A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses

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> [I]f a woman is quick with child, and, by a potion or otherwise, kills it in her womb . . . this, though not murder, . . . [is] a heinous misdemeanour.[1]

INTRODUCTION

Every year, approximately one million people attempt suicide in the United States.[2] The vast majority of these individuals—some 96% of them—survive their attempts to take their own lives.[3] Unsuccessful suicide attempts nonetheless can permanently alter the course of an individual's life, including as a result of serious injuries that may have long-term effects on health, financial stability, and general well-being.[4] Only in rare circumstances, however, do individuals face the risk of criminal prosecution for attempting suicide. All fifty states have abandoned the common-law practice of criminalizing attempted suicide,[5] though it can be punished under the Uniform Code of Military Justice.[6] Many states also explicitly allow for the criminal prosecutions of those who accidentally cause the death of a third party while attempting suicide.[7]

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1. 1 WILLIAM BLACKSTONE, COMMENTARIES *129–30.

2. *See* John L. McIntosh & Christopher W. Drapeau, *U.S.A. Suicide: 2010 Official Final Data*, AM. ASS'N SUICIDOLOGY (Sept. 20, 2012), http://www.suicidology.org/c/document_library/get_file?folderId=248&name=DLFE-618.pdf.

3. *See id.*

4. *See Understanding Suicide*, CDC.GOV (2012), http://www.cdc.gov/ViolencePrevention/pdf/Suicide_FactSheet_2012-a.pdf.

5. *See* Washington v. Glucksberg, 521 U.S. 702, 774 n.13 (1997) (Souter, J., concurring); Thea E. Potanos, Note, *Dueling Values: The Clash of Cyber Suicide Speech and the First Amendment*, 87 CHI.-KENT L. REV. 669, 676–77 (2012).

6. *See* United States v. Caldwell, 70 M.J. 630 (N-M. Ct. Crim. App. 2010) (affirming the conviction under 10 U.S.C. § 934 of a soldier who tried to commit suicide by slitting his wrists), *rev'd on other grounds*, 72 M.J. 137 (C.A.A.F 2013) (finding it unnecessary to resolve the issue of whether a service member may incur criminal liability on the basis of a bona fide suicide attempt alone).

7. *See* John H. Derrick, Annotation, *Criminal Liability for Death of Another as Result of Accused's Attempt to Kill Self or Assist Another's Suicide*, 40 A.L.R. 4TH 702 (1985 & Supp. 2013).

No individual who has survived a recent suicide attempt has been threatened with possible criminal penalties greater than those faced by an Indianapolis woman named Bei Bei Shuai. In December 2010, Shuai attempted to commit suicide by ingesting rat poison.[8] Shuai was thirty-three weeks pregnant at the time, and the Indianapolis prosecutor eventually charged her with the murder and attempted feticide of her then-unborn (but viable) fetus,[9] which was delivered via emergency caesarian section eight days after Shuai ingested the rat poison.[10] Because Indiana law presumes bail should be denied in murder cases,[11] Shuai spent over a year in prison awaiting trial before the Court of Appeals of Indiana decided, on interlocutory appeal, that Shuai had offered sufficient evidence to rebut the presumption against bail.[12]

In the face of tremendous public pressure against the prosecution,[13] and after the court hearing the case granted Shuai's motion in limine to suppress evidence important to the prosecution's case, the prosecutor eventually dropped the murder and attempted feticide charges against Shuai in exchange for her agreement to plead guilty to misdemeanor criminal recklessness.[14] For approximately two-and-a-half years, however, Shuai faced the possibility of spending up to sixty-five years in prison for attempting suicide while pregnant,[15] even though attempting suicide is not in itself a crime in the State of Indiana.[16]

Shuai's case quickly became something of a *cause célèbre* for public health advocates[17] and was covered widely by both foreign and domestic media.[18]

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8. Brief of Appellee at 3, Shuai v. State, 966 N.E.2d 619 (Ind. Ct. App. 2012) (No. 49A02-1106-CR-486) [hereinafter Shuai Appellee's Brief].

9. For the sake of simplicity, this Comment—unless otherwise specified—uses the term "fetus" to refer to all stages of prenatal development, including the first two months when "embryo" is the correct term.

10. Shuai Appellee's Brief, *supra* note 8, at 2, 4.

11. *Shuai*, 966 N.E.2d at 623 (citing Bozovichar v. State, 103 N.E.2d 680, 683 (Ind. 1952), *abrogated on other grounds by* Fry v. State, 990 N.E.2d 429 (Ind. 2013)).

12. *Id.* at 625. To be precise, Shuai spent 435 days in jail before she was allowed to post bail. Dave Stafford, *The Case Against Bei Bei Shuai*, IND. LAW., Aug. 17–30 2012, at 1, 1. Shuai's release predated a 2013 Indiana Supreme Court case that contradicted nearly a century and a half of case law by holding that the burden of proving that an individual accused of murder should be denied bail must be placed on the State. *Fry*, 990 N.E.2d at 433. Presumably, Shuai would have had an easier time obtaining bail had she been arrested after June 2013.

13. More than 100,000 people ultimately signed a petition on Change.org to "Free Bei Bei!" *See Protect Pregnant Women: Free Bei Bei!*, CHANGE.ORG, http://www.change.org/petitions/protect-pregnant-women-free-bei-bei. In addition, dozens of medical, public health, civil liberties, and reproductive rights organizations have expressed support for her cause through amicus curiae briefs that were filed on her behalf in the Court of Appeals of Indiana. *See infra* note 17 and accompanying text.

14. Diana Penner, *Shuai Freed on Guilty Plea*, INDIANAPOLIS STAR, Aug. 3, 2012, at A1; *see also infra* notes 91–93 and accompanying text.

15. *See* IND. CODE § 35-50-2-3(a) (2008).

16. *Shuai*, 966 N.E.2d at 630 (citing Prudential v. Rice, 52 N.E.2d 624, 626 (Ind. 1944)).

17. The following organizations each signed on to one of several amicus curiae briefs, submitted to the Court of Appeals of Indiana on Shuai's behalf: American Association of Suicidology, American Congress of Obstetricians and Gynecologists, American Medical

Although the circumstances of Shuai's case were remarkable, she is far from the only woman to face the threat of criminal liability for allegedly causing the death her fetus. In fact, "[s]ince abortion was legalized in 1973, *hundreds* of women across the country have been arrested for harming their fetuses, with charges ranging from child endangerment to first-degree murder."[19] As more states pass more laws granting more legal protections to fetuses,[20] the potential for fetal rights to conflict with maternal rights is likely to increase as well.[21]

While any subjugation of maternal rights to fetal rights will necessarily involve weighty constitutional and public policy considerations,[22] this Comment focuses primarily on those statutes that could be used to charge pregnant women with various crimes of homicide—including murder, negligent homicide, and manslaughter—for killing their own fetuses. Specifically, this Comment surveys the fetal homicide statutes[23] of the fifty states and finds that many states do not

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Women's Association, American Nurses Association, American Society of Addiction Medicine, Association of Reproductive Health Professionals, Baron Edward de Rothschild Chemical Dependency Institute, Child Welfare Organizing Project, Depression and Bipolar Support Alliance, HealthRight International, International Mental Disability Law Reform Project, Mental Health America, Mental Health America of Indiana, National Alliance on Mental Illness, National Alliance on Mental Illness–Indiana, National Asian Pacific American Women's Forum, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers, the Indiana Chapter of the National Association of Social Workers, National Coalition for Child Protection Reform, National Institute for Reproductive Health, National Latina Institute for Reproductive Health, National Perinatal Association, National Women's Health Network, Society for Maternal-Fetal Medicine, the Women's Therapy Centre Institute, Postpartum Support International, Indiana National Organization for Women, Law Students for Reproductive Justice, National Women's Law Center, SisterSong Women of Color Reproductive Justice Collective, the Indiana Perinatal Network, Legal Voice, The MISS Foundation, and Open Arms Perinatal Services. In addition, numerous doctors, lawyers, academics, and advocates joined the briefs in their individual capacities.

18. *See, e.g.*, Ada Calhoun, *Mommy Had to Go Away for a While*, N.Y. TIMES, Apr. 29, 2012, at MM30; Ed Pilkington, *Indiana Prosecutor Accused of Silencing Chinese Woman on Murder Charge*, GUARDIAN (July 15, 2012, 10:45 AM EDT), http://www.guardian.co.uk /world/2012/jul/15/indiana-abortion; Stafford, *supra* note 12.

19. Calhoun, *supra* note 18 (emphasis added); *see also* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013) (providing the first ever systematic survey of these sorts of cases). The Paltrow and Flavin article "report[s] on 413 cases from 1973 to 2005 in which a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of a woman's physical liberty." *Id.* at 299. As the authors explain, however, the 413 cases they analyze represent a "substantial undercount" of all such cases. *Id.* at 303.

20. *See infra* Part III.

21. *Cf.* Lynn Paltrow, Exec. Dir., Nat'l Advocates for Pregnant Women, Reproductive Justice and the Indiana Case of Bei Bei Shuai, Address at Indiana University Maurer School of Law (Mar. 29, 2013), *available at* http://www.youtube.com/watch?v=_5NPldYYLic, at 33:55–35:56.

22. *See* Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 614–15 (1986).

23. For convenience, this Comment refers to all statutes that define embryos and fetuses as potential victims of homicide (including feticide) as "fetal homicide statutes."

explicitly exempt pregnant women from homicide prosecution for causing the death of their own fetuses. While others have previously surveyed fetal homicide statutes in academic articles,[24] and various organizations maintain websites that monitor changes in the relevant laws,[25] these sources generally do not focus on the question of whether or not the laws might be used to prosecute pregnant women for harming their own fetuses.[26] Given that fetal homicide statutes tend to be most controversial when applied to pregnant women with respect to their own fetuses,[27] a survey that focuses on that particular controversial application of the statutes is warranted.

This Comment proceeds in four parts. Part I provides a brief historical account of how fetal protective statutes have developed in this country. Part II discusses three prominent cases—*Shuai v. State*,[28] *State v. Ashley*,[29] and *State v. McKnight*[30]—that illustrate different methods by which pregnant women might encounter criminal liability for causing the death of their own fetuses. With the context provided by Parts I and II, Part III surveys the fetal homicide laws of the fifty states, paying particular attention to whether these statutes are susceptible to being interpreted to provide the basis for the prosecution of pregnant women for causing the deaths of the fetuses they carry. Part III also discusses some alternative ways states might protect fetal life, as well as how the fetal homicide statutes on the books relate to the Supreme Court's abortion jurisprudence. Part IV argues that even though fetal homicide statutes should probably not be interpreted as applying to pregnant women with respect to their own fetuses, states that have not already done so should consider amending their fetal homicide statutes to add an explicit "maternal exception." The Comment concludes with an appendix of state authorities recognizing fetuses as potential victims of violent crimes.

As the cases discussed in Part II demonstrate, courts should avoid interpreting state fetal homicide statutes as protecting fetuses from the women who carry them, but these cases also indicate that legislative action may be needed in this area because litigation has so far proven to be a very unsatisfactory method for determining to whom these statutes apply. Even if courts ultimately decide that the statutes do not apply to pregnant women who harm their own fetuses, those

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24. *See, e.g.*, Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845 (2000).

25. *See, e.g.*, *Fetal Homicide Laws*, NAT'L CONF. ST. LEGISLATURES (Feb. 2013), http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx#resources; *State Homicide Laws That Recognize Unborn Victims*, NAT'L RIGHT TO LIFE COMMITTEE (May 24, 2013), http://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/.

26. *See, e.g.*, Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43, 72–73 (2008) (containing a page-and-a-half discussion about "The Difficulty of Feticide Legislation that Protects the Fetus from Its Mother"); Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 734–37 (2006) (containing a three page discussion on "Abortion and Maternal Liability Exceptions").

27. *See infra* Part IV.A.

28. 966 N.E.2d 619 (Ind. Ct. App. 2012).

29. 701 So. 2d 338 (Fla. 1997) (per curiam).

30. 576 S.E.2d 168 (S.C. 2003).

decisions will often come far too late to fully protect the rights of women like Bei Bei Shuia, who must invest significant time and resources defending themselves against the most serious of criminal charges.

I. A BRIEF HISTORY OF FETAL PROTECTIVE LEGISLATION

For thousands of years, governments have prescribed various punishments for causing the loss of a pregnancy, and typically these punishments have been substantially less severe than those prescribed for causing the death of those "born alive." For example, as early as the eighteenth or nineteenth century BCE, the Code of Hammurabi provided that "[i]f a man strike[s] a free-born woman so that she lose[s] her unborn child, he shall pay ten shekels for her loss."[31] A similar commandment can be found in the Bible's book of Exodus.[32] While the ancients recognized the loss of a pregnancy as a legally cognizable injury, they generally did not punish feticide the same as they punished homicide, which—like many other crimes—was usually punishable by death.[33]

Consistent with this tradition, the common law of England generally did not consider the destruction of a fetus to be homicide.[34] According to the so-called born alive rule, most famously articulated by Lord Coke in the seventeenth century:

> If a woman be quick with child, and by a Potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great [misdemeanor], and

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31. THE CODE OF HAMMURABI ¶ 209 (L.W. King trans., Forgotten Books ed. 2007). In contrast, if the man caused the death of the woman herself, the attacker's daughter was to be put to death. *See id.* ¶ 210.

32. *Exodus* 21:22–23 (King James) ("If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life."). These two verses have traditionally been interpreted as demonstrating that "the fetus did not have the same status as the mother in ancient Hebrew law." Roy Bowen Ward, *The Use of the Bible in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 391, 396 (1993) (citing JOHN R. CONNERY, ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE 11 (1977)). In the aftermath of *Roe v. Wade*, 410 U.S. 113 (1973), some conservative Protestants have interpreted these verses as requiring fines for causing premature birth and the death penalty for causing either miscarriage *or* the death of the mother. *See, e.g.*, H. Wayne House, *Miscarriage or Premature Birth: Additional Thoughts on* Exodus *21:22–25*, 41 WESTMINSTER THEOLOGICAL J. 108, 112 (1978). However, this alternative interpretation seems to have been unconvincing to most of those outside the pro-life community. *See, e.g.*, Carlton W. Veazey & Marjorie Brahms Signer, *Religious Perspectives on the Abortion Decision: The Sacredness of Women's Lives, Morality and Values, and Social Justice*, 35 N.Y.U. REV. L. & SOC. CHANGE 281, 296 (2011); Ward, *supra*, at 396–97.

33. *See, e.g.*, Charles F. Horne, *Introduction* to THE CODE OF HAMMURABI, *supra* note 31, at 1 ("[A]ll the heavier crimes [were] made punishable with death."); *Exodus* 21:12 (King James) ("He that smiteth a man, so that he die, shall be surely put to death.").

34. *See* Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,* 17 N.Y.L.F. 335, 338 (1971), *cited with approval in* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984).

> no murder: but if the child 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* [in existence], when it is born alive.[35]

In other words, although the common law sometimes criminally punished those that caused the death of "quick" fetuses,[36] the common law did not equate feticide with murder unless the fetus was born alive and survived independently of its mother before succumbing to its prenatal injuries. In part, this is because the relatively unsophisticated state of medical technology, until recently, made it difficult to prove that the fetus was alive when the accused committed the allegedly harmful act.[37] Common law jurists were evidently willing to impose misdemeanor liability in circumstances in which it was difficult to determine whether a defendant's actions actually caused the death of the fetus, but they refused to impose murder liability on a defendant unless the fetus survived long enough for the cause of its death to be reasonably clear. Due to a "confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins," the common law simply did not impose *any* punishment on those who caused the death of fetuses before quickening.[38]

Although the common law embraced the born alive rule for centuries, general acceptance of the born alive rule has declined significantly in the last few decades. Just thirty years ago, the rule was embraced by every American jurisdiction that had considered the question of whether killing a fetus constituted murder.[39] In 1984, however, the Supreme Court of Massachusetts concluded in *Commonwealth v. Cass* that advances in medicine had largely undermined one of the primary rationales for the born alive rule.[40] Consequently, the court rejected the rule and held that, under Massachusetts law, the "infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide."[41] Since 1984, thirty-six additional states have legislatively defined fetuses as potential victims of homicide.[42]

After support for the born alive rule began dwindling at the state level, Congress in 2004 enacted the so-called Unborn Victims of Violence Act, which amended the United States Code and the Uniform Code of Military Justice to "protect unborn

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35. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 50 (1680). For the definition of *in rerum natura*, see BLACK'S LAW DICTIONARY 865 (9th ed. 2009).

36. At common law, "quickening" was "[t]he first motion felt in the womb by the mother of the fetus, [usually] occurring near the middle of the pregnancy." BLACK'S LAW DICTIONARY, *supra* note 35, at 1367.

37. *See Cass*, 467 N.E.2d at 1328 (citing Means, *supra* note 34).

38. Roe v. Wade, 410 U.S. 113, 132–33 (1973). The *Roe* Court was most interested in the common law's approach to abortion regulations, but its explanation of why the common law did not criminalize the abortion of fetuses before quickening is pertinent to an understanding of the common law's approach to other types of fetal injuries as well.

39. *See Cass*, 467 N.E.2d at 1328 n.5.

40. *See id.* at 1328.

41. *Id.* at 1329.

42. *See infra* Part III.

children from assault and murder."[43] Among other provisions, the Act provided that "[w]hoever engages in conduct that violates [certain enumerated federal statutes] and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense."[44] Although many pro-choice groups opposed the Act, fearing—perhaps rightly—that it was part of a multifront campaign to justify further restrictions on abortion,[45] the Act did include what might be called a "maternal exception."[46] Specifically, the Act provided that "[n]othing in [the Act] shall be construed to permit the prosecution . . . of any woman with respect to her unborn child."[47] Thus, as the Act's alternate title, "Laci and Conner's Law,"[48] makes clear, the Act was intended to protect fetuses from crimes of violence committed against pregnant women by third parties, not to protect fetuses against those who carry them.

The Unborn Victims of Violence Act, like the 2004 murder case that motivated its passage, provided additional motivation for even more states to pass legislation protecting fetal life.[49] Many of these state statutes, like the federal statute, included an express maternal exception.[50] However, many states with fetal homicide statutes have not explicitly exempted pregnant women from prosecution under the statutes.[51] As a result, women in some of these states may now be at risk for criminal prosecution because some prosecutors have proved willing to advocate for a broad interpretation of the statutes.

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43. Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841, 10 U.S.C. § 919a (2012).

44. 18 U.S.C. § 1841(a)(1).

45. *See, e.g.*, *The So-Called "Unborn Victims of Violence Act" Does Not Protect Women or Children*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Mar. 5, 2004), http://advocatesforpregnantwomen.org/issues/unborn_victims_of_violence_act/the_socalled_unborn_victims_of_violence_act_does_not_protect_women_or_children_1.php; *see also* Joanne Pedone, Note, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 95 (2009) ("Opponents also feared that laws like the UVVA would promote the concept of a fetus having its own right to life and health, and, even if they did not directly undermine abortion rights, they would at least create situations where the government would increasingly interfere with the woman's freedom to assure the well-being of her fetus.").

46. Legislation that would presumably close this exception has been proposed from time to time. *See, e.g.*, Sanctity of Human Life Act, H.R. 212, 112th Cong. (2011).

47. 18 U.S.C. § 1841(c)(3).

48. This is a reference to the much-discussed 2004 case in which Scott Peterson was convicted in California of murdering his wife, Laci, and her viable fetus. People v. Peterson, No. 1056770 (Cal. Super. Ct. 2004). Peterson was convicted on two counts of violating section 187 of the California Penal Code, which defined murder as "the unlawful killing of a human being, or a fetus, with malice aforethought."

49. Fleming, *supra* note 26, at 51–52.

50. *See infra* Table 1. Some of the state statutes even incorporated the language of the federal Act's maternal exception. *Compare, e.g.*, GA. CODE ANN. § 16-5-80(f) (2007), *with* 18 U.S.C. § 1841(c).

51. *See infra* Table 1.

II. THREE REPRESENTATIVE CASES INVOLVING PROSECUTIONS OF PREGNANT WOMEN FOR CAUSING HARM TO THEIR OWN FETUSES

Bei Bei Shuai's prosecution represented "the first time in Indiana's history . . . [that] the State decided to prosecute a woman for murder of her child based on her conduct *during* her pregnancy."[52] However, prosecutors in other states have brought various criminal charges against pregnant women for causing harm to their own fetuses.[53] This Part examines two additional cases that contribute to an understanding of how states should (and should not) approach such issues. In *State v. Ashley*,[54] the Florida Supreme Court faced a situation somewhat factually similar to the *Shuai* case, but interpreted Florida's fetal homicide statute as not applying to pregnant women with respect to their own fetuses. Both *Shuai* and *Ashley* illustrate situations in which—in the absence of a maternal exception—prosecutors might attempt to use fetal homicide statutes to impose criminal liability on pregnant women who harm their fetuses. The final case discussed in this Part—*State v. McKnight*[55]—illustrates that fetal homicide statutes are by no means the only tool creative prosecutors may use to bring charges against women who engage in various self-destructive behaviors during their pregnancies. As explained in Part III, all three cases support the argument that courts should not read criminal penalties as reaching pregnant women absent express statements to that effect, and ideally legislatures should include an explicit maternal exception to prevent prosecutors from seeking to use fetal homicide statutes in unintended ways.

A. Attempted Suicide: Shuai v. State

In December 2010, Bei Bei Shuai was eight months pregnant with a fetus that was the result of a sexual relationship she had with a man named Zhiliang Guan. A week before Christmas, Guan—who had previously indicated he was happy about Shuai's pregnancy—broke off his relationship with Shuai[56] and expressed doubts about whether he was responsible for the pregnancy.[57] On December 23, Shuai "wrote Guan, saying she felt she and the fetus were a burden on Guan, she had resolved to kill herself, and she was 'taking [the] baby . . . with [her].'"[58] After ingesting multiple packages of rat poison, Shuai called Guan to tell him about what she had done.[59] She then "laid down to die alone in her apartment."[60] Responding

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52. Shuai v. State, 966 N.E.2d 619, 634 (Ind. Ct. App. 2012) (Riley, J., concurring in part and dissenting in part) (emphasis in original).

53. *See supra* note 19 and accompanying text.

54. 701 So. 2d 338 (Fla. 1997) (per curiam).

55. 576 S.E.2d 168 (S.C. 2003).

56. Shuai Appellee's Brief, *supra* note 8, at 3.

57. *Id.*

58. Shuai v. State, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012) (second alteration in original).

59. Shuai Appellee's Brief, *supra* note 8, at 3.

60. Brief of Appellant at 6, *Shuai,* 966 N.E.2d 619 (No. 49A02-1107-CR-00590) [hereinafter Shuai Appellant's Brief].

to an anonymous tip (presumably provided by Guan), the police went to Shuai's apartment, but Shuai told the police she was fine.[61]

When the poison failed to kill her, Shuai went to visit a friend.[62] After Shuai admitted she had ingested the rat poison, she was taken to the hospital for treatment.[63] Over the course of the next week, "Ms. Shuai's mental state stabilized, . . . she began to express shock and disbelief at her suicide ideations, and she began planning for her child's future as well as her own."[64] However, on New Year's Eve, one of the doctors attending Shuai "observed . . . an unusual fetal heart rate and advised Ms. Shuai that she should agree to immediate caesarean surgery for the protection of the anticipated newborn."[65] Shuai consented to the procedure, and the doctor delivered a premature infant, whom Shuai named Angel.[66]

Angel was immediately transferred to the hospital's neonatal intensive care unit, where it was discovered that her blood would not clot and that she was hemorrhaging.[67] Angel's condition steadily declined over the next few days, and "[o]n January 3, 2011, Shuai consented to removing [Angel] from life support."[68] Angel subsequently died of what the coroner's report described as "intracerebral hemorrhage due to maternal [rat poison] ingestion."[69] Shuai was treated in the hospital's psychiatric unit until February 4, 2011.[70]

On March 14, 2011, the Indianapolis prosecutor charged Shuai with murder and attempted feticide, and Shuai turned herself in that day.[71] Shuai filed a motion for bail and a motion to dismiss the charges against her, both of which were denied by the trial court.[72] On August 15, 2011, the Court of Appeals of Indiana agreed to hear Shuai's interlocutory appeal of the trial court's decision on the two motions, and on February 8, 2012, the court issued an opinion reversing the trial court's decision to deny bail to Shuai, but affirming the trial court's decision to deny Shuai's motion to dismiss.[73] This ruling was thus a mixed success for Shuai—it allowed her to be released on bail pending trial, but it did not stop the prosecution against her.[74]

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61. *Shuai*, 966 N.E.2d at 622.
62. *Id.*
63. *Id.*
64. Shuai Appellant's Brief, *supra* note 60, at 6.
65. *Id.* at 7.
66. *Id.*
67. *Shuai*, 966 N.E.2d at 622.
68. *Id.* at 622–23.
69. *Id.* at 623 (footnote omitted). Shuai contested the reliability of the coroner's conclusion that Angel died of maternal rat poison ingestion and succeeded in convincing the judge hearing the case that the coroner's report should not be admitted at trial. *See* Charles Wilson, *Bei Bei Shuai Trial: Rat Poison Link to Newborn's Death 'Unreliable,' Judge Rules*, HUFFINGTON POST, Jan 23, 2013, http://www.huffingtonpost.com/2013/01/24/bei-bei-shuai-pregnant-rat-poison-unreliable-_n_2541222.html.
70. *Shuai*, 966 N.E.2d at 623.
71. *Id.*
72. *Id.*
73. *See id.* at 632.
74. *See* Stafford, *supra* note 12. Shuai was also required to wear an electronic ankle monitor while awaiting trial. *See* Diana Penner, *Shuai Freed on Guilty Plea*, INDIANAPOLIS STAR, Aug. 3, 2013, at A1.

In affirming the trial court's decision to deny Shuai's motion to dismiss, the appellate court held, among other things, that (1) the murder and feticide statutes applied to Shuai, and (2) the common law did not afford Shuai immunity from prosecution.[75] Regarding the first issue, the court acknowledged that "[t]he question whether the murder and feticide statutes can be applied to a woman in Shuai's situation [was] one of first impression in Indiana,"[76] but the court ultimately found the relevant statutes to be unambiguous and dispositive. The murder statute provides that "[a] person who: . . . knowingly or intentionally kills a fetus that has attained viability . . . commits murder."[77] Similarly, the feticide statute provides that, outside the context of a legal abortion, "[a] person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide, a Class B felony."[78] The *Shuai* court found that because nothing in the text of either statute indicates the legislature did not intend them to apply to pregnant women who harm their fetuses, the State "should be given the opportunity to [prove its case] without the intervention of a reviewing court prior to trial."[79]

The court essentially ignored Shuai's arguments for why the murder statute was unconstitutional as applied to her. In a footnote, the court explained:

> As we may resolve the issue based on the plain language of the statute, we need not address her constitutional arguments. *See Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 139 (Ind. 1999) ("If a statute is unambiguous, then 'courts must apply the plain language . . . despite perhaps strong policy or constitutional reasons to construe the statute in some other way.'") (quoting *Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F. Supp. 975, 986 (S.D. Ind. 1996)).[80]

This explanation makes little sense in light of Shuai's actual constitutional argument. The crux of that argument was that even if the court concluded that

> the Indiana Legislature enacted homicide laws that do apply to a pregnant woman and the fetus she carries, those laws would violate numerous rights and protections provided to Ms. Shuai by both the federal and state constitutions, including rights of due process both as a matter of notice and vagueness, privacy, equal protection, and the prohibition against cruel and unusual punishment.[81]

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75. *Shuai*, 966 N.E.2d at 628–29, 631. The court also held that the information used to charge Shuai was not defective and that Shuai was not being improperly prosecuted for attempting suicide. *Id.* at 627, 630.

76. *Id.* at 628.

77. IND. CODE § 35-42-1-1(4) (2008).

78. IND. CODE § 35-42-1-6 (Supp. 2012).

79. *Shuai*, 966 N.E.2d at 629 n.15.

80. *Id.*

81. Shuai Appellant's Brief, *supra* note 60, at 36.

The court's explanation for why it declined to address these arguments is an explanation for why the court rejected Shuai's interpretation of a supposedly unambiguous statute. However, it is not an explanation for why the court declined to address Shuai's argument that the interpretation of the statute the court actually chose to adopt rendered the statute unconstitutional as applied to Shuai.

As to whether Shuai enjoyed a common law immunity from prosecution for causing the death of her fetus, the court found that although "[o]ther states have advanced this common law immunity for pregnant women, [they] have not cited a specific English common law supporting their positions."[82] Consequently, the court cited Lord Coke's articulation of the born alive rule[83] for the proposition that women at common law did not enjoy complete immunity from prosecutions for harm they caused to their own fetuses.[84] It therefore rejected Shuai's argument that the legislature would have had to "expressly include pregnant women as possible perpetrators in the elements of the murder and feticide statutes" before those laws could be applied in such cases.[85]

Although the members of the three-judge panel that heard the case unanimously agreed that the trial court abused its discretion by denying Shuai's request for bail, Judge Patricia A. Riley dissented from the part of the court's opinion that affirmed the trial court's decision to deny Shuai's request to dismiss the charges against her. Judge Riley first disagreed with the majority's opinion that the information used to charge Shuai was legally sufficient for that purpose.[86] According to Judge Riley, because Angel was born alive and because "[t]he State did not present any evidence that Shuai did anything to endanger [Angel] after her birth," "the State [had] failed to establish the essential element of that crime, *i.e.*, that [Angel] was a viable fetus."[87]

On the attempted feticide charge, Judge Riley concluded: "In light of Indiana's long-standing statutory and case law history, . . . it was never the intention of the legislature that the feticide statute should be used to criminalize prenatal conduct of a pregnant woman."[88] She warned that the majority's interpretation of the statute "might lead to a slippery slope whereby the feticide statute could be construed as covering a full range of a pregnant woman's behavior."[89] In the end, Judge Riley failed to convince the majority, but her dissent was persuasive enough to compel the majority to acknowledge that "[a]s illustrated from this panel's diverging opinions, it is possible the language of the statute could lead to many possibly absurd outcomes."[90]

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82. *Shuai*, 966 N.E.2d at 630. The primary authority the court cited for the proposition that "[o]ther states have advanced this common law immunity for pregnant women" was the Florida Supreme Court's *State v. Ashley* opinion. *Id.*; *see infra* Part II.B.

83. *See* text accompanying *supra* note 35.

84. *See Shuai*, 966 N.E.2d at 631.

85. *See id.* at 630–31.

86. *See id.* at 635 (Riley, J, concurring in part and dissenting in part).

87. *Id.* at 634–35.

88. *Id.* at 635–36.

89. *Id.* at 636.

90. *Id.* at 629 n.15 (majority opinion).

After Shuai's partial success in the Court of Appeals of Indiana, she was scheduled for trial in September 2013.[91] After the trial court accepted her motion to exclude certain evidence important to the prosecutor's case, however, the prosecutor agreed to drop the murder and feticide charges in exchange for Shuai's guilty plea to criminal recklessness, a misdemeanor.[92] After accepting her plea, the court sentenced her to less than time served.[93]

B. Self-Abortion: State v. Ashley

Another way a pregnant woman might violate state fetal homicide statutes is by performing—or attempting to perform—an illegal abortion on herself. The somewhat bizarre 1997 *State v. Ashley* case illustrates this situation. Although the facts of this case are quite atypical of most criminal abortion cases, a brief review of the case is warranted here because the Florida Supreme Court's *Ashley* opinion provides support for Judge Riley's *Shuai* dissent.

In *Ashley*, an unwed teenager named Kawana Ashley, who was between twenty-five and twenty-six weeks pregnant at the time, shot herself with .22 caliber firearm, critically injuring her fetus.[94] Unlike Shuai, Ashley did not shoot herself because she wanted to end her own life. Apparently, Ashley merely wanted to terminate her pregnancy and believed she would be unable to obtain a legal abortion.[95] In this desire, she was successful. The bullet struck the fetus's wrist, and the fetus died of immaturity fifteen days after being removed during surgery.[96]

To be sure, "the concept of a self-induced abortion via .22 caliber bullet is dubious in itself and is highly questionable as a procedure intended to be regulated by" Florida's criminal abortion act,[97] but Ashley was nonetheless charged with alternative counts of felony murder and manslaughter, with Ashley's alleged violation of the criminal abortion act serving as the underlying offense for the two charges.[98] The trial court dismissed the murder charge against Ashley but allowed the State to proceed with the manslaughter charge.[99] The District Court of Appeal affirmed and certified two questions for review by the Florida Supreme Court: "1. May an expectant mother be criminally charged with the death of her born alive child resulting from self-inflicted injuries during the third trimester of pregnancy?" and "2. If so, may she be charged with manslaughter or third-degree murder, the

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91. *Bei Bei Shuai Pleads Guilty in Baby's Death*, HUFFINGTON POST, Aug. 2, 2013, http://www.huffingtonpost.com/2013/08/02/bei-bei-shuai-guilty_n_3698383.html. Shuai had previously filed a petition for transfer to the Supreme Court of Indiana to further challenge the legality of the prosecution against her, but the court unanimously denied the petition on May 11, 2012. *See* Shuai v. State, 967 N.E.2d 1035 (table).

92. *See Bei Bei Shuai Pleads Guilty in Baby's Death*, *supra* note 91.

93. *See id.* Shuai was sentenced to 178 days time served, *see id.*, but she had previously served 435 days in jail while her case was on interlocutory appeal, *see supra* note 12 and accompanying text.

94. State v. Ashley, 701 So. 2d 338, 339 (Fla. 1997) (per curiam).

95. *See id.* at 340.

96. *See id.* at 339.

97. *Id.* at 341–42.

98. *See id.* at 339–40.

99. *See id.* at 340.

underlying predicate felony being abortion or attempted abortion?"[100] The Florida Supreme Court answered the first question in the negative, mooting the second question.[101]

In concluding that pregnant women could not be charged with murder for causing harm to a fetus that lives briefly after being born, the *Ashley* court, unlike the *Shuai* court, accepted the idea that the common law provided women in such situations immunity from prosecution. According to a 1904 Connecticut Supreme Court case the *Ashley* court quoted:

> At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another; and the aid she might give to the offender in the physical performance of the operation did not make her an accomplice in his crime. The practical assistance she might thus give to the perpetrator did not involve her in the perpetration of his crime. *It was in truth a crime which, in the nature of things, she could not commit.*[102]

In other words, according to the *Ashley* court, the criminal law has traditionally differentiated between acts committed by a third party and acts committed by the pregnant woman herself because "the criminal [abortion] laws were intended to protect, not punish" pregnant women.[103]

Because the court accepted this view that pregnant women enjoyed immunity from prosecutions from self-abortions at common law, and because nothing in the statutes Ashley was charged under stated unequivocally that the legislature intended to alter the common law rule, the court concluded that "the legislature did not abrogate the common law doctrine of immunity for the pregnant woman."[104] However, both the court and even Ashley herself seemed to acknowledge that the legislature could have criminalized Ashley's conduct if the legislature had enacted a criminal abortion or fetal homicide statute that unambiguously targeted pregnant women who harm their own fetuses (though such statutes would have to satisfy constitutional limits, of course).[105]

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100. *Id.* at 339.

101. *Id.*

102. *Id.* at 340 (emphasis added) (quoting State v. Carey, 56 A. 632, 636 (Conn. 1904)).

103. *See id.* at 341 (citing Gaines v. Wolcott, 167 S.E.2d 366, 370 (Ga. Ct. App. 1969)).

104. *Id.*

105. *See id.* at 343 (Harding, J., specially concurring). Historically, some American jurisdictions did criminalize attempts to obtain an illegal abortion. For example, during the nineteenth century, "the legislatures of fifteen states declared that a woman who solicited or submitted to an abortion had committed a criminal act. However no reported cases reflect the actual enforcement of these provisions against women." Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1785 (1991) (footnote omitted). Generally speaking, to the extent that the various states criminalized abortion, they focused on the culpability of the abortion provider, not the woman receiving the abortion. *See id.* at 1783–95. In part, this is because, as a practical matter, "it was a nearly impossible task to convict an abortionist without the testimony of the woman." Ashley Gorski, Note, *The Author of Her Trouble: Abortion in Nineteenth- and Early Twentieth-Century Judicial*

C. Drug Use: State v. McKnight

For several years, various commentators and medical professionals have warned that "prosecuting as child abusers or even murderers the thousands of American women who carry pregnancies to term despite their drug addictions not only fails to further the states' goal of protecting fetal health, but also violates the constitutional rights of pregnant women."[106] Nevertheless, over the course of the last thirty years, hundreds of women, particularly poor women of color, have been civilly confined or criminally prosecuted for using drugs during their pregnancies[107]—even though a growing body of medical research indicates that drug abuse during pregnancy is not as harmful to prenatal development as was once believed.[108]

South Carolina has been particularly aggressive at prosecuting women who abuse drugs during their pregnancies.[109] In 1997, in *Whitner v. State*, [110] a sharply divided (3–2) South Carolina Supreme Court affirmed the conviction of a mother who pled guilty to criminal child neglect after she gave birth to a baby with cocaine metabolites in its system. In so doing, the court held that "the *plain* meaning of 'child' as used in [the child endangerment] statute includes a viable fetus,"[111] making it the first state supreme court to uphold a criminal child abuse conviction based on a woman's substance abuse during pregnancy.[112]

In 2003, another divided South Carolina Supreme Court (again 3–2) affirmed the twenty-year prison sentence imposed on Regina McKnight after she was convicted of homicide by child abuse in connection with a stillbirth that was attributed to McKnight's use of crack cocaine during her pregnancy.[113] In reaching this result, the court specifically held, among other things, that (1) the *Whitner* case

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Discourses, 32 HARV. J.L. & GENDER 431, 443 (2009). Although *Roe v. Wade* and its progeny have significantly limited the extent to which states may criminalize abortion prior to viability, criminal abortion statutes may be constitutional as applied to pregnant women who illegally abort their *viable* fetuses, provided that such criminal statutes do not impose an undue burden on women seeking legal abortions. *See infra* Part III.C.

106. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 382 (2008); *see also, e.g.*, Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179, 214–15 (1989); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1044–54 (1999).

107. *See* Ehrlich, *supra* note 106, at 381–82.

108. *See id.* at 388–89.

109. For example, as early as 1988, Charleston obstetrics patients suspected of using drugs were routinely subjected to urine tests without their knowledge or consent pursuant to a policy developed by a local hospital in collaboration with local law enforcement. Ferguson v. City of Charleston, 532 U.S. 67, 70–73 (2001). Those women who tested positive for drugs were referred to the authorities for prosecution. *Id.* at 72–73. The *Ferguson* Court found this practice a violation of the patients' Fourth Amendment rights against unreasonable searches. *Id.* at 84–86.

110. 492 S.E.2d 777 (S.C. 1997).

111. *Id.* at 785 (emphasis in original).

112. *See State Policies in Brief: Substance Abuse During Pregnancy*, GUTTMACHER INST. (Dec. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf.

113. State v. McKnight, 576 S.E.2d 168 (S.C. 2003). To be specific, "McKnight was sentenced to twenty years, suspended to service of twelve years." *Id.* at 171.

had put McKnight on notice that her conduct was proscribed, so the prosecution did not violate due process; (2) the prosecution did not violate McKnight's right to privacy; and (3) the twenty-year prison sentence McKnight had received did not constitute cruel and unusual punishment.[114]

In a powerful dissent with which one other justice concurred, Justice James E. Moore explained why the majority was incorrect to conclude that the South Carolina legislature intended for the state's criminal child abuse to be applied to women like McKnight:

> Once again, I must part company with the majority for condoning the prosecution of a pregnant woman under a statute that could not have been intended for such a purpose. Our abortion statute . . . carries a maximum punishment of two years or a $1,000 fine for the intentional killing of a viable fetus by its mother. In penalizing this conduct, the legislature recognized the unique situation of a feticide by the mother. I do not believe the legislature intended to allow the prosecution of a pregnant woman for homicide by child abuse under [the child abuse statute] which provides a disproportionately greater punishment of twenty years to life.
>
> As expressed in my dissent in *Whitner v. State*, it is for the legislature to determine whether to penalize a pregnant woman's abuse of her own body because of the potential harm to her fetus. It is not the business of this Court to expand the application of a criminal statute to conduct not clearly within its ambit. To the contrary, we are constrained to strictly construe penal statutes in the defendant's favor.[115]

As Justice Moore pointed out, the majority's interpretation of the criminal child abuse statute is extraordinarily harsh compared with the state's criminal abortion statute. It hardly seems possible that the legislature could have intended for a woman who causes the death of her viable fetus through neglect or indifference to be punished *at least* ten times more severely than a woman who intentionally kills her viable fetus.[116] Furthermore, to the extent there remains any ambiguity with respect to the intended applicability of the statutes to pregnant women who cause the deaths of their own fetuses, the so-called rule of lenity should require courts to resolve that ambiguity in favor of the accused.[117]

Five years after affirming Regina McKnight's conviction, a unanimous South Carolina Supreme Court granted McKnight's request for postconviction relief based on ineffective assistance of counsel.[118] Although the court found McKnight's attorney's performance deficient in several respects, the court seemed particularly concerned about the fact that McKnight's attorney had failed to present available evidence rebutting the State's allegations regarding the supposed link between

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114. *Id.* at 168.

115. *Id.* at 179–80 (Moore, J., dissenting) (footnote omitted) (citation omitted).

116. The statute under which McKnight was prosecuted provided for a sentence between twenty years and life. *Id.* at 177 (majority opinion).

117. *Cf.* United States v. Bass, 404 U.S. 336, 347 (1971).

118. *See* McKnight v. State, 661 S.E.2d 354 (S.C. 2008).

cocaine use and stillbirth.[119] However, the court did not address the constitutionality of McKnight's prosecution itself, and the court specifically rejected McKnight's equal protection argument.[120] Thus, while the decision seems to represent an acknowledgement by the court that drug use during pregnancy may not be as harmful to developing fetuses as was once believed,[121] the court did not actually reverse its earlier decisions regarding the appropriateness of prosecuting pregnant women for child abuse when those women cause harm to their fetuses by using drugs during their pregnancies.

In construing its child endangerment statute so broadly, South Carolina has become something of an outlier. A number of state supreme courts have explicitly held that various criminal statutes do not apply to pregnant women who expose their fetuses to controlled substances during pregnancy.[122] However, seventeen states—Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin—consider substance abuse during pregnancy child abuse for purposes of their civil child welfare statutes, and four states—Minnesota, Oklahoma, South Dakota, and Wisconsin—consider it grounds for civil commitment.[123] Additionally, when drug abuse is suspected, several states require health professionals to report to the state, test for prenatal drug exposure, or both.[124]

In January 2013, Alabama became the second state to explicitly allow pregnant drug users to be charged with criminal child abuse when the Supreme Court of Alabama affirmed a decision by the Alabama Court of Criminal Appeals, holding that a viable fetus is a "child" for purposes of the state's criminal statute prohibiting the chemical endangerment of a child.[125] A similar case is also winding its way through the Mississippi court system, where Rennie Gibbs faces a "depraved heart murder" charge in connection with a stillbirth she had shortly after her sixteenth birthday.[126] As in the previous cases, prosecutors allege the stillbirth was caused by

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119. *See id.* at 357–61.

120. *See id.* at 363–65.

121. *See* Lynn Paltrow & Kathrine Jack, *Pregnant Women, Junk Science, and Zealous Defense*, CHAMPION, May 2010, at 30, 30–31.

122. *See, e.g.*, State v. Aiwohi, 123 P.3d 1210, 1225 (Haw. 2005) (manslaughter); Commonwealth v. Welch, 864 S.W.2d 280, 285 (Ky. 1993) (child abuse); State v. Stegall, 828 N.W.2d 526, 533 (N.D. 2013) (child endangerment); State v. Gray, 584 N.E.2d 710, 713 (Ohio 1992) (child endangerment).

123. *See* OKLA. STAT. ANN. tit. 63, § 1-546.5 (West Supp. 2013); GUTTMACHER INST., *supra* note 112.

124. *See* GUTTMACHER INST., *supra* note 112.

125. *See Ex Parte* Ankrom, Nos. 110176 & 1110219, 2013 WL 135748, at *1 (Ala. Jan. 11, 2013).

126. *See* Gibbs v. State, 2010-IA-00819-SCT (Miss. 2011) (dismissing Rennie Gibbs's interlocutory appeal as improvidently granted); Calhoun, *supra* note 18. The Supreme Court of Mississippi recently affirmed the dismissal of a "fatally flawed" indictment of a woman named Nina Buckhalter who was charged with similar conduct as Rennie Gibbs. *See* State v. Buckhalter, 2012-CA-00725-SCT (¶¶ 1, 16) (Miss. 2013), 119 So. 3d 1015, 1019. However, the court declined to address the merits of Ms. Buckhalter's constitutional arguments against the prosecution. *See id.*

Ms. Gibbs's use of crack cocaine during her pregnancy.[127] If convicted, Ms. Gibbs could receive a life sentence.[128]

III. USING STATE FETAL HOMICIDE STATUTES TO PROSECUTE WOMEN FOR CAUSING HARM TO THEIR OWN FETUSES

As the cases discussed above illustrate, some states—despite the objections of the nation's leading medical associations and public health experts[129]—have used a variety of means to prosecute pregnant women who engage in various self-destructive behaviors during their pregnancies. Most states that have brought criminal prosecutions against pregnant women for harming their own fetuses have done so under their child abuse or child endangerment laws,[130] but the *Shuai* case raises the possibility that prosecutors in other states may try to use fetal homicide statutes to prosecute pregnant women who cause the deaths of their own fetuses.

As the *Shuai* case also illustrates, the mere fact that prosecutors have not used their states' fetal homicide statutes in precisely that way in the past does not provide any guarantee that they will not do so in the future.[131] Unless a state's fetal homicide statute contains an explicit maternal exception like that contained in the Unborn Victims of Violence Act, a pregnant woman of that state may, like Bei Bei Shuai, find herself the subject of a type of prosecution previously unheard of in her jurisdiction—at least until a court intervenes on her behalf.[132] Indeed, some prosecutors might be more willing to bring such a prosecution now that they can point to the Indiana Court of Appeal's opinion for persuasive authority for the proposition that women like Bei Bei Shuai can be prosecuted under their states' fetal homicide statutes.

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127. *Gibbs*, 2010-IA-00819-SCT, ¶ 5 (King, J., objecting to the order with separate written statement).

128. MISS. CODE ANN. § 97-3-21 (West Supp. 2013).

129. *See* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 154 (2007) ("[T]he nation's leading medical associations, including the American Medical Association, the American Academy of Pediatrics, and the American Public Health Association, have all opposed punitive measures against pregnant women who use drugs. Their opposition is due in part to their understanding that such measures will deter women from accessing much needed prenatal care and that the absence of such care certainly will have deleterious consequences for both maternal and fetal health.").

130. Paltrow & Flavin, *supra* note 19, at 321.

131. Recall that the prosecution against Bei Bei Shuai represents "the first time in Indiana's history . . . [that] the State decided to prosecute a woman for murder of her child based on her conduct *during* her pregnancy." Shuai v. State, 966 N.E.2d 619, 634 (Ind. Ct. App. 2012) (Riley, J., concurring in part and dissenting in part) (emphasis in original).

132. *Cf.* Kilmon v. State, 905 A.2d 306, 311–12 (Md. 2006) (finding that, in seeking to determine whether a woman could be charged with reckless endangerment of a child for ingesting cocaine during a pregnancy, "criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be").

A. A Survey of State Fetal Homicide Statutes

Thirty-six states currently have statutes recognizing embryos or fetuses as potential victims of homicide and other violent crimes.[133] Although criminal defendants charged under the statutes have challenged them on a variety of grounds (e.g., the fact that the criminal defendant may not have known that the mother was pregnant), the courts that have heard challenges to the statutes by third-party defendants have generally upheld them.[134] Some courts have even upheld the application of fetal homicide laws to situations in which criminal defendants alleged they acted with the consent of the pregnant woman whose fetus was harmed.[135]

Although a strong majority of those states with fetal homicide statutes—twenty-five of them—proscribe harming fetuses or embryos at any stage of development, some states only apply their fetal homicide statutes to fetuses that have reached a certain gestational age.[136] California and Virginia only protect "fetuses" (as distinct from embryos),[137] while other states require that the fetus must be "quick" (Michigan, Nevada, Rhode Island, and Washington)[138] or "viable" (Florida and Maryland).[139] "Viability" is also the point at which fetuses are protected under Massachusetts common law.[140]

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133. *See infra* Table 1. The states that have not enacted such laws are Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Maine, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, and Wyoming. *See id.* The District of Columbia does not have such a law either. *Id.* However, some of these states, by operation of their state common law, protect viable fetuses and/or fetuses that are born alive. *See supra* text accompanying notes 40–41; *infra* note 225. Some of them also protect fetuses by imposing extra penalties for attacking pregnant women. *See* statutes cited *infra* notes 174–76 and accompanying text.

134. *See, e.g.*, State v. Cotton, 5 P.3d 918, 925 (Ariz. 2000); People v. Taylor, 86 P.3d 881, 886 (Cal. 2004); Brinkley v. State, 322 S.E.2d 49, 53 (Ga. 1984). *See generally* Douglas S. Curran, Note, *Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws*, 58 DUKE L.J. 1107, 1139–41 (2009).

135. *See, e.g.*, Mary Beth Hickcox-Howard, Note, *The Case for Pro-Choice Participation in Drafting Fetal Homicide Laws*, 17 TEX. J. WOMEN & L. 317, 338–39 (2008) (discussing a Texas case in which a man claimed his girlfriend asked him to assault her to end her pregnancy after she had been told that her pregnancy was too far advanced for her to be able to obtain a legal abortion).

136. *See infra* Table 1. Some states provide explicitly that the statutes apply "at any stage of development," but a number of states provide that the statutes apply after "fertilization" or "conception." *Id.* Although the state definitions sometimes differ from the accepted medical definition of those terms, *see infra* note 228, the important point is that most states' fetal homicide statutes protect the unborn at *very* early stages of development.

137. *See* CAL. PENAL CODE § 187(a) (West 2008); VA. CODE ANN. § 18.2-32.2 (2009); People v. Davis, 872 P.2d 591 (Cal. 1994). Although the plain language of the Virginia statute seems to indicate that it only applies during the postembryonic stage of development, the statute has not yet been interpreted by the Supreme Court of Virginia. *See Ex parte* Ankrom, Nos. 1110176 & 1110219, 2013 WL 135748, at *21 n.17 (Ala. Jan. 11, 2013).

138. *See* MICH. COMP. LAWS ANN. §§ 750.322–.323 (2004); NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2012); R.I. GEN LAWS § 11-23-5 (2002); WASH. REV. CODE ANN. § 9A.32.060 (West 2009).

139. *See* FLA. STAT. ANN. § 316.193 (West 2006 & Supp. 2013); §§ 782.071, .09 (West 2007); MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis 2012).

140. *See supra* text accompanying notes 40–41.

In a few states, the gestational age at which a fetus or embryo is protected depends on the specific crime with which the defendant has been charged. Although one cannot be prosecuted for homicide in Arkansas for causing the death of a fetus before it reaches twelve weeks of development, it appears that one can be prosecuted for battering a fetus or embryo during any stage of gestational development.[141] Similarly, in Indiana, a defendant cannot be prosecuted for the manslaughter or murder of a previable fetus, but a defendant can be charged with feticide for causing the death of an embryo or fetus during any period of gestational development.[142] Unlike Indiana, Iowa does not allow a defendant to be prosecuted for feticide until the fetus reaches the third trimester, but Iowa does allow one who causes "serious injury to a human pregnancy" to be prosecuted regardless of the stage of the pregnancy.[143]

Like the Federal Unborn Victims of Violence Act, a majority of state fetal homicide statutes expressly do not apply to pregnant women with respect to their own fetuses.[144] For example, the Georgia feticide statute provides that:

> Nothing in this Code section shall be construed to permit the prosecution of: (1) Any person for conduct relating to an abortion for which the consent of the pregnant woman, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law; (2) Any person for any medical treatment of the pregnant woman or her unborn child; or (3) Any woman with respect to her unborn child.[145]

Twenty-four of the thirty-six states that have passed statutes recognizing embryos and fetuses as potential victims of violent crimes have included similar language to their statutes expressly exempting pregnant women from being prosecuted for causing injury to their own fetuses.[146] However, in a few instances, the statutory protection such clauses afford to pregnant women may be incomplete. For example, while Arkansas expressly exempts pregnant women from being prosecuted for the homicide of their own fetuses, the state does not expressly exempt such women from prosecution for the battery of their fetuses.[147]

Although some states have failed to expressly exempt pregnant women from being prosecuted for crimes against their own fetuses, at least a few of these states seem to have foreclosed the possibility of such prosecutions because of the way the statutes are drafted. For example, the Michigan Penal Code provides that "[t]he

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141. *Compare* ARK. CODE ANN. § 5-1-102(13) (2006 & Supp. 2013), *with* § 5-13-201.

142. *Compare* IND. CODE § 35-42-1-1 (2008) (murder), § 35-42-1-3 (voluntary manslaughter), *and* § 35-42-1-4 (involuntary manslaughter), *with* § 35-42-1-6 (feticide).

143. *Compare* IOWA CODE ANN. § 707.7 (West 2003 & Supp. 2013) (feticide), *with* § 707.8 (serious injury to a human pregnancy).

144. *See infra* Table 1.

145. GA. CODE ANN. § 16-5-80(f) (2007).

146. These states are Alabama, Arkansas, Alaska, Arizona, California, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. *See infra* Table 1.

147. *Compare* ARK. CODE ANN. § 5-1-102(13) (2006 & Supp. 2013), *with* § 5-13-201.

wilful 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, shall be deemed manslaughter."[148] Since a mother could not be criminally prosecuted for murder if she caused her own death through self-injury, the language of the statute would seem to imply that it does not apply to pregnant women with respect to their own fetuses. For similar reasons, pregnant women probably cannot be prosecuted under the relevant Nevada,[149] Virginia,[150] and Washington[151] statutes.

A number of states—including Indiana,[152] Iowa,[153] Mississippi,[154] Missouri,[155] Rhode Island,[156] and Wisconsin[157]—are simply silent on the issue of whether a pregnant woman can be prosecuted for various crimes of violence against their own fetuses.[158] In addition, while it appears that women in Michigan cannot be prosecuted for manslaughter under section 750.322,[159] it is less clear whether they

148. MICH. COMP. LAWS ANN. § 750.322 (West 2004).

149. *See* NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2012) ("A person who willfully kills an unborn quick child, by any injury committed upon the mother of the child, commits manslaughter . . . ."). An unusually determined prosecutor could theoretically argue that the statute should be interpreted as allowing prosecutions against women who intentionally kill their quick fetuses through self-injury. However, interpreting the statute this way would produce an absurd result—a woman would be perfectly free to kill her fetus so long as she do so without injuring herself, but would face manslaughter charges if she did happen to injure herself in the process.

150. *See* VA. CODE ANN. § 18.2-32.2 (2009) ("Any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus *of another* is guilty of a Class 2 felony." (emphasis added)).

151. *See* WASH. REV. CODE ANN. § 9A.32.060 (West 2009) ("A person is guilty of manslaughter in the first degree when: . . . He intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child."); *see also supra* note 149 (explaining why a similar statute should not be interpreted as applying to a pregnant woman who harms her own fetus).

152. *See* IND. CODE §§ 35-42-1-1, -3, -4, -6 (2008).

153. *See* IOWA CODE ANN. §§ 707.7, .8 (West 2003 and Supp. 2013).

154. *See* MISS. CODE ANN. §§ 97-3-19, -37 (West 2011).

155. Although Missouri law provides that no cause of action shall accrue "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," the statute could be interpreted as leaving open the possibility that pregnant women could be criminally liable for harming their fetuses, at least in situations in which they willfully harm their fetuses. *See* MO. ANN. STAT. § 1.205(4) (West 2000).

156. *See* R.I. GEN LAWS § 11-23-5 (2002).

157. Wisconsin does not allow women to be prosecuted under its criminal abortion statute, but it is silent with respect to the question of whether a pregnant woman could be prosecuted for various other crimes. *See infra* Table 1. However, in light of the statutory protection the women of that state enjoy from prosecutions under the criminal abortion statute, interpreting the state's other statutes as allowing those same women to be prosecuted for more serious crimes seems even more unreasonable—and less likely to be advocated for—than it is in states without such a statutory exception. However, the *McKnight* case indicates that it is not impossible that the state would adopt a seemingly unreasonable interpretation of the statute. *See supra* notes 115–16 and accompanying text.

158. *See infra* Table 1.

159. *See* MICH. COMP. LAWS ANN. § 750.322 (West 2004); *see also* text accompanying note 148.

can be prosecuted under section 750.323, Michigan's criminal abortion law.[160] The fact that some of these states have already brought prosecutions against pregnant women for harming their own fetuses[161] provides a reason to suspect that prosecutors in some of the other states may—rightly or wrongly—consider their states' silence on this issue as providing a basis for arguing that the relevant statutes could be applied more broadly than they have been in the past.

In addition, the statutes of a handful of states seem to expressly authorize prosecutions of pregnant women who harm their own fetuses, at least in certain situations. Utah provides that "[a] woman is not guilty of criminal homicide of her own unborn child if the death of her unborn child: (a) is caused by a criminally negligent act or reckless act of the woman; and (b) is not caused by an intentional or knowing act of the woman."[162] Although the statute prohibits pregnant women from being charged with negligently or recklessly causing the death of their own fetuses, the *plain language* of the statute would seem to allow homicide prosecutions of women who intentionally or knowingly cause the death of their own embryos or fetuses. Similarly, Oklahoma expressly allows a pregnant woman to be charged with homicide if she commits "a crime that caused the death of the unborn child."[163] Although this language is somewhat ambiguous, it was apparently aimed at allowing pregnant women to be charged when they commit some acts outside of legal abortions that lead to the deaths of their fetuses.[164]

B. Alternatives to Fetal Homicide Statutes

Fetal homicide statutes generally recognize embryos or fetuses or both as potential victims of violent crimes either by defining them as "persons" for purposes of the state's existing criminal laws or by creating new offenses. There are, however, other means by which states can protect fetuses. One alternative approach—albeit a rather extreme one—is to enact a state constitutional amendment giving the unborn all of the rights and privileges of citizenship from the moment of conception.[165] These so-called personhood amendments have been proposed in many states, but have—so far—been rejected by the voters of every

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160. *See* MICH. COMP. LAWS ANN. § 750.323 (West 2004) ("Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter."). Although the Michigan legislature may not have intended for "any person" to include the pregnant women to whom the statute refers, it does seem conceivable that the statute could be interpreted that way.

161. *See supra* Part II.

162. UTAH CODE ANN. § 76-5-201(4) (LexisNexis 2012).

163. OKLA. STAT. ANN. tit. 21, § 691 (West 2004).

164. *See* TRENT H. BAGGET, LEGISLATIVE UPDATE 2006, at 10–11, *available at* http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/1621/rec/229.

165. *See generally* Valena Elizabeth Beety, *Mississippi Initiative 26: Personhood and the Criminalization of Intentional and Unintentional Acts by Pregnant Women*, 81 MISS. L.J. SUPRA 55 (2011).

state in which the initiatives have appeared on the ballot.[166] Additionally, because of the obvious conflict between such initiatives and the Supreme Court's abortion jurisprudence,[167] one state supreme court has refused to even permit a proposed personhood amendment to appear on the ballot.[168]

A somewhat less extreme alternative is to recognize fetuses as potential victims of crimes, but to impose less substantial penalties when a pregnant woman harms her own fetus. For example, New York, a state generally regarded as one of the more progressive states when it comes to reproductive rights,[169] has two pre-*Roe* statutes making an "unjustified" "self-abortion" a class A or a class B misdemeanor, depending on whether the fetus has achieved a gestational age of twenty-four weeks.[170] According to one commentator:

> With respect to a self-committed abortional act within the 24-week period, the most sensible [post-*Roe*] construction of the [statute]—though not the literal one, is that such act is not criminal. After the 24-week period, the woman could be guilty of self-abortion if she did not act on the advice of a physician that such act was necessary to preserve her life.[171]

To be sure, these statutes may be largely a product of their time and seem to have been used only a handful of times since 1980.[172] Nevertheless, the laws remain

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166. *See* Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 79–81 (2013); Grace Wyler, *Personhood Movement Continues to Divide Pro-Life Activists*, TIME (July 24, 2013), http://www.nation.time.com/2013/07/24/personhood-movement-continues-to-divide-pro-life-activists/.

167. *See* Manian, *supra* note 166, at 86–89. Although it is true that the Supreme Court upheld personhood-type language in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the relevant statute did not actually impose any practical obstacles to a woman's exercise of her right to obtain a legal abortion. *Id.* at 505–06.

168. *See In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637, 637–38 (Okla. 2012) (holding that a proposed personhood initiative was "clearly unconstitutional pursuant to *Planned Parenthood v. Casey*"), *cert. denied*, Personhood Okla.v. Barber, 133 S. Ct. 528 (2012) (mem.). In March 2013, several news outlets reported, somewhat misleadingly, that North Dakota had become the first state to enact a fetal personhood amendment. *See, e.g.*, Laura Bassett, *North Dakota Personhood Measure Passes State House*, HUFFINGTON POST (Mar. 22, 2013, 4:02 PM EDT), http://www.huffingtonpost.com/2013/03/22/north-dakota-personhood_n_2934503.html. However, the amendment is currently pending voter approval in November 2014. *See id.* If approved, it would be the first such amendment successfully enacted into law. *See id.*

169. *See* NARAL PRO-CHOICE AM. & NARAL PRO-CHOICE AM. FOUND., WHO DECIDES?: THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 66 (22d ed. 2013), *available at* http://www.prochoiceamerica.org/assets/download-files/2013-who-decides.pdf (giving New York a grade of "A-" in its 2013 Report Card on Women's Reproductive Rights).

170. *See* N.Y. PENAL LAW §§ 125.50, .55 (McKinney 2009).

171. William C. Donnino, *Practice Commentary*, *in* N.Y. PENAL LAW § 125.40, at 59, 60 (McKinney 2009) (citations omitted) (internal quotation marks omitted).

172. *See* Anemona Hartocollis, *After Fetus Is Found in Trash, a Rare Charge of Self-Abortion*, N.Y. TIMES, Dec. 2, 2011, at A32 (indicating that between 1980 and 2011 only five women had been charged for violating one of the statutes).

on the books, and one was used as recently as December 2011 to charge a woman after her fetus was found in a New York City dumpster.[173]

Another way some states seek to protect fetal life is to provide additional penalties for causing injuries to a pregnant woman. For example, although Colorado does not recognize fetuses as separate victims of violent crimes, Colorado does consider the intentional killing of a pregnant woman with the knowledge that she was pregnant to be an aggravating factor for purposes of determining whether to impose the death penalty on a criminal defendant.[174] The state also provides that certain intentional crimes against pregnant women must be punished more harshly than would be required if the woman had not been pregnant (or if the defendant had lacked knowledge of the pregnancy).[175] Similarly, an "assault of a pregnant woman resulting in termination of pregnancy" is a class A felony in Connecticut, making it the most serious assault crime recognized under Connecticut law.[176]

This approach is favored by those who fear that "[b]y granting fetuses victim status, the UVV and similar state laws sever the interests of fetus and pregnant woman, ultimately furthering an agenda of control over women's bodies and lives."[177] This approach also unambiguously excludes pregnant women who harm their own fetuses from the class of persons potentially subject to the extra penalties. Since a woman could never be prosecuted merely for causing an injury to herself, there is no way a woman could be subject to the extra penalties that the state would impose upon a third-party attacker. Consequently, pregnant women in states with such laws are in no danger of being prosecuted under those laws for harming their own fetuses.

C. State Fetal Homicide Statutes and the Supreme Court's Abortion Jurisprudence

Of course, the mere fact that these fetal homicide laws exist does not mean that they are enforceable as applied to pregnant women who harm their own fetuses. After all, fourteen states have laws providing near total criminal bans on abortion.[178] Such

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173. *See id.* Those charges were ultimately dropped, but not until the woman's name—and the circumstances of her alleged self-abortion—had been widely reported in the mainstream media, severely undermining any right to privacy the woman may have had in choosing to abort what was likely a previable fetus. *See DA Drops Self-Abortion Case Vs. NYC Woman*, HUFFINGTON POST, Jan. 31, 2012, http://www.huffingtonpost.com/2012/01/04/da-drops-self-abortion-ca_n_1183152.html.

174. *See* COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2013).

175. *See id.* §§ 18-1.3-401(13), -501(6).

176. *See* CONN. GEN. STAT. ANN. § 53a–59c (West 2012).

177. Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 696 (2006).

178. NARAL PRO-CHOICE AM. FOUND., *supra* note 169, at 10. These states are Alabama, Arizona, Arkansas, Colorado, Delaware, Louisiana, Massachusetts, Michigan, Mississippi, New Mexico, Oklahoma, Vermont, West Virginia, and Wisconsin. *Id.* Although most of these criminal bans were enacted before *Roe v. Wade*, Louisiana's criminal abortion ban was not enacted until 1991. *Id.* Other criminal bans enacted after *Roe* have been struck down on constitutional grounds. *See, e.g.*, Leavitt v. Jane L., 518 U.S. 137, 138–39 (1996) (per curiam) (holding that the unconstitutional portion of a Utah statute purporting to ban abortions prior to twenty weeks of gestation in all but five enumerated circumstances was severable from a similar constitutional provision that applied to abortions after twenty weeks of gestation).

laws are clearly unconstitutional under *Roe v. Wade*[179] but might become enforceable in the event that *Roe* is overturned.[180] Thus, it is certainly possible that, as a matter of state or federal constitutional law,[181] some state fetal homicide statutes are unconstitutional as applied to pregnant women who harm their own fetuses.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[182] the Court reaffirmed *Roe v. Wade*'s "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[183] But *Casey* also reaffirmed and even strengthened the "principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[184] Unfortunately, the U.S. Supreme Court's current abortion jurisprudence is not entirely clear with regard to whether and to what extent it is constitutionally permissible for a state to criminally prosecute a pregnant woman for causing injury to her own fetus. *Casey* stands for the proposition that states may not impose an undue burden on a woman's right to obtain a previability abortion from a healthcare professional,[185] but the Court's abortion cases do not directly address the question of whether a woman has any sort of fundamental right to take actions to abort a pregnancy on her own or to take other actions during pregnancy that risk harm to the development of the embryo or fetus she carries.[186]

Although the Supreme Court has not expressly addressed these issues, "self-abortions [are] currently being practiced in the United States," and "the danger they pose to both the women and the fetuses is real."[187] For example, the U.S. Court of Appeals for the Ninth Circuit recently heard a case—*McCormack v. Hiedeman*[188]—involving an Idaho woman who had been charged under Idaho's 1973 criminal abortion statute after she used medication purchased over the Internet to induce an abortion, due to the high cost of obtaining a legal abortion in rural Idaho.[189] If convicted, Jennie Linn McCormack faced a possibility of up to

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179. 410 U.S. 113 (1973).

180. NARAL PRO-CHOICE AM. FOUND., *supra* note 169, at 10. Indeed, four states—Louisiana, Mississippi, North Dakota, and South Dakota—have enacted criminal abortion bans explicitly contingent upon this eventuality. *See id.*

181. Sixteen states—Arkansas, Arizona, California, Connecticut, Florida, Illinois, Indiana, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Tennessee, Vermont, and West Virginia—have interpreted their state constitutions as being somewhat more protective of abortion rights than the federal constitution. *Id.* at 29.

182. 505 U.S. 833 (1992).

183. *Id.* at 846.

184. *Id.*

185. *See, e.g.*, *id.* at 878 ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

186. *See* Suzanne M. Alford, Note, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1012 (2003).

187. *Id.* For example, recall that Kawana Ashley shot herself for the express purpose of inducing an abortion. *See supra* notes 94–96 and accompanying text.

188. 694 F.3d 1004 (9th Cir. 2012).

189. *Id.* at 1007–08.

five years of imprisonment for violating the statute.[190] However, the court found, among other things, that the statute imposed an undue burden on McCormack's right to have an abortion.[191]

Although the *McCormack* court stated in dicta that the Supreme Court's abortion cases "in no way recognize, permit, or stand for the proposition that a state may prosecute a pregnant woman who seeks an abortion in a manner that may not be authorized by the state's statute,"[192] the court cited a number of specific factors that contributed toward its finding that the law violated *Casey*'s undue burden test. These included (1) the fact that the statute required women to "police their provider's compliance with Idaho's regulations" in order to avoid criminal liability,[193] (2) the fact that the FDA-approved medicine used to induce the abortion had been prescribed by a physician,[194] and (3) the fact that it would have been quite difficult for McCormack to obtain a legal abortion.[195]

The *McCormack* case indicates that state laws imposing criminal liability on pregnant women for causing harm to their own fetuses may violate *Casey's* undue burden test, and this analysis presumably applies to so-called fetal homicide statutes just as it does to criminal abortion statutes. It seems plausible to think that the court might have reached a different result under a different set of facts, particularly if the statute had only placed restrictions on McCormack's ability to "self-abort" a viable fetus. Because states have a compelling interest in promoting the life or potential life of the unborn and also in protecting the health of pregnant women,[196] imposing criminal liability on pregnant women who terminate their fetuses without obtaining a legal abortion may be consistent with the Supreme Court's abortion jurisprudence in certain situations—particularly once the fetuses obtain viability. However, as will be explained below, state legislators should be wary about exercising any constitutional authority they may have to punish pregnant women who harm their own fetuses at any stage of pregnancy.

IV. A CALL FOR REFORM

The proliferation of state fetal homicide statutes indicates that the statutes are generally popular due to widespread condemnation of violence against pregnant women.[197] Most women who lose pregnancies due to the actions of third parties feel, understandably, that they have suffered a serious wrong, and when these statutes are used as intended, there is no danger that the statutes could be used to infringe upon the reproductive rights of the pregnant women the statutes were designed to protect.[198]

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190. *See id.* at 1007.
191. *See id.* at 1014.
192. *Id.* at 1013.
193. *Id.* at 1015.
194. *Id.* at 1018.
195. *Id.* at 1017.
196. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (O'Connor, Kennedy & Souter, JJ.).
197. *See* Curran, *supra* note 134, at 1119.
198. *Cf.* Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 580–81 (1992) ("Traditionally, the law did not treat

However, when state fetal homicide statutes are used to prosecute the very women they were designed to protect, the statutes raise serious constitutional and public policy concerns. Furthermore, the consensus among medical experts is that the best way to protect fetal life is to provide pregnant women with treatment, not punishment, when they engage in self-destructive or risky behaviors that ultimately put their fetuses at risk.[199] Consequently, courts should be quick to grant motions to dismiss such prosecutions, and state legislators who have not done so should seriously consider adding language to their state's fetal homicide statutes clarifying that the statutes do not apply to pregnant women who harm their own fetuses.

A. Why Fetal Homicide Statutes Should Not Be Used to Prosecute Pregnant Women Who Harm Their Own Fetuses

As the public outcry that has erupted over the *Shuai* case indicates,[200] many people who might otherwise support fetal homicide statutes feel strongly that it is inappropriate to use such statutes to prosecute pregnant women who harm their own fetuses. Further, not only pro-choice and women's rights advocates but some pro-life groups have joined medical and public health associations in expressing concerns about the unintended consequences of interpreting the statutes too broadly.[201] Even if one believes it is morally wrong for a woman to harm her own fetus, there are several reasons why one might also believe it is unwise to prosecute such a woman for murder under existing fetal homicide statutes.

Among women who know they are pregnant, the miscarriage rate is about fifteen to twenty percent, and it is often difficult to determine with certainty what caused a particular miscarriage.[202] As a result, the criminal justice system would often encounter difficulties in reliably determining whether a miscarriage is the result of a specific action by a pregnant woman that is worthy of criminal penalty.[203] It may sometimes be difficult to determine whether the actions of a third party caused a miscarriage, but in the typical case involving a violent attack on a pregnant woman, the connection between the third party's actions and the fetal harm is usually pretty obvious. By way of contrast, because many miscarriages cannot be attributed to a particular cause,[204] prosecuting a pregnant woman for

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the fetus as a separate entity in contexts that would create an adversarial relationship between a pregnant woman and the fetus within her. Rather, the law recognized the fetus as a legal entity only for carefully defined purposes, with a view toward protecting and promoting the interests of women as well as their children.").

199. *See, e.g.*, Brief Submitted in Support of Appellant Bei Bei Shuai by Amici Curiae Am. Ass'n of Suicidology et al. at 18–22, Shuai v. State, 966 N.E.2d 619 (Ind. Ct. App. 2012) (No. 49A02-1106-CR-486), 2011 WL 3892890 [hereinafter Shuai AAS Brief].

200. *See supra* note 13 and accompanying text.

201. *See* Eleanor J. Bader, *Criminalizing Pregnancy: How Feticide Laws Made Common Ground for Pro- and Anti-Choice Groups*, TRUTHOUT (June 14, 2012, 11:18 AM), http://www.truth-out.org/news/item/9772-criminalizing-pregnancy-how-feticide-laws-made-common-ground-for-pro-and-anti-choice-groups.

202. *See Miscarriage*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/ency/article/001488.htm (last updated Oct. 31, 2013). "A miscarriage is the spontaneous loss of a fetus before the 20th week," while the loss of a pregnancy after that point is a "preterm delivery." *Id.* Accordingly, the statistic above describes losses of preterm fetuses only.

203. *See* Beety, *supra* note 165, at 61–62.

204. *See id.*

allegedly causing her own miscarriage runs a substantial risk of punishing her for an act outside her control. Given this risk and the severe emotional distress many women experience after a miscarriage,[205] it seems insensitive to even investigate whether a woman did something to cause her miscarriage.

Applying fetal homicide statutes to pregnant women who harm their own fetuses also fails to distinguish a violent attack against a pregnant woman from the actions of the pregnant woman herself.[206] This distinction is important because "[t]he woman has a constitutionally protected right to bodily autonomy, but the third party has no right to terminate the woman's pregnancy."[207] Reasonable minds may disagree regarding whether a woman who intentionally causes the death of a fetus deserves criminal punishment, but in light of these constitutional and policy considerations, it would seem that the pregnant woman, at a minimum, is less deserving of punishment than the third party. Consequently, it makes little sense to charge both the pregnant woman and the third party attacker with the same offense.

In addition, applying fetal homicide statutes to pregnant women with respect to their own fetuses "raises a number of policy, social, moral, and legal implications" and "under our form of government, the appropriate place for those issues to be resolved is in the legislature."[208] However, these special concerns were not resolved by the legislatures that passed the existing fetal homicide statutes because the fetal homicide statutes were generally enacted to protect pregnant women from crimes of violence, not to protect fetuses from the women who bear them.[209] Indeed, given the widespread popular support for both fetal homicide statutes and continued access to abortion,[210] it is entirely possible that some of the existing fetal homicide statutes would not have been enacted if it had been known at the time that they could be used to prosecute pregnant women with respect to their own fetuses.[211] To the extent that state legislators believe it is appropriate to impose criminal liability on pregnant women who harm their own fetuses, they should say so explicitly so that opponents of such a policy have an opportunity to raise their concerns.

Most importantly, perhaps, the consensus of medical and public health associations is that pregnant women who engage in self-destructive behavior should receive treatment, not punishment. To the extent such punishments are intended to protect unborn life, they actually have the opposite effect. As dozens of medical organizations and individual doctors explained in amicus briefs they filed on Shuai's behalf in the Court of Appeals of Indiana:

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205. In one influential study, "[20%] of the patients who had miscarried showed a grief reaction, 12% showed a depressive reaction, and 20% responded with a combined depressive and grief reaction." Manfred Beutel, Rainer Deckardt, Michael von Rad & Herbert Weiner, *Grief and Depression After Miscarriage: Their Separation, Antecedents, and Course*, 57 PSYCHOSOMATIC MED. 517, 517 (1995).

206. *See* Ramsey, *supra* note 26, at 765–68.

207. Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 459 (1998).

208. State v. Ashley, 701 So. 2d 338, 343 (Fla. 1997) (Harding, J., specially concurring).

209. *See* text accompanying *supra* note 197.

210. *See* Ramsey, *supra* note 26, at 725, 729–30.

211. *See* Smith, *supra* note 24, at 1876–77.

> When prosecutors adopt a policy of criminal punishment for pregnant women whose actions are believed to threaten fetal welfare, the prosecutors actually make it *less* likely that fetal welfare will be promoted. . . . Severely depressed women in Indiana now know that if their physician or other health care provider finds out about any behavior that might be construed as a suicide attempt, they could be charged with attempted homicide or attempted feticide. . . . If trying to commit suicide can trigger criminal charges because of the potential for harm to the fetus, so can drinking alcohol or using other drugs. Instead of getting care for their alcoholism or drug addiction, pregnant women will try to avoid detection by physicians or other health care providers. As a result, physicians, nurses, psychologists and others are less able to provide the kinds of treatment that could address the woman's medical condition and help avert fetal harm.[212]

These harmful effects are not theoretical: in South Carolina, infant mortality has *increased* in the years following *Whinter v. State*, when the South Carolina Supreme Court first held that women who use drugs during pregnancy can be charged with criminal child abuse.[213]

Similarly, using fetal homicide statutes to prosecute pregnant women who harm their own fetuses could create perverse incentives for those women to abort unwanted pregnancies to avoid criminal prosecution.[214] If pregnant women who are addicted to drugs and alcohol know that they can be prosecuted for fetal homicide or attempted fetal homicide, they will have to choose between having an abortion and risking criminal prosecution.[215] Those who support prosecutions against women like Regina McKnight probably do not intend to encourage these women to obtain abortions, but that is the likely unintended result of imposing severe criminal liability on women who might otherwise seek treatment for their drug and alcohol abuse.

B. Why It Is Important for Fetal Homicide Statutes to Contain Explicit Maternal Exceptions Notwithstanding the Fact That Any Ambiguity in the Statutes Should Be Resolved in Favor of Pregnant Women Charged Under the Statutes

Although pro-choice groups have tended to oppose fetal homicide statutes,[216] some commentators have argued that this approach is mistaken: "[I]nstead of opposing fetal homicide laws, pro-choice groups should work to ensure that proposed fetal homicide laws have adequate exemptions for abortion, because poorly written fetal homicide laws are far more threatening to the right to choose

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212. *See* Shuai AAS Brief, *supra* note 199, at 20–21 (emphasis in original) (footnote omitted).

213. Am. Coll. of Obstetricians & Gynecologists Comm. on Ethics, Comm. Op. No. 321, *Maternal Decision Making, Ethics, and the Law*, 106 OBSTETRICS & GYNECOLOGY 1127, 1134 (1995). *See generally* text accompanying *supra* notes 109–11 (describing *Whitner*).

214. *See* Shuai AAS Brief, *supra* note 199 (citing AMA Bd. of Tr., *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990)).

215. *See id.*

216. *See, e.g.*, NAT'L ADVOCATES FOR PREGNANT WOMEN, *supra* note 45.

than are well-designed fetal homicide laws."[217] Particularly in light of prosecutions of women like Bei Bei Shuai,[218] it seems critical that those who oppose such prosecutions not simply oppose the enactment of fetal homicide statutes, but engage with their proponents to ensure any law enacted is not susceptible to use by prosecutors against women for actions during pregnancy that may harm embryonic or fetal development.

To the extent that state legislators did not intend for their states' fetal homicide statutes to be used against pregnant women with respect to their own fetuses, it may make sense for them to resolve any ambiguity in the statutes legislatively before the courts attempt to resolve that ambiguity on their own. At the very least, legislators in states that may enact such statutes in the future should take care in how they draft the statutes. As the cases discussed in this Comment illustrate, even if prosecutions against women like Bei Bei Shuai are ultimately unsuccessful, the prosecutions themselves infringe upon the liberty of the women involved.[219] Shuai spent over a year in prison *before she was convicted of anything*.[220] Although it is not uncommon for persons accused of murder to be incarcerated pending trial,[221] Shuai's pretrial detention was especially problematic due to the strong constitutional arguments in support of the proposition that what she was accused of doing was no crime at all.

Further, even though the murder charges against Shuai were ultimately dropped, her privacy was severely invaded by the prosecution and the worldwide coverage it received.[222] The case generated a huge amount of legal fees as well. The lawyers representing Shuai donated over two million dollars in pro bono legal work to Shuai's defense.[223] Shuai did not bear those costs directly, but she certainly had to contribute a significant amount of her time and energy helping to prepare an adequate defense. Given that prosecutors who have brought charges against pregnant women for harming their own fetuses have tended to disproportionately target poor women of color,[224] it is also unlikely that many women targeted for such prosecutions would be able to mount the type of sophisticated legal defense that eventually succeeded in obtaining a dismissal of the murder and feticide charges against Shuai.

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217. Hickcox-Howard, *supra* note 135, at 322.

218. *See supra* Part II.A.

219. *See* Johnsen, *supra* note 198, at 600 ("In the Massachusetts case, *Commonwealth v. Pellegrini*, the court described the level of governmental intrusion into a woman's life entailed by such a prosecution: 'In order to prosecute Ms. Pellegrini, the commonwealth must intrude into her most private areas, her inner body.' It also noted that 'the level of state intervention and control over a woman's body required by the prosecution' would set a dangerous precedent for numerous other pregnancy related restrictions on women.") (footnotes omitted) (quoting Commonwealth v. Pellegrini, No. 87970, slip op. at 6, 9 (Mass. Super. Ct. Oct. 15, 1990), *rev'd*, 608 N.E.2d 717 (Mass. 1993)).

220. *See supra* Part II.A.

221. *See supra* notes 11–12 and accompanying text.

222. *See supra* text accompanying note 18.

223. Dave Stafford, *Shuai Case Resolved, Thorny Legal Issues Remain*, IND. LAW., Aug. 14–27, 2013, at 1.

224. *See* Paltrow & Flavin, *supra* note 19, at 311.

CONCLUSION

Prosecuting pregnant women for harming their own fetuses raises serious constitutional questions, and it is bad public policy because it actually undermines the goal of protecting fetal life. Although it seems likely that such prosecutions will be rare, the prosecutions will profoundly affect the lives of women unfortunate enough to be targeted for them. Judges hearing such cases should be quick to dismiss them, but state legislators can protect women like Shuai from such prosecutions by resolving any ambiguity in the intended scope of the statutes. As cases from Alabama and South Carolina illustrate, such legislation would need to cover all of the potentially relevant statutes to avoid merely redirecting prosecutorial attention to different statutes. Nevertheless, a maternal exception like the kind included in many fetal homicide laws likely would have prevented the Indianapolis prosecutor from charging Bei Bei Shuai. Therefore, to the extent that state legislators did not intend for their state fetal homicide statutes to allow for prosecutions of women in Shuai's situation, those legislators that have not done so should consider adding language to their fetal homicide statutes clarifying that they do not apply to pregnant women with respect to their own fetuses.

APPENDIX

Table 1. State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes[225]

State	Authorities	Gestational Age Required	Maternal Exception?
Alabama	ALA. CODE § 13A-6-1(a)(3) (LexisNexis 2005) (defining "person" as including the unborn for purposes of the state's murder, manslaughter, criminally negligent homicide, and assault statutes).	Any stage of development	Yes
Alaska	ALASKA STAT. § 11.41.150 (LexisNexis 2012) (murder of an unborn child); § 11.41.160 (manslaughter of an unborn child); § 11.41.170 (criminally negligent homicide of an unborn child); § 11.41.180 (applicability); § 11.41.280 (assault of an unborn child in the first degree); § 11.41.282 (assault of an unborn child in the second degree); § 11.81.900(b)(62) (definitions).	Any stage of development	Yes
Arizona	ARIZ. REV. STAT. ANN. § 13-1101 (West 2010) (definitions); § 13-1102 (negligent homicide); § 13-1103 (manslaughter); § 13-1104 (second-degree murder); § 13-1105 (first-degree murder).	Any stage of development	Yes
Arkansas	ARK. STAT. ANN. § 5-1-102(13) (2006 & Supp. 2013) (defining "person" and "unborn child" for purposes of the state's capital murder, first-degree murder, second-degree murder, manslaughter, and negligent homicide statutes); § 5-13-201 (battery in the first degree).	Twelve weeks for the homicide statutes; none provided for battery	Yes for the homicide statutes; none provided for battery

225. This table surveys those state criminal statutes that define fetuses as a potential victim of a violent crime. It does not include every state law governing the legal rights of fetuses, nor does it necessarily include every state statute proscribing punishments for violent crimes that result in fetal harm. For example, it does not include those statutes that provide extra penalties for crimes of violence committed against pregnant victims. *See, e.g.*, COLO. REV. STAT. ANN. § 18-1.3-401(13)(a) (West 2013) (providing a certain range of punishments for crimes of violence if "(I) [t]he victim of the offense was pregnant at the time of commission of the offense; and (II) [t]he defendant knew or reasonably should have known that the victim of the offense was pregnant."). Because such statutes recognize the pregnant woman herself—and not her fetus—as the victim of the offense, no pregnant woman could possibly be prosecuted under such a statute for harming her own fetus. For similar reasons, this table does not survey cases from those states that still adhere to the born alive rule. *See, e.g.*, State v. Courchesne, 998 A.2d 1 (Conn. 2010). At least in modern times, the born alive rule has never been interpreted as applying to pregnant women with respect to their own fetuses because doing so would create a very bizarre situation: a woman could avoid criminal prosecution entirely if she made sure the fetus died before birth, but she might be charged with murder if she allowed her doctors to do what they could to save the fetus.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
California	CAL. PENAL CODE § 187(a) (West 2008) (defining murder as "the unlawful killing of a human being, or a fetus, with malice aforethought").	Post-embryonic[226]	Yes
Colorado	None	—	—
Connecticut	None	—	—
Delaware	None	—	—
District of Columbia	None	—	—
Florida	FLA. STAT. ANN. § 316.193 (West 2006 & Supp. 2013) (DUI manslaughter); § 782.071 (West 2007) (vehicular homicide); § 782.09 (murder & manslaughter).	Viability	Yes for manslaughter; implied for the others[227]
Georgia	GA. CODE ANN. § 16-5-20 (2007) (simple assault); § 16-5-28 (assault of an unborn child); § 16-5-29 (battery of an unborn child); § 16-5-80 (feticide and voluntary manslaughter of an unborn child); § 40-6-393.1 (feticide by vehicle); § 52-7-12.3 (West, WestlawNext through 2013 reg. sess.) (feticide by vessel).	Any stage of development	Yes
Hawaii	None	—	—
Idaho	IDAHO CODE ANN. § 18-4001 (2004) (murder); § 18-4006 (Supp. 2013) (manslaughter); § 18-4016 (2004) (definitions).	In utero	Yes
Illinois	720 ILL. COMP. STAT. ANN. § 5/9-1.2 (West Supp. 2013) (intentional homicide of an unborn child); § 5/9-2.1 (West 2002) (voluntary manslaughter of an unborn child); § 5/9-3.2 (involuntary manslaughter and reckless homicide of an unborn child); § 5/12-3.1 (West Supp. 2013) (battery and aggravated battery of an unborn child).	Post-fertilization	Yes

226. People v. Davis, 872 P.2d 591, 599 (Cal. 1994).

227. Additionally, in light of the Florida Supreme Court's *Ashley* decision, it seems highly unlikely that the court would interpret these statutes as applying to pregnant women with respect to their own fetuses, even if the statutes were somewhat ambiguous on that point. *See supra* Part II.B.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Indiana	IND. CODE § 35-42-1-1 (2008) (murder); § 35-42-1-3 (voluntary manslaughter); § 35-42-1-4 (involuntary manslaughter) § 35-42-1-6 (feticide).	Manslaughter and murder require viability; feticide requires only a pregnancy	No
Iowa	IOWA CODE ANN. § 707.7 (West 2003 & Supp. 2013) (feticide); § 707.8 (2003) (serious injury to a human pregnancy).	Third trimester for feticide; injury to a pregnancy requires only a pregnancy	No for feticide; yes for injury to pregnancy
Kansas	KAN. STAT. ANN. § 21-5419 (Supp. 2012) (defining an "unborn child" as a potential victim of capital murder, first-degree murder, second-degree murder, voluntary manslaughter, involuntary manslaughter, vehicular homicide, and battery).	Post-fertilization	Yes
Kentucky	KY. REV. STAT. ANN. § 507A.010 (LexisNexis 2008) (definitions); § 507A.020 (first-degree fetal homicide); § 507A.030 (second-degree fetal homicide); § 507A.040 (third-degree fetal homicide); § 507A.050 (fourth-degree fetal homicide).	Conception[228]	Yes
Louisiana	LA. REV. STAT. ANN. § 14:2 (Supp. 2013) ("unborn child"); § 14:32.5 (2007) (definition of feticide); § 14:32.6 (first-degree feticide); § 14:32.7 (second-degree feticide); § 14:32.8 (Supp. 2013) (third-degree feticide).	Fertilization and implantation	Yes
Maine	None	—	—
Maryland	MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis 2012) (defining "viable fetuses" as potential victims of murder and manslaughter).	Viability	Yes

228. The Kentucky statute provides that the term "'[u]nborn child' means a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency." KY. REV. STAT. ANN. § 507A.010(1)(c) (LexisNexis 2008). The statute seems to use "conception" as a synonym for "fertilization." However, this definition of "conception" is contrary to the medical definition of the term, which defines it as a synonym for "implantation." *See* Johnsen, *supra* note 106, at 182 n.13 (citing OBSTETRIC-GYNECOLOGIC TERMINOLOGY 229, 327 (Edward C. Hughes ed., 1972)). Many of the statutes surveyed in this Appendix also create a legal definition of "conception" that is at odds with the medical definition of the word.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Massachusetts	Commonwealth v. Lawrence, 536 N.E.2d 571, 571 (Mass. 1989) (holding that a viable fetus is considered a human being for purposes of common law murder); Commonwealth v. Cass, 467 N.E.2d 1324, 1324 (Mass. 1984) (holding that a viable fetus is considered a person for purposes of the state's vehicular homicide statute).	Viability	No
Michigan	MICH. COMP. LAWS ANN. § 750.322 (West 2004) (criminalizing willful killing of unborn child by injury to the mother); § 750.323 (death of unborn child by use of medicine or instrument).	Quickening	No for death of unborn child by use of medicine; implied for willful killing by injury to mother
Minnesota	MINN. STAT. ANN. § 609.21 (West 2009) (criminal vehicular homicide and injury); § 609.266 (definitions); § 609.2661 (murder of unborn child in the first degree); § 609.2662 (murder of unborn child in the second degree); § 609.2663 (murder of unborn child in the third degree); § 609.2664 (manslaughter of unborn child in the first degree); § 609.2665 (manslaughter of unborn child in the second degree); § 609.267 (assault of unborn child in the first degree); § 609.2671 (assault of unborn child in the second degree); § 609.2672 (assault of unborn child in the third degree); § 609.268 (injury or death of unborn child in commission of crime).	Conception	Yes
Mississippi	MISS. CODE ANN. § 97-3-19 (West 2011) (defining an "unborn child" as a potential victim of murder); § 97-3-37 (defining an "unborn child" as a potential victim of numerous enumerated crimes of violence).	Any stage of development	No
Missouri	MO. ANN. STAT. § 1.205 (West 2000) (granting the "unborn child" "all the rights, privileges, and immunities available to other persons, citizens, and residents").[229]	Conception	No

229. This statute is clearly unconstitutional to the extent that it conflicts with the Supreme

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Montana	None	—	—
Nebraska	NEB. REV. STAT. ANN. § 28-389 (LexisNexis 2009) (definitions); § 28-390 (applicability); § 28-391 (murder of an unborn child in the first degree); § 28-392 (murder of an unborn child in the second degree); § 28-393 (manslaughter of an unborn child); § 28-394 (LexisNexis 2009 & Supp. 2013) (motor vehicle homicide of an unborn child); § 28-397 (LexisNexis 2009) (assault of an unborn child in the first degree); § 28-398 (assault of an unborn child in the second degree); § 28-399 (assault of an unborn child in the third degree).	Any stage of development	Yes
Nevada	NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2012) (willful killing of unborn child).	Quickening	Implied
New Hampshire	None	—	—
New Jersey	None	—	—
New Mexico	None	—	—
New York	None	—	—
North Carolina	N.C. GEN. STAT. ANN. § 14-23.1 (definition of "unborn child") (West Supp. 2012); § 14-23.2 (murder of an unborn child); § 14-23.3 (voluntary manslaughter of an unborn child); § 14-23.4 (involuntary manslaughter of an unborn child); § 14-23.5 (assault inflicting serious bodily injury on an unborn child); § 14-23.6 (battery on an unborn child); § 14-23.7 (applicability).	Any stage of development	Yes
North Dakota	N.D. CENT. CODE § 12.1-17.1-01 (2012) (definitions); § 12.1-17.1-02 (murder of an unborn child); § 12.1-17.1-03 (manslaughter of an unborn child); § 12.1-17.1-04 (negligent homicide of an unborn child).	Conception	Yes

Court's abortion jurisprudence. Although this statute was the subject of *Webster v. Reproductive Health Services*, the Supreme Court expressly declined to rule on the statute's constitutionality. *See* 492 U.S. 490, 505–06 (1989); *see also supra* note 167 and accompanying text.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Ohio	OHIO REV. CODE ANN. § 2903.01 (LexisNexis 2010) (aggravated murder); § 2903.02 (murder); § 2903.03 (voluntary manslaughter); § 2903.04 (involuntary manslaughter); § 2903.041 (reckless homicide); § 2903.05 (negligent homicide); § 2903.06 (aggravated vehicular homicide); § 2903.09 (definitions).	Fertilization	Yes
Oklahoma	OKLA. STAT. ANN. tit. 21, § 652 (West 2002 & Supp. 2013) (discharging firearms and assault and battery); tit. 21, § 691 (West Supp. 2013) (defining an "unborn child" as a potential victim of homicide); tit. 63, § 1-730 (West 2004 & Supp. 2013) (definitions).	Fertilization	Partial
Oregon	None	—	—
Pennsylvania	18 PA. CONS. STAT. ANN. § 2603 (West 1998) (criminal homicide of unborn child); § 2604 (murder of unborn child); § 2605 (voluntary manslaughter of unborn child); § 2606 (aggravated assault of unborn child); § 2608 (applicability); § 3203 (definitions).	Fertilization	Yes
Rhode Island	R.I. GEN. LAWS § 11-23-5 (2002) (willful killing of unborn quick child).	Quickening	No
South Carolina	S.C. CODE ANN. § 16-3-1083 (Supp. 2012) (death or injury of child in utero due to commission of violent crime).	Any stage of development	Yes
South Dakota	S.D. CODIFIED LAWS § 22-1-2 (2006) (definitions); § 22-16-1 (defining "homicide" for purposes of the state's homicide statutes); § 22-16-1.1 (fetal homicide); § 22-16-15 (manslaughter); § 22-16-41 (vehicular homicide).	Fertilization	Yes
Tennessee	TENN. CODE. ANN. § 39-13-107 (Supp. 2012) (defining embryos and fetuses as potential victims for purposes of the assault statutes); § 39-13-214 (Supp. 2013) (defining embryos and fetuses as potential victims for purposes of the homicide statutes).	Any stage of development	Yes
Texas	TEX. PENAL CODE ANN. § 1.07 (West Supp. 2012) (defining "individual" for purposes of the entire penal code); § 19.06 (applicability of homicide statutes); § 22.12 (applicability of assault statutes).	Fertilization	Yes

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Utah	UTAH CODE ANN. § 76-5-201 (LexisNexis 2012) (criminal homicide).	Any stage of development	Partial
Vermont	None	—	—
Virginia	VA. CODE ANN. § 18.2-32.2 (2009) (killing a fetus).	Postembryonic	Implied
Washington	WASH. REV. CODE ANN. § 9A.32.060 (West 2009) (manslaughter in the first degree).	Quickening	Implied
West Virginia	W. VA. CODE ANN. § 61-2-30 (LexisNexis 2010) (defining embryos and fetuses as potential victims of certain enumerated crimes of violence).	Fertilization	Yes
Wisconsin	WIS. STAT. ANN. § 940.01 (West 2005) (first-degree intentional homicide); § 940.02 (West 2005) (first-degree reckless homicide); § 940.03 (West 2005 & Supp. 2012) (felony murder); § 940.04 (abortion) (West 2005 & Supp. 2012); § 940.05 (West 2005) (second-degree intentional homicide); § 940.06 (second-degree reckless homicide); § 940.08 (West 2005 & Supp. 2012) (homicide by negligent handling of dangerous weapons, explosives, or fire); § 940.09 (West 2005 & Supp. 2012) (homicide by intoxicated use of vehicle or firearm); § 940.10 (2005) (homicide by negligent operation of a vehicle); § 940.13 (abortion exception); § 940.195 (battery and aggravated battery to an unborn child).	Conception	Yes for abortion; no for the rest
Wyoming	None	—	—