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PROTECTION OF REPRODUCTIVE AUTONOMY

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FETAL HOMICIDE LAWS: THE UTMOST PROTECTION OF REPRODUCTIVE AUTONOMY

Eryn Correa*

I. INTRODUCTION

*The pro-choice movement ought actually to support strict laws against feticide. The whole point of an abortion right, after all, is that a pregnant woman—not the state or anyone else—decides whether to have an abortion. A woman who plans to give birth, but is attacked by someone who kills her fetus in the process, is violently deprived of the right to choose not to have an abortion.*¹

Teresa Keeler, eight months pregnant, was driving down a narrow road in California when her ex-husband spotted her from the passing lane.² He recklessly blocked the tight passage with his car and approached Mrs. Keeler, who had pulled over to the side of the road in response to Mr. Keeler’s actions.³ At first he was calm, even friendly, gently helping her out of her vehicle.⁴ However, when he realized that she was carrying another man’s child, he became “visibly upset” and screamed at Mrs. Keeler that he was going to “stomp it out of you.”⁵ He proceeded to savagely strike Mrs. Keeler in the face and knee her repeatedly in the abdomen.⁶

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¹ Michael C. Dorf, *How Abortion Politics Impedes Clear Thinking on Other Issues Involving Fetuses*, FINDLAW (May 28, 2003), http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/dorf/20030528.html.

² Keeler v. Superior Court, 470 P.2d 617, 618 (Cal. 1970).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

When she regained consciousness, she was forced to deliver the baby stillborn, due to the massive skull fractures the child had suffered as a result of the force to her stomach during the brutal attack.⁷ Despite causing her death, Mr. Keeler was successful in receiving a writ of prohibition to prevent a charge for the murder of Mrs. Keeler's unborn daughter.⁸

Eighty-four percent of Americans believe that prosecutors should be able to bring homicide charges on behalf of an unborn child killed in the womb by someone other than the pregnant woman or an abortion provider.⁹ Nonetheless, both state and federal fetal homicide laws that aim to criminalize harmful acts against a fetus by third-party attackers have been heavily criticized and debated.¹⁰ On the one hand, those in support of fetal homicide laws, mainly pro-life advocates, have lauded these laws as one step closer to recognizing the rights of a fetus as a natural and legal person.¹¹ Those opposed to these laws, mainly pro-choice and feminist advocates, fear that these laws, by giving a fetus the full rights of a natural person, will chip away at a woman's right to choose an abortion.¹²

Characterizing the debate over fetal homicide laws in terms of the fetus' rights versus the mother's right to reproductive autonomy misses the point. Rather than engaging in a debate concerning "legal" or "natural" personhood of a fetus, the focus of the discussion surrounding these laws should be on the protection of women from violent domestic abuse and other harmful third party actions taken without the consent of the mother. Thus, the consent of the mother is the definitive line separating illegal fetal homicide from legal abortion. As Benjamin Wolf of *The Elliot Schlissel New York Law Blog* points out: "the fact that states consider non-consensual abortion to be murder while consensual abortion is perfectly legal indicates that in this area of the law, the interests, choices, and wishes of pregnant women are the overriding concern, rather than any attempt at a consistent definition

⁷ *Id.*

⁸ *Id.* at 630.

⁹ H.R. REP. NO. 108-420, pt. 1, at 5 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533.

¹⁰ *Fetal Homicide Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14386> (last visited Oct. 8, 2013).

¹¹ *Id.*

¹² *Id.*

of ‘when life begins.’”¹³ In other words, fetal homicide laws recognize a woman’s ability to exercise her reproductive rights and protect her choice of whether or not to end her pregnancy; a third party attacker may not decide that for her.¹⁴ Rather than further engaging in what Deborah Tuerkheimer dubs “the twentieth century maternal-fetal conflict,”¹⁵ we should recognize fetal homicide laws as a true attempt to justly punish the violent actions of a third party attacker aimed at pregnant women and preserve a woman’s right to reproductive autonomy.

Part II of this Note discusses the current statistics concerning violent domestic abuse against pregnant women. Part III provides a brief background on the history of fetal homicide laws. Part IV examines the current ‘personhood’ debates and argue that calling a fetus a person—natural or judicial—detracts from the goal of fetal homicide laws. Part V argues that the mother’s consent is the appropriate common denominator for reconciling legal abortion and fetal homicide laws by drawing analogies to rape laws, where consent is also the dividing line between a legal and an illegal action by a third party. Finally, Part VI discusses why a one-victim rather than a two-victim approach is the correct way to understand fetal homicide laws.

II. DOMESTIC ABUSE AND PREGNANCY

There are approximately six and a half million pregnancies in the United States every year.¹⁶ During pregnancy, it is expected that between 3.9% and 8.3% of women experience violent domestic abuse¹⁷ including both physical and sexual abuse, both of which can have long-term adverse effects on the fetus. It has been estimated that a pregnant woman’s risk of violent domestic abuse is 60.6% greater than that a non-pregnant woman, with rates of abuse increasing as the woman gets

¹³ Benjamin Wolf, *New York’s Fetal Homicide Law & Legal Abortion—the Common Denominator*, THE ELLIOT SCHLISSEL NEW YORK LAW BLOG (Apr. 20, 2009), <http://schlissellaw.wordpress.com/2009/04/20/new-york-will-soon-classify-killing-a-fetus-at-any-stage-of-gestation-as-homicide/>.

¹⁴ *Id.*

¹⁵ Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 689 (2006).

¹⁶ Stephanie J. Ventura, M.A. et al., *Estimated Pregnancy Rates and Rates of Pregnancy Outcomes for the United States, 1990–2008*, 60 NATIONAL VITAL STATISTICS SYSTEM 7 (June 20, 2012), available at http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_07.pdf.

¹⁷ See Tamara L. Taillieu & Douglas A. Brownridge, *Violence Against Pregnant Women: Prevalence, Patterns, Risk Factors, Theories, and Directions for Future Research*, 15 AGGRESSION AND VIOLENT BEHAVIOR 14, 15–16 (2010) (aggregating figures from several studies on the prevalence of violence against pregnant women to describe the majority view on the rates of such violence).

further along in her pregnancy.¹⁸ Although there is little research on why exactly partners are more likely to attack the woman the longer that she carries the child, studies show that this increase in violence may be attributable to a number of different factors. Included in these factors are a partner's jealousy of the unborn child; fear that the future child will detract from the woman's role as caretaker of her partner; or the partner's need to regain control of a situation—pregnancy—which he feels is largely outside of his control.¹⁹

Violent domestic abuse against a pregnant woman has severe physical consequences for the fetus. In its most extreme form, violent domestic abuse can lead to death of both the mother and the fetus. According to Sondra Goldschein, a state strategies director for the ACLU's Reproductive Freedom Project, murder is the leading cause of death in pregnant women.²⁰ In the cases that do not result in death of the mother, the physical trauma itself has a number of adverse fetal outcomes including miscarriage, stillborn birth, preterm labor and delivery (abused mothers are 37% more likely to deliver preterm children²¹), direct fetal injury, fetal hemorrhage, and placental abruption.²² Additionally, violent domestic abuse during pregnancy has been associated with maternal substance abuse, smoking, unhealthy diet, low weight gain and delayed entry into prenatal care.²³ Although there have been few studies on the link between violent domestic abuse and fetal death in the United States, research from studies conducted in both Canada²⁴ and India²⁵

¹⁸ Eli Newberger, *Abuse of Pregnant Women and Adverse Birth Outcome*, 267 JAMA 2370 (1992), available at <http://www.elinewberger.com/articles/archive/domesticviolence/abuse.html>.

¹⁹ See generally JANA L. JASINSKI, VIOLENCE AGAINST WOMEN: AN EXAMINATION OF DEVELOPMENT ANTECEDENTS AMONG BLACK, CAUCASIAN, AND HISPANIC WOMEN (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/189243.pdf> (drawing on various studies and the author's speculations as to the driving forces behind domestic violence against pregnant women).

²⁰ Christine Vestal, *States Expand Fetal Homicide Laws*, STATELINE (Aug. 22, 2006), <http://www.stateline.org/live/details/story?contentId=135873>.

²¹ *The Facts on Reproductive Health and Partner Abuse*, FUTURES WITHOUT VIOLENCE, http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Reproductive.pdf (last visited Oct. 8, 2013).

²² See, e.g., Thomas M. Goodwin & Michael T. Breen, *Pregnancy Outcome and Fetomaternal Hemorrhage After Noncatastrophic Trauma*, 162 AM. J. OBSTETRICS & GYNECOLOGY 665 (1990) (Study conducted on the effects of trauma in the second half of pregnancy).

²³ Tuerkheimer, *supra* note 15, at 673.

²⁴ See Patricia A. Janssen et al., *Intimate Partner Violence and Adverse Pregnancy Outcomes: A Population-Based Study*, 188 AM. J. OBSTETRICS & GYNECOLOGY 1341, 1346–47 (2003) (Study on prevalence of intimate partner violence and its consequences for the pregnant woman and the fetus).

suggest that women facing domestic abuse during pregnancy are at a significantly higher risk of experiencing fetal death.²⁶

Intuitively, American society seems to believe that violent domestic abuse that results in the homicide of a pregnant woman claims two victims: the mother and the fetus. Multiple op-ed authors have chastised the limitations of state murder statutes that do not recognize the fetus as an additional victim in cases of homicide, home robbery, or more catastrophic events.²⁷ As Tracy Marciniak, a victim of an assault that ended her pregnancy stated in her testimony before the House Judiciary Constitution Subcommittee that was considering the federal Unborn Victims of Violence Act (UVVA):

I know that some lawmakers and some groups insist that there is no such thing as an unborn victim and that the crimes like this only have a single victim. But this is callous, and it is wrong. Please don't tell me that my son was not a real victim of a real crime.²⁸

Additional families who appeared in Washington, DC to advocate for the UVVA expressed similar sentiments about the crimes their families and communities had experienced: Sharon Rocha, the mother of Laci Peterson, came from California; Carol and Buford Lyons travelled from Kentucky to testify about the loss of their 18-year-old daughter and unborn grandchild to homicide; Stephanie Alberts from West Virginia testified about the death of her daughter and unborn granddaughter in a home robbery; and Cynthia Warner, who had lost her daughter and unborn grandson to homicide in Maine, came from Minnesota. All pled the same thing before Congress: please understand that we have lost two people.²⁹

²⁵ Shireen J. Jejeebhoy, *Associations Between Wife-Beating and Fetal and Infant Death: Impressions from a Survey in Rural India*, 29 *STUD. FAM. PLAN.* 300, 308 (1998).

²⁶ Christina C. Pallitto, *Domestic Violence and Maternal, Infant, and Reproductive Health: A Critical Review of the Literature* (2004), available at www.paho.org/English/AD/FCH/WM/DVlitreviewengl.doc.

²⁷ *Crimes that Claim Two Victims*, NAT'L RIGHT TO LIFE, <https://www.nrlc.org/federal/unbornvictims/twovictims/> (last visited Oct. 8, 2013).

²⁸ H.R. REP. NO. 108-420, pt. 1, at 4 (2004), reprinted in 2004 U.S.C.C.A.N. 533.

²⁹ *Family Members of Unborn Victims Go to Washington to Help Pass Bill*, NAT'L RIGHT TO LIFE (Apr. 5, 2004), http://www.nrlc.org/archive/news/2004/NRL04/family_members_of_unborn_victims.htm.

Legislators seem to have difficulty effectively criminalizing violent domestic abuse that leads to fetal death because of the difficulty in conceptualizing how this death fits within traditional ambit of criminal law. At one end of the spectrum, some states largely disregard fetal injuries or fetal death that results from violent domestic abuse, restricting a court to granting remedies based solely on the physical harm suffered by the pregnant woman herself without regard to effects this physical harm has on the fetus.³⁰ At the other end of the spectrum, some states, such as Oklahoma, Virginia, Colorado and Mississippi, have attempted to pass fetal personhood amendments, which purport to grant the fetus the full rights of natural persons and thus the full protection of criminal laws—including assault, battery and homicide.³¹ It is the balancing of these two interests—the interest in protecting the mother from violence and the interest in justly criminalizing the loss of life at any state of development—that has coalesced into the codification of fetal homicide laws.

III. BACKGROUND AND HISTORY OF FETAL HOMICIDE LAWS

A. *Fetal Homicide at Common Law*

During the nineteenth century, American common law did not recognize a cause of action for the death of a fetus not “born alive.”³² As William Blackstone expressed in his *Commentaries on the Laws of England*: “[T]o kill a child in its mother’s womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it receives in the womb it seems, by the better opinion, to be murder.”³³ The “Born Alive” rule was meant to alleviate the difficulty of establishing a causal link between a defendant’s misconduct and a fetus’ death. This rule was conceived at a time when medical knowledge was not sophisticated enough to determine whether a child was alive before birth or whether the defendant or some other factor had caused the death of the fetus in utero.³⁴ Thus, the common law adopted the “single entity approach,”

³⁰ See, e.g., *People v. Moorehead*, 648 N.Y.S.2d 528 (N.Y. Just. Ct. 1996) (discussing a criminal complaint of a woman, eight months pregnant, who was kicked in the stomach and was unable to refer to the loss of her fetus as anything more than “stomach pains” under New York tort statute).

³¹ See *infra* notes 61–63.

³² Mamta K. Shah, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931, 934 (2001).

³³ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198.

³⁴ See Shah, *supra* note 32, at 937 (expressing the difficulty in determining the cause of death of a fetus during a time when prenatal mortality rates were high).

which asserted that an unborn child and its mother were a single entity, on the theory that a person could not be charged with the death of an entity who was not yet legally “alive.”³⁵

It was because of this common law approach that Mr. Keeler was successful in seeking a writ of prohibition against a homicide charge for the killing of Mrs. Keeler’s unborn child. At the time the Supreme Court of California examined the case, § 187 of the California Penal Code provided that “[m]urder is the unlawful killing of a *human being* with malice aforethought.”³⁶ The court concluded that the California Legislature of 1850 when § 187 was drafted intended the term “human being” to have the “settled common law meaning of a person born alive.”³⁷ As stated by Black, although the killing of a fetus was seen as a great “misprision,” a child within a mother’s womb was not a “human being” within the meaning of that term as used in defining murder.³⁸ Thus, the charge for murder against Mr. Keeler could not continue despite his brutal actions.³⁹

Until the 1850’s, states largely followed the common law Born Alive rule and refused to recognize the death of a fetus as punishable under murder statutes.⁴⁰ Consequently, states have only recently begun grappling with the concept of whether life could end in utero, as science and medical technology have provided greater insight as to “when life begins.” Thirty-eight states have since codified fetal homicide laws,⁴¹ however, the Born Alive rule is still the approach used in the

³⁵ *Id.*

³⁶ *Keeler v. Superior Court*, 470 P.2d 617, 619 (Cal. 1970) (quoting Cal. Penal Code § 187 (West 1999)) (emphasis added).

³⁷ *Id.* at 622, 631.

³⁸ *Id.* at 630.

³⁹ *Id.* (granting a preemptory writ of prohibition restraining the respondent court from proceeding with the charge of murder against Mr. Keeler).

⁴⁰ See Stephanie Rittrivi McCavitt, *The “Born Alive” Rule: A Proposed Change to the New York Law Based on Modern Medical Technology*, 36 N.Y.L. SCH. L. REV. 609, 612 (1991) (citing two court decisions applying the Born Alive rule as being indicative of the norm).

⁴¹ ALA. CODE § 13A-6-1 (2009); ALASKA STAT. § 11.41.150 (2009); ARIZ. REV. STAT. ANN. § 13-1102 (2009) (West); ARK. CODE ANN. § 5-1-102(13)(B)(i)(a)–(b) (2009) (LexisNexis); CAL. PENAL CODE § 187(a) (West 2009); COLO. REV. STAT. ANN. § 18-1.3-401(13) (West 2009); FLA. STAT. ANN. § 782.09 (West 2009); GA. CODE ANN. § 16-5-80 (West 2009); IDAHO CODE ANN. § 18-4001 (West 2009); 720 ILL. COMP. STAT. ANN. § 5/9-1.2 (West 2009); IND. CODE ANN. § 35-42-2-1.5 (West 2009); IOWA CODE ANN. § 707.8 (West 2009); KY. REV. STAT. § 507A.010 (West 2009); LA. REV. STAT. ANN. § 14:32.5 (2009); ME. REV. STAT. ANN. tit. 17-A, § 208-C (2009); MD. CODE ANN., CRIM. LAW § 2-103 (West 2009); MICH. COMP. LAWS ANN. § 750.323 (West 2009); MINN. STAT. ANN. § 609.205 (West

Model Penal Code⁴² and still haunts state legislation that has undertaken to criminalize fetal death at the hands of a third-party attacker.

B. Attempts to Fill the Void—Codifying Fetal Homicide Laws

Fetal homicide laws are a response to the common understanding by survivors that the loss of an unborn child at the hands of a third party attacker is a crime with a unique victim that is wholly separate from the mother and thus should be punished accordingly. However, state legislators and state courts still struggle with how to define and punish the death of an entity that technically, is not yet “alive.” A number of states have incorporated a version of the Born Alive rule into their fetal homicide laws by requiring that the fetus attain a certain state of development—most generally “quickening” or “viability”—before it can be considered a separate victim for the purposes of charging a defendant with murder.⁴³ For example, Arkansas requires that an unborn child reach 12 weeks or greater gestation before such a penalty can be applied.⁴⁴ The rationale for imposing a particular gestational age or stage of development is that although a fetus was not technically “born alive,” there was a scientific possibility that it *could* have been born alive and survived on its own.⁴⁵ Because the fetus could have survived, the state’s interest in preserving its life is triggered and therefore justifies a conviction under the applicable murder statute.

2009); MISS. CODE ANN. § 11-7-13 (West 2009); NEB. REV. STAT. ANN. § 28-388 (West 2009); NEV. REV. STAT. § 200.210 (West 2009); N.D. CENT. CODE ANN. § 12.1-17.1-01 (West 2009); OHIO REV. CODE ANN. § 2901.01 (West 2009); OKLA. STAT. ANN. tit. 21, § 691 (West 2009); 18 PA. CONS. STAT. ANN. § 2603 (West 2009); R.I. GEN. LAWS ANN. § 11-23-5 (West 2009); S.C. CODE ANN. § 16-3-1083 (2009); S.D. CODIFIED LAWS § 22-16-41 (2009); TENN. CODE ANN. § 39-13-214 (West 2009); UTAH CODE ANN. § 76-5-201 (West 2009); VA. CODE ANN. § 18.2-32.2 (West 2009); WASH. REV. CODE ANN. § 9A.32.060 (West 2009); W. VA. CODE ANN. § 61-2-30 (West 2009); WIS. STAT. ANN. § 940.04(2) (West 2009).

⁴² See MODEL PENAL CODE § 210.0(1) (1962).

⁴³ Such states include Arkansas, California, Florida, Indiana, Maryland, Massachusetts, Michigan, Nevada, Rhode Island, Tennessee, and Washington. See, e.g., ARK. CODE ANN. § 5-1-102(13) (West 2009).

⁴⁴ See *id.*

⁴⁵ See Bicka A. Barlow, *Severe Penalties for the Destruction of “Potential Life”—Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 498–99 (1995); Sandra L. Smith, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1875 (2000).

The majority of states, however, have chosen to disregard any requirement as to gestational age. For example, Georgia's criminal statute defines the term "unborn child" to mean "any member of the species *Homo sapiens* at any stage of development who is carried in the womb."⁴⁶ Of the 37 states that have enacted fetal homicide laws, 22 have adopted this approach.⁴⁷ For these states, the focus is not on viability or the possibility of being "born alive"; rather, these laws focus exclusively on criminalizing violent third-party acts taken against a woman that terminate her pregnancy without her consent.

The murder of Laci Peterson and her unborn son, Connor, brought national attention to the dearth of federal legislation addressing unborn victims.⁴⁸ At the time, although many states had fetal death laws on the books, the fetus was not recognized as a victim of federal crimes of violence. After much petitioning from advocates and victims such as Tracy Marciniak, who had lost her son after her husband had punched her in the stomach and refused to allow her to seek medical care⁴⁹ and Sharon Rocha, the mother of Laci Peterson,⁵⁰ Congress passed the UVVA, which was signed into law by President Bush on April 1, 2004.⁵¹

The UVVA has codified a clear, two-victim approach that recognizes the fetus as a separate victim unto itself, without regard to gestational age.⁵² Under this statute, any person who commits a violent act against the mother listed under the provisions of UVVA is guilty of an additional offense if that action results in the death of a child in utero.⁵³ Much like the state laws that similarly recognize the

⁴⁶ GA. CODE ANN. § 52-7-12.3 (West 2008).

⁴⁷ These 22 states include Alabama, Alaska, Arizona, Georgia, Idaho, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *See, e.g.*, 18 PA. CONS. STAT. § 2603 (2012); S.C. CODE ANN. § 16-3-1083 (2012).

⁴⁸ Harriet Ryan, *Fetal Homicide Issue Arises in Laci Peterson Case*, CNN JUSTICE (Mar. 26, 2003), http://articles.cnn.com/2003-03-26/justice/ctv.fetal.homicide_1_fetal-homicide-murder-charges-murder-statute?_s=PM:LAW.

⁴⁹ *See* H.R. REP. NO. 108-420, pt. 1, at 9 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 539.

⁵⁰ *See id.*

⁵¹ *See* Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat 568 (codified as amended at 10 U.S.C. § 919a (2006)).

⁵² *See id.*

⁵³ *See id.*

fetus as a separate victim, this act makes exceptions for legal abortion undergone with the mother's consent.⁵⁴

IV. PERSONHOOD DEBATES

Unfortunately, the debate over fetal homicide laws has become a discussion about the rights of the fetus, rather than focusing on the remedy fetal homicide laws provide to pregnant victims of violent abuse.⁵⁵ Although those states that have codified fetal homicide laws make explicit provisions excluding punishment for legal abortion, pro-life advocates interpret fetal homicide laws to be one step closer to recognizing the fetus as a natural person.⁵⁶ This recognition could lead to the criminalization of abortion for any reason. In response, pro-choice and feminist opponents are appropriately threatened by this slippery slope of fetal "personhood" that these laws seem to be on the road to recognizing and worry how this recognition will effect women's right to reproductive autonomy.⁵⁷

Fetal personhood has been a subject of debate since the Supreme Court handed down *Roe v. Wade*,⁵⁸ which seemed to leave an opening for states to legislatively define when life begins.⁵⁹ As stated by Justice Blackmun in that decision, "the word 'person' as used in the Fourteenth Amendment, does not include the unborn."⁶⁰ Since then, a number of states and pro-life advocates have fiercely attempted to close this gap left by Justice Blackmun by defining the fetus as a "person" who is afforded the same Fourteenth Amendment protections as any other person who is "born alive" and would have the effect of prohibiting abortion for any reason.⁶¹ Most recently, states such as Oklahoma and Virginia have been

⁵⁴ *See id.*

⁵⁵ *See* Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 722 (2006) (recommending that the focus on fetal homicide laws be on the harm to the potential mother).

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁹ *See id.*

⁶⁰ *Id.* at 158.

⁶¹ *See, e.g., Amendment 62: Application of the Term Person*, 2010 STATE BALLOT INFORMATION BOOKLET 1, 16 (2010), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251658319927&ssbinary=true>; Steven Ertelt, *North Dakota Senate Approves Personhood Amendment Abortion Ban*, LIFE NEWS.COM

successful in passing personhood bills that define “person” to include the unborn from the moment of conception, in one house of their respective state congresses (the Oklahoma State Senate and the Virginia House of Delegates) and are awaiting passage in the concurrent legislative body.⁶² States such as Colorado and Mississippi have also made attempts at the definition of personhood. In 2008, Colorado introduced the first “personhood” amendment, Amendment 48, to define personhood as the beginning of the moment of conception.⁶³ In 2011, the Mississippi state government held a referendum to amend its constitution with Initiative #26, which defined a person to include “every human being from the moment of fertilization, cloning or the functional equivalent thereof.”⁶⁴ All of these personhood amendments have failed. However, pro-life advocates nonetheless take great faith in fetal homicide laws, which appear to admit the beginnings of a fetal right to life at any gestational age in stating that the death of a pregnant woman claims two victims. As Richard Land, president of the Southern Baptist Convention’s Ethics & Religious Liberty Commission said at the signing of the UVVA, “[the enactment of the UVVA] is another reminder that we are slowly but surely winning the battle for the hearts and minds of the American public when it comes to the personhood of unborn human beings.”⁶⁵

Richard Land is right: both sides of the debate—both for and against fetal homicide laws—understand fetal homicide laws to accord the fetus some level of personhood rights, independent of the mother.⁶⁶ However, the response to the perceived codification of fetal “personhood” in fetal homicide laws has been varied. On the one hand, groups such as Planned Parenthood and the National Organization for Women and National Abortion Rights Action League (NARAL)

(Feb. 7, 2013); Personhood USA, *available at* <http://www.personhoodusa.com/> (last visited Oct. 8, 2013).

⁶² See, e.g., Steve Olafson, *Anti-Abortion “Personhood” Bill Clears Oklahoma Senate*, REUTERS (Feb. 16, 2012), <http://www.reuters.com/article/2012/02/16/us-oklahoma-personhood-idUSTRE81F0ES20120216>.

⁶³ Bente Birkeland, *“Personhood” Amendment on Colorado Ballot*, NPR (Oct. 29, 2008), <http://www.npr.org/templates/story/story.php?storyId=96167092>.

⁶⁴ Letter from P. Riley Leslie, Jr., Mississippi Secretary of State, to John Helmert, Mississippi Office of State Public Defender (Nov. 22, 2008), *available at* <http://www.sos.ms.gov/links/elections/home/tab2/26text.pdf>.

⁶⁵ *Some Reactions to the Enactment of the Unborn Victims of Violence Act*, NAT’L RIGHT TO LIFE (Apr. 1, 2004), http://www.nrlc.org/archive/news/2004/NRL04/some_reactions_to_the_enactment_.htm.

⁶⁶ *Id.*

Pro-Choice America have vociferously spoken out against fetal homicide laws and, in particular the UVVA, which they believe undermines the right to abortion recognized under *Roe v. Wade*, as part of a deceptive pro-life strategy that severely restricts a woman's right to choose.⁶⁷ The fact that Republican president George Bush, a staunch pro-life advocate, signed this piece of federal legislation into law does nothing to calm these fears.⁶⁸ On the other hand, some advocates of fetal homicide laws take no issue with them, given that most make exceptions for legal abortion within text of the law itself.⁶⁹ As Harvard criminal law Professor Richard Parker demonstrated while discussing the UVVA, when there are exemptions for legal abortion in a fetal homicide law, "[t]here is nothing as a formal law that would undermine *Roe v. Wade*."⁷⁰

The legislative history of the enactment of the UVVA is helpful in understanding the ideological split of pro-choice and pro-life advocates on this Act. In 2003, Senator Diane Feinstein and Congresswoman Zoe Lofgren introduced the Motherhood Protection Act (MPA), which proposed to levy additional punishment for certain crimes against women when those crimes caused "an interruption in the normal course of their pregnancies."⁷¹ Instead of punishing a third-party aggressor for an additional *crime* if his violent action against the mother resulted in fetal death, the MPA focused exclusively on the harm exacted on the woman and imposed an additional *penalty*⁷² for third party acts that resulted in fetal death.⁷³ Supporters of the MPA lauded this Act's focus on the issue of violence against pregnant women.⁷⁴ However, critics of the MPA condemned this "one-victim" or "single-entity" approach considered by this proposed legislation as a "step away

⁶⁷ *Id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ Marcia Yablon, *Victim Politics*, THE NEW REPUBLIC, May 21, 2001, at 16.

⁷¹ Motherhood Protection Act of 2003, H.R. 2247, 108th Cong. § 1 (2003), <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.+2247>.

⁷² Specifically, punishment by fine under Title 18 of the U.S. Code, imprisonment for more than twenty years, or both if the assailant did not terminate the pregnancy.

⁷³ H.R. 2247.

⁷⁴ Shannon M. McQueeney, *Recognizing Unborn Victims Over Heightening Punishment for Crimes Against Pregnant Women*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 461, 478 (2005).

from justice”⁷⁵ because it seemed to ignore the understanding of the fetus as victim unto itself that deserved justice for the harms enacted upon it.⁷⁶ It was this argument that won the day.⁷⁷ Examined in this light, Congress’ decision to enact the UVVA that codifies a two-victim approach, in lieu of the MPA, which adopts the opposite, one-victim approach that focused exclusively on the mother and the abuse she suffers, does appear to give a nod in the direction of greater fetal rights—whether full-fledged personhood rights or not—thus helping to explain the discomfort of pro-choice advocates in relation to the UVVA.

Even so, some advocates of fetal homicide laws take no issue with the fact that the fetus is defined as a “person” under the gloss of fetal homicide laws, which these advocates understand to justly criminalize harmful third party acts against the fetus. Rather than recognizing the fetus as a “natural” person, that is, “such as the God of nature formed us”⁷⁸ and afforded full constitutional liberties flowing from humanity’s “very dignity and existence,”⁷⁹ these advocates understand the fetus as a “judicial” person.⁸⁰ A judicial person is a creature of the state and hence, is only accorded the rights states choose to give as a means to accomplish certain goals.⁸¹ For example, Michael Dorf points out:

Statutes routinely define various words, including “person,” so that they will mean exactly what the legislature intends in a particular context. . . . Corporations, for example, are “persons” under the Fourteenth Amendment in the sense that their property cannot be taken without fair processes, but not in the sense that they are entitled to vote on equal terms with natural persons.⁸²

⁷⁵ *Unborn Victims of Violence Act of 2003 or Laci and Conner’s Law: Hearing on H.R. 1997 Before the H. Comm. on the Judiciary*, 108th Cong. 20, 23 (2003) (statement of Serrin M. Foster, President, Feminists for Life of America).

⁷⁶ McQueeney, *supra* note 74, at 482.

⁷⁷ *Id.* at 477.

⁷⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES 119.

⁷⁹ Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 199 (1996).

⁸⁰ Juliana Vines Crist, *The Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws*, 60 CASE W. RES. L. REV. 851, 863 (2010).

⁸¹ Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 380 (2007).

⁸² Dorf, *supra* note 1.

In terms of fetal personhood, this delineation means that the fetus is not accorded the full protection of a “natural person” under the Constitution, but only as much protection as the state believes necessary to achieve the ends of any particular (fetal) homicide statute.⁸³ With this understanding, the law “can logically refer to the fetus as a ‘person’ and, at the same time, not grant it a constitutional right to life,” thus making room for legal abortion.⁸⁴ These advocates of fetal homicide laws find nothing legally inconsistent in defining “person” differently to achieve different ends, whether it is to criminalize the harmful actions of a third party attacker or protect a woman’s constitutional right to choose.⁸⁵

On the other hand, many feminist scholars still understand fetal homicide laws to afford the fetus the beginnings of full personhood rights and take issue with these laws. These scholars believe that fetal homicide laws marginalize a woman’s role in society to that of a “vessel” with no rights or concerns of her own. According to Tuerkheimer:

Although a pregnant woman is not yet a mother . . . she is expected to possess the same characteristics that are associated with idealized motherhood. The paradigmatic woman is selfless, sacrificing, willing and able to put the interests of her unborn child ahead of her own needs and desires, and fully committed to—and capable of—providing a uterine environment that is nothing short of perfection. Deviation from this archetype threatens social norms; fetal rights provide the justification for punishing any such deviation.⁸⁶

In other words, feminist scholars such as Tuerkheimer who speak out against fetal homicide laws believe according a fetus any rights whatsoever necessarily infringes on the mother’s right to make decisions about her own pregnancy and thus allows society to judge and punish the mother for making a decision other than one that is protective of that fetus inside her.⁸⁷ The fear here is that any potentially harmful

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Crist, *supra* note 80, at 854.

⁸⁶ Tuerkheimer, *supra* note 15, at 692–93.

⁸⁷ *Id.* at 693–94.

actions taken by the mother—from smoking a cigarette to legal abortion—could be criminally prosecuted.⁸⁸

This fear is not unwarranted. A recent rash of cases have shown that many state courts have at least attempted (with little success) to penalize mothers for substance abuse that causes harm to her unborn child, struggling mightily to punish the mother's substance abuse by way of criminal feticide statutes.⁸⁹ At this end of the spectrum of the fetal homicide law debates, feminist dissenters understand the state's interest in the unborn life as overriding any voice the woman has in the issue.⁹⁰ Again, although the responses to fetal homicide laws are varied, it seems that considered from any perspective it is impossible to deviate from the idea of the fetus as a "person."

V. CONSENT

To characterize fetal homicide laws as pitting a mother's rights against the fetus' rights is to mischaracterize the goal behind fetal homicide laws: to justly criminalize harmful third party actions against pregnant women where we as a society instinctively believe a greater crime has been exacted when these actions also result in the death of a fetus. Although it is legally consistent that a fetus may be defined as a "person" in terms of fetal homicide laws but not in the case of legal abortion,⁹¹ this argument plays too heavily into the personhood debates, which should have no place in discourse about fetal homicide laws. Furthermore, feminist scholars are also misguided in their belief that fetal homicide laws infringe on a woman's reproductive rights.⁹² Rather than engaging in any debate concerning fetal "personhood," the discussion should be focused on the goals of fetal homicide laws—to punish harmful third party acts against a fetus while affording a woman the most protection possible over the exercise of her reproductive rights.

Supreme Court Justice Ruth Bader Ginsburg argues "reproductive autonomy is, at its most basic level, about putting a woman in control of her destiny and her

⁸⁸ *Id.*

⁸⁹ See generally Alison M. Leonard, *Fetal Personhood, Legal Substance Abuse, and Maternal Prosecutions: Child Protection or Gestational Gestapo?*, 32 NEW ENG. L. REV. 615 (1998) (discussing the complex issue of prosecuting women for injuries caused to their fetus through the mother's actions).

⁹⁰ *Id.*

⁹¹ See Crist, *supra* note 80, at 854.

⁹² Tuerkheimer, *supra* note 15, at 694.

place in society.”⁹³ When a pregnant woman suffers at the hands of a third-party attacker that results in the death of her fetus, her reproductive right *not* to choose an abortion has been violated.⁹⁴ Far from infringing on a woman’s right to determine the course of her pregnancy, fetal homicide laws are strongly protective of a woman’s right to choose—whatever that choice may be—and are meant to punish parties that make those choices about her body without her consent.⁹⁵

Designating consent as the dividing line between illegal fetal homicide and legal abortion is logically consistent with the rationale behind other criminal offenses such as rape. The Model Penal Code makes clear that some actions, if taken with the consent of another party, are not considered criminally punishable. For example, there is little difficulty recognizing that two consenting adults may freely engage in sexual intercourse; we find no reason to bring these people in front of a criminal prosecutor. However, we *do* take issue if one of these two parties was *not* consenting to sexual intercourse or was otherwise unable to do so; so does the Model Penal Code⁹⁶ and all 50 state legislatures.⁹⁷

A number of courts have similarly recognized consent as the valid line between criminal fetal death and consensual legal abortion. For example, the Minnesota Supreme Court rejected an Equal Protection challenge brought by the defendant who claimed that he and a pregnant woman were in the same class of persons who “intentionally destroy a nonviable fetus” but only his actions—not those of a woman and her abortion doctor—were subject to criminal liability.⁹⁸ The court refused to accept this argument claiming:

⁹³ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ MODEL PENAL CODE § 213 (1980).

⁹⁷ *See, e.g.*, ALA. CODE § 13A-6-61(a)(1) (2011); ALASKA STAT. ANN. § 11.41.410(a)(1) (West 2006); ARIZ. REV. STAT. ANN. § 13-1406(A) (2006); ARK. CODE ANN. § 5-14-103(a)(1) (West 2009); CAL. PENAL CODE § 261(a)(2) (West 2003); COLO. REV. STAT. ANN. § 18-3-402 (West 2006); CONN. GEN. STAT. ANN. § 53a-70 (West 2011); DEL. CODE ANN. 11 § 773(a)(1) (West 2006); KAN. STAT. ANN. § 21-5503(a)(1) (2006); S.D. CODIFIED LAWS § 22-22-1 (2009); TEX. PENAL CODE ANN. § 22.011(a)(1)(A) (West 2006); UTAH CODE ANN. § 76-5-406 (West 2011); WASH. REV. CODE ANN. § 9A.44.050(1)(a) (West 2006); WIS. STAT. ANN. § 940.225(1)(a) (West 2006).

⁹⁸ *Minnesota v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990).

[A] defendant who assaults a pregnant woman causing the death of the fetus she is carrying does so without the consent of the woman. This is not the same as a woman who elects to have her pregnancy terminated by one legally authorized to perform the act.⁹⁹

In similar cases, it has been found that *only* where a mother consents to the termination of her pregnancy and the State can persecute one person's actions and not another's will an Equal Protection claim be triggered.¹⁰⁰ Until that point, a woman's right to determine the direction of her pregnancy belongs to her alone.¹⁰¹

VI. ONE VICTIM VS. TWO VICTIM APPROACH

*It matters even more that the true nature of the crime be recognized, so that the punishment—which should indeed be severe—will fit the true nature of the crime. This is a question not only of severity, but of justice.*¹⁰²

Focusing on the consent of the mother as the dividing line between fetal homicide and legal abortion is more closely aligned with the theory underlying the one-victim approach as opposed to the two-victim approach advocated by both the UVVA, as well as many persons closely affected by fetal death. However, understanding fetal homicide statutes as primarily an extension of a woman's reproductive rights as opposed to an expansion of fetal "personhood" rights properly contextualizes the goals of these statutes—to deter violence against women and justly criminalize these victims' loss when a third-party attacker intrudes on their right to determine the course of their pregnancy.

Pregnant women are inherently more vulnerable and thus are deserving of the full protection of law for both their physical person and their reproductive rights.¹⁰³ As Tuerkheimer points out, "whatever the underlying explanation for violence during pregnancy, a distinguishing feature of pregnancy battering is captured by the

⁹⁹ *Id.* at 322–23.

¹⁰⁰ *Flores v. State*, 245 S.W.3d 432, 437 (Tex. Crim. App. 2008).

¹⁰¹ *Id.*

¹⁰² *Unborn Victims of Violence Act of 2003 or Laci and Conner's Law: Hearing on H.R. 1997 Before the H. Comm. on the Judiciary*, 108th Cong. 23 (2003) (statement of Serrin M. Foster, President, Feminists for Life of America).

¹⁰³ Tuerkheimer, *supra* note 15, at 680.

simple truth: a batterer may more easily and more effectively dominate a woman who is already in a position of vulnerability.”¹⁰⁴ This vulnerability is not only a result of a pregnant woman’s physical condition, but equally a result of her societal position. As Martha Fineman has observed:

[T]he label “Mother” is modified by her legal relationship (or lack thereof) to a male. Mothers are classified by whether or not they are single, a fact that is positioned as significant and even central to the discourses. The absence of the formal legal tie to a male is far more than just a descriptive term or a classifying category. It has powerful ideological implications. In addition to providing a basis to determine who is undeserving in our culture, the rhetoric constructs single motherhood as dangerous and even deadly, not only to the single mothers and their children, but to society as a whole.¹⁰⁵

Given this societal understanding of the pregnant woman, it seems that pregnant women who experience violent domestic abuse may not only be physically unable to escape their untenable situation, but also face inordinate societal pressure not to expose herself or her child to the scorn of single motherhood. As Tuerkheimer remarks, “it is not surprising that many women ‘choose’ to remain in battering relationships, given the options.”¹⁰⁶ Rather than condemning pregnant women to this cycle of violence, it is the law’s responsibility to provide appropriate avenues for the deterrence of violence in addition to just punishment.

Fetal homicide laws provide this avenue and in so doing, perform a dual function. On the one hand, fetal homicide laws act to deter harmful third-party actions against the pregnant woman and her fetus. On the other, fetal homicide laws are the proper criminalization of the loss a woman and her family understands when a fetus is lost to these harmful actions. As Tuerkheimer, points out: “the relationship between a pregnant woman and her developing fetus is unique; its intimate nature is qualitatively different from that which characterizes the closeness of two fully formed human beings.”¹⁰⁷ Given this closeness, when a woman loses her fetus, there is a greater feeling of grief than would ordinarily be associated with (however unfortunately this diction may be) the “ordinary” course of domestic

¹⁰⁴ *Id.* at 679–80.

¹⁰⁵ Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 285–86 (1991).

¹⁰⁶ Tuerkheimer, *supra* note 15, at 681.

¹⁰⁷ *See id.* at 705.

violence or the “ordinary” homicide. This greater sorrow is the oft-repeated message of victims and families of victim who lose a fetus as a result of harmful third-party acts. As Sharon Rocha pointed out in her letter to Congress in support of the UVVA, “I do not understand how any legislator can vote to force prosecutors to tell such a grieving mother that she didn’t really lose a baby—when she knows to the depths of her soul that she did.”¹⁰⁸

Although the feelings of loss of a fetus may be similar whether a woman loses her fetus through abortion or violent third-party actions, the manner in which this loss is effectuated is fundamentally different and should be treated as such by law. Fetal homicide laws capture this division by properly drawing the line between legal abortion and illegal fetal homicide at consent, thereby criminalizing those actions that are taken without the mother’s consent. Understood from this angle, the discourse of fetal personhood rights has no place in the discussion about fetal homicide laws. Although the state has an interest in protecting potential life,¹⁰⁹ fetal homicide statutes are primarily about the *mother’s* interest in both the protection of her life and the life of her fetus.

¹⁰⁸ McQueeney, *supra* note 74, at 479.

¹⁰⁹ *Roe v. Wade*, 410 U.S. 113, 154 (1973).