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ARTICLES

THE PROSPECT OF ENACTING AN UNBORN VICTIMS OF VIOLENCE ACT IN NORTH CAROLINA

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I. INTRODUCTION

In 2005, a state bill mirroring the federal Unborn Victims of Violence Act,[2] also known as Laci and Conner's Law, failed passage in the North Carolina legislature.[3] If a similar bill passes in the future, North Carolina courts will face many decisions of statutory interpreta-

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2. Unborn Victims of Violence Act of 2004, 18 U.S.C.S. § 1841 (Law. Co-op. Supp. 2005).

3. H.B. 1324, 2005-2006 Sess. (N.C. 2005). The North Carolina bill stalled in the House Judiciary Committee.

tion and likely force the hand of the state legislature to determine the very meaning of a human being under the law.

Although similar but unsuccessful efforts to pass a federal fetal homicide statute began in 1999,[4] the federal Unborn Victims of Violence Act was enacted in 2004 following the 2002 death of Laci and Conner Peterson in California.[5] When Laci Peterson, eight and a half months pregnant, and her unborn child, Conner, were found dead, the nation mourned their loss. That Laci Peterson was murdered while pregnant heightened the cry for the severest of punishments for her convicted husband, and indeed, he received a capital sentence.[6] Accountability for the death of Conner, however, was not fully allowed by statute in the State of California, where only one murder charge, not two, could be brought. The fetus[7] was not a "person" under the applicable statute.

The Peterson family responded by advocating for a federal law recognizing the death of a fetus as the death of a legal person and full human being. Laci and Conner's Law was thus enacted to create a second crime of murder for the death of the fetus when a pregnant woman is assaulted.[8] As a federal crime, it only applies under limited federal jurisdiction. It would not have applied to the Peterson case had it been a law in force at the time of the murder. Nevertheless, it has served as a template for state legislatures that have subsequently drafted and passed similar statutes under state law.

The current increase in the number of fetal homicide statutes has concerned women's rights activists, including domestic violence victim advocates.[9] Many fetal homicides are a result of spousal homicide. Some women's rights activists fear the legal recognition of fetal homicide will undermine the proper focus on the harm to the slain woman, and place a woman's abortion rights and general right to privacy in jeopardy. While fetal homicide statutes inherently focus on the fetus

4. Unborn Victims of Violence Act, H.R. 2436, 106th Cong. (1999).

5. For a review of the legislative history of the federal Unborn Victims of Violence Acts and competing statutes, such as the Motherhood Protection Act, H.R. 2247, 108th Cong. (2003), *see* Shannon M. McQueeney, *Recognizing Unborn Victims Over Heightening Punishment for Crimes Against Pregnant Women*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 461, 473-479 (2005).

6. For a chronological history of the case, *see* http://www.lacipeterson.com/whatshappening/index.html; http://www.nbc11.com/news/1883355/detail.html (last visited April 1, 2006).

7. "Fetus" is the term used for unborn humans throughout this discussion because that is the term most commonly used in legal decisions concerning their rights. The author recognizes that embryo, fetus and child are medically distinct beings. Where courts and legislatures have narrowly defined a "fetus," such distinctions are noted within.

8. Unborn Victims of Violence Act of 2004, 18 U.S.C.S. § 1841 (Law. Co-op. Supp. 2005).

9. *See, e.g.*, Elizabeth Spiezer, *Recent Developments in Reproductive Health Law and the Constitutional Rights of Women: The Role of the Judiciary in Regulating Maternal Health and Safety*, 41 CAL. W. L. REV. 507 (2005).

as a "person" to be protected, this is by no means a novel approach in American law. For decades, both civil and criminal laws across the country have recognized the "fetus" as a legal person in certain circumstances. Nonetheless, to date, none of these laws has infringed upon the constitutional privacy rights of women to seek a lawful abortion under state law. Fetal homicide statutes uniformly exempt women who obtain lawful abortions from criminal indictment. However, even with the abortion exemption legally secure, it is a persuasive argument that the "rhetoric" of the Unborn Victims of Violence Act "will likely color the abortion debate and the legal battles of the next century."[10]

The concern is how this dichotomy of protection of both mother and child can be sustained. Will the current trend of our precedent ensure the longevity of the woman's right to an abortion as well as the fetus's right to live and be protected from harm, and if so under what policy and rationale? The array of decisions upholding the mother's right to kill the fetus and the fetus's right to live have proffered a diverse number of competing and contradictory rationales. Therefore, in designing laws that address both the interests of the mother and the fetus, it is crucial that legislative intent is clear both in the statutory language and the legislative record. Without clarity, speculation as to the strength of the mother's and/or fetus's rights will be intensely socially divisive.

For example, if an abortion right is sustained based on recognition of the undue burden that an unwanted pregnancy places on a woman, a justification defense to murder may be implied. If the abortion right is viewed as a mother's individual right, a significantly lesser right in the minor child may be implied, in line with the superior status mothers' rights are often given in relation to both fathers' rights and children's rights. In states where fetal rights are given little or no recognition, the rationale behind a woman's abortion right is neither justification nor superseding power, but simply the privacy right over one's own body against state interference.

A state legislature has many choices among the various rationales supporting fetal rights, whether focusing on the fetus as a human being, as a full legal person, as a minor with limited rights, or simply as the "potentiality of life" as expressed by the United States Supreme Court in *Roe v. Wade*.[11] As national trends emerge as to which rationales are more favored, the timeless potential conflict between a

10. Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS 215, 235 (2002).

11. Roe v. Wade, 410 U.S. 113, 162 (1973) (holding the potentiality of human life becomes a compelling state interest at the point of viability) [hereinafter Roe].

mother's rights and her unborn child's rights during pregnancy, the very point at which they are inextricably bonded, will take shape in the legal landscape, challenging our diverse and deep moral convictions about life and death, individual rights and social obligations, and the status of parent and child.

In failing to pass the Unborn Victims of Violence Act in 2005, North Carolina very narrowly avoided the need for clarification of fetal rights in the criminal justice system. Yet, North Carolina is particularly ripe for judicial and legislative attention to this issue. North Carolina currently lacks statutory definitions of a human being and a fetus for criminal application. In addition, since the 1989 North Carolina Supreme Court decision in *State v. Beale*,[12] the North Carolina appellate courts have not reexamined whether to continue to apply the common law definition of a human being as only a live birth for the purpose of homicide statutes. This places North Carolina in a minority of jurisdictions that have not followed the national trend to expand the definition of a human being in homicide statutes to a being alive from the age of conception. A careful consideration of the diverse rationales and potential impact of fetal homicide laws and fetal and women's rights in general should be addressed before the North Carolina legislature again considers enacting fetal homicide legislation.

II. THE HISTORICAL DEVELOPMENT OF FETAL RIGHTS

Understanding the various rationales for balancing maternal and fetal rights requires a review of the historical development of those rationales, including consideration of the role of the state, and the increasing rights of children as they develop.[13] Minors as a whole are viewed as a distinct class of human beings based on their extended period of vulnerability and dependence prior to adulthood.[14] This status has imposed both legal disabilities and special protections for the young, which correspondingly diminish as the child approaches the age of majority. At the discretion of courts and legislatures, the

12. State v. Beale, 376 S.E.2d 1 (N.C. 1989).

13. Numerous authors have outlined the early legal history of fetal rights. *See, e.g.*, Eugene Quay, *Justifiable Abortions - Medical and Legal Foundations (pts. 1 & 2)*, 49 GEO. L.J. 173 (1960), 49 GEO. L.J. 395 (1961); Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y. LAW FORUM 335 (1971); Jeffrey L. Lenow, *The Fetus as Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1 (1983); Mark S. Scott, Note, *Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199 (1996); Michael S. Robbins, *The Fetal Protection Act: Redefining "Person" for the Purposes of Arkansas' Criminal Homicide Statutes*, 84 ARK. L. REV. 75 (2001); JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006).

14. *See generally,* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 3 (2d ed. 2003).

endpoint of legal childhood, the age of majority, as well as the inception of legal childhood and personhood, have changed substantially over time.

For centuries, early common law did not envision the fetus as an individual life until it had "quickened" around 16-18 weeks, that is, when the mother could feel movement in the womb.[15] The traditional Biblical Apostles' Creed reads: "From thence He shall come to judge the quick and the dead."[16] According to Blackstone: "For if a woman is quick with child, and . . . killeth it in her womb; or if any one beat her whereby the child dieth in her body, . . . this though not murder was by the ancient law homicide or manslaughter."[17] At common law, therefore, abortion of fetuses before quickening may not have been legally actionable. Even from early English settlement through the time state legislatures first began to enact anti-abortion laws in the early nineteenth century, as long as "quickening" was the defining line, a mother and other third parties could not be charged for harming a fetus that had not yet quickened.[18] Some scholars have noted that this is not necessarily evidence of early protection of a mother's right or disregard for fetal rights but rather an acceptance of an inability to medically determine the existence of the fetus in earlier centuries.[19]

A review of various legal actions, both civil and criminal, all point to a growing recognition that the fetus has certain rights in certain circumstances. This includes a review of fetal homicide statutes, civil actions on behalf of fetuses, and child endangerment criminal actions for harm to a fetus. No court, however, has granted the fetus the full personhood enumerated in the Fourteenth Amendment of the United

15. EDD DOERR & JAMES W. PRESCOTT (EDS.), ABORTION RIGHTS AND FETAL 'PERSONHOOD' xvi (2d ed. 1990). Note that early Greek, Roman and European law preceding English common law also vigorously debated whether the unborn child had a soul, and whether abortion should be criminalized or made legal. *See Abortion in Historical Context in* THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY 3 (Eva R. Rubin ed., 1994) (citing JAMES HALL, U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, *Abortion: Legal Control*, Report No. IB74019 (1976), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7702).

16. *See, e.g.*, BOARD OF PUBLICATION OF THE METHODIST CHURCH, INC., BOOK OF HYMNS: OFFICIAL HYMNAL OF THE UNITED METHODIST CHURCH § 738 (1961); THE BOOK OF COMMON PRAYER 54 (Charles Mortimer Guilbert, custodian 1979).

17. Britt v. Sears, 277 N.E.2d 20, 25 (Ind. Ct. App. 1972) *citing* 1 WILLIAM BLACKSTONE, COMMENTARIES *129.

18. *But see*, JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006). Note the concept of quickening is a Western construct. For example, prior to the development of British common law, "[i]n China the ages of individuals and their astrological destinies were calculated not from the hour of birth but from the hour of conception." DANIEL J. BOORSTIN, THE DISCOVERERS: A HISTORY OF MAN'S SEARCH TO KNOW HIS WORLD AND HIMSELF 76 (1985).

19. *See* Phillip A. Rafferty, *Roe v. Wade: A Scandal Upon the Court, Part I: The Unsettling of Roe v. Wade*, 7 RUTGERS J.L. & RELIGION 1 (2005).

States Constitution. The United States Supreme Court in *Roe* clearly held that the fetus may have certain rights, but it is not deemed a "person" with the same protections of life granted to born children and adults.[20]

Similarly, in 1981, the North Carolina Supreme Court held in *Stam v. State* that "a human fetus is not a 'person' within the protection guaranteed by Article I, Sections 1 and 19 of the North Carolina Constitution."[21] The Court in *Stam* did not distinguish between different developmental stages; it simply asserted that a fetus at any stage would not be given the full constitutional protection of the following provisions:

> *Article I, § 1. The Equality and Rights of Persons.* We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.[22]
>
> *Article I, §19. Law of the Land; Equal Protection of the Laws.* No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.[23]

Thus, granting certain rights to the unborn does not necessarily imply that they have been given the full constitutional rights of born persons. Generally, the extent of the rights given to unborn children is determined by their developmental stage, the weight of harm to the children born, and the risk of harm to the interests of those who have a duty to care for them and an interest in parenthood. Balancing the competing multiple interests surrounding an unborn child is a complex endeavor, but one which the courts have faced for some time in both criminal and civil actions.

A. *The National Trend to Enact Fetal Homicide Laws*

Most scholars to date have asserted that early English common law did not recognize the fetus *in utero* as a person for the purpose of homicide charges.[24] One explanation is the circular argument that the fetus was not legally defined as a person (i.e., a fetus was not defined

20. Roe v. Wade, 410 U.S. 113, 157 (1973).
21. Stam v. State, 275 S.E.2d 439, 441 (N.C. 1981).
22. N.C. CONST. art. I, § 1.
23. N.C. CONST. art. I, § 19.
24. Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) ("The rule has been accepted as the established common law in every American jurisdiction that has considered the question.").

as a person because the law had not defined it as a person); another is that medical scientific advances had not reached the point where the actual cause of death of the fetus could be proven.[25] As stated in the 16th century:

> [I]f a man killed the child in the womb of its mother: this is not a felony, neither shall he forfeit anything, and this so for two reasons: first, because the thing killed has no baptismal name; second, because it is difficult to judge whether he killed or not, that is, whether the child died of this battery of its mother or through another cause.[26]

Two centuries later, however, as described in 1762, some harm to the fetus became actionable, but not to the same extent as the killing of the pregnant mother, which brought a death sentence:

> . . . [i]f Men strive and hurt a Woman with Child, so that her Fruit depart from her, and yet no Mischief follows, he shall be surely punished, according as the Woman's Husband will lay upon him, and he shall pay as the Judges determine; And if any Mischief follow, then thou shalt give Life for Life.[27]

In the year prior to the State's first statutory enactment of abortion crimes in 1881, the North Carolina Supreme Court described its view of the common law on this issue. It determined that common law provided a misdemeanor crime for inducing abortion after the mother is quick with child, although early common law may have deemed it murder.[28]

Generally under common law in the United States, a fetus could not be "murdered," and its "life" was not valued or even recognized under criminal law. The fetus was viewed as a part of the woman's body, and therefore she was "the only 'person' legally capable of sustaining injury."[29] However, a murder charge could result if the child was born alive and then died as a result of injuries sustained in the womb.[30] "Born alive" usually required that the child had an existence separate from the mother, such as breathing independently after the umbilical cord was cut.[31] A pregnant mother, however, was rarely prosecuted for contributing to or causing the death of an injured fetus

25. Judith C. Rosen et al., *A Legal Perspective on the Status of the Fetus: Who Will Guard the Guardians?, in* ABORTION RIGHTS AND FETAL 'PERSONHOOD' 29 (Edd Doerr & James W. Prescott eds., 2d ed. 1990) [hereinafter Rosen].

26. *Id.* (citing SIR WILLIAM STANFORD (1509-58), Book One, Chap. 13).

27. I WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN, § 16 (4th ed., London, Richardson & Lintot 1762), *reprinted in part in* THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY 6 (Eva R. Rubin ed. 1994).

28. State v. Slagle, 82 N.C. 653, 655 (1880) (per curiam).

29. Britt v. Sears, 277 N.E.2d 20 (Ind. Ct. App. 1972) (referring to the first case of pre-natal injury to a child thereafter born alive, Dietrich v. Northampton, 52 Am. Rep. 242 (Mass. 1884)).

30. *See, e.g.*, State v. Doyle, 205 Neb. 234, 287 N.W.2d 59, 63 (1980).

31. *See, e.g.*, Morgan v. State, 256 S.W. 433 (Tenn. 1923); Lane v. Commonwealth, 248 S.E.2d 781 (Va. 1978).

"born alive."[32] Most mothers garnered sympathy and were found to lack the criminal intent necessary to hold them accountable, as the Courts may have viewed them as ignorant or incapable of care.[33]

Therefore, if a fetus died in the womb, regardless of cause, no criminal liability would attach with respect to harming the fetus. If the fetus was injured but was born alive for however short a time, the abusive father could be charged and convicted for his assault to mother and child. However, the mother was deemed to have acted merely negligently if she, who had the greatest ability to care for the fetus, failed to do so, abandoning the newborn and causing its death. Here we see early legal recognition of the undue burdens placed on women as the sole physical caretakers of human life in its earliest stages. However, the historical responsibility and duties placed on mothers as primary caretakers of children has also imbued them with greater power over the life and death of their children than that of fathers, at least in the earliest stages of life. If a mother no longer wished to be a mother, she could fail to feed the newborn; if the father did the same he would likely end up in prison. This is in direct contrast to earliest Roman law, where *patria potestas* granted the father but not the mother the power of life and death (*jus vitae necisque*) over their children.[34]

With regard to the fate of unwanted newborns, since the 1980s women and men increasingly are held to an equal standard of accountability, with the child's right to live given greatest weight. For example, in 1998, a young mother whose abandonment killed her newborn received a life sentence in prison.[35] However, the burdens faced by young mothers continue to be recognized in mitigation as well. For example, in *State v. Daniel*, the North Carolina Supreme Court recognized such mitigating factors when it reversed a life sentence of a mother whose child died after she had abandoned it.[36]

Some authors attribute New York in 1828 to have been the first American state to criminalize all abortions, with the rationale being in part to protect women from dangerous medical procedures in an age before antibiotics.[37] England's Lord Ellenborough's Act in 1803 had

32. ROBERT D. GOLDSTEIN, CHILD ABUSE AND NEGLECT: CASES AND MATERIALS 320 (West 1999).

33. *See* State v. Osmus, 276 P.2d 469 (Wyo. 1954).

34. R.W. LEE, ELEMENTS OF ROMAN LAW 58 (Sweet & Maxwell Ltd., 2d ed. 1949).

35. Robert Hanley, "Couple Receives Terms in Prison in Baby's Death," N.Y. Times, July 10, 1998, at A1, *cited in* ROBERT D. GOLDSTEIN, CHILD ABUSE AND NEGLECT: CASES AND MATERIALS 321, n.cc (West 1999).

36. State v. Daniel, 354 S.E.2d 216 (N.C. 1987).

37. *See* Rosen, *supra* note 25, at 32. Note that many authors refer to the published research of Eugene Quay when designating the 1820s as the period of America's first abortion statutes. *See also* Quay, *supra* note 13.

preceded American law by statutorily prohibiting abortion several decades earlier.[38] By the end of the 1950s, a majority of states also banned all abortions, with the sole defense to abortion the protection of the life of the mother.[39] However, many jurisdictions applied a lesser penalty if the fetus had not quickened, again recognizing a lesser fetal right based on lack of development. For example, the 1828 New York statute punished the killing of a quick fetus as second degree manslaughter, and the killing of an unquick fetus as a misdemeanor.[40]

Given the common law denial of personhood to fetuses, the current trend towards inclusion of the fetus as a potential homicide victim has been a product of primarily legislative reform since the 1970s. Thus, increased criminal penalties for the killing of fetuses arose at the same time as increased rights of women to lawful abortions. *Roe* was decided in 1973.[41] For example, in 1986 the California legislature enacted a feticide statute under California Penal Code § 187(a), after the California Supreme Court refused to define a stillborn fetus as a lawful victim of homicide. As in many fetal homicide cases, the fetus had died at the hands of its father who had violently assaulted its mother.[42]

Today, the common law view that unborn children are not "human beings" or victims for the purpose of criminal actions continues to exist in only a minority of jurisdictions. For example, the Connecticut Superior Court in *State v. Anonymous*,[43] declined to include the death of an unborn child for the purpose of its murder statute and continued to follow the common law born alive rule. The fetus had died as a result of the shooting and killing of its pregnant mother.

Even in those jurisdictions that began to recognize the fetus as a separate victim, the emphasis was often still on the injury to the mother. For example, in 1983, although acts of domestic violence caused the death of the fetus, the Kentucky Supreme Court primarily focused on the harm to the estranged wife as a victim of assault.[44]

A clear majority of states have now criminalized the killing of a fetus through statutory reform measures. Most state courts have declined to define even a viable fetus as a human being for the purpose of murder, manslaughter, and vehicular homicide crimes without ex-

38. Mark S. Scott, *Note, Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199, 252 (1996).

39. *See* Rosen, *supra* note 25, at 32-33.

40. *Id.* at 32.

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

42. Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970), *superseded by* Cal. Penal Code § 187(a) (2004).

43. 516 A.2d 156 (Conn. 1986).

44. Hollis v. Kentucky, 652 S.W.2d 61 (Ky. 1983), *overruled by* Kentucky v. Morris, 142 S.W.2d 654 (Ky. 2004).

press statutory authority. The courts have argued that to do so would exceed judicial power and deny defendants their due process rights.[45]

In some states, the definition of a murder victim has been expanded to include fetuses.[46] For example, Indiana Code sections 35-42-1-1, -3, and -4 expressly state that murder, voluntary manslaughter, and involuntary manslaughter, respectively, include a viable fetus as a possible victim. In contrast, others have created a separate feticide statute.[47]

Many States, although no longer a majority, continue to follow the pattern of more restrictive early common law and limit criminal liability for harm to the fetus only after it is "quick" or viable. This approach of requiring a certain developmental stage has been criticized by Nan Hunter of the ACLU's Reproductive Freedom Project who argued:

> All such laws lack an objective standard to determine whether the defendant knows or should have known a woman is pregnant. Viability, however, is not a useful concept in the feticide context. Viability occurs at different points in different pregnancies and requires medical expertise to diagnose . . . . Except in the very last stages of pregnancy, no one other than a physician could be expected to know the fetus is viable.[48]

The majority of states no longer require a certain developmental stage of the fetus for a homicide conviction, thus avoiding the difficult evidentiary requirement. The federal Laci and Conner's Law also carries no such limitation.[49] However, they also do not require knowledge of pregnancy, relying on the theory of transferred intent which many argue is a step too far.

The breadth of fetal homicide statutes is directly related to increased attention to domestic violence in the United States. Death and injury to a fetus through violence is a major problem across the country. The leading cause of death of pregnant women is homicide by a domestic violence partner.[50] Pregnancy is a key risk factor for

45. *See, .e.g.,* State v. Trudell, 755 P.2d 511 (Kan. 1988); State v. Green, 781 P.2d 678 (Kan. 1989); State v. Anonymous, 516 A.2d 156 (Conn. 1986) ("This court concludes that the legislature did not intend such a meaning [i.e., to define a fetus as a person in the murder statute] and that if this court were to construe the statute to the contrary, it would exceed its judicial power and deny the accused due process of law.").

46. IDAHO CODE § 18-4001 (including a fetus as a victim of murder); IDAHO CODE § 18-4006 (including a fetus as a victim of manslaughter).

47. *See, e.g.,* CAL. PENAL CODE § 187 (murder of a fetus); GA. CODE ANN. § 16-5-80 (2004) (feticide). Note Georgia had previously permitted fetal homicide if the fetus was quickened.

48. *Cited in* Rosen, *supra* note 25, at 40.

49. Unborn Victims of Violence Act of 2004, 18 U.S.C.S. § 1841 (Law. Co-op. Supp. 2005).

50. VAWnet *Fact Sheet: Domestic Violence and Pregnancy* (Fall 2004), http://www.vawnet.org/Domestic Violence/PublicPolicy/Children/DVPregnancy.pdf.

victims of marital rape.[51] National estimates for assaults against pregnant women range from 1-20%, depending upon a study's definition of assault and the population addressed.[52] In North Carolina, one study of 1997-2000 data found up to 5.5% of all pregnant women in the state experienced physical violence, including being pushed, hit, slapped, and subjected to more severe acts.[53] Once a child is born, domestic violence and child abuse co-occur in 30-60% of cases.[54] Common reasons given for violence against pregnant women are that the male partner or father of the child feels increased stress over the impending birth and an increased loss of control over the mother.[55] Certainly these dynamics of domestic violence influenced state legislatures and the federal government to increase the accountability of abusers of pregnant women.

Although Laci and Conner's Law, also known as the federal Unborn Victims of Violence Act, by no means is the first statute to declare a fetus a person for the purpose of criminal or civil liability, it is the first federal statute to give the fetus the full status of a crime victim, equal to that of born persons. The 2004 federal Unborn Victims of Violence Act[56] included both Laci and Conner's Law as well as its military law counterpart in 10 U.S.C. § 919a.[57] Their addition is consistent with the trend towards enactment of state fetal homicide statutes across the nation. Its federal jurisdiction provides enhanced status to the rights of fetal homicide victims.

Thus far unchallenged in federal court, Laci and Conner's Law has been cited in support of upholding state recognition of the fetus as a homicide victim. In *Commonwealth v. Morris*,[58] the Supreme Court of Kentucky acknowledged the enactment of the federal Unborn Victims of Violence Act and the state trend to abandon the common law born alive rule in favor of a rule that states life begins at fertilization and conception: "For any purpose other than abortion, many jurisdic-

51. *See* R.K. BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS (Sage, 1996).

52. L.E. Saltzman et al., *Physical Abuse Around the Time of Pregnancy: An Examination of Prevalence and Risk Factors in 16 States*, 7 MATERNAL & CHILD HEALTH J. 31 (2003).

53. Matt Avery, *Physical Violence Against Pregnant Women in North Carolina: 1997-2000* (Statistical Brief No. 25, State Center for Health Statistics, NC Dept. of Health and Human Services, May 2003), *available at* http://www.schs.state.nc.us/SCHS/pdf/SB25.pdf.

54. A.E. Appel & G.W. Holden, *The Co-occurrence of Spouse and Physical Child Abuse: A Review and Appraisal* 12 J. OF FAMILY PSYCHOLOGY 578 (1998).

55. Pan American Health Organization, World Health Organization *Fact Sheet: Domestic Violence During Pregnancy* (2004), *available at* http://www.paho.org/English/ad/ge/VAWpregnancy.pdf

56. 18 U.S.C.S. § 1841 (West 2004).

57. M.C.L. 750.90a-f (2004). Note that the Military Code had already provided federal penalties for intentional, wanton or wilful disregard for the consequences causing miscarriage, stillbirth, or aggravated physical injury to an embryo or fetus.

58. Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004).

tions have abandoned viability because it has no magic sense in identifying the beginning of a person's life."[59]

From an international perspective, the American Convention on Human Rights is the only international human rights instrument to contemplate the right to life from the moment of conception, rather than from birth.[60] As stated in Article 4, "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Most related international instruments have affirmatively respected a woman's right to abortion.[61]

In the United States, legislative efforts to overturn *Roe* and provide fetuses with full constitutional rights have continued to be unsuccessful. Immediately following the *Roe* decision in 1973, two amendments to the Constitution were proposed that would have defined a "person" to include unborn humans, both of which failed. Section 1 of the Buckley Amendment proposed:

> With respect to the right to life, the word 'person', as used in this article and in the Fifth and Fourteenth Amendments to the United States Constitution, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.[62]

The Buckley Amendment did contain an exception for risk of death to the mother.[63] The second proposed amendment was drafted by Representative Jesse Helms from North Carolina and carried no exceptions for the life or health of the mother: "Neither the United States nor any State shall deprive any human being from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws."[64]

Thirty years later, the federal government has successfully enacted by statute, if not by constitutional amendment, the Unborn Victims of Violence Act, which recognizes, for criminal law purposes, that a fetus has a right to life against the violence of third parties. Yet a woman's constitutional right to abortion in the first trimester remains intact.

In turn, state laws holding defendants accountable for crimes against the unborn have also withstood a barrage of constitutional challenges. For example, as a matter of first impression in Penn-

59. *Id.* at 669.

60. Human Rights Watch, *International Human Rights Law and Abortion*, *at* http://hrw.org/reports/2005/argentina0605/7.htm (2004).

61. *See* Section III.

62. The Buckley Amendment, S.J. Res. 119, 93rd Cong. § 1 (1974).

63. *Id.* at § 2.

64. The Helms Amendment, S.J. Res. 130, 93rd Cong. (1974).

sylvania, the Crimes Against the Unborn Child Act was held by the Superior Court of Pennsylvania in *Commonwealth v. Bullock*[65] to be constitutionally sound on a number of grounds. Matthew Bullock confessed to the police that he had strangled his girlfriend, Lisa Hargrave, who was then twenty-two to twenty-three weeks pregnant.[66] He was found guilty, but mentally ill, of murder in the third degree of Lisa Hargrave and guilty, but mentally ill, of voluntary manslaughter in the death of the unborn child. He was sentenced to a twenty to sixty year term of imprisonment.[67]

The first constitutional challenge in *Bullock* asserted that the fetal homicide statute violated substantive due process in its vagueness and overbreadth by using the term "unborn child," which in its definition does not include a viability element.[68] The defendant argued the viability element was necessary to ensure that the fetus was sufficiently developed to permit the causation element to be proved. The court reasoned that the statutory definition of the term "unborn child" as "an individual of the species homo sapiens from fertilization until live birth" was clear, where current medical technology could define whether the defendant's actions caused the death of the fetus, as the medical evidence had shown in this case.[69]

The second challenge to the constitutionality of the Pennsylvania feticide statute also asserted overbreadth because the statute did not define a "living" organism, and a defendant could not be held criminally liable for destruction of a non-living organism.[70] Again, the court denied the overbreadth claim, relying on current medical technology to determine whether the fetal organism was alive; if it was not alive, then the defendant would not be liable.[71]

The third constitutional challenge was based on an equal protection claim that the statute criminalized only the actions of males, and not similarly situated females.[72] As only a pregnant woman was exempted from liability with regards to her own unborn child, the *Bullock* Court determined that a man could never be similarly situated to a pregnant woman. In addition, the woman's constitutional right is a liberty interest in her privacy, not a right to harm her unborn child; therefore, under a rational basis analysis, and following *Roe v. Wade*, the Court held "without hesitation" that the Crimes Against the Unborn Child

65. Commonwealth v. Bullock, 868 A.2d 516, (Pa. Super. Ct. 2005) (reviewing the Crimes Against the Unborn Child Act, 18 PA. CONST. STAT. ANN. § 2601 *et seq.* (West 2005)).
66. *Id.* at 520.
67. *Id.* at 521.
68. *Id.* at 522.
69. *Id.*
70. *Id.* at 522-23.
71. *Id.* at 523.
72. *Id.* at 524.

Act is rationally related to the government's interest in protecting the potentiality of human life.[73]

Thus, a majority of jurisdictions, both state and federal, have now successfully enacted and sustained fetal homicide laws to include the death of the unborn child, defining the unborn child from the age of conception or a later development stage such as a quick or viable fetus. Without such statutory reform, most state courts have refused to veer from the common law born-alive rule, as North Carolina refused in *State v. Beale*.[74] Of the twenty-one states that clearly include as a victim of homicide a human being from the age of conception, at least nine of those states have been adopted by statutes enacted since 2000.[75]

Below is a current state-by-state listing of the various approaches toward fetal homicide enactment:[76]

States with fetal homicide laws where fetuses are victims from conception

Arizona[77]
Idaho[78]
Illinois[79]
Kentucky[80]
Louisiana[81]
Michigan[82]
Minnesota[83]

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73. *Id.* at 524-25.

74. State v. Beale, 376 S.E.2d 1 (N.C. 1989).

75. Arizona, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, West Virginia, and Texas.

76. *See also*, Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (2006). The author was unable to conclusively determine the state of the law as to recognition of the fetus for the purpose of homicide in the following state jurisdictions: Alaska, Colorado, Delaware, Hawaii, Maine, Montana, Nevada, and Oregon.

77. ARIZ. REV. STAT. § 13-604 (2005), 2005 Ariz. Sess. Laws 188.

78. 2002 Idaho Sess. Laws 330.

79. 720 ILL. COMP. STAT. § 5/9-1.2 (1993) (intentional homicide); United States *ex rel.* Ford v. Ahitow, 888 F. Supp. 909 (C.D. Ill. 1995), People v. Campos, 592 N.E.2d 85 (Ill. App. 1992) *cert. denied*, 514 U.S. 1024 (1995).

80. Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004), *overruling* Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983); Ky. Rev. Stat. § 507A (2004).

81. State v. Keller, 592 So. 2d 1365 (La. Ct. App. 1 Cir. 1991); LA. REV. STAT. ANN. § 14:32.7 (West 2005) (feticide); State v. Smith, 676 So. 2d 1068 (La. 1996), *reh'g denied*, 679 So. 2d 380 (La. 1996).

82. MICH. STAT. ANN. §§ 750.90 (application to pregnant victims), 28.555 (manslaughter) (Michie 2005), 750.322 (manslaughter, quick); People v. Kurr, 253 Mich. App. Ct. 317 (2002).

83. MINN. STAT. ANN. §§ 609.21 (West 1999) and 609.266 (West 1987); State v. Merrill, 450 N.W.2d 318 (Minn. 1990), *cert. denied*, 496 U.S. 931 (1990); State v. Bauer, 471 N.W.2d 363 (Minn. Ct. App. 1991); State v. Noble, 669 N.W.2d 915 (Minn. 2003). For an analysis of Minnesota's Crimes Against Unborn Children Act and judicial interpretation upholding its constitu-

Mississippi[84]
Missouri[85]
Nebraska[86]
North Dakota[87]
Ohio[88]
Oklahoma[89]
Pennsylvania[90]
South Dakota[91]
Utah[92]
Virginia[93]
West Virginia[94]
Wisconsin[95]
Texas[96]
Wyoming[97]

Note that the legal expansion of the definition of a homicide victim to include the unborn fetus has generally been accomplished through statutory reform redefining a "person" or "human being." However, Kentucky provides the exception to the rule. In *Commonwealth v. Morris*,[98] the Supreme Court of Kentucky without explicit direction by the legislature overruled decades of adherence to the common law

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tionality see Michael Holzapfel, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL'Y 431, 458-63 (2002).

84. 2004 Miss. Laws 521.

85. MO. ANN. STAT. §§ 1.205, 565.024 (West 2006) (murder and manslaughter); State v. Holcomb, 956 S.W.2d 286 (Mo. Ct. App. 1997); State v. Knapp, 843 S.W.2d (Mo. 1992) (MO. REV. STAT. 1.205.1 stating life begins at conception and unborn children have protected legal interests applicable to involuntary manslaughter).

86. NEB. REV. STAT. § 28-391 (2002) (murder), § 28-325 (2005).

87. N.D. CENT. CODE § 12.1-17.1-02 (2005).

88. OHIO REV. CODE ANN. § 2903.01 (Anderson 1996); *but see* State v. Winston, 593 N.E.2d 308 (Ohio 1991) (viable unborn fetus is part of the mother until born); State v. Alfieri, 724 N.E.2d 477 (Ohio 1998) (upheld without viability).

89. OKLA. STAT. ANN. tit. 21 §§ 713 (West 1991) (manslaughter if quick); 701.7 (1998 Supp.) (first degree murder if 24 weeks and medical testimony of viability); Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994) (viability); McCarty v. State, 41 P.3d 981 (Okla. 2002); Birdine v. State (2004); 2005 Okla. Sess. Laws 200 (2005 HB 1686) extends to "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, morula, blastocyst, embryo and fetus.").

90. 18 PA. CONS. STAT. ANN. § 2601-09 (1998).

91. S.D. CODIFIED LAWS CODE ANN. §1.07.

92. UTAH CODE ANN. § 76-5-201 (Supp. 1998); 2002 Utah Laws 327.

93. VA. CODE ANN. § 18.2-32.2 (2004).

94. W.VA. CODE § 61-2-30; 2005 W. Va. Acts 241.

95. WIS. STAT. ANN. § 939.75 (West 1998); State v. Black, 526 N.W.2d 132 (Wis. 1994).

96. Prenatal Protection Act of 2003, S.B, 319, 78th Regular Session (Tx. 2003).

97. Goodman v. State, 601 P.2d 178 (Wyo. 1979) (prosecution for homicide of fetus and pregnant woman not double jeopardy).

98. Commonwealth v. Morris, 142 S.W.2d 654 (Ky. 2004), *overruling* Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).

born alive rule. The Court reasoned that medical advancements had made obsolete the former rationales for the born alive rule, and that increased recognition of fetal rights in other legal arenas justified the change in the judiciary's view regarding a criminal application:

> It is inherently illogical to recognize a viable fetus as a human being whose estate can sue for wrongful death and who cannot be consensually aborted except to preserve the life or health of the mother, but not as a human being whose life can be nonconsensually terminated without criminal consequences. We thus overrule Hollis and hold that a viable fetus is a 'human being' for purposes of KRS 500.080(12) and the KRS Chapter 507 homicide statutes.[99]

However, nine days after the oral argument was heard in Morris, the Kentucky General Assembly adopted House Bill 108, creating the new offense of fetal homicide, and defining the unborn child as "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."[100] Thus, while the Supreme Court of Kentucky significantly expanded fetal rights for viable fetuses, the state legislature expanded them even more to apply to all fetuses.

States with fetal homicide laws where fetuses are victims at certain stages of development

Arkansas[101]
California[102]
Florida[103]
Georgia[104]
Indiana[105]
Iowa[106]
Maryland[107]

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99. *Id.* at 660.

100. *Id.* at 661, citing HB 108 § 1(c) (2004) (codified as KY. REV. STAT. ANN § 507A (Michie 2004)).

101. ARK. CODE § 5-1-102(13).

102. CAL. PENAL CODE § 187(a); People v. Davis, 872 P.2d 591 (Cal. 1994) (applying murder of a "fetus" as defined as "beyond the embryonic stage of seven to eight weeks"), People v. Dennis, 950 P.2d 1035 (Cal. 1994) (allows inclusion of fetal homicide in capital sentencing); People v. Valdez, 126 Cal. App. 4th 575, 23 Cal. Rptr. 3d 909 (2005).

103. FLA. STAT. ANN. § 782.09 (West 1999).

104. GA. CODE ANN. § 16-5-80 (1996, revised in 2004) (quickening); Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987); Brinkley v. State, 322 S.E.2d 49 (Ga. 1984); Kempson v. State, 278 Ga. 285 (2004).

105. IND. CODE ANN. § 35-42-1-1 (murder against viable fetus); Horn v. Hendrickson, 824 N.E.2d 690 (Ind. 2005).

106. IOWA CODE ANN. § 707.7 (West 2004), § 707.8 (West 2005) (viable).

107. 2005 HB 398 (amending MD. ANN. CODE § 2-103) (viable).

Massachusetts[108]
Rhode Island[109]
South Carolina[110]
Tennessee[111]
Washington[112]

States Continuing to Follow the Common Law Born Alive Rule

Alabama[113]
Connecticut[114]
New Jersey[115]
New York[116]
Vermont[117]

Note that in the minority of states that continue to follow the common law born alive rule for homicide, the intent of the legislature has been an imperative focus of the courts' decisions. As the Supreme Court of Vermont explained in *State v. Oliver*:

> As far back as the 17th century, it was the prevailing view under the common law that only living human beings could be the victims of homicide. The killing of a fetus did not constitute criminal homicide unless it was born alive and later died of injuries inflicted prior to birth . . . . In light of this rule, we interpret the legislature's intent in using the word 'person' in § 1091(c) as limiting the application of the statute to circumstances involving the death of individuals who have already been born.[118]

States with a focus on indirect harm "resulting" to the fetus or a focus on harm to the pregnant woman

Kansas[119]

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108. Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (viability).

109. R.I. GEN. LAWS § 11-23-5 (1994).

110. McKnight v. South Carolina, 576 S.E.2d 168 (S.C. 2003), *cert. denied,* 540 U.S. 819 (2003) (a viable fetus is legally a person); State v. Horne, 319 S.E.2d 703 (S.C. 1984); State v. Ard, 505 S.E.2d 328 (S.C. 1998), *overruled in part by* State v. Shafer, 531 S.E.2d 524 (S.C. 2000).

111. TENN. CODE ANN. § 39-13-201 (2004).

112. WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West Supp. 1999) (quick); Baum v. Burrington, 119 Wash. App. 36 (2003).

113. Clarke v. State, 23 So. 671 (Ala. 1898).

114. State v. Anonymous, 40 Conn. Supp. 498 (Conn. Super. Ct. 1986).

115. Interest of S., 440 A.2d 1174, (N.J. Juv. & Dom. Rel. Ct. 1980), *aff'd by* 440 A.2d 1144, (N.J. Super. Ct. 1981).

116. People v. Hall, 158 A.D.2d 69 (1st Dep't 1990).

117. State v. Oliver, 563 A.2d 1002 (Vt. 1989) (vehicular homicide).

118. *Id.* at 627-628, 563 A.2d 1003 (1989).

119. State v. Trudell, 243 Kan. 29, 755 P.2d 511 (1988) (viable fetus is not a human being for the purpose of the vehicular homicide statute); KAN STAT. ANN. § 21-3440 (2005) (injury to a pregnant woman sentencing enhancement).

New Hampshire[120]
New Mexico[121]
North Carolina[122]

Note that while New Hampshire and New Mexico enacted specific crimes for harm to a pregnant woman, Kansas and North Carolina chose to enact sentencing enhancements rather than separate crimes for such harm.[123]

B. *Civil Suits By and on Behalf of the Fetus*

Although the criminal trend is of relatively recent origin, the civil expansion of fetal rights occurred somewhat earlier. Nevertheless, similar to the criminal assault statutes, the first legal recognition of fetal rights in civil actions required that the fetus had rights but could only assert them if born alive.[124] For example, since the nineteenth century, the inheritance rights of fetuses have been recognized, as long as the fetus is eventually born alive.[125] The history of the inheritance rights of the fetus in North Carolina mirrors much of the debate today over legally defining life and personhood. In 1853, the Supreme Court of North Carolina's decision in *Dupree v. Dupree*[126] determined whether a fetus six days after conception could be gifted the deed of a slave named Rose by the fetus's great-grandmother. In denying the fetus rights to a gift, the Court followed the common law requirement that homicide victims be born alive: "[i]f a woman be quick with child, and by a potion killeth it in her womb, or if a man beat her, whereby the child dieth in her body, this is a great misprison, but no murder."[127] While Justice Pearson for the majority posed the following: "the question is, can an atom, a thing in its mother's womb, six days old, acquire a right of property by a common law conveyance?"; the dissent of Justice Rodman replied: "It is just as capable of assenting as an infant just born, or an idiot, and just as capable of taking

120. N.H. REV. STAT. ANN. § 631:1(I)(c) (2005) (crime of assault resulting in miscarriage or stillbirth).

121. N.M. STAT. ANN § 30-3-7 (Michie 2005) (crime of injury to pregnant woman as a third degree felony).

122. N.C. GEN. STAT. § 14-18.2 (2005) (sentencing enhancement for injury to a pregnant woman causing miscarriage or stillbirth).

123. *See* Section IV for discussion of North Carolina's approach to fetal homicide.

124. *See* Bonbrest v. Katz, 65 F. Supp. 138 (D.C. Cir. 1946) (infant recovers medical malpractice damages for injuries sustained in the womb); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Britt v. Sears, 150 Ind. App. 487, 495, 277 N.E.2d 20, 25 (1972) (in the year prior to *Roe,* provides a thorough national comparative review of wrongful death approaches to fetal deaths).

125. *See* Cowles v. Cowles, 13 A. 414 (Conn. 1887); Christian v. Carter, 137 S.E. 596 (N.C. 1927).

126. Dupree v. Dupree, 45 N.C. Busb. Eq. 164, 59 Am. Dec. 590 (1853).

127. *Id.*

possession of it. A guardian or friend only, in any of the cases can protect the property."[128]

Since that time, however, North Carolina General Statute section 41-5 has expressly stated for decades that the unborn infant may take by deed or writing.[129] In applying the statute, the Supreme Court of North Carolina asserted in 1949 that "'[b]iologically speaking, the life of a human being begins at the moment of conception in the mother's womb, and in the law of inheritance this view is adopted, . . .'."[130]

Similarly, tort claims on behalf of fetuses harmed in the womb were uniformly denied under common law, partly on the basis that the cause of harm could not be determined medically at that time, which was also a rationale for the early denial of criminal liability.[131] The separate existence of the fetus was also not generally recognized for civil personal injury claims, where the fetus was considered a part of the mother.[132]

Over a century later, the concept of guardianship proposed in the dissent of Justice Rodman in *Dupree* arose in a 1981 dispute between the mother and the State over the right to an abortion in Georgia, where a guardian was appointed for the unborn child. The Supreme Court of Georgia upheld the lower court's ruling that "as a matter of fact the unborn child is a human being fully capable of sustaining life independent of the mother and ordered the mother to undergo a caesarian section without her consent."[133]

A majority of jurisdictions today permit recovery for the wrongful death of a fetus.[134] North Carolina's Wrongful Death Act under N.C.G.S. § 28A-18-2 has been interpreted to include claims on behalf of a viable fetus *en ventre sa mere*.[135] The distinction of viability was addressed because the wrongful death statute indicates the death of a "person," which the North Carolina Supreme Court in *DiDonato v.*

128. *Id.*

129. N.C. GEN. STAT. § 41-5 (2005).

130. Mackie v. Mackie, 52 S.E.2d 352, 354 (N.C. 1949); *see also* Campbell v. Everhart, 52 S.E. 201 (N.C. 1905).

131. *See* Stanford v. St. Louis – San Francisco Ry. Co., 108 So. 566 (1926).

132. *See* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

133. Jefferson v. Griffin Spaulding City Hospital, 274 S.E.2d 457 (Ga. 1981). Note that the mother was never actually forced to undergo the caesarian section. She gave birth safely and vaginally before the decision was finally rendered. Rosen, *supra*, note 25, at 29.

134. For an analysis of the history of the wrongful death statutes and recognition of a fetus as a person in North Carolina, see Tony Hartsoe, *Person or Thing – In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169 (1995).

135. *See* Johnson v. Ruark Obstetrics and Gynecology Assocs., 365 S.E.2d 909 (N.C. Ct. App. 1988) (physician's failure to treat mother's diabetes caused fetus to die *in utero* of malnutrition); DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987). *But see* Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985), *cert. denied* 479 U.S. 835 (1986) (North Carolina does not recognize a wrongful life or wrongful birth claim with respect to medical negligence for failure to inform parents that fetus had Down's Syndrome).

Wortman determined in 1987 must be someone who possesses "human life":

> A viable fetus, whatever its legal status might be, is undeniably alive and undeniably human. It is, by definition, capable of life independent of its mother. A viable fetus is genetically complete and can be taxonomically distinguished from non-human life forms.[136]

This rationale has been asserted by state courts for decades. As early as 1971, the West Virginia Supreme Court of Appeals asserted that a fetus is a person for the purpose of the wrongful death statute "in view of the fact that 'biologically speaking' such a child is, in fact, a presently existing person, a living human being."[137] Yet even in those States that deny recovery for fetal wrongful death, the decisions have not argued that the fetus cannot be a person under the law, but that the common law and statutory law have not granted the Courts authority to define the fetus as a person.[138] This again leaves the door open to increased fetal rights through legislative reform.

In federal benefits cases, the greater focus on parental rights is less clear. The fetus has been recognized at times and not at others through the vagaries of statutory reform. For the purpose of AFDC benefits, the fetus was originally included in the definition of a needy dependent as one under the age of 21, until the United States Supreme Court in 1975 held that States were not required to interpret the statute in this way.[139] By 1985, eligibility for AFDC benefits and prenatal care was primarily determined by focusing on the needs of the pregnant mother, rather than identifying the fetus as a dependent in need of care.[140]

Civil recognition of fetal rights may have had a longer and more varied history than recognition in criminal law, as seen in the review of inheritance, wrongful death, and inheritance actions. Nevertheless, the recognition of fetal personhood in civil statutes should not necessarily influence the trend toward a similar recognition in criminal actions. The Ohio Supreme Court in *State v. Dickerson* expressly refused to apply the civil definition of a person to a criminal statute, even though the civil wrongful death statute would have allowed re-

136. DiDonato, 358 S.E.2d at 491; cf. *Stetson v. Easterling*, 161 S.E.2d 531 (1968) (claim for wrongful death of viable fetus upheld).

137. Baldwin v. Butcher, 184 S.E.2d 428, 432 (W. Va. 1971).

138. *See, e.g.*, Justus v. Atchison, 565 P.2d 122 (Cal. 1977) (use of the word "person" indicates legislative intent to exclude fetuses as wrongful death victims).

139. Burns v. Alcala, 420 U.S. 575 (1975) (interpreting 42 U.S.C. § 606(a) (1976)).

140. *See* Lewis v. Grinker, 965 F.2d 1206, 1211 (2d Cir. N.Y. 1992); Lewis v. Thompson, 252 F.3d 567 (2d Cir. N.Y. (2001) (States can deny prenatal care to undocumented illegal resident mothers).

covery for the death of the fetus.[141] "It is one thing to mold, change and even reverse established principles of common law and civil matters. It is quite another thing to do so in regard to criminal statutes."[142] Today, state crimes are generally matters of statutory enactment within a comprehensive criminal justice scheme to ensure fairness, equity, and accountability for criminal intent and harm. As a result, most state courts require clear legislative intent to expand interpretation of criminal statutes, including an expansion of the definition of a crime victim to include the unborn. While expanded fetal rights in a civil context may color the fetal homicide debate, ultimately most states have required legislative reform to expand the rights of fetal crime victims.

C. *Child Endangerment Actions for Risk to the Fetus*

As a hybrid of both civil and criminal approaches to fetal harm, child endangerment laws are more likely to impact the growth of fetal homicide statutes. Statutory child abuse and neglect statutes have historically not included unborn children. However, in line with the general trend toward (1) increased protections of the fetus and the child, (2) heightened duties of care required by parents, and (3) increased State intervention on behalf of child rights, state legislatures have begun to reform their civil and criminal statutes to include risks to the fetus as a form of child abuse and neglect.[143] Much of this shift to expand the duties of parents to the unborn has occurred within the last five years.

As early as 1981, the New Jersey legislature specifically included the fetus as a child protected from neglect.[144] Two decades later in South Carolina, Regina McKnight received a twelve-year active prison sentence in 2003 for smoking crack cocaine resulting in the birth of a stillborn child.[145] The court applied a 1992 statute for child abuse and neglect to a child younger than 11 "under circumstances manifesting an extreme indifference to human life."[146]

141. State v. Dickerson, 275 N.E.2d 599 (1971); *see also* People v. Guthrie, 293 N.W.2d 775 (1980) (refusing to permit application of a wrongful death definition of a fetus as a person to a criminal statute); *contra* Commonwealth v. Morris, 142 S.W.2d 654 (Ky. 2004), as discussed above.

142. Dickerson at 28 Ohio S.2d 65, 70, 275 N.E.2d 599.

143. For a thorough analysis of child endangerment laws applied to pregnant women, *see* Cheryl E. Amana, *Drugs, AIDS and Reproductive Choice: Maternal-State Conflict Continues into the Millennium*, 28 N.C. CENT. L.J. 32 (2005). *See also,* Robert D. Goldstein, *Is There Jurisdiction Over A Fetus?*, CHILD ABUSE AND NEGLECT: CASES AND MATERIALS 302-321 (West 1999).

144. N.J. STAT. ANN. § 3:4C-11 (West 1981).

145. State v. McKnight, 576 S.E.2d 168 (S.C. 2003), *cert. denied,* 540 U.S. 819 (2003).

146. *Id.* at 176.

In contrast, in 2001 the Oklahoma Court of Criminal Appeals reversed the child neglect conviction of a pregnant woman who was found in a methamphetamine laboratory trailer.[147] The defendant mother had tested negative for narcotics and eventually gave birth to a healthy son. In *Ferguson v. Charleston*, the United States Supreme Court held that a hospital policy to collect evidence of drug use from all pregnant women's bodies for possible criminal prosecution violated the mothers' Fourth Amendment rights to a reasonable expectation of privacy as a patient in medical setting.[148]

In child endangerment actions by the State, the balance between State, maternal, and fetal rights during pregnancy is precarious. No clear trends towards affirmation of maternal rights exists as it does in fetal homicide excepts for lawful abortion. The reality is that a mother may be prosecuted for negligently harming her unborn child, yet she is immune from prosecution for killing the unborn child in a lawful abortion. This is where the future legal debate on fetal and maternal rights will likely come to a head in the near future. Any consideration of fetal homicide reform must consider the impact on women's rights and fetal rights for actions that cause both lethal and non-lethal harm to the fetus.

In 2004, the Court of Appeal of California upheld the termination of parental rights of both parents of a boy, Travis, who had been exposed to multiple forms of abuse, including substance abuse by both parents.[149] One factor cited was that Travis's premature birth was due to the mother's poor prenatal care and a "hostile environment" created by both the mother and the father of the fetus.[150] While this may seem a reasonable approach to many, the pendulum for child endangerment may swing much farther. In 2004, Utah became the first State to press homicide charges against a mother who had refused to undergo a cesarean section, causing the stillborn death of one of her two twin fetuses.[151]

Most failure to protect charges involve drug use and failure to seek adequate health care during pregnancy. Fetal homicide bills, however, invoke a fear among domestic violence victim advocates that failure to protect charges will not only address a mother's unjustifiable negligent prenatal care, but her fully justifiable failure to protect the

147. In re Unborn Child of Starks, 18 P.3d 342 (Okla. 2001).

148. Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001).

149. In re Travis. C., No. A103237, 2004 WL 670928, at *6 (Cal. Ct. App. April 1, 2004).

150. *Id.* at *1.

151. *See* Monica K. Miller, *Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act?*, 15 HEALTH MATRIX 383 (2005) (The mother pled guilty to a child endangerment charge).

fetus from domestic violence as well.[152] Even women who receive threats to kill by the abuser or are severely harmed when they try to leave are already subject to increased scrutiny by the courts when their born children are also at risk.[153]

A major concern of the child endangerment approach to a pregnant woman who fails to adequately care for her growing fetus is that it increases punishment of mothers who essentially need help. The moral conflict cannot be ignored when a State increases punitive measures against pregnant mothers who do not seek help, in part because the State fails to make available sufficient treatment options. "Despite the fact that drug treatment programs tailored for pregnant and parenting women help them overcome their addiction problems, greatly improve birth outcomes, and are cost-effective, such programs are extremely rare and overburdened."[154]

D. *The Limited Scope of Fetal Rights in Abortion Law*

The pattern of expansion of human rights has included increased rights generally for a diversity of adults, as well as the rights of born children and now unborn children. Historically in the United States, many classes of born persons have been denied the status of "person" under the law, a matter of national shame for us today. For example, the Supreme Court of Appeals of Virginia asserted in 1858:

> [S]o far . . . as civil rights and relations are concerned, the slave is not a person, but a thing. The investiture of a chattel with civil rights or legal capacity is indeed a legal solecism and absurdity. The attribution of legal personality to a chattel slave . . . implies a palpable contradiction in terms.[155]

However, in the 150 years since this decision, the trend towards greater civil rights under the law has been one of consistent inclusion, on the basis of race, gender, class, property ownership, sexual orientation, and age. Where constitutional law continues to distinguish between full "personhood" of citizens and "personhood" to a lesser or limited degree, is among the classes of persons deemed "incompetent": minors and persons with cognitive disabilities, whether genetic

152. North Carolina Coalition Against Domestic Violence, *NCCADV Position Statement: Fetal Murder Legislation* (2006) ("The domestic violence community is concerned that this legislation is one step closer to the possibility that a pregnant victim of domestic violence could be held responsible for the death of her child because she did not 'protect' her unborn child from a batterer.").

153. *See* Nicholson v. Scoppetta, 116 F.App'x. 313 (2d Cir. 2004) (preventing State overreaching in addressing children exposed to domestic violence).

154. Center for Reproductive Rights Briefing Paper, *Punishing Women for Their Behavior During Pregnancy: An Approach That Undermines Women's Health and Children's Interests*, 7 (Sept. 2000), *at* http://reproductiverights.org/pdf/pub_bp_punishingwomen.pdf.

155. Bailey v. Poindexter's Ex'r, 55 Va. (14 Gratt.) 132 (1858).

or acquired through age or injury. The rationales underlying the distinctions are varied and complicated. We see in fetal homicide charges, civil suits and child endangerment actions a trend towards both increased recognition of fetal rights and increased recognition of the duties and rights of the parents of the fetus.

Roe constitutionally protected a woman's right to privacy in her unlimited choice to abort a fetus in the first trimester of its being, following the historical emphasis on the "quickened" fetus as a person. Although the nature of a woman's abortion right will be discussed in greater depth in Section III below, the United States Supreme Court's view of fetal rights since *Roe* has displayed an increasing willingness to define certain rights in the fetus from conception.[156]

In *Roe v. Wade*, the Supreme Court did not expressly state that the fetus had individual constitutional rights; rather, as Justice Blackmun argued for the majority, the State held a legitimate interest in protecting the "potentiality" of life among its citizenry.[157] The Court also held that its prior decisions had not given a fetus the status of full constitutional "personhood" as it did born humans, providing that "the unborn have never been recognized in law as persons in the whole sense."[158] Nevertheless, the combination of the "potentiality" language and the silence over whether partial "personhood" could be recognized, and has left open the door for argument as to whether a fetus holds at least limited human rights under the Constitution.

Indeed, in the following decade in the 5-4 decision of *Webster v. Reproductive Health Services*, the United States Supreme Court upheld a Missouri law that defined "human life" as beginning at conception in order to restrict access and the right to an abortion.[159] The Court continued to uphold *Roe*, but declared "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability."[160] Thus, States took this to mean that they were granted leave to pass additional restrictive laws upon abortion, as long as the basic rights to abortion expressed in *Roe* were upheld.[161] Justice Stevens disagreed, arguing in his dissent in *Webster* that "a woman's constitutionally protected liberty encompasses the right to act on her own belief that . . . until a seed has acquired the powers of sensation and movement, the life of a human

156. Webster v. Reprod. Health Services, 492 U.S. 490 (1989).

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

158. *Id.*

159. *Webster*, 492 U.S. at 494.

160. *Id.* at 519.

161. EDD DOERR & JAMES W. PRESCOTT, ABORTION RIGHTS AND FETAL 'PERSONHOOD' viii (2d ed. 1990).

being has not yet begun."[162] Nonetheless, no majority decision of the U.S. Supreme Court has since taken the position that Justice Stevens asserted: that even in its early stages a fetus is not a human being. Subsequent state decisions have interpreted *Roe* and *Webster* to permit granting rights and criminal justice protections to fetuses from conception as long as the basic right to abortion is a lawful exception to harming the fetus.[163] As the Minnesota Supreme Court asserted in *State v. Merrick*: "*Roe v. Wade* . . . does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."[164] As discussed in Part II(C), a greater infringement on *Roe* has occurred in child endangerment actions by the State against pregnant mothers.

Nevertheless, the right to abortion is only one of several related rights of potential parents. For example, the constitutional right to privacy includes the right to refuse to create new life. Across the nation, adults and minors, both male and female, may confidentially obtain contraception by choice.[165] Here is the American limit to the legal protections for the "potentiality" of life. While eggs and sperm are respectively present and alive in the female and male human bodies, obviously essential to the "potentiality" of life, no state has attempted to deny childbearing human beings the right of access to contraception since the U.S. Supreme Court upheld the right to contraception in marriage in 1965.[166]

Therefore, the potential parts of a fetus prior to conception wholly lack constitutional protection. Coupled with *Roe's* focus on the development and viability of the fetus limiting a pregnant woman's right to privacy, jurisprudence for the past several decades has deemed conception essential to the establishment of personhood with corresponding constitutional rights. This outer limit to legal personhood implies the creation of personhood at conception, whether one argues that it is a partial or increasing personhood until viability or birth, or that it is full personhood at conception.

The U.S. Supreme Court has declined to affirmatively state when life or viability begins:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this

162. *Webster*, 492 U.S. at 572.

163. *See supra* Section II(A) (*discussing* Commonwealth v. Bullock, 868 A.2d 516 (Pa. Super. Ct. 2005)).

164. State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990), *cert. denied*, 496 U.S. 931 (1990).

165. Carey v. Population Services Int'l, 431 U.S. 678 (1977).

166. Griswold v. Connecticut, 381 U.S. 479 (1965); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

> point in the development of man's knowledge, is not in a position to speculate as to the answer.[167]
>
> It is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestational period. The time when viability is achieved may vary with each pregnancy.[168]
>
> Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all.[169]

Nevertheless, *Roe* set the first trimester as the benchmark for the "compelling point" of viability. As the Court explained:

> This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb . . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[170]

Thereafter, the State's protection of fetal rights generally supersedes maternal rights, regardless of the fact that her body carries the unborn child.

Prior to *Roe,* nineteenth century criminal abortion statutes had also looked to the developmental stage of the fetus. However, the trend to use the term "quickening" as the benchmark in criminal anti-abortion statutes declined steadily throughout the nation. North Carolina General Statutes section 14-44 enacted in 1881 was the last such statute in the United States to include the term.[171] This North Carolina statute continues to this day to criminalize the unlawful abortion of a "quickened" fetus as a Class H felony.[172] Nevertheless, *Roe* permanently altered the landscape of abortion rights. Pursuant to *Roe*, lawful abortions may be obtained in North Carolina until the point of viability that is designated as 20 weeks.[173] For states such as Indiana, which have chosen not to have a "bright-line trimester-based presumption of viability," if the medical physician fails to adequately record viability, then any relevant party may file an injunction to prevent the mother

167. Roe v. Wade, 410 U.S. 113, 159 (1973).

168. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64 (1976).

169. Colautti v. Franklin, 439 U.S. 379, 396 (1979).

170. *Roe*, 410 U.S. at 163-64.

171. Mark S. Scott, *Note, Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199, 259 (1996).

172. N.C. GEN. STAT. § 14-44 (2006).

173. Id. § 14-5.1.

from exercising her right to terminate the pregnancy.[174] Viability is presumed.

It must be recognized, however, that any definition of constitutional personhood, including the point of its inception and termination, is a legal fiction created by legislators and judges according to their assessment of precedent, moral ethics and the wishes of a democratic adult populace. If moral ethics under the law require justification for the lawful killing of a person or even a non-human sentient being such as an animal, then the possible justifications for the killing of fetuses must be examined with great care in as much depth as possible.

In recent years the trend towards increased fetal rights has relied more on medical advances than moral ethics. However, scientific definitions of personhood are also matters of fiction and human construct, however ordered and logical they may be. For example, while neuroscientist Michael Bennett asserts that "[p]ersonhood develops well after birth in a gradual process and requires changes in this neural equipment, mainly in the connections between neurons,"[175] he also acknowledges that the lack of personhood in a young developing infant does not justify infanticide, where empathy, and societal and parental interests in the welfare of the infant outweigh any possible interest in killing the infant.[176] In the legal debate over fetal rights, science inherently merges with culture. Anthropologists for decades have described the cultural rationales of societies that permit infanticide on the basis that newborns and young infants are deemed non-human until a certain developmental stage.[177] Of course, the United States government and its history of British common law have never subscribed to this view, but it has been a matter of cultural choice as to whether a fetus is in fact human and worthy of human rights.

Today, in most jurisdictions, a fetus has certain limited civil and criminal rights in certain circumstances. If a change in this trend were to allow a fetus full rights of personhood, whether by constitutional reform or interpretation, the impact on society would be unimaginable. Yet, the prospect of an Unborn Victims of Violence Act in

174. *See* S.H. v. D.H., 796 N.E.2d 1243, 1248 (Ind. Ct. App. 2003).

175. Michael V.L. Bennett, *Personhood From a Neuroscientific Perspective* in ABORTION RIGHTS AND FETAL 'PERSONHOOD' 77-79 (2d ed. 1990).

176. *Id.* at 78.

177. *See generally,* Lynn M. Morgan, *When Does Life Begin? A Cross-Cultural Perspective on the Personhood of Fetuses and Young Children, in* ABORTION RIGHTS AND FETAL 'PERSONHOOD' 89 (2d ed, 1990). *See also*, Glenn Hausfater, *Infanticide: Comparative and Evolutionary Perspectives*, 25(4) CURRENT ANTHROPOLOGY 500, 501 (1984) (listing cross-cultural comparisons of the following types of offspring at greatest risk of infanticide: "if they are (1) deformed, (2) illegitimate, (3) born too close in time to a sibling, or (4) of the wrong sex in a society which values the labor of males and females differentially.").

North Carolina requires consideration of the specter of such a potential future in order to better guide any current efforts at reform.

III. JUSTIFYING ABORTION IN THE CHILD RIGHTS ERA

The current fetal homicide statutory reform movement has arisen since the 1970s at the height of the Child Rights Movement, the Abortion Rights Movement, and the Domestic Violence Movement. Indeed, scholarship has begun to pair the Fetal Rights Movement with that of the already existing Child Rights Movement. According to one recent anti-abortion view: "True recognition of the civil rights of children will not meaningfully progress until America learns to value children at all stages of development."[178]

The increased recognition of child rights has been dramatic, as seen in the 1989 International Convention on the Rights of the Child.[179] The United States Supreme Court cited the Convention in its six-to-three decision in *Roper v. Simmons* in 2005, recognizing with disapproval that only the United States and Somalia have failed to sign the Convention.[180] *Roper* was the first United States Supreme Court decision prohibiting capital punishment for minors under 18. Even the dissents of Justice Scalia and Justice O'Connor in *Roper* recognize that youth deserve special consideration and protection, providing that the status of youth itself should be a mitigating circumstance in sentencing.[181]

Most fetal homicide cases have described horrific domestic violence homicides of pregnant women such as Laci Peterson. We have also seen numerous major statutory reforms nationally and internationally concerned with family violence and the rights of the vulnerable. The Violence Against Women Act was recently reauthorized granting federal protections to adults and children against domestic violence, sexual assault and child abuse.[182]

Roe created a balancing test, recognizing the State's legitimate interest in protecting the "potentiality of human life" as well as the life and health of the mother.[183] Yet at no point in *Roe* is the fetus considered non-human. Essentially, in a single decision, *Roe* embodies

178. Tracy Leigh Dodds, Note, *Defending America's Children: How the Current System Gets It Wrong*, 29 HARV. J.L. & PUB. POL'Y 719, 719 (2006).

179. International Convention on the Rights of the Child, November 20, 1989, 28 I.L.M. 1448, 1468-1470.

180. Roper v. Simmons, 543 U.S. 551 (2005).

181. *Id.* at 588, 621 (J. Scalia writes "juries take seriously their responsibility to weigh youth as a mitigating factor").

182. The Violence Against Women Act originated in 1994 (18 U.S.C.A. §§ 2261 *et seq.*), was reauthorized by the Violence Against Women Act 2000, and most recently reauthorized by the Violence Against Women Act 2005 (Pub. L. 109-162, 119 Stat. 2960).

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

much of the balancing required in the conflux of these various human rights movements. However, for the purpose of determining the constitutional rights, if any, of the fetus, the Court made the choice to define the fetus as a legal "person" who could be unduly deprived of life, liberty or property under the U.S. Constitution only *after* birth. Under *Roe*, the increasing legal protections given the fetus as it develops and becomes viable in the womb are expressed as a *State* interest in the potentiality of life, not as recognition of the child as a full or partial legal person with individual constitutional rights.

If *Roe* had not protected women's liberty interests in this way, one concern is that "[t]o deprive women their right to control their actions during pregnancy is to deprive women of their legal personhood."[184] Indeed, according to the Supreme Court of Massachusetts following the *Roe v. Wade* decision,

> [t]he constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice, and self determination as fundamental constituents of life. The value of life . . . is lessened . . . by the failure to allow a competent human being the right of choice.[185]

How then is the balance to be maintained? Again, this is a required consideration for any effort to enact an Unborn Victims of Violence Act, for aside from the fetal interest, a pregnant mother's interest will be of greatest importance. A review of some of the rationales justifying abortion bears notice.

A. *Human Population Control*

The United States does not face severe population problems today. However, what is strangely not discussed in the abortion debate is the obvious reality that a severe population problem would clearly occur if abortion were uniformly prohibited. In 1953, Alfred Kinsey's research determined that approximately 90% of premarital pregnancies ended in abortion and that 22% of married women had obtained an abortion, despite the fact that abortion was illegal at the time.[186] Currently, about one in three American women will have had an abortion by the age of 45.[187] In North Carolina in 2003, 26,708 abortions were

184. Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599, 620 (1986).

185. Superintendent of Belcherton State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (1977).

186. ESTELLE B. FREEDMAN, NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN 236 (1st ed. 2002).

187. Guttmacher Institute, *State Facts About Abortion: North Carolina* (2006) *at* www.guttmacher.org.

performed in the state.[188] Approximately 19% of North Carolina pregnancies result in abortion each year.[189]

Thus, even if eventually the tide of fetal rights were to actually reduce or eliminate a woman's right to an abortion, no plan is proffered by right to life scholars as to how the State would alleviate the expected additional burden on women, their children, their families, and the State itself. Departments of Social Services throughout the country struggle with inadequate resources to address already existing poverty, neglect and abuse. Even if the burdens of desperate women unable to care for additional children were not taken into account, a rendering of the social fabric of the United States would occur where the impact of these additional children would deeply impact the lives of born persons, and specifically the poverty rates among women and children. With the stress of poverty partly associated with family violence, ironically an end to abortion would likely increase domestic violence, child abuse, and spousal and fetal homicide.

Nevertheless, abortion rights are also human rights matters that require great care. If the United States were to recognize population control concerns as a justification for permitting abortion, then the role of the State in deciding whose population should be controlled has unacceptable potential for undermining many of the human rights we have achieved. For example, between 1936 and 1976 Sweden forcibly sterilized over sixty thousand people, "most of them women considered [by the State] to be racially or socially inferior."[190] China's 1979 one child per family campaign was implemented for the purpose of population control; state financial and housing benefits for families that complied brought about voluntary use of state funded contraception, abortion, and sterilization.[191] In 1995 China was compelled to enact legal measures to prevent abortion on the basis of the gender of the fetus, in a society where sons had greater social status than daughters.[192] The anthropological selective factors noted previously regarding infanticide appear naturally in the right to abortion, whether culturally Western or First World or not.

Modern scientific advances have already touched on the State's burden in unexpected ways. Since the 1980s there has been open discussion about the ethics of discarding unneeded fertilized eggs in the *in*

188. Tania Malik, NARAL Pro-Choice North Carolina, *Sex and Reproduction: At What Point May Privacy be Set Aside?*, N.C. Bar Association CLE (Jan. 14, 2005). According to the report, the majority of cases involve ethnic minority women over the age of 20 who already have had at least one child but who have never had an abortion before.

189. Guttmacher Institute, *State Facts About Abortion: North Carolina* (2006) *at* www.guttmacher.org.

190. Freedman, *supra* note 186, at 233.

191. *Id.* at 245.

192. *Id.* at 246.

vitro fertilization process and its impact on the abortion debate.[193] The process of *in vitro* fertilization requires the abandonment of a number of fertilized eggs once the mother is successfully impregnated with one of them.[194] If the killing of these unborn "children" was not justified under the law, would the State be able to ensure their survival and well being through birth, childhood and life? There are approximately 400,000 human embryos, "each the size of the head of a pin," stored in cylinders in over 430 fertility clinics across the country.[195] To deny parents the right to this form of pregnancy assistance on the basis of the ethical problem of destroying the fertilized eggs would also prevent the life of the one child successfully born through the process. Hence, it pits fetal rights against fetal rights. Any uniform abortion prohibition would inherently impact fertilization assistance technology and availability.

In 2005, the Court of Appeals of Arizona held that parents of five negligently destroyed frozen pre-embryos, which had progressed from zygote to 8-celled organisms, did not have a claim for wrongful death because the statutory definition of a "person" did not include "conception outside a woman's womb."[196] While the decision hinged on legislative intent, as with many fetal rights legal decisions it invited public and legislative debate regarding recognition of parental and fetal rights for the 400,000 human embryos currently existing in our society. While domestic violence cases such as that of Laci Peterson invoke a natural empathetic response to the loss of the unborn, the ripple effect of fetal rights legislation reaches far beyond the legal waters of the criminal justice system.

B. *The Undue Burden of an Unwanted Pregnancy*

Justifying abortion based on the special burden placed on women as unique childbearers remains the primary basis for maintaining a constitutional right to privacy in abortion decisions. In writing for the majority in *Roe*, Justice Blackmun described the importance of a woman's right of privacy with regard to abortion:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.

193. *See* Janet Gallagher, "*Eggs, Embryos, Foetuses: Anxiety and the Law*," *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 139, 147 (Michelle Stamworth ed. 1987).

194. For a discussion of scientific advances in pregnancy and the abortion debate, *see* Michael V.L. Bennett, "*Personhood From a Neuroscientific Perspective,*" *in* ABORTION RIGHTS AND FETAL 'PERSONHOOD' 77, 78 (Edd Doerr & James W. Prescott eds., 2d ed., 1990).

195. Bob Smietana, *When Does Personhood Begin? And What Difference Does it Make?*, CHRISTIANITY TODAY, July 2004, at 24.

196. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1261 (Ariz. Ct. App. 2005).

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[197]

Prior to *Roe*, this burden on women was also acknowledged. In addressing Indiana's right to abortion, Justice DeBruler in his dissent argued:

> [A] pregnant woman denied an abortion by this law, must run the risk of dying when that risk is not a certainty, but only a middle range probability. Once pregnant, she is mandated in service of the State to hazard the risks of pregnancy and delivery, no matter what the degree of risk to her own health might be, and even though she may be involuntarily pregnant as the result of a rape. And after assigning her these burdens, this statute gives no form or degree of remedy or recognition to her person, her suffering, or any of her needs, be they physical, mental or even financial.[198]

Since *Roe,* much of the undue burden language of the Supreme Court decisions relating to abortion addressed the undue burden of restrictions on the right to an abortion, such as parental notification,[199] pro life counseling,[200] and a husband's consent.[201] However, in upholding the right to abortion, the Court has also addressed the burdens placed on women facing an unwanted pregnancy. This rationale of an "undue burden" on the mother is one of the most important justifications that the Court has invoked. The burden on the pregnant woman should she be forced to conceive and/or forced to give birth is a burden not only on herself, but on the father, her other children, and the State.

The dissent of U.S. Supreme Court Justice Blackmun in *Webster v. Reproductive Health Services* clearly delineates the justification for abortion rights based on the hardship to women:

> The plurality would clear the way once again for government to force upon women the physical labor and specific and direct medical and psychological harms that may accompany them carrying a fetus to term. The plurality would clear the way again for the State to con-

197. Roe v. Wade, 410 U.S. 113, 153 (1973).

198. Cheaney v. State, 285 N.E.2d 265, 274 (Ind. 1972).

199. *See* Hodgson v. Minnesota, 497 U.S. 417, 444-45 (1990).

200. *See* Thornburgh v. the Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 768-769 (1986).

201. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 79 (1976); and Planned Parenthood Assoc. of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

script a woman's body and to force upon her a 'distressful life and future'."[202]

Note that Justice Blackmun, the author of *Roe's* majority decision, did not emphasize the inherent rights or power of women to make the choice to abort, nor did he argue that the fetus lacked all rights, but instead, the Justice emphasized the justification to abort due to the hardship and undue burden upon women who do not wish to give birth or care for an additional child.

One must also keep in mind that for the greater part of history the burden on women to bear children has existed whether they have consented to the sexual act or not. Having the legal right to force sex upon a wife essentially made legal a husband's right to force pregnancy upon her. Only as recently as 1993 did North Carolina completely abolish the marital rape exemption, which had allowed a husband to force sexual intercourse upon his wife regardless of the degree of force or presence of injury.[203] Many states continue to grant some degree of exemption to husbands for marital sex crimes. Marital rape victims report greater long-term effects of trauma than victims of any other kind of rape or domestic violence because of the personal betrayal and often repeated sexual and physical violence against them.[204] Should a forced pregnancy result, the burden and trauma upon the mother may be psychologically unbearable.

Mental health conditions, addictions, fear of poverty, and other factors may account for the neglect of the mother toward her unborn child. The role of domestic violence in child endangerment cases must also be taken into account. Domestic violence against pregnant women occurs in up to 20% of cases.[205] Aside from the physical injury to the mother and fetus addressed by criminal statutes, the violence can severely impact the psychological health of the mother. Abused pregnant women have a higher risk of conditions of depression, stress, and addiction to tobacco, alcohol and drugs.[206] The resulting depression

202. Webster v. Reprod. Health Services, 492 U.S. 490, 557 (1989).

203. N.C. GEN. STAT. § 14-27.8 (1993).

204. *See generally,* DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985); DIANA E.H. RUSSELL, RAPE IN MARRIAGE (Indiana Univ. Press, 1982); RAQUEL KENNEDY BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS (Sage Series on Violence Against Women, Vol. 2, 1996); and Jennifer A. Bennice et al., *The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology*, VIOLENCE & VICTIMS, Feb. 2003, 87.

205. Linda E. Saltzman et al., *Physical Abuse Around the Time of Pregnancy: An Examination of Prevalence and Risk Factors in 16 States*, MATERNAL & CHILD HEALTH J., March 2003, at 38.

206. E.H. Newberger & S.E. Barkan, *Abuse of Pregnant* Women and Adverse Birth Outcome, J. OF THE AM. MED. ASS'N 2370 (1992).

can lead to a general loss of interest in the baby's health and welfare during the pregnancy and after the child is born.[207]

Yet, if the fetus were given full personhood status, the social and physical stresses upon the mother would not legally justify her failure to act on behalf of the fetus and its welfare. Duress must be much more direct to provide a justification defense than mere depression from abuse or poverty. Not only does the State fail to adequately support women under these circumstances, it now exacerbates their burdens through the punitive measures of child endangerment actions.[208]

Based on the social and physical reality of the special risks and burdens for women as child bearers, what is required is greater judicial and social recognition of these risks and burdens, as well as increased public memory prior to *Roe* of the social impact on the United States when abortion was prohibited. In nations that currently deny women the right to abortion, the devastating consequences mirror those that the United States experienced prior to *Roe v. Wade.* In Argentina, for example, Human Rights Watch has documented the denial of access to contraception and abortion as a human rights violation. According to Argentina's Health Ministry, 40% of all pregnancies are terminated through illegal abortions, up to half a million abortions a year.[209] Moreover, illegal abortion has been the leading cause of death of pregnant women in Argentina for decades.[210]

Only when the government can adequately fund the prenatal care of mother and fetus and the future care of impoverished mothers and their born children, only then will the undue burden on the mother be diminished as a justification for abortion.

C. *The Risk of Injury, Death or Severe Disability*

Although the U.S. Supreme Court has permitted restrictions on the right to abortion, it has consistently upheld the right to abortion at all stages of pregnancy when the health or life of the mother is at risk.[211] In the balance between the mother's interests and that of the "potentiality of life" within her, the mother's interest in life outweighs the fetal interest in life. The Model Penal Code in 1962 used justification language in promoting legal abortion, with its first justification listing health risks to mothers:

207. *Id.*
208. *See* Section II(C).
209. Human Rights Watch, *Decisions Denied: Women's Access to Contraceptives and Abortion in Argentina* (2004), *at* http://hrw.org/women/argentina.
210. *Id.*
211. *See* Ayotte v. Planned Parenthood of N. New England, 126 S. Ct. 961 (2006).

> (2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this Subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable.[212]

Early complete prohibitions of abortion were often justified on the basis that the abortions themselves were generally unsafe for the mother. By 1972, just prior to *Roe,* state courts began to note that "an abortion, under proper medical care, during the early months of pregnancy is now safer than childbirth."[213] The comparative risks of abortion and childbirth were addressed in a March 1989 public hearing on a report from the House Committee on Government Operations entitled "The Federal Role in Determining the Medical and Psychological Impact of Abortion on Women." In this report, the availability of abortion was found to have a positive health impact on women, but only if done early:

> Carrying a pregnancy to term is 7 to 25 times more likely to result in the death of the woman than a first trimester abortion . . . . [T]he U.S. Centers for Disease Control (CDC) showed that abortion generally does not affect subsequent fertility . . . . [The] CDC reported that the risk of death to the pregnant woman obtaining an abortion doubles for every two weeks' delay after eight weeks of gestation . . . .[214]

As to the mental health impact of abortion, the American Psychological Association report discussed at the 1989 hearing concluded "despite the flaws in the research, there is so little evidence of psychiatric problems following abortion, and so much evidence of relief, that therefore abortion does not cause more psychiatric problems than unwanted pregnancy."[215]

In earlier decisions, the justifications for rape and incest were likely founded on moral grounds. However, today with a greater understanding of the substantial mental health trauma caused by rape, the justification of gravely impairing the mental health of the mother could potentially encompass acts of rape as well. Justifying abortion of children born with grave "defects" is a more difficult issue, where the constitutional rights of persons with disabilities deemed legally incompetent are firmly protected, despite their more limited nature. In

212. American Law Institute, Model Penal Code, § 230.3 Abortion (1962).
213. Cheaney v. State, 285 N.E.2d 265, 267 (Ind. 1972).
214. Bennett, *supra* note 175, at xi-xii, *citing* Rep. 101-392, 101st Cong., 1st Sess.
215. *Id.* at xii.

North Carolina, discovery of severe defects is not grounds for a late-term lawful abortion.[216]

As long as the government refuses to adequately research and fund birth control, provide public education on its use, and equitably address the social hardships on a mother in bearing primary legal and social responsibility for the children born to her, it has no choice but to recognize the unequal and significant burdens on women as a justification for upholding a right to abortion. The State's repeated interest in the fetal rights debate has been in the continued welfare of its citizenry as a whole, including mothers, fathers, and their born children. Part of the desperation of mothers who unsafely abort their fetuses when such options are illegal is due to their understanding that the State is unwilling and unable to adequately assist them in the care of their born children, something many single mothers in poverty experience today on a daily basis.

The emergence of fetal homicide statutes brings to light how important the right to abortion is, particularly for women facing unexpected and abhorrent forced sexual encounters and domestic violence, who then bear the brunt of responsibility for unwanted pregnancies. Realistically, American society cannot possibly take over this burden for the vast numbers of children potentially added to the welfare rolls each year if abortion were prohibited. The burden on women far outweighs the rights of the fetus at the earliest stages, rights which do exist but are much more limited than that of any born persons.

Nevertheless, respecting the pregnant woman's choice to abort inherently implies respecting her choice to keep the child and experience motherhood. The violence that fetal homicide laws address not only perpetrates a wrong against the unborn child with its more limited legal rights, but also takes away the pregnant woman's choice to become a mother, which is her full legal right.[217] For most parents, the loss of a child is unbearable whether the child is born or nearly born. As the Indiana Court of Appeals acknowledged in 2005 when permitting wrongful death damages to parents whose viable unborn child was killed in an automobile accident:

> [T]he fact that the child was born alive, which allowed the parents to touch and see the child prior to its death, is a valid consideration for the jury in awarding damages. But it is not uncommon for the parents of a stillborn fetus to hold their child, and like the parents of a child born alive, parents of an unborn viable fetus have been damaged by

216. 48 N.C. Att'y Gen. 136 (1979) (to Mr. Lewis H. Nelson, M.D., Assistant Professor, Bowman Gray School of Medicine).

217. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (liberty is a basic civil right, fundamental to the existence and survival of the race, and includes the right to marry and to procreate).

> the loss of their progeny whose love and affection they would have enjoyed, but for the intervening wrongful act.[218]

While every state and federal fetal homicide law increases recognition of fetal rights and the harm of domestic violence, every such law, including Laci and Conner's Law, carries an explicit exception for a woman's choice to obtain a lawful abortion. This approach has created a consistent balancing of maternal, State and fetal rights. The balance continues to be necessary.

IV. CONSIDERATIONS FOR AN UNBORN VICTIMS OF VIOLENCE ACT IN NORTH CAROLINA

Even before consideration of the State's Unborn Victims of Violence Act of 2005, North Carolina was noted in the hearings of the United States House of Representatives in addressing the first attempt at a federal Unborn Victims of Violence Act. As the first to testify on July 21, 1999, Republican Representative Charles Canady of Florida opened his testimony with his first example justifying the act:

> The Unborn Victims of Violence Act will enable prosecutors to bring to justice criminals like these: Reginald Anthony Falice, who on April 28, 1998, shot his eight-months pregnant wife, Ruth Croston, five times as she sat at a red light in Charlotte, North Carolina. Falice was convicted by a federal grand jury – federal jury just last week for interstate domestic violence and using a firearm in the commission of a violent crime, but because federal law does not currently recognize the unborn as victims, he received no additional punishment for killing the near-term infant.[219]

The extreme violence of such acts, particularly by a spouse and father, is abhorrent. Had the crime been addressed by state law alone, however, North Carolina law at the time and today, would not have recognized a separate crime in the killing of the "near-term infant." In North Carolina, common law continues to define murder and manslaughter as the "unlawful killing of a human being,"[220] with degrees of the crimes based on the level of intent. Without statutory guidance to define a "human being," the North Carolina Supreme Court in *State v. Beale*[221] relied on common law to hold that a viable unborn fetus was not a human being for the purpose of the murder statute. In

218. Horn v. Hendrickson, 824 N.E.2d 690, 703 (Ind. 2005).

219. Verbatim Transcript, U.S. HR Judiciary Subcommittee on the Constitution Committee Hearing (July 21, 1999) *at* 1999 WL 527771 (F.D.C.H.).

220. State v. Myers, 263 .S.E.2d 768, 772 (1980) (first degree murder); State v. Rick, 463 S.E.2d 182, 186 (1995) (second degree murder); State v. Kea, 124 S.E.2d 174 (1962). N.C. GEN. STAT. §§ 14-17 to 14-18 define the punishments for murder and manslaughter but do not define the crimes themselves.

221. State v. Beale, 376 S.E.2d 1 (1989).

other words, only causing the death of children born alive would be murder in the State of North Carolina.

In *Beale*, Donald Ray Beale fired a shotgun at his pregnant wife, Donna, killing both her and their viable unborn daughter.[222] The North Carolina Supreme Court followed the determination of most other States that common law murder did not contemplate the killing of an unborn child: "[i]t is beyond question that when the predecessor statutes to N.C.G.S. § 4-1 and N.C.G.S. § 14-17 were originally enacted in 1715 and 1893 respectively, and when the Declaration of Independence was promulgated in 1776, the killing of a viable, but unborn child was not murder at common law."[223] The Court specifically left the "creation and expansion of criminal offenses" in this regard to "the legislative branch of the government."[224] To date the North Carolina legislature has chosen not to enact a feticide statute such as the Unborn Victims of Violence Act.

At the time of the *Beale* decision in 1989, North Carolina was among a majority of states that had judicially adopted the common law born-alive rule for criminal law purposes.[225] By 1995, this continued to be the majority rule.[226] Today North Carolina is in a small minority of jurisdictions that continue to follow the common law born-alive rule for homicide, if only because the State Legislature has not defined a human being to include the unborn as many other states have done.[227] Missouri's Court of Appeals in *State v. Holcomb*[228] compared North Carolina's *Beale* decision with that of Arkansas and Kansas in declining to follow the minority born-alive rule. In the decade following *Holcomb*, Arkansas adopted a statute expanding the definition of a human for criminal statutory purposes to include a viable fetus.[229] Kansas and North Carolina adopted sentencing enhancements for injury to a pregnant woman, using language that emphasized only the harm to the woman and more indirect language regarding the resultant loss of the fetus.[230]

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222. *Id.*

223. *Id.* at 89.

224. *Id.* at 92.

225. Gary V. Perko, *State v. Beale and the Killing of a Viable Fetus: An Exercise in Statutory Construction and the Potential for Legislative Reform*, 68 N.C.L. REV. 1144, 1147 (1990).

226. Tony Hartsoe, *Person or Thing – In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 212 (1995) ("thirty states have adopted the 'born alive' rule by judicial decision").

227. *See* Section II(A).

228. State v. Holcomb, 956 S.W.2d 286 (Mo. Ct. App. 1997), *citing* Meadows v. State, 722 S.W.2d 584 (Ark. 1987), and State v. Green, 781 P.2d 678 (Kan. 1989).

229. ARK. STAT. ANN § 5-1-102(13) (Michie 2006).

230. KAN STAT. ANN. § 21-3440 (2005) (criminal harm to pregnant woman); N.C. GEN. STAT. § 14-18.2 (2005) (injury to a pregnant woman).

Note that North Carolina courts have not addressed whether a minor may include an unborn child for the purpose of its criminal child abuse statutes. For example, misdemeanor assault on a child applies to domestic violence assaults in the presence of a minor and a minor is defined as any "person" under the age of eighteen.[231] Presumably the courts would follow the reasoning of *State v. Beale* and require a criminal assault victim to be born alive unless the statute specifically stated otherwise as it does in its reference to an "unborn child" in the crime of abortion in North Carolina General Statutes section 14-44.

Effective since 1881, North Carolina's criminal abortion statutes have applied to women "pregnant or quick with child." The wilful use of drugs or instruments to destroy an unborn child is a Class H felony under section 14-44 of the North Carolina General Statutes. Administering drugs or using an instrument to procure a miscarriage or to injure or destroy the woman is a Class I felony under section 14-45 of the North Carolina General Statutes. Judicial interpretations of the legislative intent of these two statutes have held that the purpose of section 14-45 is to protect the mother, therefore the age of the fetus in this section is irrelevant.[232] In contrast, the purpose of section 14-44 is to protect the fetus.[233] For over a century, North Carolina's legislature has maintained a State interest in the well-being of both pregnant women and unborn children.

"Quick" with child was not initially defined by statute, but the North Carolina Supreme Court determined that for the purpose of N.C. General Statutes section 14-44, at least within the first 30 days after conception a child could not be quick and no criminal liability would attach.[234] Abortion after *Roe* became lawful in North Carolina under certain circumstances, giving pregnant women up to 20 weeks to choose to terminate the pregnancy without justification:

> (a) it shall not be unlawful, during the first 20 weeks of a woman's pregnancy, to advise, procure, or cause a miscarriage or abortion when the procedure is performed by a North Carolina licensed physician practicing in a Department of Health and Human Services certified hospital or clinic;
>
> (b) lawful after 20 weeks if pregnancy causes substantial risk to life or gravely impairs the health of the woman . . . .[235]

231. N.C. GEN. STAT. § 14-33(d)(3) (2005).

232. State v. Hoover, 113 S.E.2d 281, 286 (1960).

233. *Id.* at 233.

234. State v. Jordan, 42 S.E.2d 674 (N.C. 1947); *see also* State v. Mills, 21 S.E. 106 (1895) (referring to 3 Coke Inst. 50 and construing common law definitions of "quick").

235. N.C. GEN. STAT. §15-45.1 (2005).

Even prior to the enactment of section 14-44, consideration of the mother's special status was recognized and she could not be found to be an accomplice to an illegal abortion procured under this section.[236]

In 2005, the North Carolina House failed to pass the "Unborn Victims of Violence Act," a state law mirroring the federal Laci and Conner's Law.[237] House Bill 1324 provided in part:

> Section 1. G.S. 14-17. Murder in the first and second degree defined; punishment.
>
> (c) Any person who murders a pregnant woman and thereby causes the death of an unborn child is guilty of a separate offense under this subsection. Except as otherwise provided in subsection (c) of this section, the punishment for that separate offense is the same as the punishment provided under subsection (a) of this section. An offense under this subsection does not require proof that the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of the unborn child.[238]

The exemptions for the death of a fetus during a lawful abortion and to protect the health of the mother were contained in subsection (c):

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

In addition, House Bill 1324 would have replaced the current one level sentencing enhancement for domestic violence related injury to a pregnant woman causing injury to the woman and resulting in miscarriage or stillbirth.[239] The law would replace the enhancement with the imposition of a separate crime for the death of the fetus as discussed above. Similar to the federal Unborn Victims of Violence Act, this sentencing enhancement enacted in 1999 applied to the fetus from the moment of conception, without limiting miscarriages to a certain "quick" stage of development and including stillbirths "irrespective of

236. State v. Shaft, 81 S.E. 932 (N.C. 1914).
237. H.B. 1324, 2005-2006 Sess. (N.C. 2005).
238. *Id.*
239. N.C. GEN. STAT. § 14-18.2 (1999).

the duration of pregnancy."[240] A significant difference, however, is that the enhanced punishment is only imposed if the perpetrator knew the woman was pregnant, a *mens rea* requirement not found in the federal fetal homicide act.

If North Carolina followed the approach of Laci and Conner's Law and removed the knowledge of pregnancy requirement currently present in the State's injury to a pregnant woman enhancement, the legitimacy of the legislative purpose would be questioned. Some have argued that if the punishment does not vary on the degree of evil, but rather on the degree of bad luck or fortuity in finding after the fact that the woman was pregnant, then no legitimate purpose could be served in deterrence or retributivism.[241] Although many domestic violence batterers may intend to harm both mother and unborn child, many intend to harm only the mother that they may have been doing on a regular basis. Nonetheless, determining the perpetrator's knowledge of the pregnancy would likely be an evidentiary impossibility in many cases of early pregnancy, but less so if North Carolina adopted an application of feticide only in cases of later developed fetuses, or even "quickened" fetuses.

House Bill 1324 would not have clarified this, with its statutory language of "unborn child," where "child" remains undefined. The Utah Supreme Court addressed a similar issue in *State v. MacGuire*.[242] The murder statute included an "unborn child" victim, the Court determined that the "the commonsense meaning of the term 'unborn child' is a human being at any stage of development *in utero* . . . ."[243] The California Supreme Court in *People v. Taylor* would not extend inclusion of the unborn to common law murder, but instead noted it would have needed clear legislative intent such as statutory language stating "for the purposes of this section a human being includes a fetus."[244]

Unlike Utah, however, the continuing historical precedent of North Carolina defines the unborn for the purpose of criminal charges such as the abortion crimes of sections 14-44 and 14-45 as a "quickened" fetus, not from the moment of conception. As a result, the proposed Unborn Victims of Violence Act of 2005 in North Carolina with its use of the term "unborn child" could have provided *less* protection for fetuses at the earliest stages of development than the already existing

240. *Id.* at § 14-18.29(a). A miscarriage is defined as "the interruption of the normal development of the fetus" other than by live birth or lawful abortion, and a stillbirth as "the death of the fetus," and both must occur prior to complete expulsion or extraction from the woman. *Id.*

241. Gerald S. Reamey, *The Growing Role of Fortuity in Texas Criminal Law*, 47 S. TEX. L. REV. 59, 95 (2005).

242. State v. MacGuire, 84 P.3d 1171 (Utah 2004).

243. *Id.*

244. People v. Taylor, 86 P.3d 881, 890 (Cal. 2004).

injury to a pregnant woman enhancement, which currently covers miscarriages and stillbirths at any stage.

Because the North Carolina legislature has already differentiated between words such as "child," "miscarriage" and "stillborn" it would need to specify for every criminal charge it wished to apply to the unborn whether the unborn are included and at what stage of development. In 2000, as a matter of first impression for the Indiana Court of Appeals, the fact that other statutory crimes, including feticide and murder, already included terms such as "fetus," and "fetus that has attained viability," required the Court to interpret the legislative intent behind the crime of criminal neglect of a "dependent" to *exclude* the unborn.[245] In this case, because the neglect crime did not specify the inclusion of a fetus, when other statutory crimes did, the legislative intent could not have anticipated charging a cocaine addicted pregnant mother with neglect.

Missouri has one of the most exhaustive statutes ensuring the application of criminal liability for the death of the fetus, while still exempting lawful abortion and protecting the mother from prenatal child endangerment. In 1986, the legislature enacted section 1.205 of the Revised Statutes of Missouri which states:

1. The general assembly of this state finds that:
   (1) The life of each human being begins at conception;
   (2) Unborn children have protectable interests in life, health, and well-being;
   (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. [T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn . . . children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.[246]

245. Herron v. State, 729 N.E.2d 1008 (Ind. 2000).

246. *See* State v. Holcomb, 956 S.W.2d 286 (Mo. Ct. App. 1997), *motion for reh'g and/or transfer denied* (1997).

This broad approach would avoid the confusion caused by piece-meal definitions of a child scattered throughout the statute books. On the other hand, universal application without discretion, as seen in Missouri's statute, risks unanticipated and possibly undesirable results.

A final consideration is that a feticide statute would likely apply even if the fetus had no realistic chance of survival due to genetic disorder or natural illness. The California Court of Appeal upheld a murder conviction of a defendant who had shot a pregnant woman, killing her and her unborn child, a child who already suffered from a fatal medical condition and would not have survived the second trimester.[247] The medical condition was determined to be irrelevant, just as a murder conviction would stand if it "unlawfully shorten[ed] the existence of a terminally-ill human being . . . ."[248] Clearly North Carolina has much to consider before it again attempts to join the ranks of the majority and increase liability to causing harm to the unborn.

V. CONCLUSION

Undoubtedly, per the warnings of many of its earliest critics, the federal Unborn Victims of Violence Act, with its State law predecessors and progeny, has already "color[ed] the abortion debate and the legal battles of the next century."[249] Nevertheless, the Act does not bring us new legal concepts, for fetal rights have been protected in both civil and criminal state law for decades in whole or in part. The legal debate over fetal homicide laws should not focus on whether one advocacy group or another fails to care about pregnant women or unborn children. Social and cultural norms in the United States, and human instinct, imbue in us a deep care for both, regardless of political or cultural affiliation, activist goals, or personal experiences. Rather the debate must focus on a balance of interests.

If we are to consider the legal distinctions between adult, child and fetus, examining both rights and duties, then certainly the rights of adults consistently have been stronger and more numerous than the limited rights of the child today, and the rights of the child stronger and more numerous than the rights of the fetus. Nevertheless, the duties of the State and parent to the child are generally ones of care and protection, including the maintenance of the health and welfare of that child. We see this increase in parental duty in stark contrast to centuries of common law; the State now subjects mothers and fathers

247. People v. Valdez, 23 Cal. Rptr. 3d 909, 914 (2005), *rev. denied* (2005).
248. *Id.* at 914.
249. Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 234 (2002).

to higher duties of care, and greater monitoring and intervention by the State, as seen in the application of child endangerment laws in fetal abuse and neglect cases. The sheer complexity of the balance among rights is daunting.

Society has called for higher sanctions against perpetrators who cause the death of a fetus by inflicting violence against the woman carrying the fetus in her womb, violence towards the mother of an unborn child. Although the language of most states that have enacted feticide statutes distinguish the fetus as a separate person and victim, even those such as North Carolina that have chosen not to enact an Unborn Victims of Violence Act may have recognized an added harm for violence to a pregnant woman through sentencing enhancements. Regardless of whether the mother views this enhancement or a separate charge of feticide as warranted and necessary, the State in enacting such a statute has deemed the fetus worthy of protection even if not imbued with full personhood. In domestic violence homicides of pregnant women the mother's view of her pregnancy may never be known, but the State will have spoken.

What is protected is not only the potentiality of life for the fetus, and the life of the woman, but the potentiality of motherhood in the woman. Preserving the exception for lawful abortion for a woman carrying the fetus is also a way of protecting the potentiality of motherhood. To fully respect the burden and honor of women to be able to bear children and raise them to adulthood necessitates an understanding that motherhood should be chosen and not forced by the State or third parties. Domestic violence batterers can both cause unwanted pregnancy, and physically beat it out of women against their will. Laci and Conner's Law and similar state statutes recognize this added violence not only to the fetus, but to the mother as well.

Nevertheless, the abortion exception in these laws recognize that although unborn children rightfully have been granted limited legal rights for decades, these human rights are limited initially and increase through development as they do for born children until the age of majority. In the very earliest stages of life, the limited level of fetal rights do not outweigh the liberty interest of pregnant women and the enormous decisions they must make on behalf of their health, their lives and their families. They do not outweigh the right to choose motherhood or to deny it.

In 2001, the United States Surgeon General issued a letter to the U.S. Department of Health and Human Services concerning the sex-

ual health risks to the nation's citizens.[250] In addition to the challenges of living with sexually transmitted disease and sexual violence, the Surgeon General listed the over one million abortions which had occurred in 1996 and the fact that nearly one-half of pregnancies are unintended.[251] From a public health stance, he expressed hope for attaining positive solutions in the face of these challenges:

> Given the diversity of attitudes, beliefs, values and opinions, finding common ground might not be easy but it is attainable. We are more likely to find this common ground through a national dialogue with honest and respectful communication. We need to appreciate and respect the diversity of our culture and be informed by the science that is available to us.[252]

This message is useful as we engage in dialogue regarding fetal rights, maternal rights and duties, and sound legal approaches to domestic violence homicide. As long as the constitutional right to abortion is respected, North Carolina's choice whether to enact an Unborn Victims of Violence Act and increase accountability for domestic violence homicide to pregnant women and their unborn children is one which may alter the existing legal approach to women and their liberty interests, but not to the extent of depriving a woman of the right to abortion in the first trimester. As for the rights of the unborn, enacting a fetal homicide statute would prove groundbreaking in North Carolina with respect to its impact on the criminal justice system. However, careful consideration must be taken into account of the potential impact on many other criminal and civil actions, the extent liability should attach regarding the developmental stage of the fetus, and whether as a matter of constitutional implication and compassionate social policy pregnant women should be exempted.

250. United States Department of Health & Human Services, *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior, A Letter from the Surgeon General* (July 9, 2001).

251. *Id.*

252. *Id.*