

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman William Mason at 1:30 p.m. on March 4, 2004 in Room 313-S of the Capitol.

All members were present.

Committee staff present:

Russell Mills, Legislative Research Department  
Mary Torrence, Revisor of Statutes Office  
Dennis Hodgins, Legislative Research Department  
Rose Marie Glatt, Secretary

Conferees appearing before the committee:

PROPONENTS:

Representative Steven R. Brunk, Wichita, KS  
Nick Tomasc, District Attorney, Wyandotte County  
Mike Farmer, Executive Director, Kansas Catholic Conference  
Kathy Ostrowski, Kansans For Life  
Jeanne Gawdon, Kansans For Life  
Elmer Feldkamp, Right to Life of Kansas, Inc.  
\*written testimony only  
\*Denise Burke, Americans United for Life  
\*Judy Smith, Director, Concerned Women for America of KS

OPPONENTS:

Jennifer McAdam, Planned Parenthood of Kansas & Mid-Missouri  
Julie Burkhart, Pro Kan Do  
Anna Holcombe, Kansas National Organization for Women  
William Westerbeke, University of Kansas, School of Law  
Sandy Barnett, KS Coalition Against Sexual & Domestic Violence  
Barbara Holzmark, National Council of Jewish Women

Others attending:

See Attached List.

**HB 2552 - Unborn victims of violence act**

Ms. Torrence stated that the bill defines for purposes of the KS criminal code, a person or human being to include an unborn child. She explained three instances in which the bill does not apply.

**PROPONENTS:**

Representative Brunk, a sponsor of the bill, provided the reason for inclusion of "unborn child" in the definition of person or human being (Attachment 1). He cited three reasons where the bill shall not apply:

- any act committed by the mother of the unborn child;
- any medical procedure, including abortion, performed by a physician or other licensed medical professional at the request of the pregnant woman or her legal guardian; or
- the lawful dispensation or administration of a lawfully prescribed medication.

Nick Tomasc, District Attorney, Wyandotte County, stated there is little protection for a woman carrying an unborn child, and there is no protection for the unborn child should either or both of them be seriously injured or killed as a result of another's negligence or intentional act (Attachment 2). Testimony included an article from the May 2000 *William and Mary Law Review*, by Sandra L. Smith, entitled *\*1845 Fetal Homicide: Woman or Fetus as Victim?*; survey of current state approaches; and recommendations for future state application.

Mike Farmer, Executive Director, Kansas Catholic Conference, stated that **HB 2552** would enable Kansas to recognize that when a pregnant woman is assaulted or killed within its jurisdiction, and her unborn

CONTINUATION SHEET

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child is harmed or killed as a result, the crime has two victims - the woman and her child (Attachment 3). **HB 2552** is constitutional; it complies with legal precedent, and mirrors laws in 29 other states.

Kathy Ostrowski, Kansans For Life, presented a packet of information pertaining to context of unborn-victim laws; Kansas status; public perception; legal issues; protective effect; profiles in violence; and objections to the bill (Attachment 4). She urged the Committee to examine the explosion of violence against the unborn, not just when they are victimized because they accompanied their moms, but as they themselves are the actual target of violence.

Jeanne Gawdon, Kansans For Life, played a video of Carol and Buford Lyons of Scott County, Kentucky giving testimony before the Kentucky legislature. Their testimony was included in her hand-out (Attachment 5).

Elmer Feldkamp, Right to Life of Kansas, Inc., appeared as a proponent with concerns (Attachment 6). He stated that they opposed the bill as currently written because it exempts acts of violence against the unborn. He suggested that all reference to "abortion" be removed from **HB 2552**.

\*Written testimony only

\*Denise Burke, Americans United for Life, wrote that **HB 2552**, as drafted, was constitutional and furthers the State of Kansas' interest in protecting unborn children from criminal violence (Attachment 7).

\*Judy Smith, Director, Concerned Women for America of KS, presented information about fetal homicide law in twenty-nine states and data on three national polls pertaining to the issue of criminal assault to a woman who carries an unborn child. (Attachment 8).

**OPPONENTS:**

Jennifer McAdam, Planned Parenthood of Kansas & Mid-Missouri, stated that Kansas law has already addressed the issue of restitution for injury to a pregnant woman in two different statutes. KS 21-3440 and KS 21-3441 both ensure stiffer penalties for crimes that injure a pregnant woman if she miscarries (Attachment 9).

Julie Burkhart, Pro Kan Do, stated three reasons why they were opposed **HB 2552** (Attachment 10). The bill does not protect women; would create a new and separate offense for a fetus that is harmed during the commission of certain criminal acts; and is a measure to establish a fetus as a person, therefore, attempting to sabotage the 1973 Supreme Court ruling of *Roe v. Wade*.

Anna Holcombe, Kansas National Organization for Women, testified the Unborn Victims of Violence Act diverts the legal system's attention away from a pervasive and very real social problem - violence against women (Attachment 11). A political agenda which serves to deprive women of their rights cannot paradoxically be used in legislation that addresses violence against women.

William Westerbeke, University of Kansas, School of Law, stated the bill would have the legal effect of creating two crimes where one crime previously existed, with the potential for considerably longer periods of incarceration than currently are available under the sentencing guidelines (Attachment 12). An Act defining "person" for criminal law purposes may not have its effects limited to criminal law. He concluded by saying that from a procedural perspective, good legislation should identify its purpose, address it clearly with unambiguous language, and in a manner that has the least potential for unexpected consequences elsewhere in the law.

Sandy Barnett, KS Coalition Against Sexual & Domestic Violence, believed that the proposed legislation was not an appropriate remedy to address violence against women. She offered ten steps the Kansas legislature could take to more effectively address violence against women (Attachment 13).

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Barbara Holzmark, National Council of Jewish Women, testified that the bill is another attempt to undermine a woman's right to choose (Attachment 14). She questioned whether the bill does anything to curb domestic violence and suggested there are more appropriate ways to punish "harm to the pregnant woman". She urged the Committee to vote No on **HB 2552**.

Discussion followed regarding civil verses criminal action; definition of current law as it relates to pregnant women involved in an accident; purpose and intent of the bill; definitions in the bill; and whether penalties are a deterrent to criminal acts.

The hearing was closed on **HB 2552**. The meeting adjourned at 3:20 p.m. The next meeting is March 8, 2004.

# HOUSE FEDERAL & STATE AFFAIRS COMMITTEE GUEST LIST

DATE 3-4-04

<u>NAME</u>	<u>REPRESENTING</u>
Mike Farmer	Kansas Catholic Conference
Jean Farmer	Self
BEATRICE SWOOPES	KANSAS CATHOLIC CONFERENCE
Judy Smith	Concerned Women for America
Joy E Bourdless	Concerned Women for America
Elmer Feldkamp	Right To Life of Kansas
Laura Mallard	Right To Life of KS.
William Westerbeke	Self
Anna Holcombe	Kansas Now
Sandy Barnett	
Joyce Glover	KCSDV
Shary Mann	KCSDV
Jennifer McAdam	Planned Parenthood
Cassie Timmen	ProKandO
Marilyn Anet	KCSDV
Jamie Pawde	KFC
Kathleen M. Murphy	KFL
Kel O Tomason	K.C.K. P-A
Barbara Halzmark	Ks SPA Chair for National Council of Jewish Women
Sharon Lockhart	Kansas Choice Alliance

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TOPEKA

COMMITTEE ASSIGNMENTS  
MEMBER: ECONOMIC DEVELOPMENT  
FEDERAL AND STATE AFFAIRS  
FINANCIAL INSTITUTIONS  
TAXATION

March 4, 2004

Mr. Chair, committee, thank you for allowing the introduction of this bill.

This bill is called the Unborn Victims of Violence Act.

It simply says that in the Kansas Criminal Code, “person” and “human being” also mean an unborn child.

There are some specific “shall nots.” It does not apply to:

- (1) any act committed by the mother of the unborn child;
- (2) any medical procedure, including abortion, performed by a physician or other licensed medical professional at the request of the pregnant woman or her legal guardian; or,
- (3) the lawful dispensation or administration of a lawfully prescribed medication.

To my knowledge twenty-nine other states have homicide laws that recognize unborn victims.

Recently, the House of Representatives passed their own version of this bill. Perhaps the most publicized and well known law is in California, known because of the brutal death of Laci Peterson and her unborn child, Connor Peterson, allegedly at the hands of her husband, Scott Peterson.

On January 23, the Utah Supreme Court upheld the state’s statute defining homicide as causing “the death of another human being, including an unborn child.”

There is more that I could say. The conferees here today, both pro and con, need to be heard.

Thank you Mr. Chairman,

Rep. Steve Brunk  
District #85

Nick Tomas  
District Atto<sup>y</sup>  
Wyandotte County

## HOUSE FEDERAL & STATE AFFAIRS COMMITTEE

March 4, 2004

**SUBJECT: Need for Legislation - Creating Crimes Against  
an Unborn Child; Prohibiting Acts Which Cause  
the Death or An Injury To An Unborn Child**

This is an opportunity to enact legislation that will guarantee the equal protection of the Constitution and Statutory Laws to all persons.

Our criminal laws are deficient in a major area.

There is little protection for a woman carrying an unborn child, and there is no protection for the unborn child should either or both of them be seriously injured or killed as a result of another's negligence or intentional act.

In Wyandotte and Johnson County, within the last few years, I personally know of three unborn children who were killed as a result of motor vehicle accidents directly related to alcohol and/or negligent operation of the vehicle.

Our laws now provide that the child must be *born alive*, and that a *fetus* is not a *person*; and accordingly, that unborn child has no protection. For example, imagine the same three unborn children, instead of being killed, were seriously injured, and

were later born alive with the injuries being permanent in nature. Our law now provides them no protection.

The State of Minnesota had that same problem, and the Minnesota Supreme Court on December 6, 1985, held that the Minnesota criminal statutes did not allow a *fetus* to be considered a *human being*, and they further said that if the criminal statutes are to *be expanded so as to encompass in its victim definition a viable fetus, such expansion is within the sole function and discretion of the State Legislature.*”

Following this mandate, the Minnesota Legislature enacted the following legislation:

- (1) that applies where there is an assault upon the mother that results in injury to an unborn child who is subsequently born alive (Assault & Battery);
- (2) punishes one who causes the death of, or great bodily harm to an unborn child through operation of a motor vehicle, in a negligent manner or while under the influence of alcohol or drugs;
- (3) applicable to persons who cause the death of an unborn child - intentionally;
- (4) *Unborn Child* is defined to include conceived but unborn offspring.

The Minnesota law was upheld by the Minnesota Supreme Court as constitutional. The Supreme Court refused to equate the murder of a fetus with that of a woman who has an abortion. The Court further held the law constitutional even though it does not distinguish between viable and non-viable fetuses.

FETAL HOMICIDE - Who is the victim - the fetus or the woman?

Two approaches are now taken by the States:

- A. Born Alive Rule
- B. Harm to the Woman

## BORN ALIVE RULE

- Originated in England
- Based on *medical knowledge* of the 16<sup>th</sup> Century

It was difficult to distinguish the cause of death or injury until after the baby was born.....so a determination as to the cause of injury or death can't be made.

But, now *medical science* has improved. It is possible to tell or discover many things about the condition of the fetus. Now eighteen states have the *Born Alive Rule* - either by *statutes* or *judicial* interpretation.

## CIVIL LAW

Viable fetus is a person within the State's wrongful death statute.

## CRIMINAL LAW

Six states with the *Born Alive Rule* have held that if fetuses are injured before birth, and *are born alive*, and then die, their deaths can be prosecuted as homicides.

Twenty-four states criminalize actions against the fetus.

Different approaches - mainly when the fetus reaches a certain stage in development. *Viability*

Six states criminalize homicides of *viable* fetuses in different ways: knowingly terminating a pregnancy by violence - criminal penalty and enhanced sentence for the crime against the woman.



Three states that recognize viability have the transferred intent doctrine.

*Pregnant woman stabbed - she survives - fetus dies ....* The fetus was a *person* and a crime occurred.

## THE LAWS - ALL EXEMPT - LEGAL ABORTIONS

### QUICKENING

When fetus first moves - 16<sup>th</sup> & 18<sup>th</sup> week

Six states criminalize actions against "Quick" fetuses . . . but not murder. It is manslaughter.

### KANSAS

1995 - K.S.A. 21-3440, *Injury to a Pregnant Woman*, enacted.

A. A crime to cause a *miscarriage* during the commission of a felony or misdemeanor.

B. 1995 - K.S.A. 21-3441

*Injury to a pregnant woman by vehicle*

*Miscarriage* results from the unlawful operation of a vehicle.

BOTH make the woman the victim, not the fetus.

## INTENT

### A. General Intent

State of mind required for the commission of certain crimes not requiring a specific intent; negligence or reckless acts.

### B. Specific Intent

State of mind required to commit certain crimes -e.g., Robbery - Burglary - Larceny

K.S.A. 21-3440 and K.S.A. 21-3441 are General Intent crimes.

## RECOMMENDATIONS

State legislatures enacting fetal homicide statutes should consider all of the dimensions and factors discussed previously. Specifically, if focusing on the fetus as the victim, state legislatures should refer to the Illinois statutes because they offer comprehensive treatment of fetal homicide and identify appropriate levels of intent without being too broad. [FN225]

Illinois defines a fetus as an *unborn child* from fertilization until birth [FN225] Only in involuntary manslaughter and reckless homicide statutes is the definition potentially problematic. In all other relevant offenses the accused must act intentionally or knowingly. [FNN226] The laws exempt lawful abortion, although they do not specifically exempt other actions of the pregnant woman. [FN226] Illinois Courts have upheld these statutes. [FN228] In *People v. Ford*, [FN229] the court held that “[c]learly a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated.” [FN230] The court said that even though the statute defined *unborn child*, it did not need to determine when human life begins because the statute only required proof that the *entity* was alive, and that it died due to the defendant’s actions. [FN231]. *William and Mary Law Review*, 41 WM & Mary L. Rev. 1845

to an unborn child subsequently born alive.

(b) Criminal vehicular operation resulting in injury to an unborn child subsequently born alive is a class E felony.

Sec. 4. (a) Murder of an unborn child in the first degree is the killing of an unborn child committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.

(b) Murder of an unborn child in the first degree is a class A felony.

Sec. 5. (a) Murder of an unborn child in the second degree is the malicious killing of an unborn child committed without deliberation or premeditation and not in the perpetration or attempt to perpetrate a felony:

(b) Murder of an unborn child in the second degree is a class B felony.

Sec. 6. (a) Voluntary manslaughter of an unborn child is the unlawful killing of an unborn child, without malice, which is done intentionally upon a sudden quarrel or in the heat of passion:

(b) Voluntary manslaughter of an unborn child is a class C felony.

Sec. 7. (a) Involuntary manslaughter of an unborn child is the unlawful killing of an unborn child, without malice, which is done unintentionally in the wanton commission of an unlawful act not amounting to felony, or in the commission of a lawful act in an unlawful or wanton manner.

(b) As used in this section, an "unlawful act" is any act which is prohibited by a statute of the United States or the state of Kansas or an ordinance of any city within the state, which statute or ordinance is enacted for the protection of human life or safety.

(c) Involuntary manslaughter of an unborn child is a class D felony.

Sec. 8. (a) Aggravated battery against an unborn child is an aggravated battery, as defined in K.S.A. 21-3414, and amendments thereto, committed against a pregnant woman and the infliction of great bodily harm on an unborn child who is subsequently born alive.

(b) Aggravated battery against an unborn child is a class C felony.

Sec. 9. (a) Battery against an unborn child is a battery, as defined in K.S.A. 21-3412, and amendments thereto, committed against a pregnant woman and the infliction of substantial bodily harm on an unborn child who is subsequently born alive.

(b) Battery against an unborn child is a class B misdemeanor.

Sec. 10. (a) Assault of an unborn child is:

(1) Committing an act with intent to cause fear in a pregnant

1 woman of immediate bodily harm or death to the unborn child; or  
2 (2) intentionally inflicting or attempting to inflict bodily harm on  
3 an unborn child who is subsequently born alive.  
4 (b) Assault of an unborn child is a class A misdemeanor.  
5 Sec. 11. (a) Causing injury to an unborn child in the commission  
6 of a felony is causing great or substantial bodily harm to an unborn  
7 child while perpetrating or attempting to perpetrate any felony.  
8 (b) Causing injury to an unborn child in the commission of a  
9 felony is a class D felony.  
10 (c) As used in this section, "felony" does not include a violation  
11 of K.S.A. 21-3410 or section 8, and amendments thereto.  
12 Sec. 12. Sections 4 to 11, inclusive, do not apply to any act  
13 described in K.S.A. 21-3407, and amendments thereto.  
14 Sec. 13. This act shall be part of and supplemental to the Kansas  
15 criminal code.  
16 Sec. 14. This act shall take effect and be in force from and after  
17 its publication in the statute book.

PROPOSAL

Session of 1990

HOUSE BILL No. ~~25~~

By Committee on Judiciary

1-25

9 AN ACT concerning crimes and punishments; defining and classifying  
10 certain crimes relating to the injury or death of an unborn child.  
11

12 *Be it enacted by the Legislature of the State of Kansas:*  
13 Section 1. As used in this act:

14 (a) "Bodily harm" means physical pain or injury, illness or any  
15 impairment of physical condition.

16 (b) "Great bodily harm" means bodily injury which creates a high  
17 probability of death, or which causes serious permanent  
18 disfigurement or which causes a permanent or protracted loss or  
19 impairment of the function of any bodily member or organ or other  
20 serious bodily harm.

21 (c) "Substantial bodily harm" means bodily injury which involves  
22 a temporary but substantial disfigurement, or which causes a  
23 temporary but substantial loss or impairment of the function of any  
24 bodily member or organ or which causes a fracture of any bodily  
25 member.

26 (d) "Unborn child" means the unborn offspring of a human being  
27 from the time of conception until birth.

28 (e) "Unlawful sexual act" shall have the meaning ascribed to such  
29 term under K.S.A. 21-3501, and amendments thereto.

30 (f) "Vehicle" means any self-propelled vehicle, aircraft or  
31 watercraft.

32 Sec. 2. (a) Criminal vehicular operation resulting in death to an  
33 unborn child is operating a vehicle in a grossly negligent manner or  
34 in a manner while under the influence of alcohol or drugs, or a  
35 combination of alcohol and drugs, in violation of K.S.A. 8-1567, and  
36 amendments thereto which results in death to an unborn child.

37 (b) Criminal vehicular operation resulting in death to an unborn  
38 child is a class E felony.

39 Sec. 3. (a) Criminal vehicular operation resulting in injury to an  
40 unborn child subsequently born alive is operating a vehicle in a  
41 grossly negligent manner or in a manner while under the influence  
42 of alcohol or drugs, or a combination of alcohol and drugs, in violation  
43 of K.S.A. 8-1567, and amendments thereto which results in injury

**State Homicide Laws That Recognize Unborn Victims**  
**National Right to Life Committee**  
**Federal Legislative Office**  
**September 2, 1999**

**Full-Coverage Unborn Victim States (11)**  
**(States With Homicide Laws That Recognize Unborn Children as Victims Throughout the**  
**Period of Pre-natal Development)**

Click on the link below for a map detailing state homicide laws that recognize unborn victims.

<http://www.cnn.com/interactive/allpolitics/0104/fetus.laws/frameset.exclude.html>

**Arizona:** The killing of an "unborn child" at any stage of pre-natal development is manslaughter. Ariz. Rev. Stat. § 13-1103(A)(5) (West 1989 & Supp. 1998).

**Illinois:** The killing of an "unborn child" at any stage of pre-natal development is intentional homicide, voluntary manslaughter, or involuntary manslaughter or reckless homicide. Ill. Comp. Stat. ch. 720, §§5/9-1.2, 5/9-2.1, 5/9-3.2 (1993).

**Louisiana:** The killing of an "unborn child" is first degree feticide, second degree feticide, or third degree feticide. La. Rev. Stat. Ann. §§ 14:32.5-14.32.8, read with §§ 14:2(1), (7), (11)(West 1997).

**Minnesota:** The killing of an "unborn child" at any stage of pre-natal development is murder (first, second, or third degree) or manslaughter (first or second degree). It is also a felony to cause the death of an "unborn child" during the commission of a felony. Minn. Stat. Ann. §§ 609.266, 609.2661-609.2665, 609.268(1) (West 1987). The death of an "unborn child" through operation of a motor vehicle is criminal vehicular operation. Minn. Stat. Ann. § 609.21 (West 1999).

**Missouri:** The killing of an "unborn child" at any stage of pre-natal development is involuntary manslaughter or first degree murder. Mo. Ann. Stat. §§ 1.205, 565.024, 565.020 (Vernon Supp. 1999), *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992), *State v. Holcomb*, 956 S.W.2d 286 (Mo. App. W.D. 1997).

**North Dakota:** The killing of an "unborn child" at any stage of pre-natal development is murder, felony murder, manslaughter, or negligent homicide. N.D. Cent. Code §§ 12.1-17.1-01 to 12.1-17.1-04 (1997).

**Ohio:** At any stage of pre-natal development, if an "unborn member of the species *homo sapiens*, who is or was carried in the womb of another" is killed, it is aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, negligent homicide, aggravated vehicular homicide, and vehicular homicide. Ohio Rev. Code Ann. §§ 2903.01 to 2903.07, 2903.09 (Anderson 1996 & Supp. 1998).

**Pennsylvania:** The killing of an "unborn child" at any stage of pre-natal development is first, second, or third-degree murder, or voluntary manslaughter. 18 Pa. Cons. Stat. Ann. §§ 2601 to 2609 (1998).

**South Dakota:** The killing of an "unborn child" at any stage of pre-natal development is fetal homicide, manslaughter, or vehicular homicide. S.D. Codified Laws Ann. § 22-16-1, 22-16-1.1, 22-16-15(5), 22-16-20, and 22-16-41, read with §§ 22-1-2(31), 22-1-2(50A)(Supp. 1997).

**Utah:** The killing of an "unborn child" at any stage of pre-natal development is treated as any other homicide. Utah Code Ann. § 76-5-201 *et seq.* (Supp. 1998).

**Wisconsin:** The killing of an "unborn child" at any stage of pre-natal development is first-degree intentional homicide, first-degree reckless homicide, second-degree intentional homicide, second-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, homicide by intoxicated use of vehicle or firearm, or homicide by negligent operation of vehicle. Wis. Stat. Ann. §§ 939.75, 939.24, 939.25, 940.01, 940.02, 940.05, 940.06, 940.08, 940.09, 940.10 (West 1998).

**Partial-Coverage Unborn Victim States (13)**  
**(States With Homicide Laws That Recognize Unborn Children**  
**As Victims, But Only During Part of the Period of Pre-natal Development)**

**Note:** These laws are gravely deficient because they do not recognize unborn children as victims during certain periods of their pre-natal development. Nevertheless, they are described here for informational purposes.

**Arkansas:** The killing of an "unborn child" of twelve weeks or greater gestation is murder, manslaughter, or negligent homicide. Enacted April 9, 1999, 1999 AR H.B. 1329. (A separate Arkansas law makes it a battery to cause injury to a woman during a felony or Class A misdemeanor to cause her to undergo a miscarriage or stillbirth, or to cause injury under conditions manifesting extreme indifference to human life and that results in a miscarriage or stillbirth.)

**California:** The killing of an unborn child after the embryonic stage is murder. Cal. Pen. Code § 187 (a) (West 1999).

**Florida:** The killing of an "unborn quick child" is manslaughter. Fla. Stat. Ann. § 782.09 (West 1992).

The killing of an unborn child after viability is vehicular homicide. Fla. Stat. Ann. § 782.071 (West 1999).

**Georgia:** The killing of an "unborn child" after quickening is feticide, vehicular feticide, or feticide by vessel. Ga. Code Ann. § 16-5-80 (1996); § 40-6-393.1 (1997); and § 52-7-12.3 (1997).

**Massachusetts:** The killing of an unborn child after viability is vehicular homicide. *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984). The killing of an unborn child after viability is involuntary manslaughter. *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989).

**Michigan:** The killing of an "unborn quick child" is manslaughter. Mich. Stat. Ann. § 28.554 (Callaghan 1990). The Supreme Court of Michigan has interpreted this statute to apply to only those

unborn children who are viable. *Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973). (A separate Michigan law, effective Jan. 1, 1999, provides felony penalties for actions that intentionally, or in wanton or willful disregard for consequences, cause a "miscarriage or stillbirth," or cause physical injury to an "embryo or fetus.")

**Mississippi:** The killing of an "unborn quick child" is manslaughter. Miss. Code Ann. § 97-3-37 (1994).

**Nevada:** The killing of an "unborn quick child" is manslaughter. Nev. Rev. Stat. § 200.210 (1997).

**Oklahoma:** The killing of an "unborn quick child" is manslaughter. Okla. Stat. Ann. tit. 21, § 713 (West 1983). The killing of an unborn child after viability is homicide. *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994).

**Rhode Island:** The killing of an "unborn quick child" is manslaughter. The statute defines "quick child" to mean a viable child. R.I. Gen. Laws § 11-23-5 (1994).

**South Carolina:** The killing of an unborn child after viability is homicide. *State v. Horne*, 319 S.E.2d 703 (S.C. 1984); *State v. Ard*, 505 S.E.2d 328 (S.C. 1998).

**Tennessee:** The killing of an unborn child after viability is first-degree murder, second-degree murder, voluntary manslaughter, vehicular homicide, and reckless homicide. Tenn. Code Ann. § 39-13-201, 39-13-202, 39-13-210, 39-13-211, 39-13-213, 39-13-214, 39-13-215 (1997 & Supp. 1998).

**Washington:** The killing of an "unborn quick child" is manslaughter. Wash. Rev. Code Ann. § 9A.32.060(1)(b) (West Supp. 1999).

### **States Without Unborn Victims Laws, Which Instead Criminalize Certain Conduct That "Terminates a Human Pregnancy" Or That Causes a Miscarriage (7)**

**Note:** These laws are gravely deficient, because they do not recognize unborn children as victims, nor allow justice to be done on their behalf. These laws are included here for informational purposes.

**Indiana:** An individual who knowingly or intentionally "terminates a human pregnancy" commits feticide. Ind. Code Ann. § 35-42-1-6 (Burns 1994 & Supp. 1998).

**Iowa:** An individual who intentionally "terminates a human pregnancy" without the consent of the pregnant woman commits a felony. This law also sets forth other crimes involving the termination of a human pregnancy, such as during the commission of a forcible felony. Iowa Code Ann. § 707.8 (West Supp. 1999).

**Kansas:** Injury to a pregnant woman during the commission of a felony or misdemeanor which causes a miscarriage results in specific levels of offense severity. Kan. Stat. Ann. § 21-3440 (1997). Also, injury to a pregnant woman through the operation of a motor vehicle which causes a miscarriage results in specific levels of offense severity. Kan. Stat. Ann. § 21-3441 (1997).



**New Hampshire:** It is a felony to cause injury to another person that results in a miscarriage or stillbirth. N.H. Rev. Stat. Ann. §§ 631:1-631:2 (1996).

**New Mexico:** It is a felony to injure a pregnant woman during the commission of a felony and cause her to undergo a miscarriage or stillbirth. N.M. Stat. Ann. § 30-3-7 (Michie 1994). It is also a crime to injure a pregnant woman through the unlawful operation of a vehicle which causes her to undergo a miscarriage or stillbirth. N.M. Stat. Ann. §§ 66-8-101.1 (Michie 1998).

**North Carolina:** It is a felony to injure a pregnant woman during the commission of a felony and cause her to undergo a miscarriage or stillbirth. It is a misdemeanor to cause a miscarriage or stillbirth during a misdemeanor act of domestic violence. N.C. Gen. Stat. § 14-18.2 (Supp. 1998).

**Virginia:** The premeditated killing of a pregnant woman with the intent to cause the termination of her pregnancy is capital murder. Va. Code Ann. § 18.2-31 (Michie Supp. 1998). The unpremeditated killing of a pregnant woman with the intent to cause the termination of her pregnancy is also a crime. Va. Code Ann. § 18.2-32.1 (Michie Supp. 1998). It is a felony to injure a pregnant woman with the intent to maim or kill her or to terminate her pregnancy and she is injured or her pregnancy is terminated. Va. Code Ann. § 18.2-51.2 (Michie Supp. 1998).

#### **New York: Conflicting Statutes**

**New York:** Under New York statutory law, the killing of an "unborn child" after twenty-four weeks of pregnancy is homicide. N.Y. Pen. Law § 125.00 (McKinney 1998). But under a separate statutory provision, a "person" that is the victim of a homicide is statutorily defined as "a human being who has been born and is alive." N.Y. Pen. Law § 125.05 (McKinney 1998). *See People v. Joseph*, 130 Misc.2d 377, 496 N.Y.S.2d 328 (County Court 1985); *In re Gloria C.*, 124 Misc.2d 313, 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984); *People v. Vercelletto*, 514 N.Y.S.2d 177 (Co.Ct. 1987).

Click on the link below for a map detailing state homicide laws that recognize unborn victims.

<http://www.cnn.com/interactive/allpolitics/0104/fetus.laws/frameset.exclude.html>

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Note

\*1845 FETAL HOMICIDE: WOMAN OR FETUS AS VICTIM? A SURVEY OF CURRENT STATE APPROACHES AND RECOMMENDATIONS FOR FUTURE STATE APPLICATION

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On June 7, 1998, Sabrina Adkinson was walking across Mercury Boulevard in Hampton, Virginia. [FN1] At the time, she was eight months pregnant with her seventh child, a daughter to be named Destiny. [FN2] Traveling between sixty-five and sixty-eight miles per hour in a forty-mile per hour zone, an apparently drunk driver plowed into, and killed, both Ms. Adkinson and the fetus. [FN3] The driver had been convicted of driving under the influence (DUI) in 1996 and was charged with involuntary manslaughter in Ms. Adkinson's death. [FN4] He could not be charged in the death of the fetus because Virginia law does not allow separate prosecutions for fetal homicides unless the fetus is first born alive, nor does Virginia law provide increased penalties for vehicular homicides involving pregnant women. [FN5]

The Virginia General Assembly first considered a feticide bill in the 1996 session [FN6] and considered a similar measure in 1998. [FN7] The proposed 1996 bill provided that a fetus is a person for laws related to murder. [FN8] The General Assembly eventually passed legislation that increased penalties for murdering pregnant women and amended the aggravated malicious wounding statute to include miscarriage as a serious bodily injury. [FN9] The proposed \*1846 1998 bill, sponsored by State Senator Forbes, from Chesapeake, established the crime of feticide for the murder of an unborn viable fetus, but the bill was not carried over to the next legislative session. [FN10]

This Note explores the topic of **fetal homicide** statutes and their application in Virginia and other states. The first section provides an overview of the approaches taken by states on the issue of **fetal homicide** statutes. The second section examines the dimensions of **fetal homicide** laws, noting important trends among the state statutes. Most significantly, the states tend to diverge with respect to who is the victim protected in **homicide** statutes: the fetus or the pregnant woman. The third section suggests ways that states can take a balanced stance on the issue of **fetal homicide**, regardless of which dominant approach is chosen, and submits that the optimal strategy should focus on the woman as the victim, thereby satisfying societal concerns while avoiding the brunt of opposition by pro-choice advocates. Finally, this Note proposes a Virginia statute that would penalize persons who drive under the influence of alcohol and injure pregnant women.

Overview of Approaches Taken by States

States take various approaches to punishing harm caused to pregnant women. Generally, states can be divided into those adopting a born alive rule, those punishing harm inflicted upon a fetus, and those punishing harm to the woman. Each of these approaches will be discussed in turn.

The Born Alive Rule

This subsection focuses on the born alive rule [FN11] and the changes to the rule adopted or considered by many

states. The treatment begins with a historical discussion of the born alive rule and then surveys those states that subscribe to this rule.

\*1847 The common law born alive rule originated in England, based on the medical knowledge of the sixteenth century. [FN12] Under this rule, live birth, regardless of the actual gestational age, was the point at which life could be observed clinically. [FN13] In cases of fetal death, it was difficult to distinguish between death from natural causes, or injuries inflicted in utero. [FN14] Determining if "material acts" caused the death required the fetus to be born alive. [FN15] Sir Edward Coke reflected the seventeenth-century common law view that the homicide of an unborn fetus was not murder, but some lesser crime, [FN16] which Sir William Blackstone reiterated in the eighteenth century. [FN17] The rule "is recognized to be an evidentiary principle that was required by the state of medical science of the day." [FN18] Jurisdictions in the United States adopted the born alive rule, and several states maintain the rule either through express statutes or court interpretation. [FN19]

\*1848 The case most widely cited for a discussion of the born alive rule is *Keeler v. Superior Court*. [FN20] In *Keeler*, the defendant blocked his ex-wife's car on a narrow mountain road and forced her out of the car. [FN21] At the time his ex-wife was pregnant with a viable fetus, later determined to have a seventy-five to ninety-six percent chance of survival if born uninjured. [FN22] The defendant had warned her of the consequences if she were pregnant with another man's child. [FN23] After realizing that she was pregnant, [FN24] the defendant threatened "I'm going to stomp it out of you," and then "pushed her against the car, shoved his knee into her abdomen, and struck her in the face." [FN25] The woman survived, but the fetus was stillborn and the defendant was charged with murder. [FN26] Writing for the majority, Justice Mosk discussed the history of the born alive rule extensively and evaluated the legislature's intent in enacting the state's murder statute. [FN27] The majority determined that the legislature "did not intend the act of feticide-as distinguished from abortion-to be" a crime. [FN28]

Currently, a total of eighteen states still subscribe to the born alive rule, either by express statutory language or through judicial interpretation. [FN29] In eight of these eighteen states, criminal statutes explicitly define "person," "individual" or "human being" as one who is born and alive. [FN30] Eight other states have definitions of "person" or "human being" in their statutes or refer to \*1849 persons or human beings in their homicide statutes; [FN31] their courts have held explicitly that the definitions of these statutes do not encompass fetuses. [FN32]

North Carolina considered application of the born alive rule in *State v. Beale*. [FN33] The grand jury indicted the defendant with the murder of his wife and unborn child, [FN34] specifically charging that he fired a "shotgun with intent to destroy the unborn child." [FN35] \*1850 The Supreme Court of North Carolina held that the definition of a victim under the murder statute did not include an unborn viable fetus. [FN36] Despite the court's precedent recognizing a viable fetus as a person within the state's wrongful death statute, [FN37] the court distinguished the legislative actions and histories between the wrongful death and murder statutes. [FN38] The court relied upon *DiDonato v. Wortman*, [FN39] a case concerning the wrongful death of a stillborn child, in which the court reasoned that, because the state's statutes provided for tort claims by children to recover for fetal injuries, the legislature would also want to allow recovery for a viable fetus's death. [FN40] The court in *DiDonato* held that the term "person" in the wrongful death statute included a viable fetus. [FN41] In *Beale*, however, the court listed specific occasions in which the legislature could have amended criminal statutes to include fetuses as victims, but did not. [FN42] The court strictly construed the criminal statutes to exclude the fetus as a victim. [FN43]

Courts in Alabama, Kentucky, Maryland, New Jersey, New York, and Texas, though maintaining the born alive rule, have held that if fetuses are injured before birth, are born alive, and then die, their deaths can be prosecuted as homicides. [FN44]

#### \*1851 States Criminalizing Actions Against Fetuses

In contrast to those maintaining the born alive rule, twenty-four states criminalize actions against the fetus. This approach recognizes the fetus as the victim of the aggressor's actions. As will be seen, however, these states differ with respect to the threshold at which criminal culpability attaches- some states will punish the offender only if the harmed fetus has reached a certain stage of development. This section surveys the states according to fetal gestational age.

## Viability

Modern medical jurisprudence refers to "viability" as an important stage in fetal development. [FN45] The Supreme Court defined viability in *Roe v. Wade* [FN46] as that period at the end of the second trimester of pregnancy when the fetus is capable of surviving outside the womb. [FN47] The Court determined that when balanced against a woman's right to privacy, a fetus was not a "person" with rights under the Fourteenth Amendment. [FN48] States, however, have an interest in protecting "potential life" when the fetus reaches viability, usually at twenty-eight weeks of pregnancy, but theoretically as early as twenty-four weeks. [FN49] The Court in *Roe* limited its discussion to actions taken by the mother and her physicians, not actions taken by a third party to terminate the pregnancy without the woman's consent. [FN50]

Six states criminalize homicides of viable fetuses by statute or judicial interpretation. [FN51] Three of these states protect fetuses \*1852 with homicide statutes. [FN52] For example, Indiana originally enacted \*1853 a "feticide" statute that criminalized knowing or intentional termination of another's pregnancy, with exceptions for abortion, and mandated a maximum eight-year penalty. [FN53] In *Baird v. State*, [FN54] the Supreme Court of Indiana held that the legislature intended this statute to punish those who "knowingly terminated a human pregnancy," even without the specific intent to kill the fetus. [FN55] Despite the defendant's argument that the statutory language required a specific intent to kill the fetus, the court reasoned that the language was used specifically to exempt from prosecution two intentional actions by physicians. [FN56] Yielding to popular support for a more effective feticide law, [FN57] the Indiana legislature, over the governor's veto, enacted sweeping legislation criminalizing acts against pregnant women and fetuses. [FN58] The most significant provision of these new laws established murder of a pregnant woman that results in the intentional death of a viable fetus as an aggravating circumstance for a death sentence or life imprisonment without parole. [FN59] The Indiana law also includes penalties for crimes against viable fetuses and pregnant women ranging from murder to aggravated battery. [FN60]

\*1854 In the remaining three states that recognize viability as the threshold for criminal culpability, the courts, as opposed to the legislatures, have taken the lead. Although their statutes are silent on the meaning of "person" for the purposes of homicide, [FN61] the courts of Massachusetts, [FN62] South Carolina, [FN63] and Oklahoma [FN64] have held that viable fetuses are indeed persons under these \*1855 laws. The situation in South Carolina is illustrative. South Carolina abrogated the born alive rule in 1984 in *State v. Horne*. [FN65] In *Horne*, the defendant was convicted of assault and battery with intent to kill and involuntary manslaughter. [FN66] Horne had stabbed his estranged wife, who survived, but her full-term viable fetus died. [FN67] The court determined that the fetus was the victim of the defendant's transferred intent toward the mother and held that a viable fetus was a "person" within the state's statutory definition of murder. [FN68]

In *State v. Ard*, [FN69] the Supreme Court of South Carolina upheld a defendant's death sentence for the murders of his girlfriend and their viable unborn son. [FN70] The *Ard* court ruled that a viable fetus is a "person" or "child" in terms of statutory aggravating circumstances, making the defendant eligible for the death penalty. [FN71] The court recognized that when the legislature added the appropriate aggravating circumstance to the murder statute, it was aware of the court's decision in *Horne* and could have decided to exempt fetuses from the definition. [FN72] South Carolina thus became the first state to "allow the death penalty for someone convicted of murdering a viable fetus." [FN73] The state's attorney general emphasized that the decision "does not mean doctors who illegally perform third-trimester abortions can be sent to Death Row." [FN74]

## Quickening

Quickening is the period prior to viability when the mother first feels the fetus move in the womb, normally between the sixteenth and eighteenth week of pregnancy. [FN75] At common law, this \*1856 was the period when the fetus was first considered alive. [FN76] In *Roe v. Wade*, [FN77] Justice Blackmun described quickening as the "confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins." [FN78] Since the advent of modern medical techniques, quickening has "little medical or legal significance in understanding pregnancy." [FN79] At common law, killing a "quickened" fetus was homicide, but not murder. [FN80]

Six states criminalize actions against "quick" fetuses. Florida, Mississippi, Nevada, Rhode Island, and Washington

all punish willfully or intentionally and unlawfully killing an unborn quick child as manslaughter; [FN81] Georgia punishes such an action as feticide. [FN82] The states vary with respect to punishment. [FN83] The courts in these states have applied these statutes on numerous occasions. [FN84]

\*1857 Florida provides a useful example of how a state's criminal law protecting fetuses can develop in the context of the abortion debate. Typically, Florida rarely prosecuted violations of the state's fetal manslaughter statute. [FN85] In a notable case, however, a defendant who stabbed his ex-wife was charged with fetal manslaughter, along with first-degree murder. [FN86] The case attracted a great deal of attention from both sides of the abortion debate. [FN87] The jury ultimately convicted the defendant for manslaughter of the woman, but the court dismissed the manslaughter charge for the fetus. [FN88] The judge said that according to the 100-year-old statute, the defendant "could be convicted of manslaughter in the death of the fetus only if he had been found guilty of murdering" the woman, rather than for the lesser charge of manslaughter. [FN89]

Recently, Florida enacted a vehicular homicide law that makes it a crime to kill a viable fetus in a car accident. [FN90] Florida enacted this law in reaction to intense lobbying on behalf of a woman whose daughter and grandson were killed in a car accident along with the daughter's unborn child. [FN91] The original bill, first proposed in 1997, was caught up in controversy between pro-choice and antiabortion forces. [FN92] One pro-choice lobbyist, however, said that although she opposed permitting separate \*1858 convictions for killing a fetus, she could support increased penalties for those who kill pregnant women and their fetuses. [FN93] The bill's sponsor, an abortion opponent, claimed that "[t]his has no-thing-repeat nothing-to do with abortion." [FN94] He then changed the proposed legislation to restrict prosecutions to those involving viable fetuses, and the legislature passed the revised version. [FN95] The new law has been criticized because it could lead to conflicts in future cases regarding the issue of whether the affected fetus was viable. [FN96]

#### Twelve Weeks of Fetal Development

Arkansas recently established the culpability threshold at twelve weeks of development. Arkansas originally subscribed to the born alive rule, reinforcing this rule in *Meadows v. State*. [FN97] In *Meadows*, the defendant drove recklessly while intoxicated and struck an oncoming car. [FN98] The driver of the other car was killed, along with the viable fetus of a passenger in the defendant's car, and the defendant was convicted of two counts of manslaughter. [FN99] The Supreme Court of Arkansas held that the fetus was not a "person" for purposes of the manslaughter statute. [FN100] The court determined that such a decision should be made by the legislature; to do otherwise would create a new common law crime. [FN101]

Later in 1987, the Arkansas legislature responded to *Meadows* by enacting a statute enlarging the crime of battery to include \*1859 injuries to pregnant women resulting in miscarriage. [FN102] The resulting sentence may not be less than five years or more than twenty years. [FN103] As a further reaction to the *Meadows* decision, the Arkansas legislature recently enacted a comprehensive fetal protection act and amended the Arkansas Code to expand the definition of "person" to include fetuses at twelve weeks of development. [FN104] Accordingly, Arkansas is unique because it has laws protecting both women and fetuses.

#### Seven to Eight Weeks of Fetal Development

California also draws a unique line in determining what fetal crimes are punishable under its criminal law. Although California's murder statute extends protection to the unborn, the law does not specify the applicable stage of development. [FN105] In the landmark case of *People v. Davis*, [FN106] the California Supreme Court determined that fetal viability was not an element of fetal murder, but established seven to eight weeks of development as the threshold for criminal culpability. [FN107] In *Davis*, the defendant \*1860 shot a pregnant woman in the course of a robbery. [FN108] The woman survived, but her nonviable fetus died. [FN109] The court's opinion reviewed the legislative history of the state's murder statute, [FN110] noting that the legislature had amended the law to include fetuses in response to a supreme court holding [FN111] that a fetus was not a "human being" for purposes of the murder statute. [FN112] The *Davis* court held that viability is not a requirement for fetal murder "as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks." [FN113] The court, however, also decided that the decision would apply prospectively. [FN114]

Reaction to Davis was widespread. [FN115] Abortion rights activists claimed that the decision "moved the law in a very troubling direction." [FN116] Since the Davis ruling, there have been several convictions under the fetal murder statute, with fetal developments ranging from fifteen weeks to eight months. [FN117] The California courts, however, have limited the application of fetal homicide \*1861 measures to charges of murder. [FN118] In 1998, the California Supreme Court upheld the first-degree murder and second-degree fetal murder convictions of a defendant who had asked for an instruction on fetal manslaughter and was refused. [FN119] The court held that the crime of fetal manslaughter does not exist in California. [FN120]

#### Fertilization or Conception

The last stage of fetal development that states have used as the basis for criminalizing actions against fetuses is fertilization or conception. [FN121] Seven states penalize harm inflicted upon the unborn at fertilization or conception: Missouri, [FN122] Pennsylvania, \*1862 [FN123] Louisiana, [FN124] North Dakota, [FN125] Illinois, [FN126] Minnesota, [FN127] and \*1863 Wisconsin. [FN128]

As Minnesota illustrates, a state's fetal homicide legislation often develops in response to a high profile incident or a controversial court decision. In 1985, the Supreme Court of Minnesota held in *State v. Soto* [FN129] that an unborn viable fetus was not a "human being" for the purposes of the state's vehicular homicide statute. [FN130] In *Soto*, the defendant struck another car while driving intoxicated, resulting in the death of an eight-month-old fetus. [FN131] The court emphasized that only the legislature had the power to expand the statute to include fetuses. [FN132] In response to strong public sentiment in the wake of this decision, [FN133] the state legislature enacted a chapter entitled "Crimes Against Unborn Children," which criminalized several forms of fetal violence, including murder, manslaughter, injury or death in the commission of a crime, vehicular homicide, and assault. [FN134] These statutes \*1864 subsequently withstood equal protection and vagueness challenges in the courts. [FN135]

#### Statutes with No Specified Gestational Age

Finally, of the states that criminalize harmful actions against a fetus, three do not specify a threshold stage of fetal gestation: Arizona, [FN136] South Dakota, [FN137] and Utah. [FN138] For example, Arizona's \*1865 manslaughter law includes "knowingly or recklessly causing the death of an unborn child at any stage of its development." [FN139] One prosecution under this law was for the 1997 shooting of a pregnant woman by her ex-boyfriend. [FN140] The woman survived, but her four-month-old fetus was killed. [FN141] The case ignited debate on abortion, with antiabortion activists using the case as an example of the need to change abortion laws, and pro-choice activists maintaining that the case was about a criminal act, not women's rights. [FN142]

#### Crimes Against Pregnant Women

Several states, including Virginia, that subscribe to the born alive rule in their homicide statutes, nevertheless penalize actions against pregnant women that result in miscarriage, or in some states, injury to the fetus. [FN143] These states include New Mexico, [FN144] Wyoming, [FN145] New Hampshire, [FN146] Kansas, [FN147] Iowa, [FN148] \*1866 Ohio, [FN149] and Delaware, [FN150] which consider the pregnant woman \*1867 the victim of the criminal act, rather than the fetus. In so doing, avoid the issue of whether the fetus is a "victim" or a "person." [FN151] The potential exists for the resulting criminal penalties to be substantially the same or greater than statutes that criminalize actions against the fetus, depending on the way the legislatures craft the statutes. [FN152]

Several states that seek to protect the woman have developed fetal homicide statutes in response to specific homicide incidents or court decisions. Having changed its approach to fetal homicide several times since 1985, the state of Kansas provides a useful illustration of such development. The Kansas Supreme Court appeared to abrogate the born alive rule in 1985 in *State v. Burrell*. [FN153] It subsequently reinforced the rule in 1988, however, in *State v. Trudell* [FN154] and again in 1989, in *State v. Green*. [FN155] In *Burrell*, the defendant ran a stop sign and struck another car. [FN156] A passenger was thrown from the car, killing the passenger and her viable fetus. [FN157] The defendant was charged with two counts \*1868 of involuntary manslaughter. [FN158] The court, without comment,

appeared to abandon the born alive rule by reversing, on other grounds, the trial court's dismissal of the two charges, and remanding the case. [FN159]

In 1988, the Trudell court considered the case of a defendant charged with aggravated vehicular homicide. [FN160] The court noted that Kansas had a feticide statute in effect from 1855 to 1969, but that the state criminal code enacted in 1969 did not include an equivalent law. [FN161] The court considered as dicta a statement in Burrell that referred to the mother and fetus as "two human beings." [FN162] One year later in Green, the court considered the case of a defendant charged with the first-degree murder of his former girlfriend and her unborn fetus. [FN163] The court applied its rationale from Trudell and held that the viable fetus was not a person for purposes of the murder statute. [FN164]

In 1995, the Kansas state legislature responded to these cases with new fetal homicide legislation. [FN165] The two new laws provided penalties for injuries to pregnant women. [FN166] The first statute relates to injuries caused to a pregnant woman in the commission of a felony or misdemeanor resulting in miscarriage. [FN167] The other statute relates to miscarriage-producing injuries caused by a vehicle, with more severe penalties for injuries caused while driving under the influence of alcohol or drugs. [FN168] Originally, the bill was drafted to define a "preborn human being" as 'a human being in existence from fertilization until birth.' [FN169] Abortion-rights advocates said "the bill went too far," because "abortion could become first-degree murder." [FN170] The legislature revised the \*1869 proposal and modeled it after New Mexico's laws penalizing those who cause miscarriages by injury to the woman. [FN171] Additionally, like the New Mexico statutes, the Kansas statute does not specify the fetus's gestational age. [FN172] Pro-choice and pro-life activists were pleased with the final result. [FN173] Peggy Jarman, pro-choice lobbyist said, "[s]ounds OK." . . . 'As I said before, there's a way to do this right. Sounds to me like they've figured out how to do that.' [FN174] Abortion opponent Senator Don Sallee, sponsor of the original measure, said, "[y]ou did what I asked." . . . 'You didn't throw it in the trash, and you're trying to make it work. It appears to me like you're doing what I set out to do.'" [FN175]

### The Dimensions of Fetal Protection Laws

#### Identifying the Victim

The preceding survey demonstrates that state legislatures and courts can choose between two approaches to penalizing fetal homicide depending on their definition of the crime victim. [FN176] \*1870 Either the fetus or the pregnant woman can be considered the victim of a crime that results in fetal death or injury. Several factors potentially impact a state's decision concerning which approach will best suit its needs, as well as provide laws that will be feasible politically. The predominant factor is the impact of the proposed legislation on abortion. In addition, there are structural considerations for state legislatures creating new laws. States choosing to criminalize actions against fetuses or pregnant women can either modify existing statutes or create new statutes to include fetuses or pregnant women as victims.

Among the states that treat fetuses as victims, five state legislatures modified existing statutes to include fetuses as victims of crime, [FN177] whereas sixteen state legislatures created new statutes to cover crimes against the fetus. [FN178] If a state wants to classify the fetus as victim, there are several advantages to creating separate statutes specifically covering criminal actions against the fetus rather than merely expanding the definition of "victim" or "person" to include the fetus in existing homicide and assault statutes. One major concern expressed during the Virginia feticide bill hearings was that establishing the fetus as a person in the homicide laws would lead to attempts to classify the fetus as a person in other laws, such as wrongful death laws. [FN179] Crafting \*1871 separate laws for crimes against the fetus would segregate those laws from laws protecting the already born, and a state could identify the fetus as a victim or person solely for the laws specifically related to the fetus. Another major concern, particularly from the perspective of pro-choice advocates, is that defining fetuses as victims or persons within existing statutes would increase the threat to a woman's right to choose. [FN180] Pro-choice advocates believe that if enough states specifically declare fetuses as victims or persons, even with exceptions for legal abortions, the Supreme Court might use the declarations as evidence to overturn Roe. [FN181] One author also expressed his belief that it "would be more difficult to protect potential human life fully" with fetal protection scattered throughout the state's criminal code. [FN182] In addition, having a separate section of the law for crimes against the fetus allows the legislature to craft separate penalties for such crimes, instead of necessarily having the same penalties as

for living persons who are later killed. [FN183]

States that focus on the pregnant woman as the victim also have crafted either separate legislation or identified the pregnant woman as victim in existing statutes. Kansas, New Mexico, and Iowa crafted separate legislation to cover injuries to pregnant \*1872 women resulting in miscarriage. [FN184] The other states identifying the pregnant woman as a victim, including Virginia, identified the crimes in existing statutes in the criminal code, generally in separate paragraphs or sections. [FN185] Either approach is effective because the focus is on the pregnant woman alone as victim. No conflicts arise between the rights of the mother and fetus if the fetus is lost through actions of a third party causing miscarriage, because the two entities are treated as one. Resulting statutes avoid the problems of encroaching on abortion rights or attempting to include the fetus in other areas of law, such as wrongful death.

One disadvantage of identifying the pregnant woman as victim, however, has been expressed by family members of victims who believe that the accused should be charged with two separate crimes, one for the woman and one for the fetus. [FN186]

### Scope of the Legislation

Another important consideration for states enacting fetal homicide statutes is the scope of the legislation. The state must decide how broadly its law will sweep, and, in particular, whether the statute will cover only homicide or include offenses causing fetal injury. The state statutes focusing on the fetus as victim vary widely in scope. Twelve states only penalize some form of homicide (murder, feticide, or manslaughter), [FN187] whereas nine \*1873 states cover both death and injury to the fetus. [FN188] Generally, the comprehensive statutes were written in response to specific incidents, and the legislatures intended to respond to any possible crimes against the fetus. As a result, the statutes also have widely varying intent requirements. [FN189] The most common problem identified with statutes including injury to the fetus is determining causation. [FN190]

Statutes focusing on the woman as victim also vary in scope. Iowa's statute includes "nonconsensual termination or serious injury to a human pregnancy" during the commission of various crimes, and includes acts that unintentionally terminate or "injure" the pregnancy. [FN191] Similarly, Ohio's laws cover crimes against the pregnant woman ranging from murder to assault. [FN192] The other state laws that focus on the woman as victim are narrower in scope and center on death or injury to the woman rather than injury to the fetus. [FN193]

### \*1874 Gestational Age Protected

States choosing to focus on either the fetus or pregnant woman as victim should be concerned about the gestational age protected. Statutes focusing on the fetus as victim, however, encounter different problems than those focusing on the woman. In statutes focusing on the fetus, the fetal gestational age chosen for protection depends in large measure on the level of the accused's intent. Where the accused knows that the woman is pregnant and intends to harm her or terminate the pregnancy, gestational age should not matter. Conversely, when the accused does not know the woman is pregnant, protecting all fetuses from fertilization becomes more problematic.

The "quickening" standard, although used by several states, is currently a vague standard with little medical significance. [FN194] Likewise, imposing liability beginning as early as conception presents problems due to fetal fragility and miscarriage. [FN195] A large percentage of pregnancies spontaneously terminate before the woman knows she is pregnant. [FN196] Consequently, an accused could be convicted of homicide during the period when there is a high rate of termination from forces other than the accused's actions. [FN197] Justice Mosk expressed this concern in *People v. Davis*, [FN198] in which the California Supreme Court held that fetal viability was not a requirement for a homicide conviction, and that a seven-week-old fetus could be covered under the murder statute. [FN199] Justice Mosk's primary concern was that a defendant conceivably could be convicted of felony (capital) murder for causing the death of something "roughly the size and weight of a \*1875 peanut." [FN200] He also hypothesized that if an unarmed individual shoplifts, and in his haste to escape knocks a woman to the floor, causing her to miscarry (even if she does not know she is pregnant), the defendant could be charged and convicted of felony murder. [FN201] He noted that in cases concerning early pregnancies, causation might be more difficult to prove because a high percentage of such pregnancies end in spontaneous abortion. [FN202] It might be difficult to prove



whether the defendant's actions caused fetal death, or the death was the result of natural causes. [FN203]

On the other hand, viability can be determined by objective medical standards. [FN204] As a result of Roe, the standard is well established, such that a statute drawing the line at viability would protect fetuses that have a high potential of independent life. [FN205] In addition, state laws establish processes for abortions after viability. [FN206] Specifically, performing abortions or causing miscarriages are lawful after the second trimester only if "the continuation of the pregnancy is likely to result in the death of the woman or substantially and irretrievably impair the mental or physical health of the woman." [FN207] In addition, the attending physicians are required to have life support available and use it if there is "clearly visible evidence of viability." [FN208] Such conditions lend further support to establish the threshold for criminal liability at viability, because at that point the state has an established interest in protecting "potential life" per Roe. [FN209] Unfortunately, the states defining the fetus as victim have specified only one gestational age, regardless of the level of intent required for the offense.

Statutes that define the pregnant woman as the victim have the same gestational age concerns, depending on the intent required for conviction. The states currently focusing on the \*1876 pregnant woman as victim either do not specify fetal gestational age, meaning convictions at any gestational age are possible, or specify gestational age at fertilization. [FN210] These states run the same risks as those who focus on the fetus as victim, and thus states considering focusing on the woman as victim should also consider varying the fetal gestational age with different levels of intent. Currently Virginia has limited culpability to those who intentionally kill or injure women that they know are pregnant, and therefore gestational age should not matter in those specific intent situations. [FN211] As a result, under revised Virginia laws, a court conceivably could punish perpetrators such as those in Keeler v. Superior Court, [FN212] Hollis v. Commonwealth, [FN213] and State v. Beale, [FN214] who could not be punished under their states' existing laws.

#### ACLU Factors

A predominant consideration for any state contemplating fetal homicide legislation is the impact the legislation will have on a woman's right to choose. The ACLU has been active in scrutinizing proposed fetal protection legislation. This scrutinization has been to ensure that the proposals (1) do not infringe on a woman's right to choose, (2) discourage the "policing" of pregnancy, and (3) do not violate due process rights. [FN215] To that end, they devised a list of six factors for legislators and pro-choice activists to consider when drafting and evaluating such legislation. First, the bill should define the woman alone as the victim, as opposed to the fetus alone, or both the woman and the fetus. [FN216] If the state does not include such exceptions, then the proposal will probably be stiffly opposed by pro-choice activists who might \*1877 view it as a threat to abortion rights, [FN217] as well as by groups opposed to laws criminalizing maternal behavior during pregnancy. [FN218] Second, in order to diffuse pro-choice opposition, the bill should have an exemption for abortions and the woman's conduct. [FN219] Statutes that characterize the pregnant woman as victim do not share the same problems because they penalize actions of others against pregnant women, rather than the fetus and do not focus on the potential actions of the pregnant woman. Third, the language used to describe the fetus should not include anti-choice terms such as "pre-born" or "unborn child." [FN220] Fourth, to comport with due process, the bill should require adequate knowledge or intent to commit the crime. [FN221] Fifth, the terms and prohibited conduct should be defined precisely to avoid vagueness concerns. [FN222] Sixth, the penalties for causing fetal death should not be as severe as for killing a live person. [FN223] Aligning proposed legislation with these factors can help avoid conflicts with pro-choice advocates.

#### \*1878 Recommendations

##### All States

State legislatures enacting fetal homicide statutes should consider all of the dimensions and factors discussed previously. Specifically, if focusing on the fetus as the victim, state legislatures should refer to the Illinois statutes because they offer comprehensive treatment of fetal homicide and identify appropriate levels of intent without being too broad. [FN224]

Illinois defines a fetus as an "unborn child" from fertilization until birth. [FN225] Only in the involuntary

manslaughter and reckless homicide statutes is the definition potentially problematic. In all other relevant offenses the accused must act intentionally or knowingly. [FN226] The laws exempt lawful abortion, although they do not specifically exempt other actions of the pregnant woman. [FN227] Illinois courts have upheld these statutes. [FN228] In *People v. Ford*, [FN229] the court held that "[c]learly, a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated." [FN230] The court said that even though the statute defined "unborn child," it did not need to determine when human life begins because the statute only required proof that the "entity" was alive, and that it died due to the defendant's actions. [FN231]

Another Illinois court considered the causation issue in *People v. Campos*. [FN232] The defendant shot his wife, who was pregnant with a five-month-old fetus. [FN233] For eight days, the woman was in \*1879 a coma and brain dead, and the fetus was stillborn shortly before the woman was pronounced dead. [FN234] The bullet the defendant fired at the woman did not injure the fetus directly, but the medical examiner determined that the fetus was stillborn due to the woman's lack of oxygen. [FN235] The defendant claimed that his act did not cause the fetus's death, but the court inferred that the trauma to the woman ultimately caused the fetus's death, and thus the causal link was established. [FN236]

Evaluating the Illinois statutes in light of the ACLU factors, [FN237] the only areas where the statutes do not align with the ACLU factors are the terms used to characterize the victim ("unborn child" as opposed to "fetus"), and the penalties for killing a fetus are essentially the same as those for killing live persons, except that the death penalty is not available for intentional homicide. Crafting legislation based on the Illinois statutes, with several changes, might more easily satisfy pro-choice activists. Suggested changes include using the term "fetus" instead of "unborn child," establishing viability as the gestational age for the involuntary manslaughter and reckless homicide provisions, specifically exempting actions of the pregnant woman, and possibly crafting lesser penalties for crimes against the fetus than for crimes against living persons.

State legislatures focusing on the pregnant woman as victim have two promising alternatives. The Kansas and New Mexico statutes cover a wide range of offenses, [FN238] but could be improved by specifying viability as the appropriate gestational age for offenses involving reckless or negligent conduct where the defendant does not know that the victim is pregnant. The Virginia statutes are targeted more specifically at defendants who kill the pregnant woman with the intent to terminate the pregnancy, or intentionally harm the woman knowing she is pregnant. [FN239] These statutes cover the vast majority of cases considered by other jurisdictions evaluated in this Note, particularly those \*1880 involving domestic violence. The Kansas, New Mexico, and Virginia statutes appear to satisfy the ACLU factors regarding fetal protection [FN240] and would also protect the woman's right to choose abortion or to carry to term without interference from a third party.

State legislatures interested in creating fetal homicide statutes should focus on the pregnant woman as victim, rather than on the fetus itself. State legislatures that have focused on the pregnant woman as victim generally have met with less opposition from pro-choice activists, and also have met with support from groups concerned about domestic violence. [FN241] These states, thus, are able to satisfy concerns from groups representing various perspectives, while punishing those who commit crimes against women that result in miscarriages.

## Virginia

As noted above, Virginia has enacted laws to protect pregnant women. [FN242] Vehicular homicide is the one crime among these \*1881 existing laws that, if amended, would further protect the right of pregnant women to carry to term.

Currently, Virginia law does not provide penalties for persons causing miscarriages in drunken driving incidents. Of the twenty-four states focusing on the fetus as a victim, sixteen provide penalties for some form of vehicular homicide either by statute or judicial interpretation. [FN243] Of the eight states that focus on the \*1882 pregnant woman as victim, Iowa, Kansas, New Mexico, Ohio, and Wyoming include vehicular homicide or drunken driving accidents that result in miscarriage as an offense. [FN244] One way to punish this conduct under the Virginia Code would be to include it in section 8.2-51.4, which pertains to maiming that results from driving under the influence (DUI). [FN245] Punishment for this offense, a class six felony, is defined in section 18.2-10(f), with a

maximum punishment of one to five years imprisonment. [FN246] Although the penalty is not as severe as for similar crimes in other states, this proposal would recognize the involuntary termination of a woman's pregnancy as a punishable offense. The Virginia Code could also be modified in section 18.2-36.1, linking DUI manslaughter with maiming. [FN247] The statute should draw \*1883 the gestational age line at viability. If enacted, the proposal would punish a drunken driver for causing the miscarriage of a viable fetus regardless of whether the pregnant woman survived. Linking DUI manslaughter and maiming would not result in prosecuting someone for two crimes with the same elements. A demonstration of this principle occurred when the Court of Appeals of New Mexico upheld that state's injury to pregnant woman by vehicle statute in 1987 in *State v. Begay*. [FN248] The defendant in *Begay* was charged with vehicular homicide and injury to a pregnant woman as a result of a head-on collision while driving under the influence. [FN249] The victim and her unborn fetus were both killed, along with another woman. [FN250] The defendant asserted the two charges should merge because "vehicular homicide of the pregnant woman necessarily includes injury to a pregnant woman." [FN251] The court disagreed, concluding that "either offense can be committed without committing the other offense." [FN252] The court noted that "the legislative intent in enacting the two statutes is to punish a person who violates the two statutes under the provisions of both," [FN253] and went on to hold that the two statutes did not merge. [FN254]

Similarly, the proposed changes to Virginia law would result in prosecuting a drunken driver for actions resulting in a pregnant woman's death or miscarriage. This policy would be in general alignment with continuing movement toward greater liability for those who drive while under the influence of alcohol and cause death or injury as a result. [FN255] If these statutes were in effect in 1998, the driver who hit Sabrina Adkinson could have been prosecuted for causing both Sabrina's and Destiny's deaths.

#### \*1884 Conclusion

States have adopted fetal homicide legislation in various forms over the past fifteen years, often in response to specific situations when pregnant women have been killed or suffered miscarriages at the hands of third parties. Additionally, states considering fetal homicide legislation have several choices and can adopt proposals focusing on either the fetus or pregnant woman as victim. Proposed statutes focusing on the fetus as victim are prone to opposition from pro-choice advocates who view the proposals as threats to a woman's right to choose abortion. For a variety of reasons, statutes focusing on the pregnant woman as victim are suggested as the preferred approach. Proposals using this alternative focus have received less opposition from pro-choice advocates, and, if the statutes are crafted carefully, will likely enjoy support from both pro-choice and antiabortion advocates, as well as groups concerned about the effects of domestic violence. Although these laws would not result in separate prosecutions for fetal deaths or injuries, they would provide a greater level of comfort for victims' families than laws in states that do not punish third-party harms to fetuses.

Virginia's current laws illustrate this preferred focus on the pregnant woman as victim. With the addition of laws punishing drunk drivers who cause miscarriages, Virginia could protect not only pregnant women in situations such as those including domestic violence, but women like Sabrina Adkinson, who, along with their unborn children like Destiny, are helpless victims of individuals who choose to drink and drive.

[FN1]. See Kelli Caplan, *Pregnant Woman, Fetus Die After Being Hit by Car: Driver Charged with Drunken Driving*, Daily Press (Newport News, VA), June 9, 1998, at A1.

[FN2]. See *id.*

[FN3]. See *id.*

[FN4]. See Kelli Caplan, *Man Faces Charges in Death: Pregnant Woman Killed; Suspect's 2nd DUI Charge*, Daily Press (Newport News, VA), June 10, 1998, at C1. The defendant pleaded guilty to aggravated involuntary manslaughter and was sentenced to eighteen years in prison (four years suspended, leaving fourteen years to serve).

See William H. McMichael, Driver Will Serve Years for Death of Woman, Daily Press (Newport News, VA), Sept. 1, 1999, at C1. The trial judge noted that the defendant was on probation for a previous DUI conviction at the time of the instant offense, and called Ms. Adkinson's death "a very tragic, horrific case." Id.

[FN5]. See Caplan, *supra* note 4, at C1.

[FN6]. See S.B. 495, 1996 Reg. Sess. (Va.).

[FN7]. See S.B. 198, 1998 Reg. Sess. (Va.).

[FN8]. See Va. S.B. 495.

[FN9]. See Va. Code Ann. § 18.2-31(11), -32.1, -51.2 (Michie 1996 & Supp. 1999).

[FN10]. See Va. S.B. 198.

[FN11]. See generally Allison Tsao, Note, Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?, 25 *Hastings Const. L.Q.* 457 (1998) (discussing various state approaches to fetal homicide statutes).

[FN12]. See Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 *Val. U. L. Rev.* 563, 571 (1987) (providing an excellent reference for a detailed history of the born alive rule and its application in common law and in American jurisdictions).

[FN13]. See *id.* at 568. Life may be observed clinically "[w]henver the infant at or after birth breathes spontaneously or shows any other sign of life such as heart beat or definite spontaneous movement of voluntary muscles . . . ." Id. (quoting Jack Pritchard et al., *Williams Obstetrics* 2 (17th ed. 1985)).

[FN14]. See *id.* at 575.

[FN15]. See *id.*

[FN16]. If a woman be quick with childe, and by a Potion or otherwise killeth in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder; but if the childe be born alive; and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive. Id. at 583 n.92 (quoting Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* 50 (photo. reprint 1986) (1797)).

[FN17]. [I]f a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanor. Stephanie Rittrivi McCavitt, The "Born Alive" Rule: A Proposed Change to the New York Law Based on Modern Medical Technology, 36 *N.Y.L. Sch. L. Rev.* 609, 612 (1991) (quoting 1 William

Blackstone, Commentaries \*129-\*130).

[FN18]. Forsythe, *supra* note 12, at 586.

[FN19]. See *id.* at 596 n.161.

[FN20]. 470 P.2d 617 (Cal. 1970).

[FN21]. See *id.* at 618.

[FN22]. See *id.* at 619.

[FN23]. See *id.* at 618.

[FN24]. See *id.*

[FN25]. *Id.*

[FN26]. See *id.* at 619.

[FN27]. See *id.* at 619-22; see also Forsythe, *supra* note 12, at 603-04 (recounting Justice Mosk's discussion in Keeler of the history behind the born alive rule).

[FN28]. Keeler, 470 P.2d at 622.

[FN29]. See *infra* notes 30-44 and accompanying text.

[FN30]. See Ala. Code § 13A-6-1(2) (1994); Alaska Stat. § 11.41.140 (Michie 1998); Colo. Rev. Stat. Ann. § 18-3-101(2) (West 1999); Haw. Rev. Stat. Ann. § 707-700 (Michie 1993); Mont. Code Ann. § 45-2-101(28) (1999); Neb. Rev. Stat. Ann. § 28-302(2) (Michie 1995); Or. Rev. Stat. § 163.005(3) (1990); Tex. Penal Code Ann. § 1.07(26) (West 1994). Additionally, Idaho and Maine define "person" as "human being" in their statutes, but their state courts have been silent on the issue of whether "persons" or "human beings" include fetuses. See Idaho Code § 18-101, 4001, 4006 (1997); Me. Rev. Stat. Ann. tit. 17-A, § 2(20), 201 (West 1983).

[FN31]. See Conn. Gen. Stat. Ann. § 53a-3(1) (West 1994); Ky. Rev. Stat. Ann. § 507-010 (Banks-Baldwin 1990); Md. Ann. Code, art. 27, § 407 (1996); N.J. Stat. Ann. § 2C:1-14, :11-2 (West 1995); N.Y. Penal Law § 125.00, 125.05 (Consol. 1998); N.C. Gen. Stat. § 14-17 (1993); Vt. Stat. Ann. tit. 13, § 5301(4) (1998); W. Va. Code § 61-2-1 (1997).

[FN32]. See *Williams v. State*, 550 A.2d 722 (Md. 1988) (sustaining the common law rule, but also holding that homicide includes deaths of fetuses born alive, but injured before birth); *In re A.W.S.*, 440 A.2d 1144 (N.J. 1981)

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(holding that an unborn fetus was not a person within the criminal homicide provision); People v. Vercelletto, 514 N.Y.S.2d 177 (1987) (holding that manslaughter in the second degree did not extend to an unborn fetus injured in a car accident, although the court also held that a pregnant victim's loss of a fetus was a "serious physical injury" for purposes of the second-degree vehicular assault statute); People v. Joseph, 496 N.Y.S.2d 328 (1985) (holding that the homicide statute did not include nonabortional homicides of viable fetuses); State v. Beale, 376 S.E.2d 1 (N.C. 1989); State v. Oliver, 563 A.2d 1002 (Vt. 1989) (holding that a viable fetus was not a person within the meaning of "person" in the state's death by motor vehicle statute); State ex rel. Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984) (holding that a viable unborn child was not a victim within the murder statute). Kentucky sustained the born alive rule in 1983 in Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983). The defendant was indicted for murder after he told his wife he did not want a baby, and forced his hand up her vagina intending to destroy the fetus. See id. at 61. The defendant's actions killed the viable fetus. See id. at 61-62. The Supreme Court of Kentucky ultimately held that the fetus was not a person for purposes of the murder statute. See id. at 62-65. See generally Perry Mack Bentley, *Feticide: Murder in Kentucky?*, 71 Ky. L.J. 933 (1982) (analyzing the court's decision and proposing a feticide statute); Margaret A. Miller, *Criminal Law- Murder-Intentional Killing of Viable Fetus Not Murder*, 11 N. Ky. L. Rev. 213 (1984) (analyzing the court's decision and the born alive rule); Tracy A. Nelson, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 Ind. L. Rev. 1119 (1984) (discussing the Hollis decision, the need to eliminate the born alive rule, and proposing legislative reform).

[FN33]. 376 S.E.2d 1 (N.C. 1989). See generally Tony Hartsoe, Person or Thing-In Search of the Legal Status of a Fetus: A Survey of North Carolina Law, 17 Campbell L. Rev. 169 (1995) (examining the legal status of a fetus under North Carolina law in the areas of wrongful death, prenatal injury, criminal law, wrongful birth, and wrongful conception); Gary V. Perko, State v. Beale and the Killing of a Viable Fetus: An Exercise in Statutory Construction and the Potential for Legislative Reform, 68 N.C. L. Rev. 1144 (1990) (analyzing the court's decision and the born alive rule).

[FN34]. See Beale, 376 S.E.2d at 1.

[FN35]. Id.

[FN36]. See id. at 4.

[FN37]. See id. at 2 (citing DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987)).

[FN38]. See id.

[FN39]. 358 S.E.2d 489 (N.C. 1987).

[FN40]. See id. at 491.

[FN41]. See id.

[FN42]. See Beale, 376 S.E.2d at 4.

[FN43]. See id.

[FN44]. See Clarke v. State, 23 So. 671 (Ala. 1898) (upholding the defendant's conviction for second-degree murder of a fetus after the defendant beat the mother); Jones v. Commonwealth, 830 S.W.2d 877 (Ky. 1992) (upholding a conviction for second-degree manslaughter during the operation of a motor vehicle); Williams v. State, 550 A.2d 722 (Md. 1988) (upholding a conviction for manslaughter by bow and arrow); State v. Anderson, 343 A.2d 505 (N.J. 1975) (upholding a conviction for the murder of twin fetuses); People v. Hall, 557 N.Y.S.2d 879 (N.Y. App. Div. 1990) (upholding a conviction for second-degree manslaughter); Cuellar v. State, 957 S.W.2d 134 (Tex. Crim. App. 1997) (upholding a conviction for intoxication manslaughter); see also McCavitt, *supra* note 17, at 609 (comparing New York law with **fetal homicide** laws of other states and suggesting the state adopt similar laws based on viability); Annissa R. Obasi, Note, Protecting Our Vital Organs: The Case for Fetal Homicide Laws in Texas, 4 Tex. Wesleyan L. Rev. 207 (1997-98) (supporting the intermediate appellate court's decision in Cuellar v. State and recommending that Texas formally adopt the limited revision of the born alive rule); Court Refuses to Hear Appeal in Case Involving Fetus Death, San Antonio Express-News, Apr. 23, 1998, at B2, available in 1998 WL 5088854 (describing the Texas Court of Criminal Appeals' refusal to hear an appeal of an intoxication manslaughter case).

[FN45]. See Forsythe, *supra* note 12, at 569.

[FN46]. 410 U.S. 113 (1973).

[FN47]. See *id.* at 162-64.

[FN48]. See *id.* at 155-59.

[FN49]. See *id.* at 162-64.

[FN50]. See *id.* at 163-65.

[FN51]. See Ind. Code Ann. § § 35-42-1-1(4), -42-1-6 (Lexis 1998 & Supp. 1999); Mass. Gen. Laws Ann. ch. 265, § 1 (West 1990); Mich. Comp. Laws Ann. § 750.322 (West 1991); Okla. Stat. Ann. tit. 21, § § 105, 711 (West 1983); S.C. Code Ann. § 16-3-10 (Law Co-op. 1976); Tenn. Code Ann. § 39-13-214 (1997).

[FN52]. See Ind. Code Ann. § § 35-42-1-1(4), -42-1-6; Mich. Comp. Laws Ann. § 750.322; Tenn. Code Ann. § 39-13-214. The Michigan statute provides penalties for the manslaughter or willful killing of an "unborn quick child," see Mich. Comp. Laws Ann. § 750.322, but curiously the state's supreme court has held that the word "child" in this statute and the abortion statutes refer to a viable child. See Larkin v. Cahalan, 208 N.W.2d 176 (Mich. 1973). Larkin defines a child as: A viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community. *Id.* at 180. In 1980, however, the Michigan Court of Appeals decided that the state's vehicular homicide statute did not include viable fetuses as victims. See People v. Guthrie, 293 N.W.2d 775 (Mich. Ct. App. 1980). Subsequently, the legislature considered a bill that would provide penalties for harming a fetus, with a possible penalty of life in prison for "intentionally causing a miscarriage or stillbirth." Karen Schulz & Ed Golder, Bill Gives Rights to Unborn Fetuses; Some Fear the Legislation, Which Gov. Engler Is Expected to Sign, Is a Step Toward Ending a Woman's Right to Choose Abortion, Grand Rapids Press, June 14, 1998, at A1, available in 1998 WL 12600004. An opponent responded that "[i]t doesn't overtly say fetuses are people. . . . But in a backhanded fashion, it creates a situation where an embryo or a fetus is a person." *Id.* The bill did not become law. See generally Mark S. Kende, Michigan's Proposed Prenatal Protection Act: Undermining a Woman's Right to an

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Abortion, 5 Am. U. J. Gender & L. 247 (1996) (examining Senate Bill 515, introduced in the 1995 session of the Michigan Legislature, and its alternative). Tennessee originally subscribed to the born alive rule. See Forsythe, *supra* note 12, at 596 n.161. For example, in State v. Evans, 745 S.W.2d 880 (Tenn. Crim. App. 1987), the court held that a viable fetus was not a person within the state's vehicular homicide statute. See *id.* at 882. In Evans, the defendant collided with another vehicle while driving drunk, killing the pregnant passenger's fetus, which was in its eighth month of development. See *id.* at 880. The court noted that the same state senator sponsored both the state's wrongful death statute and vehicular homicide statute, and that the legislature passed both measures during a single legislative session. See *id.* at 882. The court reasoned that the legislature intended that viable fetuses not be included in the homicide statute because the wrongful death statute included viable fetuses as victims, while the vehicular homicide statute did not. See *id.* Two years after Evans, the Tennessee legislature expanded the definition of "another" and "another person" to include a viable fetus as a victim of homicides and assaults. See Tenn. Code Ann. § 39-13-214. The state demonstrated its resolve to apply the newly expanded law by prosecuting a drunk driver who was sentenced to two six-year prison terms for the vehicular homicide deaths of a pregnant woman and her eight-month fetus in the first conviction under the new law. See Bob Fowler, Man Petitions Court for Relief from Vehicular Homicide Terms; Moore Has Been Denied Parole at 3 Hearings, Knoxville News-Sentinel, Apr. 18, 1994, at BC1, available in 1994 WL 7916394. A year later, the Tennessee Court of Criminal Appeals went one step further and upheld the defendant's conviction of vehicular homicide in State v. Williamson, 919 S.W.2d 69 (Tenn. Crim. App. 1995). In Williamson, the defendant was a vehicle owner who let a friend drive while intoxicated. The intoxicated driver subsequently collided with another car killing herself and the other car's occupant, a pregnant woman carrying a fetus in its thirty-eighth week of gestation. See *id.* at 73. The Williamson case became "one of the first in Tennessee to hold the owner of a car-not just the driver-responsible for the death of a fetus in a traffic accident." Gina Fann, Car Owner Jailed for DUI Deaths, Nashville Banner, Dec. 22, 1995, at A12, available in 1995 WL 1278764.

[FN53]. See Ind. Code Ann. § § 35-42-1-6, -50-2-5.

[FN54]. 604 N.E.2d 1170 (Ind. 1992).

[FN55]. Id. at 1190.

[FN56]. See id. at 1189-90.

[FN57]. See Jennifer E. Smith, Grieving Families Seek Law Change, Indianapolis Star, June 28, 1995, at E01, available in 1995 WL 3069616 (reporting the case of an Indiana couple who criticized the low penalties in the state's feticide law after they had been shot and injured as they sat on their porch, killing her eight-month-old fetus).

[FN58]. See Editorial, A Vote for the Unborn's Worth, Indianapolis Star, Jan. 24, 1998, at A8, available in 1998 WL 8306412 (reporting the governor's concern that physicians could be prosecuted for late-term abortions, even though the legislation exempted legal abortions).

[FN59]. See Ind. Code Ann. § 35-50-2-9.

[FN60]. See id. § 35-42-1-1 (murder); id. § 35-42-1-3 (voluntary manslaughter); id. § 35-42-1-4 (involuntary manslaughter); id. § 35-42-2-1.5 (aggravated battery).

[FN61]. See Mass. Gen. Laws Ann. ch. 265, § 1 (West 1990); Okla. Stat. Ann. tit. 21, § § 105, 711 (West 1983); S.C. Code Ann. § 16-3-10 (Law Co- op. 1976).



[FN62]. Massachusetts first addressed the question of a viable fetus as a victim of homicide in Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984), and later applied the same standard in a different setting in Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989). In Cass, the defendant struck a female pedestrian while operating an automobile. See Cass, 467 N.E.2d at 1325. The collision killed the victim's eight-and-one-half-month-old fetus and resulted in the driver's prosecution for violating the vehicular homicide statute. See id. Although it applied the rule prospectively, the Supreme Judicial Court of Massachusetts held that the legislature contemplated that the term "person" would be construed to include viable fetuses in the homicide statutes. See id. See generally Roselee Price, Commonwealth v. Cass: Criminal Liability for the Death of a Viable Fetus Under the Massachusetts Vehicular Homicide Statute, 21 New Eng. L. Rev. 147 (1985) (analyzing the court's rejection of the born alive rule). In Lawrence, the defendant was charged with first-degree murder of a sixteen-year-old girl and involuntary manslaughter of her viable fetus. See Lawrence, 536 N.E.2d at 573. As it had in Cass, the high court held that a viable fetus could also be considered a "person" in the common law crime of homicide. See id. Subsequently, a man was convicted of two counts of involuntary manslaughter for shooting and killing his girlfriend and her viable fetus. See Dorchester Man Convicted in Death of Woman, Fetus, Boston Globe, Apr. 19, 1991, available in 1991 WL 7410428. The supreme court upheld the conviction, see Commonwealth v. Crawford, 629 N.E.2d 1332 (Mass. 1994), and the superior court later rejected the defendant's contention that the two convictions and consecutive sentences violated double jeopardy. See Commonwealth v. Crawford, No. CRIM. A. 089011- 12, 1997 WL 184429 (Mass. Super. Ct. Feb. 27, 1997), aff'd 722 N.E.2d 960 (Mass. 2000).

[FN63]. See infra notes 65-74 and accompanying text.

[FN64]. Oklahoma cases follow the approaches taken in Massachusetts and South Carolina. For example, in Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994), the court considered the case of a defendant who, while intoxicated, drove her vehicle into oncoming traffic and collided with another vehicle. See Hughes, 868 P.2d at 731. The driver of the other vehicle was nine months pregnant and due to deliver in four days. See id. An emergency caesarian section was performed, but the fetus was stillborn. See id. The Oklahoma Court of Criminal Appeals, agreeing with the courts in Cass and Horne, expressly rejected the born alive rule and held that a viable fetus could be the victim of a homicide. See id. The court, however, decided to apply the rule prospectively and reversed the manslaughter conviction. See id. at 704. The court observed that its decision was consistent with its decision in Hooks v. State, 862 P.2d 1273 (Okla. Crim. App. 1993), in which it upheld the defendant's conviction under a manslaughter statute. See id.; see also Okla. Stat. Ann. tit. 21, § 713 (West 1983). The court made it clear that the new status of the fetus under the criminal law would not affect abortion. See Hughes, 868 P.2d at 734-35.

[FN65]. 319 S.E.2d 703 (S.C. 1984).

[FN66]. See id.

[FN67]. See id. at 704.

[FN68]. See id.

[FN69]. 505 S.E.2d 328 (S.C. 1998).

[FN70]. See id. at 331.

[FN71]. See id. at 330.

[FN72]. See id. at 331.

[FN73]. Death Penalty Upheld for Killing Viable Fetus, *Post & Courier* (Charleston, SC), Sept. 17, 1998, at B6, available in LEXIS, News Library, SCNEWS File.

[FN74]. *Id.* (quoting South Carolina Attorney General Charlie Condon).

[FN75]. See Forsythe, *supra* note 12, at 567.

[FN76]. See id. at 568.

[FN77]. 410 U.S. 113 (1973).

[FN78]. Id. at 133.

[FN79]. Forsythe, *supra* note 12, at 567.

[FN80]. See McCavitt, *supra* note 17, at 612.

[FN81]. See Fla. Stat. Ann. § 782.09 (West 1992); Miss. Code Ann. § 97-3-37 (1998); Nev. Rev. Stat. Ann. § 200.210 (Michie 1997); R.I. Gen. Laws § 11-23-5 (1994); Wash. Rev. Code Ann. § 9A.32.060 (West 1988 & Supp. 1999).

[FN82]. See Ga. Code Ann. § 16-5-80 (1999).

[FN83]. Georgia and Washington have maximum sentences of life imprisonment. See Ga. Code Ann. § 16-5-80 (1997); Wash. Rev. Code Ann. § 9A.32.060 (West Supp. 1999); id. § 9A.20.021 (West 1988). Florida's punishment is a term not greater than 15 years, Mississippi's sentence is 2 to 20 years, and Rhode Island's punishment is a term not greater than 30 years. See Fla. Stat. Ann. § 775.082(3)(c) (West 1992 & Supp. 1999); Miss. Code Ann. § 97-3-25; R.I. Gen. Laws § 11-23-3. Georgia extends criminal liability further by providing penalties for feticide by vehicle. See Ga. Code Ann. § 40-6-393.1 (1997).

[FN84]. See, e.g., Brinkley v. State, 322 S.E.2d 49 (Ga. 1984) (holding that the description "quick" in the state's feticide statute was not unconstitutionally vague and noting that the term had been used in criminal provisions in English law since 1803); State v. Willis, 457 So. 2d 959, 960 (Miss. 1984) (holding, in a case of first impression, that manslaughter of a fetus did not merge with the charge of murder of the mother, and the defendant could be charged with murder in the mother's death and manslaughter in the fetus's death); State v. Amaro, 448 A.2d 1257, 1259-60 (R.I. 1982) (holding that the state's homicide statute did not apply to fetuses in light of the state feticide statute that specifically punished the "wilful killing of an unborn quick child"). Compare Anne Koch et al., *Killer's Life Influenced Jurors: Blackwell Avoids Death Penalty; Jury Splits Decision*, *Seattle Times*, June 19, 1996, at B1, available in 1996 WL 3668913 (describing a brutal killing for which the defendant was convicted of three counts of

aggravated first-degree murder and fetal manslaughter, and was sentenced to life imprisonment without the possibility of parole), with Julie Emery, Six-Month Sentence for Driver of Car that Killed Unborn Baby, *Seattle Times*, Dec. 10, 1987, at E11, available in [1987 WL 5386126](#) (describing a case in which the defendant was convicted of vehicular assault, rather than vehicular homicide, because the applicable statute did not apply to fetuses as victims).

[FN85]. See Henry Pierson Curtis, When Fetus Died, Trial Got Complicated; An Orlando Baker Is Charged with Killing His Ex-Wife, Who Was 6 Months Pregnant, *Orlando Sentinel*, Aug. 25, 1991, at B1, available in LEXIS, News Library, Orsent File.

[FN86]. See *id.*

[FN87]. See *id.* (noting that both abortion supporters and opponents believed a conviction could affect the right to abortion).

[FN88]. See Purvette A. Bryant, Fetus Slaying Charge Dropped However, [Michael Garner Faces Up to 30 Years in Prison for Killing His Pregnant Ex- Wife, Angelica](#), *Orlando Sentinel*, Oct. 30, 1997, at D1, available in [1997 WL 13302070](#).

[FN89]. *Id.*; see also [Fla. Stat. Ann. § 782.09](#) (West 1992) ("The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother . . .").

[FN90]. See [Fla. Stat. Ann. § 782.071](#) (West Supp. 1999).

[FN91]. See Mary Lou Pickel, Gardens Woman's Crusade Wins in Legislature, *Palm Beach Post*, May 2, 1988, at 3B, available in LEXIS, News Library, Pbpst File.

[FN92]. See Dina Nelson, Bill to Punish Motorists Who Kill Fetuses Caught in Abortion Debate, *Palm Beach Post*, Apr. 25, 1997, at 6B, available in LEXIS, News Library, Pbpst File.

[FN93]. See *id.*

[FN94]. *Id.*

[FN95]. See Pickel, *supra* note 91, at 3B.

[FN96]. See Unfathomable Grief, Inappropriate Laws, *Palm Beach Post*, June 7, 1998, at 2E, available in LEXIS, News Library, Pbpst File.

[FN97]. [722 S.W.2d 584](#) (Ark. 1987).

[FN98]. See *id.* at 585.

[FN99]. See *id.*

[FN100]. See *id.* at 587; see also Ark. Code Ann. § § 5-1-102(13), - 10-104 (Michie 1997). See generally John T. Shannon, Note, A Fetus Is not a "Person" as the Term Is Used in the Manslaughter Statute: Meadows v. State, 10 U. Ark. Little Rock L.J. 403 (1987-88) (analyzing the court's decision and the born alive rule).

[FN101]. See Meadows, 722 S.W.2d at 587.

[FN102]. See Ark. Code Ann. § 5-13-201(5). An article in The Arkansas Gazette explained that the prior "[e]xisting law makes it impossible to file a criminal charge, for example, when a drunk driver causes the death of a fetus in a wreck." Legislative Calendar, Ark. Gazette, Feb. 25, 1987, at 9A, available in 1987 WL 5677861.

[FN103]. Compare Ark. Code Ann. § 5-4-401 (providing a sentence of not less than 5 years or more than 20 years for battery), with Va. Code Ann. § § 18-2.51.2, -10 (Michie 1996 & Supp. 1999) (providing a sentence of 20 years to life for aggravated malicious wounding).

[FN104]. See Ark. Code Ann. § 5-1-102(13)(B) (Supp. 1999); see also James Jefferson, Senate OKs Measure to Protect the Unborn, A.P. Newswires, Apr. 7, 1999, available in WESTLAW, APWIRES Database (describing efforts to pass the Arkansas legislation). Four defendants recently were charged with capital murder in the state's first test of the fetal homicide laws. See Kristin Everett, Innocent Pleas Entered to Murder Charges in Death of Fetus, A.P. Newswires, Sept. 3, 1999, available in WESTLAW, ARNEWS Database. One defendant has been accused of offering to pay the other three defendants to beat up his girlfriend who was nine-months pregnant. See *id.* The beating killed the fetus. See *id.*

[FN105]. See Cal. Penal Code § 187 (West 1999).

[FN106]. 872 P.2d 591 (Cal. 1994).

[FN107]. See *id.* at 591. See generally Julie N. Qureshi, Note, People v. Davis: California's Murder Statute and the Requirement of Viability for Fetal Murder, 25 Golden Gate U. L. Rev. 579 (1995) (analyzing the court's decision and suggesting that California enact separate feticide legislation).

[FN108]. See Davis, 872 P.2d at 592.

[FN109]. See *id.*

[FN110]. See Cal. Penal Code § 187; Davis, 872 P.2d at 594-96.

[FN111]. See Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970).

[FN112]. See Davis, 872 P.2d at 607 (discussing the California legislature's reaction to Keeler).

[FN113]. Id. at 602.

[FN114]. See id. at 600. Justice Mosk, the sole dissenting judge, vigorously disagreed with the majority's view and believed the legislature intended to limit the murder statute's application to the murder of a viable fetus. See id. at 607 (Mosk, J., dissenting).

[FN115]. See, e.g., Maura Dolan, Assault Causing Miscarriage Can Be Murder Case, L.A. Times, May 17, 1994, at 1, available in 1994 WL 2166085.

[FN116]. Id. (quoting Abby Leibmen, executive director of California Woman's Law Center).

[FN117]. See Jim Mikles, Drunk Driver Who Killed Fetus Gets 21 Years to Life, Sacramento Bee, May 19, 1995, at B1, available in 1995 WL 4119840 (reporting the case of a woman convicted of second-degree murder in the death of an eight-month-old fetus in a drunken driving accident where the driver was driving on a suspended license and previously had been convicted eight times of drunken driving); Tim O'Leary, 27 Years in Death of Fetus. Temecula Man Sentenced for Beating Family Members Including His Pregnant Wife Who Miscarried, Press-Enterprise (Riverside, CA), May 8, 1998, at B1, available in 1998 WL 12001057 (reporting the defendant's second-degree murder conviction for beating his wife, causing a miscarriage in the final weeks of her pregnancy); Teen Sentenced in Fetus Slaying; Fresnan Convicted in Shooting that Led to the Death of 15-Week-Old Fetus, Fresno Bee, July 15, 1995, at B3, available in 1995 WL 7419741 (reporting the defendant's second-degree murder conviction and sentence of twenty years to life in prison for shooting and killing his ex-girlfriend's fifteen-week-old fetus).

[FN118]. See People v. Brown, 42 Cal. Rptr. 2d 155 (Ct. App. 1995).

[FN119]. See People v. Dennis, 950 P.2d 1035 (Cal.), cert. denied, 525 U.S. 912 (1998).

[FN120]. See id. at 1058. The court also held that the second-degree murder conviction, along with first-degree conviction in the mother's death, made the defendant eligible for the death penalty under the state's multiple-murder special circumstance. See id. at 1059-60.

[FN121]. Most medical authorities equate the two terms. See Forsythe, *supra* note 12, at 620 n.338.

[FN122]. Courts in Missouri have interpreted their statutes to include the fetus as a victim for specified crimes. See State v. Knapp, 843 S.W.2d 345, 346 (Mo. 1992); State v. Holcomb, 956 S.W.2d 286, 290-91 (Mo. Ct. App. 1997). The Missouri statute specifies that the term "unborn child" includes human offspring from the moment of conception until birth. See Mo. Ann. Stat. § 1.205.3 (West 1969 & Supp. 1999). The Missouri Supreme Court held that this definition applied to both the state's involuntary manslaughter statute and first-degree murder statute. See Knapp, 843 S.W.2d at 346 (Mo. 1992). In Knapp, the defendant drove across the highway center line while intoxicated and collided with a car driven by a woman who was six-months pregnant. See id. at 346. The mother survived, but the viable fetus died prior to birth from injuries sustained in the accident. See id. The court determined that the definition in section 1.205.3 applied to the involuntary manslaughter statute. See id. at 349; see also Mo. Ann. Stat. § 565.024 (West 1999). The court noted that the legislature passed both statutes on the same day and that the statutes must be read together. See Knapp, 843 S.W.2d at 347. In State v. Holcomb, 956 S.W.2d 286 (Mo. Ct. App. 1997), the defendant was found guilty of murdering his girlfriend and her unborn fetus. See id. at 288. The court, consistent with Knapp, held that an unborn child was a "person" for the purposes of the first-degree murder

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statute. See *id.* at 290; see also Mo. Ann. Stat. § 565.020 (West 1999). The court distinguished between the mother's right to obtain an abortion and the killing of the fetus by a third party without the mother's consent. See Holcomb, 956 S.W.2d at 291. The defendant contended that his actions were equivalent to an illegal abortion and should have been prosecuted as such (with a less severe penalty), rather than as first-degree murder. The court reviewed the point, despite the defendant's failure to preserve it for appeal, and concluded that criminal abortion laws "assume the actual or apparent consent of the mother." *Id.* at 292. The court indicated that its result was consistent with those reached by courts in other states. See *id.*

[FN123]. See 18 Pa. Cons. Stat. Ann. § § 2601-2609 (West 1998). In 1997, Pennsylvania passed the chapter, "Crimes Against Unborn Child," which established penalties for murder, manslaughter, and assault. See *id.* The statute's expansive definition of "unborn child," which includes fetuses at any stage of development, see *id.* § 3203 (West 1983), created great controversy. See, e.g., Bill to Punish Fetal Homicide Poorly Done, Allentown Morning Call, Sept. 28, 1997, at A26, available in 1997 WL 11127446. Pro-choice activists were concerned that defining the "unborn child" separately from the mother created an artificial conflict between mother and fetus, and the Pennsylvania Coalition Against Domestic Violence disagreed with the law's focus on the fetus instead of the mother. See Pennsylvania: Feticide Bill Close to Becoming Law, Abortion Rep., Aug. 8, 1997, available in LEXIS, News Library, Wire Service Stories File.

[FN124]. See La. Rev. Stat. Ann. § § 14:2, 32.5 (West 1997). This feticide statute specifies three degrees of feticide that are comparable to murder, manslaughter, and criminally negligent homicide, including those inflicted by vehicle. See *id.* § § 14:32.5 to .8. The fetus is protected from the point of fertilization until birth. See *id.* § 14:2. In State v. Smith, 676 So. 2d 1068 (La. 1996), the Supreme Court of Louisiana upheld the statute. See *id.* (holding that the defendant's convictions for manslaughter and feticide did not violate double jeopardy in the strangulation death of his girlfriend and the subsequent death of her fetus); see also Jarvis DeBerry, Slidell Man Denied Driver's License, Fetus Was Killed in DWI Crash, New Orleans Times-Picayune, Jan. 28, 1999, at B1, available in 1999 WL 4390991 (describing a feticide conviction of a defendant who, while driving intoxicated, crossed the highway center line and slammed head-on into a pickup truck carrying a couple on the way to the hospital for their unborn child's birth; the unborn child was killed in the accident).

[FN125]. See N.D. Cent. Code § § 12.1-17.1-01 to -06 (1997). North Dakota's statutes include a chapter entitled "Offenses Against Unborn Children," with offenses ranging from murder to assault. See *id.* § § 12.1-17.1-01 to -07. The statute protects the fetus from conception to birth. See *id.* § 12.1-17.1-01.

[FN126]. See 720 Ill. Comp. Stat. Ann. 5/9-1.2 (West 1993). Illinois enacted its feticide legislation in response to the state supreme court's ruling in People v. Greer, 402 N.E.2d 203 (Ill. 1980) (upholding the born alive rule). The initial feticide statute contained a viability requirement. See People v. Ford, 581 N.E.2d 1189, 1200 (Ill. App. Ct. 1991). In 1986, the legislature repealed the 1981 statute and enacted laws specifying several intentional crimes against "unborn children." 720 Ill. Comp. Stat. 5/9- 1.2, -2.1, -3.2, 5/12-3.1, -4.4 (applying to the fetus at any stage of development); see also Bruce Kirkham, State Senate OKs Bill Making Harm to Fetus a Crime, Chi. Sun-Times, May 14, 1986, at 12, available in 1986 WL 3795970 (stating that the proposed offenses would range from homicide to battery). Subsequent cases have upheld both the validity of the statute and its penalties. See People v. Shoultz, 682 N.E.2d 446 (Ill. App. Ct. 1997) (holding that the penalties under the feticide statute were not disproportionate when compared to penalties for illegal abortion); Ford, 581 N.E.2d at 1201 (holding that the statute was constitutional even though it did not distinguish between viable and nonviable fetuses).

[FN127]. See Minn. Stat. Ann. § § 609.266, .2661-.2665, .267-.2672, .268 (West 1987 & Supp. 1999).

[FN128]. See 1998 Wis. Legis. Serv. 295 (West). In 1998, Wisconsin enacted fetal homicide legislation in response to a jury's refusal to convict a man of killing a fetus under a criminal abortion statute. See *id.*; Richard P. Jones & Mike Johnson, Cocaine Mom, Feticide Bills Ok'd, Debate Turns Emotional Over Measures Aimed at Protecting

Fetuses, Milwaukee J. Sentinel, May 2, 1998, at 1, available in 1998 WL 6320568; see also Wis. Stat. Ann. § 940.04(2)(a) (West 1996) (defining abortion as "[i]ntentionally destroy[ing] the life of an unborn quick child"). The Wisconsin Supreme Court, upon certification from the trial court, had held that the defendant could be charged under the criminal abortion statute and remanded the case for trial. See State v. Black, 526 N.W.2d 132, 133 (Wis. 1994). At trial, however, the prosecution could not prove the requisite intent, and the jury acquitted. See Jones & Johnson, *supra*, at 1. The new statute dispenses with the requirement of intent for many offenses. See Alan J. Borsuk, Wisconsin Law Makes Injuring Fetus a Criminal Act, *Clev. Plain Dealer*, June 18, 1998, at 17A, available in 1998 WL 4140874.

[FN129]. 378 N.W.2d 625 (Minn. 1985).

[FN130]. See *id.* at 629.

[FN131]. See *id.* at 626.

[FN132]. See *id.* at 630. The court noted that Minnesota is a "code" state as opposed to a "common law" state. See *id.* at 627; cf. *supra* notes 61-74 and accompanying text (discussing three "common law" states, Massachusetts, South Carolina, and Oklahoma, and their state courts' decisions to read their statutes expansively in the absence of legislative direction).

[FN133]. See Lawmakers React to Ruling on Fetus, *Chi. Trib.*, Dec. 8, 1985, at 20, available in 1985 WL 2566887 (noting predictions that abortion would be an issue in a renewed legislative debate); Minnesota Court Rules Unborn Child Not Person, *Chi. Trib.*, Dec. 6, 1985, at 24, available in 1985 WL 2566369 (discussing the Minnesota Supreme Court ruling that prompted legislative action).

[FN134]. See Minn. Stat. Ann. § § 609.266, .2661-.2665, .267-.2672, .268, 609.21 (West 1987 & Supp. 1999).

[FN135]. See, e.g., State v. Merrill, 450 N.W.2d 318, 322-24 (Minn. 1990). In *Merrill*, the defendant was charged in the shooting death of his girlfriend and her twenty-eight-day-old embryo. See *id.* at 320. The decision was controversial because it was unclear whether the defendant knew that the woman was pregnant, because of the embryo's early gestational age, and because the statute did not distinguish between viable and nonviable fetuses. See *id.* at 321; Donna Halvorsen, Court Upholds State Fetal Death Laws, Leaves Questions on When Life Begins, *Star Trib. (Minneapolis, MN)*, Jan. 19, 1990, at 1A, available in 1990 WL 5390274. The defendant based his equal protection claim on the fact that he stood to be punished for actions that, if taken by a person aborting a nonviable fetus, would not result in punishment. See Merrill, 450 N.W.2d at 321. The court found the disparity to be valid, reasoning that one who terminates a woman's pregnancy without her consent is not similarly situated with a woman who elects to have a legal abortion. See *id.* at 321-22. The court also rejected the defendant's argument that the statute was void for vagueness because it "fail[ed] to give fair warning to a potential violator," particularly when neither the violator nor the pregnant woman knows about the pregnancy. *Id.* at 323. The reaction to the *Merrill* decision was mixed. Abortion opponents were pleased with the court's decision upholding crimes against the fetus. See Donna Halvorsen, Both Sides Find Reason to Like Ruling on Fetal Homicide Law, *Star Trib. (Minneapolis, MN)*, Jan. 20, 1990, at 4B, available in 1990 WL 5390139. Conversely, abortion rights activists appreciated the court's distinction between abortion and the actions of third parties who kill fetuses without the mother's consent, although the activists were still concerned about the state considering fetuses as persons. See *id.* The U.S. Supreme Court denied certiorari, see Merrill v. Minnesota, 496 U.S. 931 (1990), and the defendant ultimately pleaded guilty to two counts of second-degree murder. See Jill Hodges, Fetus Law Challenge Fails; Murder Trial Can Proceed, *Star Trib. (Minneapolis, MN)*, June 12, 1990, at 1B, available in 1990 WL 5386310; Man Says He Killed Woman, Embryo, *Star Trib. (Minneapolis, MN)*, Sept. 15, 1990, at 4B, available in 1990 WL 5344690.

[FN136]. See Ariz. Rev. Stat. Ann. § 13-1103 (West 1989 & Supp. 1998).

[FN137]. See S.D. Codified Laws § 22-1-2(50A), -16-1, -1.1 (Michie 1998). South Dakota passed fetal homicide legislation in 1995. See South Dakota: Fetal-Homicide Bill Awaits Gov's Signature, Abortion Rep., Feb. 21, 1995, available in LEXIS, News Library, Wire Service Stories File. The statutes include the "unborn child" in the definition of homicide and provide protection in specific homicide and assault statutes. See S.D. Codified Laws § 22-16-1, -1.1, -20, -41, -42, 22-18-1.2, -1.3.

[FN138]. See Utah Code Ann. § 76-5-201 (1995 & Supp. 1998). The Supreme Court of Utah previously held that an unborn fetus was not a "person" within the vehicular homicide statute. In 1996, a defendant was charged with two counts of capital murder in the stabbing death of his girlfriend and her nonviable fetus and pleaded guilty to one count. See State v. Larsen, 578 P.2d 1280, 1282 (Utah 1978).

[FN139]. Ariz. Rev. Stat. Ann. § 13-1103(A)(5) (West Supp. 1998).

[FN140]. See Susie Steckner, Fetal-Killing Case Provides Fuel for Abortion Debate, Ariz. Republic, Apr. 13, 1997, at B1, available in 1997 WL 8355886.

[FN141]. See *id.*

[FN142]. See *id.* In another case, the court sentenced a man to 20 years for stabbing his ex-girlfriend, resulting in the deaths of both the woman and her six-week-old fetus. See Joe Salkowski, Ex-Wrangler Gets 20 Years in '92 Stabbing Death of Pregnant Girlfriend, Ariz. Daily Star, June 8, 1993, at 2B, available in 1993 WL 5746738. Another man was convicted of felony murder, subject to the death penalty, for killing his ex-girlfriend's sister and eight-month-old fetus. See Pila Martinez, Man, 44, Convicted in Deaths of Ex-Girlfriend's Sister, Fetus, Ariz. Daily Star, Apr. 10, 1996, at 2B, available in 1996 WL 4983644. The Arizona Supreme Court, however, reversed a defendant's manslaughter conviction because of a faulty jury instruction regarding transferred intent, even though it upheld his first-degree murder conviction for killing the mother. See State v. Amaya-Ruiz, 800 P.2d 1260, 1280-81, 1291 (Ariz. 1990) (finding that the statute does not provide for transferred intent, but rather requires mental states for the crimes against both the mother and fetus).

[FN143]. See *infra* notes 144-50, 153-75 and accompanying text.

[FN144]. See N.M. Stat. Ann. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie 1998). The statutes entitled "Injury to pregnant woman" and "Injury to pregnant woman by vehicle," provide harsher penalties for injuries caused while driving under the influence. See *id.* § 66-8-101.1 (Michie 1998). These statutes do not specify any fetal gestational age. See *id.* § 66-8-101.1 (Michie 1998); *id.* § 30-3-7 (Michie 1994). In 1996, a drunken driver ran a red light, resulting in the deaths of two women, one of them pregnant. See DWI Deaths Get Man 8 Years in Prison, Albuquerque J.-Trib., Dec. 5, 1996, at A3, available in WESTLAW, ALBQ-JTRIB Database. The defendant pleaded guilty to charges including vehicular homicide, injury to a pregnant woman by vehicle, and driving while intoxicated (DWI). See *id.* He was sentenced to serve eight years in prison. See *id.*

[FN145]. See Wyo. Stat. Ann. § 6-2-502(a)(iv) (Lexis 1999) (providing penalties for aggravated assault and battery that cause bodily injury to a pregnant woman). The state also provides increased penalties for persons who cause miscarriages while driving under the influence of alcohol. See *id.* § 31-5-233(h).



[FN146]. New Hampshire specifically exempts the fetus from protection under its homicide statutes. See N.H. Rev. Stat. Ann. § 630:1(IV) (1996). In 1991, however, the legislature considered legislation that would include the fetus in the vehicular homicide statute. See New Hampshire: No Vote Taken on Fetal Homicide Bill, Abortion Rep., Mar. 1, 1991, available in LEXIS, News Library, Wire Service Stories File. One pro-choice advocate recommended that the proposed law "focus on the 'mother as victim rather than the fetus.'" *Id.* (quoting Susan Arnold from the National Abortion and Reproductive Rights Action League). The legislature eventually enacted laws that would allow a felony prosecution for an assault on a pregnant woman that "[p]urposely or knowingly causes injury" resulting in miscarriage, without specifying the fetus's gestational age. N.H. Rev. Stat. Ann. §§ 631:1(I)(c), :2(I)(e) (1999).

[FN147]. See Kan. Stat. Ann. § 21-3440, -3441 (1995). For further discussion on this statute, see *infra* notes 153-75 and accompanying text.

[FN148]. Iowa enacted a statute in 1996 criminalizing "[n]onconsensual termination-serious injury to a human pregnancy." Iowa Code Ann. § 707.8 (West Supp. 2000). The law covers both intentional and unintentional terminations, and the fetus's gestational age is not specified. See *id.* The statute was the result of intense lobbying by two families who lost viable fetuses as a result of reckless drivers. See Roos Jonathan, House Approves Pregnancy Bill, Des Moines Reg., Feb. 20, 1996, at 6, available in 1996 WL 6227249. "Any time a woman chooses to become pregnant, she should have the right to continue that pregnancy," said one of the mothers. *Id.* The bill's floor manager said "it provides justice to parents with shattered dreams." *Id.* In April 1998, a man was charged in accordance with the new law for the beating death of his girlfriend and her unborn fetus. See Metro Iowa, Des Moines Reg., Apr. 8, 1998, at 4, available in 1998 WL 3203235.

[FN149]. In 1996, Ohio legislators passed legislation in response to the death of a woman and her eight-month-old fetus in a reckless driving incident, when the driver could not be charged with the fetus's death. See Laura Goldberg, Protection Bill Signed for Fetus, Law Stems from Local Traffic Death, Cin. Enquirer, June 7, 1996, at C1, available in 1996 WL 2245181; Hands Off: Ohio "Feticide" Bill Jeopardized by Abortion Meddling in the House, Cin. Enquirer, Apr. 23, 1996, at A6, available in 1996 WL 2239572; Randy Ludlow, Ohio Lawmakers Pass "Feticide" Bill, Death of Unborn by Crime Punishable, Cin. Post, May 30, 1996, at 8A, available in 1996 WL 5062237. See generally David M. Henry, Comment, Feticide: Time to End Ohio's Blind Imitation of the Past, 17 Ohio N.U. L. Rev. 659 (1991) (proposing changes to Ohio statutes that would include feticide). The legislature modified existing homicide statutes to add the phrase "unlawful termination of another's pregnancy." Ohio Rev. Code Ann. §§ 2903.01-.07 (West 1997 & Supp. 1999). The legislation also defined "another's unborn" as a victim in various types of assault, adopting a two-pronged approach to punishment for fetal injuries or death. See *id.* § 2903.08, .11, .14 (West 1997). The laws cover fertilization until birth. See *id.* § 2903.09. A military court convicted an Air Force member of involuntary manslaughter, assault, and aggravated assault for beating his wife and causing her miscarriage. See Major Michael J. Davidson, Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law, Army Law., July 1998, at 23 (describing the Robbins case and also providing an excellent overview of fetal crimes in the military context); Ohio: Airman Sentenced to 8 Years for Fetal Homicide, Abortion Rep., Dec. 11, 1996, available in LEXIS, News Library, Wire Service Stories File. This was the first test of the new law. See *id.* Other persons have been convicted of aggravated vehicular homicide under the new laws for causing fetal deaths on the road. See Kristen Delguzzi, Driver Guilty in Death. Juror: Fetus Law Didn't Sway Verdict, Cin. Enquirer, May 3, 1997, at A1, available in 1997 WL 5448835 (reporting the conviction of a woman in a "road rage" incident); Mark Gillispie, Driver Sentenced to Prison for Role in Fatal Car Crash, Clev. Plain Dealer, Aug. 20, 1998, at 1B, available in 1998 WL 4150017 (reporting the conviction of a man in a drunk driving incident).

[FN150]. See Del. Code Ann. tit. 11, §§ 222(22), 605-06, 612(a)(9) (Supp. 1999). Delaware enacted laws making it a felony to abuse or assault pregnant women. See Judge Sentences Waterman to Life in Prison for Killing Pregnant Wife, A.P. Newswires, Dec. 3, 1999, available in WESTLAW, APWIRES Database. The legislature acted in response to the case of a defendant who strangled his wife two days before she was to give birth. See *id.*

[FN151]. See, e.g., N.M. Stat. Ann. § 30-3-7 (Michie 1994); id. § 66-8-101.1 (Michie 1998).

[FN152]. See Va. Code Ann. § § 18.2-31(11), -32.1, -51.2(B) (Michie Supp. 1999). Under the capital murder statute in Virginia, for example, a defendant can receive the death penalty for the premeditated intentional murder of a pregnant woman.

[FN153]. 699 P.2d 499 (Kan. 1985).

[FN154]. 755 P.2d 511 (Kan. 1985).

[FN155]. 781 P.2d 678 (Kan. 1989).

[FN156]. See Burrell, 699 P.2d at 500.

[FN157]. See id.

[FN158]. See id.

[FN159]. See id. at 503.

[FN160]. See State v. Trudell, 755 P.2d 511, 512 (Kan. 1988).

[FN161]. See id. at 513.

[FN162]. Id. at 514 (quoting Burrell, 699 P.2d at 502).

[FN163]. See State v. Green, 781 P.2d 678, 681 (Kan. 1989).

[FN164]. See id. at 683.

[FN165]. See Kan. Stat. Ann. § § 21-3440, -3441 (1995).

[FN166]. See id.

[FN167]. See id. § 21-3440.

[FN168]. See id. § 21-3441.

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[FN169]. Judy Lundstrom Thomas, Panel Sets Wording of-Fetal Death Measure, *Wichita Eagle*, Jan. 31, 1995, at 1D, available in WESTLAW, WICH-EAGLE Database.

[FN170]. *Id.*

[FN171]. *See id.*

[FN172]. *See id.*

[FN173]. *See id.*

[FN174]. *Id.*

[FN175]. *Id.*

[FN176]. Several states have considered fetal homicide legislation in the past few years. See A.B. 722, Reg. Sess. (Cal. 1999-2000) (proposed DUI manslaughter bill); S.B. 249, Reg. Sess. (Ky. 1998) (1998 proposal to define human being from fertilization to death); HILL. 805, 119th Leg., Reg. Sess. (Me. 1999) (proposed laws on crimes against unborn children); H.B. 4476, 89th Leg., Reg. Sess. (Mich. 1997) (injury to pregnant woman bill); S.B. 21, 89th Legis., Reg. Sess. (Mich. 1997) (pregnant woman and prenatal protection act); L.B. 111, 96th Leg., 1999 Reg. Sess. (Neb.) (proposed bill defining "unborn child" and redefining "person" in homicide laws); A. 2524, 208th Leg., Reg. Sess. (N.J. 1998) (feticide bill); S.B. 2171, 222d Reg. Sess. (N.Y. 1999) (proposed laws on fetal death and injury); H.B. 920, 1999 Reg. Sess. (N.C.) (proposed statute on injury to pregnant woman by vehicle); S.B. 188, 76th Leg., Reg. Sess. (Tex. 1999) (proposed laws on injury to pregnant woman); H.B. 357, 65th Biennial Sess. (Vt. 1999) (proposed statutes on crimes against fetuses); see also Peggy Fikac, Senate Passes Bill Toughening Sanctions for Assaulting Pregnant Women, *A.P. Newswires*, Mar. 31, 1999, available in WESTLAW, APWIRES Database (describing Texas's proposed statutes on assaults against pregnant women); Joseph Gerth, 1998 Kentucky General Assembly; House Backs Bill to Protect Fetuses, Sponsor Calls It a Step Toward Ban On Abortions, *Courier- J. (Louisville, KY)*, Feb. 21, 1998, at 1A, available in [1998 WL 2098128](#) (describing efforts in Kentucky to enact fetal protection legislation); Terrence Stutz, Bill Would Make It a Felony to Injure Pregnant Women, *Dallas Morning News*, Mar. 31, 1999, at 23A, available in [1999 WL 4111254](#) (describing Texas's proposed legislation); Robynn Tysver, Lawmakers Debate When Life Begins, *Omaha World-Herald*, Mar. 5, 1999, at 15, available in [1999 WL 4490657](#) (describing Nebraska's debate over fetal homicide law).

[FN177]. *See* Ariz. Rev. Stat. Ann. § 13-1103.A.5 (West 1989); Ark. Code Ann. § 5-1-102(13)(B) (Michie Supp. 1999); Cal. Penal Code § 187 (West 1999); Tenn. Code Ann. § 39-13-214 (1997); Utah Code Ann. § 76-5-201 (1995 & Supp. 1998).

[FN178]. *See* Fla. Stat. Ann. § 782.09 (West 1992); Ga. Code Ann. § 16-5-80 (1999); 720 Ill. Comp. Stat. Ann. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (West 1993); Ind. Code Ann. § § 35-42-1-1(4), -42-1-6 (Michie 1998); La. Rev. Stat. Ann. § § 14:2(7)(11), :32.5, :32.9 (West 1997 & Supp. 1999); Mich. Comp. Laws Ann. § 750.322 (West 1998); Minn. Stat. Ann. § § 609.266, .2661-.2665, .267-.2672, .268 (West Supp. 1999); Miss. Code Ann. § 97-3-37 (1999); Mo. Ann. Stat. § 1.205.3 (West 1969 & Supp. 1990); Nev. Rev. Stat. Ann. § 200.210 (Michie 1997); N.D. Cent. Code § 12.1-17.1-01, -02 to -06 (1997); 18 Pa. Cons. Stat. Ann. § § 2601-2609 (West 1998); R.I. Gen. Laws § 11-23-5 (1994); S.D. Codified Laws § § 22-1-2(50A), -16-1, -16-1.1 (Michie 1998); Wash. Rev. Code Ann. § 9A.32.060 (West 1988 & Supp. 1999); 1998 Wis. Legis. Serv. 295 (West).

[FN179]. See Ellen Nakashima, Va. Debates Law on Fetal Homicide; Legislation Entan-

[FN180]. led with Abortion Issue, Wash. Post, Feb. 26, 1996, at D1. See generally 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) (detailing state statutes regarding wrongful deaths of fetuses). See, e.g., Peter Baker & Spencer S. Hsu, Virginia Assembly Focuses on Abortion, House Passes Notification Bill; Senate Seeks to Outlaw Feticide, Wash. Post, Feb. 14, 1996, at C3 (describing the criticism of pro-choice activists that passing the feticide bill could result in a "slippery slope" that could end up limiting abortion rights).

[FN181]. See Klasing, *supra* note 179, at 966 (explaining the conflict between a woman's right to terminate her pregnancy and a wrongful death act on behalf of the same fetus) (citing Toth v. Goree, 237 N.W.2d 297, 301 (Mich. Ct. App. 1975)); see also What's Wrong with Fetal Rights: A Look at Fetal Protection Statutes and Wrongful Death Actions on Behalf of Fetuses (last modified July 1996) <<http://www.aclu.org/issues/reproduct/fetal.html>> [hereinafter Fetal Rights] (providing a list of factors, devised by the ACLU, to be considered when drafting fetal protection legislation).

[FN182]. Jeffrey A. Parness, Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life, 22 Harv. J. on Legis. 97, 136 n.169 (1985).

[FN183]. See Bicka A. Barlow, Severe Penalties for the Destruction of "Potential Life"-Cruel and Unusual Punishment?, 29 U.S.F. L. Rev. 463, 502-03 (1995).

[FN184]. See Iowa Code Ann. § 707.8 (West 1993), amended by § 707.8 (West Supp. 1999); Kan. Stat. Ann. § § 21-3440, -3441 (1995); N.M. Stat. Ann. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie 1998).

[FN185]. See Ark. Code Ann. § 5-13-201(5)(A)-(C) (Michie 1997); Del. Code Ann. tit. 11, § § 222(22), 605-06, 612(a)(9) (Supp. 1999); Ohio Rev. Code Ann. § § 2903.01-.08, .11, .14 (West 1997); Va. Code Ann. § § 18.2-31, -32.1, -51.2 (Michie Supp. 1999); Wyo. Stat. Ann. § 6-2- 502(a)(iv) (Michie 1999).

[FN186]. See Joy Powell, Homicide Law Doesn't Cover Fetus in Crash, Omaha World-Herald, Feb. 20, 1997, at 1, available in 1997 WL 6293299 (describing parents and grandparents as upset that a drunken driver would not be penalized separately for causing the death of a fetus in a motor vehicle accident).

[FN187]. See Ariz. Rev. Stat. Ann. § 13-1103.A.5 (West 1989); Ark. Code Ann. § 5-1-102 (Supp. 1999); Cal. Penal Code § 187 (West 1999); Fla. Stat. Ann. § 782.09 (West 1992); Ga. Code Ann. § 16-5-80 (1999); Ind. Code Ann. § § 35-42-1-1(4), -1-6 (Michie 1998); La. Rev. Stat. Ann. § 14:32.5 (West 1997); Mich. Comp. Laws Ann. § 750.322 (West 1991); Miss. Code Ann. § 97-3-37 (1999); Nev. Rev. Stat. Ann. § 200.210 (Michie 1997); R.I. Gen. Laws § 11-23-5 (1994); Utah Code Ann. § 76-5-201 (1995 & Supp. 1998).

[FN188]. 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 to -06 (1997) (including murder, manslaughter, negligent homicide, aggravated assault and assault); 18 Pa. Cons. Stat. Ann. § § 2601-2609 (West 1998) (including first,

second and third-degree murder, voluntary manslaughter and aggravated assault); S.D. Codified Laws § § 22-1-2(50A), -16-1, -16-1.1, -16-20, -16-41 to -42 (Michie 1998) (including fetal homicide, second-degree manslaughter, vehicular homicide and vehicular battery); Tenn. Code Ann. § 39-13-214 (1997) (including homicide and assault); Wash. Rev. Code Ann. § 9A.32.060 (West Supp. 1999) (including manslaughter); id. § 9A.36.021 (including assault); 1998 Wis. Legis. Serv. 295 (West) (including crimes similar to that covered in Minnesota).

[FN189]. See Barlow, *supra* note 183, at 485-89.

[FN190]. See *id.* at 482-84 (citing People v. Campos, 592 N.E.2d 85 (Ill. App. Ct. 1992)). The court determined that a causal link existed between a gunshot wound to the mother and the resultant deaths of both mother and fetus. See *id.*

[FN191]. Iowa Code Ann. § 707.8 (West 1993 & Supp. 1999).

[FN192]. See Ohio Rev. Code Ann. § § 2903.01-08, .11, .14 (West 1997). Ohio Code sections 2903.11 and 2903.14, discussing assault, include assault against both "another and another's unborn." *Id.* § § 2903.11, .14.

[FN193]. See Del. Stat. Ann. tit. 11, § 222(22), 605-06, 612(a)(9) (1995) (including abuse of a pregnant female and recklessly or intentionally causing physical injury to a pregnant female); Kan. Stat. Ann. § § 21-3440, -3441 (1995) (including injury and injury by vehicle); N.H. Rev. Stat. Ann. § § 631:1.I.(c), :1.II., :2.I.(e), :2.II. (1996) (including first and second-degree assault); N.M. Stat. Ann. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie 1998) (including injury and injury by vehicle); Va. Code Ann. § § 18.2-31, -32.1, -51.2 (Michie Supp. 1999) (including capital murder, murder, and aggravated malicious wounding); Wyo. Stat. Ann. § 6-2-502(a)(iv) (Michie 1999) (including aggravated assault and battery).

[FN194]. See Barlow, *supra* note 183, at 498.

[FN195]. See *id.* at 499.

[FN196]. See *id.* at 493.

[FN197]. See *id.*

[FN198]. 872 P.2d 591, 602-20 (Cal. 1994) (Mosk, J., dissenting).

[FN199]. See *id.* at 602.

[FN200]. *Id.* at 614 (citing 20 Encyclopedia Britannica (15th ed. 1990)).

[FN201]. See *id.* at 619.

[FN202]. See *id.* at 620.

[FN203]. See *id.*

[FN204]. See Barlow, *supra* note 183, at 498.

[FN205]. See *id.* at 498-99.

[FN206]. See, e.g., Va. Code Ann. § 18.2-74 (Michie 1996).

[FN207]. *Id.* § 18.2-74(b).

[FN208]. *Id.* § 18.2-74(c).

[FN209]. See *Roe v. Wade*, 410 U.S. 113, 162 (1973).

[FN210]. See *supra* notes 144-50 and accompanying text.

[FN211]. See Va. Code Ann. § 18.2-31, -32.1, -51.2 (Michie Supp. 1999).

[FN212]. 470 P.2d 617 (Cal. 1970); see *supra* text accompanying notes 20- 28.

[FN213]. 652 S.W.2d 61 (Ky. 1983); see *supra* note 32.

[FN214]. 376 S.E.2d 1 (N.C. 1989); see *supra* text accompanying notes 33- 43.

[FN215]. See Fetal Rights, *supra* note 180.

[FN216]. See *id.*

[FN217]. If states specify the fetus as victim, any proposed legislation should include specific exceptions for legal abortion and the conduct of the mother. For example, North Dakota's statute has the following exception regarding abortion: This chapter does not apply to acts or omissions that cause the death or injury of an unborn child if those acts or omissions are committed during an abortion performed by or under the supervision of a licensed physician to which the pregnant woman has consented, nor does it apply to acts or omissions that are committed pursuant to usual and customary standards of medical practice during diagnostic or therapeutic treatment performed by or under the supervision of a licensed physician. N.D. Cent. Code § 12.1-17.1- 07 (1997). Similarly, Missouri's statute includes the following exception regarding conduct of the pregnant woman: "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." Mo. Ann. Stat. § 1.205.4 (West Supp. 1999). The problems of maternal abuse are beyond the scope of this Note.

[FN218]. See *Fetal Rights*, supra note 181.

[FN219]. See *id.*

[FN220]. See *id.*

[FN221]. See *id.*

[FN222]. See *id.*

[FN223]. See *id.*

[FN224]. See 720 Ill. Comp. Stat. Ann. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (West 1993). The statutes include intentional homicide, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery, and aggravated battery.

[FN225]. See 720 Ill. Comp. Stat. Ann. 5/9-1.2, -2.1, -3.2, 5/12-3.1.

[FN226]. See 720 Ill. Comp. Stat. Ann. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4.

[FN227]. See *id.*

[FN228]. See generally Craig O. Smith, *Legal Murder: The Intentional Killing of the Unborn*, 11 *Crim. Just. J.* 423 (1989) (describing judicial review of feticide statutes and generally addressing the issue of fetal homicide).

[FN229]. 581 N.E.2d 1189 (Ill. App. Ct. 1991).

[FN230]. *Id.* at 1199.

[FN231]. See *id.* at 1201.

[FN232]. 592 N.E.2d 85 (Ill. App. Ct. 1992).

[FN233]. See *id.* at 89.

[FN234]. See *id.*

[FN235]. See *id.* at 96.

[FN236]. See *id.*

[FN237]. See Fetal Rights, *supra* note 181; *supra* text accompanying note 218.

[FN238]. See Kan. Stat. Ann. § 21-3440 to -3441 (1995); N.M. Stat. Ann. § 30-3-7 (Michie 1994); *id.* § 66-8-101.1 (Michie Supp. 1998).

[FN239]. See Va. Code Ann. § 18.2-31, -32.1, -51.2 (Michie Supp. 1999).

[FN240]. See Fetal Rights, *supra* note 181; *supra* text accompanying note 218.

[FN241]. See, e.g., *supra* notes 170-75 and accompanying text.

[FN242]. See *supra* note 239 and accompanying text. The current Virginia law originated on January 22, 1996, with the introduction of Virginia Bill 495 by former State Senator, and current Virginia attorney general, Mark L. Earley. See S.B. 495, 1996 Reg. Sess. (Va.). The bill provided that "a fetus is considered a person and can be the victim of a murder." *Id.* Earley proposed the bill in response to the murder of a pregnant woman and her unborn child. See Mike Allen, 'Feticide' Could Be Outlawed, Legal Abortion Would Be Exempt, Rich. Times-Dispatch, Feb. 12, 1996, at A1, available in 1996 WL 2290309 [hereinafter Allen, Outlawed]. Earley said that "[t]he family was distraught, and the intensity of their loss was exacerbated when they learned that no additional punishment would be imposed on the offender for killing the victim's fetus." *Id.* The Senate Committee for Courts of Justice amended the bill to allow the killer of an unborn to be subject to the charge of first or second-degree murder, depending on the absence or presence of premeditation. The proposal received vigorous debate in the General Assembly and the press. Alexandria's commonwealth attorney, John E. Kloch, was concerned with where the bill would lead, stating, "[i]f a fetus, by this statute, is now a person, can this fetus inherit property? Do social services have an obligation to support it? . . . This starts on a philosophical train [and] we don't know where it goes." Nakashima, *supra* note 179, at D1. The debate also centered around the bill's potential impact on a woman's right to choose to have an abortion, despite its specific exclusion from the bill. See Baker & Hau, *supra* note 180, at C3. In support of the law, Virginia's chief medical examiner remarked: I have never had a homicide of a mother go to court where it was permitted to say she was pregnant, and that the infant was killed. It's a free homicide. How would you feel if you were sitting there examining a baby that was perfect and had a bullet through its brain, and know that this was not a crime? Allen, *supra*, at A1 (concluding that "for any battered woman in this commonwealth, we ought to send a loud and clear message that you cannot beat on pregnant women and not get a stiffer charge"). The main opposition to the feticide bill came from pro-choice forces. Although the bill would have exempted legal abortion, as Planned Parenthood lobbyist Karen Raschke told Virginia senators, "[i]f you call a fetus a person for the purpose of the homicide statutes, it makes it arguable that a fetus is a person for the purposes of abortion." *Id.* Adding fuel to the fire was the fact that admittedly antiabortion state senators sponsored the bill. See Kerry Dougherty, Editorial, Do We Really Need a Feticide Bill?, Virginian-Pilot, Feb. 24, 1996, at A11, available in 1996 WL 5986302. They were accused of having a secret agenda: Have the Commonwealth acknowledge a viable fetus as a person, with the intent of opening the door to restricting abortions. See Mike Allen, Subpanel Rejects 'Feticide' Bill, Full House Panel Debates It Today, Rich. Times-Dispatch, Mar. 4, 1996, at A1 [hereinafter Allen, Rejects]; Susie Dorsey, Editorial, Honest Talk Still Needed on Abortion, Daily Press (Newport News, Va.), Mar. 17, 1996, at H3. Ultimately, the feticide bill failed when an alternative measure passed in 1997 that focused on the pregnant woman as the victim, rather than the fetus. See Allen, *Rejects supra*, at A1; Nakashima, *supra* note 179, at D1. The legislation, which modified the state's capital murder, murder, and aggravated malicious wounding statutes, see Va. Code Ann. § 18.2-31, -32.1, -51.2 (Michie Supp. 1999), enjoyed the strong support of Planned Parenthood of Virginia. See David M. Poole, House Panel Nixes 'Feticide' as Separate Murder Charge, Raises Prison Term 5 Years Instead, Roanoke Times, Nov. 26, 1996, at C3, available in 1996 WL 6060830 (quoting Karen Raschke, "We are recognizing the horrible injury



suffered by these women").

[FN243]. See Ark. Code Ann. § 5-13-201 (Michie 1997); Fla. Stat. Ann. § 782.071 (West Supp. 1999); Ga. Code Ann. § 40-6-393.1 (1997); Ill. Comp. Stat. Ann. 5/9-3.2 (West 1993); Ind. Code Ann. § 35-42-1-4 (Michie 1998); La. Rev. Stat. Ann. § 14:32.8 (West 1997); Minn. Stat. Ann. § 609.21 (West Supp. 1999); Mo. Ann. Stat. § 565.024 (West 1999); N.D. Cent. Code § 12.1-17.1-04 (1997); S.D. Codified Laws § 22-16-41 (Michie 1998); Tenn. Code Ann. § 39-13-213(a)(2) (1997); Utah Code Ann. § 76-5- 201 (1995); 1998 Wis. Legis. Serv. 295 (West). Massachusetts, Oklahoma, and South Carolina have included viable fetuses in vehicular homicide laws by judicial interpretation. In addition, Pennsylvania's voluntary manslaughter of an unborn child statute includes negligent or reckless conduct, and thus possibly covers vehicular homicide. Of the eight states that do not include vehicular homicide, only seven penalize crimes against the fetus as manslaughter, while California only punishes fetal murder. See generally James J. Dietrich, Problems and Charging Choices in Prosecuting Vehicular Fatalities, Prosecutor, Jan.-Feb. 1997, at 32 (describing prosecutors' options regarding vehicular homicide and traditional homicide); Alan Hersh, Tragedy Behind the Wheel: Understanding Manslaughter by Culpable Negligence, Vehicular Homicide, and DUI Manslaughter, Fla. B.J., Dec. 1992, at 46 (describing the three most common motor vehicle homicide charges).

[FN244]. See Iowa Code Ann. § 707.8 (West 1993); Kan. Stat. Ann. § 21- 3441 (1995); N.M. Stat. Ann. § 66-8-101.1 (Michie Supp. 1998); Ohio Rev. Code Ann. § 2903.04 (West 1997); Wyo. Stat. Ann. § 31-5-233 (Lexis 1999).

[FN245]. The Virginia Code currently states: Any person who, as a result of driving while intoxicated in violation of § 18.2-266 or any local ordinance substantially similar thereto in a manner so gross, wanton and culpable as to show a reckless disregard for human life, unintentionally causes the serious bodily injury of another person resulting in permanent and significant physical impairment shall be guilty of a Class 6 felony. Va. Code Ann. § 18.2- 51.4(A) (Michie Supp. 1999). Under the suggestion offered here, the following language would be added: For the purposes of this section, the involuntary termination of a woman's viable pregnancy shall be deemed a serious bodily injury resulting in permanent and significant physical impairment.

[FN246]. The Virginia Code currently states: For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both. Va. Code Ann. § 18.2-10(f) (Michie 1996).

[FN247]. The Virginia Code currently states: "Any person who, as a result of driving under the influence in violation of subdivision (ii),(iii), or (iv) of § 18.2-266, unintentionally causes the death of another person, shall be guilty of involuntary manslaughter." Id. § 18.2-36.1. The following language could be added to link DUI manslaughter with maiming: If, in addition, the victim was a pregnant woman, and the involuntary termination of her viable pregnancy resulted from her death, any person subject to prosecution under this section shall also be scution under § 18.2-51.4.

[FN248]. 734 P.2d 278 (N.M. Ct. App. 1987).

[FN249]. See id. at 279.

[FN250]. See id.

[FN251]. Id. at 282.

[FN252]. Id.

[FN253]. Id.

[FN254]. See id.

[FN255]. See generally Hersh, *supra* note 243 (describing the three most common motor vehicle homicide charges).

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### TESTIMONY IN SUPPORT OF H.B. 2552

Chairman Mason, and members of the Committee:

Thank you for the opportunity to testify in support of H.B. 2552, the unborn victims of violence act. My name is Mike Farmer and I am the Executive Director of the Kansas Catholic Conference the public policy office of the Catholic Church in Kansas.

The Catholic Church proclaims, as stated by the U.S. Catholic Bishops in their document "Sharing Catholic Social Teaching, Challenges and Directions" that:

"...human life is sacred and that the dignity of the human person is the foundation of a moral vision for society. Our belief in the sanctity of human life and the inherent dignity of the human person is the foundation of all the principles of our social teaching. ...We believe that every person is precious, that people are more important than things, and that the measure of every institution is whether it threatens or enhances the life and dignity of the human person."

H.B. 2552 supports this teaching. It protects unborn children whose mothers are physically assaulted, beaten, maimed or murdered in violation of specified provisions of Kansas law. Surprisingly, in current law when a pregnant woman is herself the victim of a violent crime, any resulting injury to her unborn child – harm to which the woman obviously has not consented – goes unpunished. H.B. 2552 will enable Kansas to recognize that when a pregnant woman is assaulted or killed within its jurisdiction, and her unborn child is harmed or killed as a result, the crime has two victims – the woman and her child.

It is disappointing that some opponents of the bill claim it should nonetheless be defeated to preserve a "right" to abortion because it acknowledges the existence of prenatal human life. In fact, this bill specifically does not apply in the abortion context. This bill simply offers an opportunity to protect both the pregnant woman and her unborn child from violent assault and murder.

MOST REVEREND GEORGE K. FITZSIMONS, D.D.  
DIOCESE OF SALINA

MOST REVEREND JAMES P. KELEHER, S.T.D.  
*Chairman of Board*  
ARCHDIOCESE OF KANSAS CITY IN KANSAS

MOST REVEREND THOMAS J. OLMSTED, J.C.D., D.D.  
DIOCESE OF WICHITA

MOST REVEREND RONALD M. GILMORE, S.T.L., D.D.  
DIOCESE OF DODGE CITY

MOST REVEREND EUGENE J. GERBER, S.T.L., D.D.  
RETIRED

MOST REVEREND MARION F. FORST, D.D.  
RETIRED

MICHAEL P. FARMER  
*Executive Director*

MOST REVEREND  
HS Federal and State Affairs  
March 4, 2004  
Attachment 3

We believe H.B. 2552 is constitutional; it complies with legal precedent, and mirrors laws in 29 other states. Unborn children can own property, sue for paternity rights and loss of companionship. It is time that our Kansas laws against violence embrace reality.

This bill is common sense and a compassionate approach, consistent with government's responsibility to protect vulnerable human life.

Please consider H.B. 2552 on its merits and support its passage.

Thank you,

A handwritten signature in cursive script that reads "Mike Farmer". The signature is written in black ink and is positioned above the printed name.

Michael P. Farmer  
Executive Director



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## Testimony in support of HB 2552, Unborn-Victims of Violence

**March 4, 2004**

**House Federal State Affairs Committee**

**Hon. Bill Mason, Chair**

Good Afternoon Mr. Chairman and committee members, I am KFL Legislative Director Kathy Ostrowski, and I'm pleased to speak to you today.

Kansans for Life supports passage of HB 2552 the Unborn-Victims of Violence Bill. The bill would establish that if an unborn child is injured or killed during the commission of a violent crime, the assailant may be charged with a second offense on behalf of the second victim, the unborn child. The exact charge would depend on which law is involved, the degree of harm done to the child, and other factors.

### CONTEXT OF UNBORN-VICTIM LAWS

Any objection to the term "unborn child" is without merit. The term has been widely used and accepted by judges, legislators and legal scholars and has withstood challenges in the courts. "Unborn child" is the established term used in at least 19 similar state statutes and by abortion supporters such as Justice Thurgood Marshall. ([http://www.nrlc.org/Unborn\\_Victims/UVVAHJCreport2004.pdf](http://www.nrlc.org/Unborn_Victims/UVVAHJCreport2004.pdf))

The bill explicitly does not apply to any abortion to which a woman has consented, to any act of the mother herself (legal or illegal), or to any form of medical treatment. Nevertheless, Kansans for Life supports the bill because it achieves other pro-life purposes that are worthwhile in their own right: the protection of unborn children from acts of violence other than abortion, the recognition that unborn children may be victims of such violent criminal acts, and the punishment of those who harm unborn children while engaged in criminal acts of violence.

Unborn-victims laws do not affect legal abortion, but they do allow justice to be done for unborn babies whose lives are snuffed out by the actions of violent criminals, and for the parents and grandparents of such victims.

### KANSAS STATUS

Currently, by Kansas statute, injury to a pregnant woman during the commission of a felony or misdemeanor, which causes a miscarriage, results in a specific level of severity. [KSA 21-3440 (1997)] Injury to a pregnant woman through the operation of a motor vehicle, which causes a miscarriage, also results in specific levels of

offense severity. [KSA 21-3441 (1997)] These laws are gravely deficient because only one victim, an adult, is acknowledged. The unborn are absolutely deprived of their right to life through acts that were not abortions and that are in no way shielded by Roe v. Wade.

Criminals who cause violence to a pregnant woman escape prosecution for the death or injury to the woman's unborn baby in 21 states, including Kansas. A non-comprehensive selection of crimes involving the unborn in Kansas is included. [\[see attachment A\]](#)

## **PUBLIC PERCEPTION**

A May 2003 Newsweek poll found that 84 percent of Americans believe that when both mother and fetus die, the attacker should be charged "for two murders instead of one," including 56 percent who believe this should apply "in all cases where a pregnant woman is murdered" and another 28 percent "where the fetus is viable — that is, is able to survive outside the womb." Two other national polls found similar results. In these three surveys, only 7 to 10 percent thought that the law must not recognize the fetal homicide at any point. [\[see attachment B on polling data\]](#)

The case of Laci & Conner Peterson, whose dead bodies washed up on separate shores last Easter, has riveted the nation. According to a just-released Gallup poll, 57 percent of Americans are paying attention to the Peterson case, significantly more than any other judicial proceeding currently underway. Scott Peterson is charged with two murders because the crimes occurred in California, where, since 1970, the law has applied the same consequences to the murder of the unborn as to the murder of a born human being.

## **LEGAL ISSUES**

HB2552 does not apply to any act committed by the mother of an unborn child, to any medical procedure (including abortion) performed by a physician (or other licensed medical professional) at the request of the pregnant woman (or her legal guardian), or to the lawful dispensation or administration of lawfully prescribed medication. To avoid any possible constitutional problems, HB2552 is intended to reach nonconsensual conduct only, and excludes conduct of the pregnant woman herself. Criminal defendants and advocacy groups have mounted over a dozen legal challenges to state unborn-victims laws — and every one has failed in the federal and state courts. [\[see attachment C\]](#)

State fetal homicide laws, like HB 2552 explicitly exclude abortion. Although some opponents have made claims about what these bills will cause to happen, these are extravagant misrepresentations that cannot survive scrutiny of the actual bill language. Laws like HB 2552 have been enforced for decades, and have had no effect on abortion. The 1994 ruling of the California Supreme Court is typical: "[W]hen the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide."

In its 1989 Webster ruling, the U.S. Supreme Court let stand that "the life of each human being begins at conception," and that the "unborn child" has the rights of others under all state laws (including criminal laws) outside the realm of abortion. A lower court had ruled that Missouri's law "impermissibl[y]" adopted "a theory of when life begins," but the Supreme Court nullified that ruling, allowing the law to go into effect so long as the state did not use it to restrict abortion.

## **PROTECTIVE EFFECT**

The courts have even held that such laws may be constitutionally applied whether or not an attacker knew of the unborn victim's existence. For example, the Minnesota supreme court upheld the double-homicide indictment of a man charged with killing a woman who, on post-mortem examination, was discovered to be about 28 days pregnant, noting: "The possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude." [see attachment D, Prof. Kolb] What an excellent, woman-protective doctrine to establish in the law!

President Clinton's former advisor on constitutional issues and abortion said, "I don't think they [fetal-homicide laws] undermine Roe v. Wade. The legislatures can decide that fetuses are deserving of protection without having to make any judgment that the entity being protected has freestanding constitutional rights." <http://newsobserver.com/news/v-print/story/2690147p-2494289c.html> Other prominent defenders of Roe v. Wade recently have voiced similar views [see attachment D]

Of all women killed by violence in 2000, the US Department of Justice statistics showed one third killed by their intimate partner. A growing body of evidence shows that violent deaths among women are strongly associated with their pregnancies. A March 2001 JAMA study showed homicide as the leading cause of death for pregnant women in Maryland. Domestic violence often escalates during pregnancy, with physical abuse changing location from the woman's face to her abdomen.

For a pregnant woman whose husband or boyfriend does not want the baby, the choice to abort has truly become the duty to abort. Coerced decisions to abort may account for up to 60% of all abortions. Many news stories attest to attacks against women who wanted to keep pregnancies not wanted by their partner. [see attachment E] Clearly, these are situations where a pregnant woman has had choices taken away from her; thus opposition to HB 2552 makes no sense coming from those claiming to represent "women" and "choice".

## PROFILES IN VIOLENCE

Kansans for Life supports unborn-victim bills because we recognize that abortion, while a critical issue, is not the only pro-life issue. The unborn and their families have the right to expect protection from, and prosecution for, acts of violence. Many crimes of violence are going unpunished because lawmakers have been caught in the stranglehold of Roe v. Wade politics. Laws that serve a valid purpose-- like justice for crime victims-- have been suppressed. Why should abortion be able to reach into robberies, assaults and vehicular homicide that have nothing to do with abortion? The decision Minnesota v. Merrill stated that Roe "does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."

There have been numerous double homicides from drunk drivers, where the conviction was only for the adult mother. And the unborn-victim law assists those situations. But it is much broader. Too many unborn have been shot, knifed, delivered too early, permanently damaged or killed, all because they were nestled inside a mother who fell prey to a violent assault. And far too many criminals served no time for the brutal demise of those hidden tiny unborn victims. Those examples are sufficient to pass HB 2552.

But I urge this committee to examine the explosion of violence against the unborn, not just when they are victimized because they accompanied their moms, but as they themselves are the actual target of violence. The very existence of these innocents can be the origin of the violence. Some individuals can view the unborn as intolerably burdensome and expensive commitments. The ensuing violence is breathtakingly chronicled in hundreds of news accounts available online.

([http://www.sba-list.org/index.cfm/section/whatsnew/page/UVVA\\_case2.html](http://www.sba-list.org/index.cfm/section/whatsnew/page/UVVA_case2.html))

I have attached a sampling [see attachment E] of crimes against the unborn this past winter, showing a diversity of motives and assailants.

- 1) A woman attacked her husband's girlfriend because she was carrying his child. She successfully killed his unborn child while the mother survived. The attacker is in prison for 7-14 years for the assault and for the death of the unborn because Pennsylvania law includes unborn protection.
- 2) Contract killers were hired to kill the baby of a highly paid football star who didn't want to pay child support. The mother died, the child lived but will always need nursing care. The North Carolina convictions are being appealed.
- 3) A doctor slipped abortifacient chemicals into his pregnant girlfriend's drink so that she would lose the baby and he could reconcile with his wife. She lived, the baby died. The doctor is in prison in Ohio for 3 years for attempted poisoning; he was not charged for the baby's death.
- 4) A woman who was faking a pregnancy killed her pregnant girlfriend and surgically removed the unborn, apparently believing she could pass the baby off as her own. The baby died. Charges filed in Oklahoma, will not recognize both victims.
- 5) With the help of his pal, a 21 year old brutally beat and buried alive his 8 month pregnant 14 year old girlfriend. In Massachusetts, both men were convicted for both deaths.

These sample cases illustrate the escalation of violence and the need for two-victim justice. 29 states have partial or full protection for the separate, second unborn victim of violence. [see attachment F]

## **OBJECTIONS ANSWERED**

No doubt, opponents will attempt to raise objections to unborn protection from violence. Please read the testimony submitted by Denise Burke, counsel for Americans United for Life, for insightful corrections to some misconceptions about unborn-victim bills. A summary is instructive:

HB 2552 criminalizes violence by third parties against an unborn child. It does not seek to criminalize legal abortion. It is not about abortion per se, although Kansans for Life asserts that our abortion complacent culture lowers the horror of harming the unborn and heightens the acceptability of violence.

HB 2552 does not conflict with pro-life goals.

- It does NOT seek to criminalize legal abortion;
- It does NOT in any way place a public or legislative "seal of approval" on the practice of abortion;
- It does NOT legalize abortions that are currently illegal;
- It does NOT somehow provide further or greater legal protection for the practice of abortion as currently defined by constitutional precedent or existing Kansas law;
- It does NOT constrain the state in continuing to champion and advance its preference for child birth and adoption over abortion;
- It does NOT ingrain an explicit or tacit approval of abortion into the state's criminal code, so as to violate or undercut Kansas' "Human Life Resolution".

Kansans for Life urges passage of HB2552, so that Kansas' criminals may be prosecuted properly and our vulnerable, tiniest crime victims will have the full protection of the law. Thank you.

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Attachments A, B, C, D, E, F and testimony from Americans United for Life



**Attachment A-** Kansans for Life in support of HB 2552, Unborn-Victims of Violence

## **Kansas Case law, failure to prosecute deaths of unborn**

[www.kscourts.org/kscases/wordsrch.htm](http://www.kscourts.org/kscases/wordsrch.htm)

### **Unborn death unprosecuted, unrelated to abortion**

*CREAMER = 1997 drunk driver kills adult driver and injures pregnant woman such that her unborn child dies; mom survives. Creamer was convicted under K.S.A. 21-3441 and K.S.A. 1998 Supp. 21-3442 and sentenced to a term of 41 months*

*SHELTON = 1997 mom & 9 month unborn child destroyed by drunk driver; wrongful death suit pursued on behalf of unborn as well as mom.*

*PRUITT = 1998 mom & 9 month fetus brutally killed in drug robbery; woman was repeatedly stabbed and beaten on the head with a hammer. Pruitt charged with first-degree premeditated murder or, in the alternative, felony murder; aggravated kidnapping; aggravated robbery; injury to a pregnant woman; aggravated burglary; and criminal possession of a firearm.*

### **Viable unborn considered not “born” alive, thus no charge of murder**

*TRUDELL = 1986 aggravated vehicular homicide dismissed for death of unborn due to drunk driver; Kansas Supreme Court affirmed dismissal of charge because even though child was 25 weeks, viable, it had not been born alive.*

*GREEN = 1987 murder of 8 ¾ months pregnant woman; her baby delivered by emergency c-section, considered stillbirth but resuscitated to heartbeat within 10 minutes, however, baby died in transfer to ICU. Green conviction of 2 murders reversed by Kansas Supreme Court to one count on interpretation that infant technically was not born alive.*

**Wichita Eagle 10-28-89, “KILLING FETUS NOT A CRIME, COURT RULES”**

**Imposing criminal liability is a legislative function, said the Court’s opinion in Green.**

**Rep. Kathleen Sebelius, then a member of the House Judiciary committee, was quoted, “I think for me and a lot of other people, there are certain inalienable rights established for a person, but those are not applied in utero.**

*NOEL = 1988 death of mom and unborn by drunk driver; conviction for adult only.*

**Olathe Daily News 9-28-88: Johnson County D.A. Dennis Moore said he was prohibited by law from filing charges to Noel on behalf of 7 month old unborn child; “I don’t believe that’s what the law should be.”**

### **Unborn death from violence caused by refusal of mother to abort**

*THOMAS = 1997 murder of his 5 ½ month unborn child by beating mother. Thomas did not want the baby and wanted mother to have an abortion. Thomas repeatedly struck, hit, and kicked her in the abdomen and threatened to kill her. Victim went to the emergency room where medical inspection showed numerous bruises throughout her trunk and abdominal region. Doctors determined the unborn child had died and then induced labor.*

**One Victim or Two?** The Unborn Victims of Violence Act would recognize as a legal victim an unborn child who is injured or killed during commission of a crime against the baby's mother. What does the general public say? If a criminal assaults a woman who carries an unborn child, does that crime have two victims, or only one?

Polls	One Victim	Two Victims
<p>"If a violent physical attack on a pregnant woman leads to the death of her unborn child, do you think prosecutors should be able to charge the attacker with murder for killing the fetus?"</p> <p><b>Yes 79%</b> (including 69% of "pro-choice")  <b>No 10%</b>  <b>Not sure 11%</b></p> <p>Fox News/Opinion Dynamics, July 15-16, 2003.  <i>(900 registered voters. Margin of error: +/- 3%.)</i></p>	<p>10%</p>	<p>79%  <i>(includes 69% of "pro-choice")</i></p>
<p>"We're interested in how you think the criminal justice system should deal with cases involving the murder of a pregnant woman. When, if ever, do you think prosecutors should be able to bring SEPARATE murder charges against someone who kills a fetus still in the womb? In other words, try them for two murders instead of one. Do you think this should be done in ALL cases where a pregnant woman is murdered, only in cases where the fetus is viable – that is, is able to survive outside the womb, or not at all?"</p> <p><b>All cases 56%</b>  <b>Fetus Viable 28%</b>  <b>Not at all 9%</b>  <b>Don't Know 7%</b></p> <p>Newsweek/Princeton Survey Research Associates, May 29-30, 2003.  <i>(1,009 adults, age 18+. Margin of error: +/- 3%.)</i></p>	<p>9%</p>	<p>84%  <i>("all cases" 56% and "fetus viable" 28%)</i></p>
<p>"If Scott Peterson is convicted of killing his pregnant wife Laci, do you think he should be charged with one count of homicide for murdering his wife or two counts of homicide for murdering both his wife and unborn son?"</p> <p><b>One count 7%</b>  <b>Two counts 84%</b>  <b>Something else 1%</b>  <b>Not sure 8%</b></p> <p>Fox News/Opinion Dynamics, April 22-23, 2003.  <i>(900 registered voters. Margin of error: +/- 3%.)</i></p>	<p>7%</p>	<p>84%</p>

## Constitutional Challenges to State Unborn Victims Laws

**As of 2-1-04 All challenges were unsuccessful. All challenges were based on *Roe v. Wade* and/or denial of equal protection, unless otherwise noted.**

CALIFORNIA: In *People v. Davis* [872 P.2d 591 (Cal. 1994)], the California Supreme Court upheld the legislature's addition of the phrase "or a fetus" to the state murder law in 1970, but held that the term "fetus" applies "beyond the embryonic stage of seven to eight weeks." (California Penal Code 187(a) says, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.") In *People v. Dennis* [950 P.2d 1035 (Cal. 1994)], the California Supreme Court upheld inclusion of fetal homicide under Penal Code 190.2(3), which makes a defendant eligible for capital punishment if convicted of more than one murder.

GEORGIA: A three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously upheld the conviction of Richard James Smith, Sr., under Georgia's "feticide" statute. Smith argued that the law conflicted with *Roe v. Wade*, but the court rejected this assertion as "without merit." The court held: "The proposition that Smith relies upon in *Roe v. Wade* – that an unborn child is not a "person" within the meaning of the Fourteenth Amendment -- is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus." *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987). Related state supreme court decision: *Brinkley v. State*, 322 S.E.2d 49 (Ga. 1984) (vagueness/due process challenge).

ILLINOIS: *U.S. ex rel. Ford v. Ahitow*, 888 F.Supp. 909 (C.D.Ill. 1995), and lower court decision, *People v. Ford*, 581 N.E.2d 1189 (Ill.App. 4 Dist. 1991).

*People v. Campos*, 592 N.E.2d 85 (Ill.App. 1 Dist. 1992). Subsequent history: *appeal denied*, 602 N.E.2d 460 (Ill. 1992), *habeas corpus denied*, 827 F.Supp. 1359 (N.D. Ill. 1993), *affirmed*, 37 F.3d 1501 (7th Cir. 1994), *certiorari denied*, 514 U.S. 1024 (1995)

LOUISIANA: Re double jeopardy – *State v. Smith*, 676 So.2d 1068 (La. 1996), *rehearing denied*, 679 So.2d 380 (La. 1996).

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

Re establishment clause – *State v. Bauer*, 471 N.W.2d 363 (Minn. App. 1991).

MISSOURI: In the 1989 case of *Webster v. Reproductive Health Services* (492 U.S. 490), the U.S. Supreme Court refused to invalidate a Missouri statute (Mo. Rev. Stat. 1.205.1) that declares that "the life of each human being begins at conception," that "unborn children have protectable interests in life, health, and well-being," and that all state laws "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," to the extent permitted by the Constitution and U.S. Supreme Court rulings. A lower court had held that Missouri's law "impermissibl[y]" adopted "a theory of when life begins," but the Supreme Court nullified this ruling, and held that a state is free to enact laws that recognize unborn children, so long as the state does not include restrictions on abortion that *Roe* forbids.

In *State v. Knapp*, 843 S.W. 2nd (Mo. en banc) (1992), the Missouri Supreme Court held that the definition of "person" in this law is applicable to other statutes, including at least the state's involuntary manslaughter statute.

PENNSYLVANIA: *Commonwealth of Pennsylvania v. Corrine D. Wilcott*, No. 2426 A & B of 2002 (Court of Common Pleas of Erie County, Pennsylvania, Criminal Division). Rejected challenges that Pennsylvania Crimes Against Unborn Children Act is unconstitutionally vague, violates U.S. Supreme Court abortion cases, violates equal protection clause, and conflicts with state tort law on definition of "person." January 24, 2003.

UTAH: *State of Utah v. Roger Martin MacGuire*. MacGuire was charged under the state criminal homicide law with killing his former wife and her unborn child. He argued that the law, which covered "the death of another human being, including an unborn child," was unconstitutional because the term "unborn child" was not defined. The Utah Supreme Court upheld the law as constitutional, holding that "the commonsense meaning of the term 'unborn child' is a human being at any stage of development in utero. . ." MacGuire was also charged under the state's aggravated murder statute, which applies a more severe penalty for a crime in which two or more "persons" are killed; the court ruled that this law was also properly applied to an unborn victim and was consistent with the U.S. Constitution. January 23, 2004.

WISCONSIN: Re due process – *State v. Black*, 526 N.W.2d 132 (Wis. 1994) (upholding earlier statute).

## **Attachment D – Unborn protection v abortion- Kansans for Life supporting HB 2552 What noted abortion supporters say about “fetal homicide” laws**

**Professor Richard Parker, Harvard University** ([http://www.beliefnet.com/story\\_7941.html](http://www.beliefnet.com/story_7941.html)) In “Victim Politics,” by Marcia Yablon, *The New Republic*, May, 2001, this passage appeared:

Organizations like Planned Parenthood and the National Abortion Federation . . . oppose the Unborn Victims of Violence Act because they say that by legally enshrining fetal personhood it undermines *Roe v. Wade*. But that simply isn't true. Since the bill specifically exempts all forms of legal abortion, it leaves the constitutional rationale for the right to choose unaffected. According to Richard Parker, a professor of criminal law at Harvard University and a supporter of abortion rights, “There is nothing as a formal law that would undermine *Roe v. Wade*. . . . This is not at all a big deal.”

### **The Alan Guttmacher Institute**

Heather Boonstra, senior public policy analyst at the Alan Guttmacher Institute (affiliated with Planned Parenthood), acknowledged that (*National Journal*, April 21, 2001, page 1173)

“the federal Unborn Victims of Violence Act “would probably survive a court challenge.”

### **Professor Michael Dorf, Columbia University School of Law**

([http://writ.news.findlaw.com/scripts/printer\\_friendly.pl?page=/dorf/20030528.html](http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/dorf/20030528.html))

Dorf is a former Supreme Court clerk who, by some accounts, drafted some key parts of the 1992 5-4 ruling in *Casey v. Planned Parenthood*, which reaffirmed *Roe v. Wade*. This passage excerpted from Dorf's essay for Findlaw.com, titled “How Abortion Politics Impedes Clear Thinking on Other Issues Involving Fetuses,” under the subheading, “Why Feticide Prohibitions that Exempt Abortion Are Consistent with *Roe*.””

There are two satisfactory answers to the worry that supporting anti-feticide laws undermines *Roe*. First, laws treating feticide as murder do not need to define fetuses as persons. California's law is illustrative. It defines murder as the killing of a human being or a fetus.

Second, there is nothing especially troubling about permitting the law to define the word “person” differently for different purposes. Statutes routinely define various words, including “person,” so that they will mean exactly what the legislature intends in a particular context, and even general constitutional language can be interpreted differently depending upon the context. Corporations, for example, are “persons” under the Fourteenth Amendment in the sense that their property cannot be taken without fair processes, but not in the sense that they are entitled to vote on equal terms with natural persons.

*Roe v. Wade* said that states are not obligated to treat fetuses as persons. It also said that in a conflict with the constitutional liberty of a pregnant woman seeking an abortion before the fetus is capable of survival outside the womb, the fetus may not be given the same rights as the woman. However, that certainly does not mean that there are no circumstances in which fetuses can be given legal protection. Again, it all depends on the context.

Consider another analogy. Cats and dogs are not “persons” under the Fourteenth Amendment. Yet surely there is nothing constitutionally suspect about laws forbidding cruelty to animals, even though they limit the liberty of those who would perpetrate such acts of cruelty. Indeed, there would be no inherent constitutional problem with terming a malicious cat or dog killing “murder”—though imposing too severe a sentence for that act might run afoul of the Eighth

## **Attachment D – Unborn protection v abortion- Kansans for Life supporting HB 2552**

Amendment's ban on cruel and unusual punishment. In sum, so long as respecting the rights and interests of fetuses does not conflict with the right of a woman to decide whether to terminate her pregnancy, there is no necessary contradiction between the abortion right established in *Roe* and feticide laws.

**Professor Sherry F. Colb, Rutgers Law School** The following is excerpted from an essay on [www.findlaw.com](http://www.findlaw.com) by Professor Sherry F. Colb of Rutgers Law School, titled, "Is Killing an Undiscovered First-Trimester Fetus Murder in California? The Answer Probably Is, and Should Be, 'Yes'," January 28, 2004, <http://writ.findlaw.com/colb/20040128.html>.

Earlier this month, the California Supreme Court heard argument in a case raising important issues about how the crime of fetal murder is to be defined in the State of California. The Justices' questions and comments to counsel during oral argument suggest that they are inclined to rule that a defendant can be guilty of murder for killing the fetus of a woman who neither the defendant, nor the woman herself, knew was pregnant. Though seemingly draconian, this result is both sensible and fair, upon close analysis. . . . First, in the current case, when defendant Harold Taylor shot his ex-girlfriend Patty Fansler to death in 1999, neither the victim nor Taylor knew that Fansler was pregnant. In killing her, the defendant accordingly did not intentionally or knowingly cause the death of anyone other than his ex-girlfriend.

Second, unlike in *Keeler*, where the fetus was viable and could probably have been born alive and healthy on the very day that the killing took place, Patty Fansler's fetus was nowhere near viability, at somewhere between eleven and thirteen weeks gestation -- that is, within, or just at the end of, the first trimester of pregnancy. Upon first considering the Taylor prosecution, it might seem that the killer's ignorance about his ex-girlfriend's pregnancy should be an absolute bar to a murder conviction. Having had no idea that the fetus even existed, how could Taylor possibly be guilty of "murdering" it?

The answer is that he could not, if he had lacked any sort of murderous intention, knowledge, or recklessness. Had Taylor, for example, accidentally caused a miscarriage by slipping on a crowded subway platform and consequently knocking a pregnant woman to the ground, he could not be prosecuted for murder. Our case, however, is notably distinct from this hypothetical scenario. The actual Harold Taylor intentionally killed his ex-girlfriend by shooting her to death. His behavior was in no way accidental, and he was in fact subsequently convicted of second-degree murder for killing Fansler. In the process of deliberately killing his intended victim, however, he unwittingly also killed her fetus.

A truer analogy, then, is not to the man who slips on a subway platform but rather to the man who shoots at a woman who is lying in her bed but whose bullet kills not only the woman but also a child concealed underneath the woman's blanket. Though the shooter did not know about the child when he aimed his gun, his actions were nonetheless intentional, and he specifically meant for those actions to result in a person's death. . . . So it was for good reason that the Justices on the California Supreme Court appeared, during the arguments, unconvinced that Harold Taylor's conviction for murder of a fetus should be overturned on appeal in the absence of proof that he knew of the fetus's existence. . . . The fact that a fetus is not yet born, or even viable, speaks not to the value of that fetus but only to the consequences of terminating an unwanted pregnancy. Lack of viability -- and the location of a growing fetus inside a mother who is prepared to carry that fetus -- thus do nothing to mitigate the homicide of a sentient, living creature. California law in its current incarnation properly affirms that premise.

**Attachment E- Violence & death to pregnant women - Kansans for Life testimony in support of HB 2552**

**DECEMBER 2003**

Oklahoma (coverage only of viable unborn) WOMAN KILLS PREGNANT FRIEND TO GET BABY

Effie Goodson killed her 6-month pregnant friend and carved the child out of the womb. Goodson is charged with both deaths. <http://www.channeloklahoma.com/news/2727030/detail.html>

Mississippi (full coverage for unborn) WOMAN KILLS PREGNANT ROOMMATE & 7 MONTH UNBORN

Krystal Williams, 21, is being held for the murder of her roommate, seven-month pregnant Shanee Howard, 20, and the manslaughter of Howard's unborn child. <http://www.clarionledger.com/news/0312/11/m14.html>

Nebraska (full coverage for unborn) BOYFRIEND KILLS PREGNANT TEEN & 8-MONTH UNBORN

Bobby Joe Moss, 25, charged with 2 deaths in the murder of his 17 year old girlfriend, 8 months pregnant. <http://www.thereader.com/createpage.asp?ContentID=2017>

Massachusetts (partial coverage for unborn) ADULT KILLS PREGNANT MINOR & 8-MONTH UNBORN

14 year old Chauntase Jones was savagely beaten and buried alive by her 21 year old boyfriend., Kyle Bryant. Bryant and his pal were convicted for killing the 8 month pregnant Jones and her unborn child. <http://www.bostonherald.com/cgi-bin/www.bostonherald.com/search/search.bg>

Indiana (full coverage for unborn) ABUSER KILLS PREGNANT GIRLFRIEND & 9-MONTH UNBORN Robert Johnson

received 2 life sentences for the death of his 9 month pregnant girlfriend and their unborn son. The woman was trying to leave Johnson. <http://www.wave3.com/Global/story.asp?s=%20%201560085>

SouthDakota (full coverage for unborn) PREGNANT WOMAN SURVIVES BOYFRIEND STABBING; UNBORN DIES

Sundance Keeble, arrested for death of fetus after he stabbed his girlfriend. The mother survived, the 4-5 month baby died. <http://www.lifenews.com/state238.html>

**OCTOBER 2003**

Ohio (full coverage for unborn) DOC SECRETLY ABORTS LOVER'S UNBORN CHILD

Dr. Maynard Muntzing sent to 5 years prison for secretly putting abortifacient drug in girlfriend's drink, causing death of their unborn child. Muntzing wanted to reconcile with his wife, who assisted in procuring the drug. He was not charged for the unborn's death, just the assault and contamination of drink. <http://1290whio.com/news/1002muntzing.html>

North Carolina (no coverage) FOOTBALL STAR HAS GIRLFRIEND KILLED; UNBORN SURVIVES;

NFL player Rae Carruth was convicted for arranging the shooting death of his pregnant girlfriend. The child was born alive, but with severe medical conditions necessitating lifelong care & assistance. <http://www.lifenews.com/nat162.html>

Oklahoma (coverage only of viable unborn) DRIVER KILLS WOMAN & UNBORN

David Leonard has been charged with 2 vehicular deaths, that of a pregnant woman and her unborn child. <http://www.lifenews.com/state190.html>

Colorado (no coverage of unborn ) MAN KILLS GIRLFRIEND PREGNANT WITH ANOTHER MAN'S CHILD

Daniel Self killed his pregnant girlfriend and their unborn son, but will only be charged with 1 death. <http://www.lifenews.com/state184.html>

**SEPTEMBER 2003**

Florida (coverage only of viable unborn) HUSBAND KILLS WIFE WHO REFUSED TO ABORT, UNBORN DIES

Joseph Peck convicted of murder only for the death of his pregnant wife. The victim was allegedly killed for refusing to have an abortion. Their unborn 16 month child was not considered "viable" <http://www.lifenews.com/state137.html>

Pennsylvania (full coverage of unborn) WIFE BEATS HUSBAND'S PREGNANT LOVER. KILLS UNBORN Corinne

Wilcott beat the pregnant mother of a 15 week old unborn child sired by her husband. Wilcott was sentenced 7-14 years in prison for assaulting a pregnant woman and killing her unborn child..

<http://www.centredaily.com/mld/dailytimes/2002/12/01/news/4642194.htm>

# **Attachment F- Kansans for Life in support of HB 2552, Unborn-Victims of Violence State Homicide Laws That Recognize Unborn Victims**

National Right to Life Committee

February 20, 2004

What appears below is a summary of the laws of the 29 states that recognize the unlawful killing of an unborn child as homicide in at least some circumstances.

## **Full-Coverage Unborn Victim States (16) States With Homicide Laws That Recognize Unborn Children as Victims Throughout the Period of Pre-natal Development**

**Arizona:** The killing of an "unborn child" at any stage of pre-natal development is manslaughter. Ariz. Rev. Stat. §13-1103 (A)(5) (West 1989 & Supp. 1998). Also to be read with Ariz. Rev. Stat. § 13-702(c)(10).

**Idaho:** Murder is defined as the killing of a "human embryo or fetus" under certain conditions. The law provides that manslaughter includes the unlawful killing of a human embryo or fetus without malice. The law provides that a person commits aggravated battery when, in committing battery upon the person of a pregnant female, that person causes great bodily harm, permanent disability or permanent disfigurement to an embryo or fetus. Idaho Sess. Law Chap. 330 (SB1344)(2002).

**Illinois:** The killing of an "unborn child" at any stage of pre-natal development is intentional homicide, voluntary manslaughter, or involuntary manslaughter or reckless homicide. Ill. Comp. Stat. ch. 720, §§5/9-1.2, 5/9-2.1, 5/9-3.2 (1993). Ill. Rev. Stat. ch. 720 § 5/12-3.1. A person commits battery of an unborn child if he intentionally or knowingly without legal justification and by any means causes bodily harm to an unborn child. Read with Ill. Rev. Stat. ch. 720 § 5/12-4.4.

**Kentucky:** Since February, 2004, Kentucky law establishes a crime of "fetal homicide" in the first, second, third, and fourth degrees. The law covers an "unborn child," defined as "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."

**Louisiana:** The killing of an "unborn child" is first degree feticide, second degree feticide, or third degree feticide. La. Rev. Stat. Ann. §§14:32.5 - 14.32.8, read with §§14:2(1), (7), (11) (West 1997).

**Michigan:** The killing of an "unborn quick child" is manslaughter under Mich. Stat. Ann. § 28.555. The Supreme Court of Michigan interpreted this statute to apply to only those unborn children who are viable. *Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973). However, a separate Michigan law, effective Jan. 1, 1999, provides felony penalties for actions that intentionally, or in wanton or willful disregard for consequences, cause a "miscarriage or stillbirth," or cause "aggravated physical injury to an embryo or fetus." (M.C.L. 756.90)

**Minnesota:** Since 1986 the killing of an "unborn child" at any stage of pre-natal development is murder (first, second, or third degree) or manslaughter, (first or second degree). It is also a felony to cause the death of an "unborn child" during the commission of a felony. Minn. Stat. Ann. §§609.266, 609.2661- 609.2665, 609.268(1) (West 1987). The death of an "unborn child" through operation of a motor vehicle is criminal vehicular operation. Minn. Stat. Ann. §609.21 (West 1999).

**Missouri:** The killing of an "unborn child" at any stage of pre-natal development is involuntary manslaughter or first degree murder. Mo. Ann. Stat. §§1.205, 565.024, 565.020 (Vernon Supp. 1999), *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992), *State v. Holcomb*, 956 S.W.2d 286 (Mo. App. W.D. 1997).

**Nebraska:** The killing of an "unborn child" at any stage of pre-natal development is murder in the first degree, second degree, or manslaughter. Neb. Rev. Stat. § 28-391 to § 28-394. (2002)

**North Dakota:** Since 1987 the killing of an "unborn child" at any stage of pre-natal development is murder, felony murder, manslaughter, or negligent homicide. N.D. Cent. Code §§12.1-17.1-01 to 12.1-17.1-04 (1997).

**Ohio:** At any stage of pre-natal development, if an "unborn member of the species *homo sapiens*, who is or was carried in the womb of another" is killed, it is aggravated murder, murder, voluntary manslaughter, negligent homicide, aggravated vehicular homicide, and vehicular homicide. Ohio Rev. Code Ann. §§ 2903.01 to 2903.07, 2903.09 (Anderson 1996 & Supp. 1998).

**Pennsylvania:** An individual commits criminal homicide in the first, second, or third-degree, or voluntary manslaughter of an "unborn child" if the individual intentionally, knowingly, recklessly or negligently causes the death of an unborn child. 18 Pa. Cons. Stat. Ann. §§ 2601 to 2609 (1998) "Unborn child" and "fetus." Each term shall mean an individual organism of the species *Homo sapiens* from fertilization until live birth."

**South Dakota:** The killing of an "unborn child" at any stage of pre-natal development is fetal homicide, manslaughter, or vehicular homicide. S.D. Codified Laws Ann. §22-16-1, 22-16-1.1, 22-16-15(5), 22-16-20, and 22-16-41, read with §§ 22-1-2(31), 22-1-2(50A) (Supp. 1997).

**Texas:** Under a law signed June 20, 2003, and effective September 1, 2003, the protections of the entire criminal code extend to "an unborn child at every stage of gestation from fertilization until birth." The law does not apply to "conduct

committed by the mother of the unborn child" or to "a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent." (SB 319, Prenatal Protection Act)

**Utah:** The killing of an "unborn child" at any stage of pre-natal development is treated as any other homicide. Utah Code Ann. § 76-5-201 *et seq.* (Supp. 1998) and UT SB 178 (2002).

**Wisconsin:** Since 1998 the killing of an "unborn child" at any stage of pre-natal development is first-degree intentional homicide, first-degree reckless homicide, second-degree intentional homicide, second-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, homicide by intoxicated use of vehicle or firearm, or homicide by negligent operation of vehicle. Wis. Stat. Ann. §§939.75, 939.24, 939.25, 940.01, 940.02, 940.05, 940.06, 940.08, 940.09, 940.10 (West 1998).

## **Partial-Coverage Unborn Victim States (13) States with Homicide Laws That Recognize Unborn Children as Victims, But only During Part of the Period of Pre-natal**

**Development:** These laws are gravely deficient because they do not recognize unborn children as victims during certain periods of their pre-natal development. Nevertheless, they are described here for informational purposes.

**Arkansas:** The killing of an "unborn child" of twelve weeks or greater gestation is capital murder, murder in the first degree, murder in the second degree, manslaughter, or negligent homicide. Ark. Stat. Ann. § 5-1-102(13)(b)(i)(a), read with Ark. Stat. Ann. §§ 5-10-101 to 5-10-105. (A separate Arkansas law makes it a battery to cause injury to a woman during a Class A misdemeanor to cause her to undergo a miscarriage or stillbirth, or to cause injury under conditions manifesting extreme indifference to human life and that results in a miscarriage or stillbirth. Ark. Stat. Ann. § 5-13-201 (a)(5)(a)).

**California:** California Penal Code § 187(a) says, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." The words "or a fetus" were added by the legislature in 1970. The California Supreme Court later interpreted "fetus" to apply "beyond the embryonic stage of seven to eight weeks." (*People v. Davis*, 1994) In addition, Penal Code § 190.2(3) makes a defendant eligible for capital punishment if convicted of more than one murder, and the California Supreme Court ruled that fetal homicide is included under this provision as well (*People v. Dennis*, 1998).

**Florida:** The killing of an "unborn quick child" is manslaughter, a felony of the second degree. Fla. Stat. Ann. § 782.09 (West 1999). The killing of an unborn child after viability is vehicular homicide. Fla. Stat. Ann. § 782.071 (West 1999).

**Georgia:** The killing of an "unborn child" after quickening is feticide, vehicular feticide, or feticide by vessel. Ga. Code Ann. § 16-5-80 (1996); § 40-6-393.1 (1997); and § 52-7-12.3 (1997).

**Indiana:** The killing of "a fetus that has attained viability" is murder, voluntary manslaughter, or involuntary manslaughter. Indiana Code 35-42-1-1, 35-42-1-3, 35-42-1-4.

**Massachusetts:** The killing of an unborn child after viability is vehicular homicide. *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984). The killing of an unborn child after viability is involuntary manslaughter. *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989).

**Mississippi:** The killing of an "unborn quick child" is manslaughter. Miss. Code Ann. § 97-3-37 (1994).

**Nevada:** The killing of an "unborn quick child" is manslaughter. Nev. Rev. Stat. § 200.210 (1997).

**Oklahoma:** The killing of an "unborn quick child" is manslaughter. Okla. Stat. Ann. tit. 21, § 713 (West 1983). The killing of an unborn child after viability is homicide. *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994).

**Rhode Island:** The killing of an "unborn quick child" is manslaughter. The statute defines "quick child" to mean a viable child. R.I. Gen. Laws § 11-23-5 (1994).

**South Carolina:** The killing of an unborn child after viability is homicide. *State v. Horne*, 319 S.E.2d 703 (S.C. 1984); *State v. Ard*, 505 S.E.2d 328 (S.C. 1998).

**Tennessee:** The killing of an unborn child after viability is first-degree murder, second-degree murder, voluntary manslaughter, vehicular homicide, and reckless homicide. Tenn. Code Ann. §39-13-201, 39-13-202, 39-13-210, 39-13-211, 39-13-213, 39-13-214, 39-13-215 (1997 & Supp. 1998).

**Washington:** The killing of an "unborn quick child" is manslaughter. Wash. Rev. Code Ann. § 9A.32.060(1)(b) (West Supp. 1999).

## **Conflicting Statutes**

**New York:** Under New York statutory law, the killing of an "unborn child" after twenty-four weeks of pregnancy is homicide. N.Y. Pen. Law § 125.00 (McKinney 1998). But under a separate statutory provision, a "person" that is the victim of a homicide is statutorily defined as a "human being who has been born and is alive." N.Y. Pen. Law § 125.05 (McKinney 1998). See *People v. Joseph*, 130 Misc. 2d 377, 496 N.Y.S.2d 328 (County Court 1985); *In re Gloria C.*, 124 Misc.2d 313, 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984); *People v. Vercelletto*, 514 N.Y.S.2d 177 (Co. Ct. 1987).





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**STATEMENT INTRODUCING VIDEO  
SUPPORTING UNBORN VICTIMS OF VIOLENCE LEGISLATION  
HOUSE FEDERAL & STATE AFFAIRS COMMITTEE**

**Thursday, March 4, 2004**

**Jeanne Gawdun, Kansans for Life Lobbyist**

Chairman Mason and Members of the Committee:

Thank you for allowing Kansans for Life to show the following video as part of our testimony in support of HB 2552.

The testimony in the video is that of Carol and Buford Lyons of Scott County, Kentucky. The Lyons are the parents of 18 year-old Ashley Lyons, who, along with her 21 week-old unborn son, Landon, was murdered on January 7, 2004. Their testimony before a Kentucky legislative committee in support of unborn victims of violence legislation is both powerful and moving, as it was given on January 15, only eight days after their daughter and grandson were killed.

I have attached a copy of their story, as written and presented by Carol Lyons at a press conference in Washington, D.C. in support of the federal unborn victims of violence act.

Thanks in part to the Lyons' personal testimony; after 18 years overwhelming majorities in both the Kentucky House and Senate passed the unborn victims of violence act. Governor Ernie Fletcher signed the bill into law on February 20, 2004.

Opponents of unborn victims of violence legislation claim that "enhanced penalties" for harm done to a pregnant woman are more appropriate. But, as Mrs. Lyons states in the video, it is her belief that her daughter was killed **because** she was pregnant. In other words, Ashley's baby, Landon was not just an incidental victim of a violent act against his mother, but a **target**. How can "enhanced penalties" offer justice to this family for the loss of their unborn grandchild?

In 2002, Planned Parenthood presented to this committee testimony in opposition to an identically worded unborn victim protection bill claiming it "elevates the fetus...to a status equal with that of an adult woman who **suffers the primary harm**, along with the additional harm of losing a wanted pregnancy." In March 1994, Rebecca Woodruff of Vassar, Kansas, lost her unborn child, Morgan Elizabeth, in a car accident the day before she was due to be born. Does Planned Parenthood believe that Rebecca suffered the "primary harm" even though her daughter was the one who died? How can "enhanced penalties" offer justice to this family for the loss of their unborn child?

I ask you to support HB 2552 and find it favorable for passage. Thank you.

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March 4, 2004  
Attachment 5

## **Don't Tell Me There Was Only One Victim**

**By Carol Lyons**

On January 7, I was seeing my grandson, Landon, for the very first time. Landon was moving around in an ultrasound image on the TV screen in our home in Stamping Ground, Kentucky.

Our 18-year-old daughter, Ashley, was 21 weeks pregnant, and she had just gotten the ultrasound video from her doctor. Ashley was incredibly excited about her baby as she pointed out, to her brother and me, every part of that baby on the screen -- the little toes and fingers, his spine, everything.

We could clearly see Landon's little heart beating. We could see his little face.

Just a few hours later, Ashley and Landon were both dead. They were found murdered -- shot to death -- in Ashley's own car in a local park.

Since then, life has been a nightmarish blur -- never-ending anguish, mixed with anger and bafflement. The police have not yet apprehended the killer. We can only hope that eventually they will make an arrest, and that justice will be done.

But it cannot be full justice, because soon after the crime, I was informed that in the eyes of the law, we had lost a daughter, but not a grandson.

Under Kentucky law, I learned, this crime had a single victim.

I could not accept this. Nobody can tell me that there were not two victims. I placed Landon in Ashley's arms, wrapped in a baby blanket that I had sewn for him, just before I kissed my daughter goodbye for the last time and closed the casket.

After that, I learned that for many years some legislators in Kentucky had attempted to pass a "fetal homicide" bill, but it had always been blocked by objections from groups like the ACLU, who think that somehow it would undercut legal abortion.

That is so wrongheaded it makes me furious. Abortion is a different issue. Twenty-eight other states already had fetal homicide laws -- that's why the State of California has charged Scott Peterson with two murders in the killings of Laci Peterson and her unborn son, Conner. Those laws hadn't interfered with access to abortion.

I found a journal that Ashley had been writing to her baby. Right at the beginning, when she was only two months pregnant, she wrote how she had rejected advice to get an abortion.

"I couldn't do that," she wrote. "I already loved you."

Ashley also wrote, "You are the child I have always dreamed about. I know that it will be a long time before I meet you but I can't wait to hold you for the first time. I love you more everyday. Always, Mommy."

Yes, the killer took two lives -- each with a long, bright future ahead. It is heartless and cruel to say that the law must pretend this is not so, in order to preserve "choice" on abortion. Ashley had made her choice. She chose life.

Our case was widely reported in Kentucky. We appealed to the legislature, and the legislature responded by passing a fetal homicide bill, which Governor Ernie Fletcher signed into law a few days ago.

I pray that the U.S. Senate will also act, by passing soon the Unborn Victims of Violence Act, which would allow a criminal to be charged for any harm he does to an unborn child during commission of a federal or military crime.

The U.S. House already passed the bill on February 26, 254-163, and President Bush supports it -- but it is being obstructed by a group of senators, all Democrats.

Of course, laws are not retroactive, so no laws enacted now will allow full justice to be done on Landon's behalf.

But they will ensure that in the future, no mother, grandmother, or other family member will ever again be told that the law is blind to the loss of a child who was unborn, but already living and loved.



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Testimony of

Elmer Feldkamp

President, Right To Life of Kansas, Inc.

Before the

Kansas House of Representatives Federal and State Affairs Committee

concerning

House Bill 2552 - The unborn victims of violence act

Mr. Chairman and Members of the Committee,

My name is Elmer Feldkamp, President of Right To Life of Kansas. I thank you for the opportunity to appear before this Committee today and speak concerning the Unborn victims of violence act.

Right To Life of Kansas opposes HB2552 as it is presently written because it exempts those most vicious acts of violence that can possibly be perpetrated on an innocent human being. Abortionists, themselves, have testified in court that even in abortions as early as the 12<sup>th</sup> week of gestation, using the vacuum aspiration method, the entire unborn baby often comes through the vacuum tube alive.

From the 13<sup>th</sup> through the 19<sup>th</sup> week abortionists use ultrasound to monitor the fetal heartbeat. They indicate that the lack of heartbeat is the best available measure for determining fetal death. They testified that ultrasound confirms that the unborn baby is invariably alive when the procedure known as dilation and extraction begins. They report that heart activity has been observed even with "extensive parts of the fetus removed."

While this information has been taken from court records of the *Stenberg v. Carhart* trial concerning the partial birth abortion procedure these comments do not refer to the doctor jabbing a scissors in the base of the baby's skull and suctioning out the contents of the brain, killing the baby, so the head can be easily removed from the mother's body.

To indicate that the state will prosecute the murder of an unborn child and at the same time sanction the child's murder by abortion, whether by surgery or chemicals, is willful and deliberate intent to carry out capital crimes on the unborn! This is a monstrous act of discrimination and as such is a serious violation of Section 1 of the Bill of Rights of the Kansas Constitution, which guarantees equal rights to all human beings.

Because this is apparently not meant to be an abortion regulating proposal we suggest all reference to abortion be removed. This can be accomplished as follows: in line 19 following the word *utero* add *or ex utero*; strike all of lines 15 and 16 and renumber the remaining subsections accordingly; and strike all of lines 21 through line 27. These changes would make HB 2552 acceptable and we would support the remaining portions.

Thank you.

HS Federal and State Affairs  
March 4, 2004  
Attachment 6

**Testimony of Denise M. Burke, Esq.**  
**Before the House Committee on Federal and State Affairs**  
**On House Bill 2552 – Unborn Victims of Violence Act**  
**March 4, 2004**

**CHAIRMAN MASON AND MEMBERS OF THE COMMITTEE:**

I am Denise M. Burke, staff counsel with Americans United for Life (AUL), a national public interest law firm with a practice in bioethics law. For many years, AUL has played a leading role in championing laws protecting unborn children from criminal violence. I have extensive experience in constitutional law, in general, and laws seeking to protect unborn victims of violence, in particular, having consulted with legislators, participated in the drafting of bills, provided committee testimony, and served as a media spokesperson.

I have thoroughly reviewed House Bill 2552 (HB 2552), the Unborn Victims of Violence Act, and am testifying in this proceeding as an expert in constitutional law and as an expert on laws criminalizing violence against the unborn. I appreciate this opportunity to testify as to the constitutionality of HB 2552 and the importance of this legislation.

It is my opinion that HB 2552 is constitutional and is consistent with existing legal requirements and constitutional precedents. HB 2552 substantially complies with similar laws in 16 other states that protect an unborn child from criminal violence from conception until birth.

No state law protecting unborn victims of violence, often commonly referred to as a “fetal homicide law,” has ever been declared unconstitutional. Rather, such laws have been repeatedly upheld as constitutional and have withstood multiple legal challenges.

To assist you in evaluating HB 2552, my testimony will provide (1) an overview of unsuccessful legal challenges to laws in other states; and (2) a response to some common objections to laws protecting unborn victims of criminal violence.

From the onset, it is important to be very clear about what HB 2552 is and is not. Simply, HB 2552 is not about abortion. HB 2552 does not seek to criminalize legal abortion and, equally, does not - in any way - place a public or legislative “seal of approval” on the practice of abortion. In enacting this legislation, the State of Kansas is not constrained in continuing to champion and advance its preference for child birth and adoption over abortion. Moreover, HB 2552 does not ingrain an explicit or tacit approval of abortion into the state’s criminal code, so as to violate or undercut Kansas’ “Human Life Resolution” which was passed a few years ago.

Rather, HB 2552 criminalizes violence by third parties against an unborn child. As many tragic accounts of family loss and countless news stories will attest, there is a critical need for the protections provided by this legislation. We are all painfully aware of the case of Laci and Conner Peterson in California. This case has done much to focus attention on the need for legislation like HB 2552, but the Peterson case is but one example of a growing national tragedy. In virtually every state, there are similar stories of loss and, sometimes, justice denied grieving family members and survivors. In many

states, including Kansas, the criminal code does not allow prosecutors to charge a perpetrator for killing or harming an unborn child even when the unborn child was the intended victim.<sup>1</sup>

### UNSUCCESSFUL LEGAL CHALLENGES

It is important to emphasize again that no state law criminalizing a fatal or nonfatal attack on an unborn child has ever been declared unconstitutional. This is not for lack of attempts to invalidate such laws. Since the early 1980's (after the U.S. Supreme Court's 1973 decision legalizing abortion, *Roe v. Wade*), several statutes criminalizing the killing of an unborn child have faced constitutional and other legal challenges. Statutes in California, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Utah and Wisconsin have been challenged and, in each instance, the challenged law, along with specific indictments and convictions, was upheld.<sup>2</sup> Currently, laws in Michigan and Arkansas are facing similar constitutional challenges.<sup>3</sup>

Generally, three common arguments were made and rejected in these legal challenges. First, attorneys argued that laws protecting unborn victims from fatal attacks violated the principles of *Roe v. Wade*, the decision legalizing abortion, and, thus, attacked or undercut a woman's right to choose abortion. This contention has been uniformly and repeatedly rejected. In so ruling, courts have correctly noted that unborn victims of violence protections implicate the acts of third parties done without the consent of the mother of the unborn child and that the challenged statutes specifically excluded legal abortion from potential prosecution.

Second, attorneys have argued that it violates equal protection guarantees to subject a third party to potential prosecution for killing or harming an unborn child and to exclude actions by the mother of the unborn child from liability. Basically, the argument is that it is unfair that a woman can kill her unborn child through, for example, drug abuse, alcohol abuse or otherwise intentionally causing or inducing an abortion, miscarriage or stillbirth and not face prosecution, but that anyone else who caused the same harm to the child could be prosecuted. This argument has also been uniformly and soundly rejected. Only one state, South Carolina, currently prosecutes women for harming or killing their unborn children (typically, through drug abuse). However, it does so under the auspices of specific language in South Carolina's child abuse statute, not under unborn victims of violence statutes or protections.<sup>4</sup>

Finally, many challenges to these laws have alleged that these laws could only be applied, if at all, to unborn children who had reached viability or would have been able to survive outside the womb at the time they were killed. These arguments have also been repeatedly rejected. This rejection underscores that abortion law concepts such as "viability" are not applicable to laws criminalizing violence against the unborn and that states can and should choose to protect unborn children at any stage of development or gestation from violence by third parties.

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<sup>1</sup> Current Kansas law criminalizes assaults that results in a miscarriage or stillbirth. See Kan. Stat. Ann. § 21-3440 and §3441 (by vehicle) (2003). These statutes do not recognize the unborn child as a victim and only provide prosecutors with authority to seek justice on behalf of the woman who was injured and not the unborn child.

<sup>2</sup> See generally, "Crimes Against the Unborn Child Act: Fetal Homicide Model Legislation and Policy Guide," March 2004, ©Americans United for Life.

<sup>3</sup> *Id.*

<sup>4</sup> See e.g. *State v. McKnight*, 576 S.E.2d 168, 352 S.C. 635 (SC 2003), *cert. denied*, 124 S.Ct. 101 (U.S. 2003) (affirming conviction, under child abuse statute, of mother whose drug use caused the death of her unborn child).

## ANSWERS TO COMMON OBJECTIONS

My testimony has, I believe, already adequately addressed several common objections to legislation protecting unborn victims of violence. Specifically, it is clear that such legislation does not violate *Roe v. Wade*, does not implicate a woman's right to choose abortion (as defined by U.S. Supreme Court and other jurisprudence), is not subject to abortion law principles such as "viability," and does not violate the U.S. Constitution's guarantees of equal protection under the law.

In closing, I would like to briefly address two other common complaints. First, I have heard complaints that the exceptions to prosecution, such as those provided in Section C (lines 21-27) of HB 2552, are unnecessary or ill-advised. The language of HB 2552, including the exceptions, exactly mirrors the language in AUL's model unborn victims of violence bill and language that is already in effect in numerous other states. In short, the three exceptions are legally required and do not dilute the effectiveness of the legislation for its stated purposes: to protect unborn children from criminal violence and to provide for the prosecution of third parties who harm or kill an unborn child.

The exception for medical procedures, specifically abortion, is necessary because, as you are well-aware, under current constitutional doctrine, abortion is a constitutionally-protected right and states are limited in how and to what extent they may regulate or restrict abortions. States may not use legislation such as HB 2552 to enact a ban on abortions and failing to include an exception for medical procedures including abortion would, arguably, do just that. Similarly, this exception, along with the exception for legally prescribed and dispensed medication, also shields medical professionals from prosecution when otherwise appropriate or advisable medical treatment inadvertently causes the death of an unborn child.

Finally, the exception for conduct by the pregnant woman herself is also necessary. The authority of the states to prohibit self-abortion or other conduct by the woman herself which may be injurious to the life or health of her unborn child is unclear. It should be noted that, prior to *Roe v. Wade*, women were not prosecuted for self-abortion. Further, in the absence of special legislation, such as that I previously mentioned in South Carolina, courts have generally refused to hold a pregnant woman liable under neglect or other criminal statutes for prenatal injuries, regardless of how they were inflicted.

To avoid any possible constitutional problems, while still fulfilling the purposes of the Unborn Victims of Violence Act, HB 2552 is designed to reach nonconsensual conduct only and specifically excludes conduct by the woman herself or medical treatment or care undertaken with her consent or the consent of her guardian.

Second, I would like to address the objection, infrequently raised by concerned pro-life groups or individuals, that legislation of this type legalizes abortions that are currently illegal or somehow provides further or greater legal protection for the practice of abortion. Nothing in Section C makes lawful an abortion that is otherwise illegal under Kansas law. Further, as I stated at the start of my testimony, this legislation is not an abortion bill and it does not in any way implicate the right to abortion as currently defined by constitutional precedent or existing Kansas law.

In conclusion, HB 2552, as drafted, is constitutional and furthers the State of Kansas' interest in protecting unborn children from criminal violence. Thank you.



March 3, 2004

Members of the House Federal and State Affairs Committee:

Teddy bears... bassinets... cribs, and layettes represent the hopes and dreams of a pregnant woman who yearns to hold her infant in her arms. Her hopes and dreams are not placed on a "parasite" growing in her womb; nor on a clump of cells, they are placed upon a child who has its own unique DNA, who, when born, will be an unique individual who will someday have his/her own hopes and dreams.

A woman who experiences violence in her pregnancy has to be concerned about two people; herself *and* her unborn child. That child is as real to her as if he/she is already in her arms. When something happens to that child as a result of violence done to the woman two people are harmed or killed.

Unfortunately, violence done to women who are pregnant is all too common. Cara Krulewitch, an epidemiologist at the University of Maryland in Baltimore, looked at death records in Washington D.C. from 1988 and 1996 and found that **38 percent** of pregnant women who had died had been victims of homicide. According to a study published in the *Journal of the American Medical Association*, murder is now believed to be the leading cause of death for pregnant women. An expectant mother is more likely to be killed than to succumb to a medical complication, such as embolism or hemorrhaging.

Twenty-nine states have some sort of fetal homicide law. California enacted its law in 1970, the law now being prosecuted in the Scott Peterson murder trial for the death of his wife Laci and their unborn son Connor. In 1988 the California Supreme Court in *People v. Bunyard*, unanimously upheld the death penalty in a double homicide where one victim was unborn; "It is clear that the multiple-murder special circumstance is applicable to the killing "by a single act" of a pregnant woman and her viable fetus." In 1989 the court again unanimously upheld the death penalty in a similar case, *People v. Hamilton*. The court stated: "The Courts of Appeal have inferred a viability limitation in light of the subsequent abortion cases, which first recognized a woman's constitutional right to terminate her pregnancy before the fetus becomes viable." In 1994, in *People v. Davis*, the court affirmed a lower court ruling that eliminated the viability finding: We conclude that viability is not an element of fetal homicide under section 187, subdivision (a). The third party killing of a fetus with malice aforethought is murder under section 187, subdivision (a) as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks."

A woman who is pregnant expects to have a child and nothing else. A woman who is injured or killed while pregnant has lost something precious, something that should be protected under the law. The families of these victims deserve something better too.

Thank you.

*Judy Smith*  
Judy Smith, State Director

Concerned Women for America of Kansas

HS Federal and State Affairs  
March 4, 2004  
Attachment 8

## One Victim or Two?

The Unborn Victims of Violence Act (S. 1019) would recognize as a legal victim an unborn child who is injured or killed during commission of a *federal* crime against the baby's mother. A substitute amendment to be offered by Senator Dianne Feinstein would increase penalties for federal crimes against pregnant women – but would recognize only *one* victim, the mother, and without recognizing any loss of human life if the mother survives the assault. Sharon Rocha, mother of Laci Peterson and grandmother of Conner Peterson, has called such a single-victim proposal “a step away from justice, not toward it.” But what does the general public say? If a criminal assaults a woman who carries an unborn child, does that crime have two victims, or only one? Here are three recent national polls on that issue.

Polls	One Victim	Two Victims
<p>“If a violent physical attack on a pregnant woman leads to the death of her unborn child, do you think prosecutors should be able to charge the attacker with murder for killing the fetus?”</p> <p>Yes            79% (including 69% of “pro-choice”)            No             10%            Not sure    11%</p> <p>Fox News/Opinion Dynamics, July 15-16, 2003. (900 registered voters. Margin of error: +/- 3%.)</p>	<b>10%</b>	<b>79%</b>  <i>(includes 69% of “pro-choice”)</i>
<p>“We’re interested in how you think the criminal justice system should deal with cases involving the murder of a pregnant woman. When, if ever, do you think prosecutors should be able to bring SEPARATE murder charges against someone who kills a fetus still in the womb? In other words, try them for two murders instead of one. Do you think this should be done in ALL cases where a pregnant woman is murdered, only in cases where the fetus is viable – that is, is able to survive outside the womb, or not at all?”</p> <p>All cases            56%            Fetus Viable       28%            Not at all            9%            DK                    7%</p> <p>Newsweek/Princeton Survey Research Associates, May 29-30, 2003. (1,009 adults, age 18+. Margin of error: +/- 3%.)</p>	<b>9%</b>	<b>84%</b>  <i>(total “all cases” 56% and “fetus viable” 28%)</i>
<p>“If Scott Peterson is convicted of killing his pregnant wife Laci, do you think he should be charged with one count of homicide for murdering his wife or two counts of homicide for murdering both his wife and unborn son?”</p> <p>One count            7%            Two counts        84%            Something else (vol.) 1%            sure                8%            Not</p> <p>Fox News/Opinion Dynamics, April 22-23, 2003. (900 registered voters. Margin of error: +/- 3%.)</p>	<b>7%</b>	<b>84%</b>



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**Testimony by**

**Jennifer McAdam**

**Kansas Public Affairs Director/Lobbyist**

**Planned Parenthood of Kansas and Mid-Missouri**

**Before the Federal and State Affairs Committee  
of the  
Kansas House of Representatives**

**On March 4, 2004**

**in Opposition to House Bill 2552**

My name is Jennifer McAdam. I am the Kansas Public Affairs Director and Lobbyist for Planned Parenthood of Kansas & Mid-Missouri. Thank you, Chairman Mason and members of this committee, for allowing me to discuss my opposition to HB 2552.

Planned Parenthood operates three health centers in Kansas, in Wichita, Hays, and Lawrence. We are affiliated with Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri in Overland Park. We also operate eight centers in Missouri. In 2003, Planned Parenthood provided family planning and related care to over 30,000 women and men.

Planned Parenthood is founded on the belief that every woman should be safe and healthy. For a woman to determine her own destiny requires that she be able to control the timing and extent of her childbearing and the integrity of her own body. The ability to make decisions about childbearing without interference and regardless of geography, economic circumstance, or political considerations, is the most fundamental civil and human right. I am opposing the so-called Unborn Victims of Violence Act, HB 2552, because this bill threatens that right by elevating the legal status of the fetus to that of an adult human being and indeed superior to the woman in some ways.

On its face, HB 2552 creates a penalty for violation of a number of criminal statutes if, in the course of commission of these crimes, an "unborn child" is injured or killed. Make no mistake: Planned Parenthood strongly condemns any act of violence that interferes with a woman's choice to carry a pregnancy to term. However, HB 2552 ignores the woman who will suffer the greatest physical and emotional harm from the commission of the crime, and instead endows the fetus with its own distinct rights. By creating a separate offense for injury to the fetus, this bill would for the first time elevate the fetus to a status equal with that of the adult woman who suffers the primary injury, along with the additional harm of losing a wanted pregnancy.

Although the sponsors of HB 2552 attempt to disguise this bill as protecting wanted pregnancies, it is in truth an attempt by anti-choice lawmakers to erode a woman's right to choose. Not only does this bill treat the woman as separate from her fetus, but it also attempts to make that fetus a distinct legal entity from the moment of conception. The bill defines "unborn child" as "a living fetus in utero at any stage of development or gestation from conception until live birth." This sweeping definition of "unborn child" means that an embryo only a few weeks old is protected by state law – even before its existence is known to the woman. This is in tension with the Supreme Court's decision in *Roe v. Wade* where the Court ruled that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." This definition, therefore, is sure to create fertile ground for litigation as courts attempt to determine what constitutes an "unborn child."

Kansas law has already addressed the issue of restitution for injury to a pregnant woman in two different statutes. KS 21-3440 and KS 21-3441 both ensure stiffer

penalties for crimes that injure a pregnant woman if she miscarries. If the legislature believes these statutes to be inadequate, Planned Parenthood would fully endorse the further enhancement of these penalties. This would allow us to find the same solutions without the issue being politically charged.

Planned Parenthood recognizes that a woman suffers a unique and tragic injury if a wanted pregnancy is harmed or ended by an act of violence. However, the sponsors of this bill do not really care about the women who are the victims of these crimes. They care about the rhetoric. If they did care about these women, the woman – rather than embryos and fetuses – would be the focus of the bill. If the sponsors cared about these women, they would be advancing legislation aimed at stemming the tide of violence against women and assuring that every child brought into this world is wanted and safe.

Planned Parenthood fully supports a woman's right to choose, including a woman's right to choose to carry a pregnancy to term. The loss of a wanted pregnancy is a tragedy, but solutions to the problems posed by violence against pregnant women should be real, not political. HB 2552 is not the solution.

4 March 2004

Chairman Bill Mason  
300 SW 10th Ave. # 170W  
Topeka, Kansas 66612-1504

Dear Chairman Mason:

Thank you Chairman Mason for allowing me to address the committee today regarding HB 2552 and our opposition to this measure. My name is Julie Burkhardt and I am the Executive Director of ProKanDo, which is a statewide pro-choice grassroots network.

Our opposition to this bill is based on the following three items, which I'll elaborate on shortly, that are inherent to the bill. 1. The bill does not protect women from further victimization by perpetrators during pregnancy nor does it recognize the harm that is inflicted on women; 2. The bill recognizes a fertilized egg (zygote), pre-implantation embryo (blastocyst), embryo and fetus as "victims" of a crime with distinct and separate legal rights; and 3. This bill represents a concerted effort by the anti-choice movement to redefine personhood and to roll back *Roe v. Wade*.

First, HB 2552 does not protect women. By viewing harm inflicted on a fetus as a separate offense, the bill disregards the offense that is done to the pregnant woman. Under this bill, there is potential for an adversarial relationship between the health of the woman and that of the fetus. The use of inflammatory language in the bill, such as "unborn child," exemplifies the lack of protection afforded women under this Act and the absence of focus on the pregnant woman. HB 2552 does not recognize that any act of violence that harms a woman's pregnancy is intrinsically an attack on the woman.

Second, HB 2552 would create a new and separate offense for a fetus that is harmed during the commission of certain criminal acts. If passed, this bill would establish in law, that an "unborn child" is an individual separate from a woman, and elevate its status over that of a woman. There are cases in other states where anti-choice prosecutors have used laws similar to this bill to prosecute women for behavior such as alcohol use, suicide attempts and drug use, which are potentially harmful to a fetus. One woman was even prosecuted for failure to follow her doctor's orders to remain on bed-rest.

Third, this bill is simply a measure, on a national scale, by anti-choice extremists to establish a fetus as a person; therefore, attempting to sabotage the 1973 Supreme Court ruling of *Roe v. Wade*. In *Roe v. Wade*, the Supreme Court established that "the word 'person' as used in the fourteenth amendment, does not include the unborn." The sole purpose of this act is to undermine a woman's right to choose. Since anti-choice groups have had little success in making abortion illegal, they have resorted to back door attempts to try to overturn *Roe v. Wade*.

Instead of passing this bill, which would separate a woman from her fetus in the eyes of the law and turn a blind eye to the integral connection between the woman and her fetus, we are advocating for *enhanced penalties* for the statutes that are already in

effect in Kansas. Those statutes are: KS 21-3440 - created the crime of "injury to a pregnant woman" which applies if a pregnant woman suffers a miscarriage as a result of an injury received during the commission of a felony or misdemeanor. And the second statute is KS 21-3441 - created the crime of "injury to a pregnant woman by vehicle" which applies if a pregnant woman suffers a miscarriage as a result of an injury received from another person's unlawful operation of a motor vehicle. In the interest of protecting pregnant women from acts of violence during pregnancy, we urge you to increase the penalties, under the pre-existing statutes, for crimes against pregnant women so that perpetrators will be brought to justice.

We unequivocally agree that there should be severe penalties for violence against women and the subsequent termination of a woman's pregnancy. There is no greater loss for a woman than when she loses a wanted pregnancy - it's heartbreaking at best. Additionally, we are also supportive of attempts to achieve this goal through non-inflammatory language and through language that recognizes the devastating loss or injury *to the woman*. Therefore, I urge you to vote against HB 2552, as this bill's sole purpose is for political gain through the exploitation of tragic situations.

I thank you again Chairman Mason for allowing me to testify today before your committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie Burkhart", with a long horizontal line extending to the right.

Julie Burkhart

**INJURY TO A PREGNANT WOMAN**  
**(Causing the pregnant woman to suffer a miscarriage as a result of the injury)**

**Kansas Statute 21-3440**

Injury to a pregnant woman while committing a felony or misdemeanor

Injury of pregnant woman while committing any felony  <b>Severity level 4, person felony</b> Penalty range: 38 months to 172 months	Injury of a pregnant woman while committing specific misdemeanors, including Battery (21-3412) 1 <sup>st</sup> & 2 <sup>nd</sup> offense Domestic Battery (21-3412a) Battery against LE Officer (21-3413[a][1]) Sexual Battery (21-3517)  <b>Severity level 5, person felony</b> Penalty Range: 31 months (border box) to 136 months	Injury of a pregnant woman while committing misdemeanors other than those listed  <b>Class A, person misdemeanor</b> Penalty Range: Up to 1 year in jail & up to \$2500 fine
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**Kansas Statute 21-3441**

Injury of a pregnant woman by vehicle while committing a traffic violation

While operating a vehicle under the influence of drugs or alcohol <b>Severity level 5, person felony</b> Penalty Range: 31 months (border box) to 136 months	While operating a vehicle and a violation other than DUI <b>Class A, person misdemeanor</b> Penalty Range: Up to 1 year in jail & up to \$2500 fine
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## INJURY TO A PREGNANT WOMAN THAT DOES NOT CAUSE MISCARRIAGE

Battery K.S.A. 21-3412	Domestic Battery K.S.A. 21-3412a	Sexual Battery K.S.A. 21-3517
<p>Class B person misdemeanor  <b>Penalty Range:</b>                      Up to 6 months in county jail                      Up to \$1000 fine</p>	<p><b>First Offense:</b> Class B person misdemeanor  <b>Penalty Range:</b> Not less than 48 consecutive hours nor more than 6 months imprisonment &amp; \$200 to \$500 fine  <b>Second Offense:</b> Class A person misdemeanor  <b>Penalty Range:</b> Not less than 90 days (5 consecutive days required) nor more than 1 year imprisonment                      \$500 to \$1000 fine  <b>Third or Subsequent Offense:</b> Person Felony  <b>Penalty Range:</b> Not less than 90 days (48 hours consecutive required) nor more than 1 year imprisonment                      \$1000 to \$2500 fine</p>	<p>Class A person misdemeanor  <b>Penalty Range:</b>                      Up to 1 year in county jail                      Up to \$2500 fine</p>

**Federal and State Affairs Committee,  
Kansas House of Representatives**

March 4, 2004

Testimony presented by Anna Holcombe, for the Kansas National Organization for Women (NOW) P. O. Box 1061, Lawrence, KS 66044 Ph: 785-550-9176

**In opposition to HB 2552, Unborn Victims of Violence Act**

Thank you Chairperson Mason and Members of the Committee,

The National Organization for Women is concerned with the extent of violence against women. We advocate for government programs that promote prevention, assist survivors and punish perpetrators. Kansas NOW applauds the House for its recent unanimous vote for HB 2697, which codifies the full faith and credit provision of the Violence Against Women Act.

**However, The Unborn Victims of Violence Act diverts the legal system's attention away from a pervasive and very real social problem-- violence against women.** HB 2552 furthers the system's focus away from women who are the primary targets of violence. In Kansas, during the year of 2001, there were 19,870 domestic violence incidents reported and 17,208 reported domestic violence injuries. In the midst of this social and cultural problem, which affects the lives of women, their friends and families, HB 2552 does not speed the urgency of legislation in regard to women. Such a bill does not increase penalties and punishments for harm done to pregnant women. It motivates a legal discussion around that of a zygote, blastocyst, or fetus, with the intention of sparking debate about women's right to choose instead of the most effective means to decrease violence against women. An effective means toward such legislation is centered around a discussion about women.

**A political agenda which serves to deprive women of their rights cannot paradoxically be used in legislation that addresses violence against women.** HB 2552 is in discord with Roe vs. Wade. The act establishes the personhood of a zygote, blastocyst, and fetus separate to that of the woman. It enacts the status of an embryo to the legal status of a person. HB 2552 sets a serious precedent for the deterioration of women's right to safe, legal abortion. Let us not move legislation toward a time when women's personal decisions in regard to the concurrence of their life and health also lead to illness or death from unsafe abortion. Let us move in the direction where a woman's personal decision is respected, so that women may have control of their bodies, lives, and health through personal means instead of be deprived of their reproductive rights to the political morale and control of others.

In conclusion, opposition to HB 2552 is founded on NOW's belief that women who endure domestic violence should not be brought into legislative debate through a means which deprives them of their rights. In addition, we oppose such legislation which does not further discussion about domestic violence and shifts attention away from violence against women.



TESTIMONY  
HOUSE BILL NO. 2552

William E. Westerbeke  
Professor of Law  
School of Law  
University of Kansas  
Lawrence, Kansas 66045  
(785) 864-9216

I am a Professor of Law and have taught in the areas of Torts, Products Liability, Appellate Advocacy, and Constitutional Law (First Amendment) for the past thirty years. I wish to express my opposition to House Bill No. 2552 in its present form. My reasons for this position are both substantive and procedural (linguistic).

From a substantive point of view, I am concerned that the bill, if enacted into law, would create a series of strict liability crimes that would occur when neither the perpetrator nor the victim mother would know that a fetus exists. This bill would have the legal effect of creating two crimes where one crime previously existed, with the potential for considerably longer periods of incarceration than currently are available under the sentencing guidelines. Kansas prisons are overcrowded, and a drain on state revenues. The political will to build and maintain additional prisons seems to be lacking in this time of budget crisis. Because this second crime cannot be known in advance of the criminal act, a meaningful deterrence effect is unlikely. If more serious penalties for the killing of or physical harm to a fetus is desired, the matter can be more effectively addressed in the sentencing guidelines.

I also fear that an Act defining "person" in this manner for criminal law purposes may not have its effects limited to criminal law. Statutes and regulations having a criminal or regulatory

purpose, and no intent to impact civil actions, find their way into civil actions. For example, the doctrine of negligence *per se* is a judicial doctrine that adopts standards set forth in criminal statutes or regulations that are silent on their applicability to civil actions and uses them to provide a more specific standard of care in negligence actions. *See, e.g.*, Restatement (Second) of Torts §§ 285-288C (1965); *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 875 P.2d 949 (1994); *Scholobohm v. United Parcel Service, Inc.*, 248 Kan. 122, 804 P.2d 978 (1991).

In the event that the definition of person in House Bill No. 2552 finds its way into civil law, it may lead to a substantial increase in personal injury claims based on conduct allegedly affecting the fetus in its earliest time of existence. For example, possible litigation might include claims against the alcohol industry for prenatal damage caused by the mother's drinking at a time when the mother was not aware that she had conceived, or wrongful death claims that a routine automobile accident was a contributing cause to an early-term miscarriage.

Historically, the common law did not recognize prenatal torts at all, primarily because of the concerns about proof of causation and the potential for fraudulent claims. In the modern era, courts have relaxed that rule, recognizing certain prenatal injury claims caused to a viable fetus. Today states are divided between the viability rule, *i.e.*, that time when the fetus could survive outside the womb, and the quickening rule, *i.e.*, that time when the fetus begins to move inside the womb. But the vast majority of courts seem reluctant to relax the rule to an earlier period because of fear of fraudulent or frivolous claims or claims in which the issue of causation is extremely speculative. I have not had the time to reflect fully on what this legislation might do to litigation possibilities in the area of wrongful birth or wrongful life litigation. Some of my colleagues have suggested that this bill might be renamed the "personal injury lawyers' full employment act." I am not yet convinced that the impact would be quite that dramatic, but there

is a real potential for significant increases in personal injury litigation.

I suspect that there are other areas outside of criminal law that could be adversely effected. In the tax field are the parents of a fetus ended by miscarriage in the early term entitled to a deduction for a child? Or as a head of household, if they are otherwise childless. What will be the impact on tax revenues in the state, and will taxes or fees have to be increased elsewhere to meet the demands of the state budget? In the area of wills and trusts, what effect will an early-term miscarriage of a fetus have on the distribution of assets within the family? In the area of welfare and other benefits programs, what is the effect if eligibility is measured in part by the number of dependent children? In all these areas what are the possibilities for fraudulent claims? I do not have the answers to these questions, but courts will eventually have to address these questions and a myriad of additional matters that I have not yet recognized.

Finally, from a procedural perspective, good legislation should identify its purpose, address it clearly with unambiguous language, and in a manner that has the least potential for unexpected and unwanted adverse consequences elsewhere in the law. As I indicated earlier, if the purpose of this proposal is the increase the penalty when a criminal act kills or harms the fetus as well as the mother, the sentencing guidelines may deal with that concern in a manner that is efficient, clear and unambiguous, and with very little potential for unexpected adverse consequences.



UNITED AGAINST VIOLENCE

## KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE

220 SW 33rd Street, Suite 100 Topeka, Kansas 66611  
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org

### House Federal and State Affairs Committee

HB 2552  
OPPOSE  
March 4, 2004

presented by  
Sandy Barnett

Chairman Mason and Members of the Committee:

There are tragedies in this world that make no sense and seem unpredictable. Tragedies that haunt us for a long time. Most of us still feel weak kneed at the tragedy of September 11<sup>th</sup>. I suspect we are horrified every time we see or read a news story about the death of a woman, frequently accompanied by the death of her children, and sometimes accompanied by subsequent suicide of her murderer. Nearly one in every three women experience at least one physical assault by a partner during adulthood. Every year in the U.S., 152,000 – 324,000 women experience violence during their pregnancy. And, 1,200 women die at the hands of someone who claims to love them. During 2002, Kansas law enforcement agencies responded to more than 22,000 reports of domestic violence. During the same period, more than 29,000 victims called either the statewide hotline or those operated by the 27 domestic violence programs. The Kansas Bureau of Investigation reports between 11 and 41 domestic violence homicides a year during the past ten years. Domestic violence is the most common crime experienced by women.

Although many see the proposed legislation as anti-abortion, HB 2552 is being presented as violence against women legislation. After careful analysis, the Kansas Coalition Against Sexual and Domestic Violence believes this proposed legislation is not an appropriate remedy to address violence against women.

I watched TV last December and January and was heartbroken at the pleas made by the parents of Laci Peterson who were desperate to find their pregnant daughter. Later, I watched, almost with shame that I was intruding on the fear and grief of Laci's dad, when he talked about the loss of Laci and mourned the loss of most grandparents' dreams to celebrate the birthdays and holidays with their child and grandchild(ren). I heard his voice break and saw the tears slide down his face. And, I remembered the breaking voices of other parents and siblings I have talked to about the serious injury or loss of their daughters and grandchildren. First they are immobilized with grief and then, later, by life-changing anger at what has happened.

Last week I watched the Congressional debate on the Federal Unborn Victims of Violence Act – exactly the same language as the Bill proposed today. It was named the Laci and Connor Act. I watched as a life-sized picture was shown of a woman holding her dead baby at the baby's funeral, and I cried. I cried because I can recall vividly

holding my own babies, in the hospital and at 2:00 a.m. in the morning at home. I recall their warmth and baby smell; just like any of you who are parents can recall those moments. I cannot imagine, nor can I tell you, what it must feel like to hold your own dead baby. I cannot imagine, nor can I tell you, how the anger must feel that results from such a senseless tragedy.

But, I can tell you one thing – every single person I have ever worked with who has lost a child or nursed an injured child or sibling, or taken a call from a screaming and scared family member would trade any level of penalty for an early intervention that would have saved their loved one's life or have prevented serious injury.

These domestic violence crimes may be senseless, but they are not unpredictable. Gavin De Becker, a personal security expert and consultant is best known as the author of the book, The Gift of Fear (Random house, 1997). De Becker is also the primary developer of MOSAIC, a domestic violence lethality prediction program used by many law enforcement agencies. De Becker tells us that *domestic homicide is America's most predictable murder*. He suggests three actions we can take to prevent these murders (and therefore injury): refer women to community battered women's shelters; refer men to batterers intervention programs, and stop participating as bystanders. In short, these injuries and murders are a failure of our society to intervene appropriately and early. KCSDV believes it is unconscionable to wait to act until women are injured or killed, regardless of whether they are pregnant or not.

The Kansas Legislature has a long history of enacting strong anti-domestic violence laws. Kansas was one of the first states to enact a protection from abuse act, one of the first seven states to remove the marriage defense from the rape statute, and one of the states that has enhanced penalties for third-time domestic batterers and created penalties for crimes perpetrated against pregnant women. But, what Kansas has not done is make a serious commitment to provide the three actions that De Becker suggests.

- There are still only 27 domestic violence programs in 105 counties
- Crisis services are available in only 38 percent of counties
- Children's services are available in only 16 percent of the domestic violence programs

There are a number of steps the Kansas Legislature can take to more effectively address violence against women. The Kansas Legislature could:

- 1) Ensure that emergency safe shelter is easily accessible and available in locations that do not make women choose between keeping their children in school, being close to family and friends, or keeping employment in order to seek safety.
- 2) Ensure that appropriate batterers intervention programs are available in every judicial district in Kansas.

- 3) Ensure that children's advocacy programs are available in every shelter in Kansas.
- 4) Support training of health care workers to screen and identify domestic violence, and take appropriate action to support battered women.
- 5) Fully fund the courts so women have timely access to protection orders.
- 6) Adequately fund welfare programs, employment programs, and family support programs so women have economic options away from the abuser.
- 7) Support training and a statewide campaign that teaches citizens how not to participate in this violence as bystanders.
- 8) Support the development of safe and affordable housing options.
- 9) Fund training and support for law enforcement and prosecutors to appropriately enforce current state laws.
- 10) Support the development of data collection systems that provide adequate information for the formation of public policy and service delivery.

**KCSDV believes HB 2552 is an ineffective remedy to protect women.**

KCSDV appreciates your commitment to ending violence against women and looks forward to working with you to address this most urgent social problem.

For more information about domestic violence in Kansas, visit our website at [www.kcsdv.org](http://www.kcsdv.org), or contact KCSDV at 785/232-9784.



National Council of Jewish Women

March 4, 2004

Testimony of Barbara Holzmark, Kansas State Public Affairs Chair  
National Council of Jewish Women  
8504 Reinhardt Lane, Leawood, Kansas 66206  
(913)381-8222, Fx: (913)381-8224, E-Mail: [bjbagels@aol.com](mailto:bjbagels@aol.com)

Representative Mason and Members of the House Federal and State Affairs Committee:

My name is Barbara Holzmark and I am the Kansas State Public Affairs Chair for the National Council of Jewish Women. (NCJW). I reside in Leawood and am a Life Member of the Greater Kansas City Section. We are nearly 1000 members strong in the Kansas City area, 200 sections across the United States, and 90,000 members nationwide.

The National Council of Jewish Women is opposed to HB 2552.

NCJW opposes the so-called "Unborn Victims of Violence Act", which is another attempt to elevate the status of the fetus to that of a person in order to undermine a woman's right to choose. This bill violates *Roe v. Wade* and shifts the focus away from the principle harm to the pregnant woman.

The "Unborn Victims of Violence Act" would make it a criminal offense to kill or injure an "unborn child" while committing another crime, presumably directed at the pregnant woman. Thus, HB 2552 equates harm to an "unborn child," from conception to birth, with harm to a person. This bill shifts the focus of the crime away from the woman, in order to provide her zygote, blastocyst, embryo or fetus with the legal rights of a person.

This bill erodes a Woman's Reproductive Rights, as well as restricts the Liberties of Pregnant Women. Pregnant Women could become trapped in a web of restrictive rules governing work, travel, or other activities. Women themselves could be sued for harm to a fetus. A woman's conduct during and even before pregnancy could become subject to judicial scrutiny for neglect of, or intentional harm to her fetus.

What does HB 2552 do to help curb domestic violence? By passing this bill, the state becomes the protector of the "unborn children" while ignoring the harm women suffer when they lose a pregnancy as a result of a violent act of which they are the primary victim. Where in HB 2552 is there mention of the pregnant woman, who is the primary victim?

Are there not more appropriate ways to punish "harm to a pregnant woman"? Rather than pass a bill that threatens women's rights? Kansas should support laws and fully fund programs that deter and punish Violence Against Women. Kansas should concentrate on laws that focus on the

Harm to the Pregnancy, and which include sentencing enhancement when a crime against a pregnant woman causes a miscarriage, stillbirth, or injury to a pregnancy.

I urge you to vote NO on HB 2552.

HS Federal and State Affairs  
March 4, 2004  
Attachment 14