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INTRODUCTION

On December 24, 2002, eight months pregnant with her first child, 27-year-old Laci Peterson vanished from her California home.¹ Four months later, both Laci’s and her unborn son Conner’s bodies were discovered separately along the shore of the San Francisco bay.² On April 18, 2003, police arrested Laci’s husband, Scott Peterson (Scott),³ for the murder of his wife and fetus.⁴ Because California is one of 28 states whose homicide statute protects fetuses,⁵ Scott was charged and convicted of multiple homicide making him eligible for the death penalty.⁶ Had the same situation occurred in Hawaii or the fifteen other states without a feticide law, Scott could not be charged for the death of the fetus, unless the fetus was proven to have been “born alive”⁷ prior to its murder.⁸ Thus,

¹ See Kathleen Murphy, Abortion Issues Could Law Changes, CONNECTICUT LAW TRIBUNE, June 2, 2003 at 5.
⁴ Police Arrest Laci’s Hubby: Faces Slay Charges After Bodies ID’d, supra n.2, at 5.
⁵ CA. PENAL CODE tit. 8, § 187 (2004) provides, “Murder is the unlawful killing of a human or fetus with malice aforethought” (emphasis added). See infra n.105 and accompanying text.
⁷ The born alive rule is discussed infra n.237-42 and accompanying text.
⁸ See Murphy at supra n.1.
the state has the additional burden of proving that Laci’s pregnancy resulted in a live birth prior to the child’s death.

The Laci Peterson tragedy gave momentum to the Unborn Victims of Violence Act (Laci and Conner’s Law)\(^9\) passed by Congress into law on April 1, 2004.\(^{10}\) Laci and Conner’s Law makes injuring or killing an unborn child, during the commission of certain federal crimes, a separate offense other than the crime against the mother.\(^11\) This Comment regards Laci and Conner’s Law as striking a balance between punishing criminal violence against fetuses while not infringing upon a woman’s right to have an abortion. This Comment argues for the enactment of similar legislation in Hawaii, specifically the pending Crimes Against the Unborn, House Bill No. 1508 (the Bill), which creates criminal offenses for violent acts committed against fetuses.\(^12\) Hawaii subscribes to the common law born-


\(^{11}\) See Josh Hafenbrack, Case Sparks Debate Peterson Slaying Prompts Proposal to Protect Fetuses Legislature 2004 Abortion Debate, CHARLESTON DAILY MAIL, February 20, 2004 at P1A.


"Unborn child" means the unborn offspring of a human being from conception until birth, but not yet completely born.
"Without lawful justification" means acting under circumstances in which the use of lethal force is not legally justified.

Murder of an unborn child.

(1) A person who causes the death of an unborn child is guilty of murder of an unborn child if the person, without lawful justification:
(a) Intends to cause the death of or do great bodily harm to the unborn child, or knows that the acts will cause the death, or do great bodily harm to the unborn child;
(b) Knows that the acts create a strong probability of death or great bodily harm to another;
(c) Attempts or commits a felonious act that involves a high risk
of violence; or
(d) Perpetrates an act eminently dangerous to another and evinces a depraved mind, without regard for human or fetal life.

(2) This section shall not apply to the perpetrator if the perpetrator is the pregnant woman.

(3) Murder of an unborn child is murder in the second degree.

Voluntary manslaughter of an unborn child.

(1) A person who causes the death of an unborn child is guilty of voluntary manslaughter of an unborn child if the person, without lawful justification:
(a) Intends to cause the death of another in an immediate response provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances;
(b) Commits or attempts to commit, a misdemeanor or gross misdemeanor offense with such force or violence, that the death of or great bodily harm to another was reasonably foreseeable; or
(c) Intends to cause the death of an unborn child because the actor is coerced by threats made by someone other than a coconspirator and which causes the actor to reasonably believe that the act is the only means of preventing imminent death to the actor or another.
(2) This section shall not apply to the perpetrator if the perpetrator is the pregnant woman.

(3) Voluntary manslaughter of an unborn child is a class B felony.

Involuntary manslaughter of an unborn child.

(1) A person who causes the death of an unborn child is guilty of involuntary manslaughter of an unborn child if the person, without lawful justification:
(a) Creates an unreasonable risk by culpable negligence and consciously takes a chance of causing death or great bodily harm to another;
(b) Shoots the mother of the unborn child with a firearm or other dangerous weapon as a result of negligently believing her to be an animal;
(c) Sets a spring gun, pit fall, deadfall, snare, or other-like dangerous weapon or device; or
(d) Negligently permits any animal known by the actor to have vicious propensities, or to have caused great or substantial bodily
harm in the past, to run uncontrolled off the owner's premises, or negligently fails to keep that animal properly confined.

(2) This section shall not apply to the perpetrator if the perpetrator is the pregnant woman.

(3) Involuntary manslaughter of an unborn child is a class C felony.

Battery of an unborn child.

(1) A person who inflicts great or substantial bodily harm upon an unborn child, who is subsequently born alive, by intentionally or knowingly touching a pregnant woman without her consent and without lawful justification; is guilty of battery of an unborn child.

(2) This section shall not apply to the perpetrator if the perpetrator is the pregnant woman.

(3) As used in this section "Great bodily harm" includes, but is not limited to, permanent disability or disfigurement. "Substantial bodily harm" includes, but is not limited to, the birth of the unborn child prior to thirty-seven weeks gestation if the child weighs 2,500 grams or less at the time of birth. The term does not include the inducement of the unborn child's birth when done for bona fide medical purposes.

(4) Battery of an unborn child is a misdemeanor.

Section - Assault of an unborn child. (1) A person who does any of the following without lawful justification commits assault of an unborn child:

(a) Commits any act with the intent to cause fear in a pregnant woman of immediate bodily harm to herself or with the intent to cause fear in a pregnant woman of the death of her unborn child; or

(b) Intentionally inflict or attempts to inflict bodily harm on an unborn child who is subsequently born alive.

(2) This section shall not apply to the perpetrator if the perpetrator is the pregnant woman.

(3) Assault of an unborn child is a petty misdemeanor.

Section - Exceptions. This chapter does not apply to:

(a) Acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented.

(b) Acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.
alive rule, which would not permit Scott to be charged with murder for causing the death of Conner. Given Hawaii’s historically liberal abortion law, there is a perceived tension between women’s rights and fetal protection. However, feticide statutes such as Laci and Conner’s Law and Hawaii’s Crimes Against the Unborn Bill do not infringe upon women’s rights inasmuch as these laws expand their rights through the protection of women’s interests in their bodies and, a fortiori, their fetuses, against third parties’ violent acts. One commentator states, “Roe v. Wade protects a woman’s right of choice; it does not protect, much less confer on an assailant, a third party, the unilateral right to destroy the fetus.”

One way of ensuring protection of women’s constitutional rights is through defining the fetus differently from a person. It is then understood that women’s rights as constitutional people preempt the fetus’ right to potential life. Legislators should primarily focus on the woman because she is the constitutionally recognized person. The woman is the person actually suffering the attack and injury; the fetus is affected only through its mother. In determining the punishment for a pregnant woman’s attacker versus a non-pregnant person, the termination of her desired pregnancy should result in an increased penalty.

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13 See infra n.47, 77-90 and accompanying text.

14 As discussed in infra n.61-6 and accompanying text, Hawaii legalized abortion before the Roe v. Wade decision following a liberal shift in public sentiment.


16 In Roe v. Wade (hereinafter Roe), the Supreme Court held inter alia that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” 410 U.S. 113, 158 (1973). See infra n.167-175 and accompanying text. Since the state’s interest in protecting fetuses’ interest in life do not become compelling until viability, women’s constitutional rights preempt fetuses’ interests.

17 Id.

18 Sandra L. Smith, Note: Fetal Homicide: Woman or Fetus As Victim? A Survey of Current State Approaches and Recommendations for Future State Application, 41 Wm. and Mary L. Rev. 1845, 1872 (2000).
rights are thus not eroded by recognizing injury to the fetus and both can be protected from the criminal actions of third parties.

Yet if a fetus is not a “person” under Roe v. Wade, how can a criminal statute classify causing the death of a fetus as a separate homicide? In addition, how can Laci and Conner’s Law protect fetuses against third parties while exempting the mothers’ acts?

Although under Roe, a fetus is not a person under the Fourteenth Amendment, Roe does not preclude recognition of fetal rights in other contexts, such as in criminal or tort law. Jurisdictions’ inconsistency in fetal protection against the criminal acts of third parties becomes increasingly significant as more pregnant women die from homicide than

19 Id.

20 Roe at 158. See supra n.16.

21 Aaron Wagner, Comment, Texas Two-Step: Serving up Fetal Rights by Side-Stepping Roe v. Wade has Set the Table for Another Showdown on Fetal Personhood and Beyond, 32 Tex. Tech. L. Rev. 1085, 1099 (2001).

22 Id.

23 The 14th Amendment provides in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added). U.S. CONST. Amend.XIV § 1.

24 For example, In re Estate of Holt, 75 Haw. 224, 857 P.2d 1355 (1993) (guardian ad litem for unascertained and unborn beneficiaries of a testamentary trust appeals the termination date of the trust) and Wade, supra n.72, (parents of viable stillborn twins can maintain wrongful death action for their deaths); Los Angeles County v. Winans, 13 Ca 234, 109 P. 640 (1910) (future contingent remainder in unborn is an alternative contingent remainder); and Hall v. Brittain, 153 P. 906 (1915) (where a decree in distribution gives a life estate in land with the remainder in fee simple to her children with a provision that should she deed the land her life estate ceases, any conveyance pertaining to her future life estate made to unborn children is destroyed). See also supra n. 74.
from childbirth or complications arising from pregnancy. In the context of a third party’s violent acts against a fetus, the mother’s liberty interest is not implicated and viability is not a prerequisite.

PART I: RECOMMENDATION THAT HAWAII ENACT THE CRIMES AGAINST THE UNBORN BILL

A. Laci and Conner’s Law

Although the Constitution does not include “fetus” within its text nor does it contain the definition of “person,” Congress protects the unborn through Laci and Conner’s Law. The U.S. Supreme Court has held that a state’s interest in protecting fetuses becomes “compelling” at viability. Eighteen states adhere to the born alive rule, although only eight have statutorily defined “person,” “individual,” or “human being” to include only those who have been born alive. Another eight states have statutorily defined “person” not to include the unborn.

Laci and Conner’s Law protects unborn children in a separate offense from the mother during the commission of certain federal crimes.

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26 Roe at 157.

27 Roe, generally.


29 State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989). See also Smith, supra n.18 at 1848.
regardless of the perpetrator’s mens rea. 30 18 U.S.C. § 1841 provides in relevant part:

(A)(1) Whoever engages in conduct that ... 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...

(2)(a) [T]he 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.

(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 under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.31

30 Protection of Unborn Children (Laci and Conner’s Law) does not require the defendant to have knowledge of the victim’s pregnancy. 18 U.S.C. § 1841 (2004).

31 18 U.S.C. §§ 1111-1113 (2003) respectively define first degree murder, manslaughter, and attempted murder and manslaughter and penalties for each as follows in relevant part:

§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.
Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section. \(^{32}\)

For intentional acts, the statute provides penalties for murder, manslaughter, or attempted murder.\(^{33}\) Laci and Conner’s law treats an assailant’s injury to a fetus as if the injury occurred to the mother.\(^{34}\) For example, if a defendant caused the death of a fetus during a failed attempt to kill the mother, he could be charged with homicide as if he had killed

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

§ 1112. Manslaughter

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary--Upon a sudden quarrel or heat of passion.

Involuntary--In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death...

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be fined under this title or imprisoned not more than ten years, or both;

Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than six years, or both.

§ 1113. Attempt to commit murder or manslaughter

Except as provided in section 1113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall, for an attempt to commit murder be imprisoned not more than twenty years or fined under this title, or both, and for an attempt to commit manslaughter be imprisoned not more than seven years or fined under this title, or both.


\(^{33}\) Id.

\(^{34}\) Id.
the mother. However, Laci and Conner’s Law does not allow imposition of the death penalty.\(^{35}\)

This statute refers to the fetus from conception as an “unborn child.”\(^{36}\) “Unborn child” is a term suggesting “personhood” with attached rights inconsistent with a woman’s right to terminate her pregnancy.\(^{37}\) To avoid conflicts with women’s fundamental rights, feticide statutes should use neutral terms.\(^{38}\) Fetuses should be protected from third parties’ violence, but not at the expense of their mothers’ fundamental rights.\(^{39}\) As important as protecting the fetus’ potential life is protecting the mother’s interest in her own body, including the fetus as part of her body.

Laci and Conner’s Law is consistent with *Roe* and *Planned Parenthood v. Casey* in that it provides an exception for the mother’s actions and promotes the state’s interest in protecting the life of the mother and the fetus from conception.\(^{40}\) A criminal defendant can be prosecuted for harming a fetus at any point of the fetus’ gestation, regardless of whether or not the mother knew she was pregnant.\(^{41}\) This may seem

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\(^{35}\) *Id.* The death penalty could be prohibited because lawmakers acknowledge the fetus may not be a “person” whose deprived right to life justifies the death of a constitutionally recognized person.

\(^{36}\) *Id.*

\(^{37}\) *See also* ACLU factor four in proposing avoidance of terms using pro-life terms such as “pre-born” or “unborn” in feticide legislation. *See Smith,* supra n.18.

\(^{38}\) Smith, *supra* n.18 at 1877 (citing Murphy S. Klasing, The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases, 22 Pepp. L. Rev. 933 (1995)).


\(^{40}\) *Planned Parenthood v. Casey* (hereinafter *Casey*) affirmed three *Roe* holdings: (1) Recognition of the right to have an abortion before viability without the State’s interference, (2) with exceptions for the health of the mother, the state has the right to regulate abortion prior to viability and (3) from conception, the state has an interest in protecting the life of the mother and the fetus. 505 U.S. 833, 846 (1992). Exceptions to the Unborn Victims of Violence Act include legal abortion, conduct in the course of medical treatment, and the mother’s actions.

inconsistent with *Casey*, that a woman has a right to an abortion before viability without undue interference from the state.\(^{42}\) A woman’s right to terminate her pregnancy arises from her Fourteenth Amendment liberty interest to privacy.\(^{43}\) The privacy interest articulated in *Casey* arose from a line of cases recognizing “constitutional protection for personal decisions relating to marriage, … procreation, … family relationships, … child rearing and education, …contraception, …and the right to be free from governmental intrusion …into matters…[such] as …whether to bear or beget a child.”\(^{44}\) This interest is vested in the mother, in her right to control her body, and in no way extends to acts committed by third persons against the mother’s fetus. Hence, in an attack against the mother or fetus, which causes the death of the fetus, the mother’s constitutional rights are not implicated and viability is not required.\(^{45}\) “Abortion is a unique act” resulting from a woman’s decision not to bear a child and it is not similar to nor should it be used to protect the violent acts of third parties.\(^{46}\) By criminalizing harm to fetuses, the statute adheres to *Casey* through protection of the state’s interest in the health of the mother and the potential life of the fetus from the criminal actions of third parties.

### B. Recommendation for Hawai’i

1. **History of Hawaii Abortion Law**

Hawaii has shown a pattern of liberal abortion rights, yet it fails to address feticide either statutorily or through precedent.\(^{47}\) Hawaii’s

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\(^{42}\) *Casey* at 846.

\(^{43}\) *Id.* at 846-53.


\(^{45}\) *Id.* at 846. *Casey* held inter alia that the state has the right to regulate abortion after viability.

\(^{46}\) *Id.* at 852.

original abortion law penalized feticide as the crime of abortion.\textsuperscript{48} In 1970, the abortion law was repealed three years before \textit{Roe v. Wade}.\textsuperscript{49} Currently, Hawaii homicide and manslaughter statutes require the crime to be committed against a “person.”\textsuperscript{50}

Early Native Hawaiians practiced infanticide and induced abortion either surgically or through the use of herbs provided by a \textit{kahuna}.\textsuperscript{51} Also, the mother could ‘\textit{omilomilo}’ or terminate the pregnancy through a series of violent exercises.\textsuperscript{52} ‘\textit{Omilomilo}’ also refers to surgical abortion using a sharply pointed stick and an instrument of polished stone.\textsuperscript{53} Usually, women wanted to end their pregnancies because of disparities between the parents’ social standing.\textsuperscript{54}


\textsuperscript{48} \textsc{The Penal Laws of the Hawaiian Islands} 75 (Hawaiian Gazette 1897) (1897). \textit{See also} Patricia G. Steinhoff & Milton Diamond, \textit{Abortion Politics: The Hawaii Experience} 3 (The University Press of Hawaii 1977)(1977). \textit{See infra} n.55-60 and accompanying text.


\textsuperscript{52} \textit{Id}.

\textsuperscript{53} Mary Kawena Pukui, E.W. Haertig, M.D., & Catherine M. Lee, \textit{Nana I Ke Kumu (Look to the Source)}, Vol. II (1972). It is unknown how often ‘\textit{omilomilo} (‘omilo)’ was practiced. However, Native Hawaiians resorted to infanticide or abortion when slaves (the untouchables) fathered children with non-slave women. ‘\textit{Omilo}’ is “to produce abortion, destroy.” Mary Kawena Pukui & Samuel H. Elbert, \textit{New Hawaiian Pocket Dictionary} 114 (The University Press of Hawaii (1975))(1992).

\textsuperscript{54} E.S. Craighill Handy & Mary Kukuna Pukui, \textit{The Polynesian Family System in Ka-‘U 79}. Children fathered by \textit{kanuwa} (outcasts) were victimized. These children were despised and “regarded as worthless trash” by the mother’s family.
Hawaii’s King and Legislative Assembly of the Hawaiian Islands enacted Hawaii’s original abortion law in 1869. The *Code of the Laws of the Kingdom* provides in relevant part:

> Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman when with child, in order to produce her miscarriage, or maliciously uses any instrument or other means with like intent, shall if the women is then quick with child, be imprisoned not more than five years; And if she is then not quick with child, shall be punished by a fine not exceeding $500 and imprisoned at hard labor not more than two years.

Where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified.\(^{55}\)

The law prohibits abortion but exempts acts to save the mother’s life. The legislators distinguished between abortions based on quickening, with a five-year prison term for abortions occurring after quickening and a two-year prison term and $500 fine for abortions before quickening. Quickening occurs between the sixth and eighth weeks of pregnancy, when a pregnant woman first feels the fetus’ movement.\(^{56}\)

Significantly, a person who kills a fetus “maliciously... with like intent” is guilty of the crime of abortion. Thus, the act of a third person intentionally harming a fetus of feticide was punished through abortion law.

In 1925, Hawaii’s abortion law was amended to discourage infanticide through prohibiting the concealment of the infant’s death: “If any woman conceals the death of an issue of her body, whether born alive or not, which if born alive would have been a bastard, so that it may not be known whether the issue was born alive or not, or whether it was murdered, she shall be punished by a fine of not more than $100 and imprisoned at hard labor not more than two years.”\(^{57}\)

This amendment was intended to discourage unmarried mothers from killing their infants by requiring reporting of the infants’ deaths. Since the statute prohibits

\(^{55}\) THE PENAL LAWS OF THE HAWAIIAN ISLANDS 75. See also Steinhoff, *supra* n.45.

\(^{56}\) See *infra* n.243-9 and accompanying text. Causing the death of a fetus prior to quickening generally was not unlawful.

concealment of the death of a woman’s “issue...whether born alive or not,” a narrow reading of the amendment requires reporting of all abortions regardless of whether the abortion was induced.\textsuperscript{58} In 1940, the Hawaii Supreme Court narrowed the exception for abortions to save the mother’s life to only medical practitioners.\textsuperscript{59} Hawaii’s abortion law remained essentially unchanged through several revisions of the penal code and into statehood in 1959.\textsuperscript{60}

In the 1960’s, Hawaii experienced a shift in public sentiment towards legalizing abortion.\textsuperscript{61} In 1962, the American Law Institute published the Model Penal Code that liberalized the justification for legal abortion: (1) to prevent the grave mental or physical impairment of the mother, (2) if the child would be born with grave mental or physical defects or (3) if the pregnancy resulted from rape or incest.\textsuperscript{62} In addition,

\begin{itemize}
  \item \textsuperscript{58} Steinhoff, supra n.48 at 4.
  \item \textsuperscript{59} Territory v. Hart, 35 Haw. 582, 585 (1940). The Supreme Court of Hawaii held that “there is no presumption of good faith or legitimate purpose where a layman performs an abortion.”
  \item \textsuperscript{60} Steinhoff, supra n.48 at 4.
  \item \textsuperscript{61} Id. at 6.
  \item \textsuperscript{62} American Law Institute, Model Penal Code 230.3 (1962) provides in part:
    \begin{itemize}
      \item (1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by live birth commits a felony of the third degree or, where a pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.
      \item (2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes that there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirements of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible]
      \item (3) Physician's Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which
    \end{itemize}
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they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any requirements of this Subsection gives rise to the presumption that the abortion was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony in the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs, or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs, or violence upon herself for the purposes of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purposes to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer, or display is to a physician or druggist or to an intermediary in the chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with the intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade and professional channels not likely to reach the general public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this Section shall be deemed applicable to the prescription, administration, or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at, or immediately after fertilization. See also Jon F. Merz et al., Article: A Review of
the 1964-1965 rubella epidemic pushed physicians to perform more abortions for women who were or might have been exposed to the virus.\textsuperscript{63} Physicians became increasingly open to performing the procedure in situations where the mother’s life was not threatened.\textsuperscript{64} The first bills to legalize abortion were introduced into the Hawaii legislature in 1967, resulting in the abortion law’s repeal in 1970.\textsuperscript{65} Hawaii then enacted legislation, similar to its current statute, allowing for abortion by a licensed physician, in a hospital, on a woman who has resided in Hawaii for 90 days, to terminate a nonviable fetus.\textsuperscript{66} Through statute, Hawaii thus legalized abortion before the landmark decision in \textit{Roe v. Wade}.

\begin{itemize}
\item Steinhoff, \textit{supra} n. 48 at 6.
\item Id. Technically exposure to rubella was not life threatening to the mother however her fetus was likely to be born with birth defects or other complications. Carolyn DiGuiseppe, \textit{Guide to Clinical Preventive Services, Second Edition, Infectious Diseases} (1996), available at http://cpmcnet.columbia.edu/texts/gcps/gcps0042.html
\item Steinhoff, \textit{supra} n. 48 at 4. See also Merz, \textit{supra} n. 62 (discussing the repeal of Hawaii’s abortion law).
\begin{quote}
Intentional termination of pregnancy; penalties; refusal to perform
(a) No abortion shall be performed in this State unless:
(1) Such abortion is performed by a licensed physician or surgeon, or by a licensed osteopathic physician and surgeon; and
(2) Such abortion is performed in a hospital licensed by the department of health or operated by the federal government or an agency thereof; and
(3) The woman upon whom such abortion is to be performed is domiciled in this State or has been physically present in this State for at least ninety days immediately preceding such abortion. The affidavit of such a woman shall be prima facie evidence of compliance with this requirement.
(b) Abortion shall mean an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section.
(c) Any person who knowingly violates this section shall be fined not more than $1,000 or imprisoned not more than five years, or both.
\end{quote}
\end{itemize}
In 1869, had Laci Petersen been murdered in Hawaii, Conner’s death could have been prosecuted under Hawaii’s original abortion law since the assailant “maliciously, without lawful justification…produced [Laci’s] miscarriage” when she was “quick with child.” Scott could “be imprisoned not more than five years” and fined $500. Currently, since Hawaii does not have a feticide statute or enhanced penalties for harming a pregnant woman, Scott might only be subject to a $1,000 fine with five years imprisonment under the abortion statute. However, the abortion statute on its face addresses the intentional actions of pregnant women and medical practitioners rather than nonconsensual third party acts. Furthermore, since Conner was viable, the abortion statute would not apply. Although causing Conner’s death as a viable fetus does not independently result in an additional criminal penalty, Laci’s parents could maintain a cause of action against Scott for Conner’s wrongful death.


(d) Nothing in this section shall require any hospital or any person to participate in such abortion nor shall any hospital or any person be liable for such refusal.

67 THE PENAL LAWS OF THE HAWAIIAN ISLANDS at 75.

68 See supra n.55-6 and accompanying text.

69 HAW. REV. STAT. 453-16 (2003), supra n.66. See also State v. Keeler (hereinafter Keeler), 87 Cal. Rptr. at 635, 470 P.2d at 627 (the court suggests the defendant who intentionally killed a viable fetus had notice he was committing the crime of abortion). See also infra n.107-111.

70 Id.

71 Id. H.R.S. 453-16 specifically exempts viable fetuses; “The termination of a viable fetus is not included in this section.”

72 Wade v. U.S., 745 F. Supp. 1573, 1579 (D. Haw. 1990) (hereinafter Wade). In a suit against the Government under the Federal Torts Claims Act, the Federal District Court held (1) the Hawaii Wrongful Death statute was construed to allow suit by parents of viable stillborn twins, but the cause of action was limited to viable fetuses (2) summary judgment was precluded under Hawaii law because there was an issue of material fact as to whether the twins were viable at the time of the injury and (3) a 22-week-old fetus is viable as a matter of law. Although in Wade, the viable fetuses’ parents filed suit and, in the case at bar, Laci is dead and the father is the defendant. There is no case on point, however, given the circumstances the court may allow suit by the grandparents.
Hawaii does not statutorily protect fetuses. Within the meaning of the Hawaii Penal Code, “person” means “a human being who has been born and is alive.” Therefore, in the criminal context fetuses are not statutorily included as “persons.” However, in other areas of law both in Hawaii and other states, the rights of the unborn have historically been recognized. The fetus’ interests in property and probate are well established. In Hawaii, a cause of action for viable fetuses who have not been born is recognized in the Wrongful Death statute. In 1990, the U.S. District Court held that parents of viable stillborn twins could file suit under the Wrongful Death Statute.

In comparison, the Hawaii Supreme Court held that a fetus is not a person within the meaning of the Penal Code. In State v. Jardine, the defendant and his six months pregnant girlfriend argued while driving to a friend’s house. Several times, the girlfriend attempted to open the car door and disembark while the car was in motion. The defendant argued he used force to keep her in the car to protect the fetus from harm, but nonetheless was convicted under the abuse of a family or household member statute. The defendant then asserted the “choice of evils” or “use of force for the protection of others” defenses, claiming that he...
struck his pregnant girlfriend and pulled her hair to prevent her from hurting the fetus. The choice of evils defense states that conduct to avoid harm to one’s self or another is justifiable. According to H.R.S. § 701-118(8), “another” means “any other person and includes, where relevant, the United States, this State and any of its political subdivisions[].” The “use of force for the protection of others” defends force used to protect a third person when the actor believes it is justified and necessary. In H.R.S. § 701-118(7) defines a “person” as “any natural person.” On appeal, the defense claimed the court should have given an instruction stating that the unborn child was a “person” for the purposes of these statutes. The court noted that states with comparable statutory schemes did not expand the definition of person to include fetuses without legislative amendment. The court held that, since fetuses are not recognized as people within the Penal Code, a fetus is not a person for the purposes of a defense. Under the Penal Code, despite advances in technology rendering the born alive rule obsolete, and Roe’s holding that the State has a “compelling” interest at viability, Hawaii continues to subscribe to the born alive rule.

(1) The use of force upon or toward the person of another is justifiable to protect a third person when:

(a) Under the circumstances as the actor believes them to be, the person whom the actor seeks to protect would be justified in using such protective force; and

(b) The actor believes that the actor’s intervention is necessary for the protection of the other person. Id. at 8, 61 P.3d at 519.

83 Id. at 5, 61 P.3d at 517.
84 Id. at 8, 61 P.3d at 519 (emphasis added). See supra n.81.
86 Id. (emphasis added). See supra n.82.
87 Id. Haw. Rev. Stat. § 701-118(7). “Person is defined . . . as including any natural person and, where relevant, a corporation or an unincorporated association.” (internal quotations omitted).
88 Id.
89 State v. Jardine, 101 Hawai`i. at 8-9, 61 P.3d at 519-20.
90 Id. at 10, 61 P.3d at 521.
The Unborn Victims of Violence Bill was introduced in the Senate in the 2003, Senate Bill Number 1508, but has not passed into law.91 “Unborn child” means an unborn human offspring at conception.92 The Bill prohibits harm to a fetus using lethal force in circumstances where it is not legally justified with an exception for legal abortion and for the acts of the mother.93 Specifically, the Bill creates a separate offense for second-degree murder and involuntary manslaughter for the intentional and negligent killing of a fetus.94 Also, the Bill makes the battery of a fetus a misdemeanor.95 The Unborn Victims of Violence Bill does not infringe upon the mother’s constitutional rights while simultaneously protecting her interest in her fetus.

3. Comparison with California

a. History of California’s Abortion Law

On April 16, 1850, California passed its first anti-abortion statute.96 The statute underwent several revisions before medical

92 Id.
93 Id.
94 Id.
95 Id.
96 LOUIS J. PALMER, JR., ENCYCLOPEDIA OF ABORTION IN THE UNITED STATES 53 (McFarland and Co. (2002)) (2002). The revised abortion statute provides in relevant part:

A holder of the physician’s and surgeon’s certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion, only if each of the following requirements is met:

The abortion takes place in a hospital that is accredited by the Joint Commission on Accreditation of Hospitals.

The abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals. In any case in which the committee of the medical staff consists of no more than three licensed physicians and surgeons, the unanimous
abortions were permitted in the Therapeutic Abortion Act. The abortion statute required that (1) the abortion take place in a hospital (2) the abortion be authorized by a committee of doctors and (3) the committee find a health risk to the mother or that the pregnancy is the result of rape or incest. In 1967, California was one of the first states to legalize medical abortions through the Therapeutic Abortion Act. The Act allowed abortion by medical professionals in certified hospitals when continuing the pregnancy would gravely harm the mother or when the pregnancy was the result of rape or incest.

In 1969, California became the first state to strike down its abortion law in People v. Belous. The California Supreme Court held that the Therapeutic Abortion Act’s provision requiring the abortion to be “necessary to preserve” the mother’s life was too vague to meet due process requirements without violating the mother’s constitutional rights to life and to decide whether to bear children. Three years later, in

consent of all committee members shall be required in order to approve the abortion.

The Committee of the Medical Staff finds that one or more of the following conditions exist: (1) There is substantial risk that continuance of the pregnancy would gravely impair the physical and mental health of the mother. (2) The pregnancy resulted from rape or incest. Abortion Requirements C. 327 § 1, California Health and Safety Code § 123405 (1967) (Repealed by Stats.2002, c. 385 (S.B.1301), § 3).
People v. Barksdale, the California Supreme Court held that the provisions establishing the medical criteria for the Therapeutic Abortion Act were too vague to meet due process requirements. Portions of the Therapeutic Abortion Act establishing medical criteria were struck down and the remainder, requiring abortions to be performed by licensed doctors in accredited hospitals before the 20th week of gestation, was upheld.

b. Fetal Protection through the Murder Statute

In 1970, California amended its homicide statute to include killing a “fetus” within the definition of murder. California Penal Code § 187 provides in part:

Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

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 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.

(2) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

Murder requires the killing of a person or fetus with exceptions for doctors in instances where the mother’s health is in danger or where the mother consented to the abortion. Because of these exceptions, the mother’s wishes and health are clearly held above the rights of the fetus.

state’s social policy in saving women’s lives from dangerous abortions was not persuasive because of the increasing safeness of medical technology. In addition, the state’s interest in the fetus’ life does not prevail over the mother’s constitutional rights.

103 People v. Barksdale, 8 Cal.3d 320, 332, 503 P.2d 257, 266 (1972).

104 Id.


106 Id.
Section 187 was amended to include “fetus” in response to public outrage after a man who intentionally killed a viable fetus was not charged with the fetus’ murder in *Keeler v. Superior Court of Amador County*.\(^{107}\) In *Keeler*, the California Supreme Court held that the statutory definition of murder was not intended to include a fetus.\(^{108}\) The defendant, a pregnant woman’s ex-husband, attacked her and intentionally killed her fetus.\(^{109}\) The court found the fetus viable and that its cause of death was the defendant’s attack.\(^{110}\) Nonetheless, citing *inter alia* legislative intent, the court held a fetus was not a “human being” within the meaning of the murder statute.\(^{111}\)

After *Keeler*, the legislature amended California Penal Code § 187 to include “fetus” within the definition of murder.\(^{112}\) Significantly, in

\(^{107}\) *Keeler v. Superior Court of Amador County*, 2 Cal. 3d 619, 623, 470 P.2d 617, 618 (1970). The defendant in *Keeler* stated to the victim, “I’m going to stop [the fetus] out of you” prior to the attack on the victim resulting in the death of the fetus.

\(^{108}\) *Id.*

\(^{109}\) *Id.* at 623, 470 P.2d at 618.

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 638-639, 470 P.2d 629. Cf. Burke dissent (common-law argument supports the inclusion of a “quickened” fetus as a human being.)

\(^{112}\) This statute was enacted in 1872 and was amended to include “or a fetus” in 1970. CAL. PENAL CODE § 187 (Deering 2004).

\(^{113}\) California Penal Code § 187:

Murder defined:

(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 Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

(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.
People v. Davis the court observed that the legislature probably omitted the definition of “fetus” purposely to further discuss whether a fetus was required to be viable or not. Moreover, the legislature rejected an amendment stipulating that a fetus be 20 weeks old for statutory purposes.

Despite several challenges contending the statute’s failure to define the gestational age of a “fetus” was unconstitutionally vague, § 187 was successfully used to prosecute several fetal murders. Because of the Supreme Court’s decision in Roe, the Court of Appeals for the Ninth Circuit interpreted “fetus” to mean a “viable fetus,” which is “capable of meaningful life outside the mother's womb” in People v. Smith. The defendant beat his 12-15 weeks pregnant wife, intending to kill the fetus, resulting in its subsequent death. Since a 15-week-old fetus is incapable of surviving outside its mother’s body, the defendant could not be

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.


Id. at 803, 872 P.2d 591 at 594. (quoting Assem. Bill No. 816 (1970 Reg. Session.))

See People v. Apodaca, 76 Cal.App.3d 479, 142 Cal.Rptr. 830 (1978) (affirmed defendant’s conviction for fetal homicide when defendant argued the term “fetus” as used in the statute was unconstitutionally vague), People v. Smith (Robert Porter) 188 Cal.App.3d 1495, 234 Cal.Rptr. 142 (1987) (upheld defendant’s conviction after the defendant argued that the jury should have been instructed on the legal definition of “viable,” and People v. Henderson, 225 Cal/App. 3d 1129, 275 Cal.Rptr. 837 (1990) (held feticide statute was not vague because it did not contain the term “viable” and viability was interpreted by case law). Also see n.6 and accompanying text.

See supra n.1-6 and accompanying text. This viability definition was first articulated by the Supreme Court in Roe and subsequently adopted by the Court of Appeals for the Ninth Circuit.

Davis at 797, 872 P.2d at 595. Viability is placed at about 24 to 28 weeks.

Davis at 803, 872 P.2d at 595 (quoting People v. Smith (Karl Andrew), 59 Cal. App.3d 751, 129 Cal.Rptr 498 (1976)).

Id.
prosecuted for fetal homicide under § 187. The court rationalized that “one cannot destroy independent human life prior to the time it has come into existence.” Thus, Smith held a requirement for the application of the fetal homicide statute was fetal viability.

The California Supreme Court later expanded the definition of fetus in People v. Davis to include nonviable fetuses as well. In Davis, a pregnant woman was robbed at gunpoint and shot in the chest resulting in the loss of her 23-25-week-old fetus. After the Defendant’s conviction for fetal homicide, he successfully argued on appeal that the jury instruction defining “viability” as a “reasonable possibility of survival” should have used the higher standard of probability. The supreme court explained the erroneous jury instruction “substantially lowered the viability threshold as commonly understood and accepted” in Roe. The court then held that viability was not a requirement for fetal murder and that this “redefinition” would apply prospectively and not to the defendant. Because of procedural due process concerns, the court affirmed the Court of Appeals’ reversal of defendant’s conviction of fetal homicide.

\[121\] Id.

\[122\] Id. at 804, 872 P.2d at 595.

\[123\] Id.

\[124\] Id. at 805, 872 P.2d at 596.

\[125\] Id. at 800, 872 P.2d at 593.

\[126\] Id. at 802-803, 872 P.2d at 594. (quoting Roe (the definition of viability) and Casey (affirming the essential holding of Roe)). The correct viability standard, in CALJIC 8.10 states, “A viable human fetus is one who has attained such form and development of organs as to be normally capable of living outside of the uterus.” In contrast, the jury was issued an instruction that allowed the defendant’s conviction if the fetus possibly could have survived, “A fetus is viable when it has achieved the capability for independent existence; that is, when it is possible for it to survive the trauma of birth, although with artificial medical aid.” Id. at 801, P.2d at 593. Cf. supra n.41 and accompanying text discussing Laci and Conner’s Law.

\[127\] Id. at 814, 872 P.2d at 642.

\[128\] Id. at 810, 872 P.2d at 600.
murder. Hence, for the purposes of fetal homicide, viability is no longer a requirement for § 187.

Interestingly, for purposes of manslaughter, California subscribes to the born alive rule. Manslaughter is the killing of “a human being” without malice, with three types: (1) voluntary in the heat of passion, (2) involuntary through negligence, and (3) vehicular through the negligent operation of a vehicle. Gross vehicular manslaughter while intoxicated is an offense targets defendants operating their vehicles while intoxicated. The manslaughter statutes do not apply to fetuses. In People v. Apodaca, the California Supreme Court held that it was contrary to legislative intent to include fetuses within the definition of manslaughter in light of the murder statute’s amendment to include fetuses

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129 Id. at 811,872 P.2d at 601. The court held that application of the murder statute to defendant for killing a pre-viable fetus amounted to a “major change in the law,” that would violate the notice requirement of due process.

130 Id. at 814-15,872 P.2d at 602. However, the court required that the fetus must be shown to be seven or eight weeks old.

131 The California Penal Code § 191.5 provides in part:

§ 191.5. Gross vehicular manslaughter while intoxicated

(a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(emphases added) CAL. PEN CODE §§ 191.5 and 192. (Deerings, 2004)

132 Id.

133 CAL. PEN. CODE § 191.5. (Deerings 2004).

134 Compare California’s murder statute with its manslaughter statute; “Manslaughter is the unlawful killing of a human being without malice.” (emphasis added) CAL. PEN CODE §192. (Deerings, 2004).
Accordingly, in Apodaca, the state was prohibited from instructing the jury on the lesser included offense of fetal manslaughter. Because California’s murder statute currently protects fetuses before viability, Scott was charged for killing both Laci and her fetus. Whether Laci’s fetus was viable was not relevant in determining whether Scott is guilty of its murder under California law. Furthermore, California prosecutors are pursuing the death penalty for a double homicide, which is not possible under Laci and Conner’s Law. However, had Scott killed Conner by colliding into Laci’s car or killed Conner after a heated argument with Laci or inadvertently caused Conner’s death through a negligent act, he would not suffer additional criminal penalties unless Conner was proven to have been born alive.

PART II: PRIVACY AND DUE PROCESS CONCERNS

A. Fetal Protection Statutes Do Not Erode the Mother’s 14th Amendment Privacy Rights and Equal Protection

Roe v. Wade and Planned Parenthood v. Casey stand for a woman’s right to terminate a pregnancy without state interference before viability under privacy, a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. Roe also held that a fetus is not a person for the purposes of the Fourteenth Amendment. However, Roe’s holding does not preclude recognition of fetal rights in contexts other than abortion because a third party’s act against the mother and fetus does not implicate the mother’s privacy right. Fetal protection against third party violence is thus not inconsistent with the constitutional guarantees of the Fourteenth Amendment. Furthermore, feticide statutes do not infringe upon equal protection when they provide exemptions for the mother’s actions because the mother and a third party

135 People v. Apodaca (hereinafter Apodaca), 76 Cal. App. 3d 479, 491, 142 Cal.Rptr. 830, 838 (5th Dist. 1978). See also infra n.228-32 and accompanying text.

136 Id.

137 See supra n.9-11.

138 Roe at 152-4; Casey at 846. See also supra n.16, 40 and accompanying text.

139 Roe at 158.

140 See infra n.146.
are not similarly situated. The mother’s right to make decisions regarding procreation does not shield a third party’s criminal acts against the fetus.

1. 14th Amendment Guarantees of Privacy and Equal Protection and the Definition of Person

In Roe v. Wade, an unmarried pregnant woman challenged a Texas statute that prohibited abortions, except in cases where the mother’s life was at risk. The U.S. Supreme Court held the Texas criminal abortion statute unconstitutional because it was overbroad, failing to distinguish between early and late-term abortions. Furthermore, the statute gave as the only valid purpose for an abortion to “save the life of the mother.” The Court held a woman’s decision to terminate her pregnancy was protected by her fundamental right to privacy under the Fourteenth Amendment’s Due Process Clause. However, the state’s interest in protecting the fetus’ potentiality of life becomes “compelling” at viability. Balancing a mother’s privacy right and the state’s interest in protecting potential life, states could prohibit abortions after the first trimester, except in situations where the pregnancy is harmful to the mother’s health.

In addition to holding that a woman’s privacy right encompasses her decision to have an abortion, the Court held that a fetus is not a

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141 U.S. CONST., amend. XIV, § 1 (2004) provides:

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

142 See generally Roe.

143 Id. at 164.

144 Id.

145 Id. at 153.

146 Id. at 163.

147 Id. at 164. This describes the “rigid trimester framework” overruled in Planned Parenthood v. Casey in favor of the “undue burden” test discussed infra notes 10-12.
“person, as used in the Fourteenth Amendment.”

This narrow definition leaves the door open for courts and legislators to proclaim the unborn are people in contexts other than the Fourteenth Amendment and accord fetal rights.

In *Webster v. Reproductive Health Services*, the Supreme Court declined to address the constitutionality of a Missouri statute which defined a fetus as a person from conception and accorded fetuses “all the rights, privileges, and immunities available to other persons, citizens, and residents of this State” with protectable interests in “life, health, and well-being.”

Furthermore, the Court, *inter alia*, upheld the statute’s prohibition against using public employees and facilities to perform non-therapeutic abortions and using public funds to provide abortion counseling except to preserve the mother’s life.

The Court did not determine the constitutionality of the Missouri statute’s preamble.

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148 *Id.* at 158.

149 Generally, state tort and probate law recognize fetal rights. A majority of states have a wrongful death statute applicable to fetuses. *Farley v. Sartin*, 466 S.E.2d 522, 528 (1995). Although fetuses are not persons under the Fourteenth Amendment, they generally are persons for the purposes of trust and inheritance law. Jeffrey A. Parness and Susan K. Pritchard, Article, To Be or Not To Be: Protecting the Unborn’s Potentiality of Life. 51 U. Cin. L. Rev. 257 (1982). See also supra n.64.


151 *Id.* at 507-8.

152 *Id.* at n.4. The Court quoted the text of the statute, still current, which reads:

The general assembly of this state finds that:

(1) The life of each human being begins at conception;
(2) Unborn children have protectable interests in life, health, and well-being;
(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the
because it was merely a value judgment and does not substantively affect a woman’s right to an abortion. By granting the fetus full citizenship rights, the Webster decision opens the door for the state to regulate pregnant women’s behavior. Significantly, the Court did not address potential equal protection violations, which would result from the State’s protection of fetuses through the regulation of pregnant women’s conduct such as drug use and driving while intoxicated.

In Planned Parenthood v. Casey, the Supreme Court affirmed Roe’s essential holding that a woman’s right to an abortion may be proscribed after viability, except in circumstances to preserve the mother’s life. In Casey, a physician and five abortion clinics challenged a Pennsylvania statute, which had the following requirements: a 24-hour waiting period, spousal notice for married women, and parental consent for minors with a judicial bypass option for those who could not or did not want to obtain her parent’s consent. The Court affirmed Roe’s holding in part: 1) A woman has a right to an abortion before fetal viability

United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term 'unborn children' or 'unborn child' shall include all unborn child [sic] 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.


153 Id. at 506. The Court explained Roe v. Wade “implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.” (quoting Maher v. Roe, 432 U.S. 464, 174 (1977)).

154 Johnsen, supra n.39 at 180 (the law's treatment of the fetus could provide a foundation for the government to impose special penalties and restrictions on pregnant women's actions to promote fetal interests and would enable the government to regulate pregnant women’s lives). However, § 4 of the Missouri statute does bar any cause of action against a woman for her own treatment of her fetus. See n.152.

155 Id. (women’s fundamental rights should not unnecessarily be curtailed by laws protecting the fetus).

156 Casey, supra n.16.

157 Id. at 844.
without undue interference from the state, 2) Laws restricting abortions after viability must contain an exception for circumstances in which the mother’s health is at stake, and 3) Throughout pregnancy the state has interests in protecting both the mother and fetus. However, Roe’s trimester framework was rejected because it was inflexible and the undue burden test was adopted instead. “Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.” An undue burden is defined as a state regulation which places a substantial obstacle between a woman and her ability to terminate her nonviable fetus. The Court found that the state’s interest in protecting fetal life is not compelling enough to overcome a woman’s liberty interest until fetal viability.

Although in Webster, the Supreme Court declined to decide whether a fetus could be accorded “all the rights, privileges, and immunities available to other persons, citizens, and residents of the State [of Missouri],” the Constitution does not explicitly define “person.” Indeed, the Constitution contains several references to “person,” but the text of the Constitution does not provide a definition for “person.” The Fourteenth Amendment defines “citizens” as “persons born or naturalized in the United States.” None of the other references to “person” in the Constitution pertain to fetuses. In Roe v. Wade, for the purpose of

158 Id. at 846.
159 Id. at 873 (The trimester framework was rejected because inter alia, even in the early stages of pregnancy, state regulations with the purpose of ensuring a woman’s choice is informed do not necessarily interfere with her right to choose).
160 Id. at 874.
161 Id. at 877.
162 Id.
163 Roe at 157.
164 Id.
165 Id. See also supra n.18 U.S. CONST. amd. XIV, § 1.
166 The Court examines other references to the word “person” in the Constitution, concluding that “person” does not apply to the unborn: “in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; n53 in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl.
protection under the Fourteenth Amendment, the Court defined a person as not “includ[ing] the unborn.” The Court stated that fetuses were different from people in “very basic and legally relevant ways” and that the state’s decision to protect fetal rights is a “value choice…not supported by biological fact.” The Supreme Court has consistently held the mother’s rights above the rights of a fetus because she is a person under the Constitution. A woman is thus able to procure an abortion for health reasons.

The Supreme Court would never allow the state’s interest in protecting life to “be used to deprive pregnant women of their rights to liberty, privacy, and equality through a state-sanctioned ‘pregnancy police.’”

In Davis, the California Supreme Court noted:

By holding that the Fourteenth Amendment does not cover the unborn, the Supreme Court was left with only one constitutionally mandated right, that of the mother's privacy, to be considered along with the legitimate state interest in protecting an unborn's potential life. The Roe decision forbids the state's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent. The Court did not rule that the unborn's interests could not be recognized in situations where there was no conflict.

8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally.” Roe at 157.

167 Roe at 158.

168 Id. at 161-62.


170 Id.

171 Id. See Casey at 895-98

172 Davis at 807, 872 P.2d at 595 (quoting Parness, Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life, 22 Harv. J. on Legis. 97, 144 (1985)).
Roe’s holding is best seen as limited to the context of abortion.\textsuperscript{173} Roe is not applicable to feticide statutes, such as California’s § 187, when the fetus is killed without the mother’s consent.\textsuperscript{174} Roe prohibits the state’s protection of the fetus only when its parent’s constitutional rights are implicated.\textsuperscript{175} However, when feticide statutes are used to regulate pregnant women’s behavior, these women’s constitutional rights are then implicated and the feticide statutes would be unconstitutional.

Feticide statutes that define the fetus as a “person” with the accompanying rights and privileges would unduly interfere with abortion rights.\textsuperscript{176} It is unnecessary for feticide statutes to define the fetus as a “person” to affect their purpose of enhancing penalties for defendants causing harm to fetuses.\textsuperscript{177} However, although unnecessary for the protection of the fetus, a component of some fetal rights statutes is the definition of “person.”\textsuperscript{178} For instance, in \textit{State v. Whitner}, a viable fetus was held to be a “person” for the purposes of a child abuse statute, allowing its mother to be charged for substance abuse while she was pregnant.\textsuperscript{179} The \textit{Whitner} court interpreted the Children’s Code\textsuperscript{180} to


\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} See supra n.14 (Hawaii’s Crimes Against the Unborn Bill defines unborn as “the unborn offspring of a human being from conception until birth, but not yet completely born”), n.28-33 (Laci and Conner’s Law defines unborn as “a child, who is in utero”), n. 98 (“fetus” was added to the existing California murder statute).

\textsuperscript{177} See supra n.5. California’s murder statute does not define the fetus as a person.

\textsuperscript{178} See \textit{Webster}, supra n.150 (The Supreme Court upheld a Missouri abortion regulation statute, which bestows personhood on the fetus and accords the fetus full citizenship rights).


\textsuperscript{180} S.C. Code Ann. § 20-7-20 (c) (1985) establishes South Carolina’s children’s policy:
include fetuses, *inter alia*, because of the statute’s stated policy regarding children: “It shall be the policy of this State to concentrate on the prevention of children’s problems...[and] the abuse or neglect of a child at any time during childhood can exact a profound toll on the child...”

The court held that “this policy of prevention supports a reading of the word ‘person’ to include viable fetuses.” A pregnant woman’s behavior can thus be regulated by the state under the guise of fetal protection. However, convictions for “fetal abuse” have been reversed since statutes applicable to born people lack legislative intent to include the fetus.

This policy shall be interpreted in conjunction with all relevant laws and regulations and shall apply to all children who have need of services including, but not limited to, those mentally, socially, emotionally, physically, developmentally, culturally, educationally or economically disadvantaged or handicapped, those dependent, neglected, abused or exploited and those who by their circumstance or action violate the laws of this State and are found to be in need of treatment or rehabilitation.

...It shall be the policy of this State to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented on behalf of children and their families. The State shall encourage community involvement in the provision of children's services including, as an integral part, local government, public and private voluntary groups, public and private nonprofit groups and private-for-profit groups in order to encourage and provide innovative strategies for children's services. To maximize resources in providing services to children in need, all agencies providing services to children shall develop methods to coordinate their services and resources. For children with multiple needs, the furtherance of this policy requires all children's services agencies to recognize that their jurisdiction in meeting these children's needs is not mutually exclusive.

*Id.*

*See also Whitner* at 8, 492 S.E.2d at 781.

*Whitner* at 8, 492 S.E.2d at 781.

*Id.*

California’s murder statute was amended to include “fetus” but does not include the definition for fetus. Laci and Conner’s Law does not define the unborn as people nor does Hawaii’s Crimes Against the Unborn Act. Legislators left out the definition of person to avoid the implication of women’s liberty and equal protection rights while continuing to provide protection for fetuses. Women’s liberty is affected by granting the fetus personhood because abortion could be seen as murder. If a fetus is considered a person, then a pregnant woman’s behavior could be regulated such as in Whitner. To avoid these constitutional issues, feticide statutes should not define a fetus as a person.

2. Approaches to Feticide Legislation

States generally have taken two approaches in drafting feticide laws; legislators have either identified the victim as the woman, or the fetus as the focus of the harm. States then have either modified existing statutes or created new statutes to increase penalties for attacks on pregnant women or to include fetuses. First, when states identify the woman as the victim, there is no conflict between women’s and fetuses’ rights because the two interests are treated as a single entity. However, victims’ families often feel the fetus’ death is justly treated as a second crime in addition to the crime against the pregnant woman. Second, in states that focus on the fetus as the victim, conflicts arise with abortion rights and a concern that feticide statutes will be used to identify the fetus as a person in other areas of the law. Women’s rights groups argue that

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184 See supra n.98-121 (The Davis court observed that the legislature purposely did not include the definition of “fetus” because a provision requiring viability was specifically rejected. Although viability was no longer a requirement for the murder statute, the defendant’s conviction was overturned for due process concerns).
185 Id.
186 See supra n.165.
187 Smith, supra n.26 at 1870.
188 Id. at 1871-2.
189 Id. at 1872.
190 Id.
191 Id. at 1871.
if a majority of states enact statutes protecting fetuses, they will be used as evidence to prohibit abortions.\textsuperscript{192}

However, this concern lacks merit because recognition of fetal rights in criminal law does not lead to proscription of abortion rights \textit{per se}, especially in light of the holdings in \textit{Roe} and \textit{Casey} proclaiming abortion right absolute through a woman’s privacy.\textsuperscript{193} For instance, even in the face of public outrage the California Supreme Court refused to expand the murder statute to include fetuses in \textit{Keeler}.\textsuperscript{194} Furthermore, many jurisdictions already recognize fetal rights in, \textit{inter alia}, tort and property law.\textsuperscript{195} California recognizes fetal rights through amendment of its murder statute, “Murder is the unlawful killing of a human being, or fetus...”\textsuperscript{196} Abortion rights in California have not been affected and additional fetal rights have not since been asserted through legislation or precedent.\textsuperscript{197}

The scope of the fetal protection law is another important factor in drafting feticide legislation.\textsuperscript{198} The determination of scope is essentially whether the statute applies to feticide, to fetal injury, or to both.\textsuperscript{199} Twelve states impose culpability only for some forms of fetal death and nine states prohibit injury and death to the fetus.\textsuperscript{200} Interestingly, the nine states with

\begin{footnotesize}
\textsuperscript{192} Id.

\textsuperscript{193} See generally \textit{Roe} and \textit{Casey}, supra n.16.

\textsuperscript{194} See supra n. 99-103.


\textsuperscript{196} See supra n.98 and accompanying text.

\textsuperscript{197} For example, other sections of the California Penal Code do not include fetuses, such as manslaughter. 8 Cal. Pen Code §§ 191.5 and 192 (Deerings 2004). The effects of the recently enacted Laci and Conner’s Law have not yet been gauged.

\textsuperscript{198} Smith, supra n.26 at 1872.

\textsuperscript{199} Id. at 1873.

\textsuperscript{200} Id. See 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, - 3.2, 5/12-3.1, -4.4 (West 1993) (including intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery, and aggravated battery); MINN. STAT. ANN. §§ 609.266, 2661-.2665, 267-.2672, .268 (West Supp. 1999) (including first, second and third-degree murder, first and second-degree manslaughter, injury or death in the commission of a crime, and assault); MO. ANN. STAT. § 1.205.2 (West Supp. 1999) (declaring that the fetus is considered a person for the purposes of all state statutes); N.D. CENT. CODE § 12.1-17.1-01,-02-06 (1997) (including murder, manslaughter, negligent homicide, aggravated
\end{footnotesize}
statutes that prohibit both the fetus’ death and injury enacted the statutes as a result of a specific incident or event.\textsuperscript{201} Disadvantages to statutes prohibiting both the fetus’ death and injury are the different intent requirements and proof of causation.\textsuperscript{202} In contrast, statutes that focus on the woman as victim incriminate acts that terminate or damage the pregnancy.\textsuperscript{203} Other statutes address only the woman’s injury or murder.\textsuperscript{204}

California protects fetuses in the criminal context only for murder. For the purposes of manslaughter, involuntary manslaughter, and vehicular manslaughter, California requires a person to be born alive.\textsuperscript{205} On the other hand, Laci and Conner’s Law provides separate offenses for murder, involuntary and voluntary manslaughter, and attempted murder or manslaughter of an unborn child.\textsuperscript{206} These provisions could raise differing intent and causation problems. Similarly, Hawaii’s pending Crimes

\textsuperscript{201} Id.


\textsuperscript{203} Id. IOWA CODE ANN. § 707.8 (West 1993 & Supp. 1999).


\textsuperscript{205} 8 CAL. PEN CODE §§ 191.5 and 192 (Deering’s 2004).

Against the Unborn Act prohibits murder, involuntary and voluntary manslaughter, and battery of an unborn child.\(^{207}\) Laci and Conner’s Law and the Crimes Against the Unborn Act provide greater and more consistent fetal protection. California courts have been reluctant to expand the manslaughter statutes to include fetuses.\(^{208}\) Thus, in California, only fetal murder is prohibited and, for manslaughter or vehicular homicide, concerns arising from the born alive rule continue.\(^{209}\)

The last aspect of fetal protection legislation states have considered is the appropriate gestational age for protection.\(^{210}\) Statutes focusing on the fetus have the disadvantage of having to determine the intent of the defendant; specifically, whether the defendant is culpable depends on if he intended to cause harm to the fetus.\(^{211}\) Also, protection of the fetus from conception could conflict with notice and due process if the defendant did not know the woman was pregnant.\(^{212}\) Setting the gestational age at quickening\(^{213}\) is problematic because pregnancies often terminate for reasons other than the defendant’s actions, resulting in causation issues.\(^{214}\) In contrast, viability as the standard for fetal protection is the more objective standard because of advances in medical technology.\(^{215}\) Furthermore, this standard is consistent with Casey in that the state’s

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\(^{207}\) Crimes Against the Unborn, HI S.B. 1508, 22nd Leg., Reg. Sess. (2003). See also supra n.14-16.

\(^{208}\) For instance, in People v. Flores, 3 Cal. App. 4th 200 (1992) the intoxicated defendant’s car collided with that of a woman pregnant with a viable fetus. Although the fetus survived for 30 minutes outside the mother’s body, using the common law born-alive rule, the court would not extend the vehicular manslaughter statute to include the fetus.

\(^{209}\) See infra n.222-42 (Discussing the disadvantages of the common law rule).

\(^{210}\) Smith, supra n.26 at 1874.

\(^{211}\) Id. at 1874.

\(^{195}\) Alan S. Wasserstrom, Homicide Based on the Killing of Unborn Child, 64 A.L.R.5th 671, 2 (2004) (Feticide statutes have been constitutionally challenged based on vagueness and equal protection violations).

\(^{213}\) See n.227-234 and accompanying text.

\(^{214}\) Smith, supra n.26 at 1874. See Barlow, supra n.186.

\(^{215}\) Id. at 1875. See Barlow, supra n.186, at 498.
interest in protecting fetal life becomes compelling at viability. However, protection from conception is also consistent with Casey because when the mother’s right to privacy is not infringed, such as during the violent attack of a third party, the state may protect the fetus’ potentiality of life before viability. The state, therefore, can create feticide statutes beginning at conception without criminalizing abortion, such as in the Crimes Against the Unborn Bill and Laci and Conner’s Law.

3. Fetal Protection Statutes Do Not Erode Privacy and Equal Protection

Pregnant women’s equal protection is violated when feticide statutes are used to regulate their behavior. Only pregnant women, not men or non-pregnant women, are scrutinized for failing to care for themselves adequately to preserve the health of their fetuses. Men are free from state interference although their behavior also affects the fetus. However, fetal protection statutes target only the criminal actions of third parties; the pregnant woman’s behavior is not scrutinized. For instance, the California murder statute only prosecutes as feticide “the killing of …a fetus with malice aforethought.” It provides explicit exceptions for medical reasons and for acts the mother committed or consented to. Therefore, Laci Peterson’s behavior is not regulated by the murder statute and, furthermore, was not relevant in the prosecution of Scott for the murder of Conner.

In Smith v. Newsome, the defendant contested inter alia Georgia’s feticide statute on grounds that it conflicted with Roe’s holding that a fetus

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216 See generally Casey (holding that states may regulate abortion after viability with exceptions for the mother’s health). See supra n.38.

217 The Davis court observed that the state’s protection of fetuses is limited to after viability only in the context of abortion. Davis at 807, 872 P.2d at 595. See supra n.159.


220 CA. PENAL CODE § 187(a), supra n.98 and accompanying text.

221 See Stoval, supra n.205 at 1278.
was not a person within the meaning of the Fourteenth Amendment.\textsuperscript{222} The defendant was convicted of aggravated assault, four counts of armed robbery, and violation of the feticide statute.\textsuperscript{223} On appeal, the defendant argued the feticide statute was unconstitutionally vague in its requirement that the fetus be “quick” and that the statute contradicts Roe v. Wade.\textsuperscript{224} The court held that the feticide statute was based on the long-settled “common law understanding of ‘quick:’ when the fetus is so far developed as to be capable of movement within the mother's womb.”\textsuperscript{225} Furthermore, the statute was not in conflict with Roe v. Wade because whether the fetus is a person for the purposes of the Fourteenth Amendment “is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus.”\textsuperscript{226} The state’s protection of fetuses in the criminal context does not involve whether the fetus is a person and, thus, does not conflict with women’s constitutional rights. Thus, whether or not Conner is a person was irrelevant to a determination of Scott’s guilt for his murder.

\textbf{B. Fetal Protection Statutes, Even Protecting Fetuses From Conception, Do Not Violate Defendants’ Due Process and Equal Protection}

The California feticide statute has been challenged under vagueness and equal protection.\textsuperscript{227} In People v. Apodaca, the defendant assaulted and raped his pregnant ex-wife causing the subsequent birth of

\begin{footnotesize}
\textsuperscript{222} Smith v. Newsome (hereinafter Newsome) was a federal habeas corpus action involving a defendant convicted of aggravated assault, four counts of armed robbery, and violation of Georgia’s feticide statute in the earlier case Brinkley v. State. 815 F.2d 1386, 1388 (11th Cir. 1987).

\textsuperscript{223} Id. at 1387. The feticide statute provides in relevant part:

A person commits the offense of feticide if he willfully kills an unborn child so far developed as to be ordinarily call "quick" by any injury to the mother of such child, which would be murder if it resulted in the death of such mother. Ga. Code Ann. § 16-5-80 (1982).

\textsuperscript{224} Id. at 1388.

\textsuperscript{225} Id. at 1387. See also Sullivan v. State, 121 Ga. 183, 48 S.E. 949 (1904).

\textsuperscript{226} Id. See also Wasserstrom, supra n.15.

\textsuperscript{227} Wasserstrom, supra n.15 at 2.
\end{footnotesize}
her dead fetus. The defendant was convicted of the murder of a fetus, rape, threats of bodily harm, and assault of the mother. The defendant challenged *inter alia* the feticide statute on grounds that it was unconstitutionally vague. The court held the statute gave adequate notice that assault on a pregnant woman intentionally terminating her pregnancy without consent is murder and the statute does not deprive the defendant of due process for failing to give fair notice as to what the statute prohibits. According to the court, the defendant had adequate notice from the statute and due process does not require more. *Apodaca* shows that feticide statutes will not be held unconstitutionally vague if they clearly delineate what act is prohibited. California’s murder statute has been challenged on grounds that it does not define the gestational age for a “fetus.”

Both the federal Laci and Conner’s Law and Hawaii’s proposed Crimes Against the Unborn Bill provide explicit definitions of what “unborn child” means, as well as stipulating that fetuses are protected from “conception.” In addition, both provide more extensive and consistent protection than the California murder statute by creating offenses for manslaughter. Laci and Conner’s Law and the Crimes Against the Unborn Bill create offenses for attempted murder and manslaughter while the latter also creates an offense for misdemeanor battery of a fetus. In comparison to the California murder statute, the federal law and Hawaii bill contain explicit definitions and additional crimes to provide more consistent fetal protection.

1. *Common law Born Alive Rule and Quickening*

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228 *Adopaca* at 486, 142 Cal.Rptr. at 835.

229 *Id.*

230 *Id.*

231 *Id.* CA. PENAL CODE § 187, *supra* n.104-6 and accompanying text.

232 *Id.*

233 See *supra* n.116.


235 *Id.*

236 *Id.*
Generally, the born alive rule requires a person to be born and exist independently from its mother before a defendant can be charged for its harm.\textsuperscript{237} The born-alive rule under common law provides in relevant part:

If a woman be quick with child, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered a dead child, this is a great misprison, and no murder; but if the child be born and dyeth of the potion, battery, or other cause, this is murder; for in the law it is accounted a reasonable creature, in rearum natura, when it is born alive.\textsuperscript{238}

The born alive rule’s rationale is to set a clear standard for the beginning of life.\textsuperscript{239} Lack of medical technology 300 years ago made it impossible to determine when a fetus was alive and how it died.\textsuperscript{240} Because causation was often difficult to prove, the most practical method of delineating civil and criminal culpability was to set the standard at live birth.\textsuperscript{241} In addition, courts assumed most pregnancies would not result in live birth since the infant mortality rate was high.\textsuperscript{242}

\textsuperscript{237} Mary Lynn Kime, Recent Developments in Oklahoma Law: Article: Note: Hughes v. State: The “Born Alive” Rule Dies a Timely Death, 30 Tulsa L.J. 539, 540-41 (1995) (the born alive rule requires live birth as evidentiary standard of life); Wasserstrom, supra n.15 at 2 (an essential element at common law is a fetus’ “independent existence” from its mother); Keeler at 630, 87 Cal. Rptr. at 623 (common law requires live birth.)

\textsuperscript{238} Wagner, supra n.22 at 1100. (quoting Cueller v. State, 957 S.W.2d 134, 137-38 (Tex. App.—Forth Worth 1997, no pet.) (quoting 3 Sir Edward Coke, Institutes 58 (1648)).

\textsuperscript{239} Kime, supra n.221 at 540.


\textsuperscript{241} Id.

\textsuperscript{242} Id.
The next common law distinction involved “quickening,” which occurs within the sixth and eighth weeks of fetal development.\textsuperscript{243} Quickening is defined as the first time a mother feels the movement of her unborn child, which was evidence of her pregnancy.\textsuperscript{244} Generally, causing the death of a fetus after quickening was a misdemeanor, while feticide prior to quickening carried no punishment.\textsuperscript{245} The presumption is that a fetus is alive when the fetus moved in its mother’s womb.\textsuperscript{246} Because of the lack of medical technology and knowledge, whether a child was alive or not before quickening could not be proven.\textsuperscript{247} Also because of the high prenatal mortality rate, there was a presumption that most fetuses would perish.\textsuperscript{248} Thus, whether a defendant’s actions were the cause of a fetus’ death was not clear and it would not be fair to impose culpability.\textsuperscript{249} The born-alive rule was more widely accepted by American courts than the quickening standard.\textsuperscript{250}

2. State’s Police Power Authorizes Fetal Protection Statutes

The state’s protection of the fetus stems from the state police power \textit{parens patriae}, “the state in its capacity as provider of protection to those unable to care for themselves.”\textsuperscript{251} \textit{Parens patriae} is based on “dual federalism,” in which the federal government and states have different

\begin{itemize}
\item \textsuperscript{243} Wasserstrom, supra n.15 at 2.
\item \textsuperscript{244} Kime, supra n.224 at 541.
\item \textsuperscript{245} Wasserstrom, supra n.15 at 2.
\item \textsuperscript{246} Kime, supra n.224 at 541.
\item \textsuperscript{247} Id.
\item \textsuperscript{249} See Kime, supra n.334 at 541.
\item \textsuperscript{250} See Perko, supra n.225 at 1146 (Because of American courts early dependence on English common law, the born-alive rule was established in American common law by 1850).
\item \textsuperscript{251} BLACK’S LAW DICTIONARY 1137 (7th ed. 1999). See also Schroedel, supra n.179 at 99 (Provides a summary of several arguments of fetal rights, including \textit{parens patriae}, the mother’s voluntary relinquishment of rights by not having an abortion, and fetal rights precedence over mother’s rights).
\end{itemize}
areas of sovereignty. Fetal rights proponents use “compelling state interest,” “parens patriae,” and traditional “police power” to give states the power to regulate fetal rights. Fetal rights are premised on the concepts of separation of state and federal governments and the state’s police power to regulate “health, safety, welfare, morals, and good order.”

The state’s parens patriae power conveys “standing” on the state for the purposes of protecting the property and custody of children and incompetents. The Supreme Court in Mormon Church v. United States held that “parens patriae is inherent in the supreme power of every State...It is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.” Thus, child abuse and neglect laws are based on the state’s parens patriae power. Prosecutors use child abuse statutes to punish substance abuse by pregnant women by treating fetuses as children.

3. Application of Child Abuse and Criminal Statutes Not Expressly Intended by Legislatures to Fetuses Violate Pregnant Women’s Constitutional Rights

Application of statutes intended for born persons to fetuses infringe on women’s due process rights since these laws do not provide adequate notice of what conduct constitutes a crime. When pregnant

252 Schroedel, supra n.179 at 100.
253 Id. (citing Ralph A. Rossum & G. Alan Tarr, AMERICAN CONSTITUTIONAL LAW 472 (4th ed. 1995))
254 Schroedel, supra n.179 at 100. The Supreme Court established the State’s police power as the power of the state to establish all regulations reasonably necessary to secure the health, safety, and welfare of the people. Atlantic Coast R.R. Co. v. Goldsboro, 232 U.S. 548 (1914).
255 Id. at 101 (citing Mormon Church v. United States, 136 U.S. 1 (1890)).
256 Schroedel, supra n179 at 101-02.
257 Id. at 101.
258 Id. at 102.
259 Id. at 107 (To comport with procedural due process a criminal law must provide a clear definition of what behavior is proscribed).
women are prosecuted for fetal abuse under statutes not intended for fetuses, they are subjected to new crimes not authorized by legislatures and have no notice that their conduct is prohibited. Criminal statutes pertaining to manslaughter and child abuse generally apply to acts committed on born persons, not to mothers’ prenatal harm to their fetuses. Typically these statutes include the terms “person” or “child” signifying the legislators’ intent that categories of protected persons include born people. Including fetuses among protected classes when not expressly authorized by legislatures constitutes “judicial creation of new offenses” without fair notice and warning.

Furthermore, the application of child abuse statutes, intended for the parents of born children, hold pregnant women to a higher behavioral standard than other parents, resulting in an equal protection violation. For example, in *Whitner v. State*, a mother was prosecuted for child abuse for substance abuse during pregnancy. The defendant in *Whitner* was convicted for child abuse for using cocaine in her third trimester of pregnancy. The South Carolina Supreme Court held that the statutory language and precedent established that the fetus was a person for the purposes of the statute.

Using criminal statutes to prosecute women for actions causing harm to their subsequently born child could result in an equal protection violation because only women are pregnant people and only their rights are affected. The U.S. Supreme Court remarked in a footnote that discrimination against pregnant people is rational between pregnant and

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261 *Id.*

262 *Id.* at 508 (citing FLA. STAT. ANN. § 893.13(1)(a)(3)(c) (West 1976) (prohibiting delivery to drugs to people under eighteen years old)).


264 Schroedel, *supra* n.179 at 102.


266 *Whitner* at 4, 492 S.E.2d at 778.

267 *Id.*

268 Schroedel, *supra* n.179, at 110.
nonpregnant people, and is not *per se* discrimination against women. Discrimination based on “real biological differences” between men and women is not strictly scrutinized since equal protection applies to women only where women are “similarly situated” to men. Congress rejected the Court’s position in the context of the workplace by passing the Pregnancy Discrimination Act under Title VII. This Act prohibits discrimination in the workplace based on pregnancy. Nonetheless, the Court has not included pregnancy discrimination as sex discrimination for protection under the equal protection clause. Women are only protected from pregnancy discrimination for the purposes of employment.

In the Hawaii case *State v. Aiwohi*, a mother was prosecuted for injuries to a child inflicted prior to the child’s birth. The defendant was

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269 See Johnsen, supra n.39 at 204 n.85. “The Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), creates some doubt concerning the protection that the Supreme Court will afford women in this context by the guarantee of equal protection. The Court in *Geduldig* declared -- briefly in a footnote -- that the exclusion of pregnant women from state disability insurance benefits did not discriminate against women by permissibly distinguished between pregnant women and nonpregnant persons. See id. at 496 n.20. *Geduldig* has been widely criticized by commentators, see, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-29, at 1578 (2d ed. 1988) (describing distinction as "so artificial as to approach the farcical"), and the Court's application of *Geduldig* to the Title VII context in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), was rejected by Congress through passage of the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. 20003(k) (1982)).” Id.

270 See generally Johnsen, supra n.39.

271 Id.

272 Id.

273 Id.

274 Id.

convicted of manslaughter for causing the death of her two-day-old son by using drugs during the latter part of her pregnancy. The defendant pled guilty to manslaughter pursuant to a plea agreement in which she received five years’ probation. Furthermore, the agreement allows the defendant to appeal the court’s decision not to dismiss the charge. Aiowhi appealed. In Hawaii, the appeal for Aiowhi will determine whether mothers can be prosecuted for drug use during pregnancy causing harm to a fetus who is subsequently born.

Prosecuting pregnant women for substance abuse and drinking alcohol while pregnant does not effectuate the state’s goal of protecting children. The mother’s imprisonment is detrimental to the child causing “caus[ing] harm to children’s psychological well-being and hinder[ing] their growth and development.” Furthermore, predominantly poor minority women are convicted of abusing their fetuses, reflecting social bias and scapegoating. Pro-life activists use fetal rights against poor minority women to further their political interest of banning abortion.

C. Approaching the Law From a Pregnant Woman’s Perspective

Application of the born alive rule to the Laci Peterson case would not have allowed Scott to be charged with the murder of their eight-

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276 HAW. REV. STAT. § 707-702 (2003) provides in part: (1) A person commits the offense of manslaughter if: (a) He recklessly causes the death of another person; or (b) He intentionally causes another person to commit suicide.

Id.

277 See supra n.275.

278 See supra n.275.

279 See supra n.275.


281 Id. (quoting United States of America Rights for All, Amnesty International’s Campaign on the United States, AI Index No. AMR 51/01/99, "Not Part of My Sentence," Violations of the Human Rights of Women in Custody 23 (Mar. 1999)).

282 Paltrow, supra n.280, at 1028.

283 Id. at 1029.
month-old unborn fetus. However, in a majority of jurisdictions, if Laci had decided to have a late-term, partial birth abortion, she could have been prosecuted. Thus, at common law pursuant to the born alive rule, a third party can cause the death of a fetus without criminal liability whereas the mother of the fetus, for the same act, would be liable. Gender discrimination is the primary reason fetal rights are in conflict with women’s rights. Women are reduced to the carriers of fetuses and their interests are dwarfed and subordinated for the interests of the fetus. One commentator argued the approach in *Roe* (“When pregnant, a woman ‘carries an embryo and later a fetus’…”) alters the perspective from the pregnant woman to the fetus alone.

Another way gender discrimination affects women’s rights is through the actions of men. Although drug use by the father of a child at conception can cause genetic defects in his child, men’s actions are minimally scrutinized. Furthermore, fetal rights groups often overlook domestic abuse and violent attacks on pregnant women by males and third parties. Since the stated objective of pro-life groups is protection of fetal life, their apparent focus on pregnant women’s substance abuse is surprising considering the relatively little attention given domestic violence against pregnant women and violent third party attacks resulting in involuntary termination of the pregnancy.

To obtain fetal protection not in conflict with women’s fundamental rights, women’s and fetus’ interests must be viewed from a

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284 See *supra* n. n.228-33 and accompanying text for discussion of the born-alive rule.

285 *Roe* at 139 (This implication arises from Roe’s holding because the state has a “compelling interest” after viability, except where the mother’s health is endangered. Hence, should a woman obtain a late-term abortion for a non-health related reason in a jurisdiction with a statute prohibiting late-term abortion, she could be prosecuted).

286 Schroedel, *supra* n.179 at 110.

287 *Id.*

288 *Id.*

289 *Id.* at 111.

290 *Id.*

291 *Id.*

292 *Id.*
unitary perspective.\textsuperscript{293} When fetal and women’s rights are viewed as adversarial in the criminal and tort contexts, neither of their interests are adequately represented since their situations are only adversarial within the context of abortion.\textsuperscript{294} Pregnant women generally want a healthy child and hold that child’s interests foremost.\textsuperscript{295} The pregnant woman is thus in the best position to make decisions concerning her child and her body.\textsuperscript{296} Fetal rights proponents overlook third party attacks on the fetus and the woman by focusing on prohibiting abortion and prosecuting substance-abusing pregnant women.\textsuperscript{297} A unitary perspective would properly consolidate fetal and women’s interests against a third party’s criminal or tortious conduct.

CONCLUSION

For the purposes of a feticide statute, women’s and the fetus’ interests must be viewed from a unitary perspective to protect them during the vulnerable period of nine months during pregnancy. However, legislatures and courts must be careful not to infringe on subordinating women’s constitutional rights to the fetus’ right to potential life. Justice Stevens quoted Ronald Dworkin in \textit{Casey}:

\begin{quote}
The suggestion that states are free to declare a fetus a person … assumes that a state can curtail the some persons’ constitutional rights by adding new persons to the constitutional population … If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that constitutional arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of the pregnant women.\textsuperscript{298}
\end{quote}

\begin{footnotesize}
\textsuperscript{293} Id. at 117.
\textsuperscript{294} Id.
\textsuperscript{295} Id. at 117.
\textsuperscript{296} Id.
\textsuperscript{297} Id. at 119.
\textsuperscript{298} Paltrow, \textit{supra} n.280 at 1010. (quoting \textit{Casey} at 913 n. 2.)
\end{footnotesize}
Hawaii should have a feticide statute to protect women and their fetuses from third party violence created from a unified perspective. It is inconsistent to fail to protect an important interest in potential life from criminal conduct in a state that protects the unborn’s property interests. Anti-abortion activists incorrectly focus on fetal rights overlooking the importance of common ground between a woman and fetus in the criminal context. The fetus is not protected in Hawaii from criminal acts. Legislators should pass the Crimes Against the Unborn Bill to protect fetuses from the criminal acts of third parties. Consistent with Roe’s definition of a fetus as not a person under the Fourteenth Amendment, the Bill does not attempt to define the fetus as a person with attached rights. Casey’s holding that prohibits regulation of the state’s protection of the fetus is limited to the context of abortion. Hence, the legislation’s protection of the fetus is not in conflict with the mother’s liberty and equal protection interests. In fact, protecting fetal rights against third party harm is consistent with the State’s parens patriae power to protect fetuses and mothers when their interests do not conflict. Furthermore, women have identified eliminating violence against them as a priority since more pregnant women are killed by violent acts than by both childbirth and complications arising from childbirth.

Like California’s murder statute, the Crimes Against the Unborn Bill provides a comprehensive list of offenses so that the fetus is protected from manslaughter and battery in addition to murder.

Laci Peterson’s baby was not a “person” in California, but his rights were protected and Scott has been convicted of his murder. In addition, as a double homicide, Scott Petersen is eligible for the death penalty. Had Laci been killed in Hawaii, Conner’s death would not have been murder or incurred a heightened penalty unless the state could prove Conner was born alive. Applying only Laci and Conner’s Law, Scott could be punished for murder only if there had been a predicate federal crime. With passage of the Crimes Against the Unborn Bill, Scott could have been charged with Conner’s murder regardless of whether Conner was viable or if he was born alive. Because the Crimes Against the Unborn Bill protects the interests of mothers and fetuses, does not

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299 See supra n.24.

300 See supra n.14 for text of Crimes Against the Unborn Bill.

interfere with the mother’s constitutional rights, and provides a clear and objective standard for defendants at conception, the Bill should be passed into law.