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**INTO THE WILD BLUE YONDER OF LEGAL REPRESENTATION FOR
VICTIMS OF SEXUAL ASSAULT:
CAN U.S. STATE COURTS LEARN FROM THE MILITARY?**

*Erin Gardner Schenk & David L. Shakes**

*Erin Gardner Schenk, J.D., University of Denver Sturm College of Law; B.B.A., University of Oklahoma, thanks BIC, loyal EIC. She dedicates this article to those who have served, namely Maj. Jason W. Schenk, USAF, and her grandfather, the late Lt. Col. Louis R. Douglas, USAF Ret. This author owes much of her constitution and wherewithal to the instant at the Army Air Corps Aviation Cadet Training Program, housed at Yale University in 1943, when, even though no one else would, “ol’ Douglas jumped.”

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SECTION I: INTRODUCTION:

“If you sign up to defend your country and to risk your own life . . . [y]ou shouldn’t have to be running from your fellow soldiers and airmen—that is inexcusable.”¹ Despite public criticism regarding past attempts at addressing the problem of sexual assault within the military, the United States Armed Forces² have recently become frontrunners in the area of protecting the rights and privacy interests of sexual assault victims. The Air Force was the first branch of the Armed Forces to step outside the confines of its traditional core competency—protecting the population against outside threats—and begin implementing an innovative means of protecting its own servicemembers against an internal threat—sexual assault within its ranks.³ In early 2013, as part of a widespread and multifaceted effort to combat this problem, the Air Force initiated its Special Victims’ Counsel (“SVC”) program, through which the Air Force provides a JAG Corps⁴ attorney to independently represent the victim of an alleged sexual assault.⁵ The SVC attorney is separate and independent from the prosecutorial “trial counsel,” is provided by the Air Force at no cost to the victim, and is tasked with both advising the victim of the legal process and protecting the victim’s privacy interest⁶ under Military Rules of Evidence (“M.R.E.”) Rule 412.⁷ Not long after the Air Force implemented its SVC program, in the landmark decision *LRM v. Kastenberg*,⁸ the highest appellate court in the U.S. military justice system—the United States Court of Appeals for the Armed Forces (“C.A.A.F.”)⁹—held that a sexual assault victim’s right to be heard under the M.R.E. permits the victim to be heard through his or her SVC attorney, subject to reasonable limitations,¹⁰ during a court-martial or “Article 32 hearing.”¹¹ Subsequent to the C.A.A.F.’s

¹ Army Sgt. 1st Class Blair Huesdens, *Face of Defense: Special Counsel Aids Sexual Assault Victims*, U.S. DEPT OF DEFENSE (Dec. 6, 2013) <http://archive.defense.gov/news/newsarticle.aspx?id=121293> (quoting Army Capt. Peter Williams, Special Victims’ Counsel for the Minn. Nat’l Guard).

² For purposes of this article, the United States Armed Forces shall be referenced as “Armed Forces” or “military” and the United States may be abbreviated, “U.S.” Furthermore, the individual United States service branches may be referred to in short, such as “Army,” for United States Army.

³ *New Air Force Program Aids Sexual Assault*, Rape Abuse and Incest National Network Survivors, <https://rainn.org/news-room/us-air-force-special-victims-council-program> (Last visited Sept. 9, 2015).

⁴ The term, “JAG Corps,” refers to the Judge Advocate General’s Corps, the legal division of each branch of the Armed Services. For purposes of this article, the authors make no branch-specific distinction unless the distinction is material to the precise topic being addressed. See *About JAG*, U.S. AIR FORCE JUDGE ADVOCATE GENERAL CORPS, <http://www.airforce.com/jag/about> (Last visited Sept. 11, 2015).

⁵ *Air Force SVCs Advocate for Sexual Assault Victims*, AMERICAN BAR ASSOCIATION: NEWS ARCHIVES (Feb. 7, 2014, 5:26 PM), http://www.americanbar.org/news/abanews/aba-news-archives/2014/02/air_force_svcs_advoc.html.

⁶ One legal scholar asserts that, even more than a criminal conviction or a civil tort action in the victim’s favor, “[t]he first need of rape victims, both personal and legal, is privacy Securing personal control and reclaiming privacy are often the most important steps in reclaiming a sense of security. This need for reclaimed privacy begins with the fact of the rape itself.” Jeffrey Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of DeFacto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 713 (2007).

⁷ Mil. R. Evid. 412, in pertinent part provides, “[t]he following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c): (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim’s sexual predisposition.” 10 U.S.C. § 1044e (2014).

⁸ *LRM v. Kastenberg*, 72 M.J. 364, 370 (C.A.A.F. 2013). Note: the *Kastenberg* case referenced throughout the majority of this article is the case as heard on appeal by the C.A.A.F. Prior to the C.A.A.F. appeal, the case was heard under the same name by the U.S. Air Force Court of Criminal Appeals “AFCCA” (*infra* note 122), which shall be referenced herein as the “lower *Kastenberg*” case. However, that court’s reasoning on the issue of victim standing was limited due to the AFCCA’s holding that it lacked jurisdiction. Therefore, the references to the lower *Kastenberg* case herein will be limited to a brief procedural analysis, and unless otherwise noted, any general reference to *Kastenberg* herein refer to the C.A.A.F. case.

⁹ The C.A.A.F. is the highest appellate military justice tribunal, and is “composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate. . . . Decisions by the [C.A.A.F.] are subject to direct review by the Supreme Court of the United States.” U.S. COURT OF APPEALS FOR ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/home.htm> (last visited Sept. 15, 2015).

¹⁰ Such “reasonable limitations,” as discussed by the C.A.A.F. might include, for example, a requirement that the victim and his or her SVC make submissions in written form. *Kastenberg*, 72 M.J. at 371.

Kastenberg decision, Congress reaffirmed the right of a military sexual assault victim to be represented through counsel when, in its National Defense Authorization Act for Fiscal Year 2015, Congress required the M.R.E. be amended to reflect that “when a victim of an alleged sex-related offense has a right to be heard in connection with the prosecution of the alleged sex-related such offense, the victim may exercise that right through counsel, including through a Special Victims’ Counsel.”¹²

As previously noted, the Armed Forces have been scrutinized for years for the proliferation of sexual assault occurrences, as well as the frequency with which either military sexual assault victims have slipped through the cracks of the military justice system or—worse—reports have resulted in controversial dismissals of high profile cases¹³ or threats of career retaliation against the victims.¹⁴ Given this reputation, the Armed Forces might seem an unlikely environment for the upshot of one of the most encouraging advancements for sexual assault victims since the evidentiary “rape shield” statutes of the 1970s.¹⁵ Perhaps necessity is the mother of invention. Perhaps the dire need for reform in this area catalyzed the renovation of the legal representation concept to include victims of sexual assault. Whatever the impetus, the military is now leading the U.S., not only in its traditional defense role, but also, in its new role as a pioneer in the relatively uncharted territory¹⁶ of providing independent legal representation to victims of sexual assault.¹⁷

By the metrics set forth in recent Department of Defense (“DoD”) statistics reports,¹⁸ even based on the SVC’s yet relatively short existence, the Air Force SVC and its sister

¹¹ The term, “Article 32 hearing,” comes from Article 32 of the Uniform Code of Military Justice Title VII, “Trial Practice,” (10 U.S.C. § 832). An Article 32 hearing is somewhat analogous to a grand jury, in that an Article 32 hearing is required at which sufficient evidence must be presented before the convening authority may convene a general court-martial to try the accused. 10 U.S.C. §832 (2014); *See also* Fed. R. Crim. P. 5.1(e). However, unlike a grand jury, an Article 32 hearing grants an accused the opportunity to call witnesses and cross-examine opposition witnesses. 10 U.S.C. §832(d)(2).

¹² NDAA SEC. 534. Enhancement Of Victims’ Rights In Connection With Prosecution Of Certain Sex-Related Offenses, Subsection (c), provides, “Not later than 180 days after the date of the enactment of this Act, Part III of the Manual for Courts-Martial shall be modified to provide that when a victim of an alleged sex-related offense has a right to be heard in connection with the prosecution of the alleged sex-related such [sic] offense, the victim may exercise that right through counsel, including through a Special Victims’ Counsel under section 1044e of title 10, United States Code (as amended by subsection (a)).” 113 H.R. 3979.

¹³ *See* Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS & STRIPES, Feb. 27, 2013, <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797>. “Convening authorities have unfettered discretion to reduce penalties in criminal case dispositions and do so frequently. Dismissing an entire case, however, is extremely rare. Franklin’s disposition of the case came after a uniquely military post-trial review process in which convicted servicemembers petition the convening authority for clemency. Those petitions contain any mitigating factors and letters from supporters. Wilkerson’s 20-year career had provided him with many supporters, especially within the fighter pilot community.” *Id.*

¹⁴ “However, too many of these respondents indicated they perceived social and/or professional retaliation as a result of making a report.” DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 18, (Nov. 25, 2014), <http://i2.cdn.turner.com/cnn/2014/images/12/03/dod.sapr.report.to.potus.pdf>.

¹⁵ Privacy Protection for Rape Victims Act of 1978, 95 P.L. 540, 92 Stat. 2046.

¹⁶ Although the idea of providing legal representation to victims of sexual assault has been discussed in the literature for over a decade, and has been implemented in other national jurisdictions worldwide, as well as in the U.S. federal system, the Armed Forces have become the leader in implementing this concept in a more tangible sense in U.S. sexual assault prosecutions. Wendy J. Murphy, *The Victim Advocacy and Research Group: Serving a Growing Need to Provide Rape Victims with Personal Legal Representation to Protect Privacy Rights and to Fight Gender Bias in the Criminal Justice System*, 10 J. OF SOCIAL DISTRESS & THE HOMELESS 1, 123-38 (2001); OHIO REV. CODE ANN. § 2907.02(F) (West 2007).

¹⁷ The authors are aware that many prefer the term “survivor.” They use the term “victim” because that is the term used in the Armed Forces SVC program and the pertinent case law cited throughout this article.

¹⁸ *See e.g.*, DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE: PROVISIONAL METRICS ON SEXUAL ASSAULT, FISCAL YEAR 2014 14, (2014), http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Appendix_B.pdf; DEP’T OF

programs have the potential for success.¹⁹ However, this article does not focus solely on past achievements. Rather, the article also looks to the future and asks whether the SVC program could be effectively implemented in state criminal justice systems in the United States. Specifically, the article begins in Section II by analyzing the history of the Armed Forces' SVC programs, as well as the government's reasoning behind implementing those programs. The article continues in Section III by detailing the political path by which the Armed Forces arrived at the decision to implement the SVC programs, as well as the legislative and judicial developments since the SVC programs' inception. In Section IV, the article compares the structure and efficacy of the Armed Forces' programs to similar victims' legal representation systems worldwide. In Section V, the article addresses the constitutionality of victim representation in an adversarial justice system, including a discussion of the main objections that have been raised against the implementation of such SVC programs. The article then concludes in Section VI, in which the authors ultimately advocate for the U.S. state court systems' adoption of SVC programs in order to provide sexual assault victims with independent legal representation.

SECTION II: THE GOVERNMENT'S REASONING BEHIND ITS DECISION TO IMPLEMENT THE ARMED FORCES' SVC PROGRAMS:

The United States, on the whole, has a vested interest in reducing incidents of military sexual assault, both for the more conceptual purpose of maintaining good order and discipline, protecting the welfare of its servicemembers, and creating an environment that will attract recruits of all genders, as well as for the more concrete purpose of reducing the financial cost of investigating, prosecuting, researching,²⁰ and increasing awareness of sexual assault crimes and their effects.²¹ Although, admittedly, some critics suggest that the data reported by the DoD concerning sexual assaults is significantly exaggerated,²² it is the belief of certain political officials,²³ social justice groups,²⁴ and public media organizations,²⁵ as well as the authors' belief, that sexual assault in Armed Forces remains a persistent problem. In keeping with this belief, the development of SVC programs in response to the ongoing issue of sexual assault, as well as the political forces behind the program's conception, are detailed below.

DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2013,

http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

¹⁹ An interesting area for further research would be interviewing victims who were independently represented by counsel to inquire as to what impact their victim attorneys had on their satisfaction with the system.

²⁰ For example, the cost of producing the Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2013, according to the front page of the report itself, was "\$1,441,000 for the 2014 Fiscal Year. This includes \$183,000 in expenses and \$1,258,000 in [] labor." DEP'T OF DEF. ANN. REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2013 (2014),

http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

²¹ *Id.* at 101.

²² See, e.g., Lindsay L. Rodman, Commentary, *The Pentagon's Bad Math on Sexual Assault*, WALL STREET J. (May 19, 2013, 6:16 PM), <http://www.wsj.com/articles/SB10001424127887323582904578484941173658754>.

²³ See Tyrone C. Marshall Jr., *SAPRO Director: 'No One Declaring Success' on Sexual Assault*, U.S. DEP'T OF DEF.: DOD NEWS (Dec. 4, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=123762>. See also Stav Ziv, *Report on Sexual Assault in the Military Draws Criticism*, NEWSWEEK (Dec. 8, 2014, 4:39 PM), <http://www.newsweek.com/report-sexual-assault-military-draws-criticism-290173>. ("We still have a long way to go," outgoing Secretary of Defense Chuck Hagel said last week at a press conference")

²⁴ See, e.g., *Stop Sexual Assault in the Military*, THOMAS MERTON CENTER, <http://thomasmertoncenter.org/ssam/> (last visited Sep. 16, 2015); Peter Weber, *Can the military solve its sexual assault crisis?*, THE WEEK (May 15, 2013), <http://theweek.com/articles/464390/military-solve-sexual-assault-crisis>.

²⁵ Sarah Childress, *Why the Military Has a Sexual Assault Problem*, PBS FRONTLINE (May 10, 2013, 11:49 AM), <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/why-the-military-has-a-rape-problem/>. See also Ziv, *supra* note 23 (in which a Sunday *New York Times* editorial opinion following the publication of the DoD's December 2014 report on sexual assault emphasized, "[the] measure of the scale of the problem of sexual assault in the military" and noted, "[t]he total number of assaults is too high by orders of magnitude and the incidence of reporting is far too low.") (citation omitted).

A. A RECENT HISTORY OF THE SVC PROGRAMS:

On January 28, 2013, the U.S. Air Force began a pilot program to provide licensed attorneys from the JAG Corps to serve as Special Victims' Counsel to victims of alleged sexual assault.²⁶ Unlike anything yet attempted in the U.S. civilian criminal justice arena, the program takes a revolutionary stance by providing legal representation for third parties, that is, the individuals—in these cases, victims of alleged sexual assault—who are not a legal party to a lawsuit.²⁷ These SVC advocates are unlike a “SARC” (Sexual Assault Response Coordinator) or a “VA” (Victim Advocate), both of whom fill the role of psychiatric, emotional, or logistical counselors.²⁸ Rather, the SVC are licensed JAG Corps attorneys, provided upon request, as early as the reporting stage of the process, at no cost to the victim, dedicated solely to advocating for the legal needs of that victim throughout the military criminal justice process.²⁹ Just as defense counsel represents the accused and trial counsel represents the government, “[e]very SVC is charged to zealously represent [his or her] client, even when that interest is not in the government's interest.”³⁰

Notably, the Air Force has not been alone in its strides. Two other U.S. military service branches followed, with the Department of the Navy³¹ and the Coast Guard launching similar pilot programs in the summer of 2013.³² Shortly thereafter, then-U.S. Secretary of Defense, Chuck Hagel, issued a memorandum requiring the implementation of SVC programs in each branch of the U.S. Armed Forces.³³ The Army and the Marine Corps implemented their SVC programs in November 2013, with instructions to be fully operational by January 2014.³⁴ Implementation of SVC programs advanced to the state National Guard level when Minnesota became one of the first states to implement such a system in late 2013.³⁵ Finally,

²⁶ R. CHUCK MASON, CONG. RESEARCH SERV., R43213, SEXUAL ASSAULTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ): SELECTED LEGISLATIVE PROPOSALS 8 (2013). For purposes of this article, “victim,” or “sexual assault victim,” or “sexual assault” all refer only to the context of criminal sexual assault. This article excludes from its scope all evidentiary matters related to civil sexual assault hearings.

²⁷ *Id.* at 9. In traditional civilian criminal cases, the parties are limited to the defendant and the state/government.

²⁸ See U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, *Need Assistance? Help for Me*, <http://sapr.mil/index.php/victim-assistance/need-assistance/help-for-me> (last visited September 16, 2015); U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, *Responding to Reports of Sexual Assault*, http://myduty.mil/public/docs/responding_to_reports_of_sexual_assault.pdf (last visited September 16, 2015).

²⁹ See 10 U.S.C.S. § 1565b (2015); 10 U.S.C.S. § 1044 (2015).

³⁰ Michael Biesecker & Emery P. Dalesio, *New Corps of Military Lawyers Help Rape Victims*, WASH. TIMES (Mar. 30, 2014), <http://www.washingtontimes.com/news/2014/mar/30/new-hearing-set-monday-in-army-generals-sex-case/print/> (quoting Col. Jay McKee, who has managed the Army's Special Victims Counsel program since its Nov. 1, 2014 launch).

³¹ DEP'T OF THE NAVY, SECNAVINST. 1752.4B, SEXUAL ASSAULT PREVENTION AND RESPONSE (2013), <http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1752.4B.pdf>.

³² The Coast Guard SVC program became effective July 15, 2013. U.S. COAST GUARD, R. 151700Z, SEXUAL ASSAULT PREVENTION AND RESPONSE—SPECIAL VICTIMS COUNSEL (2013), available at http://www.uscg.mil/announcements/alcoast/299-13_alcoast.txt.

³³ SEC'YS OF DEF., MEM. FOR SEC'YS OF THE MILITARY DEP'TS ET AL., SEXUAL ASSAULT PREVENTION AND RESPONSE (2013), http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

³⁴ *Establishment of the Marine Corps Victims' Legal Counsel Organization (VLCO)*, MARINES: THE OFFICIAL WEBSITE OF THE U.S. MARINE CORPS, Oct. 31, 2013, <http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/153620/establishment-of-the-marine-corps-victims-legal-counsel-organization-vlco.aspx>; *SHAPR: Special Victim Couns. Program, STAND-TO!: THE OFFICIAL FOCUS OF THE U.S. ARMY*, Dec. 2, 2013, http://www.army.mil/standto/archive_2013-12-02/ (“[T]he U.S. Army e]stablished a Special Victim Counsel (SVC) capability as of Nov. 1, 2013, in accordance with the Aug. 14, 2013 SECDEF memorandum The SVC program is expected to achieve full operational capability no later than Jan. 1, 2014.”).

³⁵ Army Sgt. 1st Class Blair Heusdens, *Face of Def.: Special Counsel Aids Sexual Assault Victims*, DEP'T OF DEF.: DOD NEWS, Dec. 6, 2013, <http://archive.defense.gov/news/newsarticle.aspx?id=121293>.

Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 provided for the “[d]esignation and availability of Special Victims’ Counsel for victims of sex-related offenses.”³⁶

Thus far, the SVC programs have been readily utilized, and sexual assault reporting has increased. Six months after the Air Force pilot program began, 392 victims of sexual assault had requested an SVC.³⁷ As of August 9, 2013, that number had grown to 419,³⁸ and as of September 6, 2013, individuals requesting SVC numbered 458.³⁹ Just over one year into the program’s existence, Air Force “SVCs ha[d] attended 110 courts-martial and 122 Article 32 hearings (pretrial hearings), [Air Force Colonel Dawn] Hankins said. SVCs ha[d] also attended more than 930 interviews with investigators, defense counsel and trial counsel.”⁴⁰

While the mere availability of victim attorneys immensely benefits victims of past crimes, both the Armed Forces and sexual assault victims share a much further-reaching goal—reducing the occurrence of future sexual assaults.⁴¹ By increasing the percentage of sexual assaults reported,⁴² the SVC also ultimately stands to decrease the number of incidents of the underlying offenses. Numerous studies, conducted at different times and based on different statistical data, independently indicate a negative correlation⁴³ between the perceived likelihood of punishment for a societally substandard or illegal behavior and deterrence of the punishable action.⁴⁴ That is, an increase in one’s perceived likelihood of punishment relates to a decrease in the likelihood of the individual taking the punishable action. Furthermore, studies indicate the relationship between the perceived *certainty* of punishment and a reduction in commission of the underlying act is stronger than any such relationship between the perceived *severity* of the punishment and the reduction of the commission of the act.⁴⁵ Essentially, far more than an individual’s perception of the potential severity of punishment for an action, the perception that he or she is likely to be caught and punished relates to a reduced likelihood that the individual will take the action. Ultimately, based on this underlying premise, if the SVC

³⁶ 127 Stat. 672 (2013). For more information on legislative history, see Section III.(B.), “The Legal Path Leading to the Armed Forces’ SVC Implementation.”

³⁷ Nancy Montgomery, *Air Force Program a Rare Bright Spot in Military’s Sex Assault Fight*, STARS & STRIPES, Feb. 26, 2014, <http://www.stripes.com/news/air-force-program-a-rare-bright-spot-in-military-s-sex-assault-fight-1.269628>.

³⁸ R. CHUCK MASON, CONG. RESEARCH SERV., *supra* note 26, at 8.

³⁹ *Special Victims’ Counsel Program*, U.S. AIR FORCE, Sep. 9, 2013, <http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf>.

⁴⁰ *Air Force SVCs Advocate for Sexual Assault Victims*, *supra* note 5.

⁴¹ One of the major reasons victims of sexual assault decide to participate in the criminal justice system is to ensure that the perpetrator does not commit additional sexual assaults. Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. COMMUNITY PSYCHOL. 191, 198 (2010).

⁴² The following article makes two references to the goal of increased reporting: Ramsey Cox & Jeremy Herb, *Senate Blocks Gillibrand Sex Assault Bill*, THE HILL (Mar. 6, 2014, 2:28 PM), <http://thehill.com/policy/defense/200124-senate-defeats-gillibrand-military-sex-assault-bill>.

⁴³ Although longstanding doctrines of logic emphasize that a correlation (relationship) between two variables does not automatically indicate a causal relationship between them, a statistical correlation is, nonetheless, required before linear causation can be determined. See Saul A. McLeod, *Correlation*, SIMPLY PSYCHOL. (Sept. 2008), <http://www.simplypsychology.org/correlation.html>.

⁴⁴ See James Q. Wilson, *Thinking About Crime: The Debate Over Deterrence*, 252 THE ATLANTIC MONTHLY 72, 72-88 (Sept. 1983). Wilson references supporting studies conducted by economist Isaac Erlich, the Panel on Research on Deterrent and Incapacitative Effects (established by the National Academy of Sciences, National Research Council), and Alfred Blumstein and Daniel Nagin (who conducted a 1977 study in which they ultimately found that the higher the probability of conviction for draft evasion, the lower the evasion rates).

⁴⁵ *Id.* See also Saranath Lawpoolsre, Jingyi Li, & Elisa R. Braver, *Do Speeding Tickets Reduce the Likelihood of Receiving Subsequent Speeding Tickets? A Longitudinal Study of Speeding Violators in Maryland*, 8 TRAFFIC INJ. PREVENTION 26, 26 (2007). “PBJ [Probation before judgment] is associated with a reduced rate of recidivism more than stronger penalties; however, it is unclear whether the reduction primarily is attributable to the penalty itself or to characteristics of drivers receiving PBJ. Increasing drivers’ perceptions that they are at risk of being caught speeding may improve the effectiveness of speeding law enforcement.”

succeeds in achieving increased reporting of sexual assault in the military, the likelihood that the offender will be brought to light and punished also increases, which could then have a significant deterrent effect as to the future commission of sexual assaults.

Based on the aforementioned deterrence studies, the SVC program already shows great potential for decreasing sexual assault by way of increased reporting. For example, “[d]uring the first three quarters of [the 2013] fiscal year, servicemembers made 3,553 complaints regarding sex assault, which was defined as rape, sodomy and other unwanted sexual contact. This represented a forty-six percent increase compared to the same time period—from October to June—in 2012.”⁴⁶

Furthermore, the Report to the President of the United States on Sexual Assault Prevention and Response: Provisional Metrics on Sexual Assault Fiscal Year [“FY”] 2014 revealed that “[i]n FY 2014, the Military Services received a total of 5,983 reports of sexual assault involving Service members as either victims or subjects, which represents an 8 percent increase from the 5,518 reports made in FY 2013.”⁴⁷ The report goes on to note a dramatic increase in reporting that coincides with the implementation of the SVC programs in 2013.

The increase in reporting from FY 2013 to FY 2014 is more modest than the increase in reporting from FY 2012 to FY 2013. This is not surprising given that the increase in FY 2013 was an unprecedented 50 percent. In FY 2014, Service members sustained the high level of reporting seen in FY 2013.⁴⁸

The dramatic increase in Fiscal Years 2013 and 2014, since the SVC programs began, can be even better understood when compared with Fiscal Years 2007 through 2012, in which the number of reports received increased only slightly from 2,846 (in 2007) to 3,604 (in 2012), a difference of only 26 percent, or 758 more reports annually over the course of five years.⁴⁹ In contrast, the 5,983 reports received in 2014 almost double the 3,604 reports received in 2012, reflecting a sixty-seven percent increase in annual reporting in only two years’ time.⁵⁰ Another way of comparing the data contained in this report is that, during the six-year period from 2007 to 2012, the “Military Services” received a total of 19,751 reports of sexual assault, whereas they received 11,501 reports in 2013 and 2014 alone.⁵¹

In addition to the primary benefit increased reporting stands to have in the form of its deterrent effect on a future perpetrator, that increased deterrence could then have a secondary benefit in that it may, in turn, increase the likelihood of future reporting by victims. Studies show that one of the major reasons victims of sexual assault decide to participate in the criminal justice system is to ensure that the perpetrator does not commit additional, future sexual assaults.⁵² Therefore, knowledge that reporting an incident could, along with other

⁴⁶ Rebecca Ruiz, *Congress Passes Major Military Sex Assault Reform*, FORBES, (Dec. 20, 2013, 12:20 PM), <http://www.forbes.com/sites/rebeccaruiz/2013/12/20/congress-passes-major-military-sex-assault-reform/>. Note: The Department of Defense, via Chuck Hagel, seemed to believe this number reflects a true increase in the number of victim reports. DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, 3 (2014)

http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SAPRO_Report.pdf.

⁴⁷ *Provisional Metrics on Sexual Assault Fiscal Year 2014*, DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, 23, (2014),

http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Appendix_B.pdf.

⁴⁸ *Id.* at 24.

⁴⁹ *See id.* at 23.

⁵⁰ *See id.*

⁵¹ *Id.*

⁵² Patterson & Campbell, *supra* note 41, at 198.

victims' reports, have the cumulative effect of reducing future incidents could encourage even more victims to report than otherwise would. Ultimately, this positive perpetual cycle could dramatically improve the dismal landscape of sexual assault.

B. DISCUSSION AS TO WHY VICTIMS OF SEXUAL CRIMES NEED REPRESENTATION, AS COMPARED TO VICTIMS OF ANY OTHER TYPE OF CRIME:

In this overarching discussion on the SVC program, one vital step is a brief discussion of how the Armed Forces arrived at their current stance on legal representation for victims of sexual assault, beginning with the historical and legislative background, both civil and military, for rape prevention. Australian studies have now documented the fact that “the percentage of . . . defendants pleading not guilty who were acquitted in the higher courts was highest in sexual assault cases.”⁵³ Even as far back as 1966, a famous study of American jurors found that the variance was greater for non-aggravated rape cases than for any other crime, as between the number of actual acquittals by jurors and the number of times the presiding judge, having been surveyed at the conclusion of the trial, would have acquitted the defendant.⁵⁴ The initial push for rape reform in the United States, at the civilian level developed shortly thereafter, in the 1970s—largely in response to the feminist movement⁵⁵ and an increase in sex crimes in the late 1960s and early 1970s—until, by the mid-1980s, most states had some type of rape reform law.⁵⁶ Among those reforms was the integration of statutory rape shield laws, the first of which was developed in 1975, which generally prevent—although to varying degrees and with varying levels of specificity—questioning as to evidence, opinion, or reputation of a sexual assault victim's past sexual conduct.⁵⁷

The military's rape shield rule came into existence in 1978.⁵⁸ Since that time, the situation for sexual assault victims in the military has continually evolved, and potential political ramifications always underlie decisions pertaining to sexual assault in the military context.

1. THE CURRENT U.S. CIVILIAN MODEL AND ITS SHORTCOMINGS AS IT PERTAINS TO SEXUAL ASSAULT TRIALS:

a. VICTIM CONSENT AS A COMMON DEFENSE:

Sexual assaults are unique crimes in the sense that most often the key witness for the prosecution is the victim of the alleged crime. Because the victim and the government usually share a common adversary—the accused—the public often perceives the objectives of the state as being aligned with those of the victim. Occasionally and coincidentally, that perception may be true. However, importantly, that perception does not always hold true from an evidentiary perspective. Because of the uniquely intimate nature of a sexual assault crime, the prosecution

⁵³ Natalie Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE at 2 (No. 344 August 2007) (Australian Institute of Criminology).

⁵⁴ David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. OF CRIM. L. AND CRIMINOLOGY 1994, 1256-57 (1997 Issue 4) (citing Harry Kalven, Jr. & Hans Zeisel, *THE AMERICAN JURY* 249-54 (1966)).

⁵⁵ Lynn Hecht Schafran & Jillian Weinberger, *Impressive Progress Alongside Persistent Problems: Rape Law, Policy and Practice in the United States*, in INTERNATIONAL APPROACHES TO RAPE 194 (Nicole Westmarland & Geetanjali Gangoli eds., 2011); See Germaine Greer, *Seduction Is a Four Letter Word*, reprinted in *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 327 (Erich Goode & Richard Troiden eds., 1974).

⁵⁶ Mitsie Smith, Comment, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER, L. & SOC. POL'Y 147, 174 (2011).

⁵⁷ See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 990-91 (2008).

⁵⁸ Privacy Protection for Rape Victims Act of 1978, 95 P.L. 540, 92 Stat. 2046.

may seek to disclose information about the victim that he or she would not like publicized or even made part of closed-chambers court proceedings. The admissibility of psychological counseling and other medical records is also frequently the subject of legal dispute in sexual assault cases.

When the commission of non-sexual crimes is at issue—take, for example, kidnapping—the victim may still serve as the key witness for the prosecution. Federal protections for victims of federal crimes have been in place since the implementation of the Crime Victims Rights Act of 2004,⁵⁹ which, in pertinent part, affords victims of alleged federal crimes the statutory right not to be excluded from any related public court proceeding,⁶⁰ the right to be heard in a public court proceeding as to very limited matters (“release, plea, sentencing, or any parole proceeding”), and the “right to be treated with fairness and with respect for the victim’s dignity and privacy.”⁶¹ Even though these protections are important for any victim of a serious crime, one notable distinction between most federal crimes and sexual assault is that the victim/witness in the kidnapping runs a relatively low risk of personally being socially, professionally, or criminally scorned for anything relating to the crime. In sexual assault crimes, however, due to the frequent centrality of the issue of consent, the victim’s lifestyle and the nature of his or her private, social, and sexual activities might readily exculpate the accused while, at minimum, publically embarrassing if not literally incriminating the victim who may have had little or no say in the state’s initial decision to bring criminal charges against the accused or in the strategic planning of the evidence presented at trial.⁶² Furthermore, because an estimated two-thirds of rapes and seventy-three percent of sexual assaults are perpetrated by someone previously known to the victim,⁶³ the accused may possess a great deal of personal or sensitive information about the victim that the accused might seek to introduce in his or her defense at trial.

In addition to the delicacy of sexual and mental health information generally, the frequently asserted defense of the victim’s consent to sexual contact increases the likelihood that intimate details of the victim’s life will be deemed admissible in court, statutory rape shield laws notwithstanding.⁶⁴ Essentially, unlike the prosecution of other crimes that often relies on otherwise unrelated witnesses who are able to testify to what they actually saw, heard, smelled, etcetera, the key witness in a sexual assault crime is highly likely to be the victim. Therefore, treating the sexual assault victim as a target on the witness stand immensely helps the accused because the accused is often able to make sexual activity appear to be consensual, primarily by virtue of the victim’s past activities or lifestyle.⁶⁵ Although discrediting a witness is an oft-employed trial tactic used by opposing counsel on either side of the courtroom in any type of case, in sexual assault prosecutions where the witness is also the victim, this tactic takes on a whole new meaning. “When consent is at issue, the defence [sic] strategy generally rests on the systematic destruction of the complainant’s self-confidence and bodily integrity in a manner that no other victim confronts.”⁶⁶

⁵⁹ Justice for All Act of 2004, 108 P.L. 405, 118 Stat. 2260 (effective Oct. 30, 2004) (codified as amended at 18 U.S.C.A. § 3771 (West 2015)).

⁶⁰ “[U]nless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” Crime Victim’s Rights Act, 18 U.S.C.A. § 3771(a)(3) (West 2015).

⁶¹ 18 U.S.C. §§ 3771(a)(4), (a)(8).

⁶² See Klein, *supra* note 56, at 993-94.

⁶³ *The Offenders: The Rapist isn’t a Masked Stranger*, RAPE, ABUSE, & INCEST NATIONAL NETWORK (last visited Sept. 22, 2015), <https://www.rainn.org/get-information/statistics/sexual-assault-offenders>.

⁶⁴ See Klein, *supra* note 57, at 993-94.

⁶⁵ *Id.*

⁶⁶ Fiona E. Raitt, *Independent Legal Representation for Complainants in Rape Trials*, in *RETHINKING RAPE LAW* 267, 272 (Clare McGlynn & Vanessa E. Munro eds., 2010).

**b. INADEQUACY OF THE PROSECUTOR IN PROTECTING
VICTIMS' PRIVACY INTERESTS:**

Even if the defense does not employ such a tactic, the victim's risk of personal exposure combined with the potential incongruences between the public interest and the victim's privacy interest "create[] a zone of perpetual friction [that] acutely curbs the capacity of prosecutors to protect complainants from harsh or undignified treatment."⁶⁷ Notably, "[u]nder US criminal law, the prosecutor represents the government, not the victim Sometimes courts rule that because prosecutors do not represent the victim, they lack standing to assert the victim's rights."⁶⁸ In these instances particularly, the interests of the victim are not compatible with either the prosecution or defense interests. One young female captain, a rape victim who benefitted from the independent representation provided by the SVC, explained the various forces at play in a criminal trial as follows:

The best description that can be made is that a court-martial is like a chess game The defense and the prosecution are the people making the moves and the victims are just chess pieces that don't know the overall plan. The SVC was able to support me while the prosecution and defense were moving their chess pieces.⁶⁹

The victim, naturally, may be reluctant to share testimonial information that the prosecution wants him or her to share. Granted, the prosecution may sometimes seek to exclude intimate information about the victim, as this information, including past sexual history, is frequently a tool by which the accused can raise doubt as to whether or not consent existed at the time of the act.⁷⁰ On the other hand, from the prosecution's tactical viewpoint, a distraught, exposed, or otherwise sensitive victim-witness stands to increase the general sympathy for that witness on the part of most juries.⁷¹ Notably, this is where the interests of the victim and the government might diverge. For the prosecution, certain pieces of sexual, marital, or otherwise personal information about the victim are beneficial when they are able to portray any previous relationship with the accused distinguishable from what happened during the incident.⁷² The victim may have very good reasons for not wanting to testify as to this information (in a civilian realm where prosecutorial discretion determines whether or not a case will be brought and the victim may be caught in the middle) or the victim may have very tangible career ramifications from the publication of this information (in a military realm, where information that would help the government could lead to negative and sometimes severe repercussions for the victim).⁷³

⁶⁷ *Id.* at 271.

⁶⁸ Schafran & Weinberger, *supra* note 55, at 204-05.

⁶⁹ Michael Biesecker & Emery P. Dalesio, *Lawyer Corps Helps Rape Victims*, HUFFINGTON POST (Mar. 30, 2014, 3:05 PM), http://www.huffingtonpost.com/2014/03/30/military-lawyres-sexual-assault_n_5059582.html.

⁷⁰ Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 578 (2005).

⁷¹ *Id.* at 560.

⁷² For example, although it is often the defendant/accused who seeks to admit evidence about a victim's history—especially sexual history, if the victim and the defendant had a past relationship, sexual or otherwise, a prosecutor/trial attorney might seek to show how the instance of the alleged attack was *different* than previous instances, thus requiring the admission of a great deal of evidence the victim might, for various reasons, not want to make public.

⁷³ For example, a prosecutor may wish to prove that the victim was incapable of consent because she was under the influence of some substance. The victim may suffer legal and career-affecting consequences if the use of that substance was illegal. Furthermore, career ramifications unique to the military exist if the victim's conduct implicates him or her in violation of military regulations concerning prohibited relationships.

Based on this disparity of evidentiary interests between the prosecution and the victim, some countries have long recognized the benefits of providing dedicated legal counsel to represent the trial and pre-trial needs of sexual assault victims. For instance, in a 1998 study conducted with the support of the European Union (Grotius Programme), the Dublin Rape Crisis Centre at the School of Law at Trinity College Dublin found:

Nine [out of twenty] participants in the study had their own lawyers. A highly significant relationship was found to exist between having a lawyer, and overall satisfaction with the trial process. The presence of a victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence [sic] lawyer was much lower.⁷⁴

On the other hand, a study by Wemmers in 1995 found, “[t]he vast majority of victims in the study (87%) reported feeling that the Public Prosecutor had shown little or no interest in them.”⁷⁵ Finally, “even when interests [of the prosecution and the victim] coincide, trial counsel [who represent the government] are unable to provide legal representation to victims or advice outside the scope of the Victim and Witness Assistance Program.”⁷⁶ For instance, as mentioned above, an independent SVC attorney may help a victim with civil matters related to the sexual assault, such as filing for a protection order against the accused, with which government counsel is unable to assist the victim.⁷⁷

Section IV provides a more exhaustive look at victim advocacy, using other nations' legal systems for their comparative value. However, the focus of this section is merely to acknowledge the need for victim advocacy, even in an adversarial legal system.⁷⁸ Most importantly, if the direct correlation between victims' legal counsel and victim confidence leads to increased reporting of sexual assault crimes, there is hope that increased reporting will ultimately lead to a decrease in the underlying crimes themselves.

2. MILITARY SEXUAL ASSAULT VICTIMS, IN PARTICULAR:

a. GENDER PERSPECTIVES ON SEXUAL ASSAULT IN THE ARMED FORCES:

Sexual assault in the Armed Forces has always been a concern, largely—as the U.S. Manual for Courts-Martial observes—because “[m]ilitary life requires that large numbers of young men and women live and work together in close quarters which are often highly isolated.”⁷⁹ Despite the feminist origins of modern sexual assault reform,⁸⁰ sexual assault has

⁷⁴ *The Legal Process and Victims of Rape*, DUBLIN RAPE CRISIS CENTRE (1998), <http://www.drec.ie/wp-content/uploads/2011/03/rapevic.pdf>.

⁷⁵ *Id.* at 52 (citing J. Wemmers, *Victims in the Dutch Criminal Justice System: The Effects of Treatment on Victims' Attitudes and Compliance*, 3 INT'L REV. VICTIMOLOGY 323 (1995)).

⁷⁶ Capt. Alison A. DeVito, *An Introduction to the Special Victims' Counsel Program*, 40 THE REPORTER 1, 5 (2013), <http://www.afjag.af.mil/shared/media/document/AFD-130408-017.pdf>.

⁷⁷ Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, A.B.A.J. (Sept. 21, 2013, 9:54 PM), http://www.abajournal.com/mobile/mag_article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/.

⁷⁸ Gershman, *supra* note 70, at 560.; see also Erin C. Blondel, *Victims' Rights in an Adversarial System*, 58 DUKE L.J. 237, 240 (2008).

⁷⁹ DEP'T. OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL U.S. A22-36 (2012).

⁸⁰ See generally Lise Gotell, *Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms*, ACADEMIA (Jan. 1, 2009),

troubled the military long before women were first permitted to serve in 1917,⁸¹ and male rape within the military remains a significant problem today.⁸² According to the Annual Report on Sexual Assault in the Military: Fiscal Year 2013, fifteen percent of restricted reports⁸³ of sexual assaults in combat areas of interest were reported by male victims.⁸⁴ A survey of active duty members contained in the provisional 2014 Report to the President of the United States on SAPR revealed that 4.3 percent of active duty women and 0.9 percent of active duty men experienced unwanted sexual contact within the last year.⁸⁵ Notably, approximately 203,000 women are currently serving on active duty, as compared to approximately 1,166,000 men,⁸⁶ making the number of men responding that they had experienced unwanted sexual contact within the last year approximately 10,500, as compared to approximately 8,800 women.⁸⁷ Unsurprisingly, male victims exhibit many of the same post-attack trauma as their female counterparts, including “mood disturbances, problems in relationships with peers, and sexual difficulties[,]”⁸⁸ with the added potential for uneasiness sharing living quarters, ultimately resulting in half of the victims reportedly desiring to be discharged from the military as a result of the attack.⁸⁹

Regardless of the gender of the victim, military sexual assault has long been a command focus because deterring sexual assault is perceived as “critical to military efficiency.”⁹⁰ Due to the increased opportunities for sexual assault unique to the Armed Forces, combined with the significant potential for resultant decrease in morale and mission competency, the military service branches and the DoD have strived to create reforms to curb military sexual assault during the last decade, albeit not always with consensus.

b. EFFECT OF COLLATERAL MISCONDUCT ON A MILITARY VICTIM’S CAREER:

While this push to combat military sexual assault mirrors the increased focus placed on sexual assault reform in the civilian realm, one main difference in the civilian world, as compared to sexual assault in the military, is that the person to whom an alleged victim servicemember reports the sexual assault incident is also very likely to be in the victim’s direct

http://www.academia.edu/322349/Canadian_Sexual_Assault_Law_Neoliberalism_and_the_Erosion_of_Feminist-Inspired_Law_Reforms.

⁸¹ “1917–1918: During last two years of World War I, women are allowed to join the military. 33,000 women serve as nurses and support staff officially in the military” *Time Line: Women in the U.S. Military*, COLONIAL WILLIAMSBURG FOUND. (2008),

http://www.history.org/history/teaching/enewsletter/volume7/images/nov/women_military_timeline.pdf.

⁸² See generally *Provisional Metrics*, *supra* note 47, at 2.

⁸³ “Restricted report” is a term of art within the military. A restricted report is a particular type of reporting that “allow[s] a survivor the ability to remain anonymous and gain access to resources [such as psychological treatment and counseling services] without initiating an investigation.” 2014 DEP’T OF DEF. REPORT OF FOCUS GROUPS ON SEXUAL ASSAULT PREVENTION AND RESPONSE, p. vi (2014),

http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_3_DMDC.pdf.

⁸⁴ DEPT. OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013 44 (2014),

http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

⁸⁵ *Provisional Metrics*, *supra* note 47, at 2.

⁸⁶ OFFICE OF THE DEPUTY ASSISTANT SEC’Y OF DEF. MILITARY CMTY. AND FAMILY POLICY, 2013 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY iii (2013), <http://www.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf>.

⁸⁷ The 10,500 and 8,800 estimates are based on an extrapolation from the data provided in the two reports. These actual figures are not contained in either report.

⁸⁸ MALE VICTIMS OF SEXUAL ASSAULT 141 (Gillian C. Mezey & Michael B. King eds., Oxford Univ. Press 2d ed. 1992) (citing P.F. Goyer & J.C. Eddleman, *Same-Sex Rape of Nonincarcerated Men*, AM. J. PSYCHIATRY (1984)).

⁸⁹ *Id.*

⁹⁰ DEP’T. OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 79, at A22-36.

chain of command.⁹¹ During the course of the criminal legal process, information adverse to the victim may surface that poses a professional risk to the victim and that would not be a risk in civilian prosecutions. As previously noted, one of the main missions of the Armed Forces in the sexual assault realm is to increase reporting. Two different reporting options exist in the military: restricted and unrestricted.⁹² Restricted reporting does not trigger an investigation but still permits the victim to use government medical and counseling resources and in some cases provides for conversion to unrestricted reporting in the future.⁹³

Notably, SVC lawyers represent victims who file a sexual assault report, including restricted reports that don't lead to prosecution. SVC attorneys handle all of the legal needs that could arise from reporting an assault, including explaining the military criminal justice process, advocating for victims on matters like rape shield laws, and helping with related civil matters like protective orders. When necessary, they can advise on any criminal charges against the victims themselves, which sometimes arise for collateral misconduct like underage drinking.⁹⁴

Although the risk of being charged with collateral misconduct exists for sexual assault victims outside the military as well, military personnel face a greater risk than civilians, simply because the scope of what is considered "misconduct" is far greater in the military than in the civilian world. For instance, the Uniform Code of Military Justice⁹⁵ ("UCMJ") not only prohibits and punishes underage drinking⁹⁶ and the illegal possession or use of controlled substances,⁹⁷ but it also criminalizes actions that are not offenses in the civilian realm, including adultery,⁹⁸ and the catch-all offense of committing "conduct of a nature to bring discredit upon the armed forces"⁹⁹ If the victim of the alleged sexual assault was engaged in any such UCMJ violations at the time of the underlying act, he or she could face personal charges that could have detrimental professional ramifications.¹⁰⁰ Consequently, the fear of collateral misconduct allegations may have the effect of deterring a military sexual assault victim from reporting the assault to the chain of command. Although some organizations argue the actual number of sexual assault victims who experience collateral misconduct accusations

⁹¹ Charles "Cully" Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, THE HERITAGE FOUND. (Nov. 6, 2013), <http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it>.

⁹² 2014 DEP'T OF DEF. REPORT OF FOCUS GROUPS, *supra* note 83, at 13.

⁹³ *Id.*

⁹⁴ Laird, *supra* note 77.

⁹⁵ 10 U.S.C. §§ 801-946 (2012).

⁹⁶ 10 U.S.C. § 815. Although the UCMJ does not expressly prohibit underage drinking, the drinking age is usually a post-specific regulation, and the offense is generally punished under Article 92—Failure to obey order or regulation, and may be subject to Article 15 non-judicial punishment. *See e.g., Article 15 Punishments Imposed in July 2007 at Eielson AFB, AK*, U.S. AIR FORCE (Aug. 20, 2007), <http://www.eielson.af.mil/news/story.asp?id=123065199>.

⁹⁷ DEP'T OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL U.S. § 37 (2012).

⁹⁸ *Id.* at § 62; 10 U.S.C. § 934 (2012).

⁹⁹ JOINT SERV. COMM. ON MILITARY JUSTICE MANUAL, *supra* note 97, at § 60.

¹⁰⁰ For example, the Air Force lists the following statistics for year 2013: "Approximately 15% of clients represented by SVCs have allegedly engaged in some form of collateral misconduct (recognizing that a percentage of clients represented by SVCs are not military members). About 75% of the time, no action has been taken. Of the 25% of victims where some action is taken, 90% of victims receive some form of administrative action. A very small percentage received NJP [Non-Judicial Punishment]. [Specifically,] AF-Wide3 – Of the 169 SA CMs [Sexual Assault Courts-Martial] in CY13, 26 involved collateral misconduct by a total of 28 victims. -5 of the 28 victims were disciplined for their collateral misconduct. -2 of the 5 victims were disciplined before the subject's trial: LOR for marijuana use; LOR for adultery. -3 of the 5 victims were disciplined after the subject's trial: SPCM for drug abuse (acquitted); 2 LORs for providing alcohol to minors." U.S. ARMY GUIDANCE DOCUMENT 26, http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q138.pdf.

is overstated,¹⁰¹ a 2004 letter from then-Under Secretary of Defense, David S.C. Chu, explicitly recognizes that, “[o]ne of the most significant barriers to the reporting of a sexual assault is the victim’s *fear* of punishment for some of the victim’s own actions leading up to or associated with the sexual assault incident.”¹⁰²

c. SVC’S SCOPE OF REPRESENTATION INCLUDES CERTAIN NON-MILITARY VICTIMS:

Finally, despite the inherently heightened risk of collateral exposure for servicemember victims, the SVC program also recognizes and protects the privacy expectations of a small pool of non-servicemember victims. Notably, the SVC program extends independent legal representation to dependents of servicemembers, overseas civilian DoD employees, and foreign military servicemembers, if the reporter claims to be the victim of a sexual assault over which the military judge would have jurisdiction, usually meaning cases in which the alleged offender is a U.S. servicemember.¹⁰³ This aspect of the program is important because it implicitly recognizes the privacy risk faced by all reporters of sexual assaults, regardless of whether the victim faces the increased risk of collateral misconduct accusation, discussed above, that is unique to military professionals.

SECTION III: THE LEGAL PATH LEADING TO THE ARMED FORCES’ SVC IMPLEMENTATION:

A. LEGISLATIVE HISTORY OF THE SVC PROGRAMS:

Special Victims’ Counsel has been one of the most recently proposed policy solutions for sexual assault victims. However, after the Air Force’s pilot SVC program began, and even after Secretary Hagel’s memorandum of August 14, 2013, requiring each service branch to provide such a program,¹⁰⁴ the legislative battle to address sexual assault in the military continued, heatedly.

On November 20, 2013, Senator Kirstin Gillibrand, [Democrat-NY], introduced the Military Justice Improvement Act of 2013¹⁰⁵ to the Senate for initial reading. The bill contained controversial changes to the military justice system concerning the prosecution of sexual assault cases. The senior military attorney of each service opposed the broad scope of the proposed changes.¹⁰⁶ When a vote on cloture—meaning to overcome a filibuster and end debate in order to vote on the substance of the bill—was taken on March 6, 2014, S. 1752 received only fifty-five votes, five votes shy of the three-fifths majority that is required to overcome a filibuster.¹⁰⁷ Notably, two cosponsors of Gillibrand’s bill—Senators Tom Carper [Democrat-Del.] and Mark Kirk [Republican-Ill.]—voted against it.¹⁰⁸ “Kirk said he cosponsored the bill because [he] strongly believe that victims of sexual assault should always

¹⁰¹ *Id.*

¹⁰² Letter from David S.C. Chu, Under Sec’y of Def., to Sec’y of the Military Dep’t et al., Dep’t of Def. (Nov. 12, 2004), <http://www.ncdsv.org/images/COLLATERALMISCONDUCT.pdf> (emphasis added).

¹⁰³ See, e.g., U.S. ARMY, OFFICE OF STAFF JUDGE ADVOCATE, SPECIAL VICTIM COUNSEL PROGRAM, <http://www.knox.army.mil/Garrison/supportoffices/sja/svc.aspx>.

¹⁰⁴ See *supra* note 33.

¹⁰⁵ Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

¹⁰⁶ *Id.*

¹⁰⁷ *On the Cloture Motion S. 1752*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/113-2014/s59> (last visited Sept. 22, 2015).

¹⁰⁸ *Id.*

be protected but voted against it because its broad scope could jeopardize our readiness and our military stationed in the field.”¹⁰⁹

However, on January 14, 2014, shortly after the introduction of S. 1752 came the introduction of another senate bill targeting sexual assault reform in the military, S. 1917, the Victims Protection Act of 2014, sponsored by Senator Claire McCaskill, [Democrat-Mo].¹¹⁰ McCaskill’s bill passed the Senate with a rare ninety-seven to zero unanimous vote on March 10, 2014.¹¹¹ Following that, the bill was referred to the House Subcommittee on Military Personnel on June 20, 2014, but was never brought to a vote.¹¹² Nonetheless, “[t]he fiscal year 2015 National Defense Authorization Act, or NDAA, signed into law [in December 2014], significantly changes the . . . UCMJ, in cases pertaining to rape and sexual assault.”¹¹³ Specifically, “[t]he FY15 NDAA requires that the preliminary hearing be conducted by a preliminary hearing officer who is a judge advocate and that qualifying victims, as defined in the statute, have a right not to testify at the hearing should they so choose.”¹¹⁴ Also notably, the 2015 NDAA codifies the holding of the landmark case, *LRM v. Kastenberg*, discussed in detail in subsection III.(B.), below, by requiring that, “when a victim of an alleged sex-related offense has a right to be heard in connection with the prosecution of the alleged sex-related such offense [sic], the victim may exercise that right through counsel, including through a Special Victims’ Counsel”¹¹⁵

B. ANALYSIS OF *LRM v. KASTENBERG*:

*LRM v. Kastenberg*¹¹⁶ provided the foundational judicial basis for the Armed Forces’ SVC programs. In July of 2013, when the C.A.A.F. decided the case, the Air Force SVC, although already experiencing success in its pilot mission, still had not received the universal validation from the DoD in the form that was soon forthcoming.¹¹⁷ In fact, on October 16, 2012—the date when the government charged underlying defendant¹¹⁸ Airman First Class Nicholas Daniels with Article 120 violations of rape and sexual assault¹¹⁹—the Air Force’s SVC pilot program had not yet begun. Even after receiving her SVC attorney, the victim, LRM, faced mounting challenges in the courtroom. The main legal issue in the case was whether LRM, through her Special Victims’ Counsel, had standing to assert legal arguments as to why certain factual information was not relevant, and therefore inadmissible evidence, as well as why medical records and counseling conversations were inadmissible under the

¹⁰⁹ Brian Tumulty, *Gillibrand’s Sexual-Assault Bill Blocked by Filibuster*, LOHUD THE JOURNAL NEWS (Mar. 7. 2014 12:01 AM), <http://www.lohud.com/story/news/politics/2014/03/06/gillibrand-military-sexual-assault-bill-hits-hurdle/6135559/> (alteration in the original) (internal quotes omitted).

¹¹⁰ H.R. Res. 1917, 113th Cong. (2013) (enacted).

¹¹¹ *U.S. Senate Roll Call Votes 113th Congress – 2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=2&vote=00062 (last visited Sept. 22, 2015).

¹¹² *All Bill Information (Except Text) for S. 1917 – Victims Protection Act of 2014*, U.S. CONG., <https://beta.congress.gov/bill/113th-congress/senate-bill/1917> (last visited Sept. 22, 2015).

¹¹³ David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, U.S. ARMY (Jan. 7, 2015), http://www.army.mil/article/140807/Legislation_changes_UCMJ_for_victims_of_sexual_assault/ (alteration in the original).

¹¹⁴ *Id.*

¹¹⁵ COMM. ON RULES, 113th Cong., HOUSE AMEND. TO THE TEXT OF S.1847 § 534(C) (Comm. Print 2014).

¹¹⁶ *Kastenberg*, 72 M.J. at 365.

¹¹⁷ *Air Force Special Victims’ Counsel Program*, THE OFFICIAL WEBSITE OF THE JUDGE ADVOCATE GEN., <http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf> (last visited Oct. 1, 2015) (“On 14 August 2013, the Secretary of Defense directed each of the Services to implement special victims’ advocacy programs to provide legal advice and representation to the victims.”).

¹¹⁸ *Kastenberg*, 72 M.J. at 366. Nicholas Daniels was also a Real Party in Interest in the appellate case.

¹¹⁹ *Id.*

psychotherapist-patient privilege in M.R.E. 513.¹²⁰ LRM relied on her right to an opportunity to be heard under M.R.E. 412, titled “Sex offense cases; relevance of alleged victim’s sexual behavior or sexual predisposition,” section (c)(2) of which “provides that, before admitting evidence under the rule, the military judge must conduct a hearing where the ‘alleged victim must be afforded a reasonable opportunity to attend and be heard[.]’”¹²¹ and M.R.E. 513, section (e)(2) of which provides that “[t]he patient shall be afforded a reasonable opportunity to attend the hearing and be heard”¹²²

At the trial level:

[t]he military judge . . . found A1C LRM had no standing (1) to move the court, through her SVC or otherwise, for copies of any documents related to Mil. R. Evid. 412 and 513; (2) to be heard “through counsel of her choosing” in any hearing before the court-martial; or (3) to seek any exclusionary remedy, through her counsel, during any portion of the trial. Finding the right to be heard in the Military Rules of Evidence does not denote the right to be heard through a personal legal representative, the military judge found A1C LRM was only authorized to be heard personally; through trial counsel in pretrial hearings under Mil. R. Evid. 412 and 513; and, in the event she became incompetent, through a guardian, representative or conservator The military judge then held she received the required opportunity to assert her privacy rights when he authorized her to speak personally to him or through the trial counsel during the hearings.¹²³

Effectively, the military trial judge ruled that an opportunity to be heard under the M.R.E. was distinguishable from standing to assert an argument on a question of law, and he limited LRM’s “opportunity to be heard” to factual information, that is, her opportunity to be heard was through her witness testimony or regarding factual elements of the pretrial hearing.¹²⁴ Furthermore, the trial judge supported his conclusion by asserting, “to hold otherwise would make A1C LRM a de facto party to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence.”¹²⁵ Upon LRM’s appeal to the intermediate U.S. Air Force Court of Criminal Appeals, the court “readily acknowledge[d] the important objectives of the SVC program[.]” but then held that, “against the backdrop of authority underscoring the specific jurisdictional boundaries of military courts under Article I of the Constitution, and specifically considering the nature of the relief sought by petitioner in the case before us, [the court did] not have jurisdiction to consider the petitioner’s extraordinary writ [of mandamus].”¹²⁶ The C.A.A.F. then took up the case on further appeal.

By the time the case was argued before the C.A.A.F. in June 2013, several *amici curiae* had submitted briefs.

The Air Force Appellate Government division wrote a brief that has been recaptioned as the Amicus Brief of the United States . . . support[ing] a

¹²⁰ *Id.*

¹²¹ *Id.* at 369.

¹²² MIL. R. EVID. 513(e).

¹²³ LRM v. Kastenberg, No. 2013-05, 2013 WL 1874790, at *3 (A.F. Ct. Crim. App. Apr. 2, 2013) (internal quotations omitted), *rev’d*, 72 M.J. 364 (C.A.A.F. 2013).

¹²⁴ *Id.*

¹²⁵ *Id.* (internal quotations omitted).

¹²⁶ *Id.*

holding] that the AFCCA erred in finding no jurisdiction, and remanding the case to the CCA for consideration of the underlying issues. Additionally, the United States Air Force Trial Defense Division, Navy-Marine Corps Appellate Defense Division, the Army Appellate Defense Division, and the United States Marine Corps Defense Services Organization wrote in support of the Appellee and Real Party in Interest. Finally, the National Crime Victim Law Institute and ‘Protect Our Defenders,’ wrote in support of the Appellant.¹²⁷

Ultimately, the C.A.A.F. held the military judge’s ruling to be in error, largely based on the reasoning that privilege is a legal assertion, which, therefore, requires *ipso facto* standing to assert a legal argument.¹²⁸ Furthermore, the C.A.A.F. stated unequivocally, “every time that the M.R.E. and the R.C.M. [(Rules for Courts-Martial)] use the term ‘to be heard,’ it refers to occasions when the parties can provide argument *through counsel* to the military judge on a legal issue, rather than an occasion when a witness testifies.”¹²⁹ The C.A.A.F. did emphasize that the opportunity to be heard was not an absolute right, but rather was limited by the word, “reasonable,” which gave discretion to the military judge as to the extent of the victim’s opportunity to be heard.¹³⁰ For instance, the C.A.A.F. noted that, “restricting the victim or patient and their [sic] counsel to written submissions,” rather than presenting live, in-person arguments, might be reasonable depending on the context of the case.¹³¹ The C.A.A.F. also noted that the right to an opportunity to be heard is waivable, and if an SVC should represent to the judge that the victim’s interests are sufficiently aligned with those of the government, that representation would likely diminish the reasonableness of providing the victim with a separate, independent motions opportunity.¹³² Finally, a “reasonable opportunity to be heard” at the court-martial or arraignment proceeding does not provide any right of an appeal of an adverse evidentiary ruling.¹³³

Despite these limitations, the *Kastenberg* holding—that a victim’s right to be heard includes the right to be represented by counsel and to make legal arguments through counsel regarding the admissibility of evidence¹³⁴—has affirmed the legal foundation of the SVC program.

SECTION IV: COMPARATIVE ANALYSIS OF THE STRUCTURE AND THE EFFICACY OF THE ARMED FORCES’ SVC PROGRAMS AND OTHER SIMILAR PROGRAMS WORLDWIDE:

A. THE CURRENT ARMED FORCES MODEL:

The Armed Forces have now adopted a model that includes independent legal representation dedicated to the victim of an alleged sexual assault.¹³⁵ This dedicated representation model provides numerous and significant advantages over the victim advocate programs that the military previously had in place. For instance, an organized cadre of SARCS (Sexual Assault Response Coordinators) has been used in the military since 2005.¹³⁶ Additionally, for military victims and all civilian victims of federal crimes prosecuted in

¹²⁷ Zachary D. Spilman, *Argument Preview: LRM v. Kastenberg*, No. 13-5006/AF, NATIONAL INSTITUTE OF MILITARY JUSTICE, CAAFLOG, June 9, 2013, <http://www.caaflog.com/category/september-2012-term/lrm-v-kastenberg/>.

¹²⁸ *Kastenberg*, 72 M.J. at 371.

¹²⁹ *Id.* at 370 (emphasis added).

¹³⁰ *Id.* at 371.

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Kastenberg*, 72 M.J. at 371.

¹³⁴ *Id.*

federal court, the Drug Enforcement Administration-Victim Witness Assistance Program (“DEA-VWAP”)¹³⁷ allows for victim referrals to support services, “includ[ing], but not be limited to, counseling, medical assistance, emergency shelter, transportation, relocation, and/or information about State Crime Compensation.”¹³⁸ However, the level of support provided by SARCS¹³⁹ and the DEA-VWAP, although vital in their own right, cannot rise to the legal level of representation provided by the current SVC programs. As one Air Force-sponsored article pointed out,

SARCS and victims’ advocates are not legally trained, and, for all their victim support, work essentially for the command. Prosecutors, likewise, work for the Air Force. Sympathetic or not, their duty is to prosecute and win cases. Further, they can’t give victims legal advice, such as telling them they don’t have to answer an improper question from a defense attorney. SVCs, on the other hand, are duty-bound to work for no one but the victim, just as defense attorneys work for the accused.¹⁴⁰

B. SURVEY OF COMPARATIVE LEGAL EXAMPLES:

The U.S. Air Force, while a frontrunner within the United States in terms of victims’ legal representation, is not the first government entity worldwide to provide an SVC program. An examination of other nations who provide SVC programs is useful in fully examining the current Armed Forces’ SVC system and in determining whether the SVC program is translatable to the U.S. state criminal justice system. Notably, this comparison will focus primarily on adversarial jurisdictions, due to their shared values and procedural similarities with the U.S., even though some persuasive arguments exist as to the exaggeration of the differences between the adversarial system and the inquisitorial system often found in European civil law jurisdictions.¹⁴¹

¹³⁵ *Mission & History*, DEP’T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, <http://www.sapr.mil/index.php/about/mission-and-history> (last visited Oct. 2, 2015).

¹³⁶ *Id.*

¹³⁷ 18 U.S.C. § 3771 (2015).

¹³⁸ Victim Witness Assistance Program, U.S. DRUG ENF’T AGENCY, <http://www.justice.gov/dea/resource-center/victims-crime.shtml> (last visited Sept. 25, 2015). Furthermore, although subsection (c)(2) of the Crime Victims’ Rights provision (18 U.S.C.A. § 3771 (2015)) requires that “[t]he prosecutor shall advise the crime victim that *the crime victim can seek the advice of an attorney* with respect to the rights described in subsection (a)” (emphasis added), the government provides neither an attorney nor the financial support for one. Lastly, the victim’s “right to be reasonably heard” as provided in subsection (4) the Crime Victims’ Rights provision is limited to “any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding[.]” and, therefore, does not extend that right to be heard to any pretrial or evidentiary hearings.

¹³⁹ A public document posted on myduty.mil describes the role of the SARC program Victim’s Advocate as follows: “Victim Advocates (VAs) provide direct assistance to victims. They listen to victims’ needs and then connect them with appropriate resources, including medical care, mental health care, legal advice and spiritual support. VAs work with victims to help them make informed choices and then support them every step of the way.” U.S. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, *Responding to Reports of Sexual Assault*, http://myduty.mil/public/docs/responding_to_reports_of_sexual_assault.pdf (last visited September 16, 2015).

¹⁴⁰ Montgomery, *supra* note 37.

¹⁴¹ See William Pizzi, *Victims’ Rights: Rethinking Our “Adversary System,”* 1999 UTAH L. REV. 349, at 350, 356 (1999); Peter Duff, *Disclosure in Scottish Criminal Procedure: Another Step in an Inquisitorial Direction?*, 11 (3) INT’L J. OF EVID. & PROOF 153, 153 (2007); Fiona E. Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials: Research Report for Rape Crisis Scotland* [hereinafter Research Report for Rape Crisis Scotland] at 23-24 (2010), <http://www.rapecrisisscotland.org.uk/workspace/publications/IndLegalRepReport-2010.pdf>. (Nonetheless, the civil law/inquisitorial system provides some compelling arguments in favor of independent legal representation. For further support for independent legal representation for sexual assault victims as evidenced by inquisitorial jurisdictions, namely in Europe); see also Susan Caringella, *Addressing Rape Reform in Law and Practice* 276 COLUM. U. PRESS (2009) (discussing the development of legal representation for victims of sexual assault in Denmark); Alexandra Goy,

1. JAPAN:

Japan has a hybrid inquisitorial/adversarial system, largely thanks to its civil law history¹⁴² combined with the influence of the United States in drafting Japan's post-World-War II constitution.¹⁴³ Therefore, admittedly, the protections provided to an accused person may, practically speaking, look different in Japan than they would in the United States, despite similarities on paper.¹⁴⁴ Those distinctions notwithstanding, since the implementation of the revision to the Code of Criminal Procedure in 2008,¹⁴⁵ Japan provides an example of an adversarial system with a broad criminal victim counsel system, in which victims' rights¹⁴⁶ include the ability to "state their opinions and ask for explanation concerning the public prosecutor's activities such as the request of examination of evidence[.]" and the ability to "question the defendant when it is deemed necessary"¹⁴⁷ Participating victims may question witnesses, make final argument, and make sentencing argument."¹⁴⁸ Additionally, victim participants [in criminal trials] "can delegate to an attorney, such acts as . . . questioning of the defendant. If their financial resources are less than 1.5 million yen . . . they can request the appointment of an attorney (referred to as an 'attorney for victim participants')."¹⁴⁹ Unlike the automatic eligibility for an attorney at government expense in the U.S. military's SVC programs, victims in Japan must meet an eligibility requirement based upon their financial resources.¹⁵⁰ However, once appointed, counsel for a victim in Japan has a far greater right to participate in all phases of the prosecution than the military's SVC.

2. IRELAND:

Ireland is a common-law, adversarial legal system even more analogous to that of the United States than Japan.¹⁵¹ Ireland also provides sexual assault victims with state-sponsored legal counsel to represent the victim in court proceedings. However, Ireland does this uniquely if the accused makes an application to the judge to cross-examine the victim about his or her sexual history.¹⁵² If that procedural requirement is satisfied, the government's Legal Aid Board will provide a victim's attorney free of charge, regardless of the financial status of the victim.

The Victim-Plaintiff in Criminal Trials and Civil Law Responses to Sexual Violence, 3 CARDOZO WOMEN'S L.J. 335, 336 (1996) (discussing in the development of legal representation for victims of sexual assault Germany).

¹⁴² Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEGAL EDUC. 1, 3 (2012) ("[T]he legal system in Japan was almost entirely based on the German civil law system.")

¹⁴³ Setsuo Miyazawa, *Introduction: An Unbalanced Adversary System—Issues, Policies, and Practices in Japan, in Context and in Comparative Perspective*, THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS 1, 1-3 (Malcolm M. Feeley & Setsuo Miyazawa, eds., 2002) (unpublished manuscript) (on file with University of Chicago at:

<http://home.uchicago.edu/~tginsburg/pdf/articles/TheJapaneseAdversarySystemInContext.pdf>).

¹⁴⁴ *Id.*

¹⁴⁵ Hiroshi Fukurai, *A Step In the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L & COMP. L. REV. 517, 554 (2013).

¹⁴⁶ Japan's adversarial system is extended to but not limited to victims of sexual assault. *See For Victims of Crime*, JAPANESE MINISTRY OF JUSTICE (Mar. 2015), <http://www.moj.go.jp/ENGLISH/CRAB/crab-02-4.html>.

¹⁴⁷ *Id.*

¹⁴⁸ Shigenori Matsui, *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, 13 ASIAN & PAC. L. & POL'Y J. 54 (2011).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ *See generally* Kieran McGrath, *Protecting Irish Children Better—The Case for an Inquisitorial Approach in Child Care Proceedings*, 5:1 JUD. STUD. INST. J. 136, at 142, 145-46 (2005).

¹⁵² *Brief Guide to the Criminal Justice System*, OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, <http://www.dppireland.ie/brief-guide-to-the-criminal-justice-system/category/5/#a35>.

However, unlike other nations' SVC programs, the victim's attorney is not able to represent the victim during the actual cross-examination.¹⁵³

3. CANADA:

Out of all of these comparative examples, Canada's emphasis on due process rights of the accused most closely resembles that of the U.S.¹⁵⁴ The Canadian Charter of Rights and Freedoms has traditionally been perceived to permit victim's advocates, in the "SARC" sense of the word "advocate,"¹⁵⁵ but Canada has thus far been reticent to permit full independent victim's counsel. The concept of a federal Sexual Assault Legal Representative has been studied and proposed in Canada, but it has not yet been adopted.¹⁵⁶

4. SCOTLAND:

Although Scotland has not yet introduced a system of SVC or independent legal representation for victims, the momentum exists to do so.¹⁵⁷ This push is largely due to the belief that Scotland's previously enacted rape prevention legislation, namely the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, known as "SOPESA,"¹⁵⁸ has not produced the expected results of restricting the use of sexual history and other character evidence as to the victim.¹⁵⁹

5. NEW SOUTH WALES, AUSTRALIA:

Notably, one other adversarial system that has begun to acknowledge the potential for coexistence between the procedural rights of a defendant and the narrowly tailored introduction of an SVC into a sexual assault trial is that of New South Wales, Australia. New South Wales introduced a state-funded program for legal representation of sexual assault victims in precisely the same capacity for which these authors advocate, that is, legal representation as to protection of the victim/witness in relation to attempted disclosure of "sexual assault communications."¹⁶⁰ In comparison to inquisitorial system counterparts—for example, Germany, which frequently provides full, state-funded representation for witnesses who are termed "Private Accessory Prosecutors" and who have the right to fully join the public prosecutor in the formal charges brought against the accused¹⁶¹—New South Wales's limited and narrowly-construed system of legal representation for the sole purpose of protecting sensitive and sexual victim information from being improperly admitted at trial comports fully with the ideas of procedural due process and fairness of criminal trials that Australia shares with the U.S.¹⁶²

¹⁵³ *Id.*

¹⁵⁴ Raitt, *supra* note 66, at 270.

¹⁵⁵ *Id.* at 275.

¹⁵⁶ Lucinda Vandervort, *Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in Edmondson, Kindrat, and Brown*, SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE AND WOMEN'S ACTIVISM 111, 147 (Elizabeth A. Sheehy ed., Univ. of Ottawa Press 2012).

¹⁵⁷ See Raitt, *supra* note 66.

¹⁵⁸ *Id.* at 273.

¹⁵⁹ *Id.* (citing Michele Burman, Lynn Jamieson, Jan Nicholson, & Oona Brooks, IMPACT OF ASPECTS OF THE LAW OF EVIDENCE IN SEXUAL OFFENCE TRIALS: AN EVALUATION STUDY, (Scottish Government Social Research 2007)).

¹⁶⁰ Kerstin Braun, *Legal Representation for Sexual Assault Victims—Possibilities for Law Reform?*, 25 CURRENT ISSUES IN CRIM. JUST. 3d. 819, 829 (Mar. 2014) (citing *Criminal Procedure Act 1986* (NSW) s 299A (Austl.)).

¹⁶¹ *Id.* at 826 (citing Bestellung eines Beistands; Prozesskostenhilfe [Appointment of Attorney as Counsel], 2014, BGBL I at 397a(1) (Ger.); Befugnis zum Anschluss als Nebenkläger [Right to Join as a Private Accessory Prosecutor], 2014, BGBL I at 395(1) (Ger.)).

¹⁶² See Anthony Gray, *Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions*, UNIV. NEW S. WALES L.J. 125, at 126, 132-33 (2014).

C. ANALYSIS OF THE EFFICACY OF TWO DIFFERENT MODELS:

1. IRELAND—REPRESENTATION LIMITED TO ISSUES OF GENERAL SEXUAL HISTORY:

a. PROTECTION FOR VICTIMS UNDER THE IRISH MODEL:

The Irish model provides an example of limited independent legal representation for sexual assault victims. Although “[t]he criminal legal process begins once a crime is reported to the Gardai [police.]”¹⁶³ the victim of alleged sexual assault in Ireland obtains independent legal representation only if the accused’s defense counsel makes an application [or motion] to admit evidence pertaining to the victim’s general sexual behavior¹⁶⁴—meaning sexual behavior not related to the alleged incident currently before the court. If the accused wishes to question the victim regarding the victim’s general sexual behavior, Ireland’s Legal Aid Board will provide the victim’s legal representation free of charge.¹⁶⁵

Pragmatically, the choice to provide legal representation at that particular stage of the proceeding seems both appropriate and cost-effective in light of the statistics that, in 2009, for example, the Director of Public Prosecutions exercised its discretion in prosecuting only twenty-seven percent of all reported cases, generally based simply on lack of admissible evidence,¹⁶⁶ but that, out of that twenty-seven percent, seventy-nine percent of accused were found guilty.¹⁶⁷ Essentially, Ireland provides independent legal representation—in the form of both a solicitor and barrister¹⁶⁸—for the victim only if the adversarial nature of the legal process targets the victim’s most intimate and vulnerable sexual history. However, the decision to limit the state’s obligation serves to decrease the state’s financial costs of providing SVC but still provides for the needs of victims by providing an independent attorney to advocate for the victim’s needs during the most confrontational portion of the process, if the process reaches that stage.

However, the limited representation program in Ireland fails to address several of the issues that would constitute effective representation the victim of sexual assault in the SVC context. Counsel being appointed only if the victim’s sexual history is placed at issue means that counsel will not be available during the initial investigation, will not be available to assist the victim with resolving collateral criminal issues, will not be available to address the inherent conflict between the victim and the prosecution, and will not be available to prevent the “re-victimization” of the victim at any stage of the proceeding other than that for which he/she was appointed. As discussed below, effective representation for a victim of sexual assault should include all these elements.

¹⁶³ *Guide to the Legal Process for Survivors of Sexual Violence*, RAPE CRISIS NETWORK IRELAND, 3, <http://www.rcni.ie/wp-content/uploads/RCNIGuidetotheLegalProcessSurvivors.pdf>.

¹⁶⁴ *Id.* at 22.

¹⁶⁵ *Id.* at 22-23.

¹⁶⁶ *Id.* at 8-9.

¹⁶⁷ *Id.* at 8.

¹⁶⁸ *The Barristers’ Profession in Ireland*, THE BAR COUNCIL OF IRELAND: LAW LIBRARY, http://www.lawlibrary.ie/docs/The_Barristers_Profession_in_Ireland/1968.htm#Difference_between_a_barrister_and_solicitor [https://web.archive.org/web/20141129040316/http://www.lawlibrary.ie/docs/The_Barristers_Profession_in_Ireland/1968.htm].

b. RIGHTS OF THE ACCUSED UNDER THE IRISH MODEL:

The rights of the accused are unaffected in instances of narrowly-construed victim representation, such as Ireland's—limited to questions of sexual history of the victim—because the scope of information the accused may legally present remains unchanged. The addition of victim's counsel merely provides one other legal representative to ensure that the accused and his or her counsel limit their questioning to that which is legally permitted.¹⁶⁹ However, the procedural rights of the accused to present information are unaffected by a system of victim's representation such as Ireland's.

2. UCMJ—REPRESENTATION THROUGHOUT THE REPORTING AND TRIAL PROCESS:

a. PROTECTION FOR VICTIMS UNDER THE UCMJ:

The scope of representation of the sexual assault victim under the UCMJ is greater than that of the Irish system of independent legal representation because the military's representation is triggered at the moment of reporting, be it restricted or unrestricted, of the alleged assault.¹⁷⁰ More specifically, independent legal representation is available at each of the five stages of the military criminal justice process: 1) the reporting of the incident, 2) the investigation, 3) pre-trial (following a decision to prosecute), 4) during trial, and 5) post-trial.¹⁷¹ For this reason, military SVCs are able and authorized to provide information to the victim that pertains to the victim's rights generally, as well as to the practical aspects of the criminal process. Specifically, military SVC aids the victim by “providing effective and timely advice, being available to assist throughout the full spectrum of the military justice practice from initial investigation to convening authority action, and providing appropriate advocacy to assure rights afforded are fully realized.”¹⁷²

b. RIGHTS OF THE ACCUSED UNDER THE UCMJ:

Even though the UCMJ provides a somewhat expanded view of independent legal representation over that of Ireland, the Armed Forces' SVC concept no more violates or infringes upon the rights of the accused than does the limited system in Ireland.¹⁷³ The reasoning behind why the SVC concept does not violate an accused's rights or the U.S. Constitution are addressed in greater detail in Section V., *infra*. However, a simplified explanation of that reasoning appears in the Special Victim Counsel Handbook, which states, “[t]he SVC Program does not increase a victim's standing in court-martial hearings or other military justice proceedings beyond the standing victims are currently afforded under existing law and rules [of evidence.]”¹⁷⁴

¹⁶⁹ *Guide to the Legal Process for Survivors of Sexual Violence*, *supra* note 163.

¹⁷⁰ SPECIAL VICTIM COUNSEL PROGRAM, SPECIAL VICTIM COUNSEL HANDBOOK (Nov. 1, 2013), http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See supra* Section V.(C)(1)(b.).

¹⁷⁴ SPECIAL VICTIM COUNSEL PROGRAM, SPECIAL VICTIM COUNSEL HANDBOOK (Nov. 1, 2013), http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf.

SECTION V: CONSTITUTIONALITY OF VICTIM REPRESENTATION IN AN ADVERSARIAL SYSTEM:

Introducing a third party into a legal process that has historically been a two-party affair will inevitably raise some concerns. Scholars in the U.S. and other common law jurisdictions have expressed apprehension that introducing a third-party with legal standing to participate in a criminal trial, as well as that third-party's attorney, would violate the constitutional rights of the defendant in the traditional adversarial system.¹⁷⁵ Amicus counsel for the Navy-Marine Corps Appellant Defense Department in the *Kastenberg* case argued that introduction of SVC into the adversarial system would be "a serious blow to fair trial rights" of defendants, would be "diametrically foreign to the system employed by the Founders of our jurisprudence[.]" and would effectively be the "first domino to chaos."¹⁷⁶ The trial court in *Kastenberg* adopted a similar view when it reasoned that, "to hold [that LRM had standing to assert her privacy rights through counsel] would make A1C LRM a de facto party to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence."¹⁷⁷ Granted, adherence to the Constitution in prosecuting criminal trials is paramount. Despite some peripheral scholarly discussions about making the rights of victims "equal" to the rights of defendants,¹⁷⁸ the authors are of the viewpoint that an equivalence in a victim's and a defendant's rights fundamentally cannot exist because the state actively seeks to deny the liberty of the defendant—a consequence of state action to which the victim is not exposed.¹⁷⁹

The disparity in victim rights and defendant rights notwithstanding, the C.A.A.F. ultimately concluded in *Kastenberg* that allowing the SVC to participate in the hearing in regard to M.R.E. 412 and M.R.E. 513 evidentiary issues would not violate fundamental concepts of justice or the fundamental due process rights of the defendant.¹⁸⁰ However, before the court reached its holding, the Navy-Marine Corps Appellate Division, in its brief of *amicus curae* in the *Kastenberg* case, clearly stated some of the more common objections to the SVC concept. Each of these objections will be examined in subsection (A.), below, followed by the respective responses to each objection. This examination will be followed in subsection (B.) by an examination of existing civilian statutory and case law that supports the SVC concept. Ultimately, as discussed below, the due process and fair trial rights of the defendant would not be prejudiced if the SVC system was limited in capacity to protection of the sexual, psychological, or otherwise intimate history of the victim.¹⁸¹

A. OBJECTIONS TO THE SVC CONCEPT:

An exhaustive list of objections to the SVC concept was presented to C.A.A.F. in the amicus brief of the Navy-Marine Corps Appellate Defense Division (hereinafter, "N-MC

¹⁷⁵ See, e.g., Ellen Yaroshesky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 135-36 (1990).

¹⁷⁶ Brief of Navy-Marine Corps Appellate Defense Division, *infra* note 182 at 20.

¹⁷⁷ AFCCA *Kastenberg*, 2013 WL 1874790 at *3 (internal quotations omitted).

¹⁷⁸ See, e.g., Paul G. Cassell & Steven J. Twist, *A Bill of Rights for Crime Victims*, CRIM. L. & PROC. PRACTICE GRP. NEWSLETTER, (FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUDIES, D.C.) Dec. 1, 1996 ("Rightly or wrongly, the Supreme Court has already federalized many aspects of criminal procedure and extended substantial rights for defendants throughout the country. *The proposed amendment simply adopts the view that victims' rights deserve equal treatment.*") (emphasis added).

¹⁷⁹ Christopher Goddu, *Victim's "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 247 (1993).

¹⁸⁰ *Kastenberg*, 72 M.J. at 372.

¹⁸¹ *Kastenberg*, 72 M.J. at 366-67, (Conclusion of the court) ("[T]he prospect of an accused having to face two attorneys representing two similar interests [is] sufficiently antithetical to courts-martial jurisprudence" and would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial").

Defense Division”).¹⁸² The authors individually examine each of the notable objections, below, followed by a response to each objection.

1. OBJECTION: THE ACCUSED WILL BE “DOUBLE-TEAMED”:

First, the N-MC Defense Division argued that allowing SVC to participate in any part of the criminal proceedings would effectively double the prosecutorial effort against the accused.¹⁸³ This argument is based on several assumptions that have little support. First, this argument assumes that the interests of the SVC will be aligned with the prosecution. However, notably, the interests of the sexual assault victim and the prosecution frequently are not congruent, particularly with regard to privacy issues.¹⁸⁴ Second, even if the prosecution and SVC are coincidentally aligned, this argument assumes that the defendant has a constitutional right to only one adversary. No authority was presented to the C.A.A.F. to support such a right. Finally, this argument assumes that the protection of the rights of the sexual assault victim necessarily results in a diminution of the due process and fair trial rights of the accused. It is not apparent that having counsel present to protect the rights of the victim witness necessarily results in fewer rights for the accused. On the contrary, it is common practice, and at times is recommended by applicable case law, that a trial judge advise a witness and sometimes even appoint counsel for a witness whose testimony indicates he or she may incriminate him- or herself in the process of answering questions by prosecution or defense counsel.¹⁸⁵

Having legal counsel for the victim should raise no constitutional issue because such counsel only would be enforcing protections that are already legally afforded to the victim witness. If the defense receives an objection at trial or at a pre-trial hearing as to the admissibility of information about the victim, the judge will assess the validity of that objection and the admissibility of that information just as he or she currently does. If the judge acts in accordance with his or her obligations, the admissibility of that information will not change merely by virtue of the number of counsel making the assertion. That is to say the question of *who objects* to inadmissible questions or lines of questioning does not change the fact that that question was fundamentally either admissible or inadmissible, as already defined by statute or applicable rule of evidence. If a piece of information about a victim witness is inadmissible when it draws an SVC objection, that piece of information would also have been inadmissible had the prosecutor objected. Essentially, that was a question the defense was not permitted to ask or a piece of information that the defense was not legally permitted to introduce at trial. Nonetheless, “[w]ithout an SVC, the victim will often feel unnecessarily

¹⁸² Brief of Amicus Curiae of Appellate Defense Division for the Navy-Marine Corps in Opposition to L.R.M.’s Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, *LRM v. Kastenber*, 72 M.J. 364 (C.A.A.F. 2013) (No. 2013-05), 2013 WL 2419446, at 14-18. (Hereinafter, “Brief of Navy-Marine Corps Appellate Defense Division.”).

¹⁸³ *Id.* at 13.

¹⁸⁴ Pokorak, *supra* note 6, at 718-19 (“Victims also may require legal representation in order to work defensively against multi-directional attacks and intrusions on their privacy that compromise their security . . . Unfortunately for the victim, it may not be made clear that this lawyer—a prosecutor—cannot be her attorney, may not even act in the victim’s interest, and may in fact act directly contrary to the victim’s interests.”).

¹⁸⁵ See, e.g., *Taylor v. Commonwealth*, 369 Mass. 183, 192 (1975) (“[I]n certain circumstances, where the witness is ignorant, misinformed or confused about his rights, and there is danger to him in the testimony sought to be elicited, it is a ‘commendable practice’ for the judge to intervene and advise the witness.” (citing *Commonwealth v. Slaney*, 345 Mass. 135, 142 (1962)); see also Roderick R. Ingram, *A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials*, 5 WM. & MARY BILL RTS. J. 299, 303 n.20 (1996) (“Judicial concern for preventing a witness from incriminating herself can result in a judge warning a witness that her testimony could lead to criminal [sic] prosecution. A judge may also choose to halt the trial and appoint counsel to the witness to explain to her the implications of her testimony and her constitutional rights.”).

compelled to answer these questions.”¹⁸⁶ For this fundamental reason, the defendant is not losing any rights, nor are his or her constitutional rights being violated by providing a second attorney, the SVC, with standing to ensure that the defendant or defense attorney does not do something he or she never had a legal right to do. Essentially, the Constitution, while rightfully protective of the accused, does not extend to a defendant of an alleged sexual assault the right to take advantage of potential prosecutorial inaction in failing to limit defense counsel to appropriate questioning of a victim witness. Granted, the judicial system must take care to ensure such a defendant receives a constitutional trial in all cases. However, an additional gatekeeper, one who answers to a third party—the victim—but merely guards the same gate that the state is currently perceived to be guarding, does not alter the rights of a sexual assault defendant. When limited to the role of protecting the victim’s privacy and providing legal counseling, the SVC concept does not constitutionally infringe upon legitimately guarded defendants’ rights. Fundamentally, the SVC concept and an accused’s due process rights are fully compatible.

2. OBJECTION: THE PROSECUTION SHOULD PROTECT VICTIMS’ RIGHTS:

The next argument made by the N-MC Defense Division was that SVC is unnecessary because the prosecution should already be protecting the interests of the sexual assault victim.¹⁸⁷ Although currently, prosecutors may find themselves filling this role and victims may often believe that prosecutors are the victims’ counsel, the ethical and practical obligations of the prosecutors are different and often, a prosecutor attempting to represent a victim creates conflicts of interest.¹⁸⁸ On this point, one author even asserted, not that SVC would infringe upon defendants’ rights, but rather that requiring “prosecutors to act as victims’ advocates [is] a posture that undermines judicial independence, prosecutorial discretion, and defendants’ rights.”¹⁸⁹ Such a posture creates inherent conflicts of interest because, for example, prosecutors whose “official decisions and judgments are explicitly undertaken to avenge the pain . . . experienced by the victim[] may find it difficult to evaluate the merits of a case and the credibility of the victim objectively[.]”¹⁹⁰ Furthermore, “[u]nfortunately for the victim, it may not be made clear that this lawyer—a prosecutor—cannot be [his or] her attorney, may not even act in the victim’s interest, and may in fact act directly contrary to the victim’s interests.”¹⁹¹

On the contrary, an SVC, as one who is clearly assigned to represent the interests of the sexual assault victim, would improve upon the current system in which the prosecution may either over- or under-zealously attempt to represent the interests of the victim while fulfilling what should be his primary goal of obtaining truth and justice for society as a whole.¹⁹² Notably, although the ABA Criminal Justice Section Standards on Prosecution Function provide that prosecutors “should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel *whenever the law so*

¹⁸⁶ 2013 Report from the Judge Advocate General of the United States Air Force to the American Bar Association 3 (Am. Bar Ass’n, 2013), http://www.americanbar.org/content/dam/aba/administrative/public_utility/USAF%202013%20Annual%20Report%200.authcheckdam.pdf.

¹⁸⁷ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 14.

¹⁸⁸ See Gershman, *supra* note 70. Pokorak, *supra* note 6, at 718-20.

¹⁸⁹ Blondel, *supra* note 78, at 240.

¹⁹⁰ Gershman, *supra* note 70, at 570 (internal quotation marks omitted).

¹⁹¹ Pokorak, *supra* note 6, at 719.

¹⁹² See generally Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537-38 (“[T]he prosecutor represents society as a whole. His goal is truth and the achievement of a just result.”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

requires[.]”¹⁹³ and prosecutors “should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded protections *where feasible*[.]”¹⁹⁴ the ABA Standards on Prosecutorial Investigations clearly state, “[t]he prosecutor’s client is the public, not particular government agencies or victims.”¹⁹⁵ SVC is not superfluous or redundant, but rather, state SVC programs would resolve the inherent conflicts that exists for prosecutors when dealing with sexual assault victims.

3. OBJECTION: THE SVC WILL COMPLICATE *BRADY* DISCLOSURES:

The landmark case, *Brady v. Maryland*, decided in the 1960s by the Supreme Court of the United States, stands for the proposition that the prosecution is required to disclose any exculpatory information to defense counsel.¹⁹⁶ The N-MC Defense Division argued in its amicus brief that the duty to disclose *Brady* information is complicated by the existence of SVC.¹⁹⁷ Specifically, the N-MC Defense Division argued that if a victim’s privacy is protected by the SVC instead of the prosecution, the SVC might discourage the victim from disclosing information to the prosecution that the prosecution would then be required under *Brady* to reveal to the defense. SVC might interfere with a victim disclosing exculpatory information to the prosecution. However, the existence of SVC does not alter the victim’s duty to answer the questions of the prosecution honestly and completely. If any exculpatory information is made available to the prosecution, then it must be disclosed to the defense. Notably, “[t]he prosecution must disclose exculpatory information to the defense whether the information is in the hands of the prosecution or not. This includes information known to the police or other prosecutorial agents[.]”¹⁹⁸ The N-MC Defense Division’s argument assumes that an SVC would advise a victim not to answer inquiries by the prosecution or investigators fully and completely. No authority was presented to the C.A.A.F. to support such an assumption.

4. OBJECTION: AN ALLIANCE BETWEEN THE SVC AND THE PROSECUTION WILL APPEAR IMPROPER:

The N-MC Defense Division also argued that the alliance of SVC with the prosecution would appear to the public to be improper.¹⁹⁹ This argument assumes that the SVC will actually be aligned with the prosecution. This assumption is simply not always true, as discussed in detail in section V.(A.)(2.), above.²⁰⁰ Second, predicting public perception is difficult. One could just as readily predict that the public’s faith in the criminal justice system would be increased by the presence of an SVC whose duties are clearly defined and readily apparent. Even though the victim’s and the public’s respective interests may at times incidentally overlap, the public, as the prosecutor’s client, should be mindful of the numerous scenarios in which a prosecutor’s interests do not overlap with that of a victim.²⁰¹ Ultimately, a prosecutor’s job, if done properly, inherently requires some degree of neutrality toward the victim, in order to avoid potential conflicts of interest, as well as to devote his or her full attention to zealous advocacy for his client—the people.²⁰²

¹⁹³ AM. BAR ASS’N, *ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 3-3.2(b): Relations with Victims and Prospective Witnesses*, 53 (James G. Exum, Jr. et al. eds., 3rd ed. 1993).

¹⁹⁴ *Id.*

¹⁹⁵ AM. BAR ASS’N, *ABA Standards for Criminal Justice, Standard 1.2: General Principles*, 52 (Mark Dwyer et al. eds., 3rd ed. 2014).

¹⁹⁶ *Brady v. Maryland*, 373 U.S. 83 *passim* (1963).

¹⁹⁷ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 14-15.

¹⁹⁸ Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33, 58 (2004).

¹⁹⁹ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 15-16.

²⁰⁰ See also Gershman, *supra* note 70.

²⁰¹ See *supra* Section V.(A.)(2.).

²⁰² Gershman, *supra* note 70, at 563.

5. OBJECTION: THE ACCUSED'S RIGHT TO CONFRONTATION WILL BE REDUCED:

Finally, the N-MC Defense Division argued²⁰³ that the existence of an attorney-client relationship between the victim and SVC would reduce the amount of impeachment evidence that would be available to the accused and would thus diminish the right of the accused to confront the victim under the Sixth Amendment to the Constitution.²⁰⁴ This argument assumes that if a victim is represented by SVC then the accused will have less access to impeachment evidence. This argument bears resemblance to objections to the SVC concept on constitutional grounds, arguing that a third attorney in the courtroom would reduce the evidentiary rights of the defendant (*see* section V.(A.)(1.), above). However, realistically, the nature and extent of impeachment evidence available to the defendant regarding the victim witness will be governed by the evidentiary rulings of the trial judge, as has long been the case.²⁰⁵ The mere presence of SVC to argue the privacy rights of the victim does not make the underlying information less admissible for purposes of impeachment.

B. EXISTING U.S. CIVILIAN AUTHORITIES SUPPORTING THE SVC CONCEPT:

Notably, “[w]hat [*Kastenberg*] has now firmly established in the military is that the reasonable right to be heard means the reasonable right [of a victim] to be heard through an attorney”²⁰⁶ The court specifically held that, under M.R.E. 513’s psychotherapist-patient privilege, “[a] reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel[.]” and that “[s]tatutory construction indicates . . . that the right to be heard in evidentiary hearings under [both] M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness.”²⁰⁷

As emphasized in this quote, the C.A.A.F. in *Kastenberg* relied on the statutory language “opportunity to attend and be heard,” in holding in favor of SVC.²⁰⁸ Admittedly, the SVC program is specific to the Armed Forces, and the statutory language, “opportunity to be heard,” is also somewhat specific to the Military Rules of Evidence. That said, the U.S. federal court system currently has express provisions providing for victims’ rights.²⁰⁹ Furthermore, the Federal Rules of Evidence (“F.R.E.”), as well as each state’s respective set of rules of evidence, has its own rape shield statute, and degrees of variations—some significant, some not—exist in the statutory language, as discussed at length in subsection V.(D.), below.²¹⁰ The F.R.E., as well as six other jurisdictions’ rules of evidence, provide some degree of a “right to be heard,” approximating that of the M.R.E. These statutory variations may largely determine the ease or even the likelihood of expanding the Armed Forces’ newfound policy of providing victim with independent counsel into the civilian world. Ultimately, however, a review of existing authorities in military, federal, and state law indicates that there may already exist a legal basis for a SVC program in state systems.

²⁰³ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 17-18.

²⁰⁴ U.S. CONST. amend. VI.

²⁰⁵ *See generally* MIL. R. EVID. 104(a), “The military judge must decide any preliminary question about whether a witness is available or qualified, a privilege exists, a continuance should be granted, or evidence is admissible.”

²⁰⁶ Kristin Davis, *Appeals Court Affirms Role of Victims’ Counsel*, AIR FORCE TIMES (July 28, 2013, 6:00 AM) (quote from Maj. Davis Younts, who worked with Col. Ken Theurer, chief appellate counselor on the case), <http://www.airforcetimes.com/article/20130728/NEWS06/307280004/Appeals-court-affirms-role-victims-counsel>.

²⁰⁷ *LRM v. Kastenberg*, 72 M.J. 364, 370 (C.A.A.F. 2013).

²⁰⁸ *Id.*

²⁰⁹ *See* section V.(B.)(1.), *infra*.

²¹⁰ Section V.(D.) of this article, *infra*.

1. FEDERAL RULES OF EVIDENCE SUPPORTING THE SVC CONCEPT:

Some statutory variation exists as between F.R.E. 412(c)(2) and M.R.E. 412(c)(2). However, that difference is slight and may not have a tangible effect on the possibility of introducing the concept of SVC in federal court. F.R.E. 412 requires that “[b]efore admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard.”²¹¹ M.R.E. 412 requires, in relevant part, “[b]efore admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard.”²¹² Despite the differences in some of the language of the rules, the portion of the language upon which the C.A.A.F. focused on in *Kastenberg*, “the opportunity to be heard,” remains common between the two rules. The most obvious difference between the two statutes is the absence of the qualifier “reasonable” in the F.R.E. in regard to the victim’s right to be heard. The C.A.A.F. relied on this word in *Kastenberg* in holding that the victim’s right is not absolute and may be limited.²¹³ However, because the language in the F.R.E. seems to be even more expansive than the M.R.E.—granting a broader right to be heard—arguably, the foundational statutory language is present for the prospect of introducing SVC into federal court prosecutions.

2. FEDERAL RULES OF CRIMINAL PROCEDURE SUPPORTING THE SVC CONCEPT:

Federal Rule of Criminal Procedure, Rule 60, is titled “Victim’s Rights.” This rule explicitly provides that a victim of an alleged federal crime has the right to (1) have “reasonable, accurate, and timely notice” of a pertinent court proceeding, (2) attend the proceeding, and (3) be heard on a hearing involving the accused’s “release, plea, or sentencing”²¹⁴ Furthermore, the rule goes on to provide that, “[a] victim’s rights described in these rules may be asserted by the victim [or] the victim’s lawful representative”²¹⁵ Finally, in the official Committee Notes on Rules—2008, the Committee states, “[i]n referring to the victim and the victim’s lawful representative, the committee intends to include counsel.”²¹⁶ Notably, Rule 60 does not pertain only to sexual assault victims, but rather, provides such rights to any victims of an alleged federal crime. Admittedly, Rule 60 does not provide a government-funded attorney to the victim in the same way Congress has provided SVC attorneys to military sexual assault victims. Nonetheless, taken together, these rule provisions and accompanying comments clearly indicate the federal criminal justice system’s stance that a victim’s right to be heard, as asserted through the victim’s independent legal counsel, does not violate the due process rights of a criminal defendant.

3. FEDERAL CASE LAW SUPPORTING THE SVC CONCEPT:

In addition to a foundation in the language of the Federal Rules of Criminal Procedure, the SVC concept is supported by existing federal case law. The *Kastenberg* court

²¹¹ FED. R. EVID. 412(c)(2).

²¹² MIL. R. EVID. 412(c)(2).

²¹³ *Kastenberg*, 72 M.J. at 372.

²¹⁴ FED. R. CRIM. P. 60(a).

²¹⁵ *Id.* at § (b)(2).

²¹⁶ Fed. R. Crim. P. Rule 60(b)(2) Advisory Committee’s N. to 2008 Amendment.

referenced several instances in which federal U.S. case law supports the proposition that victims may be represented by counsel at pretrial hearings, stating:

while the military judge[, Judge Kastenberg,] suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings. Although not precedent binding on this Court, in the United States Court of Appeals for the Fifth Circuit, for example, victims have exercised their right to be reasonably heard regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." *In re Dean*, 527 F.3d 391, 393 (5th Cir. 2008). The victims' "attorneys reiterated the victims' requests" and "supplemented their appearances at the hearing with substantial post-hearing submissions." *Id.*; see also *Brandt v. Gooding*, 636 F.3d 124, 136–37 (4th Cir. 2011) (motions from attorneys were "fully commensurate" with the victim's "right to be heard."). Similarly, in *United States v. Saunders*, at a pretrial Fed. R. Evid. 412(c)(1) hearing, "all counsel, including the alleged victim's counsel, presented arguments." 736 F. Supp. 698, 700 (E.D. Va. 1990). In *United States v. Stamper*, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for "all three parties," including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).²¹⁷

4. STATE LAW SUPPORTING THE SVC CONCEPT:

In addition to the extensive federal authority discussed above, support for the implementation of the SVC concept also exists, at least to some degree, at the state court level. As discussed in greater detail in subsection V.D., *infra*, one U.S. state, Ohio, has already enacted laws offering a state-funded option to provide independent legal representation to indigent victims of alleged sexual assault.

C. OTHER ROLES FOR SVC IN STATE CRIMINAL TRIALS:

The SVC is clearly tasked with protecting a victim at trial or at a pretrial hearing. However, counsel for victims of sexual assault could also provide victim assistance in conceptual areas extending beyond litigating the applicability of rape shield laws or the protections of psychotherapist-patient and medical privileges. The American Bar Association recently spotlighted the military SVC programs' diverse benefits by publishing an article reflecting one ABA division's 2014 Midyear Meeting that included a discussion of the SVC program's purposes and its successes to date.²¹⁸ According to Air Force Colonel Dawn Hankins, as interviewed in the ABA article,

[t]he purpose of the SVC program is threefold. It provides advocacy, protecting the rights afforded to victims in the military justice system. It provides advice, developing victims' understanding of the investigatory and military justice processes[, a]nd it empowers victims, removing barriers and giving victims a voice. The program allows victims to 'feel like they're not getting retraumatized by the system'²¹⁹

²¹⁷ *Kastenberg*, 72 M.J. at 370.

²¹⁸ *Air Force SVCs Advocate for Sexual Assault Victims*, *supra* note 5.

²¹⁹ *Id.*; see also Rebecca Campbell, Sharon Wasco, Courtney Ahrens, Tracy Self, and Holly Barnes, *Preventing the "Second Rape": Rape Survivors' Experiences With Community Service Providers*, 16 (12) J. OF INTERPERSONAL VIOLENCE 1223, 1240 (2001). "Retraumatization," colloquially known as "the second rape," refers to situations in

In this section we examine other roles that counsel for victims could perform. Those roles could include reducing re-victimization, reducing reporting inconsistencies in the investigation, protecting victims from unwarranted mental health examinations, reducing the inherent conflict of interest between victim and prosecution, and reducing the victim's exposure to collateral legal consequences.

1. REDUCING REVICTIMIZATION:

Revictimization may occur in the investigation and trial when victims are questioned in a manner that "blames the victim," are not informed about the progress of the case, and are required to forfeit aspects of their privacy. A survey of Sexual Assault Nurse Examiners found that they believed that victims were revictimized by the investigation and prosecution phases of the case.²²⁰ The fear of being blamed for the assault is one common reason victims do not report a sexual assault to the proper authorities.²²¹

Research indicates that sexual assault victims are "often denied help by their communities, and what help they do receive often leaves them feeling blamed, doubted, and revictimized."²²² Some believe that undermining the reliability and credibility of the victim is an essential role of the defense counsel and that the confrontation, perceived as blaming the victim, is merely a structural consequence of the adversarial system.²²³ However, having the advice, counsel and advocacy of an attorney experienced with the process can reduce the anxiety and misunderstanding that may exist when victims are left to navigate the adversarial legal system without their own counsel, will increase the likelihood that the victim receives the needed support from the legal, medical and community systems, and will increase victims' confidence in their ability to participate in the criminal justice process.²²⁴

2. REDUCING UNINTENDED REPORTING INCONSISTENCIES AND OBTAINING THE BEST EVIDENCE:

A key factor in determining whether a report of sexual assault will result in a prosecution is the perceived consistency or inconsistency of the victim's initial reports.²²⁵ Victims sometimes do not report embarrassing or very private matters in their initial report to police. Facts such as substance use or prior consensual sexual relations with the defendant may not be revealed because the victims do not understand the relevance of such information or do not want to reveal private information. When such information is later revealed (often initially through the statement of the defendant) the initial statement of the victim may be viewed as inconsistent and unreliable. The "discrepancy" in statements influences decision-making by police and prosecutors when deciding to move cases to prosecution and disposition.²²⁶ Having an independent attorney to provide advice and counsel to the victim at the earliest stages of the investigation may reduce the likelihood that the victim will omit facts, either intentionally or inadvertently, in initial reporting that may later be used by police, prosecutors, or defense counsel as evidence of inconsistency and hence unreliability. Ultimately, for every party in the

which victims are blamed for the assault, or do not receive needed services or support from legal, medical and community systems.

²²⁰ Shana Maier, *Sexual Assault Nurse Examiners' Perception of Revictimization of Rape Victims*, 27(2) J. INTERPERSONAL VIOLENCE 199, 315 (2012).

²²¹ Rebecca Campbell, M. Greeson, and, Debra Patterson *Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems*, 34(2) HEALTH & SOCIAL WORK 83, 136 (2007).

²²² Preventing the "Second Rape", *supra* note 219, at 1240.

²²³ Yaroshefsky, *supra* note 175, at 137.

²²⁴ Patterson & Campbell, *supra* note 41, at 191-203.

courtroom and for the benefit of justice to the general public, obtaining the best, most reliable evidence from the witness is an important and common goal, and “in itself is uncontroversial.”²²⁷

3. PROTECTING VICTIMS FROM UNWARRANTED MENTAL HEALTH EXAMINATIONS:

In some jurisdictions a sexual assault victim may be required to undergo a psychological examination.²²⁸ While such examinations may be necessary to safeguard a defendant’s right to due process, these examinations may infringe on the victim’s privacy rights and privilege, and may be the result of legal procedures that do not protect the rights of victims.²²⁹ An attorney appointed to represent the victim could ensure that the victim’s voice is heard concerning a compelled mental health examination and that the defendant meets the requisite level of need for such a potentially intrusive examination.

4. REDUCING INHERENT CONFLICTS OF INTEREST:

As discussed in detail above,²³⁰ practical and ethical considerations prevent a prosecutor from filling his or her true role of advocate for the state and the public while also attempting to protect a victim who may perceive the prosecutor to be his or her attorney.²³¹ Ultimately, “[n]o matter how ethical or concerned a prosecutor may be about a victim’s plight, there is an inherent conflict between the roles of representative of the State and counsel to the victim.”²³² SVC would avoid such a conflict.

5. REDUCING EXPOSURE TO COLLATERAL LEGAL CONSEQUENCES:

Fear of collateral legal consequences is often a key factor in a sexual assault victim’s decision not to report the crime to police or cooperate in prosecution.²³³ Victims may fear that participation in an investigation and prosecution will expose them to consequences for collateral legal issues such as truancy, underage drinking,²³⁴ illegal substance abuse, prostitution, violation of employment rules or immigration issues.²³⁵ An SVC could assist the victim in accomplishing agreements or immunities to protect the victim from being exposed to collateral legal consequences as a result of being targeted for a sexual assault.

D. THE UNIQUE WORDING OF EXISTING STATE STATUTORY AUTHORITIES:

²²⁵ Megan Alderen & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 541 (2012).

²²⁶ *Id.*

²²⁷ Raïtt, *supra* note 66, at 268.

²²⁸ Gregory Sarno, *Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution*, 45 A.L.R. 4th 310 § 3(a) (1986).

²²⁹ Oriana Mazza, *Re-Examining Motions to Compel Psychological Evaluations of Sexual Assault Victims*, 82 ST. JOHN’S L. REV. 763, 775 (2008).

²³⁰ See *supra* Sections V.(A.)(4.), II.(B.)(1.)(b.).

²³¹ Pokorak, *supra* note 6 *passim*.

²³² Yaroshefsky, *supra* note 175, at 139.

²³³ PATRICIA L. FANFLIK, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, OFFICE ON VIOLENCE AGAINST WOMEN, VICTIM RESPONSES TO SEXUAL ASSAULT: COUNTERINTUITIVE OR SIMPLY ADAPTIVE? 2 (2007).

²³⁴ T.R. Reid, *Female Air Force Cadets Allegedly Punished for Reporting Rapes*, WASH. POST (Denver), Feb. 21, 2003, at A4.

²³⁵ Kavitha Sreeharsha, *Victims’ Rights Unraveling: The Impact of Local Immigration Enforcement and the Violence Against Women Act*, 11 GEO. J. GENDER & L. 649, 659 (2010).

Much more than a comparison between the M.R.E. and the F.R.E., a comparison of the variations in statutory provisions of the fifty-three available state or territorial²³⁶ rape shield statutes runs the gamut. This variation complicates the matter immensely when considering whether the Armed Forces' SVC programs could be translated into the U.S. civilian criminal justice system. In the military realm, all Article 120 and other sexual assault crimes are all brought and tried under the same evidentiary rules.²³⁷ Therefore, M.R.E. 412 and the C.A.A.F.'s *Kastenber* holding are applicable to servicemembers no matter where, geographically, the underlying alleged crime occurred. However, in the civilian world, while rape and other sexual assault crimes are occasionally prosecuted at the federal level, the vast majority of such crimes is prosecuted through the applicable state criminal justice system. Therefore, depending on where the crime allegedly occurred and where the case is properly brought, a different set of evidentiary rules applies, therefore providing different statutory protections to sexual assault victims.

All states plus the District of Columbia, Guam, and Puerto Rico have enacted some version of a rule 412 or other rape shield statute.²³⁸ However, out of those fifty-three, only six statutes²³⁹ include an "opportunity to be heard" provision or similar clause providing the victim with an express, or even, arguably, an implied right to be heard at an in-camera²⁴⁰ evidentiary hearing.²⁴¹ Even Michigan's criminal sexual conduct statute, widely considered at the time of its inception to be the most sweeping and groundbreaking of rape reform laws,²⁴² does not provide the victim with a statutory right to be heard.²⁴³ Within those six jurisdictions that have such a provision, the rights afforded the victim range from the right to *attend* the evidentiary hearing and be accompanied by counsel (but with no express right to be heard),²⁴⁴

²³⁶ Including the District of Columbia, Guam, and Puerto Rico. (Information was not provided by the National District Attorney's Association on the Virgin Islands or American Samoa.) See *Rape Shield Statutes* 65 (NAT'L DIST. ATTORNEY'S ASS'N, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, current as of Mar. 2011), <http://www.ndaa.org/pdf/NCPA%20Rape%20Shield%202011.pdf>.

²³⁷ See MIL. R. EVID. 101(a).

²³⁸ See *supra* note 236.

²³⁹ KRE 412(c)(2), "Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard."; LA. CODE EVID. ANN. art. 412(E)(2) (2015), "The victim, if present, has the right to attend the hearing and may be accompanied by counsel."; N.C. GEN. STAT. § 8C-1, RULE 412(d) (West 2010), "... the court shall conduct an in camera hearing ... to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant ..."; N.D. R. EVID. 412(c)(2), "[T]he court must conduct an in camera hearing and give the victim and parties a right to attend and be heard."; OHIO REV. CODE ANN. § 2907.02(F) (West 2011), "Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim."; UTAH R. EVID. 412(c)(2), "[T]he court must conduct an in camera hearing and give the victim and parties a right to attend and be heard."

²⁴⁰ An "in-camera" hearing, also known as "in chambers" or a hearing outside the presence of jurors and/or the public, is used in almost all state statutes to determine whether evidence of the victim's past history (usually sexual history) should be admitted to the jurors, and the burden of proof as to whether or not to admit the evidence varies greatly, from statutes freely admitting sexual evidence about the victim when "the probative value of the evidence outweighs its prejudicial effect on the victim[.]" (CT. GEN. STAT. § 54-86(f) (2013)), to evidence being admissible only when "the probative value of the evidence *substantially* outweighs the probability that its admission will create prejudice[.]" WY. STAT. § 6-2-312(a)(iv) (2014) (emphasis added), to strict statutes that prohibit admission of past sexual conduct by the victim unless the evidence "is *so highly material* that it will *substantially* support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that *justice mandates* the admission of such evidence" (GA. CODE ANN. § 24-4-412(b)(2) (2014) (emphasis added)).

²⁴¹ The tabulation of statutes was done according to a March 2011 compilation done by the National District Attorneys Association: National Center for Protection of Child Abuse. *Rape Shield Statutes*, Westlaw Services (2011), <http://www.ndaa.org/pdf/NCPA%20Rape%20Shield%202011.pdf>.

²⁴² Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25(1) LAW AND SOC'Y REV. 117, 121 (1991).

²⁴³ MICH. COMP. LAWS ANN. 750.520j (West 2014).

²⁴⁴ LA. CODE EVID. ANN. art. 412(E)(2) (2015).

to the right to be heard, with language mirroring that provided in the F.R.E.,²⁴⁵ to the right, at any evidentiary hearing, to counsel provided by the state at no cost to the victim, if indigent and with no means of repayment (almost an alleged sexual assault victim's analog to the more familiar public defender system, but also allowing for reimbursement for some costs of representation if the victim can contribute thereto).²⁴⁶ In the remaining forty-seven jurisdictions surveyed, where no express right to be heard exists at present, the decision to implement such a right, and moreover, an SVC program, would fall to the state legislature to amend the state statutes or rules of evidence to provide a sexual assault victim with a right to be heard.

Although, presently only Ohio provides state-funded counsel for indigent victims,²⁴⁷ any state with explicit statutory reference to victims' rights stands a much greater chance of a court holding that this right should be interpreted to mean the right to dedicated, state-funded legal counsel for the victim. As to state funding, admittedly, in oral argument in *Kastenber*, the Real Party in Interest and the United States conceded that the issue of whether a victim has standing to assert his or her rights through counsel does not *require* the government to provide or appoint counsel for that victim, noting that it was "merely fortuitous" that the Air Force had appointed LRM an SVC.²⁴⁸ However, at minimum, even if a state government does not provide counsel, as do the Armed Forces and Ohio, the *Kastenber* holding stands for the proposition that in limited instances,²⁴⁹ the sexual assault victim's "reasonable opportunity to be heard" means the right to be heard through his or her counsel.²⁵⁰ Granted, this right is subject to the limitations of Rule 801, meaning the right to be heard may be limited to written submissions and, furthermore, does not create to a victim's right to appeal an adverse evidentiary ruling.²⁵¹ Nonetheless, the construction of state statutes to interpret a victim's right to be heard as meaning *through counsel*, the implementation of such victim's rights statutes in states where they do not yet exist, and the forethought of the possibility of an SVC program in civilian state jurisdictions are all ideas that provide immense potential for the improvement of both the plight of sexual assault victims and the efficacy and reliability of the criminal justice system overall.

²⁴⁵ KRE 412(c)(2); N.D. R. EVID. 412(c)(2); UTAH R. EVID. 412(c)(3).

²⁴⁶ OHIO REV. CODE ANN. § 2907.02(F) (West 2008).

²⁴⁷ *Id.*

²⁴⁸ Oral Argument of U.S. Air Force at 34:41, LRM v. Kastenber, 72 M.J. 364 (C.A.A.F. 2013) (No. 13-5006/AF), <http://www.armfor.uscourts.gov/newcaaf/CourtAudio3/20130611.wma>.

²⁴⁹ *Kastenber*, 72 M.J. at 372.

²⁵⁰ *Id.* at 371; MIL. R. EVID. 412(c)(2).

²⁵¹ *Kastenber*, 72 M.J. at 371.

SECTION VII: CONCLUSION AND RECOMMENDATION:

The military system of legal representation for victims of sexual assault remains in its infancy and will likely continue to evolve and improve. Nonetheless, the Air Force has introduced a groundbreaking concept into the realm of criminal law in the United States—a concept on which the other military service branches modeled their SVC programs and from which U.S. civilian state courts could derive analogous programs. Although critics of the SVC concept have often taken the position that the creation of SVC programs in an adversarial justice system would create an imbalance in the courtroom dynamic, the Armed Forces' SVC programs and similar programs in other adversarial systems such as Ireland and New South Wales, prove there is potential for coexistence between Special Victims' Counsel and a defendant's fundamental due process rights.

In sum, state criminal justice systems can—and should—consider the virtues of the SVC concept and the realistic possibility of implementing such a program. The full potential of the Special Victims' Counsel, even within the Armed Forces paradigm, may not yet be fully realized. Nonetheless, SVC programs have already begun to address many of the longstanding inadequacies of existing attempts to protect complainants' privacy interests. Although, in the U.S., this solution originated in the context of the military justice system, the inadequacies catalyzing its development are not new, and they are not limited to the military environment. State criminal justice systems have for decades left gaping holes in the realm of victim advocacy that future generations must address in order to achieve the universal goal of reducing the underlying incidences of sexual assault. The Air Force and other military branches' Special Victims' Counsel programs provide the promise of such a solution.

**“FUNDAMENTAL SINCE OUR COUNTRY’S FOUNDING”:
UNITED STATES V. AUERNHEIMER AND THE SIXTH AMENDMENT
RIGHT TO BE TRIED IN THE DISTRICT IN WHICH
THE ALLEGED CRIME WAS COMMITTED**

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INTRODUCTION

The Sixth Amendment guarantees a defendant “the right to . . . trial, by an impartial jury of the State *and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law.”¹ For most of the nation’s history, except for a “continuing offense” such as conspiracy, federal courts generally required that a federal crime be prosecuted in the single district in which it was deemed to have been committed.²

After 1970, however, as prosecutors increasingly resorted to multi-count and multi-defendant indictments,³ the established approach to venue often made it difficult to bring all potential charges in the same district. During this period, some commentators began to question the traditional approach to venue. In particular, a 1983 Note in the *Michigan Law Review* argued that “the overriding consideration in venue problems should be the accessibility of witnesses and tangible evidence for investigation and use at trial,” and that “the constitutional test should not be employed rigidly, but rather in the manner necessary to facilitate factfinding.”⁴

Relying in part on that student Note, the Second Circuit, in its 1985 decision in *United States v. Reed*,⁵ opined that the traditional method of determining the constitutionally permissible venue had been plagued by “an analytic flaw.”⁶ “Both courts and commentators have tended to construe the constitutional venue requirement as fixing a single proper situs for trial,” the Second Circuit wrote, but “where the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue.”⁷ “[T]o determine constitutional venue,” courts should not seek to identify one district where an alleged offense was committed, the Second Circuit explained, but instead should apply “a *substantial contacts rule* that takes into account a number of factors—the site of the defendant’s acts, the elements and nature of the crime, the locus of the effect of the

¹ U.S. CONST. amend. VI (emphasis added). Unlike the venue provision of Article III, which refers to the place of trial, the Sixth Amendment refers to the geographical unit from which the jury is to be drawn. But the Supreme Court has long interpreted the Sixth Amendment as a venue provision guaranteeing the accused the right to be tried in the state and district where the crime was committed. See *Johnston v. United States*, 351 U.S. 215, 220 (1956); *Hyde v. United States*, 225 U.S. 347, 364 (1912). As explained in *United States v. Passodelis*, 615 F.2d 975 (3d Cir. 1980),

Literally, the provision in Article III is a venue provision since it specifies the place of trial, whereas the provision in the Sixth Amendment is a vicinage provision since it specifies the place from which the jurors are to be selected. This distinction, however, has never been given any weight, perhaps because it is unlikely that jurors from one district would be asked to serve at a trial in another district, or perhaps, more importantly, because the requirement that the jury be chosen from the state and district where the crime was committed presupposes that the jury will sit where it is chosen.

Id. at 977 n.3.

² See *infra* notes 53-70 and accompanying text.

³ See, e.g., *United States v. Ashburn*, 38 F.3d 803, 818 (5th Cir. 1994) (en banc) (Goldberg, J., dissenting) (citing “the proclivity of prosecutors to file multi-count indictments”); *United States v. Sanchez*, 790 F.2d 245, 251 (2d Cir. 1986) (citing “the current spate of multi-count indictments charging multiple defendants and requiring the commitment of literally weeks and months of trial time”); *United States v. Olson*, 504 F.2d 1222, 1225 (9th Cir. 1974) (“[T]he District Court had commendable motives in seeking to deal with the United States Attorney’s policy of presenting overly lengthy indictments.”); *United States v. Mejias*, 417 F. Supp. 579, 585 (S.D.N.Y. 1976) (referring to “this age of multi-defendant, multi-count indictments”).

⁴ Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 95, 108 (1983).

⁵ *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985).

⁶ *Id.* at 480.

⁷ *Id.*

criminal conduct, and the suitability of each district for accurate factfinding.”⁸ The Second Circuit proceeded to overrule a decision concerning venue for obstruction of justice charges that had stood since 1951 and had been decided by three of the court’s leading jurists, Chief Judge Thomas Walter Swan and Judges Augustus and Learned Hand.⁹

In the three decades since *Reed*, the Second Circuit, in its own words, has “alternately applied and ignored the substantial contacts test.”¹⁰ That test has had a greater impact in the Sixth Circuit, which adopted it a year after *Reed* was decided and has continued to apply it.¹¹ The Fourth and Seventh Circuits have also discussed the test with approval,¹² although the Fourth Circuit, citing intervening Supreme Court decisions, later questioned the decision in which it had done so.¹³ In contrast, the Tenth Circuit has rejected the test.¹⁴

Recently, in *United States v. Auernheimer*, the government invoked *Reed* in urging the Third Circuit to uphold venue in a prosecution against a well-known Internet “troll.”¹⁵ Together with a collaborator, the defendant wrote a computer program that collected more than 100,000 e-mail addresses of iPad 3G users from AT&T’s website, where they had been inadvertently left available on public servers.¹⁶ To publicize what he had done, the defendant informed the media and later shared the e-mail addresses with a reporter who expressed interest in writing a story.¹⁷ The reporter then wrote a story that described the security flaw, identified the names of some of the persons whose e-mail addresses had been collected, and included redacted images of a few e-mail addresses.¹⁸

The defendant’s actions occurred in Arkansas, and the servers were located in Atlanta and Dallas.¹⁹ Nevertheless, the government obtained an indictment and conviction in New Jersey, the residence of a small percentage of the iPad 3G users whose e-mail addresses were collected.²⁰

⁸ *Id.* at 481 (emphasis added).

⁹ *See id.* at 478 n.1 (overruling *United States v. Brothman*, 191 F.2d 70 (2d Cir. 1951)).

¹⁰ *United States v. Coplan*, 703 F.3d 46, 80 (2d Cir. 2012). *Compare United States v. Saavedra*, 223 F.3d 85, 86, 92-94 (2d Cir. 2000) (applying *Reed*’s substantial contacts rule and emphasizing that “in today’s wired world of telecommunication and technology, it is often difficult to determine exactly where a crime was committed, since different elements may be widely scattered in both time and space, and those elements may not coincide with the accused’s actual presence”), with *United States v. Tzolov*, 642 F.3d 314, 319 (2d Cir. 2011) (holding, without citation to *Reed*, that venue for securities fraud charge was improper because “venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense” (quoting *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d Cir. 1989)). *See also United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012) (treating *Reed* as applicable only to continuing offenses); *United States v. Royer*, 549 F.3d 886, 895 (2d Cir. 2008) (“in this Circuit, venue must not only involve some activity in the situs district but also satisfy the ‘substantial contacts’ test of *Reed*”); *United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005) (same).

¹¹ *See United States v. Zidell*, 323 F.3d 412, 423 (6th Cir. 2003); *United States v. Williams*, 274 F.3d 1079, 1084 (6th Cir. 2001); *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986).

¹² *See United States v. Muhammad*, 502 F.3d 646, 652, 655 (7th Cir. 2007) (relying in part on *Reed*’s substantial contacts rule); *United States v. Cofield*, 11 F.3d 413, 417 (4th Cir. 1993) (same).

¹³ *United States v. Bowens*, 224 F.3d 302, 312 (4th Cir. 2000) (“Our reasoning in *Cofield* . . . cannot be reconciled with the Supreme Court’s later decisions in *Cabrales* and *Rodriguez-Moreno*.”) (citing *United States v. Cabrales*, 524 U.S. 1 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999)).

¹⁴ *See United States v. Smith*, 641 F.3d 1200, 1208 (10th Cir. 2011).

¹⁵ 748 F.3d 525, 536 (3d Cir. 2014).

¹⁶ *Id.* at 530-31.

¹⁷ *Id.* at 531.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

The Third Circuit reversed for lack of venue.²¹ The venue of criminal trials “has been fundamental since our country’s founding,”²² the court emphasized, and “cybercrimes do not happen in some metaphysical location that justifies disregarding constitutional limits on venue.”²³ The government invoked *Reed*’s substantial contacts test (which the Third Circuit had quoted with approval in a prior decision²⁴) and pointed to the third factor enumerated in *Reed*—the locus of the effect of the criminal conduct—but the *Auernheimer* panel was not persuaded.²⁵ A crime’s effects can establish venue, it concluded, only in “situations in which ‘an essential conduct element is itself defined in terms of its effects.’”²⁶

Although the defendant in *Auernheimer* was disappointed that the court did not reach his contention that his conduct was lawful,²⁷ procedure can be as important as substance.²⁸ By rejecting the government’s reliance on *Reed* to justify trying the defendant far from his home, in a place with no more connection to the alleged offenses than many other states, the Third Circuit reaffirmed a significant constitutional right and wisely gave short shrift to a test that would confer excessive power on prosecutors.

SECTION I: THE TRADITIONAL APPROACH TO VENUE

A. ORIGINS OF THE CONSTITUTION’S VENUE PROVISIONS

The venue provisions of the Constitution are linked to some of the significant events leading up to the American Revolution, including the June 1768 seizure of John Hancock’s sloop *Liberty* by customs officers in Boston.²⁹ The seizure occurred after a tidesman who had attended the ship when it had arrived in the city the preceding month changed his story and asserted that he had been held in a cabin while wine was surreptitiously unloaded.³⁰ When customs officers arranged for the *Liberty* to be towed out to the *Romney*, a British ship whose captain had recently angered Bostonians by forcibly enlisting seamen serving on inbound vessels,³¹ a riot ensued.³² British efforts to impose criminal penalties against the rioters came to naught, in part because grand jurors were selected through town meetings and radical colonists controlled the Boston Town Meeting and in part because no witnesses willing to testify against the rioters could be found.³³

Parliament responded by turning its attention to a 1543 statute under which persons accused of treason “outside the realm” could be tried “before such commissioners, and in such shire of the realm, as shall be assigned by the King’s majesty’s commission.”³⁴ In January 1769, the House of Commons approved an address to the King recommending trial in England,

²¹ *Id.* at 541.

²² *Id.* at 532.

²³ *Id.* at 541.

²⁴ See *United States v. Goldberg*, 830 F.2d 459, 466 (3d Cir. 1987).

²⁵ *Auernheimer*, 748 F.3d at 536-37.

²⁶ *Id.* at 537 (quoting *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000)).

²⁷ Emmett Rensin, *This Infamous Hacker Went to Prison for Trolling AT&T. Now He Wants to Troll Wall Street*, NEW REPUBLIC (Apr. 22, 2014), <http://www.newrepublic.com/article/117477/andrew-weev-auernheimers-tro-llc-could-send-him-back-prison>.

²⁸ See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) (“[I]f put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.”).

²⁹ Hiller B. Zobel, *THE BOSTON MASSACRE* 73 (1971).

³⁰ *Id.* at 74.

³¹ *Id.* at 73-74.

³² *Id.* at 75.

³³ *Id.* at 77.

³⁴ Treason Act, 1543, 35 Hen. 8, c. 2 (Eng.).

pursuant to the 1543 statute, of the persons most active in the commission of treason and misprision of treason in the Massachusetts Bay colony.³⁵

When the legislature of Virginia received news of Parliament’s action in May 1769, it promptly passed a resolution proclaiming that any trial for treason or misprision of treason committed in Virginia should be held in Virginia:

Resolved . . . that all Trials for Treason, Misprison of Treason, or for any Felony or Crime whatsoever, committed and done in this his Majesty’s said Colony and Dominion, by any Person or Persons residing therein, ought of Right to be had, and conducted in and before his Majesty’s Courts, held within the said Colony; . . . and that the seizing [of] any Person or Persons, residing in this Colony, [suspected] of any Crime whatsoever, committed therein; and sending such Person, or Persons, to Places beyond the Sea, to be tried, is highly derogatory of the Rights of British Subjects; as thereby the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused.³⁶

Two months later, the lower house of the Massachusetts General Court similarly approved a resolution denouncing the prospective removal to England of colonists “suspected of any Crime whatsoever” committed in Massachusetts Bay.³⁷

These resolutions did not cause Parliament to change course. In 1772, it enacted a statute providing that “[p]ersons charged with destroying “in any place out of this realm’ the King’s dock yards, magazines, ships, ammunition,” or supplies could be indicted “either in any shire or county within this realm’ or ‘in such island, country, or place, where such offense shall have been actually committed.”³⁸

Royal authorities did not in fact try any colonists in England for alleged crimes committed in the colonies.³⁹ But Parliament’s actions in 1769 and 1772 were not forgotten: In 1774 the Declaration and Resolves of the First Continental Congress proclaimed “[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”⁴⁰ In 1776, the Declaration of Independence denounced King George III “[f]or transporting us beyond Seas to be tried for pretended [offenses].”⁴¹

³⁵ William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 62-64 (1944); Zobel, *supra* note 29, at 109. After the Boston Massacre in March 1770, Parliament also passed a law, American Rebellion Act, 1774, 14 Geo. III, c. 39, intending to protect British soldiers who were charged in Massachusetts with capital offenses on the basis of actions taken in suppressing riots or enforcing the revenue laws. See, Blume, *supra*; Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 807 (1976). If the governor concluded that “an indifferent trial” could not be held in Massachusetts, the defendant could be tried in England or another colony. Kershen, *supra*, at 807.

³⁶ JOURNAL OF THE HOUSE OF BURGESSES OF VIRGINIA, 1766-1769 (John Pendleton Kennedy ed., Virginia, 1906).

³⁷ Neil L. York, *Imperial Impotence: Treason in 1774 Massachusetts*, 29 LAW & HIST. REV. 657, 659 (2011).

³⁸ Blume, *supra* note 35, at 63 (quoting 12 Geo. III, c. 24 (1772)).

³⁹ See York, *supra* note 37, at 659.

⁴⁰ *Declaration and Resolves of the First Continental Congress, Oct. 14, 1774, reprinted in Documents Illustrative of the Formation of the Union of the American States* 3, 69th Cong., 1st Sess., H.R. Doc. No. 398 (1927).

⁴¹ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

In the original Constitution, Article III required that “[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”⁴² The anti-Federalists considered that provision inadequate.⁴³ Richard Henry Lee of Virginia had asked in October 1787: “What, then, becomes of the jury of the vicinage, or at least from the county, in the first instance—the states being from fifty to seven hundred miles in extent?”⁴⁴ In September 1789, James Madison introduced in the House of Representatives an amendment which provided that “[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.”⁴⁵ The House passed that amendment with little change, but the Senate did not go along, apparently in part because of objections to the inclusion of a vicinage requirement.⁴⁶ A conference committee then produced the words later included in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”⁴⁷

Thus, in lieu of incorporating into the Constitution the jury of the vicinage as it existed at common law, the Sixth Amendment tied venue to the large judicial districts being created by Congress.⁴⁸ Under the Judiciary Act of 1789, most districts were the size of an entire state.⁴⁹ The Act created thirteen judicial districts within the eleven states that by then had ratified the Constitution, with Massachusetts and Virginia each having two districts and the other states each having a single district.⁵⁰ Today there are ninety-four federal judicial districts.⁵¹

B. CASE LAW BEFORE *REED*

At common law, offenses were understood (for jurisdictional purposes) to occur in one place, which in some instances was the place of the critical act or omission and in other instances was the place of the required result:

[T]he common law picked out one particular act (or omission) or result of the act (or omission) as vital for the determination of the place of commission (i.e. the situs) of each of the various crimes and gave jurisdiction to that state (and only that state) where the vital act or result occurred. Generally, it may be said that the situs of a crime at common law is the place of the act (or omission) if the crime is defined only in these terms, and the place of the result if the definition of the crime includes such a result.⁵²

⁴² U.S. CONST. art. III, § 2, cl. 3.

⁴³ See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 105 (1923).

⁴⁴ 1 JOHNATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 504 (2d. ed. 1836).

⁴⁵ 1 ANNALS OF CONG. 435 (1789) (Joseph Gales ed., 1834).

⁴⁶ See *Williams v. Florida*, 399 U.S. 78, 94-95 (1970).

⁴⁷ See *id.* at 95-96; U.S. CONST. amend. VI.

⁴⁸ See *Williams*, 399 U.S. at 96; Blume, *supra* note 35, at 66.

⁴⁹ Judiciary Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73.

⁵⁰ *Id.*

⁵¹ See 28 U.S.C. §§ 81-131. Rule 18 of the Federal Rules of Criminal Procedure implements the Sixth Amendment by providing that “[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.”

⁵² 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 4.4(a), at 295 (2d ed. 2003); see RESTATEMENT OF CONFLICT OF LAWS § 428 (1934).

It was established, for example, that "homicide is committed, not at the place from which the killer started the fatal force, but where it impinged upon the body of the victim,"⁵³ and that "robbery is committed where the property is taken from the victim and not where he was first seized, or where the property was subsequently taken."⁵⁴

Prior to *Reed*, federal case law concerning venue in criminal cases was similar to the common law approach to jurisdiction in that venue generally was deemed proper only in a single district.⁵⁵ That was not so for so-called "continuing offenses," and it was not so for certain other offenses, but for most offenses, courts recognized only one permissible venue.⁵⁶ Case law generally distinguished between continuing offenses and offenses consisting of "a single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere."⁵⁷ That "single act" might or might not be viewed as occurring where the defendant was physically located at the time of his criminal conduct.⁵⁸

Thus, in *Burton v. United States*, the Supreme Court held that charges against a United States Senator of receiving compensation in a matter in which the United States was interested could not be brought in the Eastern District of Missouri, where the checks were paid by the drawee bank.⁵⁹ Each of the checks was received, indorsed, and deposited by the defendant in the District of Columbia.⁶⁰ A company in Saint Louis mailed the checks to him.⁶¹ The bank where the checks were deposited gave the defendant immediate credit for the amounts involved.⁶² The Court ruled that the offenses were committed in the District of Columbia, and that "[t]here was no beginning of the offense in Missouri."⁶³

In *United States v. Lombardo*, a case decided during World War I, the Justices unanimously ruled that the District of Columbia was the proper venue for a charge of failure to comply with a provision of the Mann Act requiring anyone maintaining an alien woman for purposes of prostitution to file a statement containing specified information with the Commissioner General of Immigration, whose office was located in the District.⁶⁴ The Justices rejected the government's "conten[tion] that the offense was a continuing one" that extended from the Western District of Washington, where the defendant maintained the woman, to the District of Columbia.⁶⁵ No case had been cited, Justice McKenna explained, "which decides

⁵³ ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW ch. 1, § 3, at 40 (3d ed. 1982).

⁵⁴ *Id.* at 41 (footnote omitted).

⁵⁵ See *United States v. Salinas*, 373 F.3d 161, 164-66 (1st Cir. 2004). The venue for some federal offenses is governed by specific venue statutes: "If the statute under which the defendant is charged contains a specific venue provision, that provision must be honored (assuming, of course, that it satisfies the constitutional minima)." *Id.* at 164.

⁵⁶ *Id.* at 165.

⁵⁷ *United States v. Bozza*, 365 F.2d 206, 220 (2d Cir. 1966) (Friendly, J.) (quoting *Reass v. United States*, 99 F.2d 752, 754 (4th Cir. 1938)); see also *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188 (2d Cir. 1989) ("When a crime consists of a single noncontinuing act, it is 'committed' in the district where the act is performed.")

⁵⁸ See, e.g., *United States v. Martin*, 704 F.2d 515, 516-18 & n.6 (11th Cir. 1983) (per curiam) (holding that offense of jumping bail can be prosecuted in the district in which bail was set and reserving question whether it can be prosecuted elsewhere); *United States v. Roche*, 611 F.2d 1180, 1183 & n.4 (6th Cir. 1980) (holding that offense of jumping bail can be prosecuted in the district in which bail was set and reserving question whether it can be prosecuted where the defendant was located when he jumped bail).

⁵⁹ 196 U.S. 283, 297-299 (1905).

⁶⁰ *Id.* at 296.

⁶¹ *Id.* at 304.

⁶² *Id.* at 297.

⁶³ *Id.* at 304.

⁶⁴ 241 U.S. 73, 74 (1916).

⁶⁵ See *id.* at 76.

that the requirement of a statute . . . that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place.”⁶⁶

In a 1946 decision, *United States v. Anderson*, the Court ruled that the place where the defendant refused to take the oath of induction was the proper venue for a charge under the Selective Training and Service Act for refusal to submit to induction and that the charge could not be brought where the draft board that issued the order to report for induction was located.⁶⁷ Similarly, a decade later, a divided Court held in *Johnston v. United States* that when conscientious objectors were ordered by their local draft boards to report for civilian work at hospitals in other judicial districts, but failed to report for work as ordered, venue under the Sixth Amendment lay in the districts where the men were required to report.⁶⁸ The six-Justice majority relied on “the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime.”⁶⁹

The Court also viewed as a single-act offense the crime charged in another case decided by a 6-3 vote, *Travis v. United States*,⁷⁰ one of the high court’s many post-World War II decisions involving measures aimed at Communist subversion.⁷¹ *Travis* concerned the proper venue for a charge against a union officer under the federal false statement statute, 18 U.S.C. § 1001, for an alleged falsehood in a “non-Communist” affidavit filed pursuant to the Taft-Hartley Act of 1947, which had amended the National Labor Relations Act of 1935.⁷² The affidavit at issue, though executed in Colorado, was mailed to the National Labor Relations Board in Washington, D.C., where it was received and filed.⁷³ Speaking through Justice Douglas, the Court held that venue was improper in Colorado and that the prosecution should have been brought in Washington.⁷⁴ Justice Douglas pointed to the provision of the Taft-Hartley Act barring any Board investigation or issuance of a complaint in matters concerning a union ““unless there [was] on file with the Board’ a non-Communist affidavit of each union officer,” as well as the language in § 1001 (as it then existed) penalizing the making of a false statement “in any matter within the jurisdiction of any department or agency of the United States.”⁷⁵ Justice Harlan dissented and was joined by Justices Frankfurter and Clark.⁷⁶ In his

⁶⁶ *Id.* at 78.

⁶⁷ 328 U.S. 699, 704-06 (1946).

⁶⁸ 351 U.S. 215, 220 (1956).

⁶⁹ *Id.*

⁷⁰ 364 U.S. 631 (1961).

⁷¹ *Travis* was one of the “roughly one hundred decisions in ‘Communist’ cases” decided by the Supreme Court from the October 1949 Term through the October 1961 Term. Robert M. Lichtman, *McCarthyism and the Court: The Need for “an Uncommon Portion of Fortitude in the Judges”*, 39 J. SUP. CT. HIST. 107, 108 (2014). Through the 1954 Term, the Court generally ruled for the government in “Communist” cases. *See id.* In the next two Terms, “it issued a number of decisions in favor of accused Communists that triggered harsh attacks upon the Court,” *id.*, as well as efforts in Congress, which very nearly succeeded, to curtail the Court’s jurisdiction. *See id.* at 120-22. In the 1957 Term, “outcomes were mixed.” *Id.* at 119. “In the 1958 Term, the government prevailed in two major First Amendment decisions, and in the 1959 Term it won every one of the handful of cases decided . . . [Justice] Frankfurter was now a consistent vote for the government and . . . the leader of a five-Justice conservative majority . . . in ‘Communist’ cases.” *Id.* at 122. The usual minority in such cases became Chief Justice Warren and Justices Black, Douglas, and Brennan. *See id.* at 119, 122-23. In the 1960 Term, during which *Travis* was decided, there were “fifteen signed decisions” in “Communist” cases. *Id.* at 123. “The government prevailed in nine (a tenth had a mixed result), every one over the dissenting votes of Black, Douglas, Warren, and Brennan.” *Id.* In *Travis*, that quartet again voted against the government, and this time they were joined by Justices Whitaker and Stewart to produce a six-Justice majority in the defendant’s favor. *See* 364 U.S. at 632, 637.

⁷² *Travis*, 364 U.S. at 631, 632-33.

⁷³ *Id.* at 633.

⁷⁴ *Id.* at 636-37.

⁷⁵ *Id.* at 635.

⁷⁶ *Id.* at 637.

view, the offense charged began in Colorado and was completed in the District of Columbia and, under the continuing offense statute, could be prosecuted in either place.⁷⁷

The traditional approach to venue sometimes did not yield clear answers. For example, charges of obstruction of justice under 18 U.S.C. § 1503⁷⁸ raised a difficult issue where the obstructive conduct occurred in one district and the proceeding that the defendant allegedly intended to influence was in another district. In a 1971 decision, *United States v. Swann*, the District of Columbia Circuit held that venue lay only in the district where the obstructive conduct occurred.⁷⁹ *Swann* was consistent with a 1951 decision of the Second Circuit, *United States v. Brothman*, a case involving two defendants indicted as a result of the same espionage investigation that later led to the trial, conviction, and execution of Julius and Ethel Rosenberg.⁸⁰

Beginning in the 1970s, however, many federal courts of appeals chose not to follow *Swann* and *Brothman*. The first appellate court to reject those cases was the Sixth Circuit. In *United States v. O'Donnell*, the Sixth Circuit reasoned that "[u]nder Sec. 1503, the effect of corrupt conduct is always intended to occur only at one place: viz., the place or district in which the court sits or in which the proceeding is pending."⁸¹ The Sixth Circuit also viewed § 1503 as "a codification of the court's power to punish contempts committed outside of its presence, albeit by criminal prosecution following indictment,"⁸² and interpreted a 1941 Supreme Court decision as having "strongly implied . . . that such contempts are punishable by the court whose authority is challenged regardless of where the contemptuous acts may have occurred."⁸³ Between 1980 and 1987, the First, Fourth, and Eleventh Circuits followed the Sixth Circuit and held venue proper for a charge under § 1503 in the district of the relevant court or grand jury proceeding.⁸⁴ (In its 1985 decision in *Reed*, which is discussed in the next section, the Second Circuit reached the same result as those courts, but unlike them, it premised its decision on a new approach to venue.)⁸⁵ In 1988, Congress resolved the circuit split by providing that charges under § 1503 or under 18 U.S.C. § 1512, which prohibits tampering with witnesses, victims, or informants, may be prosecuted either in the district of the relevant court or grand jury proceeding, or in the district in which the conduct constituting the alleged offense occurred.⁸⁶

Continuing offenses have long received special treatment for purposes of venue. In the Supreme Court's words,

⁷⁷ *Id.* at 637-41. Other cases illustrating the traditional understanding of the Constitution's venue provisions include *United States v. Anderson*, 328 U.S. 699, 704-06 (1946); *Burton v. United States*, 196 U.S. 283, 296-304 (1905); *United States v. Salinas*, 373 F.3d 161, 169 (1st Cir. 2004); *United States v. Bozza*, 365 F.2d 206, 220-21 (2d Cir. 1966); and *Reass v. United States*, 99 F.2d 752, 754-55 (4th Cir. 1938).

⁷⁸ 18 U.S.C. § 1503 (2012).

⁷⁹ 441 F.2d 1053, 1055 (D.C. Cir. 1971).

⁸⁰ 191 F.2d 70, 72-73 (2d Cir. 1951), *overruled by* *United States v. Reed*, 773 F.2d 477, 485 (2d Cir. 1985).

⁸¹ 510 F.2d 1190, 1194 (6th Cir. 1975).

⁸² *Id.* at 1195.

⁸³ *Id.* (discussing *Nye v. United States*, 313 U.S. 33 (1941)).

⁸⁴ See *United States v. Johnson*, 713 F.2d 654, 658-59 (11th Cir. 1983); *United States v. Kibler*, 667 F.2d 452, 454-55 (4th Cir. 1982); *United States v. Barham*, 666 F.2d 521, 523-24 (11th Cir. 1982); *United States v. Tedesco*, 635 F.2d 902, 904-06 (1st Cir. 1980). See also *United States v. Frederick*, 835 F.2d 1211, 1214 & n.10 (7th Cir. 1987) (holding that charge of witness tampering under 18 U.S.C. § 1512 could be brought in the district of the affected grand jury proceeding, rather than where the witness tampering occurred) (*overruling United States v. Nadolny*, 601 F.2d 940, 942-43 (7th Cir. 1979) (holding that charge under 18 U.S.C. § 1510 of obstructing a criminal investigation could only be brought where the alleged beating of the witness took place)).

⁸⁵ *Reed*, 773 F.2d at 486.

⁸⁶ 18 U.S.C. § 1512(i).

A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each.⁸⁷

The federal code has contained a general venue provision for continuing offenses since 1867.⁸⁸ The original continuing offense statute provided that “[w]hen any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.”⁸⁹ So the law remained until the recodification of the federal criminal code in 1948.⁹⁰ The continuing offense statute enacted as part of that recodification (18 U.S.C. § 3237) contained one paragraph similar to the prior statute and a second paragraph aimed at crimes involving the mails or transportation in interstate or foreign commerce:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, [or] transportation in interstate or foreign commerce, . . . is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, [or] mail matter moves.⁹¹

In 1958, these two paragraphs became 18 U.S.C. § 3237(a).⁹² In 1984, Congress expanded the provision of § 3237(a) concerning transportation in interstate or foreign commerce to reach an offense involving “the importation of an object or person into the United States.”⁹³

Courts applying the traditional approach to venue held that some offenses not classified as continuing offenses nevertheless could be prosecuted in more than one district where their elements implicated multiple districts. For example, the Fourth Circuit ruled in 1982 that a charge that a union representative received a payment of money from an employer, in violation of the Taft-Hartley Act, could be brought “either wherever commerce is affected”—the provision in question applies only to representatives of employees employed in an industry affecting commerce—“or wherever the proscribed act occurs.”⁹⁴

⁸⁷ *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939) (quoting *Armour Pacing Co., v. United States*, 153 F. 1, 5-6 (8th Cir. 1907), *aff'd*, 209 U.S. 56 (1908)); *see* *Travis v. United States*, 364 U.S. 631, 634 (1961) (explaining a continuing offense “is held, for venue purposes, to have been committed wherever the wrongdoer roamed”); *United States v. Cores*, 356 U.S. 405, 408 (1958); *United States v. Johnson*, 323 U.S. 273, 275 (1944) (“By utilizing the doctrine of a continuing offense, Congress may . . . provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates.”); *United States v. Canal Barge Co.*, 631 F.3d 347, 351 (6th Cir. 2011).

⁸⁸ 18 U.S.C. § 3237 (1948) (originally enacted as Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 484).

⁸⁹ *Id.*

⁹⁰ *See* 18 U.S.C. § 3237 (1948).

⁹¹ 18 U.S.C. § 3237 (1948) (originally enacted at Act of June 25, 1923, ch. 645, § 3237, 62 Stat. 826).

⁹² *See* Pub. L. No. 85-595, 72 Stat. 512 (1958).

⁹³ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 1204, 98 Stat. 2152 (1984). The Second Circuit has held that the offense of mail fraud is not an “offense involving the use of the mails” within the meaning of § 3237(a). *United States v. Brennan*, 183 F.3d 139, 146 (2d Cir. 1999).

⁹⁴ *United States v. Billups*, 692 F.2d 320, 322-23, 333 (4th Cir. 1982).

SECTION II: *REED*—THE SUBSTANTIAL CONTACTS TEST

In *United States v. Reed*, the Second Circuit embraced a novel approach to determining where venue is proper under the Constitution. The criminal charges in *Reed* arose from a civil case in which Thomas Reed and others had been sued for allegedly making illegal insider purchases of call options.⁹⁵ The civil case had been filed in the Southern District of New York, but Reed's deposition in the case had been taken in San Francisco.⁹⁶ Federal prosecutors later obtained an indictment in the Southern District of New York charging that at his deposition Reed (i) gave false testimony in violation of the false declarations statute, 18 U.S.C. § 1623, and (ii) obstructed justice in violation of 18 U.S.C. § 1503 by relying on handwritten notes that he passed off as contemporaneous but that in fact were created after the fact (in Virginia and California).⁹⁷ The indictment also charged securities and wire fraud.⁹⁸ The district court dismissed the § 1623 and obstruction of justice charges for improper venue,⁹⁹ but the Second Circuit reversed, in an opinion by Judge Ralph Winter.¹⁰⁰ The court adopted a new methodology and reversed as to both counts, thus requiring Reed to face charges in the Southern District of securities fraud, wire fraud, making a false declaration in violation of § 1623, and obstruction of justice.¹⁰¹

Noting that neither § 1623 nor the obstruction of justice statute contains a venue provision, Judge Winter noted that as to each count the court had to "determine 'the locality of the offense.'"¹⁰² But he stressed that "an analytic flaw . . . has plagued analysis in this area."¹⁰³ Although "[b]oth courts and commentators have tended to construe the constitutional venue requirement as fixing a single proper situs for trial," Judge Winter reasoned that "where the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue."¹⁰⁴ Rather, "[t]he constitution requires only that the venue chosen be determined from the nature of the crime charged as well as from the location of the act or acts constituting it, and that it not be contrary to an explicit policy underlying venue law."¹⁰⁵

But having indicated that a policy underlying venue law may impose a limitation, Judge Winter then emphasized that "the precise policies to be furthered by venue law are not clearly defined."¹⁰⁶ "[F]airness to defendants cannot be the sole grounds for determining venue," he wrote, "because the most convenient venue for them may often have little, if any, connection with the crimes charged."¹⁰⁷ Judge Winter gave the example of "[a] foreign courier

⁹⁵ *United States v. Reed*, 773 F.2d 477, 478 (2d Cir. 1985).

⁹⁶ *Id.* at 478.

⁹⁷ *Id.* at 479. Although the *Reed* opinion refers to the § 1623 charge as a perjury charge, § 1623 was enacted as part of the Organized Crime Control Act of 1970 in order to relieve the government of some of the burdens associated with prosecutions for perjury as traditionally defined, specifically, the two-witness and direct evidence rules. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IV, § 401(a), 84 Stat. 932 (1970); H.R. REP. No. 91-1549, at 33 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4008.

⁹⁸ *Reed*, 773 F.2d at 479.

⁹⁹ *Id.* at 479. When a defendant is indicted for more than one offense, venue must be proper with respect to each count. See, e.g., *United States v. Bozza*, 365 F.2d 206, 220-22 (2d Cir. 1966); *United States v. Davis*, 666 F.2d 195, 198-201 (5th Cir. Unit B 1982).

¹⁰⁰ Judges Meskill and Kearsse joined the opinion.

¹⁰¹ *Reed*, 773 F.2d at 482-87.

¹⁰² *Id.* at 480 (quoting *Armour Packing Co. v. United States*, 209 U.S. 56, 76 (1908)).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

attempting to import illegal drugs through Kennedy Airport,” noting that such a defendant “will not find the Eastern District of New York particularly convenient.”¹⁰⁸

Judge Winter concluded his re-examination of venue law by articulating this standard:

[T]here is no single defined policy or mechanical test to determine constitutional venue. Rather, the test is best described as a substantial contacts rule that takes into account a number of factors — the site of the defendant’s acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding — which we discuss *seriatim*.¹⁰⁹

Reed implied that, to establish that venue is proper for a given charge, the government is not required to show that any particular one of the four factors identified supports venue, as long as another factor or factors sufficiently support venue. Since one of the factors is “the elements and nature of the crime,” the rule could be read to imply that venue can be proper even in a district where no element of the offense occurred.¹¹⁰ Such a result would seemingly be contrary to the Supreme Court’s declaration that “[t]he constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed.”¹¹¹ In *Reed* itself, the Second Circuit did not have to confront that apparent contradiction because the venue that the government had chosen in that case—the Southern District of New York—was closely tied to an essential element of each of the charges at issue.¹¹² The § 1623 charge required that the false statement occur “in any proceeding before or ancillary to any court or grand jury of the United States.”¹¹³ The proceeding relied upon by the government was the civil securities action, which was pending in the Southern District.¹¹⁴ With respect to the obstruction of justice charge, the court, before deciding whether venue was proper, held that “the existence of an ongoing formal proceeding is an element of a § 1503 violation.”¹¹⁵ The proceeding in question was pending in the Southern District, so again an essential element of the charge was directly linked to the venue selected by the government.

In discussing the § 1623 count, Judge Winter also reasoned (i) that “Reed’s testimony was inextricably bound to the Southern District” since the civil action in that district was the sole source of federal jurisdiction over the deposition, and the Southern District’s local rules applied to the deposition, and (ii) that “the locus of the intended effects of the alleged criminal conduct was in the Southern District of New York because the alleged perjury was intended to affect the outcome of an action pending there.”¹¹⁶ Similarly, in addressing the obstruction of justice charge, Judge Winter stressed that “the source of federal jurisdiction and the locus of harm are in the district of the pending parent proceeding.”¹¹⁷ Particularly by attributing significance to “the locus of the intended effects” in analyzing the § 1623 charge, Judge Winter illustrated that his new approach could significantly broaden the government’s choice of venue, for § 1623 imposes liability entirely without regard to whether the defendant intended

¹⁰⁸ *Id.* at 481.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *United States v. Anderson*, 328 U.S. 699, 704-05 (1946); *accord* *United States v. Cores*, 356 U.S. 405, 407 (1958) (“The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed.”).

¹¹² *Reed*, 773 U.S. at 483-86.

¹¹³ *Id.* at 482.

¹¹⁴ *Id.* at 478.

¹¹⁵ *Id.* at 485.

¹¹⁶ *Id.* at 483-84.

¹¹⁷ *Id.* at 486.

to affect the court or grand jury proceeding in which the declaration was made.¹¹⁸ If the intent to cause effects in a district could support venue in that district even if such intent is not required to establish guilt, the government's latitude in selecting a venue would be greatly increased.

Reed has elicited divergent reactions in the thirty years since it was decided. The Tenth Circuit has "decline[d] to adopt [*Reed*'s] 'substantial contacts' test,"¹¹⁹ observing:

The Constitution and Rule 18 are clear: a crime must be prosecuted in the district *where it was committed*. It is true that in some cases a crime may be committed in multiple districts. . . . However, that a crime may be committed in multiple districts means only that venue may be proper in any district where the crime was committed—not that venue is proper in every district which has "substantial contacts" with the crime.¹²⁰

The Sixth Circuit, however, has embraced *Reed*'s substantial contacts rule.¹²¹ The Seventh Circuit has also looked to the rule for guidance.¹²² The Fourth Circuit did at one time but has since questioned the decision in which it did so.¹²³ In the Second Circuit itself, *Reed*'s substantial contacts rule has received inconsistent treatment.¹²⁴ How the rule has fared in the Third Circuit is discussed in Part IV below.

SECTION III: THE SUPREME COURT'S DECISIONS IN *CABRALES* AND *RODRIGUEZ-MORENO*

Two Supreme Court decisions in 1998 and 1999, after *Reed* but well before *Auernheimer*, contributed to the *Auernheimer* court's rejection of the government's argument that it should sustain venue on the basis of *Reed*'s substantial contacts test.

In the 1998 decision, *United States v. Cabrales*, the Supreme Court addressed the proper venue for two money laundering offenses that Congress had created in 1986:¹²⁵ (1) "conduct[ing] . . . a financial transaction" involving the proceeds of "specified unlawful activity" (a term defined by statute) "to avoid a transaction-reporting requirement" and (2) "engag[ing] . . . in a monetary transaction" in property that is worth more than \$10,000¹²⁶ and constitutes or is derived from proceeds of "specified unlawful activity."¹²⁷ The defendant allegedly had deposited \$40,000 in a bank in Florida and then made four separate withdrawals of \$9,500 from the bank.¹²⁸ The funds deposited and later withdrawn were traceable to unlawful sales of narcotics,¹²⁹ which fall within the statutory definition of "specified unlawful

¹¹⁸ *Id.* at 484. *See, e.g.*, *United States v. Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976) (stating the essential elements of a § 1623 offense are "(i) the declarant must be under oath, (ii) the testimony must be given in a proceeding before a court of the United States, (iii) the witness must knowingly make, (iv) a false statement, and (v) the testimony must be material to the proof of the crime").

¹¹⁹ *United States v. Smith*, 641 F.3d 1200, 1208 (10th Cir. 2011).

¹²⁰ *Id.* (citations omitted).

¹²¹ *See United States v. Zidell*, 323 F.3d 412, 423 (6th Cir. 2003); *United States v. Williams*, 274 F.3d 1079, 1084 (6th Cir. 2001); *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986) ("We now adopt the substantial contacts test as well as the rationale and framework of analysis articulated by the *Reed* court.").

¹²² *See United States v. Muhammad*, 502 F.3d 646, 652, 655 (7th Cir. 2007).

¹²³ *See supra* note 13.

¹²⁴ *See* cases cited *supra* note 10.

¹²⁵ *United States v. Cabrales*, 524 U.S. 1, 3 (1998).

¹²⁶ *Id.*

¹²⁷ 18 U.S.C. § 1956(c)(7) (2012).

¹²⁸ *Cabrales*, 524 U.S. at 4.

¹²⁹ *Id.*

activity.”¹³⁰ The sales took place in Missouri.¹³¹ The charges (both of which alleged substantive offenses¹³²) were brought in the Western District of Missouri.¹³³ The Supreme Court unanimously ruled that venue was improper.¹³⁴

Quoting *Anderson*, the Justices adhered to the principle that “[T]he *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.”¹³⁵ But for the unlawful sales in Missouri, the Florida transactions would have been lawful. The Court nevertheless ruled that the Western District of Missouri was an improper venue because “the Government indicted Cabrales ‘for transactions which began, continued, and were completed only in Florida.’”¹³⁶ Although the government had “urg[ed] the efficiency of trying Cabrales in Missouri, because evidence in that State, and not in Florida, shows that the money Cabrales allegedly laundered derived from unlawful activity,” the Court was not persuaded.¹³⁷

A year later, the Justices decided *United States v. Rodriguez-Moreno*.¹³⁸ Like the charges in *Cabrales*, the charge in *Rodriguez-Moreno* required proof of underlying unlawful activity.¹³⁹ But unlike the charges in *Cabrales*, the charge in *Rodriguez-Moreno* required proof that *the defendant* was criminally responsible for the underlying activity.¹⁴⁰ Whereas the occurrence in Missouri of “specified unlawful activity” for which the defendant in *Cabrales* was *not* criminally responsible did make venue proper in Missouri for charges based on conduct in Florida,¹⁴¹ the Court ruled in *Rodriguez-Moreno* that *the defendant’s* commission of a crime (kidnapping) that occurred in part in New Jersey supported venue in New Jersey as to a firearms charge based on conduct in Maryland because the defendant’s involvement in the kidnapping was a predicate for the firearms charge.¹⁴²

The charges in *Rodriguez-Moreno* arose, as the Court explained, from events that began with “a drug transaction that took place in Houston, Texas,” in which “a New York drug dealer stole 30 kilograms of a Texas drug distributor’s cocaine.”¹⁴³ The distributor hired Rodriguez-Moreno and others to search for the drug dealer and to hold the middleman captive while doing so.¹⁴⁴ Rodriguez-Moreno and his collaborators took the middleman from Texas to New Jersey and then to Maryland, where Rodriguez-Moreno put a .357 magnum revolver to the back of the middleman’s neck but did not fire.¹⁴⁵ Federal prosecutors in New Jersey secured an indictment against Rodriguez-Moreno that not only charged conspiracy to kidnap and kidnapping, but also charged carrying a firearm in relation to the kidnapping in violation of 18 U.S.C. § 924(c)(1).¹⁴⁶ Rodriguez-Moreno challenged venue on the firearm charge,

¹³⁰ See 18 U.S.C. § 1956(c)(7)(a).

¹³¹ *Cabrales*, 524 U.S. at 4.

¹³² Cabrales was also charged with conspiracy, but that charge was not before the high court. See *id.* at 4-5.

¹³³ *Id.* at 4.

¹³⁴ *Id.* at 3-4.

¹³⁵ *Id.* at 6-7 (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)).

¹³⁶ *Id.* at 8 (quoting *United States v. Cabrales*, 109 F.3d 471, 472 (8th Cir. 1997), *amended by* 115 F.3d 621 (1997)).

¹³⁷ *Id.* at 9-10.

¹³⁸ *United States v. Rodriguez-Moreno* 526 U.S. 275 (1999).

¹³⁹ *Id.* at 280.

¹⁴⁰ *Id.*

¹⁴¹ *Cabrales*, 524 U.S. at 8.

¹⁴² *Rodriguez-Moreno*, 526 U.S. at 281.

¹⁴³ *Id.* at 276.

¹⁴⁴ *Id.* at 276-77.

¹⁴⁵ *Id.* at 277.

¹⁴⁶ *Id.*

pointing out that his use of a gun occurred in Maryland.¹⁴⁷ The Justices ruled that venue on the firearm charge was nonetheless proper in New Jersey.¹⁴⁸

The Court reiterated that the “*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.”¹⁴⁹ The Court added this explanation: “In performing this inquiry, a court must initially identify *the conduct constituting the offense* (the nature of the crime) and then discern *the location of the commission of the criminal acts*.”¹⁵⁰

The Court went on to point out that the court of appeals had “overlooked an essential conduct element of the § 924(c)(1) offense.”¹⁵¹ Section 924(c)(1), the Court explained, “prohibits using or carrying a firearm ‘during and in relation to any crime of violence . . . for which [a defendant] may be prosecuted in a court of the United States.’”¹⁵² The Court “interpret[ed] § 924(c)(1) to contain two distinct *conduct elements*—as is relevant to this case, the ‘using and carrying’ of a gun and the commission of a kidnaping.”¹⁵³ Because the conduct satisfying one of those two elements occurred in part in Jersey, venue was proper in New Jersey.¹⁵⁴ In explaining why that result was consistent with *Cabrales*, the Court distinguished “circumstance elements” from “conduct elements”:

As we interpreted the laundering statutes at issue [in *Cabrales*], they did not proscribe “the anterior criminal conduct that yielded the funds allegedly laundered.” The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct—defendant’s money laundering activity—occurred “‘after the fact’ of an offense begun and completed by others.”¹⁵⁵

“It does not matter,” the Court added, “that [defendant] used the .357 magnum revolver . . . only in Maryland because he did so ‘during and in relation to’ a kidnaping that was begun in Texas and continued in New York, New Jersey, and Maryland. . . . Where venue is appropriate for the underlying crime of violence, so too it is for the § 924(c)(1) offense.”¹⁵⁶ The Court expressed no opinion regarding the government’s contention that the effects of a defendant’s conduct in a district can establish venue in that district.¹⁵⁷

Cabrales and *Rodriguez-Moreno* reflect a focus on the elements of the offense in the determination of venue. *Rodriguez-Moreno* suggests, moreover, that although “conduct elements” can support venue, “circumstance elements” cannot.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 282.

¹⁴⁹ *Id.* at 279 (bracketed material in original) (quoting *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998) (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946))) (quotation marks omitted).

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Id.* at 280.

¹⁵² *Id.* (alteration in original).

¹⁵³ *Id.* (emphasis added).

¹⁵⁴ *Id.* at 282.

¹⁵⁵ *Id.* at 280 n.4 (citations omitted) (quoting *United States v. Cabrales*, 524 U. S. 1, 7 (1998)). Justice Scalia, joined by Justice Stevens, dissented. Stressing that § 924(c)(1) “prohibits the act of using or carrying a firearm ‘during’ (and in relation to) a predicate offense,” Justice Scalia reasoned that “we need only ask where the defendant’s alleged act of using a firearm during (and in relation to) a kidnaping occurred. Since it occurred only in Maryland, venue will lie only there.” *Id.* at 283 (Scalia, J., dissenting).

¹⁵⁶ *Id.* at 281-82 (majority opinion).

¹⁵⁷ *Id.* at 279 n.2.

SECTION IV: THE THIRD CIRCUIT'S DECISION IN AUERNHEIMER

The charges in *United States v. Auernheimer* that the Third Circuit ultimately held were brought in the wrong venue concerned events following Apple Computer's introduction of the iPad portable tablet computer in January 2010.¹⁵⁸ Apple entered into an exclusive contract with AT&T to provide iPad users with a cellular connection to the Internet, if they preferred such a connection to a wireless Internet, or "wifi," connection.¹⁵⁹ This cellular service offered to iPad users was known as "3G" service and was available through an account with AT&T.¹⁶⁰ With a user ID and a password, a user could access his or her AT&T account through a website created by AT&T.¹⁶¹ A user's user ID was his or her e-mail address.¹⁶²

To make access to these accounts easier, AT&T programmed its website so that when an iPad user communicated with the website, AT&T's servers searched for that iPad user's Integrated Circuit Card Identifier ("ICC-ID"), "the unique nineteen- or twenty-digit number that identifies an iPad's Subscriber Identity Module, commonly known as a SIM Card."¹⁶³ If the user had registered his or her account with AT&T, AT&T's servers automatically inserted the e-mail address associated with the user's ICC-ID in the e-mail part of the login prompt on AT&T's website.¹⁶⁴

The AT&T website attracted the interest of Daniel Spitler, a member of Goatse Security, a loosely affiliated group of eight programmers who searched for security holes.¹⁶⁵ When Spitler visited the AT&T website to sign up for service using a network card he had purchased, he entered the ICC-ID of his iPad.¹⁶⁶ He noticed that his e-mail address appeared on the AT&T login page.¹⁶⁷ He guessed that AT&T servers had derived his e-mail address from his ICC-ID.¹⁶⁸ Spitler tested his hypothesis by changing the ICC-ID in the URL by one digit; when he did so, he discovered that a different e-mail address appeared on the login page.¹⁶⁹

Spitler then wrote a computer program that he dubbed an "account slurper" to automate this process.¹⁷⁰ The program would visit the AT&T website again and again, each time using a different ICC-ID.¹⁷¹ "If an email address appeared in the login box, the program would save that email address to a file under Spitler's control."¹⁷² After Spitler shared what he had learned with Andrew Auernheimer, who was also a member of Goatse Security, Auernheimer helped him improve the program.¹⁷³ Over a four-day period, the program collected 114,000 e-mail addresses.¹⁷⁴

¹⁵⁸ *United States v. Auernheimer*, 748 F.3d 525, 529 (3d Cir. 2014).

¹⁵⁹ See Appellant's Opening Brief at 7, *Auernheimer*, 748 F.3d 525 (3d Cir. 2014) (No. 13-1816).

¹⁶⁰ *Auernheimer*, 748 F.3d at 529.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 529-30.

¹⁶⁴ *Id.* at 530.

¹⁶⁵ *Id.*; see also Indictment, *Auernheimer*, 748 F.3d 525 (3d Cir. 2014) (No. 11-470).

¹⁶⁶ *Auernheimer*, 748 F.3d at 530.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 530-31.

¹⁷¹ *Id.* at 531.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

Auernheimer e-mailed various members of the media to publicize what he and Spitler had been able to do.¹⁷⁵ Some of the persons whom Auernheimer contacted communicated with AT&T, which immediately repaired the defect.¹⁷⁶ Ryan Tate, a reporter for the online publication *Gawker*, expressed interest in writing a story.¹⁷⁷ Auernheimer explained to Tate how the e-mail addresses had been collected and sent him a list of the addresses.¹⁷⁸ *Gawker* soon ran a story by Tate entitled "Apple's Worst Security Breach: 114,000 iPad Owners Exposed," which discussed how the e-mail addresses had been obtained.¹⁷⁹ Tate's story identified some of the people whose e-mail addresses had been obtained but disclosed "only redacted images of a few email addresses and ICC-IDs."¹⁸⁰

Spitler lived and worked in California.¹⁸¹ Auernheimer lived and worked in Arkansas.¹⁸² The servers accessed by the program were located in Texas and Georgia.¹⁸³ The *Gawker* reporter, Tate, was also located outside New Jersey.¹⁸⁴

Other than the fact that approximately 4,500 of the e-mail addresses at issue belonged to New Jersey residents,¹⁸⁵ Auernheimer's actions had no particular connection to New Jersey. Nevertheless, AT&T, which had had its headquarters in New Jersey from 1992 to 2009, was able to convince the United States Attorney's Office for the District of New Jersey to pursue charges against Spitler and Auernheimer.¹⁸⁶ On January 18, 2011, the FBI arrested Auernheimer at his home in Fayetteville, Arkansas.¹⁸⁷ He was transported across the country to Newark, New Jersey and detained until he was released on \$50,000 bond.¹⁸⁸

In June 2011, the government secured Spitler's agreement to plead guilty to a two-count information.¹⁸⁹ The first count charged him with conspiring in violation of 18 U.S.C. § 371 to violate 18 U.S.C. § 1030(a)(2)(C), a provision of the Computer Fraud and Abuse Act ("CFAA") that makes it a crime to "intentionally access[] a computer without authorization or exceed[] authorized access, and thereby obtain[] . . . information from any protected computer."¹⁹⁰ The second count charged Spitler with fraud in connection with personal information in violation of 18 U.S.C. § 1028(a)(7), the so-called identity fraud statute.¹⁹¹

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 540; Elinor Mills, *Hacker in AT&T-iPad Security Case Arrested on Drug Charges*, CNET (June 15, 2010), <http://www.cnet.com/news/hacker-in-at-t-ipad-security-case-arrested-on-drug-charges/>.

¹⁸⁸ *Auernheimer*, 748 F.3d at 540; *Man Accused of "Brute Force" iPad Hack Freed From Federal Custody*, THE SMOKING GUN (February 28, 2011), <http://www.thesmokinggun.com/buster/hacking/man-accused-brute-force-ipad-hack-freed-federal-custody-02283201>.

¹⁸⁹ Letter from Assistant United States Attorney Zach Intrater to Susan Cassell, Esq., June 22, 2011, *United States v. Spitler*, Case 2:11-cr-429-SDW (filed June 23, 2011), ECF No. 29.

¹⁹⁰ *Id.*; 18 U.S.C. § 1030 (2015).

¹⁹¹ Jonathan Stempel, *Daniel Spitler Pleads Guilty to iPad Hack, Email Address Theft*, REUTERS (June 23, 2011), available at http://www.huffingtonpost.com/2011/06/23/daniel-spitler-ipad-hack-email-address-theft_n_883240.html; 18 U.S.C. § 1028 (2015).

In July 2011, after Auernheimer refused to plead guilty, the government obtained an indictment charging him with the same two offenses.¹⁹² In August 2012, the government obtained a superseding indictment against Auernheimer that increased the charge in the conspiracy count from a misdemeanor to a felony by adding the allegation that the conduct was in furtherance of a violation of New Jersey's computer crime statute.¹⁹³

Auernheimer moved to dismiss the indictment for lack of venue, but the district court denied the motion.¹⁹⁴ It found venue on the CFAA charge proper under the continuing offense statute because Auernheimer's "purported conduct—knowing disclosure of personal identifying information to the press—affected thousands of New Jersey residents and violated New Jersey law."¹⁹⁵ Venue was also likely proper on the identity fraud charge, the court ruled, because the predicate "unlawful activity" alleged in the identity fraud charge was the CFAA violation alleged in the first count, and the court had already ruled that venue was proper on the first count.¹⁹⁶

At trial, the court refused to instruct the jury on venue, holding that the government had established venue as a matter of law and that there was no genuine issue of material fact.¹⁹⁷ Auernheimer was found guilty on both counts, sentenced to 41 months in prison, and immediately remanded to custody.¹⁹⁸ He appealed, raising both substantive challenges and a challenge to venue.¹⁹⁹

In an opinion by Judge Michael Chagares, the Third Circuit reversed the conviction on both counts.²⁰⁰ Noting that the case "raises a number of complex and novel issues that are of great public importance in our increasingly interconnected age," the court deemed it "necessary to reach only one that has been fundamental since our country's founding: venue. The proper place of colonial trials was so important to the founding generation that it was listed as a grievance in the Declaration of Independence."²⁰¹

Observing that "[v]enue should be narrowly construed,"²⁰² Judge Chagares rejected the government's reliance on *Reed*'s substantial contacts rule for three reasons. First, although the Third Circuit had quoted the rule with approval in a 1987 decision, *United States v. Goldberg*,²⁰³ Judge Chagares expressed doubt that the Third Circuit had embraced the substantial contacts rule:

It is far from clear that this Court has ever "adopted" this test. We have mentioned it only once. The test was cited in a long block quote to *Reed*, and then analyzed in a single sentence. The *Goldberg* panel did not need to rely on the locus of the effects of the defendant's conduct in that case because all of his acts took place in the district in which he was tried. No panel of this

¹⁹² See Appellant's Opening Brief at 5, *Auernheimer*, 748 F.3d 525 (3d Cir. 2014) (No. 13-1816).

¹⁹³ *Id.*; *United States v. Auernheimer*, No. 11-CR-470, 2012 WL 5389142, at *4-5 (D.N.J. Oct. 26, 2012); N.J. STAT. ANN. § 2C:20-31(a) (West 2003).

¹⁹⁴ *United States v. Auernheimer*, No. 11-CR-470, 2012 WL 5389142, at *1 (D.N.J. Oct. 26, 2012).

¹⁹⁵ *Id.* at *4-5.

¹⁹⁶ *Id.* at *5.

¹⁹⁷ *United States v. Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014).

¹⁹⁸ *Id.*; *Andrew 'weev' Auernheimer sentenced to 41 months for exploiting AT&T iPad security flaw*, THE VERGE (Mar. 18, 2013), <http://www.theverge.com/2013/3/18/4118484/andrew-weev-auernheimer-sentenced-att-ipad-hack>.

¹⁹⁹ *Auernheimer*, 748 F.3d at 529.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 532.

²⁰² *Id.* at 532-33.

²⁰³ 830 F.2d 459, 466 (3d Cir. 1987).

Court has ever cited *Goldberg*, or any other case, for this test since — either before, or especially after, the Supreme Court clarified the venue inquiry in *Cabrales* and *Rodriguez-Moreno*.²⁰⁴

Second, Judge Chagares interpreted post-*Reed* decisions in the Second Circuit as establishing that the substantial contacts rule “operates to limit venue, not to expand it,”²⁰⁵ i.e., as “serv[ing] to limit venue in instances where the *locus delicti* constitutionally allows for a given venue, but trying the case there is somehow prejudicial or unfair to the defendant.”²⁰⁶ Finally, Judge Chagares stressed that “[t]he Government argues only that it has minimally satisfied one of the four prongs of the [substantial contacts] test — the ‘locus of the effect of the criminal conduct.’”²⁰⁷ “The Government has not cited,” he explained, “and we have not found, any case where the locus of the effects, standing by itself, was sufficient to confer constitutionally sound venue.”²⁰⁸ A crime’s effects are relevant to venue, Judge Chagares added, only in “situations in which ‘an essential conduct element is itself defined in terms of its effects.’”²⁰⁹ He gave the example of “a prosecution for Hobbs Act robbery,” in which “venue may be proper in any district where commerce is affected because the terms of the act themselves forbid affecting commerce.”²¹⁰

Rather than analyze venue under *Reed*’s substantial contacts rule, the Third Circuit looked to the Supreme Court’s decisions in *Cabrales* and *Rodriguez-Moreno*.²¹¹ Emphasizing the need “to separate ‘essential conduct elements’ from ‘circumstance element[s],” the Third Circuit explained that “[o]nly ‘essential conduct elements’ can provide the basis for venue; ‘circumstance elements’ cannot.”²¹² The court pointed to the Supreme Court’s observation in *Rodriguez-Moreno*, with reference to its earlier decision in *Cabrales*, that the existence of criminally generated proceeds had only been a “circumstance element” of the money laundering offense charged in *Cabrales* and that therefore the fact that the laundered proceeds were generated by illegal narcotics sales in Missouri did not establish venue in Missouri.²¹³ Turning to the case before it, the Third Circuit held that venue was improper as to the conspiracy count because “neither Auernheimer nor his co-conspirator Spitler performed any ‘essential conduct element’ of the underlying CFAA violation or any overt act in furtherance of the conspiracy in New Jersey.”²¹⁴ Similarly, venue was improper on the identity fraud charge because “Auernheimer did not commit any essential conduct of the identity fraud charge in New Jersey.”²¹⁵

SECTION V: THE PURPOSES SERVED BY THE CONSTITUTION’S VENUE PROVISIONS

Auernheimer is a sound and welcome reaffirmation of the vitality of the constitutional restrictions on the venue of criminal prosecutions and rejection of the government’s attempt to use *Reed*’s substantial contacts test to loosen those restrictions. The decision is also useful in clarifying that, although venue was sustained in *Rodriguez-Moreno*, the distinction the

²⁰⁴ *Auernheimer*, 748 F.3d at 536 (citations omitted).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 537.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* (quoting *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000)).

²¹⁰ *Id.*

²¹¹ *Id.* at 533.

²¹² *Id.* (quoting *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 & n.4 (1999); *Bowens*, 224 F.3d at 310).

²¹³ *Id.*

²¹⁴ *Id.* at 535.

²¹⁵ *Id.* at 536.

Supreme Court drew between conduct elements and circumstance elements tends to support a restrictive approach to venue.

In *Reed*, the Second Circuit seemed to question whether the constitutional provisions governing venue truly serve important purposes. The court observed that “the precise policies to be furthered by venue law are not clearly defined,” and that “the Supreme Court has yet to articulate a coherent definition of the underlying policies.”²¹⁶ Later, a district judge in the same circuit, Judge Edward Korman of the Eastern District of New York, went further, characterizing the Sixth Amendment’s venue provision as “a relic of a bygone era when jurors decided cases on the basis of personal knowledge.”²¹⁷

The venue provisions of the Constitution do serve significant purposes. In the words of Judge (as he then was) Samuel Alito, those provisions “were adopted to achieve important substantive ends—primarily, to deter governmental abuses of power.”²¹⁸

A. PROXIMITY TO THE DEFENDANT’S RESIDENCE AND RESOURCES, AND TO PERSONS WHO KNOW HIS OR HER CHARACTER

The vast majority of the time, the district where the crime allegedly occurred is the district where the defendant resides. Although the Supreme Court has deemed “erroneous” the notion that “criminal defendants have a constitutionally based right to a trial in their home districts,”²¹⁹ it has also recognized—in the words of Justice Frankfurter in *United States v. Johnson*—that allowing the government a broad choice of venue may expose the defendant to “the unfairness and hardship [of] trial in an environment alien” to him and “remote from home and from appropriate facilities for defense.”²²⁰ Similarly, referring to the right to a jury drawn from the state and district where the crime was committed, Justice Story observed:

The object . . . is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood; and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject the party to the most oppressive expenses.²²¹

Concurring in *Johnson*, Justice Murphy underscored the importance of character witnesses and their greater availability and greater likely impact in the district where the defendant resides:

²¹⁶ *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985).

²¹⁷ *United States v. Hart-Williams*, 967 F. Supp. 73, 79 (E.D.N.Y. 1997), *aff’d on other grounds*, 129 F.3d 115 (Table), 1997 WL 701374 (2d Cir. Nov. 10, 1997). *See also* *United States v. Saavedra*, 223 F.3d 85, 94-95 (2d Cir. 2000) (Cabranes, J., dissenting) (“In its opinion today, the majority suggests that [the Venue Clause of the Sixth Amendment] is somehow of diminished importance ‘in today’s wired world of telecommunications and technology.’”).

²¹⁸ *United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part & dissenting in part).

²¹⁹ *Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964).

²²⁰ 323 U.S. 273, 275 (1944); *see also* *United States v. Cores*, 356 U.S. 405, 407 (1958) (“The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.”); *Hyde v. Shine*, 199 U.S. 62, 78 (1905) (“To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.”); *United States v. Clark*, 728 F.3d 622, 625 (7th Cir. 2013) (rejecting challenge to venue in part because defendant did not suggest that government’s choice of venue will create ‘needless hardship’ (quoting *Johnson*, 323 U.S. at 275)).

²²¹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1775 (Carolina Academic Press 1987) (1833).

Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence, which in this instance is usually the place where the prohibited article is mailed. The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations.²²²

B. ACCESS TO EVIDENCE

Fact witnesses, documents, and other evidence are more likely to be found in the district where the crime was committed than elsewhere. In Justice Story's words, "trial in a distant state or territory might subject the party . . . to the inability of procuring proper witnesses to establish his innocence."²²³

C. JUROR VALUES AND EXPERIENCE

The right to be tried in the district in which the alleged offense was committed is also important because of the jury's role in, as Judge Learned Hand put it, "tempering [the] rigor" of the law "by the mollifying influence of current ethical conventions."²²⁴ As six judges of the Second Circuit recognized in a recent opinion, the Sixth Amendment, "by defining the community from which a federal jury must be drawn, permits the jury to operate as the conscience of that community in judging criminal cases."²²⁵ The Supreme Court, too, has

²²² *Johnson*, 323 U.S. at 279.

²²³ *Palma-Ruedas*, 121 F.3d at 861-62 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1775 (Carolina Academic Press 1987) (1833)); see *Travis v. United States*, 364 U.S. 631, 640 (1961) (Harlan, J., joined by Frankfurter & Clark, JJ., dissenting) ("[P]rosecution in the district in which the affidavit was executed, most often I would suppose the place where the union offices are located, is more likely to respect the basic policy of the Sixth Amendment than would a prosecution in the district where the affidavit was filed. The witnesses and relevant circumstances surrounding the contested issues in such cases more probably will be found in the district of the execution of the affidavit than at the place of filing."); *Clark*, 728 F.3d at 625 (rejecting venue challenge in part because defendant "has not argued that trial in the Southern District of Illinois will subject him to 'oppressive expenses, or . . . to the inability of procuring proper witnesses to establish his innocence.'" (quoting *Palma-Ruedas*, 121 F.3d at 861-62 (Alito, J., concurring in part & dissenting in part) (quoting Story, *supra*, § 1775))); *Nadolny*, 601 F.2d at 943 ("When venue is laid in the proper district the one in which the crime was committed witnesses are more readily available, and the operative facts and situs of the incident are closer at hand."), *overruled on other grounds*, *United States v. Frederick*, 835 F.2d 1211, 1214, 1215 n.11 (7th Cir. 1987); see also *United States v. Posner*, 549 F. Supp. 475, 478 (S.D.N.Y. 1982) (granting motion to transfer prosecution for tax evasion involving charitable donations of land in Miami from Southern District of New York to Southern District of Florida in part because a view of the land involved would be possible in Florida but not in New York).

²²⁴ *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942), *rev'd on other grounds*, 317 U.S. 269 at 281; see *United States v. Dougherty*, 473 F.2d 1113, 1131-32 (D.C. Cir. 1972) ("Human frailty being what it is, a prosecutor disposed by unworthy motives could likely establish some basis in fact for bringing charges against anyone he wants to book, but the jury system operates in fact, so that the jury will not convict when they empathize with the defendant, as when the offense is one they see themselves as likely to commit, or consider generally acceptable or condonable under the mores of the community." (cross-reference omitted)).

²²⁵ *United States v. Fell*, 571 F.3d 264, 269 (2d Cir. 2009) (Raggi, J., joined by Jacobs, C.J. & Cabranes, Parker, Wesley & Livingston, JJ., concurring in denial of rehearing *en banc*); see also *id.* at 284 (Calabresi, J., dissenting) ("The Framers found the *local* nature of a jury, and *local values* embodied in that jury, to be so important that they made it a constitutional requirement that juries in *federal* cases be not only 'impartial' but 'of the State and district wherein the crime shall have been committed.'" (quoting U.S. CONST. amend. VI)); *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) ("one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death in a capital case] is to maintain a link between contemporary community values and the penal system").

observed that “the jury trial provisions in the Federal and State Constitutions reflect . . . insistence upon community participation in the determination of guilt or innocence.”²²⁶ The ethical conventions and values that a jury can contribute to the system of justice ordinarily should be those of a jury drawn from the region in which the alleged offense was committed.²²⁷ What persons in one part of the country might consider unethical might be deemed acceptable in another region.

D. AVOIDING FORUM-SHOPPING BY THE GOVERNMENT

Finally, as Justice Frankfurter also observed in *Johnson*, granting the prosecution a broad choice of venue “leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.”²²⁸ It encourages forum-shopping, which is objectionable in matters involving enforcement of the criminal law²²⁹ just as it is in ordinary civil cases,²³⁰ cases involving alleged “enemy combatants,”²³¹ and cases involving aliens seeking to avoid deportation.²³²

Affording prosecutors a wide choice of permissible venues has become especially problematic in recent decades as Congress has created an enormous number of new federal crimes. In 1983, the Office of Legal Policy of the United States Department of Justice reviewed the United States Code page by page and counted approximately 3,000 federal

²²⁶ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *see also* *R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) (“It is assumed that twelve men know more of the common affairs of life than does one man.”); *Lawlor v. N. Am. Corp. of Ill.*, 949 N.E.2d 155, 176 (Ill. App. 2011) (“Juries have the unique ability to articulate community values.” (quotation marks omitted)); *Johnson v. United States*, 613 A.2d 888, 901 (D.C. 1992) (“[Jurors’] collective experiences and judgments are particularly adept in achieving justice”).

²²⁷ Particularly in prosecutions of alleged white collar crime, guilt or innocence may turn on the application of extremely malleable standards. For example, in cases involving alleged mail or wire fraud offenses, juries are sometimes instructed that “[a] scheme or artifice to defraud may describe a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general life of the community.” *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997) (quoting jury instructions). The unfairness of putting a citizen’s liberty at stake based on standards such as this, in a forum far from where the conduct at issue occurred, is apparent.

²²⁸ *United States v. Johnson*, 323 U.S. 273, 275 (1944); *see also* *Travis*, 364 U.S. at 634 (“[V]enue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of ‘a tribunal favorable’ to it.” (quoting *Johnson*, 323 U.S. at 275)); *Clark*, 728 F.3d at 625 (rejecting challenge to venue in part because defendant did not suggest that prosecution will cause “the ‘appearance of abuses . . . in the selection of what may be deemed a tribunal favorable to the prosecution’” (quoting *Johnson*, 323 U.S. at 275)); *United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004) (stating that the Constitution provides “a safety net, which ensures that a criminal defendant cannot be tried in a distant, remote, or unfriendly forum solely at the prosecutor’s whim. Seen in this light, it is readily apparent that venue requirements promote both fairness and public confidence in the criminal justice system.” (quoting *Johnson*, 323 U.S. at 276)).

²²⁹ *See, e.g.*, *United States v. Poole*, 531 F.3d 263, 273 (4th Cir. 2008); *United States v. Bagnell*, 679 F.2d 826, 831 (11th Cir. 1982); *United States v. Peraino*, 645 F.2d 548, 553 (6th Cir. 1981); *Jones v. Oklahoma*, 481 P.2d 169, 171-72 (Okla. Crim. App. 1971); *cf. State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (per curiam) (“To meet due process requirements, capital and other felony cases must be [assigned] . . . on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned.”); *People v. Preciado*, 144 Cal. Rptr. 102, 104 (Cal. Ct. App. 1978) (“The plea bargain in this case was improper; the district attorney had no authority to promise that a particular judge would impose sentence. The ‘promise’ to a defendant that a particular judge will handle any particular matter in the future is improper. This type of arrangement encourages ‘judge-shopping,’ an evil that should be prevented.” (footnote omitted)).

²³⁰ *See, e.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980); *Butner v. United States*, 440 U.S. 48, 55 (1979); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938).

²³¹ *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 428, 447 (2004) (“Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement. . . . This rule, derived from the terms of the habeas statute, serves the important purpose of preventing forum shopping by habeas petitioners.”).

²³² *See, e.g.*, *Vasquez v. Reno*, 233 F.3d 688, 694 (1st Cir. 2000).

crimes.²³³ By 2007, the number of federal crimes had increased by nearly fifty percent to "at least 4,450."²³⁴

One result of this expansion of federal crimes is that federal prosecutors often can bring charges under many statutes on the basis of a single course of conduct:

Given the breadth and variety of the federal criminal code, it is likely that a defendant's behavior will potentially violate a multitude of overlapping criminal statutes, especially where white-collar crime is involved. The same course of fraudulent conduct, for example, might constitute mail fraud (if the mails have been used to carry part of it out); wire fraud (if a telephone or the internet was used as part of the execution of the scheme); securities fraud under Title 18 (if the fraud was related to securities); securities fraud under Title 15 (if the fraud was in connection with the purchase or sale of securities); false statements to an agency of the government (if an agency, including the SEC, was one of the "victims" of the fraud) under Title 18; and false statements to the SEC under Title 15. If two defendants are involved, a conspiracy charge can likely be added.²³⁵

The "morass of . . . overlapping statutes"²³⁶ available to federal prosecutors makes it easier for them to obtain a conviction on at least one count even if the defendant is innocent of wrongdoing. "[W]here the prosecution's evidence is weak," Justice Stevens has observed, "its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict."²³⁷ In the words of defense attorney John Cline,

[M]any federal prosecutors take advantage of overlapping federal criminal offenses to charge the same course of conduct under two, or three, or more different statutes or regulations. Instead of a one-count indictment charged under a single statute, the jury might have ten or twenty or a hundred counts charged under several different statutes. The result is often jury compromise. Jurors cannot agree unanimously whether the defendant is guilty, so, as a compromise, they convict on some counts and acquit on others.²³⁸

²³³ Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99, 110 (1989).

²³⁴ John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 Legal Memorandum 1 (June 16, 2008), available at www.heritage.org/Research/LegalIssues/lm26.cfm.

²³⁵ Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1120 (2005) (footnotes omitted). Professor Seigel was a federal prosecutor for nine years, first as an organized crime prosecutor in Philadelphia and then as First Assistant U.S. Attorney in Tampa. *Id.* at 1107 n.1. Judge Harold Greene similarly observed that "[a]s a consequence of the proliferation of criminal laws that has occurred in recent years, almost any criminal act can today be prosecuted, at the option of the prosecutor, on the basis of a great many different charges, from an entire menu of substantive offenses, to various conspiracy counts, aiding and abetting, and any number of enhancements." *United States v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989), *rev'd on other grounds sub nom.* *United States v. Doe*, 934 F.2d 353 (D.C. Cir. 1991).

²³⁶ *Hearing Before the Over-Criminalization Task Force of 2014, H. Comm. on the Judiciary*, 113th Cong. 47 (2014) (written statement of John D. Cline, Esq.); *see also id.* ("[T]here are more than two dozen different false statement statutes in Chapter 47 of Title 18; there are seven different fraud statutes in Chapter 63 of Title 18; and I count nineteen different obstruction offenses in Chapter 73 of Title 18.")

²³⁷ *Ball v. United States*, 470 U.S. 856, 868 (1985) (Stevens, J., concurring) (quoting *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., joined by Stevens, J., dissenting)).

²³⁸ *Hearing Before the Over-Criminalization Task Force of 2014, supra* note 239, at 47. *United States v. Natale*, 719 F.3d 719 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1875 (2014), is an example of a recent case in which prosecutors apparently gained an advantage by charging the same course of conduct in multiple counts. Natale, a vascular surgeon, was alleged to have operated on ordinary aortic aneurysms that two of his patients suffered from but billed for

Broadening the government's choice of venue by applying *Reed*'s substantial contacts test would only exacerbate the problem described by Cline since it would maximize the number of charges the government could bring in a single prosecution. If the traditional approach of determining where the offense was committed means that sometimes the government cannot join all charges in a single prosecution, so be it. Given the proliferation of federal offenses, the government will typically be able to obtain an indictment that contains an ample number of counts even if has to omit some offenses committed in another district. In *Reed* itself, the charges that the court considered were charges *in addition to* the charges of securities fraud and wire fraud for which venue was concededly proper in the Southern District of New York.²³⁹

SECTION VI: CONCLUSION

Thirty-five years ago, in an opinion by Judge James Hunter III, the Third Circuit declared that “[t]hrough our nation has changed in ways which it is difficult to imagine that the Framers of the Constitution could have foreseen, the rights of criminal defendants which they sought to protect in the venue provisions of the Constitution are neither outdated nor outmoded.”²⁴⁰ The same observation would be equally apt today. The *Reed* court may have been correct that the Supreme Court's explication of the policies underlying those provisions has left something to be desired, but a citizen's right to be tried in the district where the alleged offense was committed continues to protect important interests.

operations on *renal* artery aneurysms—which are typically more difficult procedures and are reimbursed by Medicare at a higher rate—and written operative notes to make it appear he had performed the more difficult type of operation. *See id.* at 722, 724-25. As to each operation, the indictment charged both health care fraud in violation of 18 U.S.C. § 1347 and the making of a false statement in a matter involving a health care benefit program in violation of 18 U.S.C. § 1035. Indictment at 1, 5, 12-14, 17-20, *Natale*, 719 F.3d 719 (No. 11CR594). As to one of the operations, the indictment also charged mail fraud. *Id.* at 15-16. Natale was acquitted on the charges of health care fraud and mail fraud but found guilty on the two false statement charges. *Natale*, 719 F.3d at 728.

²³⁹ United States v. Reed, 773 F.2d 477, 479 (2d Cir. 1985).

²⁴⁰ United States v. Passodelis, 615 F.2d 975, 977 (3d Cir. 1980).

**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 *Whitmer 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.

