The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act

Michael Holzapfel

Follow this and additional works at: https://scholarship.law.edu/jchlp

Recommended Citation
Available at: https://scholarship.law.edu/jchlp/vol18/iss2/4
COMMENTS

THE RIGHT TO LIVE, THE RIGHT TO CHOOSE, AND THE UNBORN VICTIMS OF VIOLENCE ACT

Michael Holzapfel*

INTRODUCTION

Tracy Marciniak was just four days away from delivering her son, Zachariah, when her life changed forever. On the night of February 8, 1992, in Milwaukee, Wisconsin, Tracy had a fight with Glendale Black, her husband at the time.1 Fully aware that Tracy very much wanted the child, Mr. Black punched her twice in the abdomen, refused to call for help, and prevented Tracy from doing so.2 Eventually he relented, and Tracy was rushed to the emergency room where she delivered Zachariah by Caesarian section. Unfortunately, however, by the time she reached the hospital her child was already dead. Tracy herself was given only forty-eight hours to live, although she miraculously survived the attack.3

Contrast the case of Tracy Marciniak with that of Shiwana Pace of Little Rock, Arkansas. On August 26, 1999, just one day before Shiwana was due to deliver her unborn baby girl, three men brutally beat her, choked her, clubbed her with a gun and repeatedly kicked her in the

* J.D. 2002, Columbus School of Law, The Catholic University of America; B.A. 1999, College of the Holy Cross. The author thanks Rev. Raymond C. O'Brien for his guidance and perspective, and classmates, family and friends for their comments and support.


2. Pitts, supra note 1.

3. Id.
abdomen. During the attack, one of the assailants allegedly shouted at her, "Your baby is dying tonight!" The attack was masterminded by Pace’s former boyfriend, Erik Bullock, who paid the assailants four hundred dollars to kill the unborn child. Pace informed the police that Bullock previously told her that he did not want children and encouraged her to have an abortion.

The attacks against Marciniack and Pace present complicated legal issues. Because Wisconsin did not have laws protecting unborn victims in 1992, Marciniak’s baby was not legally recognized as the victim of a crime. As a result, her husband was convicted for the assault on his wife, but was not punished for the loss of the child. Contrarily, Mr. Bullock and the two

4. Id.
5. Id.
7. See id.
8. Id. In response to Tracy Marciniak’s case and others like it, Wisconsin subsequently enacted one of the nation’s strongest unborn victims laws. The Wisconsin statute provides:

(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

(2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:
   (a) Intentionally destroys the life of an unborn quick child; or
   (b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.

(3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than $200 or imprisoned not more than 6 months or both.

(4) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be imprisoned not more than 2 years.

(5) This section does not apply to a therapeutic abortion which:
   (a) Is performed by a physician; and
   (b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and
   (c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section “unborn child” means a human being from the time of conception until it is born alive.
other men who attacked Shiwana Pace were charged with the capital murder of Ms. Pace's unborn child under a 1999 Arkansas fetal protection law that allows for murder charges if the fetus is in the twelfth week of gestation. These conflicting positions illustrate the heart of an issue with which state legislatures have been struggling for nearly half a century.

Few topics in American jurisprudence have generated as much ideological debate as the status and rights of the unborn. As attacks against pregnant women similar to those perpetrated against Marciniack and Pace continue to occur throughout the country, a greater demand for protection of unborn victims has arisen at both the state and federal levels. Currently, more than twenty states recognize some form of

10. See, e.g., James H. Burnett III, Charge Will Stand in Feticide Case, Milwaukee J. Sentinel, July 8, 2000, at 3B. A Wisconsin man was charged with, among other things, the fetal homicide of his girlfriend's thirty-four week old fetus. Police and hospital reports showed that the defendant's girlfriend was admitted to the hospital with cuts, bruises, whip marks and cigarette burns over much of her body. She arrived at the hospital in labor, and her baby was later stillborn. See id.
In New York, Joy Schepis, a nurse at a Bronx medical center, was six to eight weeks pregnant when she was attacked. As she left work one evening, Dr. Stephen Pack, a former lover and the father of Ms. Schepis's child, plunged a hypodermic needle filled with the abortion inducing drug methotrexate into her thigh and buttocks. In the subsequent trial, prosecutors revealed that Dr. Pack, a married forty-four year old father of two, did not want his family to find out about his affair with Schepis and had urged her to have an abortion. When she refused, he attempted to induce an abortion against her will. Because New York precedent holds that the state legislature did not intend to make the non-abortional killing of an unborn child a homicide, Dr. Pack could not be tried for assault on the child. Dr. Pack later pled guilty to two counts of assault and one count of abortion and was sentenced to two years imprisonment. Ms. Schepis later gave birth to a healthy baby boy. See Chrisena Coleman, Needle Doc Tells Nurse He's Sorry, N.Y. Daily News, Apr. 21, 2001, at 8.
In California, Nikolay Soltys, a Ukrainian immigrant, brutally stabbed and murdered six relatives, including his four year old son and his wife who was three months pregnant at the time. In addition to the murder of the six family members, Soltys was also charged with the murder of the three month fetus under a 1970 state law. See Harriet Chiang, Rarely Used Law On Fetuses Invoked in Sacramento Killings, San Francisco Chron., Sept. 9, 2001, at A3.
criminal liability for harm committed against the unborn.\textsuperscript{11} Federal law, however, continues to subscribe to the "born alive rule" for purposes of crimes committed against the unborn. This rule holds that a person may only be charged with homicide, attempted murder or assault if the victim had been born and was alive at the time of the crime.\textsuperscript{12} Thus, pursuant to federal law, if a pregnant woman loses her unborn child as the result of an assault, the assailant may be prosecuted only for the assault on the mother and not for the death of the child. While this rule may constitute a cleaner, less ambiguous approach to dealing with crimes committed against pregnant mothers, changing views regarding the status of the unborn, coupled with modern medical advances, have caused the federal government, as well as many states, to rethink this traditional point of view.

Congress began its quest to bring unborn victims within the scope of federal criminal law at the end of the millenium. In 1999 and again in 2001, the House of Representatives passed the Unborn Victims of Violence Act ("the Act"). This legislation is dramatic in that, if enacted into law, it would mark the first instance in which federal law recognizes a fetus as a separate and distinct victim of a crime. The Act provides, in relevant part, that "whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section."\textsuperscript{13} The Act is noteworthy in that it attaches criminal liability to actions causing death or bodily injury to an unborn child at any period of gestation, regardless of viability. Moreover, like all state statutes providing protection for the unborn, the Act specifically excludes from its scope any consensual abortion related conduct.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{11} See infra notes 99-148 and accompanying text.
  \item \textsuperscript{13} Unborn Victims of Violence Act of 2001, H.R. 503, 107th Cong. (2001). The Act makes no other specification as to the term of the woman's pregnancy. The term "child in utero" refers to "a member of the species homo sapiens, at any stage of development, who is carried in the womb." \textit{Id}.
  \item \textsuperscript{14} (c)Nothing in this section shall be construed to permit the prosecution-(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such
With the Unborn Victims of Violence Act, the federal government has thrust itself into the very heart of the debate surrounding rights of the unborn. This Comment defends the Unborn Victims of Violence Act as a logical federal response to growing concern about pregnant mothers and their unborn children. Part I describes the controversy surrounding the Act in both the public and private spheres and examines the proposed legislation, analyzing the *mens rea* standard for conviction, the severity of punishment imposed, the various crimes that trigger attachment of criminal liability and exceptions for which liability does not apply. Part II develops a historical legal analysis regarding protection of the unborn. This analysis reveals the increasing amount of attention that laws have afforded the unborn over time. Part III examines the various positions taken by the states in their treatment of fetal homicide. This section notes that while several states continue to subscribe to the "born alive rule," many states now recognize a separate and distinct offense for causing the death of, or bodily injury to, an unborn child in an assault on the mother, whether or not the death or bodily injury was intended by the attacker. Part IV compares the Unborn Victims of Violence Act to the fetal homicide law of Minnesota, a statute closely resembling the federal legislation. An analysis of how the Minnesota courts have interpreted and implemented the state's fetal protection statute provides a general model of how the federal legislation may be implemented. Part V responds to the argument that the Act threatens the rules of law established by *Roe v. Wade*. Nothing in the Act can be construed as detrimental to *Roe's* stability. This Comment concludes with the argument that a federal fetal protection law can and should be passed by Congress without impinging upon a pregnant woman's constitutionally protected right to decide whether to conceive and bear a child.

---

The element of consent is the key component of this provision. While an abortion could certainly be classified as a "harm" inflicted upon a fetus, so long as this "harm" is inflicted with the consent of the mother, it may not be prosecuted as a criminal offense under the Act.
I. THE UNBORN VICTIMS OF VIOLENCE ACT AND PUBLIC AND PRIVATE CONCERNS

A recent study reveals that more than ninety percent of Americans would support a fetal crime law. Americans overwhelmingly endorse the concept that a pregnant woman's assailant should be held legally responsible for any consequent harm to a fetus in addition to any harm inflicted upon the pregnant mother. Support for imposing stiffer penalties on such violent acts is widespread. In a national survey of adults, ninety-three percent support a federal law that would increase punishment for a perpetrator who inflicts harm upon an "unborn child," while eighty-eight percent favor the same law that replaces "unborn child" with the term "fetus." The establishment of legal rights of and protections for the unborn is not a radical concept in American jurisprudence. In equity, property, criminal law and torts the unborn have received a legal personality. Moreover, the evolution of the unborn's status in the law has been

16. Id.
17. Id.
18. See, e.g., Kyne v. Kyne, 100 P.2d 122 (Cal. 1940) (duty of a father to support an unborn child); Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A.2d 537 (N.J. 1964) (unborn child's right to medical care, despite the mother's refusal to consent to a blood transfusion on religious grounds).
19. See, e.g., In re Estate of Holthausen, 26 N.Y.S.2d 140, 143 (1941) (holding that "it has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child en ventre sa mere is 'born' and 'alive' for all purposes of this benefit."); Cowles v. Cowles, 56 Conn. 240 (1887) (holding that a child born six months after the testator's death was, in contemplation of law, "in existence," and was therefore a beneficiary).
20. See, e.g., State v. Ard, 505 S.E.2d 328 (S.C. 1998) (upholding a sentence of death for a defendant convicted of killing both his girlfriend and her unborn viable fetus). Ard is discussed more fully later in this Comment.
21. See, e.g., Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967) (upholding an action brought by an administrator of a nonviable fetus who, as a result of an automobile accident, was born prematurely and died shortly thereafter).
extremely atomistic, espousing legal and medical doctrines rather than religious beliefs. For example, at the turn of the century, not only did American courts take the position that no cause of action would lie for the death of a fetus, but the courts routinely held that a fetus could not even be regarded as a separate being.\textsuperscript{22} One hundred years later, many courts and legislatures are taking a more innovative approach. In many jurisdictions, the unborn enjoy the same legal standing as any other person.\textsuperscript{23} This observation is particularly strong with respect to the increase in the amount of fetal homicide laws.

Fetal homicide laws are now common throughout the United States.\textsuperscript{24} In many jurisdictions, an unborn child now enjoys the same protection under the law as its mother. Several states now punish actions which cause death or injury to a fetus (with the exception of abortion) as if such action had been taken against the mother.\textsuperscript{25} A growing sense of respect for both lives is evident from the increasing amount of convictions of persons who commit crimes against pregnant women, thereby causing death or bodily injury to their unborn children.\textsuperscript{26}

While the Unborn Victims of Violence Act may reflect and endorse what has become a popular state trend, the 106\textsuperscript{th} Congress failed to garner enough support for the Act in the Senate, due in part to executive opposition to the measure. The Clinton Administration, while supporting the call for the federal government to play an important role in the campaign to end violence against women, characterized the Unborn Victims of Violence Act as “a flawed federal response to the evils of such violence.”\textsuperscript{27} In a familiar sequence of events, the Act remained stagnant.

\textsuperscript{22} See, e.g., Deitrich v. Inhabitants of Northampton, 138 Mass. 14 (1884). \textit{Deitrich} is discussed more fully later in this Comment.

\textsuperscript{23} In one particularly bold example, the Alabama legislature recently considered a provision that would allow courts to assign a guardian to represent unborn children in cases where a minor is seeking an abortion without parental consent. See Robin Travis, \textit{Alabama Considers Appointing Lawyers to Represent Fetuses}, \textit{BOSTON GLOBE}, Mar. 12, 2000, at A24.

\textsuperscript{24} See \textit{infra} notes 99-148.

\textsuperscript{25} See, e.g., State v. Merrill, 450 N.W.2d 318 (Minn. 1990). \textit{Merrill} is discussed at length later in this Comment.


\textsuperscript{27} \textit{The Unborn Victims of Violence Act: Hearing on S. 1673 Before the Senate
the Senate during the 107th Congress, primarily due to many of the same criticisms.

Critics oppose the Act for three central reasons. The first deals with the *mens rea* element of the proposed law — the defendant need not know that the victim is pregnant.28 As the Department of Justice states, "the bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict."29 Such a radical approach, according to opponents, "is an unwarranted departure from the ordinary rule that punishment should respond to culpability, as evidenced by the defendant's mental state."30

Second, critics attack the legislation for "gratuitously plunging the federal government into one of the most difficult and complex issues of religious and scientific consideration and into the midst of a variety of approaches to handling these issues."31 While the states have developed various methods of dealing with crimes committed against the unborn, the recognition of the fetus as a separate and distinct victim of a crime is unprecedented as a matter of federal statute. Opponents thus draw the apparent conclusion that the federal government should not immerse itself in a field which has been largely handled by state legislatures.32

---

28. See id.
29. Id.
30. Id. While criminal statutes requiring no *mens rea* are generally disfavored, courts have been willing to impose strict liability if there is a clear legislative intent to eliminate the *mens rea* requirement. See, e.g., Reisch v. State, 668 A.2d 970 (Md. App. 1995); In re J.R., 403 N.E.2d 114 (Ill. App. 1980). For example, "it is generally held, in the absence of statute, that the defendant's knowledge of the age of the female is not an essential element of the crime of statutory rape and therefore it is no defense that the accused reasonably believed that the [victim] was of the age of consent." 65 AM. JUR. 2D Rape § 84 (2001).
32. Although a fetus has never been recognized as a separate victim for purposes of charging a defendant under federal criminal law, the argument that any recognition of a fetus as a separate and distinct entity is *unprecedented* as a matter of federal criminal law is not entirely correct. In one area, federal criminal law already recognizes that an unborn child is not merely an extension of the mother. In 1994, Congress codified a longstanding common law doctrine by enacting an outright prohibition on the execution of any woman who carries an unborn child. See 18 U.S.C. § 3596 (2000) ("A sentence of death shall not be
Third, the measure understandably draws fire from those who fear that its ramifications may overlap into the abortion debate and threaten the stability of *Roe v. Wade*\(^3\) and its progeny. For example, some of the most vehement criticism of the Act has come from the Planned Parenthood Association of America. According to Planned Parenthood, the Unborn Victims of Violence Act is designed solely with the intent of eroding the very foundation of *Roe v. Wade*.\(^3\)\(^4\) "Cleverly spun to shift the focus away from violence against a woman to violence against a fetus, this bill does what the 'Human Life Amendment' and other anti-choice bills could not do, establish rights of personhood to a fetus, a zygote, blastocyst, or embryo."\(^5\) Similarly, the National Abortion and Reproductive Rights Action League (NARAL) takes the position that “[the Act’s] failure to even consider the woman makes it clear that this legislation is not meant to provide greater protections for pregnant women, nor to fight crimes against them, but rather to forge new legal ground that would eventually undermine *Roe v. Wade*.”\(^6\) In addition, the American Civil Liberties Union (ACLU) objects to the bill because the bill would “separate the woman from her fetus in the eyes of the law. And we believe that such separation is merely the first step toward eroding a woman’s right to determine the fate of her own pregnancy and to direct the course of her own health care.”\(^7\) This slippery slope argument stands at the heart of the positions adopted by Planned Parenthood, NARAL, the ACLU and others who see the bill as a threat to the pro-abortion platform.\(^8\)

\(^3\)410 U.S. 113 (1973).


\(^5\)Id.


\(^7\)Id.


However, the Act has amassed support in both the public and governmental sectors. The National Right to Life Committee (NRLC) heralds the bill as a worthwhile safeguard for the legal status of the unborn.\(^9\) Addressing the slippery slope argument that the bill is really an effort to thwart the authority of \textit{Roe v. Wade}, the NRLC asks:

Why do pro-abortion groups proclaim that the bill is an attempt to ban abortion, even though they know abortion is excluded from the scope of the bill? It seems their greatest fear is not of what the bill actually does legally, but of how it might encourage people to think about the unborn child.\(^{40}\)

In addition, the National Conference of Catholic Bishops recognizes the bill as offering

an opportunity to protect the unborn child in a way that clearly serves the freedom and well-being of his or her mother, by protecting both parties from violent assault and murder. To oppose such much needed legislation simply because it acknowledges a truth about unborn life that almost everyone already knows anyway, would be a terrible injustice.\(^{41}\)

Similar concerns are echoed within Congress. Senator Orin Hatch (R.-Utah), for example, stated “I cannot imagine why some people would oppose this bill. The only reason for opposition that I can suppose is that some in the pro-choice movement believe that our bill draws attention to the effort to dehumanize, desensitize, and depersonalize the unborn child.”\(^{42}\) Moreover, Representative Steve Chabot (R. – Ohio), co-sponsor of the Act, comments that

\footnotesize


40. National Right to Life Committee, \textit{Pro-Abortion Groups Lash Out As House Panel Approves “Unborn Victims of Violence Act”} (on file with author). According to an NRLC representative, those who condemn the bill “feel compelled to oppose anything that challenges their nonsensical, ideological construct, in which an unborn human being is nothing more than a collection of body tissues.” \textit{Id.}


the Act is consistent with the well-settled criminal law doctrine of transferred intent, which provides that when an individual acts with the intent to harm one person, and during the course of the offense hurts another, the law considers the perpetrator to be just as guilty of harming the second as the first. Proponents downplay the Act’s relation to the abortion debate by reiterating that the primary focus of the Act is to ensure punishment for those who interfere with a mother’s right to conceive, carry and bear a child.

The praises and criticisms of the federal legislation echo similar praises and criticisms voiced by the legislature, the courts and the public on the state level. However, before examining how similar legislation has played out on the state level, it would be beneficial to take a more in-depth look at the Unborn Victims of Violence Act.

If passed, the Unborn Victims of Violence Act would amend title 18 of the United States Code and the Uniform Code of Military Justice “to protect unborn children from assault and murder, and for other purposes.” There are four essential components to the Act. The first component sets forth the required mens rea for prosecution under the Act. Under the proposed legislation:

(a)(1) whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

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

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

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

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


45. Id.
Thus, culpability turns on an element for which liability is strict; a defendant would be guilty of causing the death of an unborn child regardless of whether he knew the woman was pregnant. It is for this reason that some critics feel that the Act "disregards the Constitution's promise that citizens are entitled to due process of law . . . . Courts have struck down criminal statutes on the grounds that they lack this requisite mental intent element, and thus punish conduct engaged in innocently."  

The second component of the Act enumerates the underlying offenses to which the Act attaches liability. The Act is best viewed as a federal felony-murder statute which recognizes two victims rather than one. In order to prosecute a defendant under the Act, his conduct must fall within one of the sixty-eight documented offenses. The more serious offenses incorporated into the Act include murder, drive-by shootings, resisting arrest, damage to property and the use or transportation of explosives with the intent to injure or kill. As an extension of existing state law, the Act also subjects a defendant to federal prosecution if he crosses state lines with the intent to injure or intimidate his spouse or partner and thereby causes the death of that spouse's or intimate partner's unborn child.  

The third component sets forth a very specific exception for abortion-related conduct. The language of the Act clearly defines three instances in which the Act may not apply. First, prosecution shall not be permitted of any person "for conduct relating to an abortion for which the consent of a pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law." Second, prosecution shall not be permitted of any person "for any medical treatment of the pregnant woman or her unborn child." Finally, nothing in the Act shall be construed to permit the prosecution "of any woman

---

54. Id.
The Right to Live

with respect to her unborn child." Thus, the Act gives legislative affirmation to the judicial principles established in Roe v. Wade.

The fourth and perhaps the most controversial component of the Act lies in its definition of "unborn child." According to the legislation, "the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb." As previously discussed, the idea of attaching rights of personhood to an unborn child at any stage of development for purposes of assigning criminal liability for causing the child's death is disturbing to those who think such a measure threatens the rationale of Roe v. Wade.

II. HISTORICAL LEGAL ANALYSIS: RECOGNIZING FETAL RIGHTS

Recognition of an unborn child as a separate and distinct being from its mother is a concept that has slowly but definitively gained support in the common law. Authorities such as seventeenth century scholar Sir Edward Coke, and eighteenth century scholar Sir William Blackstone, had an early impact on American law. Coke and Blackstone developed a theory regarding death or injury to the unborn that is still accepted in many jurisdictions today. Coke reasoned:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive....

Comparatively, in the eighteenth century, Blackstone reiterated the words

55. Id.
56. Id.
57. It is arguable that the debate over the status of the unborn predates even the evolution of the English Common Law. During the eras of Greek and Roman preeminence, both Plato and Aristotle advocated abortion as a method of population control. Moreover, any prosecution brought during these eras for the death of a pregnant woman or her unborn child was most likely a simple property claim by the pregnant woman's father. See G. Williams, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 148 (1957); Roe v. Wade, 410 U.S. 113, 130 (1973).
of Coke in his *Commentaries*:

[The person killed must be ‘a [sic] reasonable creature in being, and under the king's peace, at the time of the killing... To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.]

According to Blackstone, the killing of an unborn child was nevertheless recognized as a “barbarity.” Blackstone affirmed his position that “[o]f crimes injurious to the persons of private subjects, the most principal and important is the offense of taking away that life, which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himself or another...” However, this right of personal security did not attach from the moment of conception, but at quickening, the time the mother first feels the child move in her womb.

Thus, Coke and Blackstone developed the legal concept of the “born alive rule.” While it was a particularly heinous crime for a person to attack a pregnant woman, thereby killing or inflicting serious bodily injury upon her unborn child, there was no cause of action for the child’s death or pre-natal bodily injury unless the child was born alive. The “born alive” rule is still good law in several jurisdictions today.

The views of Coke and Blackstone subsequently entered English common law, particularly in wrongful death statutes. In one of the earliest cases dealing with the subject, Justice Lord Ellenborough wrote that “in a civil Court, the death of a human being could not be complained of as an injury.” Essentially, the cause of action died with the victim. It was not long, however, before English courts recognized the flawed reasoning behind this principle. As a result, in 1846, Parliament passed the Fatal Accidents Act, commonly known as Lord Campbell’s Act. Although Lord Campbell’s Act permitted recovery for damages by the close relatives of a

---

60. *Id.* at 313 (discussing the execution of pregnant women).
61. *Id.* at 139-140.
62. “[F]or barely, with child, unless it be alive in the womb is not sufficient.”
63. *Id.* at 314.
victim who was tortiously killed, it did not cover prenatal torts.\textsuperscript{65}

In contrast to the passage of Lord Campbell's Act in Great Britain, American courts were reluctant to abandon such a well established rule of law. At least initially, the lack of support for wrongful death actions was evident in several jurisdictions.\textsuperscript{66} It did not take long, however, for American state legislatures to begin enacting statutes similar to Lord Campbell's Act. The first such statute was enacted in New York in 1847.\textsuperscript{67} Over time, every state enacted a statute permitting recovery for wrongful death.\textsuperscript{68} Inevitably, when a cause of action for wrongful death became a matter of statutory right, the question arose whether prenatal torts were beyond the scope of these laws.

The issue of recovery for prenatal injuries was first dealt with by an American court in Massachusetts in 1884. In \textit{Dietrich v. Inhabitants of Northampton},\textsuperscript{69} a woman approximately five months pregnant slipped and fell as the result of a defect in a highway. In denying the plaintiff a cause of action, Justice Oliver Wendell Holmes held that "as the unborn child was a part of the mother at the time of the injury, and any damage to it which was not too remote to [deny recovery altogether] was recoverable by the mother."\textsuperscript{70} Justice Holmes's view that the fetus was not an independent biological entity from its mother—known as the "single entity" theory—was followed for over half a century as an unquestioned authority on the issue of recovery for prenatal injury.

It was not until the turn of the century that judges began to question the rule barring recovery for prenatal death or injury. In \textit{Allaire v. St. Luke's Hospital},\textsuperscript{71} the majority adhered to Justice Holmes's "single entity" rule and denied recovery for a mother whose child was born grossly deformed due to the hospital's negligence. However, Justice James Boggs


\textsuperscript{67} See 22A AM. JUR. 2D Death § 7 (1988).

\textsuperscript{68} See id.


\textsuperscript{70} \textit{Dietrich}, 138 Mass. at 17.

\textsuperscript{71} 56 N.E. 638 (ILL. 1900).
pointed out in his dissenting opinion that, although no court had ever awarded a plaintiff damages for injuries sustained while en ventre sa mere (literally, "in the mother’s womb"), “an adjudicated case is not indispensable to establish a right to recover under the rules of common law.” Dismissing the idea that stare decisis should preclude establishing a new right under common law, Justice Boggs opined that:

If in delivering a child an attending physician, acting for a compensation, should wantonly or by actionable negligence injure the limbs of the infant, and thereby cause the child, although born alive and living, to be maimed and crippled in body or members, it would be abhorrent to every impulse of justice or reason to deny to such a child a right of action against such physician to recover damages for the wrongs and injuries inflicted by such physician.

The dissenting opinion of Justice Boggs in Allaire marked the beginning of a movement away from Deitrich and the “single entity” principle.

It was not until 1946, however, that an American court completely departed from Deitrich. In Bonbrest v. Kotz, the District of Columbia District Court held that the single-entity theory was a “contradiction in terms.” Pointing out that, in property law, a child en ventre sa mere was regarded as a separate and distinct human being from conception, the court posed the question,

Why [is a child considered] ‘part’ of the mother under the law of negligence and a separate entity and person in that of property and crime? ... What right is more inherent, and more sacrosanct, than that of an individual in his possession and enjoyment of his life, his limbs and his body?

Coupling this fundamental right to life with the contradictory views of a fetus under the law of property and the law of negligence, the court held that “it is but natural justice that a child, if born alive and viable should be allowed to maintain an action in courts for injuries wrongfully

72. Id. at 640 (Boggs, J., dissenting).
73. Id. at 642.
75. Id. at 140.
76. Id. at 142.
77. This concept of viability as a prerequisite for a cause of action is discussed later in the Comment. See infra notes 103-108 and accompanying text.
committed upon its person while in the womb of its mother.\footnote{Bonbrest, 65 F. Supp. at 142 (quoting Montreal Tramways v. Leveille, 1933, 4 Dom.L.R. 337).}

Despite adherence to the "born alive" rule, the \textit{Bonbrest} court made a landmark ruling by wholly abandoning the reasoning of \textit{Deitrich}. The majority concluded its opinion with an interesting observation: "[t]he law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884."\footnote{Id. at 143.} In other words, the law is not static, but is constantly evolving, shaped and molded by the changing circumstances of the times. The \textit{Bonbrest} court may not have realized the significance of this observation, as courts continued to struggle with similar issues more than fifty years later.

The \textit{Bonbrest} ruling applied only to a cause of action on behalf of a \textit{viable} fetus. The question of whether viability should represent the threshold for attaching liability for death or injury inflicted upon an unborn child has proven a difficult one for courts and legislatures to answer. Although American common law outgrew the untenable positions developed by Blackstone and Coke and advanced by cases like \textit{Deitrich} and \textit{Allaire}, courts also became wary of over-extending the new doctrine applied by \textit{Bonbrest}. The child in \textit{Bonbrest} had already survived far beyond the viability stage and was subsequently born alive. Therefore, the court limited its holding to these facts.

Today, every jurisdiction permits recovery for prenatal injuries if the child is born alive.\footnote{See \textit{RESTATEMENT (SECOND) OF TORTS} § 869 (1982).} While some jurisdictions do not permit a wrongful death action for the death of an unborn child, the majority of jurisdictions permit a wrongful death action if the unborn child has reached viability.\footnote{See \textit{id.}} It was not long before courts began to encounter the issues of whether the \textit{Bonbrest} holding could be extended to cases in which a child sustained injuries prior to viability, or sustained post-viability injuries but was subsequently stillborn.

This question was most notably taken up by the Supreme Court of Appeals of West Virginia in \textit{Farley v. Sartin}.\footnote{466 S.E.2d 522 (W. Va. 1995).} In \textit{Farley}, the plaintiff's pregnant wife was killed in an automobile accident. The mother of the unborn child was approximately eighteen weeks pregnant at the time of
the accident, and the child was neither large enough nor developed
even outside the womb. Under West Virginia state law, a
wrongful death action could be maintained “whenever the death of a
person shall be caused by wrongful act, neglect, or default...” Noting
that the common definition of “child” includes an unborn person, the
court held that the phrase “unborn child” encompassed all stages of
development after conception. The court concluded that the plaintiff
could maintain a cause of action under the West Virginia wrongful death
statute for the death of the unborn child regardless of viability.

In reaching its decision, the Farley court highlighted four arguments
typically relied upon by jurisdictions that deny a wrongful death action for
a child en ventre sa mere. The first argument was the lack of precedent
allowing for such an action. Second was the related argument that courts
should continue to follow Justice Holmes’s “single entity” theory. Third,
some courts feared that allowing such claims would lead to fraudulent
claims and difficulty in proving damages. Finally, some courts felt that this
was a matter for the legislature to decide.

The Farley court rebutted each of these arguments. According to
Farley, the first argument was simply erroneous, as a considerable amount
of precedent for allowing wrongful death actions for a child en ventre sa
mere had accumulated over time. Second, the “single entity” theory has
been thoroughly discredited by advances in modern medicine. Third, the
risk of fraudulent claims did not justify barring legitimate claims. Finally,
the court felt it was incumbent upon the judiciary to supplement the law
in the absence of specific legislative intent.

83. See id. at 523.
85. Farley, 466 S.E. 2d at 524.
86. See id. at 525 (emphasis added).
87. See, e.g., Santana v. Zilog, Inc., 95 F.3d 780 (9th Cir. 1996). In Santana, the
court reasoned that “[a]lthough viability may be a somewhat arbitrary distinction
in the wrongful death context, it does provide a logical point at which to halt
further judicial extension of the cause of action. Any further expansion of
potential liability seems most properly left to the Idaho legislature, as the majority
suggests.” Id. at 786.
88. Farley, 466 S.E.2d. at 529.
89. Id.
90. Id.
91. Id. at 530.
Thus, the *Farley* court reasoned that a tortious injury suffered by a nonviable fetus, subsequently born alive, was compensable and must be treated no differently from an injury inflicted upon a viable child, subsequently born alive.\(^9\) The court’s logic suggested that retaining viability as the threshold at which liability attaches promoted inequitable and potentially arbitrary rulings:

> In our judgement, justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death. The societal and parental loss is egregious regardless of the state of fetal development. Our concern reflects the fundamental value determination that life—old, young, and prospective—should not be wrongfully taken away.\(^9\)3

From this holding the court was able to extrapolate a valuable rule of logic: should the basis for recovery turn on such an arbitrary and imprecise factor as viability, the law would regress into the days of Coke and Blackstone and produce the same inequitable rulings that resulted before such wrongful death statutes were passed.

This brief history of the common law’s treatment of the unborn — from Blackstone’s “born alive” rule, to the “single entity” theory of Justice Holmes, to the rejection of that theory by *Bonbrest*, to the extension of *Bonbrest* in *Farley* — illustrates the issues and concerns that currently surround the Unborn Victims of Violence Act. A historical analysis of the common law’s treatment of the unborn over time rebuts the argument that the Act stands for an unfounded, radical approach to dealing with crimes committed against pregnant women. This analysis shows that the Act stems from a line of cases which long predate *Roe v. Wade*. While the Act may be unprecedented as a matter of federal law, implementation of the Act can more plausibly be viewed as a logical, federal extension of a trend that has been developing over more than a century at the state level.

Moreover, the Unborn Victims of Violence Act attempts to avoid some of the problems that periodically surface in states punishing harms against the unborn. Consider the following scenario: Woman A is twenty weeks pregnant. Woman B is twenty-eight weeks pregnant. Both women are assaulted (for purposes of argument, assume that this is a federal assault charge) and, as a result, subsequently deliver stillborn babies. While both

\(^9\)2. *Id.* at 532.

\(^9\)3. *Id.* at 533.
women experience a tremendous loss, Woman A’s child, by medical standards, has not yet reached viability. To allow a cause of action for the death of Woman B’s child but not for Woman A’s child would be a gross injustice. Such an arbitrary and inequitable result is precisely what the Farley court wished to avoid. Congress attempts to remedy this discrepancy by applying the Unborn Victims of Violence Act to instances in which death or injury is inflicted upon a child at any period of gestation.

III. STATE FETAL HOMICIDE LAWS

The holding of Bonbrest still applies today: “the law is presumed to keep pace with the sciences . . .”94 Application of this truth is evident when tracing the common law’s treatment of the unborn from the days of Blackstone to modern times. Modern medical developments greatly increase the probability that a child will survive and develop outside the womb even prior to the typical viability threshold of twenty-seven weeks.95 It follows that the state’s interest in protecting and preserving both the life of the fetus and the life of the mother should increase proportionally. Yet, several states do not recognize unborn children as human victims of violent crimes,96 and those states that do afford protection to the unborn in their criminal statues differ with regard to the threshold at which criminal liability should be attached.97 These differences are echoed by those who oppose passage of the Unborn Victims of Violence Act into law.

Before addressing the arguments for and against the federal legislation, it is beneficial to examine how similar legislation is received by state courts.98 Currently, a total of thirty-two states recognize some form of

---

95. Viability is presumed to occur at twenty-seven weeks of gestation, assuming an otherwise healthy fetus, and is presumed not to occur prior to twenty weeks. The American Medical Association characterizes the time between twenty and twenty-seven weeks as a “gray zone” in which some fetuses may be viable and others are not. See Janet E. Gans Epner, Ph.D, et al., Late Term Abortion, JAMA, Aug. 26, 1998, at 724.
96. See infra notes 98-100.
97. See infra notes 103-150 and accompanying text.
98. For an excellent analysis of state fetal homicide laws, see Sandra L. Smith, Note, Fetal Homicide: Woman or Fetus As Victim? A Survey of Current State Approaches And Recommendations For Future State Application, 41 WM. & MARY
criminal liability for harms inflicted either upon the unborn child itself, or upon the mother. Jurisdictions may be divided into one of three categories: those states which follow the "born alive" rule; those states which criminalize harm to fetuses other than abortion; and those states which subscribe to the "born alive with a caveat" rule.

A. "Born Alive" States

As of January 1, 2002, eighteen states continue to subscribe to the "born alive" rule, either by express statutory language or through judicial interpretation. Eight of these states have criminal statutes explicitly defining a "person" as one who is born and is alive. Eight other states either define "person" or refer to "persons" in their statutes, but their courts have held that these definitions do not encompass fetuses. Two states define "person" and "human being" in their statutes, but their courts have not expressly ruled on whether these definitions include fetuses. As such, there is a rebuttable presumption that the common law rule applies in these two states. Courts in Alabama, Kentucky, Maryland, New Jersey, New York and Texas, though maintaining the "born alive" rule, have held that if a fetus is injured before birth, is born alive, and then dies, its deaths can be prosecuted as a homicide.
B. States Criminalizing Actions Against the Unborn

Twenty-four states criminalize actions against the fetus. However, the point at which each jurisdiction attaches criminal liability varies widely. At what gestational stage should an unborn child be recognized as a "person" for purposes of assigning criminal liability? Not surprisingly, modern medical jurisprudence continues to refer to viability as the threshold stage of fetal development for legal purposes. In the landmark decision of *Roe v. Wade*, the Supreme Court defined viability as the period at which "the fetus then presumably has the capability of meaningful life outside the mother's womb, albeit with artificial aid." Viability usually occurs at the twenty-eighth week of pregnancy, but may occur as early as the twenty-fourth week.

Six states criminalize homicides of viable fetuses. Three of these states do so by specifically protecting fetuses with homicide statutes. In the

---


104. See Epner, *supra* note 95 at 724.
105. *Id.* at 160.

The Michigan statute defines the willful killing of an "unborn quick child" as manslaughter, but the state's supreme court has held that this statute refers to a "viable" child. *See also* Larkin v. Calahan, 208 N.W.2d 176 (Mich. 1973). *Larkin* defines a "viable child" as an unborn child whose heart is beating, who is experiencing electronically measurable brain waives, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community.

*Id.* at 180.
other three states the courts have interpreted their respective homicide statutes to include an unborn viable fetus as a person under these laws. South Carolina illustrates how drastically that state's law changed over the last twenty years. Prior to 1984, South Carolina subscribed to the born alive rule. The state abandoned this rule, however, in its 1984 decision, State v. Horne. In Horne, the defendant was convicted of assault and battery with intent to kill and involuntary manslaughter. Horne stabbed his estranged wife, who survived, but her full term viable fetus died. The court determined that the fetus was the victim of the defendant's transferred intent toward the mother, and held that a viable fetus was a "person" within the state's statutory definition of murder.

Even more compelling was the recent South Carolina case of State v. Ard. In Ard, the defendant shot his eight and a half month pregnant girlfriend after expressing his desire to a confidant that he wished that his girlfriend and the child were dead. The defendant's girlfriend died from a single gunshot wound to her forehead. The unborn child survived for approximately six to eight minutes before dying from lack of oxygen.


110. See Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989); Hughes v. State, 868 P.2d 730 (Okla. Crim. 1994); State v. Horne, 319 S.E.2d 703 (S.C. 1984). But see Starks v. Oklahoma, 18 P.3d 342 (Okla. 2001). In Starks, the Supreme Court of Oklahoma held that while a viable fetus is a human being for purposes of the state's homicide law, a viable fetus could not be construed as a human being for purposes of the Oklahoma Children's Code. In Hughes v. State, 868 P.2d 730 (Okla. 1994), the Oklahoma Court of Criminal Appeals ruled that a fetus may be the subject of a homicide because medical science may provide proof of whether the fetus was alive at the time of a defendant's action. 868 P.2d at 732. However, the Starks court declined to extend the same protection to a fetus under the Children's Code because "medical science cannot provide evidence regarding whether a fetus might be emotionally, mentally, physically or intellectually deprived within the definitions of terms contained in the Oklahoma Children's Code." 18 P.3d at 345.

111. 319 S.E.2d 703 (S.C. 1984).

112. Id. at 704.

113. Id. at 704.


115. Id. at 330.

116. Id.

117. Id.
Extending the state’s precedent established in *Horne*, the *Ard* court held that “it would be inconsistent to conclude a viable fetus is a person for purposes of murder, but not a person for purposes of a statutory aggravating circumstance to murder.” Consequently, the court held that “the trial judge properly held that the murder of a viable fetus could subject a defendant to the death penalty.”

Six states criminalize actions against “quick” fetuses. Quickening is defined as the period prior to viability when the mother first feels the fetus move in her womb — usually between the sixteenth and eighteenth week of pregnancy. Florida, Mississippi, Nevada, Rhode Island and Washington punish the willful or intentional killing of an unborn quick child as manslaughter. Georgia punishes such an action as feticide.

While the courts in these states have been largely successful in obtaining convictions under these statutes, problems arise with adopting quickening as the threshold for liability. Quickening is a medically primitive term of art. Coined prior to the thirteenth century, it was employed primarily within the religious and philosophical debate as to when life “begins,” or when a being became infused with a soul, rather

118. *Id.* at 331.

119. *Id.* The Unborn Victims of Violence Act does not purport to take the law to this particular extreme. The legislation would impose on a defendant the same penalty for causing the death of or bodily injury to the fetus as would have been imposed had the death or bodily injury occurred to the child’s mother, although the death penalty may not be imposed.


123. See, e.g., Brinkley v. State, 322 S.E.2d 49 (Ga. 1984) (holding that the description “quick” in the state’s feticide statute was not unconstitutionally vague); State v. Willis, 457 So.2d 959, 960 (Miss. 1984) (holding, in a case of first impression, that manslaughter of a fetus did not merge with the charge of murder of the mother, and the defendant could be charged with murder in the mother’s death and manslaughter in the fetus’s death); State v. Amaro, 448 A.2d 1257, 1259-1260 (R.I. 1982) (holding that the state’s homicide statute did not apply to fetuses in light of the state feticide statute that specifically punished the “willful killing of an unborn quick child”).
than for any biological or medical purpose.\textsuperscript{124} Because developments in medical science have allowed physicians to determine more precisely the stage of a fetus's development, the quickening distinction has gradually disappeared from the statutory law of most states.\textsuperscript{125} The Supreme Court itself has dismissed quickening as having little medical significance today.\textsuperscript{126}

Of the remaining states that criminalize actions against the unborn, one state, Arkansas, establishes the culpability threshold at twelve weeks of fetal development.\textsuperscript{127} Like South Carolina, Arkansas originally adhered to the born alive rule. In 1987, in a response to the Arkansas Supreme Court decision in \textit{Meadows v. State},\textsuperscript{128} the state legislature enacted a statute enlarging the crime of battery to include injuries to pregnant woman resulting in a miscarriage.\textsuperscript{129} The Arkansas legislation is unique in protecting both women and fetuses. Moreover, in further response to the \textit{Meadows} decision, the Arkansas legislature recently enacted a comprehensive fetal protection act and amended the Arkansas Code to expand the definition of "person" to include fetuses at twelve weeks of development.\textsuperscript{130}

One state, California, does not specify by statute the applicable stage of development,\textsuperscript{131} but the California judiciary has established seven to eight

\begin{itemize}
\item \textsuperscript{125}See \textit{Roe v. Wade}, 410 U.S. 113, 138-40 (1973). See also, \textit{Larkin v. Calahan}, 208 N.W.2d 176, 180 (Mich. 1973). The Michigan Supreme Court employed the same logic in reaching the conclusion that the state's provision in the manslaughter statute for the killing of an unborn quick child refers to an unborn \textit{viable} child.
\item \textsuperscript{126}See \textit{Roe}, 410 U.S. at 160.
\item \textsuperscript{127}See \textit{ARK. CODE ANN.} § 5-1-102(13)(b) (Supp. 2001). However, for purposes of capital murder and drunk driving, the term "person", as used in the statute, includes "an unborn child in utero at any stage of development." \textit{See ARK. CODE ANN.} § 5-1-102(13)(B)(i)(a)(Supp. 2001).
\item \textsuperscript{128}722 S.W.2d 584 (Ark. 1987) (holding that a fetus was not a person for purposes of the manslaughter statute).
\item \textsuperscript{129}See \textit{ARK. CODE ANN.} § 5-13-201(5)(A)(1997).
\item \textsuperscript{130}See \textit{ARK. CODE ANN.} § 5-1-102(13)(B) (Supp. 2001).
\item \textsuperscript{131}See \textit{CAL. PENAL CODE} § 187(a) (West 1999); \textit{see Smith, supra} note 98 at 1859.
\end{itemize}
weeks as the threshold. Under the state statute, murder is defined as “the unlawful killing of a human being, or a fetus, with malice aforethought.” In *People v. Davis*, the California Supreme Court held that viability is not an element of fetal murder under state law. Relying extensively on the testimony of medical experts regarding the statistical probability of a fetus surviving outside of the womb at various periods of gestation, the *Davis* court held that the third party killing of an unborn fetus with malice aforethought constituted murder “as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.”

States also use fertilization or conception as the threshold for attaching criminal liability. Seven states penalize harm inflicted upon the unborn at fertilization or conception: Missouri, Pennsylvania, Louisiana, North Dakota, Illinois, Minnesota and Wisconsin. As explained later in the Comment, the Minnesota statute is the state statute most similar to the federal Unborn Victims of Violence Act.

Finally, three states criminalize harmful actions against a fetus, but do not specify any particular gestation period: Arizona, South Dakota and Utah. The wording of these statutes has proven deceptively ambiguous. For example, in *State v. Brewer*, the Supreme Court of Arizona, in upholding the trial court’s dismissal of a charge of first degree murder of a fetus, held that the state’s fetal manslaughter statute

132. See People v. Davis, 872 P.2d 591 (Cal. 1994).
133. CAL. PENAL CODE § 187 (West 1999).
134. 872 P.2d 591 (Cal. 1994).
135. Id.
136. Id. at 603.
137. MO. ANN. STAT. § 1.205 (West 2000).
141. 720 ILL. COMP. STAT. ANN. § 5/9-1.2 (West 1993).
142. MINN. STAT. ANN. § 609.266 (West 1987).
143. WIS. STAT. ANN. § 940.04(b)(6) (West 1996).
146. UTAH CODE ANN. § 76-5-201(1999).
precludes the state from prosecuting a defendant for the death of an unborn child under the homicide statutes.\textsuperscript{149}

We can assume that the legislature, when it drew up this statute in 1983, considered the complex issue of when the murder statute should apply and, when confronted with the complex legal, medical and moral questions involved in this issue, chose to create a lesser offense to murder, i.e. manslaughter, when the death of an unborn fetus is involved. We are not dealing with an ancient statute, we are dealing with a relatively new pronouncement by the legislature on what the law is.\textsuperscript{150}

The court concluded that, while the defendant could be convicted for the murder of the mother, the legislature did not intend such a severe offense to apply to causing the death of an unborn child.\textsuperscript{151}

\textbf{C. States Subscribing to the "Born Alive With A Caveat" Rule}

Several states adhere to the born alive rule, but nevertheless criminalize certain acts against pregnant women resulting in miscarriage or injury to the fetus.\textsuperscript{152} Thus, the rule adopted by these states may more appropriately be termed "born alive with a caveat." These jurisdictions recognize the mother, not the fetus, as the victim in order to avoid the question of whether the fetus is a person. For example, New Hampshire specifically exempts the fetus from protection under its homicide laws.\textsuperscript{153} After considering legislation that would include fetuses in the vehicular homicide statute, the legislature enacted laws permitting a felony prosecution for an assault by a defendant who "purposely or knowingly causes injury" to a pregnant woman resulting in miscarriage, without

\begin{footnotes}
\footnotetext{149}{See Brewer, 826 P.2d at 805.}
\footnotetext{150}{Id.}
\footnotetext{151}{Id.}
\footnotetext{153}{N.H. REV. STAT. ANN. § 630:1(IV) (1996).}
\end{footnotes}
specifying the fetus's gestational age. Although these statutes recognize the termination of a pregnancy as a cause for imposing criminal liability, organizations such as the National Right to Life Committee criticize these laws as "gravely deficient, because they do not recognize unborn children as victims, nor allow justice to be done on their behalf."

Twenty-four jurisdictions criminalize harms against the unborn, either by statute or by judicial interpretation. An additional eight jurisdictions, while not recognizing the fetus as a separate victim, view the termination of a pregnancy as a separate offense. In light of the positions adopted by a majority of the states, it is arguable that the "born alive rule" no longer has a place in American jurisprudence, and it seems plausible that it will one day be phased out completely. States possess a fundamental interest in preserving the lives of their citizens. This fundamental interest is manifested by the thirty-two jurisdictions that punish acts resulting in the death of, or harm to, an unborn child. One state, South Carolina, even goes so far as to consider the death of a fetus an aggravating circumstance warranting the death penalty in instances in which an assailant kills both the mother and her unborn child. The Unborn Victims of Violence Act does not take such drastic measures, but the motives behind the federal legislation are similar: the government has a fundamental interest in preserving life - young, old, and prospective.

A comparison between the proposed Unborn Victims of Violence Act and state statutes similar in structure and scope provides insight into how the federal legislation may function if passed into law. The judicial reception of the Minnesota statute furnishes a clear case study in this regard.

IV. MINNESOTA AS A REFLECTION OF THE UNBORN VICTIMS OF VIOLENCE ACT

The Minnesota Crimes Against Unborn Children Act defines "unborn child" as the "unborn offspring of a human being conceived, but not yet born." As with the Unborn Victims of Violence Act, the Minnesota Act applies to any child "in utero" from the point of conception or


156. MINN. STAT. ANN. § 609.266(a)(West 1987).
fertilization. The Minnesota Act lists various offenses which constitute murder of an unborn child in the first, second or third degree; manslaughter of an unborn child in the first or second degree; assault on an unborn child in the first, second or third degree; or felony murder or injury of an unborn child. As with the federal legislation, the Minnesota Act provides that the penalty for a violation of one of these laws protecting the unborn shall be substantially similar to the penalty that would have been imposed had the offense been committed against the mother. Finally, the Minnesota Act, like the federal act, incorporates by reference provisions in the state code safeguarding a woman's constitutionally protected right to procure an abortion. Under the state statute, neither the mother nor her treating physician may be subject to prosecution for conduct relating to an abortion performed in accordance with state law and with the mother's express or implied consent.

Four years after the enactment of the Crimes Against Unborn Children Act, the Supreme Court of Minnesota decided the case of State v. Merrill. In Merrill the defendant was charged with the shooting death of his girlfriend and her twenty-eight day old embryo. The defendant was subsequently indicted for the death of his girlfriend's embryo under the two statutes entitled, respectively, “Murder of an Unborn Child in the First Degree” and “Murder of an Unborn Child in the Second Degree.” On appeal, the defendant challenged the statute on two grounds. First, he argued that the statute violated the Equal Protection clause of the Fourteenth Amendment as interpreted by the Supreme Court in Roe v. Wade, by failing to distinguish between viable fetuses and embryos, and by treating fetuses and embryos as persons. Second, the defendant argued that the statute was void for vagueness. The Supreme Court of Minnesota dismissed both arguments.

In rejecting the defendant’s equal protection argument, the court pointed out that the law by no means treats similarly situated persons dissimilarly. The defendant advanced the argument that state laws

157. See id. § 609.2661.
158. See id. § 609.269.
159. Id. § 145.412.
160. 450 N.W.2d 318 (Minn. 1990).
161. Id. at 320.
162. Id. at 321.
163. Id. at 322.
164. Id. at 321.
exposed him to conviction as a murderer during the first trimester of pregnancy, while others who might intentionally destroy a nonviable fetus, such as a woman who obtains a legal abortion and the doctor who performs it, are not murderers. The court found the disparity to be valid:

The situations are not similar. 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... 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.

Predictably, the defendant in Merrill also cited the incongruity between the criminal statutes in question and the Supreme Court’s ruling that an unborn child is not a person for purposes of the Fourteenth Amendment. The state court, however, exposed the flawed logic of this argument by framing both Roe and the case in question in the context of the competing state interest in the preservation of human life. The court cited the Supreme Court’s reasoning that “the right in Roe v. Wade can be understood only by considering both the woman’s interest and the nature of the State’s interference with it.” Moreover, Roe v. Wade noted that the state “has still another important and legitimate interest in protecting the potentiality of human life.” Thus, the Merrill court concluded that the fetal homicide statutes seek to protect the potentiality of human life, and “they do so without impinging directly or indirectly on a pregnant woman’s privacy rights.”

As to the defendant’s void for vagueness argument, the court considered whether the laws failed to give fair warning of the prohibited conduct and thus encouraged arbitrary and discriminatory enforcement. The defendant contended that it was unfair to impose on the murderer of a woman an additional penalty for murder of her unborn child when

165. Id.
166. Id. at 321-322.
168. Merrill, 450 N.W.2d at 322 (citing Maher v. Roe, 432 U.S. 464, 473 (1977)).
169. Roe, 410 U.S. at 162.
170. Merrill, 450 N.W.2d at 322.
neither the assailant nor the pregnant woman may have been aware of the pregnancy. However, as the court stated, "[t]he fair warning rule has never been understood to excuse criminal liability simply because the defendant's victim proves not to be the victim the defendant had in mind." Applying the doctrine of transferred intent, the court easily dismissed this claim:

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

The court inferred that, in an assault on, or murder of, a pregnant woman, the mother and unborn child were similar enough that the requisite intent to commit the crime against the mother was logically transferable to the unborn child.

The court also addressed the defendant's void for vagueness challenge on the grounds that the statute left uncertain when death occurs and life begins. The defendant argued that causing the "death" of an embryo assumes that the embryo must first be "living," thus begging the question of when "life" begins and when "death" occurs. The court, however, interpreted the defendant's position as raising the issue of when life as a human being begins or ends. The Minnesota statute did not require that the embryo inside the mother be considered a person or a human being. The court held that the state needed only to prove that the embryo or the fetus in the mother's womb "was living, that it had life, and that it has life no longer." Therefore, in finding that the state had met its burden of proof for all elements of the crime, the court held that the Minnesota Crimes Against Unborn Children Act was not void for vagueness and affirmed the defendant's conviction for the murder of his partner's

171. Id. at 323.
172. Id.
173. Id. at 324; See Chabot, supra note 43.
174. Merril, 450 N.W.2d at 324.
175. Id.
176. Id. The court opined that to "have life" means "to have property of all living things to grow, to become." Id.
unborn child. 177

The Merrill decision reflects the reasoning used by other courts in sustaining the validity of statutes protecting the unborn. 178 As the court held, the Minnesota statutes were neither in conflict with the Fourteenth Amendment, as interpreted by the Supreme Court in Roe v. Wade, nor were they void for vagueness. The legislative intent behind the statute—the safeguarding of the state’s compelling interest in potential human life—was clear, and did not violate the mother’s constitutionally protected right to procure a post-viability abortion. The Merrill court, however, was also careful to highlight what this particular case did not involve:

People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires “personhood.” These questions are entirely irrelevant to criminal liability under the statute. . . . Defendant wishes to argue that causing the death of a living embryo or nonviable fetus in the mother’s womb should not be made a crime. This is an argument, however, that must be addressed by the legislature. Our role in the judicial branch is limited solely to whether the legislature has defined a crime

177. Id.

178. See, e.g., People v. Ford, 581 N.E.2d 1189 (Ill. 1991). In Ford, the Appellate Court of Illinois upheld the defendant’s conviction for intentional homicide of an unborn child. The defendant was found to have stomped or kicked the stomach of his seventeen year old stepdaughter who was five and a half months pregnant at the time, thereby causing the death of her unborn child. Id. at 1190. Similar to Minnesota, Illinois defines “unborn child” as “any individual of the human species from fertilization until birth.” 720 ILL. COMP. STAT. ANN. § 5/9-1.2(b) (West 1993). The court held that the state’s important and legitimate interest in protecting potentiality of human life is a valid legislative purpose justifying the fetal homicide statute even if physicians who perform abortions at the choice of pregnant women are treated differently from third parties who act intentionally against unborn children without the consent of the mother. Ford, 581 N.E.2d at 1199. Therefore, the fetal homicide statute did not violate the equal protection clause. Id. Moreover, the court also held that the trier of fact in a case involving fetal homicide need only decide whether the entity within the mother’s womb once had life which was snuffed out by the acts of the defendant, and not whether this entity was a “person” or “human being.” Id. at 1201. Citing much of the logic employed by the court in Merrill, the court in Ford held that the fetal homicide statute did not violate the due process clause. Id. at 1202.
within constitutional parameters. In other words, the judiciary is not the proper forum to argue the logic or the reason behind a constitutionally valid statute. Whatever one might think of the wisdom of a particular statute, courts should not allow philosophical or religious interpretations to govern the legitimacy of an otherwise constitutional measure.

V. SUPPORT FOR THE UNBORN VICTIMS OF VIOLENCE ACT

Two basic assumptions underlie current federal legislative efforts to protect the unborn. First, that the unborn will be born; and second, that the unborn will have a chance to live out their full potential. It appears unlikely, however, that the United States will ever see a federal manifestation of prevalent state policy protecting the unborn. Despite the overwhelming majority of Americans who support a federal fetal crime law, the controversial abortion debate has stalled enactment of the Unborn Victims of Violence. Since the landmark decision of Roe v. Wade, the Supreme Court has repeatedly reaffirmed a woman’s constitutionally protected right to procure an abortion. An analysis of the Court’s

179. Merril, 450 N.W.2d at 324.

180. See Planned Parenthood of Pa. v. Casey, 505 U.S. 833 (1992); Stenberg v. Cahart, 530 U.S. 914 (2000). In the complicated decision of Casey, the Court concluded that consideration of the fundamental constitutional question resolved by Roe, principles of constitutional integrity and the rule of stare decisis require that Roe’s essential three-part holding be affirmed. First, a woman must be able to have an abortion prior to fetal viability without undue interference from the state, whose interests are not strong enough to support a complete prohibition of abortion or the imposition of substantial obstacles to the woman’s effective right to elect the procedure. Casey, 505 U.S. at 846. Second, the state may restrict the practice of abortion after fetal viability if the law contains exceptions for pregnancies endangering a woman’s life or health. Id. Third, the state retains a legitimate interest from the outset of pregnancy in protecting the health of the woman and the life of the fetus. Id. However, the Court also held that Roe’s rigid trimester framework should be rejected, and that the state may enact measures to further its interest in potential life so long as these measures do not constitute an undue burden on the woman’s right to choose an abortion. Moreover, measures designed to advance this interest should not be invalidated merely because their purpose is to persuade the woman to choose childbirth over abortion. Id. at 873-874.

In Stenberg, the Court held that a Nebraska statute criminalizing the performance of partial-birth abortions violated the constitution, as interpreted by Roe and
treatment of abortion as a protected right under the Fourteenth Amendment, however, is beyond the scope of this Comment.

Critics who perceive the Unborn Victims of Violence Act as a threat to a woman's right to procure an abortion is fundamentally flawed for three reasons. First, the Act specifically exempts abortion-related conduct from its scope. Nothing in the Act may be construed to permit the prosecution of any person for conduct relating to a consensual abortion. Such consent may be given by the mother, or may be implied by law under medical circumstances. Neither the mother nor the treating physician are subject to the Act's penalties.

Second, the Unborn Victims of Violence Act is in fact congruous with the tenets of Roe v. Wade. The Supreme Court has addressed the right to an abortion by balancing the competing interests of two parties, the mother and the state. Although the state may have a compelling interest in protecting potential human life, it may regulate the practice of abortion only if no undue burden is placed on the mother's ability to exercise her choice. Roe v. Wade, in essence, subordinates the interests of all third parties.

---

181. See generally Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)(states are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies); Colautti v. Franklin, 439 U.S. 379 (1979)(striking down as unconstitutionally vague a Pennsylvania statute requiring every person who performs an abortion to make a determination "based on his experience, judgment or professional competence" that the fetus is not viable); Doe v. Bolton, 410 U.S. 179 (1973)(striking down as violative of the Fourteenth Amendment a Georgia law requiring that abortions be performed in a hospital accredited by a state committee, that the procedure be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians).

182. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833
parties to the interest of the woman with regard to abortion. Clearly, criminal laws punishing those who disregard this fundamentally established rule of law by terminating a woman's pregnancy against her will reinforce this logic. The decision to carry a child should be exercised by a woman and her treating physician and not by a third party. As pointed out by the Minnesota Supreme Court in Merrill, "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."

Finally, nothing in the Act can reasonably be argued to constitute an undue burden on a woman's right to have an abortion. Having specifically exempted abortion-related conduct from the scope of the Act, Congress has kept within the parameters established by Roe and its progeny. It is implausible to assert that an Act which safeguards the legality of a woman's right to abort a fetus may at the same time weaken the reasoning upon which this constitutionally protected right rests.

The Roe v. Wade decision encompasses two basic principles regarding crimes against the fetus. First, the Court declared only that the fetus was not a person for Fourteenth Amendment purposes. Outside the Fourteenth Amendment, a state may recognize or confer the right of personhood upon an unborn child. Second, where the state's interest in protecting potential human life is not outweighed by the individual's constitutionally protected rights, state law protection of a fetus could easily prevail. Congress has logically and constitutionally applied these principles to its police powers under federal law with the Unborn Victims of Violence Act.

CONCLUSION

The proposed Unborn Victims of Violence Act would criminalize various acts resulting in death or bodily injury to the unborn. While this measure may be unprecedented as a matter of federal law, it has a strong foundation in state law. The common law has changed significantly since the days of Coke and Blackstone, and legal understanding of the unborn


183. Merrill, 450 N.W.2d at 322.
185. See id. at 112.
186. See id.
child has slowly evolved from viewing it as a biological extension of the mother, to seeing it as a separate and distinct being. For purposes of criminal law, most jurisdictions have abandoned the once prevalent theory that causing the death of an unborn child can not be a crime. Many states today impose some type of criminal liability on causing the death of an unborn child, although these states differ as to the gestational period at which such liability attaches. Moreover, as illustrated by the Merrill case, courts have had little trouble sustaining these measures on constitutional grounds. For all of these reasons, Congress should reconsider its position and enact a federal fetal protection law like the Unborn Victims of Violence Act so that all human life — born and unborn — may truly enjoy the protection of law.