁷⁶ *State v. Holcomb*, 956 S.W.2d 286, 290-91 (Mo. Ct. App. 1997).

⁷⁷ *Id.* at 292.

⁷⁸ *Smith*, 815 F.2d at 1388.

⁷⁹ *Roe v. Wade*, 410 U.S. 113, 158 (1973).

⁸⁰ *Smith*, 815 F.2d at 1388; *State v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990) (explaining that under *Roe*, the State has a separate “important and legitimate interest in protecting the potentiality of human life”).

⁸¹ *Merrill*, 450 N.W.2d at 322; *People v. Davis*, 872 P.2d 591, 604 (Cal. 1994) (Kennard, J., concurring) (“Moreover, when a fetus dies as the result of a criminal assault on a pregnant woman, the state’s interest extends beyond the protection of potential human life. The state has an interest in punishing violent conduct that deprives a pregnant woman of her procreative choice.”).

⁸² *State v. Coleman*, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997); *Coleman v. Dewitt*, 282 F.3d 908, 913 (6th Cir. 2002) (“The substantive due process right in *Roe* is a decisional right against governmental interference, which is meaningless when a private party terminates a woman’s pregnancy without her consent.”); *Commonwealth v. Bullock*, 913 A.2d 207, 214 (Penn. 2006) (rejecting argument that defendant “has a right to unilaterally kill the unborn child carried by another person”).

⁸³ *Coleman*, 705 N.E.2d at 421; *Coleman*, 282 F.3d at 911 (same argument made for habeas corpus relief); *State v. Alfieri*, 724 N.E.2d 477, 482-83 (Ohio Ct. App. 1998) (rejecting claim that a feticide statute violates Due Process because it allows criminal liability predicated on the death of a non-viable fetus in contravention of *Roe*); *Merrill*, 450 N.W.2d at 321 n.3 (incorrectly categorizing the claim as an Equal Protection violation); *Lawrence v. State*, 240 S.W.3d 912, 917 (Tex. Crim. App. 2007) (rejecting the claim that a feticide statute violates “substantive due process because the embryo had not yet reached ‘viability’”).

⁸⁴ *Lawrence*, 240 S.W.3d at 917; (citing *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

constitutional authority to punish strangers who have no legally protected interest in unilaterally terminating a woman's pregnancy.

In the absence of a due process interest triggering the constitutional protections of *Roe*, the Legislature is free to protect the lives of those whom it considers to be human beings. This is a policy decision that is properly reserved to the democratic process, and should not be subject to judicial second-guessing.⁸⁵

In other words, "the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide" and can choose to do so for "murder of the postembryonic product [of conception] without the imposition of a viability requirement."⁸⁶

Third-party assailants have contended that the statutes under which they were prosecuted were unconstitutionally vague, overbroad, and failed to give them fair warning. A criminal statute is void for vagueness and fails to provide fair warning to a potential violator if it fails to define the "offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."⁸⁷ In *Merrill*, the defendant argued that the Minnesota feticide statute failed to give persons fair warning because they can violate the law without even being aware that their victim exists.⁸⁸ In response, the court noted: "The 'fair warning rule has never been understood to excuse criminal liability simply because the defendant's victim proves not to be the victim the defendant had in mind.'⁸⁹ The shotgun blast Merrill aimed at Ms. Anderson was intended to cause her death, and that intent transferred to her prenatal human because it suffered the same type of harm--death.⁹⁰

Because the offender did not intend to kill the particular victim, indeed, may not even have been aware of that victim's presence, does not mean that the offender did not have fair warning that he would be held criminally accountable the same as if the victim had been the victim intended.⁹¹

Merrill asserted that the doctrine of transferred intent did not apply "because the harm to the mother and the harm to the fetus are not the same."⁹² Given that both mother and fetus are dead as a result of his action, Merrill's contention appears to assume that transferred intent only applies to persons and that the intent to kill a person cannot properly transfer to a nonperson like a fetus. Although it recognized that the unborn are not constitutional persons, the court found the "harm is substantially similar" and rejected the fair warning claim because the State has an "interest in protecting the potentiality of life."⁹³

A defendant in an Illinois case argued that the feticide statute was unconstitutionally vague because its prohibition of causing the death of an unborn child "is 'fraught with

⁸⁵ *Id.* at 917-918.

⁸⁶ *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994). The California feticide statute applies only to the unlawful and intentional killing of a "fetus," and "a fetus is defined as 'the unborn offspring in the postembryonic period, after major structures have been outlined.' ... This period occurs in humans 'seven or eight weeks after fertilization', and is a determination to be made by the trier of fact." *Id.*

⁸⁷ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

⁸⁸ *Merrill*, 450 N.W.2d at 323.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 322-23.

uncertainty and ambiguity and in many instances would be incapable of objective measurement in dealing with nonviable embryos at an early stage” and because the trier of fact may act arbitrarily in using “subjective religious, philosophical, and political views” when determining when the unborn are alive or dead.⁹⁴ Following *Merrill*, the court observed that the State only has “to prove that the embryo or fetus was alive and then no longer had life. “It [is] not necessary to prove that the living organism in the mother’s womb, whether an embryo or a fetus, was a person or a human being. . . . The name given to that entity is irrelevant to . . . liability”⁹⁵

Other courts have rejected similar challenges based on the indeterminacy of the prohibition of killing a “quick” unborn child,⁹⁶ on the failure of the feticide statute “to adequately define when life begins and ends,”⁹⁷ the definition of “unborn child,”⁹⁸ and on the definition of feticide as resulting from “an injury to the mother . . . , which would be murder if it resulted in the death of such mother.”⁹⁹ One defendant was convicted of capital murder which prohibited knowingly causing the death of “more than one person . . . during the same criminal transaction” when he had killed a woman pregnant by him and her prenatal human with three shotgun blasts.¹⁰⁰ He argued, not surprisingly unsuccessfully, that the inclusion of “individual” in the meaning of “person” was vague even though the former term was statutorily defined “as a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.”¹⁰¹ However, although this defendant knew his victim was pregnant and intended to kill her fetus, a concurring judge properly noted that the statute may be unconstitutional as failing to give fair notice when applied to a defendant who did *not* know the victim was pregnant and “could not, therefore, have intended the death of the fetus.”¹⁰²

Defendants have made a variety of Eighth Amendment challenges to feticide statutes. One defendant lamely proposed that his prison sentence violated the Eighth Amendment because “a woman and a doctor can freely abort a woman’s pregnancy but [he] is punished for the same act . . .” as if a woman who voluntarily exercises a constitutional right and “a third-party who criminally assaults the woman” and kills her prenatal human are doing the same thing.¹⁰³ In his federal challenge, this same defendant claimed his sentence of nine years for the involuntary manslaughter of a prenatal human was grossly disproportionate to the crime.

Coleman’s actions were violent and deprived [the woman he attacked] of her child, or at least the ability to exercise her rights over her pregnancy. At least as important as a woman’s right to terminate her pregnancy is her right to choose to carry her child to term. In a jurisprudence that finds mandatory life sentences for the non-violent possession of cocaine constitutionally

⁹⁴ *People v. Ford*, 581 N.E.2d 1189, 1200 (Ill. App. Ct. 1991).

⁹⁵ *Id.* at 1201; *Commonwealth v. Bullock*, 913 A.2d 207, 212-13 (2006) (rejecting fair warning argument based on claim that until viability, a fetus cannot be alive and affirming the State need only show the embryo or fetus ceases to have the properties of biological life); *United States v. Boie*, 70 M.J. 585, 588 (A.F. Ct. Crim. App. 2011) (Prohibited conduct under the UVVA is specifically defined and contains no “ambiguities that may attend the debate over the question of when the life of a human person begins or ends”).

⁹⁶ *Brinkely v. State*, 322 S.E.2d 49, 51 (Ga. 1984); *Smith v. Newsome*, 815 F.2d 1386, 1387 (11th Cir. 1987).

⁹⁷ *State v. Alfieri*, 724 N.E.2d 477, 482 (Ohio Ct. App. 1998).

⁹⁸ *State v. MacGuire*, 84 P.3d 1171, 1174-77 (Utah 2004) (providing extended analysis of why feticide statute not vague).

⁹⁹ *Smith*, 815 F.2d at 1388 (“[T]his clause contributes specificity to the offense Juries have been deciding murder cases for centuries and are clearly competent to make such a finding.”)

¹⁰⁰ *Lawrence v. State*, 240 S.W.3d 912, 914-15 (Tex. Crim. App. 2007).

¹⁰¹ *Id.*

¹⁰² *Id.* at 919 (Johnson, J., concurring).

¹⁰³ *State v. Coleman*, 705 N.E.2d 419, 421-22 (Ohio Ct. App. 1997).

permissible . . . , we would be hard-pressed to find nine years for Coleman's violent act beyond the constitutional pale.¹⁰⁴

A Texas defendant who was convicted of capital murder of his wife and an unborn child and was sentenced to life without parole argued that the Texas feticide statute "violates the Eighth Amendment . . . because it expands those cases which can be prosecuted for capital murder in an arbitrary and capricious manner."¹⁰⁵ This claim seems to contend that the punishment of life in prison without parole is "cruel and unusual" or grossly disproportionate for a crime that necessarily includes the killing of an unborn human who is not a constitutional person.¹⁰⁶ The court did not respond to this argument because the State did not seek the death penalty.¹⁰⁷

In *People v. Bunyard*,¹⁰⁸ the defendant was convicted of the first-degree murders of both his wife and her full-term fetus and sentenced to death pursuant to the multiple murder special circumstance.¹⁰⁹ He argued that the raising of an otherwise noncapital case to capital status by the murder of a fetus violated the Eighth Amendment's ban on cruel or unusual punishment given that at common law feticide was not even a felony and that (at that time) only three states allowed feticide to qualify as a murder for purposes of the multiple murder aggravating circumstance.¹¹⁰ The California Supreme Court found this argument "provocative" but unpersuasive.¹¹¹

The offense at issue—willful, deliberate and premeditated murder—creates the utmost danger to society. The fact that the victim murdered is an unborn child does not render defendant less culpable, or the crime less severe, in light of the Legislature's determination that viable fetuses receive the same protection under the murder statute as persons.¹¹²

However, *Bunyard* may not be good law on the applicability of the death penalty to defendants who are convicted of feticide because it was decided long before the Supreme Court repeatedly narrowed the constitutionally acceptable grounds for its application.¹¹³ It may be that feticide, even when combined with the intentional murder of a person, may not be in the "narrow category of the most serious crimes" whose perpetrators display "extreme culpability" and deserve the ultimate punishment.¹¹⁴

¹⁰⁴ *Coleman v. DeWitt*, 282 F.3d 908, 915 (6th Cir. 2002); *State v. Alfieri*, 724 N.E.2d 477, 483-84 (Ohio Ct. App. 1998) (rejecting claim that a sentence for feticide was extreme and grossly disproportionate because the woman herself can terminate fetal life at will in a legal abortion).

¹⁰⁵ *Holmes v. State*, No. 01-06-00975-CR, 2008 Tex. App. LEXIS 2562, at *1, *10 (1st Cir. April 10, 2008).

¹⁰⁶ Mr. Holmes, like Mr. Lawrence, was guilty of capital murder because he intentionally or knowingly cause[d] the death of "more than one person...during the same criminal transaction." "Person" includes an "individual," and "individual" includes an "unborn child at every stage of gestation . . ." TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03(a)(7)(A), 1.07(a)(38), 1.07(a)(26) (West 2015).

¹⁰⁷ *Holmes*, 2008 Tex. App. LEXIS 2562, at *12.

¹⁰⁸ *People v. Bunyard*, 756 P.2d 795 (Cal. 1988), as modified on denial of reh'g (Sept. 1, 1988) abrogated by *People v. Diaz*, 345 P.3d 62 (Cal. 2015).

¹⁰⁹ *Id.*; CAL. PENAL CODE §190.2 (a)(3) ("The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.") (West 2015).

¹¹⁰ *Bunyard*, 756 P.2d 795 at 829.

¹¹¹ *Id.* at 829-30.

¹¹² *Id.* at 829. Six years later this same court made clear in *People v. Davis*, 872 P.2d at 843, that the murder statute encompasses all prenatal humans who have reached the gestational stage of fetuses.

¹¹³ *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); accord, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

¹¹⁴ *Kennedy*, 554 U.S. at 420; accord, *Atkins*, 536 U.S. 304 (2002); *Roper*, 543 U.S. 551 (2005).

Finally, a few defendants have claimed that feticide statutes improperly manifest religious beliefs about the moral value of the unborn. A Texas man convicted of capital murder for murdering his pregnant girlfriend's twin fetuses by stepping on her abdomen claimed that the statute including unborn humans as victims of murder "violates the Establishment Clause of the U.S. Constitution by adopting 'a religious point of view over a secular one.'" ¹¹⁵ In other words, the legislature's recognition of prenatal humans as entities whose unlawful killing is as heinous a crime as killing a person evinces a solely religious point of view on the moral status of the unborn. The court used the three-prong test from *Lemon v. Kurtzman* ¹¹⁶ to analyze this argument and concluded that the protection of fetal life from wrongful killing can be found appropriate "through secular reasoning or moral intuition unconnected to religion" and that mere consistency "between a statute and religious tenets . . . does not render a statute unconstitutional."¹¹⁷ Furthermore, no showing was made of how the feticide statute advanced religion, and the statute, which "evinces a respect for fetal life that might find approval among many religious adherents," does not entangle the state with religion. ¹¹⁸ Another Texas appellate court rejected a defendant's contention that the feticide statute endorses religion by being based solely upon a religious belief that life begins at conception, and held that the State has a legitimate secular interest in protecting unborn children from the criminal acts of others. ¹¹⁹

B. CHALLENGES FROM PREGNANT WOMEN DEFENDANTS

Very few reported opinions address the constitutionality of feticide statutes applied to pregnant women whose own behavior results in the death of their prenatal human. However, it is not all that rare for pregnant women to be criminally charged for causing the death of their own unborn. A recent comprehensive study of arrests and detention of pregnant women for engaging in conduct allegedly detrimental or fatal to their prenatal humans found forty-eight cases of women who experienced miscarriage, stillbirth, or infant death and were criminally charged with feticide or a traditional form of homicide. ¹²⁰

Regina McKnight was successfully prosecuted for homicide by child abuse following a stillbirth of her viable fetus caused, according to the state of South Carolina, by her prenatal ingestion of crack cocaine. ¹²¹ She claimed that application of the homicide by child abuse statute to her violated due process requirements of fair notice, her right to privacy, and the Eighth Amendment. ¹²² The South Carolina Supreme Court held that she had fair notice of the criminality of her conduct because it had repeatedly ruled "that a viable fetus is a person" and a "child" under that state's laws and the relevant statute clearly forbade causing "the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life."¹²³ The court

¹¹⁵ *Flores v. State*, 245 S.W.3d 432, 438 (Tex. Crim. App. 2008).

¹¹⁶ 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.").

¹¹⁷ *Flores*, 245 S.W.3d at 438 (footnote omitted).

¹¹⁸ *Id.*

¹¹⁹ *Eguia v. State*, 288 S.W.3d 1, 12 (Tex. Crim. App. 2008).

¹²⁰ Paltrow & Flavin, *supra* note 16, at 321-22. Unfortunately, this study did not distinguish between "true" feticide prosecutions in which the prenatal human died in utero and criminal homicide and prosecutions in which the child was born alive, but died later allegedly as a result of injuries inflicted while it was in utero. *Id.* The common law recognized the validity of homicide prosecutions for the death of a live-born child even if the cause of death was inflicted in utero. *Keeler v. Superior Court*, 470 P.2d 617, 625-26 (Cal. 1970).

¹²¹ *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003). See Section III (B) *infra* for criticism of courts (such as those in South Carolina) rather than legislatures making feticide a crime.

¹²² *Id.*

¹²³ *Id.* at 175-76.

dismissed her privacy claim by reiterating its previous holding that “it strains belief . . . to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy” and found that her twelve year sentence was plainly in proportion to the gravity of her offense.¹²⁴

As mentioned above, Indiana prosecuted Bei Bei Shuai for murder after she intentionally ingested rat poison in an effort to kill herself and her prenatal human,¹²⁵ and her constitutional arguments in opposition were not reached on appeal.¹²⁶ Nonetheless, given the paucity of such prosecutions, it is worthwhile to review some of the constitutional objections she posed to her prosecution for feticide in her motion to dismiss.¹²⁷ Shuai asserted that the language of the feticide statute does not include pregnant women because such statutes were enacted “to ensure that the State could take criminal action against **third parties** who injure or attack pregnant women causing fetal loss” and that the statute does not apply to “the pregnant woman herself, since a pregnant woman . . . constitutionally is so substantially differently situated to the embryo and fetus she carries and sustains them than is a third-party [sic].”¹²⁸ The Court of Appeals was not persuaded. The relevant statute provides that a “person who...knowingly or intentionally kills a fetus that has attained viability . . . commits murder.” . . . Shuai is a ‘person,’ the State alleged she intended to kill . . . , and the victim was an entity [a viable fetus] protected under the murder statute.”¹²⁹ Consequently, the mere assertion of a constitutionally significant difference between pregnant women and third-party assailants when it comes to the *intentional* killing of the unborn was held not to be decisive given the statute’s plain language.¹³⁰

Shuai also offered two other constitutional objections. First, she argued that a prosecution like hers “would render [feticide] statutes void for vagueness because pregnant women of ordinary intelligence would not be on notice of which conditions, actions, inactions or circumstances during pregnancy would subject them to . . . prosecution if they suffered a perinatal loss.”¹³¹

As will be discussed further *infra*, this argument has serious constitutional merit, although not in cases like Shuai’s where the State had some evidence that she knowingly or intentionally killed her unborn.¹³² Second, she stated that feticide prosecutions violate pregnant women’s right to procreational privacy by making it “contingent on producing a child who is healthy” and could force them “to consider terminating wanted pregnancies to avoid the

¹²⁴ *Id.* at 176-78 (quoting *Whitner v. State*, 492 S.E.2d 777, 782 (S.C. 1997)). Ms. McKnight’s equal protection argument was procedurally barred from review. Currently no other court has cited McKnight with respect to these constitutional rulings. However, the same court later overturned her conviction holding that she had received ineffective assistance of counsel which included her lawyer’s failure to challenge the State’s evidence that her cocaine use caused her prenatal human’s death. *McKnight v. State*, 661 S.E.2d 354, 357 (S.C. 2008). To avoid a retrial, Ms. McKnight pleaded guilty to manslaughter and was released for the eight years she had already served. Paltrow & Flavin, *supra* note 16, at 306.

¹²⁵ The State did have some evidence that Ms. Shuai had intended to kill her prenatal human in addition to herself as she left a note for the man responsible with her for her pregnancy saying that she resolved to kill herself and was “taking this baby, the one you named Crystal, with [her].” *Shuai v. State*, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

¹²⁶ *Id.* at 621-22 n. 1.

¹²⁷ Defendant’s Memorandum of Law in Support of Motion to Dismiss, *State v. Shuai*, No. 49G03-1103-MR-014478 (Ind. Sup. Ct. Marion County March 30, 2010), available at <https://www.aclu.org/legal-document/state-indiana-v-bei-bei-shuai-memorandum-law-support-motion-dismiss?redirect=reproductive-freedom/state-indiana-v-bei-bei-shuai-memorandum-law-support-motion-dismiss>.

¹²⁸ *Id.* at 7.

¹²⁹ *Shuai*, 966 N.E.2d at 628-29 (citation omitted).

¹³⁰ *Id.* at 629.

¹³¹ Defendant’s Memorandum of Law in Support of Motion to Dismiss, *supra* note 127, at 24.

¹³² *Shuai v. State*, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

possibility of life sentences in jail if they experienced a miscarriage, stillbirth or neonatal death.”¹³³ Putting aside questions about the precise content of the “right to procreational privacy,” it is true that feticide laws cannot fairly and constitutionally be enforced if they make pregnant women guarantors of a live birth on pain of criminal homicide prosecution.

PART III: CONSTITUTIONAL PROBLEMS WITH FETICIDE

Although no feticide statute has yet been struck down as unconstitutional in whole or in part as a result of a challenge by any defendant, questions about the constitutional validity of feticide laws arise in at least the following three areas: their radically unequal application to the unborn, their application to extracorporeal human embryos (EHEs), and their application to pregnant women with respect to the killing of their own prenatal humans outside of a constitutionally protected abortion. The first of these poses a constitutional problem only when the status of the unborn is misunderstood or feticide statutes are misapplied. The second raises the constitutional question of whether the progenitors of EHEs (and their authorized agents) have a constitutionally protected right to dispose of embryos they do not use for reproduction. The third raises serious constitutional problems at least when vaguely worded feticide laws are applied to pregnant women who kill their own prenatal humans outside of a legal abortion unintentionally.

A. UNEQUAL TREATMENT AND VARIABLE STATUS OF THE UNBORN

States’ feticide laws undoubtedly treat the unborn dramatically differently and unequally. Fourteen states and the District of Columbia lack any statute forbidding feticide—which should mean that an otherwise wrongful act ending the life of an unborn human in those jurisdictions is no crime at all against the unborn.¹³⁴ As already noted, twenty-seven jurisdictions prohibit the unlawful killing of the unborn at very early, but differing, stages of development while nine protect them at varying points later in gestation.¹³⁵ Some states prohibit feticide only for certain types of criminal homicide,¹³⁶ while others specify that fetuses can be the victims of any form of criminal homicide.¹³⁷

This huge disparity in treatment would seem to raise the constitutional question of whether the states were treating prenatal humans in an unfair, unequal, or arbitrary manner when feticide laws are apparently giving the unborn rights. However, prenatal humans are not constitutional persons and have no constitutional rights, including the right to the equal protection of the laws.¹³⁸ Consequently, the State is free to treat them unequally under the criminal law or not to make them victims of criminal wrongdoing at all, provided it acts rationally and non-invidiously in doing so.¹³⁹ “[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a

¹³³ Defendant’s Memorandum of Law in Support of Motion to Dismiss, *supra* note 127, at 28.

¹³⁴ See *supra* note 30 (listing the states).

¹³⁵ Murphy, *supra* note 26, at app. tbl. 1.

¹³⁶ E.g. *People v. Dennis*, 950 P.2d 1035, 1055 (Cal. 1998) (stating in California fetuses can be the victim of first- or second-degree murder but not manslaughter); *People v. Dennis*, 17 Cal.4th 468, 506 (1998).

¹³⁷ E.g., MINN. STAT. ANN. §§ 609.2661-2665 (West 2015).

¹³⁸ *Roe v. Wade*, 410 U.S. 113, 158-60 (1973) holding modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); see generally Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155 (2009).

¹³⁹ A jurisdiction could not, for example, constitutionally exempt prenatal humans from the scope of its feticide statute on the basis of their race or ethnic origin. See Charles Baron, “If You Prick Us, Do We Not Bleed?”: *Of Shylock, Fetuses, and the Concept of Person in the Law*, 111 L. MED. & HEALTHCARE 52, 57-58 (1983) (equal protection violation for a state to make tort damages available for wrongful death of or injury to a fetus except where the fetus was nonwhite).

rational relation to some legitimate end.”¹⁴⁰ Prenatal humans have no fundamental rights and cannot be a suspect class because they are not constitutional persons. Therefore, as victims of criminal homicide, the State can classify them as it rationally wishes. This may result in them being denied the status of victims altogether (controversial, arguably unethical,¹⁴¹ but rational as it avoids any possible interference with the rights and interests of pregnant women), made the victims of some forms of homicide rather than others (e.g., a legislative decision that only killings committed when the perpetrator knew the woman was pregnant are to be criminal in order to avoid objections about lack of fair notice seems rational), or protected by a feticide law only when they reach a certain developmental stage (a legislature may rationally conclude that the moral status of the unborn at an early stage of development is much weaker than after it reaches viability).

As for perpetrators of feticide, those who attack pregnant women obviously have no right whatsoever to perpetrate violence on them and their prenatal humans, nor are they a suspect class. In contrast, women have a constitutional right, albeit not unlimited, to end their pregnancies and, at least for previability abortions, this necessarily includes the death of their prenatal humans.¹⁴² It is rational for the legislature to choose to protect the lives of the unborn (or some subset of them) from being wrongfully taken away by third parties while simultaneously recognizing the right and interest of women in deciding whether to bear a child. It is also the case that both *Roe* and *Casey* clearly concluded¹⁴³ that the State is not required by the Constitution to protect fetal life even after viability by banning abortion, even though a postviability abortion could damage the health of a subsequently born child.¹⁴⁴ However, if a prenatal human is born alive after a criminal attack while in utero and then dies as a result of that attack, the traditional criminal law allows, indeed requires, that the perpetrator be charged with a criminal homicide.¹⁴⁵

B. MISAPPLICATION OF FETICIDE STATUTES

Unfortunately, feticide statutes have been wrongfully utilized in contexts other than the criminal killing of the unborn, and this misapplication violates the Due Process rights of those who suffer adverse consequences as a result. Paltrow and Flavin have argued that feticide laws have been “used to support the argument that generally worded murder statutes, child endangerment laws, drug delivery laws, and other laws should be interpreted to permit the arrest and prosecution of pregnant women in relationship to the embryos or fetuses they carry.”¹⁴⁶ Evidence exists that precisely this has come to pass in Texas. Shortly after Texas’s feticide law was passed, a district attorney wrote a letter to all physicians in her county “informing them that under [the feticide statute] ‘it is now a legal requirement for anyone to report a pregnant woman who is using or has used illegal narcotics during her pregnancy.’”¹⁴⁷ Apparently such reports were made, and more than fifty women in this county were charged

¹⁴⁰ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

¹⁴¹ A defense of the State providing the unborn with protection from wrongful killing is presented in Part IV. See *infra* Part IV.

¹⁴² *Roe*, 410 U.S. at 163.

¹⁴³ *Id.* at 164-65 (“For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother.”) (emphasis added); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (reaffirming this particular holding of *Roe v. Wade*).

¹⁴⁴ Premature birth is hazardous for born children. Nelson, *supra* note 138, at n.61.

¹⁴⁵ Black letter homicide law requires that “the victim be a living human being” and specifies that only humans born alive are considered “human beings.” LAFAVE, *supra* note 67, at 767-68; JOSHUA DRESSLER, UNDERSTANDING CRIM. L. 495 (6th ed. 2012); MODEL PENAL CODE § 210.0 (Proposed Official Draft 1962).

¹⁴⁶ Paltrow & Flavin, *supra* note 16, at 323.

¹⁴⁷ *Id.* at 323-24.

with drug crimes involving their fetuses, and many of them were incarcerated.¹⁴⁸ Appellate courts later repudiated the claim that a pregnant woman using drugs can “knowingly deliver[] a controlled substance” to a prenatal human via the blood stream and umbilical cord.¹⁴⁹

A feticide statute does not—and cannot—grant prenatal humans any more protection under the law than the plain words of the statute give them. A jurisdiction’s authorization of feticide prosecutions does not turn the unborn into “persons” or “children” for any other legal purpose such as child endangerment or child abuse reporting laws. Only a separate, constitutionally valid statute that expressly grants the unborn a particular form of legal protection or right could do that. For example, feticide laws provide no legal warrant for the criminal prosecution or civil detainment of pregnant drug addicts or users, or to force pregnant women to undergo medical treatment for the sake of their unborn.

State or federal legislation that grants prenatal humans some particular “person-like” legal protection or “right,” such as recognizing them as victims of criminal homicide or allowing their parents to sue for their wrongful death, does not—indeed cannot—change their fundamental constitutional status as nonpersons. “Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land,’ and ‘the federal judiciary is supreme in the exposition of the law of the Constitution.’”¹⁵⁰ *Roe v. Wade* has held that unborn humans are not persons under the Fourteenth Amendment.¹⁵¹ The Supreme Court’s interpretation of the Fourteenth Amendment “is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”¹⁵² Consequently, no state feticide statute, state constitutional amendment, “personhood” initiative, or judicial ruling can overrule the High Court’s determination that the unborn are not constitutional persons.

Similarly, Congress cannot enact legislation requiring prenatal humans to be legally considered persons because it lacks the constitutional power to determine the substance of the Fourteenth Amendment,¹⁵³ and who counts as a “person” could not be more substantive. “The power to interpret the Constitution in a case or controversy remains in the Judiciary,”¹⁵⁴ and the judiciary has ruled that the unborn are not persons. Furthermore, any State action premised on the assumption that a feticide statute itself grants prenatal humans other forms of legal status or rights would violate due process because a person could not possibly know which other laws encompass the unborn and which do not. “All are entitled to be informed as to what the State commands or forbids.”¹⁵⁵

Based on federalism and substantive principles, the Supreme Court has strongly disapproved of the concept that federal courts can recognize or create common law crimes.¹⁵⁶ “The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”¹⁵⁷ While state “courts continued to assert authority to hear common law crimes throughout most of the nineteenth

¹⁴⁸ *Id.* at 324.

¹⁴⁹ *Ex parte Perales*, 215 S.W.3d 418, 420 (Tex. Crim. App. 2007); *Ward v. State*, 188 S.W.3d 874, 875-77 (Tex. Crim. App. 2006).

¹⁵⁰ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

¹⁵¹ 410 U.S. 113, 158 (1973).

¹⁵² *Cooper*, 358 U.S. at 18.

¹⁵³ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹⁵⁴ *Id.* at 524.

¹⁵⁵ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

¹⁵⁶ *United States v. Hudson*, 11 U.S. 32, 33-34 (1812).

¹⁵⁷ *Id.* at 34.

century,” they have abandoned that practice today.¹⁵⁸ Professor Jeffries has concluded “[j]udicial crime creation is a thing of the past,” and found only two reported decisions in the 20th century in which courts upheld convictions of conduct not criminalized by statute.¹⁵⁹ Most states have expressly abolished common law crimes or “provide that no act or omission is a crime unless made so by the code or applicable statute.”¹⁶⁰ A few states stubbornly maintain the recognition of common law crimes, but only “to the extent that [they are] not inconsistent with the code.”¹⁶¹

Specifically, *only* the legislative branch can grant the unborn legal status or protection as in a feticide statute. As one court stated, “[T]he Legislature is free to protect the lives of those whom it considers to be human beings. This is a policy decision that is properly reserved to the democratic process”¹⁶² Similarly, “the Legislature may determine whether, and at what point, it should protect life inside a mother’s womb from homicide.”¹⁶³ The determination that prenatal humans have a legal status is a quintessential policy choice that belongs solely to the legislature, especially in light of the widely varying policy choices about the unborn that legislatures have in fact made.¹⁶⁴

C. EXTRACORPOREAL EMBRYOS AS FETICIDE VICTIMS

Living human embryos in their very earliest developmental stages can exist in only four places, two outside of a woman’s body and two inside. Outside a woman’s body, embryos can exist either temporarily in a laboratory culture medium where one or more oocytes have been fertilized (in vitro fertilization) prior to being transferred to a woman’s womb, or they can be frozen in liquid nitrogen where they can remain for an indeterminate time period. Inside a woman’s body, embryos can exist either in a Fallopian tube where fertilization/conception takes place and through which the embryo travels before implanting in the uterus or in the uterus once it has attached there.

The plain language of many feticide statutes includes unborn humans as potential victims of criminal feticide in these very early developmental stages. Ten of the twenty-seven states whose feticide laws apply early in development define their victims to include *all* unborn humans from fertilization or conception to birth.¹⁶⁵ For example, Oklahoma leaves no doubt

¹⁵⁸ Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 457 (2010).

¹⁵⁹ John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 194-95, n.13 (1985).

¹⁶⁰ Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 338-39 (2005).

¹⁶¹ *Id.* at 339.

¹⁶² *Lawrence v. State*, 240 S.W.3d 912, 917-18 (Tex. Crim. App. 2007).

¹⁶³ *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994).

¹⁶⁴ This is why the rulings of the Massachusetts Supreme Judicial Court in *Cass* and *Lawrence* are deficient. See *supra* note 29. The same is true for the infamous decision in *Whitner v. State*, 492 S.E.2d 777, 781-82 (S.C. 1997) *cert. denied* 534 U.S. 1145 (1998) (holding that only a viable fetus is a “child” for purposes of the child abuse and endangerment statute). The Alabama Supreme Court made this mistake when it interpreted “child” in a statute that criminalizes “[k]nowingly, recklessly, or intentionally caus[ing] or permit[ting] a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia” to include the unborn. *Ex parte Ankrom*, 152 So. 3d 397, 407-09 (Ala. 2013). This deficiency was pointed out in the dissent of Chief Justice Molone. *Id.* at 431-33.

¹⁶⁵ 720 ILL. COMP. STAT. ANN. 5/9-1.2 (b)(1) (West 2015); MINN. STAT. ANN. § 609.266(a) (West 2015); MISS. CODE ANN. § 97-3-37(1) (West 2015); MO. STAT. ANN. § 1.205(1) (West 2015); OKLA. STAT. ANN. tit. 63, § 1-730(4) (West 2015); 18 PA. CONS. STAT. ANN. § 3203 (West 2015); S.D. CODIFIED LAWS § 22-1-2(50A) (2015); TEX. PENAL CODE § 1.07(a)(26) (West 2015); UTAH CODE ANN. § 76-5-201(1)(a) (West 2015); W.VA. CODE ANN. § 61-2-30(b)(1) (West 2015). Minnesota and Missouri are included here under the assumption that when their definitions of “unborn child” refer to “conception,” they mean “fertilization.” The feticide statutes of Kansas and Kentucky are excluded from this list because both of their definitions of “unborn child” include the phrase “in utero,” despite their

whatsoever about the reach of its feticide law by exhaustively defining “unborn child” as “the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus.”¹⁶⁶ The feticide statutes of the remaining seventeen states apply to the unborn at implantation.¹⁶⁷

Consequently, by their own plain words (although perhaps not by legislative intent), feticide statutes that apply to the unborn from fertilization or conception¹⁶⁸ encompass embryos that are created in vitro for use in medically assisted reproduction.¹⁶⁹ In 2012, at least 165,000 in vitro fertilization procedures were performed by infertility clinics resulting in the birth of nearly 62,000 babies.¹⁷⁰ Data cited by the federal government’s “frozen embryo adoption public awareness campaign” indicate that more than 600,000 cryopreserved embryos exist in the United States.¹⁷¹ They can be maintained cryogenically frozen for many years and used successfully in reproduction after thawing, although not all embryos survive thawing.¹⁷²

Not only do an undetermined number of embryos die after thawing, but also many thousands of embryos not used for reproduction are commonly discarded by clinicians at the direction of the progenitors whose gametes created them.¹⁷³ Consequently, if these EHEs can be victims of feticide when discarded or thawed at the directions of their progenitors and these dispositions are not constitutionally protected by the progenitors’ fundamental right to reproductive liberty or to control their property, then many thousands of “parents” and clinicians are perpetrators of intentional feticide. It is worth noting some of these cryopreserved embryos are being stored (and disposed of) in medical facilities owned and operated by the State itself¹⁷⁴ and that criminal homicide liability could attach to these state agents who dispose of such embryos.

use of “conception” and “fertilization” as well. KAN. STAT. ANN. § 21-5419(A)(2) (West 2015) (“‘unborn child’ means a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth”); *Id.* § 507A.010(1)(c) (2015) (“‘unborn child’ means a member of the species in utero from conception onward”). “In utero” has to be read to exclude EHEs, although “conception” and “fertilization” indicate the inclusion of EHEs.

¹⁶⁶ OKLA. STAT. ANN. tit. 63, § 1-730(4) (West 2015). “Zygote” (or “human conceptus”), “blastula,” “morula,” and “blastocyst” are all technical embryological terms referring to the first, preimplantation stages of the entity created by the fertilization process whose genotype is an intermingling of maternal and paternal chromosomes. RONALD W. DUDEK, *EMBRYOLOGY* 12-3 (5th ed. 2011). After implantation in the uterus and the development of chorionic villi, the conceptus is referred to as an “embryo.” CUNNINGHAM ET AL., *supra* note 31, at 78. This Article refers to a fertilized egg as an “embryo” and avoiding the technical terms for the sake of simplicity. The embryo becomes a fetus at 8 weeks after fertilization. *Id.* at 79. However, there is no “moment of conception” as conception is a process that takes some two days. Philip G. Peters, *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199 (2006).

¹⁶⁷ Murphy, *supra* note 26, at app. tbl. 1.

¹⁶⁸ Unfortunately, both terms lack “a precise and widely-accepted meaning among scientists and ethicists.” Peters, *supra* note 166, at 203.

¹⁶⁹ Other than EHEs created with the informed consent of the progenitors for the sole purpose of being used in research, all EHE’s are created by those who want them for reproduction.

¹⁷⁰ David Beasley, *U.S. Test Tube Births Underreported by States, Study Finds*, REUTERS.COM (Dec. 10, 2014, 12:18 AM), <http://www.reuters.com/article/2014/12/10/us-usa-ivf-births-idUSKBN0JO0BY20141210>.

¹⁷¹ U.S. DEP’T OF HEALTH AND HUM. SERVS., *Embryo Adoption*, <http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/index.html> (last visited Nov. 1, 2015).

¹⁷² *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1266 (Ariz. Ct. App. 2005) (35% do not survive thawing). Frozen embryos are in suspended animation, but not dead (yet), and as such, could not be victims of feticide. But freezing them certainly endangers their life.

¹⁷³ Andrea D. Germankin, et al., *Embryo Disposal Practices in IVF Clinics in the United States*, 22 POLS. IN THE LIFE SCIS. 4, 6 (2004); Sherly de Lacey, *Parent Identity and ‘Virtual’ Children: Why Patients Discard Rather than Donate Unused Embryos*, 20 HUM. REPROD. 1661 (2005) (great majority discard).

¹⁷⁴ *E.g.*, *In re Marriage of Witten*, 672 N.W.2d 768, 772 (Iowa 2003); *Dahl v. Angle*, 194 P.3d 834, 836 (Or. Ct. App. 2008).

Of the ten states whose feticide laws encompass EHEs by their plain meaning, three have no exemption for the female progenitor (Mississippi, Missouri, South Dakota). Utah does not exempt the “mother”/the female progenitor from liability for the intentional killing of a prenatal human.¹⁷⁵ Four states provide an exemption for the “pregnant woman” (Illinois, Minnesota, Pennsylvania, West Virginia), but under the reasonable assumption that a woman is not pregnant prior to implantation, the plain meaning of the exemption in these states may well not apply to the female progenitor who directs the destruction of an EHE.¹⁷⁶ As Texas exempts the “mother of the unborn child” from feticide liability, its exemptions would include the female progenitor.¹⁷⁷ Interestingly, no state exempts the “father” or male progenitor of the prenatal human from feticide liability. Therefore, at least in some states, feticide liability could attach to the disposal of EHEs regardless of who effected disposal.

The obvious initial objection to a claim that the progenitors of EHEs who have them destroyed (and the clinicians who actually dispose of them) can be held liable for intentional feticide is that these statutes were never intended to apply to the persons who created these embryos in their efforts to give birth to a child. In addition, the fact that no one has ever been criminally prosecuted for destroying an EHE at the direction of the people who created it—when undoubtedly thousands have been destroyed—at least suggests that no prosecutor believes her jurisdiction’s feticide law applies to such behavior.¹⁷⁸ A reply to this objection would point out both that the plain wording and meaning of the statutes in question encompass EHEs because legislators should have the common knowledge that embryos are created in vitro in large quantities and many are never used for reproductive purposes. Furthermore, courts should not ignore the plain meaning of the words used in statutes:

The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself In this case it is also where the inquiry should end, for where . . . the statute's language is plain, ‘the sole function of the courts is to enforce it according to its terms.’¹⁷⁹

The most important constitutional question regarding the State’s authority to criminalize the destruction of EHEs by progenitors and their agents is whether the progenitors have a constitutional right to noncoital reproduction that includes their right to discard EHEs. The Supreme Court has on several occasions recognized a married couple’s right to procreate. *Meyer v. Nebraska* noted that constitutionally protected liberty encompasses the right of a person “to marry, establish a home and bring up children.”¹⁸⁰ *Skinner v. Oklahoma ex. rel. Williamson* found that a mandatory sterilization law (three strikes and you’re reproductively out) interfered with marriage and procreation which are among “the basic civil rights of man.”¹⁸¹ The Court in *Stanley v. Illinois* stated “[t]he rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic rights of man,’ and ‘[r]ights far more precious..than property rights.’”¹⁸² A right to procreate is clearly recognized by Justice Brennan in an oft-quoted passage in *Eisenstadt v. Baird*: ‘If the right of privacy means

¹⁷⁵ UTAH CODE ANN. § 76-5-201 (West 2015).

¹⁷⁶ 720 ILL. COMP. STAT. ANN. 5/9-1.2(c) (West 2015); MINN. STAT. ANN. § 609.266(b) (West 2015); 18 PA. STAT. AND CONS. STAT. ANN. § 2608(a) (West 2015); W.VA. CODE ANN. § 61-2-30(d)(5) (West 2015).

¹⁷⁷ Oklahoma’s “exemption” remains a puzzle. See *supra* note 42.

¹⁷⁸ Of course this application of feticide law may never have occurred to any prosecutor, and it would likely be politically unpopular to apply it to infertile persons trying to create their own child.

¹⁷⁹ *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citations omitted).

¹⁸⁰ 262 U.S. 390, 399 (1923).

¹⁸¹ 316 U.S. 535, 541 (1942).

¹⁸² 405 U.S. 645, 651 (1972) (citations omitted).

anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁸³ A prominent commentator on reproductive law has concluded that: “If the Supreme Court would recognize a married couple’s right to coital reproduction, it would recognize a couple’s right to reproduce noncoitally as well.”¹⁸⁴ Unfortunately, the Court has expressly done the former, but not the latter.¹⁸⁵

An argument can be made that the criminal prohibition of the destruction of EHEs does not abrogate, but only limits, the right to procreational liberty using noncoital means. Such a feticide law allows persons to engage in in vitro fertilization and embryo transfer, the necessary steps in noncoital reproduction. It only forbids them from destroying any embryos they create in their effort to become pregnant and deliver a child. Unfortunately, the IVF process very frequently produces more embryos than are medically advisable to implant due to the serious risks to both pregnant women and children-to-be posed by multiple pregnancy.¹⁸⁶ If they face serious criminal liability for disposing of extra embryos, the progenitors have only two choices if they are to avoid the serious risks of multiple pregnancies¹⁸⁷ and births: donate them to another couple or have them frozen. But keeping them frozen indefinitely is practically the same as disposal, and it also imposes the economic costs of cryopreservation¹⁸⁸ on the progenitors against their wishes.

In sum, if the progenitors of EHEs have a constitutionally protected right not only to create and use embryos for reproduction by means of in vitro fertilization, but also to discard them, then they should be immune from feticide liability when they do so. This right should also immunize those whom the progenitors authorize to dispose of the embryos just as a woman’s consent to a constitutionally protected abortion immunizes those performing the abortion from criminal liability. If they lack such a right, then in principle the progenitors and their agents could be liable for intentional feticide in some jurisdictions when they dispose of EHEs.

A further wrinkle is that some lower courts have ruled that progenitors have a property interest in their EHEs at least with respect to controlling their disposition, presumptively including discard.¹⁸⁹ If the progenitors of EHEs have a property interest in them,

¹⁸³ 495 U.S. 438, 453 (1972).

¹⁸⁴ John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 960 (1986).

¹⁸⁵ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2613 (2015) (“The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman.”). No mention was made of noncoital reproduction, even though married gay and lesbian couples would likely use noncoital means to have their own genetically related children.

¹⁸⁶ Morgan De Ann Shields, *Which Came First the Cost or the Embryo? An Economic Argument for Disallowing Cryopreservation of Human Embryos*, 9 J. L. ECON. & POL’Y 685, 688 (“On average, eight to fifteen oocytes are retrieved per patient . . . [T]ypically, 70% of oocytes become fertilized.”); Practice Committee of the American Society for Reproductive Medicine, *Criteria for Number of Embryos to Transfer: A Committee Opinion*, 99 FERTILITY & STERILITY 44 (2013); Laurie Tarkan, *Lowering Odds of Multiple Births*, N.Y. TIMES (Feb. 19, 2008), <http://www.nytimes.com/2008/02/19/health/19mult.html?pagewanted=all>.

¹⁸⁷ The most serious bad outcome of high multiple gestation is that all of the fetuses will die. Of course, the pregnant woman could also use selective abortion to reduce the number of fetuses she carries to a safer level. See Tarkan, *supra* note 186. But it is nothing short of bizarre, indeed irrational, for the State to force her to kill some of her fetuses during gestation in order to save some in the name of protecting EHEs from death via disposal.

¹⁸⁸ Shields, *supra* note 186, at 698-99 (averaging \$300-600 per year).

¹⁸⁹ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (concluding EHEs “are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category” which nevertheless gives the progenitors “an interest in the nature of ownership, to the extent that they have decision-making authority concerning [their] disposition”); *York v. Jones*, 717 F.Supp. 421 (E.D. Va. 1989) (holding progenitors have “property rights in the pre-zygote”).

then the State could not constitutionally deprive them of this property without due process of law—whatever that might be in this context. In any event, whether embryos are legally characterized as property or as having some intermediate ontological status between person and property, one commentator has rightly concluded that the progenitors should have the constitutional authority to direct their disposition¹⁹⁰ secondary to their right to procreational liberty.

Persons other than the progenitors of EHEs could also run afoul of feticide laws in some states. For example, someone could intentionally destroy EHEs out of spite directed at the progenitors or disable a freezer containing many of them to harm the career of a fertility specialist.¹⁹¹ Criminally negligent conduct with respect to the handling or treatment of EHEs could result in feticide liability as well.¹⁹² Finally, the destruction of EHEs secondary to another felony, say an act of arson that burned down a fertility clinic containing EHEs, could generate feticide liability with serious consequences beyond that of the arson itself.¹⁹³

These persons would lack any defense to a feticide charge based on their own constitutional rights. Other than a dubious Due Process or Fair Notice claim, these defendants could argue that the State has no constitutionally legitimate interest in making EHEs victims of criminal homicide as they cannot properly be called “the potentiality of human life”¹⁹⁴ and are not yet a “fetus that may become a child” because they are not in the womb of a pregnant woman.¹⁹⁵ While it is true that the Supreme Court has never ruled on this issue, EHEs are obviously of value to their progenitors as they could be used for reproduction and to others who might receive them as donations for their reproductive use.¹⁹⁶ One state, Louisiana, has gone to great lengths to give EHEs extensive legal status and rights. In that state, an embryo “exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb,” “shall not be intentionally destroyed by any natural or other juridical person” (including the progenitors), “shall be given an identification by the medical facility . . . which entitles such ovum [sic] to sue or be sued,” and if any dispute arises concerning such an embryo, “the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.”¹⁹⁷ Consequently, the argument that the State cannot have a legitimate interest in protecting EHEs from those who would take their disposition away from the progenitors is unpersuasive.¹⁹⁸

D. WOMEN WHO KILL THEIR OWN PRENATAL HUMANS

The constitutionality of feticide laws as applied to pregnant women with respect to the killing of their own prenatal humans outside of a constitutionally protected abortion is both controversial and complex. The constitutional and ethical propriety of the exemption they have

¹⁹⁰ John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 456-57 (1990).

¹⁹¹ *E.g.*, 720 ILL. COMP. STAT. ANN. § 5/9-1.2 (West 2015) (describing intentional homicide of an unborn child).

¹⁹² *E.g.*, TEX. PENAL CODE ANN. §§ 6.03(d), 19.05 (West 2015) (describing criminally negligent homicide).

¹⁹³ *E.g.*, MINN. STAT. ANN. § 609.2662 (West 2015) (prescribing maximum sentence of 40 years for murder of an unborn child in the second degree).

¹⁹⁴ *Roe v. Wade*, 410 U.S. 113, 162 (1973) (explaining the State has an “important and legitimate interest in protecting the potentiality of human life”).

¹⁹⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (“the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child.”) (emphasis added).

¹⁹⁶ The federal government actively promotes “projects that provide services to make this family building option [frozen embryo adoption] more attainable for infertile individuals.” U.S. DEP’T OF HEALTH AND HUM. SERVS., *supra* note 171.

¹⁹⁷ LA. STAT. ANN. §§ 9:123, 9:129, 9:124, 9:131 (2015), respectively.

¹⁹⁸ Michael J. Meyer and Lawrence J. Nelson, *Respecting What We Destroy: Reflections on Human Embryo Research*, 31 HASTINGS CTR. REP. 20-21 (2001).

been granted by many, but not all, states from the reach of feticide laws will be addressed here as well. Both of these subjects will be explored initially by analyzing the feticide statutes of one jurisdiction, Utah, because they appear to have been carefully crafted to both include and exclude pregnant women from feticide liability. The way Utah has done this avoids the most significant constitutional objections to the application of feticide laws to these women. Utah's statutory scheme regarding feticide is also worthy of attention because Utah is a jurisdiction long known for its strong opposition to abortion.¹⁹⁹

The central provision of Utah's feticide law establishes both the definition of criminal homicide and the exceptions to its scope.

Except as provided in Subsections (3) and (4), a person commits criminal homicide if the person intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of its development.²⁰⁰

A subsection clearly lays out the meaning of "criminal homicide:" "aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide."²⁰¹ The plain language of this section includes pregnant women by its use of the term "a person," an interpretation consistent with the only appellate opinion considering a roughly similar statute applied to a pregnant woman.²⁰² Moreover, subsequent portions of this statute demonstrate that the Utah legislature clearly knows how to exempt pregnant women when it chooses—rightly or wrongly—to do so. In addition, legislatures across the country clearly are aware of the possibility, meaning, and significance of exemption: witness the twenty-five jurisdictions that expressly exempt pregnant women from feticide liability.

Utah law creates three exceptions to its prohibition of feticide. First, as it must under the Constitution, Utah exempts deaths of the unborn caused by a legal abortion.²⁰³ In turn, "abortion" is defined as the intentional or attempted "termination of human pregnancy after implantation . . . through a medical procedure carried out by a physician or through a substance used under the direction of a physician."²⁰⁴ A different statute clarifies how the legislature chose to treat abortions that do not comply with §76-7-301: "The killing or attempted killing of

¹⁹⁹ See, e.g., Tamar Lewin, *Harsh Loophole in Utah's Abortion Law*, N.Y. TIMES (March 9, 1991), <http://www.nytimes.com/1991/03/09/us/harsh-loophole-in-utah-abortion-law.html> ("Because of an apparent oversight by Utah's State Legislature, a restrictive antiabortion law that goes into effect there next month could allow prosecutors to bring first-degree murder charges against women who have illegal abortions and, at least in theory, subject the women to life in prison or even death.")

²⁰⁰ UTAH CODE ANN. § 76-5-201(1)(a) (West 2015).

²⁰¹ *Id.* § 76-5-201(2).

²⁰² *Shuai v. Indiana*, 966 N.E.2d 619, 629 (Ind. Ct. App. 2012) ("We decline to adopt Shuai's argument the murder statute is ambiguous as applied to her . . . Shuai is a 'person,' the State alleged she intended to kill [her prenatal human] . . . and the victim was an entity protected under the murder statute . . .").

²⁰³ UTAH CODE ANN. § 76-5-201(1)(b) (West 2015) ("There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion . . .").

²⁰⁴ *Id.* § 76-7-301(1)(a)(i). The statute alternatively defines abortion as "the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician" and "the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician." *Id.* (ii) & (iii).

a live unborn child in a manner that is not an abortion shall be punished as provided in [the criminal homicide statutes].”²⁰⁵

The plain language of these three provisions combined indicates that a woman who intentionally terminates her pregnancy, kills her prenatal human, or causes her own miscarriage, i.e., aborts herself, in a manner other than permitted by statute commits murder, given that murder occurs in Utah, inter alia, if “the actor intentionally or knowingly causes the death of another.”²⁰⁶ Consequently, if a pregnant woman obtained misoprostol (say, from a friend who was taking it to prevent stomach ulcers, a labeled use, or from Mexico), did not use it “under the direction of a physician,” and ingested the drug with the intent of ending her pregnancy (and the State could prove all this beyond a reasonable doubt), she should be found guilty of murder. On the other hand, if she obtains an abortion in compliance with the statute (including taking the same drug under a physician’s direction), she commits no crime at all.

The second exception from criminal homicide applies if a “person” “refuse[s] to consent to medical treatment,” specifically including a cesarean section, or “fail[s] to follow medical advice,” and such refusal or failure is “the sole reason for the death of the unborn child.”²⁰⁷ While such statutory clarity regarding the rights of pregnant women is welcome, this exemption is superfluous. The Court “concluded [in *Cruzan*] that the right to refuse unwanted medical treatment [is] so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment.”²⁰⁸ Justice Brennan had the same view: “The right to be free from medical attention without consent, to determine what shall be done with one’s own body, is deeply rooted in this Nation’s traditions, as the majority acknowledges.”²⁰⁹ Pregnant women, like all other competent adults, have the constitutionally protected right to refuse medical treatment and to exercise it without incurring criminal liability for doing so. The overwhelming weight of judicial and scholarly authority affirms that pregnant women have the constitutional right to refuse medical treatment even if it poses risk to their prenatal human’s life or health.²¹⁰

Utah’s third exception applies “if the death of her unborn child...is caused by a criminally negligent act or reckless act of the woman; and... is not caused by an intentional or knowing act of the woman.”²¹¹ This statute eliminates the chance that women will be prosecuted for criminal homicide based on unintentional behavior that results in the death of their prenatal humans.

²⁰⁵ *Id.* § 76-7-301.5(2). No separate crime of “illegal abortion” exists in Utah as it does in some states. It is beyond the scope of this Article to analyze the intersection of illegal abortion and feticide statutes in those jurisdictions that have both.

²⁰⁶ *Id.* § 76-5-203(2).

²⁰⁷ *Id.* § 76-5-201(3).

²⁰⁸ *Washington v. Glucksberg*, 521 U.S. 702, 722 n.17 (1997).

²⁰⁹ *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 305 (1990) (Brennan, J., dissenting). The Court has “long recognized rights of privacy and bodily integrity. As early as 1891, the Court held ‘[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others.’” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926 (1992) (Blackmun, J. concurring in part, dissenting in part).

²¹⁰ *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc); Nancy Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986); Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: ‘Compelling Each to Live as Seems Good to the Rest’*, 37 HASTINGS L.J. 703 (1986). *But see Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr. Inc.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (holding that a woman’s constitutional rights not violated by judicially ordered cesarean delivery).

²¹¹ UTAH CODE ANN. § 76-5-201(4) (West 2015).

Minnesota, Mississippi, Missouri, and South Dakota allow pregnant women to be prosecuted for manslaughter if they engage in “culpable negligence” or “reckless killing”²¹² with respect to their own prenatal humans. The articulations of the meaning of this crime have a definite family resemblance, but some significant differences as well. Mississippi, for example, defines culpable negligence “as ‘the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk thereof.’”²¹³ South Dakota understands “reckless” to mean “a conscious and unjustifiable disregard of a substantial risk that the offender’s conduct may cause a certain result[. . .]. A person is reckless with respect to circumstances if that person consciously and unjustifiably disregards a substantial risk that such circumstances may exist.”²¹⁴

In addition, Missouri deems “act[ing] with criminal negligence to cause the death of any person” a form of manslaughter and describes someone as criminally negligent “when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.”²¹⁵ All of these statutes use significantly vague terms and thus are amenable to wide interpretation, something not uncommon in this category of crime.²¹⁶

Utah made the constitutionally correct choice with its third exemption because broadly worded statutes that permit feticide prosecutions of pregnant women for negligent or reckless, i.e., non-intentional, behavior should be found unconstitutional as they violate women’s fundamental due process liberty right as well as their right to fair notice of what constitutes such a crime. “Without doubt, [constitutional liberty] denotes not merely freedom from bodily restraint but also the right of the individual [. . .] generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”²¹⁷

Having the autonomy to make basic decisions about how to conduct one’s daily life, choosing one’s job, food, mode of exercise, place of residence, and balancing competing values without interference by the State is surely protected by the Constitution as “an interest traditionally protected by our society,” a result that upholds “the basic values that underlie our society.”²¹⁸ And the Constitution protects free women as well as free men.

[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.²¹⁹

Because a prenatal human is physically attached to and literally encased within a pregnant woman, the unborn could be killed by many things she could do or fail to do.

²¹² MINN. STAT. ANN. § 609.2665(1) (West 2015); MISS. CODE ANN. § 97-3-47 (West 2015); MO. ANN. STAT. § 565.024(1)(1) (West 2015); S.D. CODIFIED LAWS § 22-16-20 (2015).

²¹³ Harried v. State, 773 So. 2d 966, 968 (Miss. Ct. App. 2000) (citing Smith v. State, 20 So. 2d 701, 705 (Miss. 1945)).

²¹⁴ S.D. CODIFIED LAWS § 22-1-2(1)(d) (2015).

²¹⁵ MO. ANN. STAT. §§ 565.024(3), 562.016(5) (West 2015).

²¹⁶ LAFAVE, *supra* note 67, at 635-37.

²¹⁷ Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted).

²¹⁸ Michael H. v. Gerald D., 491 U.S. 110, 122-23 (1989) (citations and quotations omitted).

²¹⁹ United States v. Virginia, 518 U.S. 515, 532 (1996) (citations omitted).

Common activities could possibly cause a miscarriage: working (e.g., as a law enforcement officer or fire fighter), playing sports, strenuous hiking or climbing, skiing, undergoing medical treatment dangerous to the unborn (e.g., chemotherapy), and driving. Pregnant women should be able to engage in activities like these without fear that doing so could turn them into criminals if the unborn they carry happens to die. On the other hand, imposing feticide liability on a pregnant women for inherently wrongful and dangerous acts such as driving drunk, which some states have done, could be considered another matter.

Specific causes of miscarriage (spontaneous abortion) include infections, thyroid hormone deficiency, insulin-dependent diabetes mellitus, drug use (tobacco, alcohol, caffeine), radiation exposure, exposure to environmental toxins, trauma, high blood pressure, coeliac disease, kidney disease, lupus, HIV, malaria, rubella, chlamydia, syphilis, gonorrhea, and being overweight, obese, or underweight.²²⁰ Using a broadly worded negligent feticide statute, a prosecutor could claim that a woman negligently or recklessly failed to obtain proper medical care for one of these diseases or health conditions, used a substance or engaged in an activity harmful to the unborn, or simply did her job or vigorously engaged in recreational activity that led to the death of her prenatal human.

Given the wide range of commissions or omissions that could cause a pregnant woman's prenatal human to die in utero, it would be impossible for her to know what might trigger a prosecution for negligent or reckless feticide, and she would have no fair notice of what would make her into a criminal. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."²²¹ Furthermore, the exceedingly numerous circumstances, situations, actions, and inactions during pregnancy that could lead to fetal demise could easily generate arbitrary and enforcement by police and prosecutors who already have demonstrated great willingness of pursue women who they think harm or kill their unborn.²²²

[T]hese general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.²²³

Courts should not permit prosecutions of pregnant women arising out of broadly worded negligent or reckless feticide statutes. "[A] fair system of laws requires precision in the definition of offenses and punishments. The less the courts insist on precision, the less the legislatures will take the trouble to provide it."²²⁴

Of course, the State must also prove that the woman's negligent or reckless behavior caused the feticide and doing so beyond a reasonable doubt could prove very problematic as the "causes of euploid abortions [miscarriages of chromosomally normal fetuses] are poorly understood"²²⁵ However, this is a hurdle has not stopped several feticide prosecutions of

²²⁰ CUNNINGHAM ET AL., *supra* note 31, 217-18.

²²¹ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

²²² *Paltrow & Flavin*, *supra* note 16, at 299 ("413 cases from 1973 to 2005 in which a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of a woman's physical liberty" by the State).

²²³ *Champlin Ref. Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 243 (1932).

²²⁴ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 301 (2012).

²²⁵ CUNNINGHAM ET AL., *supra* note 31, at 217.

women for killing their own prenatal humans,²²⁶ but it should often be a serious barrier to successful prosecution and even to the proper filing of charges.

Nevertheless, the foregoing analysis leaves open the question of whether a legislature could craft a narrowly targeted negligent or reckless feticide statute that would not unconstitutionally deprive pregnant women of basic liberties or fair notice of how they could conform their behavior to the law. This may be possible. However, considerable evidence exists that the legal system is currently depriving pregnant women of their liberty by criminally prosecuting and imprisoning them in an unprincipled and unfair manner, and it is largely affecting poor women and women of color when it does so.²²⁷ This may occur regardless of how the statute is drafted. If this ends up being the case, then a legislature should hesitate mightily before enacting even a narrowly drawn negligent or reckless feticide law that would apply to pregnant women.

The preceding constitutional analysis does not, or course, address whether the State may hold women criminally liable for the intentional or knowing killing of their own prenatal humans outside of a legal abortion, with “legal” meaning not inconsistent with the regulation permitted by *Casey* and *Gonzales*. Some could argue that women have a fundamental constitutional right to self-abort or to otherwise be free from all State regulation of abortion,²²⁸ but any such argument is nothing short of untenable under existing law. *Roe* itself flatly rejected this position.

[A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.... The privacy right involved, therefore, cannot be said to be absolute.²²⁹

Casey came to the same conclusion.

[I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn²³⁰

²²⁶ *Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012); *Murphy*, *supra* note 26, at 860-63 (discussing *Gibbs v. State*, 2010-IA-00819-SCT (Miss. Oct. 27, 2011) and *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003)). *See generally* Paltrow & Flavin, *supra* note 16.

²²⁷ Paltrow & Flavin, *supra* note 16; Maya Dusenberry, *Poor Women in the United States Don't Have Abortion Rights*, PAC. STANDARD (July 28, 2015), <http://www.psmag.com/health-and-behavior/poor-women-don't-have-abortion-rights>.

²²⁸ *See, e.g.*, KATHA POLLITT, PRO: RECLAIMING ABORTION RTS., 190 (2014) (“The pure pro-choice position . . . would be to set no limits on abortion: A woman's body belongs to her throughout all nine months of pregnancy, and the state has no business interfering.”).

²²⁹ *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

²³⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992).

Furthermore, *Glucksberg's* test that a fundamental right must be objectively "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty"²³¹ cannot be satisfied with respect to, for example, self-abortion as history shows that the common law and many state statutes affirmed—and others rejected—pregnant women's criminal liability for participation in their own abortions and for self-abortion.²³²

Let's return to the example of Utah's abortion and feticide laws. Its statutes clearly state that the "killing . . . of a live unborn child in a manner that is not an abortion shall be punished as provided in [the criminal homicide statutes]"²³³ and that an abortion must be "a medical procedure carried out by a physician or through a substance used under the direction of a physician."²³⁴ The constitutionality of its requirement that a legal abortion be performed by a physician has been repeatedly upheld by the Supreme Court as a measure designed to ensure women's health and safety,²³⁵ and it worth noting that the Court rejected the argument that the statute manifested an invalid purpose because medical evidence did not support the legislature's conclusion that abortions could be safely performed by others.²³⁶

Consequently, given its constitutionally permissible (but not mandatory) interest in protecting prenatal humans from the outset of pregnancy and in protecting the woman's health, Utah may make the intentional and illegal termination of a woman's pregnancy by herself a criminal homicide—whether that termination is caused by a self-procured medication or by her intentionally stabbing herself in the abdomen. Utah also prohibits a pregnant woman from either paying or soliciting someone to end her prenatal human's life outside of a legal abortion.²³⁷ Such prohibitions may very well not be wise social policy (another subject well beyond the scope of this Article) and can certainly be understood as antithetical to women and their control over reproduction, but under the Court's current jurisprudence, they appear *prima facie* constitutional.

In theory, and in actual practice in a few states, pregnant women may face feticide liability for involvement in ending the lives of their prenatal humans outside of a constitutionally protected abortion, such as if they self-abort with medication they obtain and use themselves, a practice that appears to be dangerous.²³⁸ Of course the fundamental fairness required by Due Process and the mandate for fair warning restrict how legislatures may impose feticide liability on the pregnant woman. In addition, women should not be held responsible for feticide if providers fail to conform to State regulations imposed on those who perform abortion procedures.

It is unclear how far a legislature might go in extending a pregnant woman's liability for feticide, particularly in the current political climate that reflects a great deal of opposition

²³¹ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

²³² Suzanne M. Alford, *Note: Is Self-Abortion a Fundamental Right?* 52 DUKE L.J. 1011, 1019-25; B. James George, Jr., *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371, 381-82 (1965).

²³³ UTAH CODE ANN. § 76-7-301.5(2) (West 2015).

²³⁴ *Id.* § 76-7-301(1)(a)(i).

²³⁵ *Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (1997).

²³⁶ *Id.* at 973.

²³⁷ UTAH CODE ANN §§ 76-5-202(1)(h) (West 2015) (describing aggravated murder for remunerating someone for committing the crime), 76-4-203 (West 2015) (referencing criminal solicitation).

²³⁸ The website for the abortion clinic run by one of America's most controversial, and senior, abortion providers, Dr. LeRoy Carhart, states: "Self-induced abortions, herbal abortions, street corner (imported drug) abortions, or whatever other name they may be called, are at best unreliable, and often can cause very serious or even fatal complications. In many cases they are illegal . . . [T]here are no safe self-induced abortions." *Self-induced Abortions*, ABORTIONCLINICS.ORG, <http://www.abortionclinics.org/abortions/self-induced-abortion.html>.

to abortion rights.²³⁹ Assume a state legislature bans abortion sought for the purpose of sex or race selection, or for avoiding the birth of a child with a genetic anomaly,²⁴⁰ expressly includes such an abortion as the illegal ending of prenatal human life, imposes criminal liability for doing so, and has no exemption for the pregnant woman who initiated the termination. If it is objectionable for a clinician to perform such an abortion (again *firmly* putting aside the questions of the constitutionality and wisdom of this type of abortion regulation), some could consider her rejection of the sex, race, or genetic constitution of her child-to-be and her solicitation of the abortion likewise objectionable.

A final objection to holding women criminally liable for inducing their own abortions is that they have a common law immunity to do so. One woman charged with killing her own prenatal human argued that she could not be prosecuted for doing so on this precise ground,²⁴¹ and precedent exists in support of this claim. In *State v. Ashley*, an unwed teenager who was twenty-five or twenty-six weeks pregnant allegedly shot herself in the abdomen in an attempt to end her fetus' life, was prosecuted for murder and manslaughter, and the Florida Supreme Court quashed the criminal homicide proceedings against her because "[a]t common law, while a third-party could be held criminally [responsible] for causing injury or death to a fetus, the pregnant woman could not be . . ."²⁴² The court cited a 1904 Connecticut case as authority for this proposition which basically held that she could not commit the crime because "a man [sic] may injure his own body by his own hand or the hand of an agent, without. . . violating the criminal law It was in truth a crime which, in the nature of things, she could not commit."²⁴³ The *Ashley* court also stated: "Ultimately, immunity from prosecution for the pregnant woman was grounded in the 'wisdom of experience.'"²⁴⁴ The authority for this claim came from a variety of previous rulings. One asserted that despite the illogic in immunizing the woman "who solicits the commission of an abortion and willingly submits to its commission upon her own person," many courts have granted such immunity as "public policy demands its application" and such a rule "is justified by the wisdom of experience."²⁴⁵ Others have considered her as the victim of the crime rather than as a participant in it.²⁴⁶

Commentators have attributed this immunity to a now very suspect paternalism which considered women "incapable of making moral decisions where her own body is concerned,"²⁴⁷ as well as to the practical need of the woman's testimony to secure conviction of the abortionist when other witnesses would be unavailable and when her testimony would not be allowed if she were an accomplice.²⁴⁸ More importantly, *Roe* and *Casey* clearly permit the State to assert a legitimate and important interest in protecting the unborn—even though

²³⁹ "In the current Republican presidential contest, 16 candidates have staked out positions against abortion... [A] majority of the most prominent candidates...have said at one time or another that they oppose abortion even in the case of rape or incest, a view rejected by all previous standard-bearers . . ." Thomas B. Edsall, *The Republican Conception of Conception*, N.Y. TIMES (August 25, 2015), <http://nyti.ms/1KMllBa>.

²⁴⁰ E.g., ARIZ. REV. STAT. ANN. § 13-3603.02(A) (West 2015) (banning abortion for sex or race selection, but imposing felony liability only on the physicians performing the abortion); N.D. CENT. CODE § 14-02.1-04.1(1) (West 2015) (banning abortion for sex selection and for genetic abnormality, but imposing misdemeanor liability only on the physician).

²⁴¹ Defendant's Memorandum of Law in Support of Motion to Dismiss, *supra* note 127, at 5.

²⁴² 701 So. 2d 338, 339-40 (Fla. 1997).

²⁴³ *State v. Carey*, 56 A. 632, 635-36 (Conn. 1904).

²⁴⁴ 701 So. 2d at 340.

²⁴⁵ *Basoff v. State*, 119 A.2d 917, 923 (Md. 1956).

²⁴⁶ *Richmond v. Commonwealth*, 370 S.W.2d 399, 400 (Ky. 1963); *State v. Burlingame*, 198 N.W. 824, 826 (S.D. 1924); *Meno v. State*, 83 A. 759, 760 (Md. 1912).

²⁴⁷ E.g., Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1778 (1991).

²⁴⁸ Staci Visser, *Prosecuting Women for Participating in Illegal Abortions: Undermining Gender Equality and the Effectiveness of State Police Power*, 13 J.L. & FAM. STUDS. 171, 175 (2011).

they are not constitutional persons— that is separate from the pregnant woman's rights.²⁴⁹ Likewise, feticide statutes that expressly make the unborn victims of criminal homicide abrogate common law rules regarding the legal status of the unborn. In short, the supposed common law immunity of pregnant women to feticide charges is a dead letter. In those states that lack a statute expressly authorizing criminal prosecution for causing the death of prenatal humans, no common law immunity would be needed as neither pregnant women nor anyone else can legitimately be prosecuted for feticide as traditional homicide statutes cannot be interpreted as applying to the unborn.

In sum, it appears constitutionally permissible for a legislature, like Utah's, to impose feticide liability on a pregnant woman who intentionally ends the life of her own prenatal human outside of a legal abortion, although any such prosecution must prove the requisite mens rea and legally sufficient causation. The wisdom of doing so is deeply entangled in the ethics, politics, and rhetoric surrounding abortion, and any analysis of it is far beyond the scope of this Article. It is noteworthy that at present, the clear majority of jurisdictions have decided not to impose feticide liability on women who intentionally end their own pregnancies outside the boundaries of a legal abortion, but a few have—and the consequences for women are grave.²⁵⁰ Intentional feticide is typically equivalent to the first-degree murder of persons. More jurisdictions may do so in the future given the seemingly ever-growing regulation and opposition (hostility in the estimation of many) to the exercise of abortion rights.

PART IV: THE JUSTIFIABILITY OF FETICIDE LAWS

Pregnant women like Michelle Wilkins²⁵¹ or Teresa Keeler who are violently attacked and lose their prenatal humans to this violence²⁵² suffer more than the physical harm done directly to themselves. They have been deprived of their children-to-be, of their son or daughter who would in the normal course of events be in the world and living on their own within a few weeks or months. They have “suffered an injury that was entirely entwined with [their] pregnancy, an injury not specified in the statutes covering assault and attempted murder that already carry lengthy prison sentences.”²⁵³ This as a distinct and separate wrong done to them and harm suffered by them (and their partners in the pregnancy) that the law could—and should—recognize in one of three ways.

First, a legislature could pass a statute expressly making prenatal humans (or some subset of them) the possible victims of feticide. This would be a crime separate from whatever crimes were committed by the perpetrator against the pregnant woman herself. Second, a legislature could enact a statute that would enhance the punishment of anyone who criminally attacked a pregnant woman and ended the life of her prenatal human, roughly similar to a sentencing enhancement to the penalty for violence done to someone out of bias against persons due to their race, ethnicity, gender, or sexual orientation. Third, a legislature could enact a statute recognizing the wrongful killing of a prenatal human and punishing it as a separate crime against the pregnant woman herself. Colorado calls this the “unlawful

²⁴⁹ *Roe v. Wade*, 410 U.S. 113, 162 (1973) *holding modified by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

²⁵⁰ *See supra*, notes 33 & 34.

²⁵¹ Jesse Pauk, *Michelle Wilkins, victim in Longmont baby removal, talks to Dr. Phil*, DENV. POST (September 3, 2015), http://www.denverpost.com/news/ci_28753002/michelle-wilkins-victim-longmont-baby-removal-talks-dr.

²⁵² *See Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970).

²⁵³ Deborah Tuerkheimer, *How Not to Protect Pregnant Women*, N.Y. TIMES (April 13, 2015), http://www.nytimes.com/2015/04/13/opinion/the-error-of-fetal-homicide-laws.html?_r=0..

termination of pregnancy.”²⁵⁴ All of these approaches are consistent with the recognition that pregnant women have a special vulnerability to violence grounded in the very status of pregnancy.

Pro-choice advocates should not object to enhancement and wrongful termination statutes because they do not grant the unborn any “rights” and, therefore, supposedly cannot be used to undermine abortion rights or to prosecute pregnant women for other behavior that might harm their own unborn. In contrast, they criticize feticide statutes precisely because they recognize the unborn as distinct victims of a crime.²⁵⁵ For example, the federal UVVA was opposed in the Senate because “it would ultimately be used as an argument to overturn existing laws protecting abortion rights” and it “would elevate fetal rights and establish the legal personhood of a fetus.”²⁵⁶ This Article has already rejected the validity of this argument. Feticide statutes cannot, consistent with the Constitution and standard rules of statutory interpretation, establish the personhood of the unborn, be applied so as to take away fundamental abortion rights, be used to prosecute women who harm or endanger their own prenatal humans, or ground the prosecution of pregnant women for unintentional feticide. Nonetheless, as noted above, a legislature may enact a feticide law that applies to pregnant women who intentionally kill their own prenatal humans outside of a legal abortion.

Nevertheless, one can still question whether the State has any legitimate interest in providing prenatal humans with the protection of the criminal law by expressly making them possible victims of criminal homicide, as distinct from making their killing another wrong done to the woman who also suffered violence, and perhaps death, at the hands of a perpetrator. While it is not unreasonable for the State to conceptualize the wrong of feticide as another crime against the woman, it is likewise not unreasonable—or unfair—to conceptualize feticide as a crime victimizing the unborn themselves, one that the community seeks to prevent. The State has a legitimate interest in the welfare and future of prenatal humans for three basic reasons.

First, prenatal humans are beings with substantial moral status apart from that attributed to them by the women who gestate them, and they deserve respectful treatment consistent with this status. They have moral status because they are alive and in the process of developing into those who will be persons if their lives are not ended in the womb, although they cannot develop in the absence of the particular women who gestate them. “Persons do not spring forth fully developed into the world as Athena from the head of Zeus: every existing person was a zygote, an embryo, and a fetus within the womb of an individual woman.”²⁵⁷ Prenatal humans are of necessity in the process of developing into persons. If that process is interrupted in a way fatal to them, they can never be born and become persons. Consequently, they should presumptively have substantial moral status while in that process, provided that their treatment due to this status does not violate the basic rights of the individual women who carry them. It makes no sense that the State must have the highest regard for persons at birth but may have none whatsoever for these same beings while they are in the unavoidable process of developing toward birth, even on the very threshold of being born.

²⁵⁴ The statutes that detail this set of crimes appear in Article 3.5 of the Criminal Code which is entitled “Offense Against Pregnant Women.” COLO. REV. STAT. ANN. § 18-3.5-101(6) (West 2015).

²⁵⁵ See, e.g. NAT’L CONF. OF STATE LEGISLATURES (March 2015), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

²⁵⁶ Carl Hulse, *Senate Outlaws Injury to Fetus During a Crime*, N.Y. TIMES (March 26, 2004), <http://www.nytimes.com/2004/03/26/us/senate-outlaws-injury-to-fetus-during-a-crime.html>; Robert Steinbuch, *The Butterfly Effect of Politics over Principle*, 12 QUINNIPIAC L.J. 223, 225 (2009).

²⁵⁷ Nelson, *supra* note 138, at 202.

“Second, prenatal humans are often valued highly by the women and men who create them,” and their valuation of and personal investment in the unborn also deserve respect.

Many, perhaps most, of them consider prenatal humans as their children-to-be. Regardless of whether a particular gestational mother or...father may wish the prenatal human to be born, the assumption of all others, including the State, ought to be that the pregnancy is wanted prior to actual termination . . . and that no third-party ought to wrongfully interfere with or terminate the pregnancy.²⁵⁸

In other words, the “state has an interest in punishing violent conduct that deprives a pregnant woman of her procreative choice.”²⁵⁹ Even if a pregnant woman is on her way to terminate her pregnancy for her own reasons, the State retains an interest in keeping that choice hers—because, for one, she may change her mind and preserve her prenatal human’s life.

Third, many people with different ethical and religious convictions sincerely believe that prenatal humans are persons from the moral point of view and that abortion reflects an intolerable disrespect for and waste of human life.²⁶⁰ Many others sincerely disagree with this position²⁶¹, but that does not justify them simply disregarding those who highly value the unborn and paying no attention whatsoever to the reasons they advance for their conviction.

Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense.²⁶²

“Respecting other people’s ascriptions of moral status is part of respecting persons, part of caring for and about them”²⁶³ While this form of evaluative respect does not require moral agents to abandon their own considered moral convictions in deference to their opponents, it can obligate them to moderate how their convictions inform their behavior in the social world. Thus, the State may recognize prenatal humans as possessing significant moral status out of respect for its numerous citizens who ethically value them as persons and are offended by their destruction.

Consequently, the claim that the State has no reasonable justification whatsoever for enacting a feticide statute is unfounded. Of course these reasons which support enactment of a feticide statute also justify the enactment of an enhancement statute or a law like Colorado’s which recognizes a feticide as a separate crime against the woman.²⁶⁴ The point here is not to argue that *only* feticide laws can demonstrate that the State considers wrongful killing of prenatal humans to be a serious crime and desires to punish acts that do end their lives, but it is to contend that they are one legitimate way to do so.

²⁵⁸ *Id.*

²⁵⁹ *People v. Davis*, 872 P.2d 591, 604 (Cal. 1994) (Kennard, J., concurring).

²⁶⁰ Nelson, *supra* note 138, at 203.

²⁶¹ *Id.*

²⁶² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 914-15 (1992) (Stevens, J., concurring and dissenting).

²⁶³ MARY ANNE WARREN, *MORAL STATUS: OBLIGATIONS TO PERSONS AND OTHER LIVING THINGS*, at 170-71 (Oxford University Press 1997).

²⁶⁴ See COLO. REV. STAT. ANN. T. 18, art. 3.5 (West 2015).

PART V: CONCLUSION

If prenatal humans were constitutional persons, then feticide laws would not exist. All traditional criminal homicide laws would apply to them equally as they do to all born human beings because “the Fourteenth Amendment [would] grant[] the unborn the same right to life possessed by all other persons and [would] require[] the State to afford that life the same protection it gives to all other persons.”²⁶⁵ In addition, if prenatal humans were constitutional persons, then “[f]irst and foremost, the state would be compelled to treat all [induced] abortion as *murder*.”²⁶⁶ But unborn humans are not constitutional persons.

The Court in *Roe* carefully considered, and rejected, the State's argument “that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment” Accordingly, an abortion is not “the termination of life entitled to Fourteenth Amendment protection.” From this holding, there was no dissent . . . ; indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a “person” does not have what is sometimes described as a “right to life.”²⁶⁷

Consequently, given the State’s recognized authority to extend the law’s protection to nonpersons (endangered species, nonhuman animals) and objects (historical buildings), whether wrongfully killing prenatal humans ought to be a crime is an open question.

The current state of the law is clear: unborn humans cannot be victims under a traditional criminal homicide statute as they are not persons, unless a legislature expressly makes them victims of wrongful killing in spite of their lack of personhood. The enactment of a feticide statute alone cannot turn nonpersons into persons any more than a statute criminalizing cruelty to animals turns them into persons. Nor does passage of a feticide statute transform the unborn into quasi-persons or partial persons. “The text of the Fourteenth Amendment mandates that constitutional personhood be a categorical concept, one that does not admit degrees or conditions.”²⁶⁸ A human being (or any other entity) either has personhood (and has it on an equal basis with all other persons) or does not.

When applied to third-party assailants, feticide laws do not necessarily render the pregnant woman invisible or divert attention from the injuries she suffered in the assault that ended her pregnancy without her consent,²⁶⁹ although misapplication and misinterpretation of them can. To the contrary, they are *one* reasonable way for the State—which is supposed to represent and serve the human community—to condemn the losses each individual woman actually suffers in such an attack—the loss of her bodily integrity, the loss of pain, the loss of decision-making power over her pregnancy, and the loss of the being that, perhaps, would have been her child. The fact that some proponents of feticide laws support them due to their pro-

²⁶⁵ Nelson, *supra* note 138, at 160.

²⁶⁶ LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 121 (W.W. Norton & Company 1990); Nelson, *supra* note 138, at 170-80.

²⁶⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 913-14 (1992) (Stevens, J., concurring in part and dissenting in part) (citations and footnote omitted).

²⁶⁸ Nelson, *supra* note 138, at 164.

²⁶⁹ *But see* Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 *IND. L.J.* 667, 696 (2006). (“Redefining the fetus as a victim—to the exclusion of the pregnant woman—the law obscures the injury that has been inflicted upon the woman;” feticide statutes “sever the interests of fetus and pregnant woman, ultimately furthering an agenda of control over women’s bodies and lives.”).

life sentiments or perceive them as a vehicle for undermining or destroying abortion rights does not detract from the laws' substantive legitimacy. Again, they may be misapplied—the feticide prosecutions of pregnant women who unsuccessfully committed suicide but killed their prenatal humans come readily to mind. Unfortunately, the law is twisted and deformed by many different persons—police officers, prosecutors, politicians, lawyers, and judges.²⁷⁰

Do the feticide statutes I have surveyed pose a true crisis for women's rights, including their current constitutionally protected right to end their pregnancies? All things considered, I would say they do not. The overwhelming majority of states either lack such laws or expressly exempt pregnant women from their reach. Large numbers of feticide prosecutions targeting women for ending the lives of the unborn they carried do not exist, although ample evidence exists that pregnant women (especially those using drugs) are being pursued by the law in ways that arguably violate their rights and do not improve fetal health.²⁷¹ On the other hand, a handful of states allow feticide prosecutions against pregnant women, although whether the legislatures intended these laws to be used in this manner as opposed to being used against third-party assailants is unclear. Some women have been successfully prosecuted. Perhaps the greatest danger to women is found in broadly worded negligent or reckless feticide statutes, but I argue that they should be found unconstitutional.

It is surely trite to state that the battle over State regulation of abortion will not disappear any time soon. Because feticide laws, rightly or wrongly, are bound up with abortion, the controversy over them is not going away either. This unhappy situation regarding both would be quite different if women who are pregnant (and their physicians and others who can make termination safe) had sovereignty over abortion. But some reasonable people of good will find this wrong and unacceptable, in large part because they sincerely and not unreasonably believe the unborn as a class of beings have a moral status that is independent of that which a pregnant woman attributes to her own particular prenatal human. We should not be surprised (or dismayed or annoyed) when they perceive the death of a fetus caused by the culpable act or omission of a person to be a seriously wrongful and harmful act—and want to have the law make it a crime.

²⁷⁰ As an example of the last, see *Stump v. Sparkman*, 435 U.S. 349 (1978).

²⁷¹ See generally Paltrow & Flavin, *supra* note 16.

