Feticide\(^1\) and Criminal Law: Is There an Acceptable Approach?

INTRODUCTION

Veronica and Dale have lived together for two years. Their relationship has always been a bit rocky, and within the last few months most of their conversations have degenerated into arguments. Very recently those arguments have become increasingly heated. Financial trouble is one source of conflict, and the prospect of parenthood has only compounded their troubles. Veronica is pregnant, and Dale is angry about it. To make matters worse, Dale lost control of his drinking problem around the time he learned of her pregnancy. He then resumed the habit he had abandoned just before they met, drinking heavily every day.

A few days ago Veronica and Dale had an especially bad fight. An argument about money and the baby they were expecting quickly turned volatile, both of them screaming obscenities at each other and gesturing threateningly. The fight ended when he threw an empty vodka bottle at her. She dodged the bottle, which barely missed her head, hit some books on a bookshelf, bounced off, and fell to the floor, making a hollow sound as it hit the carpet. They were both shocked at what he had just done. There had been ugly fights before, but there had never been violence. Drunk and ashamed, he crept into the bedroom and fell down on the bed. She was scared of him now, so she left their house and went to her mother's.

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\(^1\) Because much of the language used to discuss this subject is politically charged, the term "feticide" and the phrase "killing of a fetus" have the same meaning. Both signify acts, other than abortion, that cause the development of the fetus to end, resulting in stillbirth or miscarriage. By using neutral language, the author wishes to avoid making any conclusions about the ethical status of fetuses.
After three nights at her mother's house, she moved back in with him. He said he had stopped drinking, and she believed him. But he was not telling the truth, and two days later another fight erupted. The same argument descended into more violence. He grabbed her and threw her to the ground when she told him she was leaving for good. She struggled to get up and began running towards the door, but he caught up with her in the kitchen and pushed her into the counter. She hit the counter hard and fell to the floor. Soon there were sirens and flashing lights outside their house. The police arrested him and took him to jail. An ambulance put her on a stretcher and took her to the hospital, where an ultrasound confirmed her worst fears. The collision with the counter ended the life that was developing inside her.

This hypothetical raises important ethical and legal issues. An initial legal question is, how will the district attorney charge Dale? This will depend on many factors that have little to do with the substantive criminal law in the jurisdiction where Dale is charged. But the criminal law of that jurisdiction is profoundly important with respect to the charges that could be filed against Dale. The district attorney surely has the power to charge Dale with battery and possibly aggravated battery. In some jurisdictions, there are special statutes that attach criminal penalties to domestic abuse.

Charging questions also arise from the miscarriage Dale caused. Is Dale criminally liable for causing the death of the fetus? The answer depends on the law of the jurisdiction where Dale is charged, and this paper will describe the three basic approaches American jurisdictions have adopted. Description of the existing law in any jurisdiction invites an evaluation of the law. Does the state have an interest in extending its criminal law to protect developing fetuses and the pregnant women who carry them? If so, should conduct that causes the death of a fetus be criminalized? This paper will also evaluate the approaches.

Although some American jurisdictions share answers to these questions, their approaches differ. Many American jurisdictions have answered these questions affirmatively, criminalizing the killing of fetuses, but their approaches to the problem are disparate. Of those American jurisdictions that classify the killing of a fetus as a form of homicide, some classify it as murder, while others classify it as manslaughter. Some have criminalized it through legislation, some through judicial decisions. Some use their criminal law to protect all
fetuses. Others protect only viable fetuses or quick fetuses. Still others have statutes that define the crime as assault on a pregnant woman. Many American jurisdictions have not extended their criminal law to protect fetuses or to provide special protection for pregnant women. In those states, the law provides no additional criminal penalty for the killing of a fetus or the assault on a pregnant woman.

The approach a jurisdiction chooses will have profound consequences for individuals who find themselves entangled in its criminal justice system, either as defendants or victims. For example, the futures of Veronica and Dale will hinge on the approach their jurisdiction has adopted. In addition to the individual consequences, the various approaches present important theoretical issues. Some of these issues are confined to the field of criminal law. For example, should the law focus on mens rea or rely solely on the result of the proscribed conduct in determining penalties? Applying this question to the hypothetical, should Dale be punished less severely if he did not intend to harm the fetus or should his punishment be based solely on the fact that the fetus was destroyed as a result of his conduct?

Other, less obvious theoretical issues are far more complex and difficult. These are the broader ethical issues. Is a fetus a person with rights, a person who is entitled to the same level of respect as the newborn infant, child, or adult? If a fetus does in fact become a person before birth, at what stage of pregnancy does the fetus become a person? Answering those questions requires an examination of our most deeply held philosophical and religious beliefs. Specific answers to these questions are embedded in the various approaches, and those answers will have far-reaching ramifications both inside and outside the boundaries of the criminal law. It is no coincidence that these are the same ethical questions that opposing sides of the abortion fight continue to debate with such vigor. The legal and ethical questions surrounding feticide have become another front in the war over abortion. Rather than arguing that one approach is best because its foundation is the proper ethical position on the moral status of fetuses, this paper will take a neutral position on that issue. Instead, this paper will examine the approaches in order to determine if any one of them is acceptable to reasonable people on both sides of the abortion debate.

2 In the interest of clarity, the term “fetus” means the product of human reproduction at all stages prior to birth. More precise terminology will be used when necessary.
Space limitations make a comprehensive description, analysis, and evaluation of the approaches impossible. Rather than attempting a superficial discussion of each approach, this paper describes, analyzes, and evaluates the three basic approaches. The three approaches are: killing a fetus is not a crime under the common law born alive rule, killing a fetus is a form of criminal homicide, and killing a fetus is a criminal assault on a pregnant woman. Because there is little variation among the states that adhere to the born alive rule, the paper will use legal sources from more than one jurisdiction in the course of discussing that rule. Although selection of one jurisdiction to represent the homicide jurisdictions was difficult, California is the best choice because the law of that state is both influential and developed. This paper will use New Mexico law to represent the assault jurisdictions, mostly because the author and the potential readers have a special interest in the law of that jurisdiction. Following the description and evaluation of the three approaches, the conclusion makes recommendations in light of the discussion.

THE THREE BASIC APPROACHES

1. The Common Law Born Alive Rule: Feticide is not a Criminal Offense

The importance of the common law born alive rule is twofold. First, it is prevalent; in twenty-five states it continues to bar criminal prosecutions for conduct causing the death of a fetus. A simple quantitative breakdown will give the reader a sense of where American jurisdictions currently stand. Half of the fifty states have neither extended their homicide laws to cover the killing of a fetus nor attached additional penalties to assaults on pregnant women. Twenty-three of those states have extended their criminal law through legislation. In addition, two of those states have done so by judicial decision. In the remaining twenty-five, the common law born alive rule precludes criminal liability for feticide. The importance of the born alive rule transcends its modern prevalence because every American jurisdiction followed the born alive

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rule at one time. Although other approaches had been used at early common law, "[b]y the mid-nineteenth century . . . the common law had shifted to the 'born alive' theory."5 So this approach also has historical import. The born alive rule provides a vital piece of the legal context of this problem, although that context is much too rich for this paper to discuss fully.6

According to the born alive rule, a fetus can never be the victim in a homicide case. Courts often quote Coke's formulation of the old common law rule:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.7

Coke's distinction is pertinent because it is the distinction embodied in the modern formulation of the rule. The first part of this passage describes both abortion and feticide, which are both classified as "great misprisions" or misdemeanors. The second part classifies the killing of a child that has been born alive as murder. In State v. Willis, the New Mexico Court of Appeals announces the rule in modern English:

[The unborn child is not a human being and hence cannot be the victim of homicide unless it is subsequently born alive. Early cases under the rule required a complete live birth as evidenced by an independent circulation. The rule was rather ambiguous, however, since there was no recognized standard of what constituted a live birth or an independent circulation.8

As that passage suggests, the rule's ambiguity led to much litigation on the issue of exactly when live birth occurred, but those fine distinctions are not crucial to this discussion. The crucial point is that homicide law protected no fetus; the age of the fetus and its level of development were both irrelevant at common law. Under the born alive rule, there was no legal person or human being until a live birth occurred.

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6 For a concise history of the law in this area, see Keeler v. Superior Court of Amador County, 470 P.2d 617 (Cal. 1970).
Two examples of how courts have applied the born alive rule will facilitate a clearer understanding of the rule’s meaning in modern times and the importance of the rule even in states that no longer adhere to it. Two examples follow. The first is a homicide prosecution that failed because of the born alive rule. The second is a homicide prosecution that succeeded despite the born alive rule.

In *State v. Willis*, defendant was charged with killing an unborn viable fetus under New Mexico’s vehicular homicide statute, which states, "Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle." The trial court dismissed the vehicular homicide charge on the grounds that an unborn viable fetus is not a human being for the purposes of the statute. The state argued that the legislature “intended a viable fetus to be included within the definition of human being as found in the Vehicular Homicide Statute because of its existence in the New Mexico abortion statute.” The state reasoned “that the abortion statute demonstrates the Legislature’s compelling interest to protect the life of a fetus.”

The New Mexico Court of Appeals accepted the premise that the state has an interest “in protecting the life of an unborn child,” but rejected the state’s conclusion that feticide is “the statutory equivalent of homicide.” The court noted that the existence of a state interest does not necessarily mean that the legislature has chosen to exercise its power to legislate to protect that interest. The court observed that in this instance the legislature had not exercised that power. The court looked to the history of homicide law to discover the legislative intent with respect to the term “human being.” In the mid-nineteenth century, the legislature enacted statutes that distinguished between “the killing of a human being and the killing of an unborn infant child.” In 1963, the legislature repealed the law that made it a crime to kill an unborn infant child and did not change the statutory definition of human being. Based on these historical facts, the court...
concluded that the legislature did not intend viable fetuses to fall within the meaning of the term “human being” in the homicide statute.18

In the absence of legislation, the court was unwilling to change the definition of “human being,” and the born alive rule governed the case. The court reiterated the frequently cited separation of powers principle that expanding the scope of criminal statutes is a function reserved for the legislature.19 Writing for the court, Judge Neal concluded, “Only the legislature can decide to equate the two [feticide and homicide], and until they decide to do so there is no basis upon which to impose homicide sanctions for the destruction of fetus.”20 The appellate court affirmed the trial court’s dismissal of the vehicular homicide charge, adhering to the born alive rule, which served as the default position because the legislature had not expressly abandoned or amended it.

As discussed below, a defendant in Willis’ position could face criminal penalties for causing the death of a fetus under current New Mexico law. However, changes in the law do not diminish the importance of cases like Willis, where a homicide prosecution fails as a result of the born alive rule. They are still good law in many jurisdictions. In addition, much publicity often surrounds these cases, often stirring public debate and prompting legislative reaction. For example, the reasoning in Keeler v. Superior Court of Amador County21 echoes the reasoning in Willis. In Keeler, the California Supreme Court held that an unborn viable fetus is not a “human being” for the purposes of California’s murder statute.22 In response to Keeler, California’s legislature amended its criminal code by extending its homicide provision to include fetuses, and the California Supreme Court held that the term “fetus” in the homicide provision could include seven-week-old fetuses.23 Finally, these types of born alive cases have serious implications for the ethical and legal debate about abortion. Implicit in their holdings is the proposition that fetuses are not human beings, a statement that contradicts the fundamental premise of most anti-abortion/pro-life arguments.

18 Id.
19 Id. at 1223.
20 Id.
21 470 P.2d 617 (California 1970). That case and the subsequent development of California law will be discussed below in the section on California’s approach to the feticide problem.
22 Keeler at 618.
23 People v. Davis, 872 P.2d 591, 599 (Cal. 1994).
Modern cases where a homicide prosecution succeeds despite the application of the born alive rule are also significant. Such cases define the outer limits of the born alive rule by circumscribing the class of victims the rule protects. For example, in *State v. Harroket*, the issue before the Georgia Court of Appeals was whether a murder by vehicle charge was lawful for a defendant who injured a pregnant woman, causing in utero injuries to her fetus that ultimately resulted in its death after it was born alive. The court described the facts in that case:

Appellee lost control of her car and collided with a vehicle in which Sarah Ferguson was a passenger. Ferguson was thirty-five weeks pregnant at the time. Ferguson was transported to a hospital and gave birth, through an emergency Caesarian section, to Isaac Ferguson Tolmach. The child lived approximately eleven hours before dying from the injuries he had received in the accident, primarily internal hemorrhaging and a fractured right clavicle.

The trial court relied on the born alive rule and dismissed the charge, ruling that the victim was not a “person” at the time of the accident. But the appellate court rejected the trial court’s reasoning and reversed. The court of appeals held that the victim in this case was “a legal ‘person’ at the time he died from injuries received in the automobile collision.”

The point of disagreement in *Harroket* was not whether to use the born alive rule but how to use it. The trial court construed the rule narrowly and ruled that the victim was not yet born alive at the time of the injury, which led it to the conclusion that criminal homicide was an impossibility. However, the appellate court construed the rule broadly and held “that it is not the victim’s status at the time the injuries are inflicted that determines the nature of the crime . . . but the victim’s status at the time of death which is the determinative factor.” The appellate court’s reading is correct because the narrow reading is inconsistent with homicide law. All homicides share a result, the death of a human being. In murder and manslaughter cases, if the defendant has the requisite mens rea and actus reus and his conduct causes the death of a human

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25 *Id.* at 220.
26 *Id.*
27 *Id.*
28 *Id.* at 221.
29 *Id.*
being, the defendant is guilty of criminal homicide.\textsuperscript{30} The born alive rule states that a fetus becomes a human being once born alive, so if the mens rea and actus rea are present, the defendant must be guilty. But the narrow reading makes legal guilt impossible, and there is no satisfactory justification for this anomaly.

On the other hand, the broad reading is arbitrary and could have absurd consequences. Consider the following hypotheticals. Each of two defendants kicks a pregnant woman in the abdomen, causing the death of a nine-month-old fetus. The prosecutor can prove that both defendants meet all the conduct and mental state elements for first-degree murder. The only difference is that defendant one’s victim was born alive, lived for an hour, and then died, while defendant two’s victim died in utero. Under the expansive reading of the born alive rule, defendant one is exposed to no criminal liability for intentionally causing the death of a nine-month-old fetus, but defendant two is exposed to the maximum amount of criminal liability possible under American law. This is a distinction without a principled difference, but the potential consequences for the two defendants are extremely different. As subsequent discussion will make clear, every approach to this problem suffers from the infirmity of arbitrariness. Because the criminal law must take an approach, such infirmities are not fatal.

The first significant problem with the born alive rule is that one of the original reasons for its existence may now be a reason to abandon it and attach criminal liability to feticide. A widely recognized reason for the rule was the level of development of medical knowledge and technology when the rule originated. Medical science was not advanced enough at that time to make the sorts of determinations required for criminal homicide cases involving fetuses. Determining whether a fetus was alive at any point during the pregnancy was impossible. In \textit{Hughes v. State}\textsuperscript{31}, a case in which the Oklahoma Court of Criminal Appeals abandoned the born alive rule, the court wrote, “The born alive rule was necessitated by the state of medical technology is earlier centuries. The health of a child within the womb could not be determined until the child was observed after birth.”\textsuperscript{32} That historical circumstance made it impossible to prove causation until there was a live birth. Although medical science has not yet made causation a non-issue in feticide cases,

\textsuperscript{30} Many of the complexities of the criminal law of homicide are irrelevant to this discussion and are therefore excluded; these include excuses and justifications.
medical knowledge and technology are advanced enough today to determine whether the fetus was alive at the time of the alleged criminal conduct and to determine the cause of the fetal death in most cases. The Hughes court writes, "Advances in medical technology have abolished the need for the born alive rule."33

In addition to these practical justifications, the born alive rule contains its own simple ethical justification. However, an examination of the logic of the ethical argument supporting the born alive rule reveals that the fundamental ethical proposition underlying the rule does not unavoidably lead to the conclusion that feticide should not be criminalized. People who agree with the proposition that a fetus is not a human being until it is born alive may be compelled to conclude that feticide should not be a crime, that the criminal law should not extend its protection to fetuses. Indeed, the born alive rule is founded on the proposition that no fetus is a human being until born alive. Assuming that no fetus is a human being, it would be morally wrong to convict someone of homicide for killing a fetus.

However, accepting that argument does not lead inevitably to the conclusion that feticide should not be a crime. If no fetus is a human being, then feticide is not homicide, but feticide may be some other crime. It follows that the criminal law need not take a position in the current debate about whether fetuses are human beings in order to protect them; it is possible to criminalize feticide without classifying it as homicide. Unlike the debate about abortion, this debate involves no balancing of interests. By definition, criminal feticide law need not balance a pregnant woman’s privacy interest with the state’s interest in protecting unborn fetuses.34 In fact, the interests of pregnant women and state’s interest will almost always coincide; both the pregnant woman and the state have an interest in protecting unborn fetuses. Reasonable people on both sides of the abortion debate can surely agree that a pregnant woman has an interest in protecting the life of her fetus, whether or not they believe that the fetus is a human being. If a pregnant woman has an interest in protecting herself and her unborn fetus, then the state surely has an interest in protecting a pregnant woman and her unborn fetus from criminal attacks. So those who believe that a fetus is not a human being need not support the born alive rule in order to maintain a consistent ethical framework. It makes perfect

32 Id. at 732.
33 Id.
34 See State v. Merrill, 450 N.W.2d 318 (Minn. 1990).
sense to say, “I do not believe fetuses are moral or legal persons, but the state has an interest in attaching criminal penalties to the killing of a fetus without the mother’s consent.”

This evaluation suggests that the time has come to abandon the born alive rule and criminalize feticide, but that does not solve the problem entirely. The decision to replace the born alive rule leads directly to another difficult issue. How should the law fill the gap left by the born alive rule? In order to answer that question, it is necessary to discuss the two basic approaches that American jurisdictions have adopted to determine if either is satisfactory. Should killing a fetus be a form of criminal homicide? Or should it be classified differently, as some other type of crime?

2. California: Feticide is Criminal Homicide

Before discussing the California approach, the reader should be aware of what is beyond the scope of this discussion. First, it is important to note that California’s law in this area is not truly representative of the twenty-one states that classify feticide as a form of homicide. In fact, an examination of the criminal feticide law of any one of those states would not lead to a thorough understanding of the wide variety of approaches taken by the states that classify feticide as a form of homicide. As noted in the introduction, there are many variables, including the point of fetal development when homicide law begins to apply, the penalty attached to a conviction for feticide, the level of mens rea the law requires, and the applicability of doctrines like transferred intent and the felony-murder rule. At this level of detail, the selection of California law may appear arbitrary, but California law is both influential and developed, which makes it a logical choice for the purposes of this discussion.

Second, this discussion will not include all of the constitutional challenges defendants have made against laws that classify feticide as criminal homicide. Two reasons support this limitation. The first is that courts have rejected most of those challenges, and it appears that states have the power to consider feticide a

\[35\] See Benjamin, supra note 3, for list of state statutes and code provisions that classify feticide as a form of criminal homicide.
form of homicide. The second reason is the narrow scope of this paper; although interesting, the failed challenges are at the periphery of this topic.

In order to understand California’s current approach to criminal feticide, one must be aware of the key legal events that have shaped California law on the subject. The event that precipitated the major change in California’s approach was *Keeler v. Superior Court of Amador County*. In *Keeler*, the issue before the California Supreme Court was “whether an unborn but viable fetus is a ‘human being’ within the meaning of the California statute defining murder.” In 1970, when *Keeler* was decided, the California murder statute was unremarkable. It read, “Murder is the unlawful killing of a human being, with malice aforethought.” Defendant was charged with murder for the killing of a fetus and sought a writ of prohibition to prevent the prosecution from proceeding.

A summary of the most crucial facts of *Keeler* follows. Mr. and Ms. Keeler were divorced in September of 1968. Mr. Keeler was awarded custody of their two daughters, and Ms. Keeler had visitation rights. In February of 1969, Mr. Keeler encountered his ex-wife on a mountain road and blocked the road with his car, forcing her to pull over. Defendant walked up to her vehicle said, “I hear you’re pregnant. If you are you had better stay away from the girls and from here.” She did not respond, and he opened the car door and “assisted” her out of the car. He then became “extremely upset” when he saw that she was pregnant. Then he said, “You sure are. I’m going to stomp it out of you.” He then pushed her into the car, knelt her in the abdomen, and hit her in the face several times. “When she regained consciousness” he was gone. At the hospital, an in utero examination of the fetus revealed that its head was “severely

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36 *Keeler* at 618.
38 *Keeler* at 619.
39 *Id.* at 618.
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
fractured,” and it was delivered stillborn.48 A pathologist opined that force applied to the mother’s abdomen could have caused the fatal injury.49 The evidence suggested that the fetus was between 28 and 36 weeks old, and experts concluded with a reasonable degree of medical certainty “that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question it would have had a 75 percent to 96 percent chance of survival.”50

In a five to two decision, the California Supreme Court concluded that a viable fetus was not a human being for the purposes of the murder statute and granted Mr. Keeler’s request for a writ of prohibition.51 Writing for the court, Justice Mosk held that the legislature did not intend for a viable fetus to fall within the definition of human being.52 He traced the legislative history of the statute and concluded that the legislature must have been aware of the common law born alive rule and that by using common law language in the statute, the legislature was adopting the born alive rule.53 Finally, he rejected the state’s argument that the court should abandon the born alive rule.54 Mosk agreed with the premise that advances in obstetrics and pediatrics had obviated the need for the born alive rule, but he held that due process principles prohibit courts from expanding the meaning of criminal statutes.55

In his dissenting opinion, Acting Chief Justice Burke wrote, “the majority ignore significant common law precedents, frustrate the express intent of the Legislature, and defy reason, logic and common sense.”56 He argued that quickened fetuses were considered human beings at common law and, therefore, the legislature must have intended for the term human being to encompass quickened fetuses.57 Despite this conclusion about legislative intent, Burke did not think that quickening should mark the boundary between fetuses that are human beings and fetuses that are not.58 He wrote:

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48 Id.
49 Id.
50 Id. at 619.
51 Id. at 618.
52 Id.
53 Id. at 619-24.
54 Id. at 624.
55 Id. at 618, 624, 625.
56 Id. at 630.
57 Id. at 631.
58 As an interesting aside, as late as 1993 five states classified the killing of a quickened fetus criminal homicide according to Benjamin, supra, at note 3.
I do not suggest that we should interpret the term “human being” in our homicide statutes in terms of the common law concept of quickening. At one time, that concept had a value in differentiating, as accurately as was then scientifically possible, between life and nonlife. The analogous concept of viability is clearly more satisfactory, for it has a well defined and medically determinable meaning denoting the ability of the fetus to live or survive apart from its mother.59

Therefore, he concluded, the court should have ruled that viable fetuses fall within the meaning of the term human being in the homicide statute. Although there is much more to Burke’s dissent, this summary captures the part of his argument that is important for the purposes of this discussion.

The California Legislature reacted to the Keeler decision the year it was decided, amending the murder statute to read, “Murder is the unlawful killing of a human being, or a fetus, with malice aforesight.”60 A reaction was foreseeable; the result in Keeler must have appeared unjust. Keeler had brutally assaulted his ex-wife, intentionally causing the death of a fetus that was at least six months old, yet his punishment could not exceed the punishment meted out to any other defendant convicted of assault. The California legislature attempted to prevent a Keeler-type situation from recurring by adding the word “fetus” to the homicide statute, but because of disagreement among members of the legislature, “the term ‘fetus’ was deliberately left undefined.”61 Because of that ambiguity, the amended murder statute has left an interesting but troubling wake.

Until 1994 the trial courts and appellate courts of California interpreted the term “fetus” to mean viable fetus. Published opinions from the courts of appeals consistently read a viability requirement into the murder statute.62 In the first of those cases, People v. Smith (Karl Andrew), the appellate court held that only viable fetuses fall within the meaning of the term fetus for the purposes of the homicide statute.63 The Smith court wrote:

59 Keeler at 631.
60 Cal. Penal Code § 187(a) (West 1998). § 187(b) explicitly provides that legal abortion is not murder.
61 People v. Davis, 872 P.2d 591, 594 (Cal. 1994).
63 Smith (Karl Andrew) at 502.
We, therefore, construe section 187 as making its protection coextensive with the capability for independent human life, a concept embraced within the term viability. . . . If future medical art succeeds in further lowering the age of viability, then the protection of the statute will follow, for it protects human life at the stage it has achieved the capability for independent existence.  

The court relied on the reasoning and principles of Roe v. Wade in reaching this conclusion, writing:

The underlying rationale of Wade, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in Wade is the conclusion that as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person.

Subsequent appellate decisions continued to require viability, and the California Supreme Court did not consider the issue until 1994, when it decided People v. Davis.

At trial, Davis was convicted of murder for causing the stillbirth of a fetus that was no older than 25 weeks. The jury found that Davis shot Maria Flores while robbing her and that Flores' injuries resulted in a stillbirth the next day. Whether Davis acted with malice aforethought was not an issue in the case because the prosecution proceeded under a felony-murder theory with robbery as the underlying felony. Although both the prosecution expert and the defense expert found that there was some possibility that the fetus could have survived independent of the mother, neither testified that its survival was probable. Following the holdings of several appellate court decisions, the trial judge instructed the jury that viability was a legal requirement and that a possibility of survival satisfied that requirement. The jury found Davis guilty of murder, and he was sentenced to life without the possibility of parole plus five years for murder, assault, robbery, and using a firearm in the commission of those crimes.

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64 Id.
65 410 U.S. 113 (1973).
66 Smith (Karl Andrew) at 503.
67 People v. Davis, 872 P.2d 591 at 594 (Cal. 1994).
68 Id at 593.
69 Id at 618.
70 Id.
71 Id.
72 Id.
On appeal, Davis argued that viability meant a probability of survival under *Roe v. Wade*, not a mere possibility. The People argued that viability was not a requirement of the murder statute, so that any argument about the viability instruction was irrelevant. The California Court of Appeals accepted the People’s argument, holding that the murder statute does not require that a fetus be viable. The *Davis* appellate decision reversed the course of California law, which had consistently held that viability was an element of fetal murder.

Although the Court of Appeals rejected Davis’ argument, it reversed his conviction because its holding was contrary to then existing precedent. The court reasoned that convicting him under its holding would violate Davis’ due process rights; application of the new rule would be an unconstitutional ex post facto law. The Court of Appeals held that the new construction of the murder statute would apply prospectively only and that the trial judge’s instructions were erroneous and prejudicial to Davis.

The California Supreme Court affirmed the judgment of the Court of Appeals and took the opportunity to clarify the current state of California homicide law. Writing for the court, Chief Justice Lucas discussed the history of California law in the area, noting that every appellate court had read a viability requirement into the statute but that the Supreme Court had never addressed the viability issue before. The court rejected defendant’s argument that the California murder statute applies only to viable fetuses as defined by *Roe v. Wade*. Observing that the state has an interest in protecting the lives of developing fetuses, the court concluded “that when the mother’s privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother’s womb from homicide.” Put differently, the court concluded that California had the power to classify feticide as homicide and to decide at what stage of fetal development homicide penalties attach.

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73 *Id.* at 593-4.
74 *Id.* at 594.
75 People v. Davis, 19 Cal.Rptr.2d 96, 104 (Cal.App.4th 1993).
76 *Id.* at 108.
77 *Id.* at 109.
78 People v. Davis, 872 P.2d 591, 594 (Cal. 1994).
79 *Id.* at 596.
80 *Id.* at 599.
The question then became whether the legislature had exercised its power to include nonviable fetuses as potential victims under the murder statute. In other words, what does the word “fetus” mean for the purposes of the California murder statute? The court recognized that the legislature did not agree on a definition of fetus; there was no statutory definition.\(^{81}\) Then the court held that life developing within the uterus becomes a fetus at age seven or eight weeks with no further discussion.\(^{82}\) The court relied on the definition of fetus contained in a medical-legal dictionary; its determination did not rest on any statute, legislative history, case law, or policy arguments. Nevertheless, the court reversed Davis’ conviction because it agreed with the Court of Appeals that the new interpretation of the murder statute was a significant change in the law that should be applied only prospectively.\(^{83}\)

Justice Mosk’s dissenting opinion in Davis is an excellent starting point for evaluating the Davis decision and the current state of California law in this area. He argued that the legislature intended to include a viability requirement in the murder statute. Justice Mosk noted that the issue in Davis was one of statutory interpretation, so an examination of the legislative history and the historical circumstances surrounding the enactment of the statute were the touchstones of the analysis. Justice Mosk authored the controversial lead opinion in Keeler, the case that prompted the legislature to amend the California murder statute to include fetuses. As a key player in Keeler, Justice Mosk had a special knowledge of its facts and aftermath, and he used that knowledge as the basis for his dissent in Davis.

He began by noting that the inclusion of the word fetus in the statute was a direct result of the Keeler decision, and argued that the meaning of “fetus” must be determined in the context of that decision.\(^{84}\) Justice Mosk argued that the facts of Keeler limit its holding, and Keeler involved the killing of a viable fetus.\(^{85}\) He concluded that Keeler held “that the Legislature did not intend that Robert Keeler’s act of maliciously killing an ‘unborn but viable’ fetus be prosecuted as murder under section 187.”\(^{86}\) In support of this conclusion, he reasoned that both the majority opinion and the dissenting opinion in Keeler focused on the viability of the

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\(^{81}\) Id.
\(^{82}\) Id.
\(^{83}\) Id. at 600.
\(^{84}\) Id. at 607-8.
\(^{85}\) Id. at 608.
fetus.\textsuperscript{87} Justice Mosk then summarized the legislative response to \textit{Keeler}, noting that the legislature was attempting to amend the statute so as to prevent the next defendant in Keeler’s position from escaping homicide liability for killing a viable fetus.\textsuperscript{88} By amending the murder statute in response to \textit{Keeler}, the legislature:

extended the crime of murder, as \textit{Keeler} refused to do, to include the malicious killing of a viable fetus. To read that amendment as further extending murder to include the killing of even a nonviable fetus, as the lead opinion does now, is to ignore the facts and holding of \textit{Keeler} and the direct legislative response they so plainly triggered.\textsuperscript{89}

Justice Mosk’s analysis of the legislative history is more complete than Chief Justice Lucas’. Although the amended statute does not expressly contain a viability requirement, the history of the amendment suggests that a fetus must be viable to be a victim under California’s murder statute.

Justice Mosk buttressed that reasoning with another persuasive statutory construction argument. He summarized the California case law interpreting the amended murder statute and noted that in every case the courts have held that the statute contains a viability requirement.\textsuperscript{90} He argued that since the first of those cases, “the Legislature has met 18 times but has taken no step to overrule that holding by what would be a simple amendment to the statute.”\textsuperscript{91} According to Justice Mosk, the legislature probably acquiesced because it took no action to reverse those holdings.\textsuperscript{92} Although legislative acquiescence is not always a strong argument, in this case it is extremely persuasive given the legislature’s reaction to \textit{Keeler}, which it quickly reversed by statutory amendment. If the legislature disagreed with the appellate courts’ interpretation of the amended statute, “surely it would have spoken again, and equally vigorously.”\textsuperscript{93}

In addition, Justice Mosk argued that the court’s reading of the murder statute could have absurd consequences, which the legislature must not have intended. \textit{Davis} is such an absurd consequence according to Justice Mosk. \textit{Davis} is “the first reported case in California in which a person has been convicted of fetal

\textsuperscript{86} Id. at 610.
\textsuperscript{87} Id. at 609.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 610.
\textsuperscript{90} Id. at 610-11.
\textsuperscript{91} Id. at 611.
\textsuperscript{92} Id. at 612.
murder without knowing or having reason to know of the existence of the victim." Mr. Davis neither knew
nor had reason to know that Ms. Flores was pregnant, so he could not have intended to kill her fetus with
malice and premeditation, yet he was convicted of first degree murder, a capital offense. In combination
with the felony-murder rule, the Davis holding leads to overly harsh results, results that set punishments
disproportionate to moral culpability.

Justice Mosk's felony-murder rule argument is persuasive statutory interpretation in support of his
conclusion that the California Legislature did not intend to include nonviable fetuses in the amended murder
statute. His argument suggests that Davis was wrongly decided. In addition, it is a persuasive policy argument
against classifying feticide of a nonviable fetus as murder.

However, that argument cannot assist one in determining whether killing a viable fetus should be
classified as murder. As noted above, the goal of this paper is to determine which approach rests on the most
sound policy foundation, not which approach has discovered the true ethical status of fetuses. The homicide
approach is not flawed because it wrongly equates fetuses and human beings, and it is not sound because it
correctly equates the two. It would be arrogant to try to persuade the reader of the correctness of either
proposition. The reader knows his or her opinion about whether fetuses are human beings, and this paper
will not change that opinion.

However, regardless of what one believes about the moral status of fetuses, the homicide approach is
fundamentally flawed because it attaches severe criminal penalties and stigmatization to the killing of a fetus,
an entity whose moral status is at best unclear to society as a whole. In other words, the homicide approach
itself embodies legal arrogance of the most dangerous sort. It is arrogant because it proclaims certainty with
respect to an issue about which our society is uncertain. Although individuals hold definite opinions about
the moral status of fetuses, our society is nowhere near reaching a consensus on the issue. America has not
yet decided whether a fetus is a human being, and, if so, at what point a fetus becomes a human being.

93 Id.
94 Id. at 616.
95 Id. at 617.
America may never reach a consensus, but that does not justify a legal solution that elides the difficulty of the issue and the resulting disagreement.

Arrogance alone might not be a serious enough flaw to justify rejecting the homicide approach, but its profoundly dangerous consequences make it unacceptable. The lives and liberty of citizens are at stake, and they must not depend on the whimsical legal resolution of a profound ethical dilemma about which society as a whole is agnostic. Although many individual citizens may have no moral qualms about placing a person in prison for life or executing a person for killing a fetus, society experiences collective ethical nausea, not because the punishment is necessarily wrong but because it is not necessarily right. The punishment the criminal law metes out should embody our collective ethical judgment whenever possible, and punishment fails that test when it embraces one of two diametrically opposed approaches when the collective judgment has embraced neither.

As mentioned above, the debate over the criminalization of feticide only parallels the abortion debate in that the moral status of human beings has been the central issue in both debates. Unlike the legal debate over abortion, the legal debate over feticide need not center on the moral status of fetuses. Society must attempt to determine the moral status of fetuses if it is to make abortion law because the policy of abortion law involves balancing rights and interests. However, it is possible to for the criminal law to protect fetuses without attempting to determine the moral status of fetuses because there is no balancing to be done. There is an agnostic approach that advances the policy goals of the criminal law, including protecting the rights and interests of both victims and defendants.

3. New Mexico: Feticide is a Criminal Assault on a Pregnant Woman
Arkansas, Iowa, Wyoming and New Mexico classify feticide as criminal assault on a pregnant woman. This discussion will focus on New Mexico’s approach because the approaches of these four states are very similar and because the author and potential readers probably have a particular interest in New Mexico law. None of these jurisdictions has a great deal of case law interpreting these statutes, and New Mexico has only one published opinion, so the discussion of will focus on the New Mexico statutes.

New Mexico has two statutes criminalizing injury to a pregnant woman. The first defines a crime of assault, called “Injury to [a] pregnant woman.” It reads, “Injury to [a] pregnant woman consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing her to suffer a miscarriage or stillbirth as a result of that injury.” A defendant who is convicted of “Injury to pregnant woman” is guilty of a third degree felony, generally punished by three years imprisonment. The second statute defines a traffic offense, called “Injury to pregnant woman by vehicle.” It reads, “Injury to a pregnant woman by vehicle is injury to a pregnant woman by a person other than the woman in the unlawful operation of a motor vehicle causing her to suffer a miscarriage or stillbirth as a result of that injury.” The classification of this crime and the corresponding punishment is less clear. According to the statutes, a conviction for injury to a pregnant woman by vehicle while under the influence of alcohol or drugs is a third degree felony, generally punishable by three years imprisonment. However, the statute does not specify the classification of or penalty for injury to a pregnant woman by vehicle where defendant is not under the influence of drugs or alcohol. This appears to be a legislative oversight, which needs to be corrected.

There are a few striking features of the New Mexico approach. First, New Mexico’s statutes protect fetuses and pregnant women without deciding whether fetuses are human beings. “Injury to [a] pregnant woman” is the name of the crime, and an element of that crime is a result, the death of a fetus. The New Mexico approach criminalizes feticide, attaching legal penalties to an act that society can agree should be

97 State v. Begay, 734 P.2d 278 (NM Ct.App. 1987), which held that vehicular homicide and injury to pregnant woman do not merge.
punished. As discussed above, those who believe that fetuses are not human beings can accept that fetuses and pregnant women should be entitled to protection from the criminal law. In addition, those who believe that fetuses are not human beings should be able to accept that society as a whole does not share their belief, so that feticide should be criminalized but not equated with homicide. In short, the New Mexico approach embodies societal agnosticism with respect to the ethical status of fetuses, while affording them legal protection. Under the New Mexico approach, fetuses may or may not be human beings, but the criminal law extends its protection as far as society is comfortable extending it. The killing of a fetus is a crime against the pregnant woman and against the fetus itself, regardless of whether that fetus is a human being. Because society is uneasy punishing those guilty of feticide as it punishes murderers, the penalty and the stigma attached to feticide (injury to a pregnant woman) is less severe than the penalty for homicide.

One criticism of New Mexico's approach might be that by not equating feticide and homicide, the New Mexico Legislature has determined that fetuses are not human beings and legislated accordingly. Put differently, if killing a human being is always homicide, and killing a fetus is not homicide, then a fetus is not a human being under New Mexico law. This criticism makes logical sense if one accepts the premise that the law always speaks with finality and permanence, but that premise is false. The law reflects societal consensus on a problem, and the law's solutions evolve as societal consensus evolves. The New Mexico approach makes no judgment about the ethical status of fetuses because there is nothing close to societal consensus on the issue. New Mexico's approach does make a judgment about an issue that society can agree on; it is morally wrong to kill a fetus against a pregnant woman's will, and the state has an interest in deterring such behavior and punishing it when it does occur. This approach takes a stand with respect to behavior that society knows is morally wrong and harmful, but it also embraces agnosticism about the moral status of fetuses rather than espousing a solution upon which society cannot begin to agree.

Another relevant feature of the New Mexico approach is that the statutes contain no independent mens rea element, and one can imagine cases where this omission might lead to troubling results. Because the statutes are written like the felony-murder rule, the mens rea requirement for the underlying felony is the only mens rea required for conviction. The defendant need not know of the existence of the fetus to be
found guilty. In addition, the statutes do not distinguish between viable and nonviable fetuses, so Justice Mosk's argument about overly harsh results points to one problem with the New Mexico statutes. A defendant can be held criminally liable for the death of a fetus that he did not know existed nor had any reason to know existed. For example, a defendant who is fleeing the scene of a felony on foot knocks down a woman who is a few weeks pregnant, causing a stillbirth. A New Mexico prosecutor might be able to convict that defendant of injury to a pregnant woman, thereby tacking an additional three years onto his or her sentence. In such cases, moral culpability and punishment are disproportionate, but the disproportionality is nowhere near the level possible under California law.

The other significant problem with the New Mexico approach is that it draws the line between injury to pregnant woman and homicide arbitrarily. Like the common law born alive rule, the New Mexico approach draws that line at live birth. A defendant whose acts cause the death of a fetus during the commission of a felony can be convicted of injury to a pregnant woman. But a defendant whose acts cause injury to a fetus that is later born alive and then dies can be convicted of murder. Both the stigmatization and the punishment will depend on fortuity in some cases. However, all possible approaches are flawed in this way, and the law must adopt the best choice despite imperfections.

CONCLUSION

The purpose of this paper is to explain the basic approaches to the problem of feticide in criminal law and to evaluate those approaches. If that evaluation is to be at all useful, it must not depend on arguments that attempt to persuade the reader that fetuses are human beings or that they are not human beings. Greater minds have spilled more ink and crafted more crystalline prose in failed attempts to persuade readers of these profound ethical propositions. The task at hand is less ambitious. Given that society cannot agree on the moral status of fetuses, are any of the existing approaches satisfactory to society as a whole? Are any of the approaches acceptable to those who believe that fetuses are human beings and to those who
believe that they are not? Is there an approach that accords with societal attitudes about the moral status of fetuses?

The preceding discussion points out numerous faults with the common law born alive approach and the homicide approach. The born alive rule is probably outdated because one of the original reasons for its existence was the inability of medical personnel to determine what caused the death of a fetus. In addition, even those who believe that a fetus is not a person until born alive can agree that feticide might be a crime, although that crime is not homicide. It follows from those faults that the criminal law must abandon the born alive rule and criminalize feticide. However, treating feticide as homicide is not an acceptable solution, primarily because it is an arrogant approach with frightening consequences. The homicide approach hazards an answer with respect to the moral status of fetuses and makes the lives and liberties of defendants depend on that answer. The state must not gamble the life-long deprivation of liberty or the lives of its citizens in this way.

The discussion of the three basic approaches suggests that best approach classifies feticide as assault on a pregnant woman, the approach taken by a small minority of states, including New Mexico. That approach is the best, but it is not perfect. The New Mexico approach suffers from an arbitrary line-drawing infirmity, but that infirmity is not fatal because all approaches to this problem suffer from it. No matter where one chooses to draw the line, some defendants will be exposed to greater criminal liability and stigmatization based on mere chance. In addition, the New Mexico approach does not contain an independent mens rea element, which means that punishment and moral culpability will not always be perfectly proportionate. The existing statutes should be amended to include a mens rea element, and any new statutes modeled on the existing statutes should include a mens rea element.

Despite its imperfections, the New Mexico approach is best because it accepts societal agnosticism with respect to the moral status of fetuses while adequately protecting the interests of victims and defendants. This problem is not analogous to the abortion problem, so the criminal law need not take a position about the moral status of fetuses in order to protect them. Society has not reached a consensus about whether fetuses are human beings and it is not necessary to do so in order to protect victims and defendants. So there
is absolutely no reason for the criminal law to foist a hotly contended ethical proposition upon its citizens with so much at stake. If legislation need not embrace a contentious position on a profound ethical question, then it should not do so. It is divisive to embrace one position or the other. In addition, it will cause a great deal of uncertainty and inconsistency in the law. Adopting the agnostic approach has the advantage of insulating the criminal feticide debate from the abortion debate, which will inevitably lead to more certainty in the law of individual states and more consistency in the laws of all the states. The debate over the moral status of fetuses will continue, of course, as it should, but criminal law is no place to experiment because lives and liberty are at stake. By adopting the New Mexico approach, states can pursue sound criminal law policy rather than confusing their criminal law by legislating unnecessarily on a highly charged ethical issue. America may never agree on the moral status of fetuses, but something closer to consensus must precede the criminal law adopting a position on the issue. If a consensus emerges, then the criminal law should change its approach to conform to that consensus. Until then, states should refrain from using the criminal law to give legal force to any conclusion about whether fetuses are human beings.