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# ENCOURAGING RESPONSIBILITY DURING PREGNANCY THROUGH AMENDING THE UNBORN VICTIMS OF VIOLENCE ACT

## I. INTRODUCTION

The recently enacted Unborn Victims of Violence Act (“UVVA”) allows all persons except the pregnant mother to be held liable for the death or bodily injury of an in utero child.<sup>1</sup> The statute attaches additional criminal liability to a separate offense when an alleged perpetrator injures or kills an unborn child during the commission of certain violent predefined federal crimes.<sup>2</sup> However, the Act specifically notes that the statute does not apply to any woman with respect to her unborn child.<sup>3</sup>

In light of the new statute, consider the following hypothetical situations. If a pregnant woman’s boyfriend beats her and causes the death of the unborn child, he could be convicted of two separate offenses under the statute. Yet, if a woman beats herself on the eve of her due date with the intent to kill the unborn child, resulting in its death, she could not be convicted under the statute. What if a woman encourages her husband to beat the child out of her, resulting in the death of the in utero child? Could the husband be convicted, while the mother could not? Under the wording of the UVVA, a pregnant mother is expressly excluded and thus cannot be convicted.

This Note focuses on whether the “mother exception” should be removed from the UVVA and whether state laws that do not specifically exclude mothers regarding their unborn children should amend their homicide statutes to include the language. First, this Note will trace the

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1. Unborn Victims of Violence Act of 2004, Laci and Conner’s Law, 18 U.S.C.A. § 1841 (West Supp. 2005) [hereinafter UVVA]. For the text of the UVVA, *see infra* note 83. As explained in the text of the UVVA, “in utero child” can refer to embryos and fetuses alike. The term “child, who is in utero” is defined as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.” UVVA, § 1841(d). The terms “unborn child” and “in utero child” are used interchangeably in this Note. The term “fetus,” on the other hand, only refers to an in utero child “in the postembryonic period, after major structures have been outlined, in humans from nine weeks after fertilization until birth.” DORLAND’S MEDICAL DICTIONARY 661 (29th ed. 2000). However, although case law regarding in utero children refers to them as fetuses, one English scholar, John Robertson, “has persistently critic[i]z[ed] this language.” ROSAMUND SCOTT, RIGHTS, DUTIES AND THE BODY 22 (Hart Publishing 2002). Robertson opines that “the real party in interest is not the fetus itself but the child that the fetus will become.” *Id.* (quoting JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 176 (Princeton Univ. Press 1994)).

2. UVVA, § 1841(a).

3. *Id.* § 1841(c)(3).

history of the law regarding the unborn and the case law leading to the adoption of the UVVA.<sup>4</sup> Second, this Note will compare and contrast state murder statutes with the UVVA.<sup>5</sup> Third, this Note will examine the Melissa Rowland case in light of the UVVA and will then address the inconsistencies between the federal UVVA and state homicide statutes.<sup>6</sup> Finally, I will propose that pregnant women must have a responsibility to their in utero child once they have forgone a legal abortion, and the fetus has reached the point of viability.<sup>7</sup> Thus, states should incorporate the UVVA or a similar feticide statute into their state homicide statutes, while including language that provides a narrow exception where a pregnant woman could be held liable for a crime against the in utero child. This narrow exception would require that the woman purposely or knowingly cause the death of a viable fetus.

## II. BACKGROUND

### A. *The History of the Legal Status of an Unborn Child Regarding Criminal Homicide Statutes*

#### 1. *Convictions Denied Under The “Born-Alive” Rule*

Since ancient times the legal status of a fetus has been debated.<sup>8</sup> While Greek and Roman law provided almost no protection to unborn children,<sup>9</sup> Hippocrates, the author of the Hippocratic Oath, opposed fetal homicide.<sup>10</sup>

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4. See *infra* Part II.A.

5. See *infra* Part II.B–D.

6. See *infra* Part III.

7. See *infra* Part IV.

8. Michael S. Robbins, Comment, *The Fetal Protection Act: Redefining “Person” for the Purposes of Arkansas’ Criminal Homicide Statutes*, 54 ARK. L. REV. 75, 77–82 (2001). See generally *Roe v. Wade*, 410 U.S. 113, 130–41 (1973).

9. *Roe*, 410 U.S. at 130.

10. *Roe*, 410 U.S. at 131 (stating the content of the Hippocratic Oath). “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy.”; L. EDELSTEIN, *THE HIPPOCRATIC OATH* 3 (1943); Robbins, *supra* note 8, at 77.

Author Steven Miles translates the same passage as “[a]nd I will not give a drug that is deadly to anyone if asked [for it], nor will I suggest the way to such a counsel. And likewise I will not give a woman a destructive pessary.” STEVEN H. MILES, *THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE* xiv (Oxford Univ. Press 2004). A destructive pessary was a “wool tampon[] soaked in a variety of substances, including: opium poppies, bitter almond oil, boiled honey, sea onion, ox marrow, goose fat, rose oil, thapsia root, myrtle, coriander, cumin, marjoram, bacchar (an aromatic root), perfumes, emetics or other substances.” *Id.* at 82.

Miles highlights a contradiction between the Oath’s frequent interpretation that medical ethics have renounced abortion “since the inception of the [medical] profession” and ancient Greek law. *Id.*

Early American courts frequently looked to English common law principles and authorities for insight regarding the legal treatment of the unborn.<sup>11</sup> Sir Edward Coke, an eminent seventeenth century legal scholar, asserted that the killing of an unborn child is not murder, “but if the childe be born alive, and dieth . . . this is murder[,] for in law it is accounted a reasonable creature, in *rerum natura*, when it is born alive.”<sup>12</sup> English common law defined homicide “as the killing of one human being by another,” and a fetus was not regarded as a “person” or a “reasonable creature in being.”<sup>13</sup> Therefore, the killing of a child in utero was not considered homicide. To fall within the parameters of homicide, “the child must have been born alive and have existed independently of the mother’s body.”<sup>14</sup>

This so-called “born alive” rule was adopted by early American courts.<sup>15</sup> An early case, *Evans v. State*,<sup>16</sup> held:

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at 81–82. “The *Oath’s* ‘destructive pessary’ is believed to be one that induced an abortion.” *Id.* at 82. Yet, “[a]bortion was legal in ancient Greece.” *Id.* See also EDELSTEIN, *supra*, at 10–18. Miles asserts that “[t]he modern abortion debate is largely between those who maintain that abortion is wrong because it kills a fetal-person and those who hold that the decision to continue or end a pregnancy belongs to the pregnant woman. Neither view was prominent in Greece of 400 BCE.” MILES, *supra*, at 90. He further concludes that the Hippocratic Oath has become an icon for opponents to abortion, rather than a single “passage from a human document of its time that tacitly accept[ed] slavery, limit[ed] professional training to men, and invok[ed] Apollo.” *Id.*

11. Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703, 718 (1999).

12. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 50 (photo. reprint 1986) (London 1797); see also *Clarke v. State*, 23 So. 671, 674 (Ala. 1898); Cari L. Leventhal, Comment, *The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 175 (1998). However, the earliest known English commentator on the killing of a fetus, Henry de Bracton (died 1268), argued that “the killing of a fetus, or at least a ‘quicken’d’ foetus, was a homicide.” *Commonwealth v. Morris*, 142 S.W.3d 654, 655–56 (Ky. 2004). “If there be anyone who strikes a pregnant woman or gives her a poison whereby he causes an abortion, if the fetus be already formed or animated, especially if it be animated, he commits homicide.” *Id.* Blackstone, another well-known English jurist and commentator, called life a gift of God. Parsi, *supra* note 11, at 718. “Yet, what swayed early jurists most was the common law which generally held that fetuses [and embryos] were neither legal persons nor even human beings.” *Id.* Coke opined that if the child was born alive, but subsequently died from an attack on the mother, the child had also been murdered. COKE, *supra*; BONNIE STEINBOCK, *LIFE BEFORE BIRTH* 105–06 (Oxford Univ. Press 1992). Blackstone’s position closely resembled Coke’s, as he stated that the child must be a “reasonable creature in being and under the king’s peace” to amount to homicide. William Blackstone, 4 *Commentaries* \*198; STEINBOCK, *supra*, at 106.

13. Leventhal, *supra* note 12, at 175; see also 40 AM. JUR. 2D Homicide § 9 (1968).

14. Leventhal, *supra* note 12, at 175.

15. Robbins, *supra* note 8, at 79; see *People v. Greer*, 402 N.E.2d 203 (Ill. 1980) (affirming the defendant’s murder conviction for his girlfriend’s death and reversing the murder conviction for the fetus’s death because the court deemed that taking the life of a fetus did not constitute murder under the current murder statute unless the fetus is born alive); *People v. Hayner*, 90 N.E.2d 23, 23–25 (N.Y. 1949) (reversing the defendant’s conviction because the jury was not justified in finding there had been a live birth beyond a reasonable doubt, despite the fact it was clear the defendant strangled his

Death is the opposite of life; it is the termination of life, and death cannot be caused when there is no life. There must be a living child before its death can be produced. It is not the destruction of the fetus . . . that is punished by the statute as manslaughter, but it is the causing the death of a living child.<sup>17</sup>

Other courts have continued to adhere to the “born alive” rule.<sup>18</sup> In *Keeler v. Superior Court*,<sup>19</sup> the issue before the California Supreme Court was whether an unborn but viable fetus was a human being under the state murder statute which read, “murder is the unlawful killing of a human being, with malice aforethought.”<sup>20</sup> The court looked, as earlier courts did, to the words of Sir Edward Coke and English common law to determine that the legislature had not intended to include unborn fetuses within the meaning of the murder statute.<sup>21</sup> The court reasoned that it could not extend criminal liability to the murder of a fetus because to do so would create a new common law crime which would violate the defendant’s due process rights.<sup>22</sup>

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daughter’s newborn son).

16. 49 N.Y. 86 (N.Y. 1872). Mr. Evans appealed his conviction for assault with intent to commit second-degree manslaughter. *Id.* at 87–88. He was charged with causing the miscarriage of a pregnant woman after he gave the woman medications and used instruments on her to induce a miscarriage. *Id.* On appeal, New York’s highest court found that the prosecution failed to show that the miscarriage was caused by an act of Mr. Evans. *Id.* The court held that Evans could not be charged with the death of the child because there was no evidence that the quickening period had begun because the woman had not felt the child alive within her. *Id.* at 89–91.

17. *Id.* at 90.

18. Robbins, *supra* note 8, at 80; *see also* Hollis v. Commonwealth, 652 S.W.2d 61, 64 (Ky. 1983) (holding that a homicide conviction was impossible since there was no evidence that the child had been born alive). Robert Hollis forced his hand up his estranged wife’s vagina, “manually aborting her fetus, alleged to be 28 to 30 weeks old.” STEINBOCK, *supra* note 12, at 107. However, the court did note that Hollis could “be prosecuted for violating the statute relating to criminal abortions.” *Hollis*, 652 S.W.2d at 65.

19. 470 P.2d 617 (Cal. 1970). Mrs. Keeler was driving on a narrow mountain road where her ex-husband blocked the road with his car. *Id.* at 618. He approached her car and assisted her out of the car, but after seeing her pregnant abdomen he became exceedingly angry. *Id.* He then told his ex-wife, “I’m going to stomp it out of you,” and proceeded to “shove[] his knee into her abdomen.” *Id.* Mrs. Keeler had a Caesarian and the child was delivered stillborn with a fractured skull. *Id.* The pathologist indicated the child’s death could have been caused by the blow to the mother’s abdomen. *Id.*

20. *Id.* at 619 n.2.

21. *Id.* at 620–22; *see also* COKE, *supra* note 12. The court went on to state that even if adopting such a rule did not violate or exceed its judicial and constitutional limits, the rule could only apply prospectively, and thus, such a holding would not attach criminal liability to the defendant. *Keeler*, 470 P.2d at 624–30.

22. *Keeler*, 470 P.2d at 630; Robbins, *supra* note 8, at 80. The preference for legislatively defined crimes is called legality. KATE E. BLOCH & KEVIN MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH 92 (2005). Legality also refers to the “preference for clear and advance definition of crimes.” *Id.* The reasoning used in *Keeler* is analogous to that presented in *Khaliq v. Her Majesty’s Advocate*. 1984 J.C. 23 (H.C.J. Nov. 17, 1983). Khaliq was charged with selling glue and

Numerous other courts have refused to convict alleged perpetrators for the homicide of an unborn child based on the finding that the fetus was not born alive.<sup>23</sup> For example, in *State v. Ashley*,<sup>24</sup> a Florida court found that it could not prosecute a teenager who shot herself in the abdomen during her third trimester of pregnancy.<sup>25</sup> While the mother survived, the child died fifteen days later.<sup>26</sup> The court refused to extend the “born alive” rule to

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“puffing” paraphernalia. *Id.* at 24. The court found that it was not a new crime, but merely a modern example of conduct that has long been regarded as criminal. *Id.* at 23. In *Keeler*, the court found that despite the fact that the ex-husband’s conduct was worthy of punishment, he had no fair warning that his conduct constituted murder. 470 P.2d at 626–28.

23. Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5th 671, § 4(a) (1998); see *State v. Gyles*, 313 So. 2d 799, 801 (La. 1975) (holding that because an eight month old fetus was not born alive, the defendant could not be punished for causing the death of an unborn fetus). The defendant had beaten a pregnant woman, which caused the delivery of a stillborn child. *Id.* at 799. The Louisiana Supreme Court found that the murder statute only encompassed human beings who have been born alive and who have existed independently from their mothers. *Id.* at 800–02. See also *State v. Beale*, 376 S.E.2d 1 (N.C. 1989). The defendant shot a pregnant woman, killing both the woman and the fetus. *Id.* at 1. The state argued that the court should adopt the viability standard and reject the “born alive” rule. *Id.* at 2. The court rejected that state’s position and held that the “killing of a viable, but unborn child” was not murder. *Id.* at 4.

The California legislature quickly responded to the *Keeler* decision and revised its murder statute to include fetuses. H.R. REP. NO. 108–420, pt. 1 at 9 (2004). The California murder statute now reads as follows:

- (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.
- (b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:
  - (1) The act complied with the [abortion statutes].
  - (2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
  - (3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.
- (c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

CAL. PEN. CODE § 187 (West 2004).

For an example of a case that has applied the amended statute regarding the inclusion of the word “fetus” in the murder statute, see *People v. Taylor*, 86 P.3d 881 (Cal. 2004). The defendant beat and shot his former girlfriend in the head, killing her and her fetus. *Id.* at 882–83. The California Supreme Court reversed and remanded the intermediate appellate court reversal of the defendant’s conviction regarding the fetus. *Id.* at 882. See also *People v. Dennis*, 950 P.2d 1035 (Cal. 1998) (affirming Dennis’ two murder convictions for killing his former wife and her fetus).

24. 701 So. 2d 338 (Fla. 1997).

25. *Id.* at 339. The State charged Ashley with “alternative counts of murder and manslaughter, with the underlying felony for the murder charge being criminal abortion. The trial court dismissed the murder charge but allowed the manslaughter charge to stand.” *Id.* at 339–40 (footnotes omitted). The State argued that the defendant should be convicted of manslaughter and that the “born alive” rule should apply in this case because the fetus had been born alive. *Id.* at 340.

26. *Id.* at 339. After she shot herself, she rushed to the hospital and underwent surgery. *Id.* While she survived, the child did not. *Id.* The bullet struck the child on the wrist, which was surgically removed, and the child died fifteen days later due to immaturity. *Id.* Ashley gave police officers

allow a pregnant woman to be prosecuted for manslaughter in regards to her unborn child.<sup>27</sup> The court gave no weight to the fact that the woman was in her third trimester at the time of the shooting and instead deferred to common law and granted immunity from prosecution for the pregnant woman.<sup>28</sup>

## 2. *Convictions Denied Under The “Human being” or “Person” Standard*

Other courts have held that the killing of an unborn child does not constitute homicide based on a finding that the fetus is not a “person” or a “human being.”<sup>29</sup> In *Vo v. Superior Court*,<sup>30</sup> the Arizona Court of Appeals dismissed the murder charges against the defendants pertaining to the death of a viable fetus.<sup>31</sup> The court concluded “that the legislature did not intend to include a fetus in the definition of ‘person’ or ‘human being’ within the murder statute.”<sup>32</sup> Consequently, the court determined that the killing of a fetus did not constitute first-degree murder under the Arizona statute.<sup>33</sup> However, the court noted that a stillborn, viable fetus was allowed to collect civil damages under the wrongful death statute despite

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various reasons for her conduct. *Id.* at n.1. “She initially told officers that she had been the victim of a drive-by shooting, but later said she had shot herself ‘in order to hurt the baby.’ She told another officer, however, that she had not tried to kill the baby and wanted the baby, and told a friend that the gun had discharged accidentally.” *Id.*

27. *Id.* at 342.

28. *Id.* at 340. The court stated that its reason in granting immunity “was grounded in the ‘wisdom of experience.’” *Id.* at 339–40.

29. Wasserstrom, *supra* note 23, § 4(c).

30. 836 P.2d 408 (Ariz. Ct. App. 1992).

31. *Vo*, 836 P.2d at 419. Defendant *Vo* shot at a truck on the freeway in which a pregnant woman was a passenger. *Id.* at 409. The woman was shot in the head which was found to be the direct cause of the stillborn, but viable, child’s death. *Id.* The medical examiner stated that “the baby died as a direct result of the shooting death of its mother.” *Id.*

32. *Id.* at 415.

33. *Id.* The Arizona murder statute states that a person commits first degree murder if he or she knowingly causes the “death of another with premeditation.” ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2004). Section 13-1101 defines “person” as “a human being.” *Id.* § 13-1101(3). As the definition of “person” provides no further clarification as to whether the statute applies to the unborn, the *Vo* court determined that the Arizona legislature did not intend to include a fetus in the definition of “person” or “human being” within the murder statute. *Vo*, 836 P.2d at 415. Therefore, knowingly causing the death of a fetus with premeditation is not a cognizable crime in Arizona. *Id.* at 419. In an earlier decision, *Summerfield v. Superior Court*, the Arizona Supreme Court held that a stillborn, viable fetus was a “person” within the meaning of Arizona’s wrongful death statute. 698 P.2d 712, 724 (Ariz. 1985). Yet, the *Vo* court determined that the *Summerfield* holding could not be used to expand the common law definition of “person,” reasoning, in part, that tort case decisions are not binding or persuasive in deciding whether a fetus is a person under the murder statute. *Vo*, 836 P.2d at 418.

the fact that the statute did not define “person.”<sup>34</sup> Yet, the court declined to apply an expanded definition of “person” within the penal murder statute.<sup>35</sup>

In *Meadows v. State*,<sup>36</sup> the defendant was driving recklessly while intoxicated and struck an oncoming car.<sup>37</sup> Both the driver and an unborn viable fetus were killed.<sup>38</sup> Consequently, the defendant was convicted of two counts of manslaughter.<sup>39</sup> On appeal, the Arkansas Supreme Court looked to common law at the time the state’s manslaughter statute was written and found that “in both 1839 and in 1975, an unborn fetus was not included within the definition of a ‘person’ or ‘human being,’ and therefore, the killing of a viable unborn child was not murder.”<sup>40</sup>

The previously discussed cases used two primary methods, (1) the “born alive” rule, and (2) the “human being” or “person” test, in conjunction with common law, to ascertain that the state murder statutes in question could not be applied to in utero children. The following sections illustrate applications of these standards, and the viability standard, where courts applied murder statutes in the deaths of unborn children.<sup>41</sup>

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34. *Vo*, 836 P.2d at 412. Additionally, the court noted that other statutory areas of the law treat fetuses differently from other “persons.” *Id.* at 412, 415. One such example includes the issuance of death certificates. ARIZ. REV. STAT. ANN. § 36–327 (2004); Wasserstrom, *supra* note 23, § 4(c).

35. *Vo*, 836 P.2d at 419. While the court found that the legislature did not intend to include a fetus in the definition of a person or human being, it recognized the need for modernization of the statute in light of new technology and scientific evidence. *Id.* at 415. “Although we agree with the commentators that perhaps the time has come to reexamine the protections afforded unborn children under Arizona’s criminal law in light of the scientific advances in the areas of obstetrics and forensics, we believe that any expansion of the law in this area is the prerogative of the Arizona legislature, not of the courts.” *Id.*

36. 722 S.W.2d 584 (Ark. 1987).

37. *Id.* at 585. The defendant was driving on the highway with a passenger in his car. *Id.* The fetus that was killed was carried by the passenger in the defendant’s car. *Id.*

38. *Id.* See also Robbins, *supra* note 8, at 81; Wasserstrom, *supra* note 23, § 4(c).

39. *Meadows*, 722 S.W.2d at 585. The defendant’s two count manslaughter conviction consisted of one conviction for killing the driver and the other for killing the unborn fetus. *Id.*

40. *Id.* While the court used common law principles in its reasoning, the court declined the opportunity to create a new common law crime. *Id.*

41. Although some courts have abandoned the “born alive” rule because medical technology disproves its rationale, the following section will discuss applications of the “born alive” rule, the viability standard, and the “human being” test, which have led courts to hold that in utero children do fall within the parameters of state murder statutes. Wasserstrom, *supra* note 23, § 3; Robbins, *supra* note 8, at 79–81. One of the dominant theories behind adopting the born alive rule was that a fetus is not human until it is born. *Id.* at 80. However, with the advancement of medical technology, scientists have concluded that a fetus is technically a “human being” prior to birth. *Id.* at 80, 97–98. Consequently, some courts have abandoned the “born alive” rule in favor of the viability or “human being” rationale to include fetuses in state murder statutes. *Id.* at 80. For case analysis regarding the “born alive” rule, see Wasserstrom, *supra* note 23; see also *supra* notes 18–23 and accompanying text; Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) (rejecting the “born alive” rule that requires a person to be born alive before he or she can be protected by criminal law, stating “medical

### 3. Convictions Under The “Born Alive” Rule

Many courts have upheld homicide convictions when the unborn child was injured and then born alive before its death.<sup>42</sup> In *State v. Cotton*,<sup>43</sup> the defendant accidentally shot his girlfriend, who was eight and a half months pregnant, in the back of the head.<sup>44</sup> While the girlfriend died shortly after the accident, the child was born alive and died the next day.<sup>45</sup> The Arizona Court of Appeals concluded that the child was a “person” under Arizona’s homicide statute<sup>46</sup> and held “that Arizona’s homicide statutes apply to the killing of a child who is born alive even if the death results from injuries inflicted [by the defendant] before birth.”<sup>47</sup> Thus, the defendant could be charged with the child’s murder.<sup>48</sup>

In *People v. Taylor*,<sup>49</sup> the defendant punched his girlfriend, who was seven months pregnant, once in the head and six times in the stomach.<sup>50</sup> The defendant yelled, “I don’t want this baby. I don’t want this bitch to have my baby.”<sup>51</sup> Later the same day, the child was delivered by Caesarean section, but the baby died one month later due to injuries sustained while still in the womb.<sup>52</sup> The California Court of Appeals concluded that if “(1) a defendant, acting with malice aforethought toward the fetus in a woman’s womb, assaults the woman; (2) in consequence, the fetus must be delivered prematurely; and (3) the fetus is born alive but later dies of causes to which the prematurity contributed substantially, the defendant has murdered a human being.”<sup>53</sup> The court opined that the

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science now may provide competent proof as to whether the fetus was alive at the time of a defendant’s conduct and whether his conduct was the cause of death”); *Hughes v. State*, 868 P.2d 730, 732 (Okla. Crim. App. 1994) (stating “[a]dvances in medical and scientific knowledge and technology have abolished the need for the born alive rule”).

42. Wasserstrom, *supra* note 23, § 5.

43. 5 P.3d 918 (Ariz. Ct. App. 2000).

44. *Id.* at 920.

45. *Id.*

46. ARIZ. REV. STAT. ANN. §§ 13-1104(A), 1101(3), 13-1103(A)(5) (2004). *See supra* note 33 and accompanying text.

47. *Cotton*, 5 P.3d at 925. *See also* *Ranger v. State*, 290 S.E.2d 63 (Ga. 1982) (affirming the defendants convictions for the malicious murder of his pregnant girlfriend and the felony murder of her child who was prematurely born, reasoning that the Georgia murder statute applies when a child who was born alive dies from harm inflicted while still in the womb).

48. *Id.* at 925.

49. 14 Cal. Rptr. 3d 550 (Cal. Ct. App. 2004).

50. *Id.* at 554.

51. *Id.*

52. *Id.* at 554–55.

53. *Id.* at 556; CAL. PENAL CODE § 187 (2004). *See supra* note 23 for the text of the statute. *See also* *People v. Hall*, 557 N.Y.S.2d 879 (N.Y. App. Div. 1990). The defendant shot a pregnant woman requiring her to have an emergency Caesarian. *Id.* at 880. The baby survived for thirty-six hours after

timing of the defendant's actions was irrelevant and instead held that the victim's status as a human being at the time of death was determinative.<sup>54</sup>

#### 4. *Convictions Under The Viability Rule*

Other courts have convicted perpetrators under state homicide statutes based on the finding that the fetus was viable.<sup>55</sup> A fetus is viable if it is "able to live separate and apart from its mother without the aid of artificial support."<sup>56</sup> In *Commonwealth v. Cass*,<sup>57</sup> the defendant was charged with homicide under Massachusetts' vehicular homicide statute<sup>58</sup> after striking a female pedestrian who was eight and a half months pregnant with his car.<sup>59</sup> "The fetus died in the womb and was delivered by Caesarean section."<sup>60</sup> The issue before the Massachusetts Supreme Court was

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the Caesarian. *Id.* The defendant's manslaughter conviction was affirmed as the court determined the baby was both born alive and a person at the time of her death. *Id.* at 882–85.

54. *Taylor*, 14 Cal. Rptr. 3d at 556. *See also* *Commonwealth v. Morris* 142 S.W.3d 654 (Ky. 2004) (overruling *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983)).

55. *Wasserstrom*, *supra* note 23, § 3(a). However, at least one court has declined to convict a defendant of fetal homicide despite its finding that the fetus was viable. *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807 (W.Va. 1984). In *Wilson*, the defendant robbed and killed a woman who was thirty-seven weeks pregnant. *Id.* at 808. The unborn child died within minutes of the mother's death. *Id.* While the defendant had already been convicted of first degree murder for the death of the mother, the court concluded that neither West Virginia's murder statute, "nor its attendant common law principles authorize[d] prosecution of an individual for the killing of a viable unborn child." *Id.* at 812. The court further stated that "This matter must be left to the good judgment of the legislature, which has the primary authority to create crimes." *Id.*

56. *Remy v. MacDonald*, 801 N.E.2d 260, 265 n.5 (Mass. 2004) (stating a viable fetus "is a fetus 'so far formed and developed that if then born it would be capable of living'" (quoting *Commonwealth v. Crawford*, 722 N.E.2d 960, 966 (Mass. 2000)); *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984). *See also* *Roe v. Wade*, 410 U.S. 113, 160 (1973) (holding that abortion, while a fundamental right guaranteed by the Fourteenth Amendment under the concept of personal liberty, was not absolute as states have a compelling interest in both the safety of the mother and the welfare of the fetus); *STEINBOCK*, *supra* note 12, at 47. Steinbock poses the question:

Why should the fetus's ontological, moral, or legal status depend on its capacity for independent life? The argument might be that before the fetus can survive independently of the mother, it is really only a part of her body, like an organ or a limb. By contrast, a viable fetus, though within the body of the mother, is not merely a part of her body. A mere bodily part is not capable of living on its own. A viable fetus can be separated from its mother and remain alive.

*Id.*

57. 467 N.E.2d 1324 (Mass. 1984).

58. MASS. GEN. LAWS ANN. ch. 90, § 24G(b) (West 2004). The statute, in pertinent part, states "[w]hoever . . . operates a motor vehicle . . . while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants or stimulant substances . . . or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle." *Id.*

59. *Cass*, 467 N.E.2d at 1325.

60. *Id.* An autopsy was conducted that determined "the fetus was viable at the time of the

whether a viable fetus fell within the parameters of the term “person.” The court looked to legislative intent<sup>61</sup> and determined that a viable fetus is a “person” for the purposes of Massachusetts’ vehicular homicide statute.<sup>62</sup>

In *State v. Horne*,<sup>63</sup> Horne attacked his wife who was nine months pregnant with a knife.<sup>64</sup> A lower court convicted him of assault and battery with intent to kill and voluntary manslaughter with respect to the unborn, full-term, viable female child.<sup>65</sup> The issue before the South Carolina Supreme Court was whether an unborn child was a “person” within South Carolina’s murder statute.<sup>66</sup> The court had previously determined that a wrongful death action “could be maintained for a viable, unborn fetus”<sup>67</sup> and thus ascertained that “[i]t would be grossly inconsistent . . . to construe a viable fetus as a ‘person’ for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.”<sup>68</sup> In concluding that an action for homicide could be maintained when the state can prove beyond a reasonable doubt that the fetus involved was viable, the court stated that it “has the right and the duty to develop the common law of South Carolina to better serve an ever-changing society as a whole.”<sup>69</sup>

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incident and that it died as a result of internal injuries caused by the impact of the vehicle operated by the defendant.” *Id.*

61. *Id.*

62. *Id.* at 1326; see also *Remy v. MacDonald*, 801 N.E.2d 260 (Mass. 2004) (stating that a viable fetus is a “person” within the meaning of the Massachusetts motor vehicle homicide statute); *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. Ct. App. 1980) (reversing the dismissal of the mother’s wrongful death action against the hospital as the state’s wrongful death statute did include a viable fetus).

63. 319 S.E.2d 703 (S.C. 1984).

64. *Id.* at 704. After the attack, Mrs. Horne raced to the hospital where the doctor determined that the unborn child was still alive, and consequently they performed a caesarian section in an attempt to save the child’s life. *Id.* at 704. However, the child was dead by the time she was removed from the womb. *Id.* The child’s autopsy report indicated the child was viable and had reached the stage in development where she was capable of surviving independently from the mother. *Id.* The autopsy also showed that “the child died in the womb as a result of suffocation caused by the mother’s loss of blood,” yet the mother survived.

65. *Id.* at 703. On appeal, the court affirmed in part and reversed in part. *Id.* at 705.

66. *Id.* at 704; S.C. CODE ANN. § 16-3-10 (2003) (defining murder as “the killing of any person with malice aforethought, either express or implied”). The issue as to whether the state’s murder statute included unborn children was one of first impression for the South Carolina Supreme Court. *Horne*, 319 S.E.2d at 704.

67. *Horne*, 319 S.E.2d at 704 (citing *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964)).

68. *Id.*

69. *Id.* See also *Wasserstrom*, *supra* note 23, § 3(a). The voluntary manslaughter conviction was reversed because the new rule could not be applied retroactively. *Horne*, 319 S.E.2d at 704. Also, in *Hughes v. State*, the Oklahoma Criminal Appeals Court abandoned the common law “born alive” rule and held that a viable fetus at the time of injury qualifies as a human being under Oklahoma’s murder statute which defines homicide as “the killing of one human being by another.” 868 P.2d 730, 732 (Okla. Crim. App. 1994); OKLA. STAT. tit. 21, § 691 (2004). The court opined that the “infliction of

### 5. Convictions Under The “Human being” or “Person” Standard

Courts have also convicted perpetrators under state homicide statutes based on the finding that that the fetus was a “person” or “human being.”<sup>70</sup> In *Commonwealth v. Morris*,<sup>71</sup> the Kentucky Supreme Court determined that an unborn viable fetus was a “human being” within the meaning of the Kentucky penal code, including its homicide statutes.<sup>72</sup> A husband and wife were on the way to the hospital in anticipation of the birth of their child when the defendant struck the family’s car, killing the wife and the unborn child.<sup>73</sup> The child’s autopsy revealed that she was viable and “would have been born a healthy baby girl had she not sustained a fatal brain injury in the collision.”<sup>74</sup> The Kentucky Supreme Court overruled the “born alive” rule and held that a person who kills a viable fetus could be prosecuted for homicide because a viable fetus is a “human being” for purposes of Kentucky criminal law, but the court affirmed the court of appeals’ reversal of the defendant’s conviction because the court could not retrospectively apply a new crime to the defendant’s conduct.<sup>75</sup>

prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide,” and that the state’s “criminal law should extend its protection to viable fetuses.” *Hughes*, 868 P.2d at 733 (quoting *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984)). However, Horne’s manslaughter conviction was reversed because the court’s ruling only applied prospectively. *Id.* at 736. See also Mary Lynn Kime, Note, *Hughes v. State: The “Born Alive” Rule Dies a Timely Death*, 30 TULSA L.J. 539, 555 (1995).

70. Wasserstrom, *supra* note 23, § 3(b). This argument hinges largely on the fact that a male fetus and a thirty-year-old man are genetically identical. STEINBOCK, *supra* note 12, at 51. “A human fetus is undeniably genetically human.” *Id.* In contrast, others argue while the fetus is genetically human, in a moral sense the unborn child is not a human because it is not a “full-fledged member of the moral community.” SCOTT, *supra* note 1, at 31 (quoting JT Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 281 (JT Noonan Jr. ed. 1970)).

71. 142 S.W.3d 654 (Ky. 2004) (overruling *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983)).

72. *Morris*, 142 S.W.3d 654, 660.

73. *Id.* at 655.

74. *Id.* “The parties stipulated for purposes of this appeal that ‘it is anticipated that the infant would have experienced a successful delivery given the medical information known to the parties.’” *Id.* at 655 n.1.

75. *Id.* at 663. Nine days after the conclusion of the oral argument the Kentucky House passed a bill making fetal homicide a criminal offense. *Id.* at 661. However, the Court recognized the ex post facto clause in both the United States and Kentucky Constitutions prohibited retrospective application of the statute. *Morris*, 142 S.W.3d at 662–63; U.S. CONST., art. I, § 10, cl. 1; KY. CONST. § 19. The Kentucky statute has an exception that specifically precludes mothers in regards to their unborn child:

(2) In a prosecution for the death of an unborn child, nothing in this chapter shall apply to acts performed by or at the direction of a health care provider that cause the death of an unborn child if those acts were committed:

(a) During any abortion for which the consent of the pregnant woman has been obtained or for which the consent is implied by law in a medical emergency; or

In *State v. Holcomb*,<sup>76</sup> the jury found Holcomb guilty of two counts of murder in the first degree after he beat and strangled his pregnant girlfriend to death.<sup>77</sup> According to Missouri's murder statute, "[a] person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter."<sup>78</sup> The issue before the Missouri Court of Appeals was whether an unborn child is a "person" in the context of the murder statute.<sup>79</sup> The court held that an unborn child is a "person" for the purposes of the first-degree murder statute.<sup>80</sup> In 1986, the Missouri legislature enacted an unborn child statute and the court used the statute to demonstrate that the Missouri legislature had determined that "an unborn child is a person to the full extent permitted by the Constitution of the United States."<sup>81</sup> Thus, the court

(b) As part of or incident to diagnostic testing or therapeutic medical or fertility treatment, provided that the acts were performed with that degree of care and skill which an ordinarily careful, skilled, and prudent health care provider or a person acting under the provider's direction would exercise under the same or similar circumstances.

(3) Nothing in this chapter shall apply to any acts of a pregnant woman that caused the death of her unborn child.

KY. REV. STAT. ANN. § 507A.010 (LexisNexis 2004).

76. 956 S.W.2d 286 (Mo. Ct. App. 1997).

77. *Id.* at 288–89. During the six months prior to Laura Vaughn's murder, she reported physical abuse and death threats "to kill her and her unborn child" to the police on multiple occasions. *Id.* at 288. Holcomb discussed the murders in detail with an acquaintance who was both a convicted felon and an informant for the FBI. *Id.* An autopsy revealed that the baby's gestational age was between twenty-six to twenty-eight weeks. *Id.*

78. MO. ANN. STAT. § 565.020 (West 2004).

79. *Holcomb*, 956 S.W.2d at 289.

80. *Id.* at 290.

81. *Id.* at 291. In 1986, the Missouri legislature recognized that the unborn had protectable rights, while attempting to balance those rights with those of the mother. MO. ANN. STAT. § 1.205 (West 2004). The statute states:

- (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.

...

[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 . . . .

...

[T]he term "unborn children" or "unborn child" shall include all unborn child or 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.

*Id.* (emphasis omitted).

concluded that “a husband or boyfriend of a woman who forcibly aborts a fetus against the will of the woman by physically restraining or assaulting the woman, could, under the Missouri statutes, be prosecuted for the murder of the unborn child, even if the mother is not otherwise injured.”<sup>82</sup>

### B. *The Unborn Victims of Violence Act*

Until the recent adoption of the UVVA,<sup>83</sup> “an unborn child [could have been] killed or injured during the commission of a violent [f]ederal crime

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82. *Holcomb*, 956 S.W.2d at 292. The court justified its application of Missouri’s unborn-child statute to the murder statute by stating they “were passed in the same legislative session, on the same day, and as part of the same act, H.B. 1596.” *Id.* at 290 (quoting *State v. Knapp*, 843 S.W.2d 345, 347–48 (Mo. 1992)). Furthermore, these two statutes, both of which refer to the term “persons,” are related; one defines the term “persons” for the other. *Id.* Therefore, they must be read together, or *in pari materia*. *Id.*

Other jurisdictions have held that an in utero child is a human being. *See, e.g., Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994). Hughes, while intoxicated, struck another vehicle injuring the other car’s driver, who was “nine months pregnant and expected to deliver in four days.” *Id.* at 731. The woman was rushed to the hospital after the collision caused her “stomach to hit the steering wheel . . . with such force that the steering wheel broke.” *Id.* A caesarian was performed, and the baby was delivered with only a faint heartbeat. *Id.* The doctor declared the baby brain dead upon delivery. *Id.* at 732. The Oklahoma Criminal Appeals Court stated it was unprepared “to hold that a brain dead fetus was alive when born simply because its heart was beating weakly.” *Id.* The court abandoned the common law “born alive” rule and held that “an unborn fetus that was viable at time of an injury [was] a ‘human being’ which may be the subject of a homicide.” *Id.* at 731. The court further explained that “infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide.” *Id.* at 733 (quoting *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984)).

Additionally, in *State v. Coleman*, the Ohio Court of Appeals held that unborn children were “persons” under the law, as well as those subsequently born alive. 705 N.E.2d 419, 420 (Ohio Ct. App. 1997). The court concluded that the state legislature was “‘free to impose upon the killer of the fetus the same penalty as is prescribed for the murder of a human being.’” *Id.* at 422 (quoting *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994)). The defendant beat the victim, terminating her pregnancy. *Id.* at 420. The defendant was subsequently convicted of manslaughter and his conviction was affirmed on appeal. *Id.* The Ohio involuntary manslaughter statute states, “[n]o person shall cause the death of another or the unlawful termination of another’s pregnancy as a proximate result of the offender’s committing or attempting to commit a felony.” OHIO REV. CODE ANN. § 2903.04(A) (West 1997). For an example of another court construing a manslaughter statute, see *Cuellar v. State*, 957 S.W.2d 134 (Tex. 1997).

83. UVVA, 18 U.S.C.A. § 1841 (West Supp. 2005). The text of the statute states:

(a) (1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

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

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

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

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

without any legal consequences.”<sup>84</sup> Yet, a study conducted prior to the UVVA’s implementation showed that eighty-four percent of Americans were in favor of a law that would allow prosecutors to bring a homicide charge on behalf of an unborn child killed in the womb.<sup>85</sup> Additionally,

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(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished . . . for intentionally killing or attempting to kill a human being.

...

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) As used in this section, the term “unborn child” means a child in utero, and the term “child in utero” or “child, who is in utero” means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

*Id.*

The UVVA is also known as Laci and Connor’s Law. Laci Peterson was eight months pregnant when she disappeared on Christmas Eve, December 2002. H.R. Rep. No. 108-420, pt. 1, at 8 (2004). Harriet Ryan, *From Start, Suspicion Falls on Peterson*, COURT TV, <http://www.courtvtv.com/trials/peterson/background.html> (last visited Apr. 5, 2005). Four months later, “the body of a full-term baby washed up on the shore of San Francisco Bay. . . . The next day, a dog walker found the badly decomposed body of a woman.” *Id.* Scott Peterson was charged and convicted of killing both his wife and their unborn child. Kimberly Edds & Amy Argetsinger, *Peterson Convicted Of Double Murder*, WASH. POST, Nov. 13, 2004, at A1. On December 13, 2004, the jury sentenced Peterson to death for two murders. Dean E. Murphy, *Jury Says Scott Peterson Deserves to Die for Murder*, N.Y. TIMES, Dec. 14, 2004 at A4; Louis Sahagun & Ann M. Simmons, *Jurors Say Scott Peterson Should Die for 2 Murders*, L.A. TIMES, Dec. 14, 2004, at A1.

Despite the namesake of the statute, Scott Peterson was tried under California’s state murder statute. Charles Millard, *Concern for Whom?*, N.Y. SUN, Dec. 15, 2004, at 9. Only a small number of cases have been brought under the federal UVVA. *See, e.g.*, *Carlin v. United States*, No. 04-1666, 2004 U.S. Dist. LEXIS 14252 (D. Pa. July 26, 2004) (challenging the UVVA, arguing that the prohibition of prosecution for conduct related to lawful abortions directly contradicted the UVVA and that the Act superseded *Roe v. Wade*). *See generally* Michael Holzapfel, Comment, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL’Y 431 (2002). Additionally, all constitutional challenges to state fetal homicide law have been unsuccessful. Constitutional Challenges to State Unborn Victims (Fetal Homicide) Laws, (Feb. 8, 2005), [http://www.nrlc.org/Unborn\\_victims/statechallenges.html](http://www.nrlc.org/Unborn_victims/statechallenges.html). *See, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987); *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994); *Commonwealth v. Bullock*, 868 A.2d 516 (Pa. Super. Ct. 2005); *State v. MacGuire*, 84 P.3d 1171 (Utah 2004).

84. H.R. REP. NO. 108-420, pt. 1, at 40. The Unborn Victims of Violence Act was adopted April 1, 2004. UVVA, § 1841.

85. H.R. REP. NO. 108-420, pt. 1, at 5. The survey was conducted by Princeton Survey Research Associates for Newsweek. *Id.* “Fifty-six percent (56%) of those surveyed believe that a homicide charge could be brought at any point during the pregnancy. Twenty-eight percent (28%) believe such a charge should apply only after the baby is ‘viable.’ Only 9 percent (9%) believe that a homicide charge should never be allowed on behalf of an unborn child.” *Id.* at n.5 (citing Debra Rosenberg, *The War Over Fetal Rights*, NEWSWEEK, June 9, 2003, at 40).

sixty-nine percent of registered voters who described themselves as pro-choice concurred with this view.<sup>86</sup>

The UVVA, in pertinent part, states that “[w]hoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense.”<sup>87</sup> Prior to the enactment of the UVVA, federal criminal statutes adhered to the “born alive” rule.<sup>88</sup> However, the House of Representatives’ report on the UVVA states that “the current trend in American law is to abolish the born alive rule” and follow the “trend of modern legal theory” which the UVVA codifies.<sup>89</sup> Another factor leading to the creation of the UVVA was the inadequacy of federal sentencing guidelines to address criminals who injure or kill an unborn child during the commission of a federal crime.<sup>90</sup> This inadequacy produced a gap in federal law that left the unborn unprotected from injury or harm, despite being recognized as having other types of legal rights.<sup>91</sup> For example, *Roe v. Wade*<sup>92</sup> recognized that unborn children have inheritance and property rights.<sup>93</sup> The UVVA responds to the public’s desire, the state court trend of abolishing the born alive rule due to its medical inaccuracy, and the federal sentencing guidelines inadequacy, by charging an individual with a separate offense when he or she injures or kills an unborn child during the commission of one of over sixty federal crimes and recognizes that an unborn child can be the victim of a crime.<sup>94</sup>

Another factor considered in the enactment of the UVVA was that the leading cause of death among pregnant women is homicide.<sup>95</sup> Punishing

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86. *Id.* at 40.

87. UVVA, § 1841(a)(1).

88. H.R. REP. NO. 108-420, pt. 1, at 5.

89. *Id.* at 6. The report further states that the common law “born alive” rule is obsolete due to scientific and medical advancements. *Id.* See Leventhal, *supra* note 12, at 176.

90. H.R. REP. NO. 108-420, pt. 1, at 7–8. “[T]here does not appear to be a single published or unpublished decision in which a [f]ederal court has enhanced a sentence for a violent criminal solely because the victim was pregnant or because an unborn child was killed or injured during the commission of the crime.” *Id.* at 8.

91. *The Unborn Victims of Violence Act of 2003 Or Laci and Conner’s Law: Hearing on H.R. 1997 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 1 (2003) [hereinafter *UVVA Hearing*] (statement of Steve Chabot, Chair of the Subcomm.).

92. 410 U.S. 113 (1973). The Court determined that the safety of a fetus became a compelling state interest at the point of viability. *Id.* at 163–64.

93. *Roe v. Wade*, 410 U.S. at 162, *noted in* H.R. REP. NO. 108–420, pt. 1, at 5.

94. H.R. REP. NO. 108-420, pt. 1, at 5–8, 13; *UVVA Hearing*, *supra* note 91, at 18.

95. See generally Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991–1999*, 95 AM. J. PUB. HEALTH 471 (2005) (stating that black pregnant women under the age of twenty who obtained no prenatal care were

the act of injuring or killing an unborn child adds a deterrent effect.<sup>96</sup> However, the UVVA specifically states that it does not require the offender to have knowledge that the victim of the underlying offense was pregnant nor does it require intent to kill or harm the unborn child.<sup>97</sup> Prior to enactment, opponents to the UVVA argued that it would permit prosecution without the requisite *mens rea*.<sup>98</sup> However, this is not the case. The UVVA “operates in a manner consistent with long-established *mens rea* principles of criminal law.”<sup>99</sup> The doctrine of transferred intent was described by a prominent criminal law commentator as follows:

[W]hen one person (A) acts (or omits to act) with intent to harm another person (B), but because of bad aim he instead harms a third person (C) whom he did not intend to harm, the law considers him (as it ought) just as guilty as if he had actually harmed the intended victim. . . . [Thus], A’s intent to harm B will be transferred to C.<sup>100</sup>

Under the UVVA, an offender’s intent to harm or kill the pregnant woman is transferred to the unborn child and consequently the offender is guilty of

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at the greatest risk and that 56.6% of the homicides were caused by gunshot wounds). See also Bryan Robinson, *Why Pregnant Women Are Targeted: Expectant Moms Are Vulnerable to Both Male and Female Attackers*, ABC NEWS, Feb. 24, 2005, <http://abcnews.go.com/US/LegalCenter/story?id=522184&page=1>. The article discusses several recent attacks and homicides of pregnant women including the slaying of a pregnant woman in Texas, allegedly committed by her ex-boyfriend, the attack on a pregnant, Kentucky woman who killed her female assailant after the woman tried to steal her unborn child, and a recent homicide in Missouri where Lisa Montgomery strangled a woman to death who was eight months pregnant and cut the baby from her womb. *Id.* “The child was found alive with Montgomery, who allegedly told relatives she had just given birth. Montgomery now faces a capital murder charge.” The article also describes the varying motives assailants possess in targeting pregnant women. *Id.* See also H.R. REP. NO. 108–420, pt. 1, at 40 (stating that “recent studies in Maryland, North Carolina, New York City, and Illinois indicate that homicide is the leading cause of death of pregnant women in those parts of the country”); Cara J. Krulewitch et al., *Hidden from View: Violent Deaths Among Pregnant Women in the District of Columbia, 1988–1996*, 46 J. MIDWIFERY & WOMEN’S HEALTH 4 (Jan./Feb. 2001); Lisa Collier Cool, *The Unspoken Pregnancy Danger: What Every Mother-to-be Needs to Know About Domestic Violence*, BABY TALK, Dec. 2003/Jan. 2004, at 61; Kim Curtis, *Murder: The Leading Cause of Death for Pregnant Women*, ASSOCIATED PRESS, Apr. 23, 2003, <http://www.now.org/issues/violence/043003pregnant.html>.

96. UVVA Hearing, *supra* note 91.

97. UVVA, § 1841(a)(2)(B)–(C). For the relevant text of the section, see *supra* note 83. Although Pat Brown, a criminal profiler, stated that a perpetrator has “to be a pretty cold-blooded killer to kill a pregnant woman,” the UVVA implies otherwise. Robinson, *supra* note 95. The UVVA requires no intent to kill the unborn child nor knowledge that the victim is pregnant. Compare, 18 U.S.C. § 1841(a)(2)(B)–(C), with MODEL PENAL CODE § 210.0-210.1 (1962) (defining criminal homicide as “purposely, knowingly, recklessly or negligently caus[ing] the death of another human being” and further defining a “human being” as “a person who has been born and is alive”).

98. H.R. REP. NO. 108–420, pt. 1, at 14.

99. *Id.*

100. *Id.* at 15 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 284 (2d. ed. 1986)).

a separate offense.<sup>101</sup> Thus, while there is no express intent requirement to harm or kill the unborn child, the UVVA is not without a criminal intent requirement due to the transferred intent doctrine.<sup>102</sup> While the UVVA presumptively applies the transferred intent doctrine, if the prosecution is able to prove that the offender committed one of the listed federal crimes “against a pregnant woman, *with the intent to kill the unborn child*,” the offender “shall be punished as provided under [f]ederal law for intentionally killing or attempting to kill a human being.”<sup>103</sup>

During the debate surrounding the passage of the UVVA, questions were raised as to whether it interfered with abortion rights.<sup>104</sup> The House of Representatives’ report states that the UVVA “does not affect, nor in any way interfere with, a woman’s right to abort a pregnancy.”<sup>105</sup> The text of the UVVA indicates that it does not apply to “any person for conduct relating to an abortion for which the consent of the pregnant woman . . . has been obtained” or to “any woman with respect to her unborn child.”<sup>106</sup> These provisions provide the pregnant woman with “air tight immunity” with regards to her unborn child.<sup>107</sup> The UVVA “does not inhibit the woman’s freedom to choose whether to bear a child or not.”<sup>108</sup> However, others argue that the passage of the UVVA will “set a dangerous precedent, which could easily lead to statutory changes that could hurt . . . women.”<sup>109</sup>

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101. *Id.*

102. *Id.* at 16.

103. *Id.* Thus, if the prosecution proves intent to kill the unborn child, the perpetrator will receive a more severe punishment than if he or she had no intent to kill the unborn child. *Id.* If the offender does have intent to kill the unborn child, however, the offender is punished as provided under §§ 1111 (murder), 1112 (manslaughter), or 1113 (attempt to commit murder or manslaughter) for intentionally killing or attempting to kill a human being. UVVA, § 1841(a)(2)(C). For the relevant text of the section, see *supra* note 83.

104. H.R. REP. NO. 108-420, pt. 1, at 17; *UVVA Hearing, supra* note 91, at 3-5 (statement of Jerrold Nadler, Ranking Member, H. Subcomm., on the Constitution).

105. H.R. REP. NO. 108-420, pt. 1, at 17. *See UVVA Hearing, supra* note 91, at 2 (statement of Steve Chabot, Chairman, H. Subcomm. on the Constitution) (stating that “the Unborn Victims of Violence Act has nothing to do with abortion”).

106. UVVA, § 1841(c).

107. *UVVA Hearing, supra* note 91, at 25 (oral statement of Gerard V. Bradley, University of Notre Dame School of Law Professor).

108. *Id.* at 27 (written statement of Gerard V. Bradley, University of Notre Dame School of Law Professor).

109. *Id.* at 18 (written statement of Juley Fulcher, Esq. & Director of Public Policy, National Coalition Against Domestic Violence). Ms. Fulcher further stated:

This bill would, for the first time, federally recognize that the unborn embryo or fetus could be the victim of a crime. It would not be a large intellectual leap to expand the notion of the unborn fetus as a victim in other realms. In fact, some states have already made the leap and in those states women have been prosecuted and convicted for acts that infringe on state

Another concern with the passage of the UVVA is that the Act, combined with similar state legislation and the growing societal consensus that a fetus is a person within the Fourteenth Amendment, will lead to the conclusion that abortion is murder.<sup>110</sup> Others have argued that the passage of the UVVA would give rise to a civil rights cause of action, seeking federal benefits, to be brought on behalf of an unborn child.<sup>111</sup> In response to that claim, Professor Bradley of the Notre Dame School of Law asserted that the UVVA does not logically lead to the conclusion that future courts will infer other types of causes of action on behalf of the unborn.<sup>112</sup> Bradley notes that Congress has the power to implement legislation that would create such a cause of action, but that the implementation of this particular legislation does not infer other causes of action.<sup>113</sup>

Another issue debated was whether the Act contradicted the Supreme Court's ruling in *Roe v. Wade*.<sup>114</sup> In *Roe*, the Court held that while the fundamental right to privacy included the right for a woman to make a decision about abortion, that right is not unlimited.<sup>115</sup> Regulating "these rights may be justified only by a 'compelling state interest.'"<sup>116</sup> The majority opinion adopted a trimester scheme that recognized<sup>117</sup> states have an important and legitimate interest in preserving and protecting the health of the pregnant woman, and in protecting the potentiality of human life,

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recognized legal rights of a fetus. While the [UVVA] specifically exempts the mother from prosecution for her own actions with respect to the fetus, it is easy to imagine subsequent legislation that would hold her responsible for injury to the fetus, even for the violence perpetrated on her by her batterer under a "failure to protect" theory.

*Id.*

110. *Id.* at 39–40 (testimony of Jerrold Nadler, Ranking Member, H. Subcomm. on the Constitution). Congressman Nadler expressed his fear in passing the UVVA by stating his concern for what its passage might logically promulgate. *Id.*

111. *Id.* at 32 (testimony of Melissa A. Hart, Member, H. Subcomm. on the Constitution).

112. *Id.* at 32–33. (testimony of Gerard V. Bradley, University of Notre Dame School of Law Professor).

113. *Id.*

114. *Id.* at 27–28 (statement of Gerard V. Bradley, University of Notre Dame School of Law Professor). See *Roe v. Wade*, 410 U.S. 113 (1973). *Roe v. Wade* was a class action suit brought by a single, pregnant woman, Roe; a licensed physician, James Hallford, who intervened in Roe's action; and a married couple, John and Mary Doe, to challenge the constitutionality of the Texas criminal abortion laws. *Id.* at 120–22. Appellants appealed directly to the Supreme Court after the three-judge panel, while providing declaratory relief, denied their motion for injunctive relief suspending enforcement of state anti-abortion laws. *Id.* at 122. The Court found "it unnecessary to decide whether the District Court erred in withholding injunctive relief," because "we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." *Id.*

115. *Id.* at 153–54.

116. *Id.* at 155 (internal citations omitted).

117. *Id.* at 163.

and that a state's interest in protecting the potential human life grows as the mother approaches full-term.<sup>118</sup> During the first trimester, the abortion decision is left to the mother and her doctor's recommendation.<sup>119</sup> During the second trimester, a state may regulate or proscribe abortion in the interest of protecting the health of the mother.<sup>120</sup> The state's interest reaches "the compelling point" when the unborn child reaches the stage of viability.<sup>121</sup> Thus, after viability, states may, in the interest of the potential human life, regulate abortion, or even proscribe abortion if necessary to preserve the life or health of the mother.<sup>122</sup>

However, the Supreme Court did not attempt to determine where life begins, nor did it conclude that the unborn were not persons.<sup>123</sup> In the majority opinion, Justice Blackmun stated:

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 point in the development of man's knowledge, is not in a position to speculate as to the answer.<sup>124</sup>

The Supreme Court has left it to state legislatures to attempt to answer this question. In *Webster v. Reproductive Health Services*,<sup>125</sup> health care professionals and abortion counseling facilities challenged the constitutionality of a statute enacted by the Missouri legislature that stated "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health and well-being."<sup>126</sup> The

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118. *Roe*, 410 U.S. at 159–63; Robbins, *supra* note 8, at 85.

119. *Roe*, 410 U.S. at 163.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 159; *UVVA Hearing*, *supra* note 91, at 27 (statement of Gerard V. Bradley, University of Notre Dame School of Law Professor).

124. *Roe*, 410 U.S. at 159.

125. 492 U.S. 490 (1989). Public health care officials and nonprofit corporations that performed abortions filed a class action against Missouri, challenging the constitutionality of its state statute that regulated the performance of abortions. *Id.* at 501. The Eighth Circuit declared several provisions, including the preamble, unconstitutional, based on *Roe v. Wade*. *Id.* at 503–04. However, on appeal, the Supreme Court reversed, holding that the Missouri statute preamble that stated, "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being" was not unconstitutional. *Id.* at 504–07; *See supra* note 81 for the relevant text of the Missouri statute. The Court reasoned that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." *Id.* at 506 (quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977)). Thus, the Court determined that it was unnecessary to resolve the constitutionality of the preamble as it expressed a value judgment rather than a regulation regarding abortions. *Id.* at 506–07.

126. *Webster*, 492 U.S. at 504 (quoting MO. ANN. STAT. § 1.205 (West 2004)).

Supreme Court held that state legislatures are free to make such a determination so long as the determination was not used to justify regulating abortion in a way contrary to *Roe v. Wade*.<sup>127</sup>

In *Planned Parenthood v. Casey*,<sup>128</sup> the Court reaffirmed what it deemed the “essential holding” of *Roe v. Wade*.<sup>129</sup> The authors of the joint opinion stated that *Roe's* “essential holding” had three parts:

First is a recognition of the right . . . to choose to have an abortion before viability and to obtain it without undue interference from the State. . . . Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.<sup>130</sup>

However, the Court rejected *Roe's* rigid trimester framework in favor of a framework that focuses on viability because the rigid *Roe* framework “undervalues the State’s interest in potential life. . . .”<sup>131</sup>

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127. *Id.* at 506. Similar legislation to that of the UVVA has been passed on the state level and many have been challenged in the states’ highest courts, yet no court has held that these laws are unconstitutional. *UVVA Hearing, supra* note 91, at 38 (statement of Gerard V. Bradley, University of Notre Dame School of Law Professor). Yet opponents to the UVVA are nonetheless worried the Act “could affect abortion rights and open the door to the prosecution of mothers who smoke or don’t follow their obstetrician’s diet,” said Marguerite Driessen, a law professor at Brigham Young University. Alexandria Sage, *Mom Arrested After Utah Stillbirth*, ASSOCIATED PRESS, Mar. 12, 2004, [http://www.cbsnews.com/stories/2004/03/12/health/main\\_606119.shtml](http://www.cbsnews.com/stories/2004/03/12/health/main_606119.shtml). Driessen continued, “It’s very troubling to have somebody come in and say we’re going to charge this mother for murder because we don’t like the choices she made.” *Id.*

128. 505 U.S. 833 (1992). In *Casey*, the Supreme Court examined five provisions of the Pennsylvania Abortion Control Act of 1982. *Id.* at 844. While the Court upheld four of the provisions, the Court struck down the provision that required women to notify their husbands of their intent to obtain an abortion. *Id.* at 887–98. The Court found that the requirement would “operate as a substantial obstacle to a woman’s choice to undergo an abortion. It is an undue burden, and therefore invalid.” *Id.* at 895. Thus, the Court rejected *Roe's* strict scrutiny test in favor of the undue burden test for judging the constitutionality of abortion regulations. *Id.* at 874–79. The Court articulated that the “finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 877.

129. *Id.* at 846.

130. *Id.*

131. *Id.* at 873. In *Roe*, the Court held that the State’s interest only became compelling at viability, whereas in *Casey*, the court reasoned that the “there is a substantial state interest in potential life throughout pregnancy.” *Id.* at 876. The Court previously criticized the trimester framework in *Webster v. Reproductive Health Services*, where Justice Rehnquist noted that “We have not refrained from reconsideration of a prior construction of the Constitution that has proved ‘unsound in principle and unworkable in practice.’ . . . We think the *Roe* trimester framework falls into that category.” *Webster*, 492 U.S. at 518 (citation omitted). Justice O’Connor, in her concurrence, further described the

### C. *The Regina McKnight Case*

On May 15, 1999, Regina McKnight, after carrying her baby to term, gave birth to a stillborn five-pound baby girl.<sup>132</sup> The baby's autopsy found that her cause of death was intrauterine cocaine exposure.<sup>133</sup> Pathologists testified that the baby was viable and died one to three days prior to delivery and ruled the death a homicide.<sup>134</sup> McKnight was indicted and found guilty of homicide by child abuse and sentenced to twenty years in prison by the trial court.<sup>135</sup> Under the South Carolina homicide statute, "a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life."<sup>136</sup> In South Carolina, "indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care."<sup>137</sup> The South Carolina Supreme Court held that extreme indifference is a mental state that involves "intent characterized by a deliberate act culminating in death."<sup>138</sup>

While McKnight claimed there was no evidence of extreme indifference to human life, or that she knew about the risks of using

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trimester framework as "problematic." *Id.* at 529 (O'Connor, J., concurring in part and concurring in judgment).

132. *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003).

133. *Id.* at 171–72. The substance found in the baby's system was benzoylecgonine. *Id.* at 171.

134. *Id.* at 172. One of the pathologists, Dr. Woodward, also testified that in his experience "he had seen both children and adults dead with less benzoylecgonine in their systems than McKnight's baby." *Id.*

135. *Id.* at 171. The first trial resulted in a mistrial, but the second trial resulted in the guilty verdict. *Id.* Other courts have also convicted mothers of prenatal child abuse. *See In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000) (affirming the lower courts decision convicting a mother of child abuse as both the mother and her newborn child tested positive for cocaine and holding that the newborn was per se an abused child under the Ohio statute).

136. *McKnight*, 576 S.E.2d at 172–73; S.C. CODE ANN. § 16-3-85 (2003). The statute in pertinent part states:

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of a child . . . while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child . . . .

*Id.* The statute further defined "child abuse or neglect" as "an act or omission by any person which causes harm to the child's physical health or welfare," and "harm" as both corporal punishment and the failure "to supply . . . adequate food, clothing, shelter, or health care . . . [causing] physical injury or death . . ." *Id.*

137. *McKnight*, 576 S.E.2d at 173 (quoting *State v. Jarrell*, 564 S.E.2d 362, 366 (S.C. Ct. App. 2002)).

138. *Id.*

cocaine during pregnancy, she admitted to using cocaine numerous times during her pregnancy and voluntarily gave a urine sample immediately after the delivery which indicated that there were “very high concentrations of cocaine” in her system as well as the baby’s.<sup>139</sup> Given that she knew she was pregnant and took cocaine and “that it is public knowledge that usage of cocaine is potentially fatal,” the court found sufficient evidence to submit to the jury the question of “whether she acted with extreme indifference to her child’s life.”<sup>140</sup> Consequently, the South Carolina Supreme Court upheld McKnight’s conviction<sup>141</sup> and further held that the state legislature’s use of the term “child” includes viable fetuses.<sup>142</sup>

#### *D. The Melissa Rowland Case*

On January 13, 2004, twenty-eight year-old Melissa Rowland gave birth in a Utah hospital to twins, one of which was stillborn.<sup>143</sup> In the time leading up to the birth, doctors repeatedly warned Rowland that the twins would likely die if she did not have a Caesarean section.<sup>144</sup> A nurse at an area hospital recommended Rowland visit one of two hospitals for urgent care.<sup>145</sup> In response, Rowland stated that “she would rather have both twins die before she went to either of the suggested hospitals.”<sup>146</sup> After having an ultrasound on January 2nd, Rowland’s doctor conveyed that the babies’ heart rates were slowing and that she needed to undergo an emergency Caesarean section.<sup>147</sup> “Rowland left [the hospital] after signing a document stating that she understood that leaving might result in death or brain injury to one or both twins.”<sup>148</sup> She subsequently gave birth to a still born boy and a girl addicted to cocaine.<sup>149</sup> Melissa Rowland was charged with murder for the death of her son.<sup>150</sup> Court documents stated

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139. *Id.*

140. *Id.*

141. *Id.* at 179.

142. *Id.* at 174–75. See also Thomas M. Fleming, Annotation, *Right of Child to Action Against Mother For Infliction of Prenatal Injuries*, 78 A.L.R. 4th 1082 (1990 & Supp. 2005).

143. Sage, *supra* note 127.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* This evidence was gathered by the local police from Rowland’s attending doctors. *Id.*

149. Katha Pollitt, *Pregnant and Dangerous*, THE NATION, Apr. 26, 2004, at 9. Additionally, the father of the twins admitted to taking drugs with Rowland during her pregnancy, but left her before the twins’ birth. *Id.*

150. Sage, *supra* note 127. There is a body of law regarding a woman’s right to refuse a

that the charges were a result of her “depraved indifference to human life.”<sup>151</sup> The stillborn’s autopsy concluded that he died “two days prior to delivery and would have survived if Rowland had undergone a C-section when urged to do so.”<sup>152</sup> Rowland was held on \$250,000 bail at the Salt Lake County jail,<sup>153</sup> until the charges were dropped due to Rowland’s mental state.<sup>154</sup> If she had been convicted, she could have received a sentence of five years to life in prison.<sup>155</sup>

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Caesarean. The principle of autonomy was stated early in American legal history. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”); *Schloendorff v. Soc’y of N.Y. Hospital*, 105 N.E. 92, 93 (N.Y. 1914) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body.”).

This right has also been recognized in Caesarean cases by providing competent, pregnant women the ability to refuse medical treatment. *SCOTT*, *supra* note 1, at 115. In *In re A.C.*, the court affirmed the trial court’s decision to order an emergency Caesarean after the terminally ill mother expressed conflicting statements about her desire to have the baby. 533 A.2d 611 (D.C. 1987). While the court recognized that “[t]he fundamental right to bodily integrity encompasses an adult’s right to refuse medical treatment, even if the refusal will result in death,” it also noted that this right was not absolute. *Id.* at 615. The court reasoned that states have “four countervailing interests in sustaining a person’s life: preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting innocent third parties.” *Id.* English Courts have also held that “[a] competent woman may choose, even for irrational reasons, not to have medical intervention, even though the consequence may be the death of, or serious handicap to, the child she bears; or her own death.” *Re MB*, 8 MED. L.R. 217, 227 (1997). *SCOTT*, *supra* note 1, at 142–43.

151. *Sage*, *supra* note 127.

152. *Id.* After charging Rowland with one first-degree felony count of criminal homicide a spokesperson for the district attorney’s office stated that the prosecution was “unable to find any reason other than the cosmetic motivations” for Rowland’s decision. *Id.* Yet, Caesarean sections leave only a small bikini incision. *Id.*

153. *Id.*

154. *Pollitt*, *supra* note 149. A time line of Melissa Rowland’s life demonstrates she is “a deeply troubled woman.” *Id.* She was restricted to a mental hospital at the age of twelve and at the age of fourteen she gave birth to her first set of twins. *Id.* She has tried to commit suicide twice. *Id.* She is mentally ill, estranged from her family, and four years ago she was convicted of child abuse after punching her daughter in a supermarket. *Id.* Consequently the girl was placed in foster care. *Id.*

155. *Sage*, *supra* note 127. Utah’s criminal homicide statute explicitly states that “[t]here shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion,” but does not have a provision excluding any act or omission of the mother. UTAH CODE ANN. § 76-5-201 (2004). Utah’s criminal homicide statute states:

(1) (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, *including an unborn child at any stage of its development*.

(b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion.

*Id.* (emphasis added).

For a detailed summary of the progress of state coverage regarding unborn victims, compare NAT’L RIGHT TO LIFE COMMITTEE, STATE HOMICIDE LAWS THAT RECOGNIZE UNBORN VICTIMS, Oct. 5, 2005, [http://www.nrlc.org/Unborn\\_victims/Statehomicidelaws092302.html](http://www.nrlc.org/Unborn_victims/Statehomicidelaws092302.html) [hereinafter UNBORN

### III. ANALYSIS

There is a large discrepancy among the rationales behind the treatment of the unborn. While the discrepancy remains, more states are beginning to recognize rights of the unborn.<sup>156</sup> In 1999, there were only eleven states with homicide laws that recognized an unborn child as a victim at any stage of pre-natal development and thirteen states with homicide laws that recognized an unborn child as a victim beyond a certain and variant point of fetal development.<sup>157</sup> However, these numbers are on the rise.

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VICTIMS LAWS 2005] (listing thirty-two states with homicide laws that have full or partial coverage for unborn children) with NAT'L RIGHT TO LIFE COMMITTEE, STATE HOMICIDE LAWS THAT RECOGNIZE UNBORN VICTIMS, Sept. 2, 1999, <http://www.nrlc.org/Whatsnew/sthomicidelaws.htm> [hereinafter UNBORN VICTIMS LAWS 1999] (listing twenty-four states with homicide laws that have full or partial coverage for unborn children).

In a recent Utah case, the defendant was charged with killing his ex-wife and her unborn child. *State v. MacGuire*, 84 P.3d 1171, 1172 (Utah 2004). Several days after learning his ex-wife was engaged to be married and pregnant, he went to her place of work and shot her four times: one to the back of the neck, one in the arm and two entered her abdomen. *Id.* at 1173. The fourth bullet severed the umbilical cord and traveled through the unborn child. *Id.* The Court affirmed the district court denial of the defendant's motion to dismiss. *Id.* at 1178. There were two issues before the court on appeal: "(1) whether the term 'unborn child' is unconstitutionally vague both on its face and as applied, and (2) whether [Utah's] criminal homicide and aggravated murder statutes violate the federal and state guarantees of equal protection." *Id.* at 1172. The Utah homicide statute states that a person may be prosecuted for causing the death of an unborn child. UTAH CODE ANN. § 76-5-201, *supra*. The court held that the commonsense meaning of the term "unborn child" was clear and consequently, the language "d[id] not render the criminal homicide statute unconstitutionally vague." *MacGuire*, 84 P.3d at 1178.

The defendant also argued that the Utah statutes violate the Fourteenth Amendment equal protection clause. *MacGuire*, 84 P.3d at 1177. "Specifically, [the] defendant contend[ed] that because physicians are not prosecuted for aborting fetuses and microbiologists are not prosecuted for destroying fertilized embryos for stem cell research, the statute 'does not apply equally to all persons within the class,' namely, those who cause the death of an unborn child." *Id.* at 1177-78. While the court indicated that the defendant's argument had merit, it "declin[e]d to address defendant's equal protection argument" because the defendant did not preserve the issue for the interlocutory appeal. *Id.* at 1178.

For a case where the court did address the equal protection argument, see *Commonwealth v. Bullock*, 868 A.2d 516, 524-25 (Pa. 2005) (holding that Pennsylvania's Crimes Against the Unborn Act was not unconstitutionally vague nor did it violate the equal protection guarantee of the Fourteenth Amendment because the statute does not impose criminal sanctions based on sex, as "the Act does not exempt all women from criminal liability" and the state had a "legitimate interest in protecting 'the potentiality of human life'"). For the text of the Pennsylvania Crimes Against the Unborn Act, see 18 PA. CONS. STAT. ANN. § 2605 (West 2004).

156. The "born alive" rule has undergone staunch criticism. STEINBOCK, *supra* note 12, at 105. "A number of commentators have criticized the rule, calling it arbitrary and illogical because it permits a conviction for homicide if the fetus survives birth, however briefly. If the same fetus is stillborn, however, it cannot be the victim of a homicide." *Id.* Even the House of Representatives has recognized that the "born alive" rule "has been rendered obsolete by progress and medicine." H.R. REP. NO. 108-420, pt. 1, at 5 (2004). See also *People v. Guthrie*, 293 N.W.2d 775, 778 (Mich. Ct. App. 1980) (stating that the "born alive" rule "is outmoded, archaic and no longer serves a useful purpose").

157. See UNBORN VICTIMS LAWS 1999, *supra* note 155.

Currently, twenty states have homicide laws that recognize unborn children as victims at any stage of pre-natal development and twelve states with homicide laws that recognize an unborn child as a victim beyond a certain and variant point of fetal development.<sup>158</sup>

Ancient standards are being replaced with more modern ones.<sup>159</sup> The “born alive” rule is now obsolete and courts and legislatures are now struggling with what the Supreme Court explicitly stated it would not address: where life begins.<sup>160</sup> At this point there is no clear answer to this question and thus the Supreme Court has left it to state legislatures to make independent determinations.<sup>161</sup> Some state legislatures have enacted statutory language clearly including the unborn.<sup>162</sup> In Minnesota, since 1986, the killing of an unborn child at any stage of development has constituted murder or manslaughter, while other states such as Mississippi and Virginia have adopted similar laws in 2004.<sup>163</sup> Where the language of statutes does not refer to the unborn, some courts have adhered to the strict text of their statutes and waited for congressional response, as in *Keeler*,<sup>164</sup> while other courts have interpreted existing definitions to include the unborn.<sup>165</sup> The UVVA is a response to the growing trend in the United States recognizing an unborn child as a victim of homicide.<sup>166</sup>

This trend raises numerous questions regarding a mother’s responsibility to the unborn child. While the UVVA explicitly excludes “any woman with respect to her unborn child,” some state statutes do not.<sup>167</sup> Utah’s criminal homicide statute, for example, does not include language that specifically excludes mothers.<sup>168</sup> The Utah Statute states that “[a] person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state

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158. *See id.*

159. In discussing the “born alive” rule, the Kentucky Supreme Court stated, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” *Commonwealth v. Morris*, 142 S.W.3d 654, 659 (Ky. 2004) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1896–97)).

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

161. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 505–07 (1988).

162. UNBORN VICTIMS LAWS 2005, *supra* note 155.

163. *Id.*

164. 470 P.2d 617 (Cal. 1970).

165. UNBORN VICTIMS LAWS 2005, *supra* note 155.

166. Compare UNBORN VICTIMS LAWS 2005, *supra* note 155 with UNBORN VICTIMS LAWS 1999, *supra* note 155.

167. UVVA, 18 U.S.C.A. § 1841(c)(3) (West Supp. 2005).

168. UNBORN VICTIMS LAWS 2005, *supra* note 155.

otherwise specified in the statute defining the offense, causes the death of another human being, *including an unborn child at any stage of its development*.”<sup>169</sup> While the homicide statute indicates that “[t]here shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion,” it also notes that criminal homicide is “aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide.”<sup>170</sup>

In light of precedent and legislative history, what would have been the likely outcome for Melissa Rowland had she been competent to stand trial? After *State v. McKnight*<sup>171</sup> a conviction seems more fathomable. In *McKnight*, the mother was convicted of child abuse homicide because the jury found that her acts exhibited an “extreme indifference to the value of human life.”<sup>172</sup> This language is nearly identical to that used in the Rowland case where court documents stated that the charges against her were a result of her “depraved indifference to human life.”<sup>173</sup> The South Carolina Supreme Court held that extreme indifference is a mental state that involves “intent characterized by a deliberate act culminating in death.”<sup>174</sup> Just as the court found that McKnight’s deliberate actions resulted in the death of her unborn child, Rowland too was a deliberate actor who caused the death of her unborn child. Both McKnight and Rowland knew they were pregnant and knowingly used cocaine numerous times during their pregnancies.<sup>175</sup> Thus, one can logically infer that Rowland’s stillborn child was also exposed to cocaine, and an autopsy would likely reveal the same substance that was found in McKnight’s unborn child. In both cases, the stillborn children were alive and viable days before their stillborn deliveries.<sup>176</sup> In both instances, it was public knowledge that the use of cocaine is potentially fatal.<sup>177</sup> Thus, applying the *McKnight* rationale to Rowland’s case could lead to a conviction.

In the alternative, Rowland also demonstrated a depraved indifference to her child’s life. Rowland’s refusal to have a Caesarian section was a deliberate act resulting in the death of the unborn child.<sup>178</sup> Rowland knew

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169. UTAH CODE ANN. § 76-5-201(1)(a) (2004) (emphasis added).

170. *Id.* § 76-5-201 (1)(b).

171. 576 S.E.2d 168 (S.C. 2003).

172. *Id.* at 173.

173. Sage, *supra* note 127.

174. *McKnight*, 576 S.E.2d at 173 (quoting *State v. Jarrell*, 564 S.E.2d 362, 366 (S.C. Ct. App. 2002)).

175. *Id.*; Pollitt, *supra* note 149, at 9. Rowland’s surviving baby was born addicted to cocaine. *Id.*

176. Sage, *supra* note 127. *McKnight*, 576 S.E.2d at 173.

177. *McKnight*, 576 S.E.2d at 173.

178. See Sage, *supra* note 127.

she was pregnant and was aware of the consequences, arguably even more so than *McKnight*, as she stated that “she would rather have both twins die before she went to either of the suggested hospitals.”<sup>179</sup> In addition, she signed a document stating that she understood that leaving might result in death or brain injury to one or both twins.<sup>180</sup> Given these facts, a jury could easily determine that she acted with depraved indifference to human life.

While numerous cases have held contrary to the *McKnight* case,<sup>181</sup> in the near future *McKnight* could easily become the norm. Some believe that if more cases like *McKnight* and the hypothetical Rowland case convicted mothers, those cases could affect abortion rights and “open the door to the prosecution of mothers who smoke or don’t follow their obstetrician’s diet.”<sup>182</sup> Marguerite Driessen, a law professor at Brigham Young University, stated, “[i]t’s very troubling to have somebody come in and say we’re going to charge this mother for murder because we don’t like the choices she made.”<sup>183</sup> Others believe the UVVA and similar legislation have no affect on abortion rights or the privacy of the mother.<sup>184</sup> English cases have also recognized “the potential gap between a woman’s moral and legal obligation to her fetus.”<sup>185</sup> In *Re MB*, the court deemed “it anomalous that a woman is not permitted to abort after viability (unless her life or health are at serious risk or the fetus is at risk of serious disability), but can refuse treatment resulting in fetal death for any or no reason even at the point of birth.”<sup>186</sup> These contrasting opinions suggest that while the UVVA does not directly inhibit a woman’s privacy, the UVVA is a determinative step to approaching the line between murder and personal autonomy in an area of law that has long been gray.

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179. *Id.*

180. *Id.*

181. *See* *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); *In re Appeal in Pima County Juvenile Severance Action No. S-120171*, 905 P.2d 555 (Ariz. Ct. App. 1995); *Remy v. MacDonald*, 801 N.E.2d 260 (Mass. 2004); *United States v. Foreman*, ACM No. 28008, 1990 CMR LEXIS 622 (A.F.C.M.R. May 25, 1990). For a criticism of the South Carolina approach, see Lynn M. Paltrow, *South Carolina: Where Pregnancy Is a Crime; Privacy Rights of Pregnant Women Challenged by Court*, NETWORK NEWS, July 1, 2000, at 3 (discussing *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) and the personal autonomy of pregnant women).

182. Sage, *supra* note 127.

183. *Id.*

184. *See supra* notes 105–08 and accompanying text.

185. SCOTT, *supra* note 1, at xxvii.

186. *Id.* Scott went on to comment that “notwithstanding the fetus’s lack of legal personality, the case itself can be said to acknowledge that it leaves unanswered the question of *why* a pregnant woman should be able to harm the fetus in this way. *Id.*”

#### IV. PROPOSAL

While the UVVA is a determinative step in drawing the line between personal autonomy and pregnant women's responsibility to the in utero child, whether the UVVA applies equally to all potential offenders of the law regardless of the offender's pregnancy status is questionable. The application of the UVVA—a statute that does not require awareness of the victim's pregnancy to charge a perpetrator with a separate offense—is inconsistent with the notion that laws should apply equally to all offenders by broadly excluding all pregnant women regarding their unborn children. The traditional notions of equal application of the law, fairness, and justice are not served when the UVVA convicts a man who does not have intent to harm or kill the in utero child nor has knowledge of the pregnancy with a separate federal crime against a non-viable fetus, while allowing a pregnant woman, who knows she is pregnant and has decided not to obtain a legal abortion, to kill the unborn, viable child without consequence.

My proposal seeks to promote the purpose of the UVVA, while also recognizing that pregnant women have a responsibility to their unborn child once they have forgone a legal abortion and the fetus has reached the point of viability. Thus, I recommend that states adopt or amend current criminal statutes to include the purposeful killing of an unborn, viable fetus. States and the federal government can amend their current homicide statutes or establish feticide, the unlawful killing of a fetus, as a separate crime. The following is a proposed statute for the crime of feticide including definitions, elements, and exceptions.

##### A) Feticide Definition

- 1) A person commits feticide when he purposely or knowingly causes the death of a viable human fetus.

##### B) Viable Human Fetus Definition

- 1) A viable human fetus is an unborn child that, if born at the time of the act resulting in death, would have been able to sustain life independently of its mother; or the likelihood of survival was almost certain.

##### C) Mental State Definitions<sup>187</sup>

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187. The definitions for "purposely" and "knowingly" stated in the proposed legislation are derived from the Model Penal Code. *See* MODEL PENAL CODE § 2.02 (1962). The Model Penal Code states:

(a) Purposely.

1) Purposely: A person acts purposely with respect to a material element of an offense when:

- i) The person has the conscious objective to engage in conduct of that nature or to cause such a result; and
- ii) The person is aware of the existence of such circumstances or the person believes or hopes that they exist.

2) Knowingly: A person acts knowingly with respect to a material element of an offense when:

- i) The person is aware of the nature of his or her conduct or that such circumstances exist; and
- ii) The person is aware that it is practically certain that his conduct will cause such a result.

D) The following exceptions apply to the feticide statute:

- 1) The act was a legal abortion carried out by a physician.
- 2) The act was committed by a physician in a case where, to a degree of reasonable medical certainty, the result of childbirth would cause the death or substantial injury to the mother of the fetus.
- 3) Mothers who negligently or recklessly cause the death of their baby due to drug use or similar addiction will not be liable.

This recommendation attaches criminal responsibility to mothers who have foregone a legal abortion, who have carried the child to the point of viability, and purposely or knowingly kill the unborn child. One of the reasons behind the mother exclusion in the UVVA is that if expectant women know that their acts are prosecutable, then they may be less likely

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A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

*Id.* See also MODEL PENAL CODE § 2.02 cmt. at 229 (1962).

to seek the medical help they need.<sup>188</sup> The above proposal, however, requires purposeful intent to kill the unborn child. Thus, if a woman negligently or recklessly injures the unborn, viable child, no criminal liability attaches.

In reexamining the hypothetical situations posed in the introduction of this Note, if a pregnant woman's boyfriend beats her, causing both her death and the death of the fetus, he could be convicted under the UVVA, state homicide statutes that recognize fetal homicide, or the above proposed legislation. If a woman beats herself with the intent to kill an unviable fetus, resulting in its death, she could not be convicted under the UVVA or the proposal. If a woman beats herself with the intent to kill her *viable* fetus, resulting in its death, she could not be convicted under the UVVA, but could be under the proposal. What if a woman encourages her husband to beat the child out of her, resulting in the death of the in utero child? Could the husband be convicted, while the mother could not? Under the wording of the UVVA, a pregnant mother is expressly excluded and thus cannot be convicted, but the husband's conduct falls under the Act's provision and he could be convicted. Under the proposal, the husband could be convicted and the wife, while not a direct actor, could be convicted of murder, manslaughter, or complicity because she played a role in the death.

## V. CONCLUSION

While women have a right to a legal abortion, pregnant women are not exempt from all types of criminal liability. Pregnant women who carry a viable fetus must recognize that they have at least a minimal level of responsibility to the human life they carry. The UVVA gives pregnant women air tight immunity but the exemption exposes inequity in its application. A vast gray area remains between where a pregnant woman's right to autonomy ends and a viable, unborn child's rights begin. Rule-makers must first recognize that a bright line rule in this area of law may never be possible as the two inherently overlap. However, expectant mothers who are overdue or are going to deliver today, next week, or in the near future, have some responsibility to the viable fetus they carry. They should not deliberately shoot themselves in the stomach, purposefully consume drugs with the intent to kill the unborn child, or purposely avoid health care which presents no harm to the mother.

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188. *UVVA Hearing*, *supra* note 91. This proposal assumes "but for" causation before imposing liability. Thus, a pregnant woman's misconduct must be more than a contributing factor.

Purposely causing the death of one's unborn child should result in criminal liability.

When new statutes are passed, thought must be given not only to the repercussions of the crimes created, but also to the crimes not created. Pregnant women should not go unpunished for acts punishable by life in prison for others. Blanket immunity from prosecution that benefits culpable pregnant women must end.

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