ABSTRACT

Probing the Inconsistencies of State Feticide and Abortion Law

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This paper serves as an analysis of both intrastate and interstate statutory inconsistencies between feticide and abortion law within the thirty-eight American states with criminal feticide laws on record. By reviewing the particulars of each statute, it becomes apparent that there are severe and widespread contradictions between the implications of feticide and abortion laws within each state, as well disparities amongst the states themselves. I will argue that these inconsistencies in protection for unborn life are nothing new in American law. The United States has struggled since its inception to establish stable legislation regarding the protection of the unborn. This historic struggle translates over to the country's current problem of how to regulate the protection of unborn life. The inconsistencies pose a threat to either one of two groups: the laws treat those convicted of feticide far too harshly, thus violating their right to be free from cruel and unusual punishment, or the laws neglect the inherent value of unborn life by permitting their death in cases of abortion. In either case, it is vital that the American government thoughtfully examine these contradictions and bring about a movement to remedy this violation of fundamental rights.

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PROBING THE INCONSISTENCIES OF STATE FETICIDE AND ABORTION LAW

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DEDICATION

This project is dedicated to any and all of the countless Americans whose voices were never heard throughout this nation's long history. May we work diligently to prevent further trespasses on our inalienable rights.

"Speak up for those who cannot speak for themselves,
for the rights of all who are destitute. Speak up and judge fairly;
defend the rights of the poor and needy."
Proverbs 31:8-9

CHAPTER ONE

A Brief History of American Abortion Law Before *Roe v. Wade*

This chapter serves two foundational roles in the structure of this project. First, it provides historical context into the passage of modern abortion laws. Conveying the transformation of legal policy, social customs, medicine, and moral perspectives in the United States will paint a broader picture of abortion law as a continuing line of development throughout the nation's history. This historical context shall then lead into the chapter's second role, which is to demonstrate that abortion and feticide policy in the United States has proven to be inconsistent well before the modern era. This historical inconsistency reveals a broader issue: he United States' prolonged record of overlooking its problem of statutory irregularities in abortion and feticide law presents a debilitating effect on our ability to set a standard for such protections in the laws of today.

The Absence of Law (1800-1820)

In an era where abortion was seldom discussed publicly, due in part to social decorum and in part to a general lack of scientific knowledge in fetal development, the United States rarely witnessed criminal abortion cases brought before civil magistrates. The rarity of cases and the comparatively less complex legal code overall in the earliest years of the United States led to little regulation of feticide or abortion. Leading up to the nineteenth century, there was no official written abortion law in the British colonies or the young republic after declaring their independence. Instead, English common law

largely determined how local courts ruled in the rare cases that involved the intentional termination of a pregnancy.[1] During this time, the concept of "quickening," or when a mother can first detect fetal movement, generally determined the legality of an abortion. Abortions before quickening remained legal in all circumstances, whereas abortions after quickening could potentially result in penalties. This stage of gestation varies from woman to woman, usually occurring between the twelfth and twentieth weeks of pregnancy.[2]

Modern audiences may be perplexed as to why the common law defaulted to this stage of pregnancy, and the answer lies in the lack of insight into fetal development and maternity care at the time. To doctors and magistrates alike, a quick fetus conveyed its earliest detectable sign at some separate semblance of life—the ability to move.[3] Not only did this establish some trace of humanity in the woman's womb, but on a more practical matter, it confirmed the pregnancy with absolute certainty. There were no reliable tests for pregnancy during the period, so neither women nor doctors could determine whether one was with child or whether there was some other issue causing irregular menstruation cycles. Therefore, if a woman feared an unwanted pregnancy in its early stages, she could approach a physician on the postulation that there may be an unnatural "blocking" in her natural menstrual cycle. The processes to remove such "obstructions" were the same as those used in inducing an early-stage abortion. Thus, American women around the year 1800 were legally able to terminate their pregnancies—whether they suspected

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[1] Mohr, *Abortion in America*, 3.

[2] Keown, "Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions," 5.

[3] Mohr, *Abortion in America*, 3.

themselves to be pregnant or not—so long as doctors could not confirm a pregnancy through detection of fetal movement.[4]

American women of the early nineteenth century were not limited in obtaining an abortion before quickening only through a licensed physician. Their other options included home medical manuals, midwife services, and herbal healers or "Indian doctors." Depending on a woman's wealth, marital status, and whether she lived in a rural or urban location, she or her partner could turn to these various outlets to cleanse "obstructed" menses. The practice was so common that providers of abortifacients frequently placed advertisements in local papers that promised "ladies' relief" and a return to "regularity."[5] These euphemisms conveyed both the consensus that while a non-quick pregnancy was not to be considered feticide, women should deal with such matters as discreetly and with as much propriety as they could, and they possessed a surprising number of options to do so. They could opt for more inconspicuous measures such as consulting a home manual or hiring a natural healer or midwife or resort to asking their family physician for assistance.

Upon realizing the delay of a monthly cycle, many women turned to their home medical manuals, a common asset in American homes at the time that possessed advice on at-home treatments for various medical conditions. Some manuals contained instructions for all members of the family, the most common of the period being William Buchan's *Domestic Medicine*, which was reprinted annually from 1782 to 1850.[6]

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[4] Mohr, 4.

[5] Cline, *Creating Choice - A Community Responds to the Need for Abortion and Birth Control, 1961-1973*, 20.

[6] Reiman, *Abortion and the Ways We Value Human Life*, 24.

Women often purchased manuals intended explicitly for married women, thereby possessing more detailed information regarding female reproductive organs and sexual health. The most popular editions included Samuel K. Jennings's *The Married Lady's Companion* (1808), Joseph Brevitt's *The Female Medical Repository* (1810), and Thomas Ewell's *Letter to Ladies* (1817).[7] These texts recommended a variety of natural "cures" for obstructed menstrual cycles, from bathing, ingesting doses of aloes, and douching with brandy, to bloodletting from the feet, tooth pulling, and electricity.[8] These at-home manuals made early-term abortions more accessible to lower class or rural women unable to readily visit or hire a physician.

Herbal healers, then commonly known as "Indian doctors," also helped to dispense abortifacient concoctions to women wary of their delayed menses. In 1813, Peter Smith compiled these recipes into a pamphlet entitled "The Indian Doctor's Dispensary," which detailed the properties of native North American ingredients thought to have abortion-inducing properties. These recipes proved most useful to rural Americans with ready access to various plants and oils. University of Pennsylvania medical student Thomas Massie wrote in his doctoral dissertation in 1803 that many uneducated, rural Americans learned from these healers that the Seneca snakeroot, a plant readily available in many rural areas of the country, could be utilized to destroy a fetus in the womb.[9] Additionally, he described how many Native American women concocted herbal brews of cohosh to terminate their pregnancies. The leading authority on medical

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[7] Reiman, 24.

[8] Mohr, *Abortion in America*, 6–10.

[9] Massie, "An Experimental Inquiry into the Properties of the Polygala Senega," 203.

jurisprudence of abortion at the time John B. Beck confirmed Massie's findings. He claimed that the use of herbal abortifacients was so widespread that both rural American and Native American abortifacients were a "good deal used by our American practitioners."[10] The practice of early-stage abortion was not restricted to the wealthier or urban populations of the time but was also a common practice of native tribes and rural America.

While modern audiences may associate the term "midwife" with childbirth, the profession had a long-held reputation in both England and early America as abortion providers. As physician and teacher of midwifery Valentine Seaman explained, most medical instructors imparted knowledge of abortion procedures to be used only in times of crises, such as the unexpected death of the fetus in utero or a botched abortion performed by another. However, historians widely believe that midwives extended their services frequently in non-emergency cases when given substantial compensation. In the lectures Dr. Seaman published in 1800, he cautioned midwives to refrain from assisting women with obstructed menses to avoid the deception of terminating unwanted pregnancies.[11] This warning hints that it was not altogether uncommon for women to request abortifacient services from midwives, and that women often misled medical providers to believe that some cause other than pregnancy hampered their normal cycle. As a medical student at Harvard in the early years of that century reminded himself in his notes, "Those who want to conceal pregnancy often pretend that they are subject to a variety of symptoms in consequence of the obstructed menses." Despite instruction to be

[10] Beck, *An Inaugural Dissertation on Infanticide*, 319, 321.

[11] Mohr, *Abortion in America*, 11.

cautious, even the most ardent condemners of abortion at any stage had to admit that, legally speaking, midwives and physicians could not undoubtedly determine pregnancy until they detected fetal movement.[12] Therefore, despite the potential for women to be deceptive in their requests, there existed no legal requirement for them to deny solicitations for their services or the hefty payment that often came along with it.

Similarly, family doctors faced the pressure to trust their female patients' claims that they suffered menstrual blockages rather than pregnancy. Denying a woman's request based on suspicion alone risked not only payment for the procedure, but also the future business of her family. Consequently, family physicians often found themselves blindly trusting their patients and treating the obstructions through the same procedures they would also use to induce an abortion. In addition to the common acceptance of patients' assertions, the healthcare profession widely recognized the morality of bringing botched abortions to safe conclusions.[13] While it was frowned upon to begin an abortion of a quick child oneself, doctors considered it their duty to prevent further harm to a mother from her botched abortion. Through these various scenarios, early nineteenth-century physicians could rest on the fact that these procedures brought no guilt upon them—at least in legal ramifications.

Though abortion trials proved to be rare throughout these early decades of the 1800s, a particular case in Massachusetts solidified the common law standard of quickening into legal precedent. In 1812, the Massachusetts Supreme Court ruled in *Commonwealth v. Bangs* that a woman could legally seek an abortion if her child was not

[12] Mohr, 15.

[13] Mohr, 14–15.

yet quick. Other states did not diverge from this standard, instead opting to view both *Bangs* and the traditional common law policy as binding precedent.

Americans at the turn of the nineteenth century generally did not believe abortion before quickening to be immoral. Both the medical impossibility of confirming a pregnancy until quickening and the lack of understanding of fetal development led to the common belief that what existed in a woman's womb before quickening was not human life, but rather only the potential of life. Historian Janet Farrell Brodie explains, "The nineteenth century often failed to draw a fine line between contraception and abortion."[14] Even if women did believe themselves to be pregnant, they did not believe that early abortions ended a life. To them, it was a form of contraception that prevented a life from beginning in the womb. Therefore, the practice was neither morally nor legally wrong to the overwhelming majority of Americans since pregnancies before quickening, to them, did not yet involve another human life.[15] This shared moral perspective, however, did not stand the passage of time. What changed in societal morals and legal policy to eventually lead to a nationwide ban on most abortions before the conclusion of the century?

The First Abortion Laws (1821-1830)

Despite the passage of the nation's first abortion in the state of Connecticut in 1821, the American legal community continued to abide by the common law distinction of quickening, as Connecticut's new law only provided for punishment after that stage in

[14] Brodie, *Contraception and Abortion in Nineteenth-Century America*, 71.

[15] Massie, "An Experimental Inquiry into the Properties of the Polygala Senega," 203.

pregnancy.[16] Modern audiences may assume that codifying an abortion policy into statutory law was the first step towards the government holding abortion as morally impermissible. This was not the case, however. Not only was the bill limited to quick pregnancies, but it also only outlawed a particular method of inducing an abortion that could poison an expectant mother. Moreover, it is important to note that the law did not find the woman necessarily guilty but rather the person who administered the poison.[17] The law thereby targeted only a particular method of physicians and apothecaries to combat the potential harm their abortifacients posed to women. This policy was consequently more likely intended to assure the safety of women suffering from overdoses of purgatives and herbal extracts than it was to protect the unborn.[18] While Connecticut was the first state to have any mention of induced abortion in its laws, it did little in the way of condemning the practice itself.

Seven more states would follow Connecticut's example over the next two decades, outlawing certain dangerous forms of abortion after quickening.[19] In 1830, Connecticut amended its abortion law to include a ban on another method of aborting quick children that involved the use of medical instruments. This subsequently outlawed all methods in the state to abort a pregnancy after the detection of fetal movement, granting seven to ten years in prison to abortionists convicted of violating the statute. The significance of this amendment, however, lies in that it solidified the precedent set

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[16] Reiman, 25.

[17] Connecticut et al., *The Public Statute Laws of the State of Connecticut*, 96–97.

[18] Mohr, *Abortion in America*, 21.

[19] Reiman, *Abortion and the Ways We Value Human Life*, 25.

forth by *Bangs*, maintaining the legality of early-stage abortion.[20] Connecticut did not set a new standard, but rather converted the current standard from case law into statutory law. In 1828, New York would pass a law similar to Connecticut's amendment, declaring the termination of quick children to be second-degree manslaughter. This law was momentous in that it was the first American law on abortion to follow language set forth by staunchly anti-abortion English law, which in 1803 had declared abortion *at any stage in pregnancy by any means* to be illegal.[21] While notes from the commission indicate that the primary concern of New York lawmakers was the protection of women from "quasi-medical" treatments, the steady increase in the use of proscriptive language against all abortifacients and abortion instruments in state abortion law foreshadows the stricter regulation on the practice in the decades to come. By New York's designation of the abortion of quick children as "manslaughter," this law was particularly noteworthy in first ascribing some form of semblance of personhood to an unborn child.

The Rise of Legislation Through 1850

State legislatures across the country continued to pass anti-abortion laws as the century progressed, barring specific methods and abortifacients or criminalizing the procedure altogether (whether before or after quickening). Ohio made attempting an abortion a misdemeanor and a successful abortion after quickening a felony in 1834. Indiana and Missouri passed anti-feticide laws in 1835; the former modeled itself after Ohio's policy from the previous year, and the latter made the use of instruments in the

[20] Mohr, *Abortion in America*, 25.

[21] Keown, *Abortion, Doctors and the Law*, 3–25.

abortion of a quick child equal to the crime of the use of poison as an abortifacient. Missouri also took the step to make abortion before quickening a misdemeanor,[22] and criminalized any attempt at an abortion without a physician's referral that the procedure was medically necessary.[23]

States added to the union quickly followed suit, as many passed anti-abortion laws immediately upon achieving statehood. In its first session as an official state in 1837, the Arkansas legislature passed a bill that declared abortion of a quick child to be manslaughter. Iowa, another new state in its first legislative session, issued a law preventing the use of poison as an abortifacient (similar to Connecticut's original model of the policy) in 1839. In the same year, Mississippi made abortion second-degree manslaughter without mentioning whether than meant before or after quickening.[24] Alabama followed in 1840, declaring abortion of quick pregnancies to be a crime for the first time in the state. These laws grew steadily stronger as the years progressed. The last of the earliest policies, set forth by the Maine state legislature, banned intentional feticide at any stage of pregnancy and by any means, making an exception only if the pregnancy threatened the mother's life. Abortionists who violated this statute faced up to five years in prison and hefty fines, making Maine's law the strictest in the country.[25] By mid-century, eleven out of the twenty-six states in the union held laws that declared abortion illegal in certain circumstances.

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[22] Mohr, *Abortion in America*, 39–40.

[23] Quay, *Justifiable Abortion*, 436.

[24] Mohr, *Abortion in America*, 40.

[25] Mohr, 40–41.

Despite the progression of restrictive state legislation, the abortion industry boomed in the 1840s. Newspapers continued to publish abortifacient advertisements in states where the laws forbade them, particularly in highly populated cities such as New York, Boston, and Philadelphia.[26] American women still had ready access to such services due to the variety of resources available to them. Even if someone was unwilling to accept their business, they could simply turn to another more amenable source. This characteristic of the industry proved to be crucial to the dynamic of how nineteenth-century abortion law would progress. State legislatures found themselves passing such bills, not due to pressure from society or even from their own moral convictions as legislators. Instead, pressure to strengthen abortion law derived from the nation's elite physicians who widely identified themselves as anti-abortion.

Top physicians possessed elite status in the United States leading up to the period, as they were typically highly educated men from reputable families. Untrained healthcare workers, however, began to infiltrate the field due to the lack of licensing laws and the potential to earn higher wages. By 1860, many of these workers made their living by providing the abortions elite physicians refused to perform, and the industry was generally considered a "regularly-established money making trade."[27] Most of the newcomers lacked formal medical schooling; at the turn of the nineteenth century in Philadelphia, for example, two-thirds of practicing physicians did not hold a degree from any medical school and were not members of the local College of Physicians.[28] These

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[26] Reagan, *When Abortion Was a Crime*, 10.

[27] Toner, *Abortion in Its Medical and Moral Aspects*, 445.

[28] Mohr, *Abortion in America*, 32.

so-called "irregulars" were largely self-taught, yet prescribed medications and frequently performed surgeries. Therefore, when the typically anti-abortion "regulars" refused to perform abortion services, women turned to the assistance of the irregulars. This split resulted in a broad spectrum of healthcare that varied greatly in competence, thereby severely affecting the reputation of American healthcare. Seeking to regain their professional power, regulate standard medical practice, and subdue their competition, orthodox physicians led an anti-abortion campaign throughout the state legislatures.[29]

The motivations of the regulars came not only from a business standpoint but derived in part from science and morality as well. The Hippocratic Oath, which these professionals took seriously, condemned abortion. Medical societies even went so far as to expel and revoke membership from those who were rumored to perform abortions.[30] Furthermore, the elite physicians attacked the foundational logic of the common law standard of quickening. They claimed that fetal movement "was a step neither more nor less crucial in the process of gestation than any other."[31] This revelation intertwined the scientific and moral objections together—if quickening was a relatively insignificant stage of pregnancy scientifically speaking, then there should be no moral divide between aborting a child before or after quickening. Around the mid-century, regular doctors solidified themselves as ardent protectors of human life, even if the extent of that life was still relatively unknown. For this reason, all early abortion law punished the abortionist—who should have upheld the Hippocratic Oath as a healthcare provider—

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[29] Reagan, *When Abortion Was a Crime*, 10–11.

[30] Mohr, *Abortion in America*, 35.

[31] Mohr, 35.

rather than the expectant mother. Similarly, early laws provided exceptions for abortions necessary to protect the mother's life, as this was compatible with the Oath's preservation of life value. The early anti-abortion laws passed during the mid-century were therefore primarily intended to suppress the haphazard practices of illegitimate physicians.

Despite their successes in state legislatures, anti-abortion laws were widely unenforced and did little to decrease the frequency of abortions. It was nearly impossible to prove an abortion had occurred in criminal cases, as the limited medical technology could not gain sufficient evidence during the time period.[32] The number of abortions boomed in the mid-century, reaching a rate of one for every five or six live births by the 1850s and 1860s.[33] The upsurge was due in large part to the rise in commercialism and the widespread continuation of advertisements for abortifacients and other abortion-inducing services. Just as abortion law varies today, the mid-nineteenth century saw numerous state legislatures enacting different statutes, and despite the prevalence of the operation in American society, lawmakers were far from a consensus on how to properly regulate it.[34]

Still, states continued to pass anti-abortion legislation, varying from one locale to the next on how restrictive the policies were. The motivation to pass these bills often came from sensationalized press coverage of heartbreaking stories of women harmed or killed in botched abortions. Such was the case in Massachusetts, where a young woman from Rhode Island traveled to procure abortion services. After delivering a four or five-

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[32] Mohr, 72.

[33] Mohr, 50.

[34] Mohr, 119.

month fetus, her condition gradually worsened until she died from an infection in her uterine cavity. The physician was indicted for murder in the fall of 1844, with the *Boston Daily Times* covering the case closely, creating a public spectacle of the woman's death.[35] When the higher courts acquitted the abortionist of the murder charge due to the weakness in abortion law and thus their inability to reach a condemning verdict, the state legislature took action. Within a week after the acquittal, they pushed a bill through both houses that made attempted abortion a misdemeanor with up to seven years in jail and an abortion resulting in the death of the mother a felony with a sentence of up to twenty years.[36]

As in Boston, the New York City press highlighted many abortion cases in the 1840s and 1850s. The *National Police Gazette* was one such publication that regularly covered tragic botched-abortion stories and criticized local government for not acting to prevent them. Their most famous story came in February of 1846 when the paper claimed that abortionists often sell the bodies of women who died from the procedure. Two months later, when the court indicted the husband of an abortionist for selling the corpse of his wife's patient, the anti-abortion press published even more criticism of their government. Desperate to respond to the media, the state legislature decided that not only must they deter abortionists from providing services, but they also must deter women from entering the open market for abortions. To grapple with the growing number of abortions each year and the tragedies that occasionally ensued, the government went a step further than any state had gone before. In 1845, New York became the first

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[35] Locke and Roberts, *Boston Daily Times*.

[36] Mohr, *Abortion in America*, 121.

state to revoke a woman's immunity in criminal abortion cases, signifying that not only were abortionists liable for their illegal actions, but expectant mothers could also face criminal charges for procuring their abortions.[37]

In the mid-nineteenth century, many states passed their first laws regarding abortion practices. Michigan and Vermont, two such states, adopted their first abortion laws in 1846. The former forbade abortions at any stage but specified that abortion before quickening earned a year in prison, whereas it labeled abortion after quickening as manslaughter. It included exceptions for the mother's health and only held blame for whoever performed the procedure.[38] Reacting more directly to the sensational media, Vermont implemented a policy that only made abortion a felony if the mother died as a consequence.[39]

From 1848 to 1849, five additional states passed their first anti-abortion laws. Physicians successfully pushed for a bill in Virginia that stated an abortion of a non-quick fetus would result in up to a year in prison, and the abortion of a quick fetus would grant up to five years. California and Wisconsin criminalized abortion of a quick fetus but did not address the legality of abortions before that stage. New Hampshire demonstrated the inconsistency amongst state legislation when it took a far stricter position and became only the second state to remove immunities for women who terminated their pregnancies. By 1858, three states (New York, New Hampshire, and Iowa) would strip women of their exemption in criminal abortion cases.[40] The New Jersey state legislature also came down

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[37] Mohr, 125.

[38] Quay, *Justifiable Abortion*, 483–84.

[39] Quay, 515.

[40] Mohr, *Abortion in America*, 145.

hard on existing regulation following a state supreme court case *State v. Eliakim Cooper*, which affirmed the common law standard upheld in *Bangs*. Upset with the ruling, the lawmakers unanimously passed a bill that made all abortion attempts criminal, as well as criminalized the conferment of information on such services. While women retained their immunity in New Jersey, physicians were strictly limited in their abilities to provide or advertise their services.[41]

The Surge of Laws After 1850

The 1850s brought along abortion legislation in four federal territories and two more states. The Minnesota and Oregon territories, in 1851 and 1854 respectively, codified the quickening doctrine, providing punishment for abortions after the detection of fetal movement.[42] The Kansas Territory veered from this principle, declaring attempted abortion to be a misdemeanor at any stage of pregnancy if there was proof of intention to abort.[43] The Washington Territory law went a step further in declaring it an offense to commit an abortion if the physician even suspected the woman to be pregnant. While it did not place blame on the woman, the Washington policy made it far easier to prosecute abortionists.[44] In 1854, Texas made abortion after quickening a crime with a punishment of up to ten years. Four years later, the state clarified that it was a crime whether or not the procedure successfully terminated the pregnancy. Louisiana declared

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[41] Mohr, 136.

[42] Quay, *Justifiable Abortion*, 486–87, 505.

[43] Quay, 474.

[44] *Code of Washington*, 164.

in 1856 that any actions taken to procure an abortion were a felony punishable by up to ten years of hard labor.[45] While these territories and states passed their first statutes on abortion within the same decade, standards tended to differ drastically from one region to the next. Furthermore, thirteen of the thirty-three states in the United States had yet to pass any abortion legislation at all by 1860.[46]

On the eve of the Civil War, regular physicians launched a nationwide campaign against abortion in the United States. The America Medical Association, which was founded in 1847 to reclaim the chaotic state of the medical field due to irregulars, headed the crusade against the abortion industry. The AMA revolutionized the anti-abortion movement that until the mid-century had remained a mostly ad hoc effort by local physicians through their city governments. With the AMA providing a robust and cohesive framework, a young member and practicing obstetrician-gynecologist from Boston named Horatio Robinson Storer stepped up to become the movement's leader.[47] He built a secure network of elite physicians across the nation, writing to implore them to press their state governments to pass sweeping reform to criminalize abortion. Witnessing the movement's growing power, the Suffolk County Medical Society sponsored a committee led by Storer to report on whether legislation regarding criminal abortion was necessary. Top medical journals around America endorsed the proposals

[45] Mohr, *Abortion in America*, 138–39.

[46] Mohr, 146.

[47] Mohr, 147-148.

the committee put forth, and in 1859, Storer led the AMA to publish a national proposal denouncing abortion.[48]

The AMA's proposal noted three primary causes for the "general demoralization" surrounding the nation's abortion industry. The first cause pointed to the scientific ignorance of the common law principle of quickening. Storer's report went into detail regarding the insignificance of fetal movement as a stage in gestation, thereby pointing out the logical inconsistency in differentiating abortion before or after quickening. The second point condemned regular physicians for their hypocrisy in being anti-abortion, yet often being "frequently supposedly careless" for unborn life. This chastisement served to alienate those regular physicians known to perform abortions or provide information to women who sought to terminate their pregnancies. The third aspect of the proposal dealt with the inadequacy of the laws, in which the AMA called upon its members "publicly to enter an earnest and solemn protest against [the] unwarrantable destruction of human life."[49] The proposal, therefore, called upon the top medical societies around the nation to demand that their state governments pass sweeping reform to suppress the practice of abortion in their regions.

For the rest of the century, the AMA would remain the most critical contributor in influencing abortion policy in the United States.[50] The organization continued to publish research and reports regarding the harmful consequences of the abortion industry, encouraging its members to keep pressuring their state governments for reform. This

[48] Mohr, 156.

[49] Storer, et al., "Report on Criminal Abortion," 75–78.

[50] Mohr, *Abortion in America*, 157.

effort certainly influenced local legislation, as forty anti-abortion statutes came to fruition between 1860-1890 alone, most of which accepted the AMA's claim that quickening had little impact on whether the termination of pregnancy should be considered a crime.[51] Before Storer led the regulars' crusade against abortion, state policy was cautious and vague. The last decades of the nineteenth century, however, saw a complete change in the regulatory approach to abortion policy. Several states dropped the quickening doctrine, revoked statutes protecting pregnant women from criminal charges, and censored advertisements and solicited information on abortion services.[52] The laws remained stable, enduring as relatively unchanged for approximately one-hundred years.[53]

A Nation Against Abortion: 1880 Through the Mid-Twentieth Century

For the remainder of the century, the United States completed its transition from a country with no legislation on abortion to one that had proscribed the practice. States and territories that had not enacted statutes previously did so during the closing decades of the nineteenth century—every state in the union had anti-abortion laws by 1900 (except Kentucky, where local courts outlawed the practice).[54] The government would not touch a vast majority of these statutes until the Second Wave Feminism movement of the 1960s in the years leading up to *Roe v. Wade*. Tennessee, Delaware, and South Carolina, for example, all passed sweeping abortion statues in 1883, each provision remaining virtually

[51] Mohr, 224–25.

[52] Ibid.

[53] Mohr, 200–201.

[54] Mohr, 226, 229-230.

unchanged for over eight decades.[55] This stability, which was so uncharacteristic of the previous years, made for an overall uneventful first-half of the twentieth century regarding new abortion law.

After the state legislatures successfully placed stringent policies in place, the courts solidified them through strict rulings against those charged with abortion crimes. Before 1880, abortion laws were largely unenforceable, as courts required significant proof of intent and confirmed pregnancy to reach a conviction. Questions surrounding the ambiguity of the stage of gestation or certain technical points of the law often saved accused abortionists. If a defense lawyer could point to any doubt as to whether the abortionist knew the women to be pregnant or that he or she had not intentionally terminated the pregnancy, judges would exercise caution when deciding whether to convict the accused of criminal activity.[56] The national success of the physicians, particularly in reprogramming the way government officials thought of abortion scientifically and morally, certainly contributed to the change in the position of the courts. In the 1880 case of *Orlando E. Bradford v. People*, the New York Supreme Court placed the burden of proof that an abortion was necessary for the life of the mother—the only exception for legal abortion at the time—on the indicted abortionist. Without a clear demonstration that the procedure was necessary, the courts would assume the act illegal.[57]

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[55] Mohr, 228–29.

[56] Harris, "A Case of Abortion with Acquittal," 346–50.

[57] Hun, *Reports of Cases Heard and Determined in the Supreme Court of the State of New York*, XXVII:309–12.

Massachusetts similarly lessened its requirements to reach convictions in abortion cases in the 1882 case of *Commonwealth v. Taylor*. Prosecutors no longer had to show convincing evidence that the woman was with child, much less quick with child.[58] This move emphasized the increasing trend towards protecting unborn life at all stages of gestation. The burden of proof shifted to the accused rather than the accuser, enabling the laws to be more regularly enforced into the twentieth century.[59]

Licensing laws came into play at the close of the nineteenth century, paving the way for a more solidified national policy against abortion. Regular physicians no longer faced stiff competition from irregular and unlicensed physicians, thereby satiating a primary force of the AMA's movement to enact abortion laws. As the reputation of doctors grew in esteem throughout the country, the more solidified the profession became in its anti-abortion stance. Medical societies grew to be more powerful than they had ever been before, and membership in these societies determined the livelihood of licensed physicians. These organizations held strict ethical standards, and the threat of expulsion upon violation of these rules was enough to keep society members in line.[60] While the government met their desire for stricter laws, professional physicians still remained ardently anti-abortion into the twentieth century.

Due to its criminal status, it is difficult to officially determine just how many abortions occurred from 1880 through the mid-twentieth century. While there was undoubtedly a black market for abortions, historians generally agree that cases of

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[58] Lathrop, *Reports of Cases Argued and Determined in the Supreme Court of Massachusetts, January 1882-May 1882*, CXXXII:261–63.

[59] Mohr, *Abortion in America*, 230–31.

[60] Mohr, 238–39.

abortion decreased significantly from their peak numbers in the 1840s.[61] Historian James Mohr writes that in the final decades of the nineteenth century, "abortion policy re-stabilized" and that those state policies "would remain through the first two-thirds of the twentieth century."[62]

The Case that Changed It All

One of these policies that remained in place was a Texas state law that proscribed abortion at any stage except for the mother's health. In 1970, one-hundred and twenty years after its passing, a young woman in Dallas took action against this law in claiming she had a constitutional right to an abortion. This woman, assigned the pseudonym Jane Roe, was at the forefront of arguably the most controversial Supreme Court case in American History—*Roe v. Wade*.

The Court attempted to strike a balance between three legitimate concerns her case presented: a constitutional right to privacy, the state's right to protect maternal health, and the state's right to protect unborn life. The Court's opinion added an emphasis on "viability" or the point at which the unborn child could live outside the womb, stating that states had a compelling interest to limit the right to privacy of mothers once the pregnancy reached this point in gestation.[63] The viability principle "substituted for the concept of quickening" from over a century prior, and the differences between the

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[61] Mohr, 241.

[62] Mohr, 245.

[63] "*Roe v. Wade,* 410 U.S. 113 (1973)."

two “in an ultimate sense, are not great.”[64] How did abortion policy revert to over a century before, returning to common law principles and flexible standards?

Surprisingly, one of the dominant groups leading the movement to liberalize the abortion industry in America was the same group that had led the campaign to restrict it decades prior—the nation’s prominent physicians. In the years leading up to the landmark decision, many doctors risked their licenses to test anti-abortion statutes in their states. Many renowned physicians carried public campaigns to legalize abortion that rivaled Storer’s movement in the nineteenth century.[65] A 1967 survey from *Modern Medicine* magazine found that 87 percent of the nation’s doctors favored a liberalization of abortion statutes.[66] Additionally, the American Public Health Association’s executive board endorsed more flexible abortion policies.[67] Why physicians changed general positions is a complicated issue, caused in part by the influence of second-wave feminism and the possible profit within the abortion industry.[68]

The move toward relaxed abortion policy likely began with the liberalization of sexual attitudes beginning in the 1920s. The Great Depression that followed in the 1930s saw a substantial rise in unemployment and poverty rates, resulting in a grave inability to provide for unexpected pregnancies. Women, therefore, became more desperate for abortion services. This desperation was coupled with the economic hardship physicians also faced, and they became more willing to perform abortion services for financial

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[64] Mohr, *Abortion in America*, 257.

[65] Mohr, 256.

[66] “Abortion: The Doctor’s Dilemma,” 12–32.

[67] “*Roe v. Wade*, 410 U.S. 113 (1973).”

[68] Mohr, *Abortion in America*, 256.

purposes. Likewise, despite its continued proscription, police often ignored these cases when doctors or women bought their silence through bribery.[69] While overall demand decreased following economic recovery, more women entered the workforce and universities at higher rates in the 1950s and 1960s, and the need for abortion persisted. Physicians joined in the demand for liberalized abortion policy, claiming that the ability to practice legally would better ensure the safety of women who were then subject to "back alley" dangerous procedures.[70] Thus, while physicians ardently fought for the regulation of abortion a century prior, they were also the leaders for its deregulation in the mid-twentieth century.

The majority opinion of *Roe* paid significant attention to the legal and medical history of abortion in the nineteenth century. Justice Harry Blackmun detailed the common law doctrine of quickening and pointed to how Americans during the Founding era and the nineteenth century viewed flexible abortion policy more favorably than did the current state laws of the 1970s. He claimed that previous legislatures passed anti-abortion laws mainly due to concerns over maternal health and that the advancement of medicine in the twentieth century no longer necessitated these laws. Through a combination of the First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendment, Blackmun argued that while the text does not explicitly mention it, there is a constitutional right to privacy. The opinion, therefore, declared that government could only limit a woman's right to choose after "viability" or when the "fetus then presumably has the capability of meaningful life outside the mother's womb." Before the fetus was

[69] Michael C. Dorf, *Constitutional Law Stories*, 2nd ed. (New York, NY: Foundation Press, 2009), 337.

[70] Ibid, 338.

viable, the state could only regulate abortion to protect maternal health from the potential harm of an abortion procedure.[71] Pro-life and pro-choice legal scholars alike have widely criticized this mishmash of a constitutional argument.[72]

The constitutionality of abortion policy has since been altered by another Supreme Court case *Planned Parenthood v. Casey*.[73] The Court abandoned the trimester framework of *Roe* for an even more ambiguous method. The majority held that states could regulate abortion so long as the law did not pose an "unnecessary burden" to a woman's right to procure one. It placed further emphasis on the state's ability to value unborn life, but it failed to provide any sort of standard on when states should protect the unborn versus protect the mother's right to choose.

One cannot overstate the impact of *Roe* on abortion policy; this single decision largely undid over one-hundred and fifty years of state policy. Furthermore, before the 1973 ruling, abortion policy was exclusive to the power of state governments.[74] These legislatures, while generally holding anti-abortion positions in their statutes, had significantly differed from one another in their policies leading up to *Roe*. The severity of state laws was inconsistent despite the general anti-abortion sentiment. Though the federal ruling was binding on state policy, *Roe* did nothing to amend this inconsistency. As the following chapters will examine, modern abortion law is still gravely irregular

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[71] "*Roe v. Wade*, 410 U.S. 113 (1973)."

[72] For pro-choice critiques, see John Hart Ely's "The Wages of Crying Wolf: A Comment on *Roe v. Wade*"; Ruth Bader Ginsburg's "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*." For pro-life, see Hadley Arkes's "The Question of Abortion and the Discipline of Moral Reasoning."

[73] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[74] Mohr, 259.

amongst the nation’s states, granting unborn life more significance in one region versus another.

The laws of the nineteenth and the first half of the twentieth century saw a general disdain for abortion, yet the application of that attitude varied greatly. Conversely, twenty-first century abortion laws generally favor a liberated abortion industry, prioritizing women’s privacy over the states’ interests in protecting the unborn. The application of modern law is just as varied as was the opposite position in previous centuries. The primary concern for the rest of this paper will be to exhibit these inconsistencies and argue that it is crucial for the nation to set a standard on the value of unborn life so that the government does not permit violations of Americans’ most foundational freedoms.

CHAPTER TWO

An Analysis of State Criminal Feticide Law

As of July of 2018, thirty-eight states have criminal feticide laws on record. These laws impose penalties for the unlawful killing of unborn children, identifying it as an act of homicide. This chapter will provide an overarching analysis of different elements of these laws, including each state's value language, the point in gestation when legal protections begin, any stated or implied legal equivalence between unborn children and born persons, and the maximum penalty provided under the law. These four areas will offer insight to how each state values unborn life and the length that it will go to protect it. A thorough understanding of state criminal feticide law will then allow for a comparison to state abortion law, exposing the degree of statutory inconsistencies between the two that may warrant serious legal consideration.

The Effect of Statutory Value Language

Although value language for a statute's terminology may not directly impact the application of the law, it can serve to reflect underlying values behind the motivation for a statute. The term "value language" for the purposes of this paper is meant to signify how the legislature utilizes language to indicate state interest. An obvious exemplification is the terminology describing unborn life. More scientific language, such as "fetus," "embryo," or "pregnancy" appear to take a more neutral position on addressing any level of humanity for unborn life. Many statutes, however, address this underlying humanity more directly through the use of the term "unborn child," thereby

signifying a stronger indication of protecting a *person* rather than something viewed as an organism or vague entity. The use of the word "child" naturally evokes a more emotional response than scientific terminology, which is more detached from any semblance of the personhood of the unborn. Terms like "fetus" take a more analytical and passive tone, rather than offering an indirect expression of the state's value of unborn life. Twenty-seven of the thirty-eight states with criminal feticide laws utilize this stronger terminology of "unborn child" in their text,[1] whereas the remaining eleven states defer to scientific terminologies.[2] Therefore, though there is indeed an inconsistency in the exact wording of various statutes, the majority of states designate some level of "humanness" to unborn victims through deeming them "children" rather than "fetuses" or "embryos."

Several state feticide statutes contain interesting phrases that further strengthen their apparent value for unborn life. The most common of these statements condemns the

[1] These states include: Alabama (Ala. Code § 13A-6-1), Alaska (Alaska. Stat. § 11.41.150 et seq., § 11.81.250, § 12.55.035, § 12.55.125), Arizona (Ariz. Rev. Stat. Ann. § 13-1101-1105), Arkansas (Ark. Stat. Ann. § 5-1-102(13), § 5-10-101, § 5-10-102, § 5-10-103, § 5-10-104, § 5-10-105), Florida (Fla. Stat. Ann. § 775.021(5)), Georgia (Ga. Code Ann. § 16-5-80, § 40-6-393.1), Illinois (Ill. Rev. Stat. ch. 720 § 5/9-1.2, § 5/9-2.1 and § 5/9-3.2), Kansas (Kan. Stat. Ann. § 21-5419, § 21-5401, § 21-5402, § 21-5403, § 21-5404, § 21-5405, § 21-5406, § 21-5413), Kentucky (Ky. Rev. Stat. § 507A.010 et seq.), Louisiana (La. Rev. Stat. Ann. § 14:32.5, § 14:32.6, § 14:32.7, § 14:32.8), Michigan (Mich. Comp. Laws Ann. § 750.322, § 750.323), Minnesota (Minn. Stat. § 609.205, § 609.266 et seq., §609.21), Mississippi (Miss. Code Ann. § 97-3-19, § 97-3-37), Missouri (MO Rev Stat § 1.205), Nebraska (Neb. Rev. Stat. § 28-388 et seq., § 28- 393-397, § 28-394, § 60-6,198), Nevada (Nev. Rev. Stat. § 200.210), North Carolina (N.C. Gen. Stat. § 14-23.1 et seq.), North Dakota (N.D. Cent. Code § 12.1-17.1-01 et seq.), Oklahoma (Okla. Stat. Ann. tit. 21 § 691), Pennsylvania (Pa. Cons. Stat. Ann. tit. 18 § 106, § 1102 et seq., § 2601 et seq.), Rhode Island (R.I. Gen. Laws § 11-23-5), South Carolina (S.C. Code Ann § 16-3-1083), South Dakota (S.D. Codified Laws Ann. § 22-16-41, § 22-16-1.1 et seq., § 22-16-4), Texas (Tex. Penal Code Ann. § 1.07), Utah (Utah Code Ann. § 76-5-201 et seq.), Washington (Wash. Rev. Code Ann. § 9A.32.060), and Wisconsin (Wis. Stat. § 940.04 (2) et seq.).

[2] These states include California (Cal. Penal Code § 187 (a)), Idaho (Idaho Code § 18-4001, § 18-4006, § 18-4016), Indiana (Indiana Senate Enrolled Act 203), Maryland (Md. Criminal Law Code Ann. § 2-103), Massachusetts (*Commonwealth vs. Lawrence*, 536 N.E.2d 571 (1989)), *Commonwealth vs. Cass*, 467 N.E.2d 1324 (1984)), Montana (Montana Code Ann. § 45-5-102, § 45-5-103), New Hampshire (NH RSA 630:1, 630:1-a, 630:1-b, 630:2, 630:3, and 630:4), Ohio (Ohio Rev. Code Ann. § 2903.01 et seq.), Tennessee (Tenn. Code Ann. § 39-13-107, § 39-13-214), Virginia (Va. Code § 18.2-32.2), and West Virginia (W. Va. Code § 61-2-30).

act of feticide (or homicide whose bounds include the killing of an unborn child) as conveying an extreme or depraved "indifference to human life." Seven states include this phrase in their criminal statutes that protect unborn life.[3] These states go a step beyond utilizing humanizing terminology to instead directly recognize the legislature's view that the unborn are in fact "human life," and an act of feticide undermines its value.

Other regions of the country include similar statements that bolster the principle of protection for unborn life. North Carolina, for example, condemns any person who "commits an act causing the death of the unborn child that is inherently dangerous to human life and is done so recklessly and wantonly that it reflects disregard of life."[4] While enhanced language like this does not directly impact the enforcement of the statutes, the use of more emotional language may shed light on the values of state legislatures and change the tone of criminal court proceedings involving feticide cases. After all, a woman who accuses another of "murdering her unborn child" creates a much stronger emotional reaction than phrasing the accusation as "terminating her pregnancy." By directly referencing "human life" in their law, these states appear to recognize a degree of personhood of the unborn.

Other states, such as California and Mississippi, denounce the immoral actions of those who commit feticide as consisting of an "abandoned and malignant heart"[5] or "evincing a depraved heart, regardless of human life."[6] Similarly, Texas recognizes the

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[3] These states include: Alabama (Ala. Code § 13A-6-1), Alaska (Alaska. Stat. § 11.41.150) , Arizona (. § 13-1104), Arkansas (Ark. Stat. Ann. § 5-10-101), Kentucky (Ky. Rev. Stat. § 507A.010), North Dakota (N.D. Cent. Code, § 12.1-17.1-02), and Utah (Utah Code Ann. § 76-5-203).

[4] N.C. Gen. Stat. § 14-23.2 et seq.

[5] Cal. Penal Code § 188.

[6] Miss. Code Ann. § 97-3-19.

humanity of the unborn within its homicide laws (which explicitly encompass feticide) by declaring murder an "act clearly dangerous to human life that causes the death of an individual."[7] Through such language, the state legislatures demonstrate that the state has an interest in the protection of the unborn lives. This interest is so compelling that the protection of the unborn does not depend on the rights of the mother, but rather on the value of the unborn themselves—that is, these laws do not protect fetuses for reasons of the mother's bodily autonomy. Rather, by including feticide under the definition of homicide, the state is declaring that the fetus is a separate life worthy of state protection.

Missouri's laws contain perhaps the most vigorous language surrounding the value of unborn life, strengthening the apparent level of state interest when stating outright that:

> The life of each human being begins at conception…Unborn children have protectable interests in life, health, and well-being…the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state.[8]

The gravity of these words leaves no room for doubt of the state's interest. It specifies that the state recognizes *all* rights and privileges of other citizens as also belonging to unborn children at any stage of development. It is contradictory that, as the next chapter will demonstrate, the state also permits the mother to strip these recognized rights away from her unborn child when she opts for a legal abortion. Can the state then claim that it recognizes all the rights, privileges, and immunities for unborn children as it does for its other citizens? There is a blatant contradiction between the state's value language and its

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[7] Tex. Penal Code Ann. § 19.06.

[8] MO Rev Stat § 1.205.

abortion law, the former acknowledging the rights of unborn children and the latter ignoring them.

The Supreme Court of the United States refused to invalidate this Missouri statute in *Webster v. Reproductive Health Services*, holding that so long as it did not interfere with abortion rights, the text could stand as a value statement for the state.[9] Despite the powerful language designating all rights and privileges to the unborn, these rights are inconsistent and discretionary. While Missouri claims that the unborn possess the same rights and privileges as any other citizen, the possession of such rights is dependent on circumstance—that is, whether the mother chooses for her child to die or not. In one instance, the state grants full rights from the moment of conception, thereby recognizing the full personhood of the unborn child. The moment a mother chooses to abort, however, the state revokes that personhood from the unborn child it once declared to have personhood. The rights and privileges of the fetus, then, are based on the opinion of the mother. These "circumstantial rights" are pervasive throughout state statutes for abortion and feticide, as the following chapter will further explore.

While there are discrepancies in some states claiming to value unborn life, there are also states who purposely weaken their value language for unborn life, despite their feticide statutes offering intense punishments for violators. Two states in particular utilize the language of their statutes to weaken the appearance of state interest in protecting fetuses, rather than strengthening it. In its law regarding the murder or manslaughter of a viable fetus, Maryland states that nothing in the text "shall be

[9] *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

construed to confer personhood or any rights on the fetus."[10] Despite the possibility of the government sentencing someone convicted of feticide to life in prison without parole, this phrase in the law and the terminology of "fetus" serves to weaken what would otherwise appear to be a relatively strong value for unborn life.

Likewise, South Carolina's laws make it possible for someone who committed feticide to be convicted of first-degree murder and sentenced to life in prison without parole. Nevertheless, the interest of the state in protecting unborn life seems diminished when the law adds, "Nothing in this section shall be construed to broaden or restrict any other rights currently existing for the child who is in utero."[11] Even when states like Maryland and South Carolina attempt to limit the degree of personhood granted to fetuses through these statements, their laws contradict that boundary by treating feticide similar to homicide of a born person. By failing to maintain a standard between its abortion and feticide laws, a state sets itself up for statutory contradictions no matter how strong or weak its value language appears.

Protection Begins

A vital element of a state feticide law is the point during gestation where its protections begin—the earlier the stage of fetal development that a state can convict an individual of the crime, the stricter the law and the stronger the protections are for unborn life. Twenty-seven of the thirty-eight states with criminal feticide statutes initiate their

[10] Md. Criminal Law Code Ann. § 2-109.

[11] S.C. Code Ann § 16-3-1083.

protection of unborn life at the moment of conception, the earliest stage in pregnancy[12]; furthermore, twenty-six of these states declare the killing of an unborn child at any stage of development to be manslaughter or murder.[13] Through this declaration, the majority of states in the country assert that killing an unborn child from the moment of conception is unlawful homicide.

The states whose laws do not initiate at conception instead identify various developmental stages as the starting point for implementing their feticide statutes. California's, Montana's, and Virginia's laws start their protections after the eighth week of pregnancy when the embryo becomes known scientifically as a fetus.[14] Nevada, Rhode Island, and Washington abide by the common law principle of nearly two centuries ago, starting their feticide laws once the child becomes quick.[15] Similarly, Michigan and Wisconsin heighten the crime and punishment if one committed feticide on a quick child rather than on one at an earlier stage in gestation.[16] New Hampshire's law

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[12] These states include: Alabama (Ala. Code § 13A-6-1), Alaska (Alaska. Stat. § 11.81.900), Arizona (Ariz. Rev. Stat. Ann. § 13-1103), Arkansas (Ark. Stat. Ann. § 5-1-102(13), Florida (Fla. Stat. Ann. § 775.021(5)), Georgia (Ga. Code Ann. § 16-5-80), Idaho (Idaho Code § 18-4016), Illinois (Ill. Rev. Stat. ch. 720 § 5/9-1.2), Indiana (IC §1 16-18-2-365), Kansas Kan. Stat. Ann. § 21-5419), Kentucky (Ky. Rev. Stat. § 507A.010), Louisiana (La. Rev. Stat. Ann. § 14:32.7), Minnesota (Minn. Stat. § 609.266), Mississippi (Miss. Code Ann. § 97-3-37), Missouri (Missouri Rev Stat § 1.205), Nebraska (Neb. Rev. Stat. § 28-389), North Carolina (N.C. Gen. Stat. § 14-23.1), North Dakota (N.D. Cent. Code § 12.1-17.1-01), Ohio (Ohio Rev Code Ann § 2903 01 et seq.), Oklahoma (Okla. Stat. Ann. tit. 21 § 691), Pennsylvania (Pa. Cons. Stat. Ann. tit. 18 § 320), South Carolina (S.C. Code Ann § 16-3-1083), South Dakota (S.D. Codified Laws Ann. § 22-1-2), Tennessee (Tenn. Code Ann. § 39-13-214), Texas (Tex. Penal Code Ann. § 1.07), and West Virginia (W. Va. Code § 61-2-30).

[13] The only state from the previous citation to not declare feticide to be murder or manslaughter at the point of conception is Michigan. The state law does not declare it to be manslaughter until the pregnancy has quickened. However, some protections do begin at conception—someone who kills a pre-quickened child can be sentenced to 6 years in prison according to Mich. Comp. Laws Ann. § 750.90c.

[14] Cal. Penal Code § 187, Montana Code Ann. § 45-5-103, Va. Code § 18.2-32.2.

[15] Nev. Rev. Stat. § 200.210, R.I. Gen. Laws § 11-23-5, Wash. Rev. Code Ann. § 9A.32.060.

[16] Mich. Comp. Laws Ann. § 750.90c, Wis. Stat. § 940.04.

begins protections after the twentieth week of gestation, in which all fetuses are quick since quickening usually occurs in the fifteenth to seventeenth week in gestation.[17]

Maryland and Massachusetts[18] put off their protections in cases of feticide until the child reaches viability, the point at which he or she can live outside of the womb (though with the assistance of medical machines and devices).[19] As the following chapter will demonstrate, most states ban abortion at the point of viability. It appears then that Maryland and Massachusetts, the only states with feticide laws that begin upon viability, are the only states with some degree of consistency between their abortion and feticide laws since protection for fetuses begin at the same stage in both circumstances. Therefore, the legality of terminating a fetus is not dependent on whether it occurs in the case of abortion or feticide. If this assumption of consistency is true, only two of thirty-eight states with criminal feticide laws—five percent—can claim to reliably apply the same standards in safeguarding unborn life.

Equating the Unborn with the Born

Another distinctive trait amongst state feticide policies is how they compare the legal standing of unborn children with regular citizens or "born persons." Thirteen states directly equate the two in their homicide and manslaughter laws, stating that an unborn child falls in the category of "person," "individual," or "another" when referring to

[17] NH RSA 630:1, 630:1-a, 630:1-b, 630:2, 630:3, and 630:4); Keown, "Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions," 5.

[18] It is important to note that unlike all other states with feticide statutes, Massachusetts's policies were not determined through statutory law but rather through case law.

[19] Md. Criminal Law Code Ann. § 2-103, *Commonwealth vs. Lawrence*, 536 N.E.2d 571 (1989)), *Commonwealth vs. Cass*, 467 N.E.2d 1324 (1984)).

murder victims.[20] By including the unborn within these definitions, these laws essentially place unborn children in equal legal standing with other victims of homicide. Five other states explicitly place the unborn on the same standing as their mothers, stating that the convicted murderer should receive the same punishment for killing the unborn child as they would have had the crime resulted in the death of the mother.[21] This levelling seems especially contradictory considering the deference the law grants women in their right to opt for abortion. States viewing the unborn as legally equal to born persons, who have legally recognized personhood, gives way to a stronger argument that feticide statutes grant personhood to fetuses.

Twelve states added separate provisions to address cases of feticide specifically, thereby prohibiting a direct equation between homicide of the born and the unborn.[22] Nonetheless, nearly all of these feticide laws provide for punishments equivalent or similar to those in their homicide statutes.[23] Because of this, the equality between unborn

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[20] These states include: Alabama (Ala. Code § 13A-6-1), Arizona (Ariz. Rev. Stat. Ann. § 13-1102, § 13-1103), Arkansas (Ark. Stat. Ann. § 5-1-102(13), § 5-10-101, § 5-10-102, § 5-10-103, § 5-10-104, § 5-10-105), Idaho (Idaho Code § 18-4001, § 18-4006, § 18-4016), Kansas (Kan. Stat. Ann. § 21-5419, § 21-5401, § 21-5402, § 21-5403, § 21-5404, § 21-5405, § 21-5406, § 21-5413), Mississippi (Miss. Code Ann. § 97-3-19, § 97-3-37), Missouri (MO Rev Stat § 1.205), New Hampshire (NH RSA 630:1, 630:1-a, 630:1-b, 630:2, 630:3, and 630:4), Oklahoma (Okla. Stat. Ann. tit. 21 § 691), South Dakota (S.D. Codified Laws Ann. § 22-16-41), Tennessee (Tenn. Code Ann. § 39-13-107, § 39-13-214), Texas (Tex. Penal Code Ann. § 1.07, § 19.01), and Utah (Utah Code Ann. § 76-5-201 et seq.).

[21] These states include: Florida (Fla. Stat. Ann. §775.021(5a)), Georgia (Ga. Code Ann. § 40-6-393.1), Michigan (Mich. Comp. Laws Ann. § 750.322), Rhode Island (R.I. Gen. Laws § 11-23-5), and South Carolina (S.C. Code Ann § 16-3-1083).

[22] These states include: Alaska (Alaska. Stat. § 11.41.150), Illinois (Ill. Rev. Stat. ch. 720 § 5/9-1.2, § 5/9-2.1 and § 5/9-3.2), Kentucky (Ky. Rev. Stat. § 507A.020), Louisiana (La. Rev. Stat. Ann. § 14:32.5), Maryland (Md. Criminal Law Code Ann. § 2-103), Minnesota (Minn. Stat. § 609.2661), Nebraska (Neb. Rev. Stat. § 28-390), Nevada (Nev. Rev. Stat. § 200.210), North Carolina (N.C. Gen. Stat. § 14-23.1), North Dakota (N.D. Cent. Code, § 12.1-17.1-02), Pennsylvania (Pa. Cons. Stat. Ann. tit. 18 § 1102), and Virginia (Va. Code § 18.2-32.2).

[23] Illinois, Kentucky, Nebraska, North Carolina, and Pennsylvania each have the penalty of life in prison for feticide but do not allow for the death penalty as they do in cases of first degree or capital murder. Virginia's feticide laws provide for up to 40 years in prison.

and born victims is more indirect, in the form of similar penalties, than those that include unborn within the same definition of born victims. Six other states include the unborn as a separate protected class under their homicide and manslaughter statutes, rather than directly including the unborn in the definition of "person" in their homicide laws or creating entirely different laws for feticide alone. This separation distinguishes them from born victims; however, those convicted of homicide of an unborn victim in these states can receive the same level of punishment as those convicted of homicide of a born victim.[24] Wisconsin's law is unusual in that it is the only state to have its feticide law written within its abortion law.[25] This ironic statute places two contradictory provisions side by side, granting security to an unborn child in one instance and permission for its termination in another. This illogicality demonstrates the lack of legal standards for when the government should grant protection to an unborn child.

Greatest Possible Punishment

The extent to which feticide statutes can punish those convicted of the crimes they cover is a great gauge of the severity of the laws and the degree of value they place on unborn lives. Many states with fetal homicide laws can sentence criminals to the same penalties they would receive for killing born victims.[26] Twelve states allow for the possibility of a death penalty for those convicted of feticide, the highest punishment

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[24] These states include: California (Cal. Penal Code § 187 (a)), Indiana (Indiana Senate Enrolled Act 203), Montana (Montana Code Ann. § 45-5-102), Ohio (Ohio Rev. Code Ann. § 2903.01 et seq.), Washington (Wash. Rev. Code Ann. § 9A.32.060), and West Virginia (W. Va. Code § 61-2-30).

[25] Wis. Stat. § 940.04 (2) et seq.

[26] This analysis will look strictly at the highest possibility of penalties rather than considering what states implement most often.

available for any crime in the United States.[27] Sixteen additional states allow for the possibility of life in prison for those who kill an unborn child, a standard penalty for those who kill born individuals.[28] Five of these states—Georgia, Minnesota, Nebraska, North Carolina, and Pennsylvania—*mandate* full life sentences, rather than allow for it to be a maximum penalty. Just as a majority of states protect unborn life from the moment of conception, a majority of states also have laws that allow the courts to grant life sentences to anyone convicted of taking unborn life at its earliest stage. It is imperative to note that this is not just the majority of states with criminal feticide laws—it is the majority of states within the country as a whole.

The remaining state feticide laws contain specific maximum sentences for those convicted. Virginia's statute specifies a maximum penalty of forty years in prison, Rhode Island up to thirty years, and Indiana and Mississippi up to twenty years.[29] Louisiana's law allows for a sentence of up to fifteen years of hard labor; Michigan and Wisconsin up to fifteen years in state prison.[30] Nevada allows for the shortest penalty of

[27] These states include: Alabama (Ala. Code § 13A-6-2), Arizona (Ariz. Rev. Stat. Ann. § 13-1105), California (Cal. Penal Code § 190), Florida (Fla. Stat. Ann. § 775.082), Idaho (Idaho Code § 19-2515, et seq.), Kansas (Kan. Stat. Ann. § 21-5419, § 21-5401), Montana (Montana Code Ann. § 45-5-102), Oklahoma (Okla. Stat. Ann. tit. 21 § 701.9), South Dakota (S.D. Codified Laws Ann. § 22-16-4), Tennessee (Tenn. Code Ann. § 39-13-202), and Texas (Tex. Penal Code Ann. § 19.02).

[28] These states include: Arizona (Ariz. Rev. Stat. Ann. § 13-1105), Georgia (Ga. Code Ann. § 16-5-80), Illinois (Ill. Rev. Stat. ch. 720 § 5/9-1.2), Kentucky (Ky. Rev. § 507A.060), Maryland (Md. Criminal Law Code Ann. § 2-203), Minnesota (Minn. Stat. § 609.2661), Missouri (MO Rev Stat § 565.020), Nebraska (Neb. Rev. Stat. § 28-391), New Hampshire (NH RSA 630:1-a), North Carolina (N.C. Gen. Stat. § 14-23.2), North Dakota (N.D. Cent. Code § 12.1-17.1-02), Ohio (Ohio Rev. Code Ann. § 2929.02), Pennsylvania (Pa. Cons. Stat. Ann. tit. 18 § 1102), South Carolina (S.C. Code Ann § 16-3-1083), Utah (Utah Code Ann. § 76-5-203), and Washington (Wash. Rev. Code Ann. § 9A.20.021).

[29] Va. Code § 18.2-32.2, R.I. Gen. Laws § 11-23-3, IC § 6 35-50-2-16, . § 97-3-37).

[30] La. Rev. Stat. Ann. § 14:32.6, Mich. Comp. Laws Ann. § 750.321, Wis. Stat. § 940.04 (2).

ten years in prison.[31] Though their allowed punishments are less harsh than the majority, these states view feticide as a serious crime worthy of severe prison sentences.

While the states with statutory feticide laws possess a wide range of possible punishments—anywhere from a minimum issuance of a fine to a maximum sentence of death—the proscription of terminating unborn life alone poses a contradiction with abortion law. Though there are indeed inconsistencies in how seriously states punish feticide, the more significant contradiction lies in that there is any punishment in the first place. In many cases, the death of an unborn child occurs in an entirely legal abortion procedure. The termination of that same pregnancy, however, would be prohibited as unlawful homicide if the mother of the unborn child did not consent to the unborn child's death. Declaring an act to be unlawful homicide in one case, yet declaring that same act as perfectly legal in another poses a fundamental question: at what point is an unborn child deserving of protection under the law? Without a specific standard of if and when unborn life warrants legal safeguards, the government risks having dangerous statutory inconsistencies that threaten fundamental rights.

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[31] Nev. Rev. Stat. § 200.210

CHAPTER THREE

A Comparison of State Feticide and Abortion Law

Using the analysis from the previous chapter, this section will compare state criminal feticide laws with their respective abortion laws, analyzing how the two types of legislation differ from one another. The analysis of the discrepancies between these areas of law will address both interstate inconsistency and intrastate inconsistency. Interstate inconsistency considers how states differ from one another in their treatment of unborn life, conveying a grave disparity based on the geographic location of the fetus.

Intrastate inconsistency considers how each state's abortion laws contradict its criminal feticide laws. This second layer conveys that state statutes are not only inconsistent with one another, but that they are also inconsistent within the state itself. This chapter will demonstrate that each of the thirty-eight states with criminal feticide laws contains discrepancies in one form or another, some states having greater discrepancies than others. This comparison will primarily consider the laws' language, the point at which protections for unborn life begin, and the maximum level of punishment the laws permit.

Value Language

This section will explore how the tone of abortion laws compares with that of feticide laws and how the states apply their value language in both cases. It will first address different terminology for the unborn and its variation between feticide and abortion statutes. Then, it will examine the impact of state legislatures' explicit value

language on their application of abortion law as compared to feticide law. This consideration will provide crucial insight into the difficulties of creating consistent legislation and the complexities between state and federal governments.

The Terminology of the Unborn

There is some noticeable variation when comparing the language and terminology used in abortion law as opposed to feticide law in the thirty-eight states that have criminal feticide provisions. As Figure 1 demonstrates, several states alter between the use of scientific terminology such as "fetus" and "pregnancy" and the more humanizing terminology of "unborn child." It is assumable that statutes designed to protect unborn life would use the more humanizing language, and statutes permitting the termination of that life would use more scientific language. After all, the former bases itself upon valuing that life and establishing protections for it, and the latter bases itself upon valuing liberty over that unborn life and establishing justified means to terminate it.

This conjecture holds true for six states, whose feticide laws recognize a semblance of humanity through the use of "unborn child" terminology and whose abortion laws switch to scientific language.[1] However, the assumption that states portray their value of unborn life through statutory language does not always hold. Seven states actually reverse their language in the opposite way, switching from scientific terminology

[1] These states include: Florida (Fla. Stat. Ann. § 775.021(5); 390.011, et seq.), Michigan (Mich. Comp. Laws Ann. § 750.322, § 750.323; 750.14; 722.901 et seq.; 333.17016), Mississippi (Miss. Code Ann. § 97-3-19, § 97-3-37; 41-75-1, et. seq.), Nevada ((Nev. Rev. Stat. § 200.210; 442.240 to 270), Rhode Island (R.I. Gen. Laws § 11-23-5; 23-4.7-1 to 8; 11-9-18; 23-4.8-1 to 5; 23-4.12-1 to 6), and Washington (Wash. Rev. Code Ann. § 9A.32.060; 9.02.100 et seq.).

Figure 1: State Terminology for Unborn Life

State	Feticide Law	Abortion Law
Alabama	Unborn Child	Unborn Child
Alaska	Unborn Child	Unborn Child
Arizona	Unborn Child	Unborn Child
Arkansas	Unborn Child	Unborn Child
California	Fetus	Fetus
Florida	Unborn Child	Fetus
Georgia	Unborn Child	Unborn Child
Idaho	Fetus	Unborn Child
Illinois	Unborn Child	Unborn Child
Indiana	Fetus	Unborn Child
Kansas	Unborn Child	Unborn Child
Kentucky	Unborn Child	Unborn Child
Louisiana	Unborn Child	Unborn Child
Maryland	Fetus	Fetus
Massachusetts	Fetus	Unborn Child
Michigan	Unborn Child	Fetus
Minnesota	Unborn Child	Unborn Child
Mississippi	Unborn Child	Fetus
Missouri	Unborn Child	Unborn Child
Montana	Fetus	Fetus
Nebraska	Unborn Child	Unborn Child
Nevada	Unborn Child	Fetus
New Hampshire	Fetus	Fetus
North Carolina	Unborn Child	Unborn Child
North Dakota	Unborn Child	Unborn Child
Ohio	Pregnancy	Unborn Child
Oklahoma	Unborn Child	Unborn Child
Pennsylvania	Unborn Child	Unborn Child
Rhode Island	Unborn Child	Fetus
South Carolina	Unborn Child	Unborn Child
South Dakota	Unborn Child	Unborn Child
Tennessee	Fetus	Unborn Child
Texas	Unborn Child	Unborn Child
Utah	Unborn Child	Unborn Child
Virginia	Fetus	Unborn Child
Washington	Unborn Child	Fetus
West Virginia	Fetus	Unborn Child
Wisconsin	Unborn Child	Unborn Child

in feticide law to humanizing terminology in abortion law.[2] This seeming contradiction does come with the caveat that in abortion laws, scientific terms are also frequently used. For the purposes of this study, using the term "unborn child" once classifies as using humanizing language, even if a state uses scientific terminology much more frequently. Furthermore, this study does not differentiate the use of the different terminologies in provisions proscribing abortion from those allowing for abortion in some instances. Therefore, while it may be difficult to read into the values of the state by way of their terminology describing unborn life, it is still a factor to be considered within the greater context of the inconsistencies between feticide and abortion law.

Inconsistent Application of Value Language

Something that may be more conducive to the analysis of these statutory inconsistencies in language is the state provisions that explicitly identify the intention of their legislatures. As discussed in the previous chapter, several state feticide laws identify their intention behind the law as a way to prevent the disregard for human life. For example, under its homicide laws that incorporate feticide, Alabama identifies the act as showing "extreme indifference to human life."[3] This law protects unborn children from the moment of conception, imposing up to a life sentence or even the death penalty for any individual convicted of feticide. These strict provisions that recognize the value

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[2] These states include: Idaho (Idaho Code § 18-4001, § 18-4006, § 18-4016; 18-604 et seq.), Indiana (Indiana Senate Enrolled Act 203, Indiana Code § 16-18-2-128.7), Massachusetts (Commonwealth vs. Lawrence, 536 N.E.2d 571 (1989); Massachusetts Code Ch. 112§§12K to 12U), Ohio (Ohio Rev. Code Ann. § 2903.01 et seq.; 2919.11 to 18), Tennessee (Tenn. Code Ann. § 39-13-107, § 39-13-214; 39-15-202), Virginia (Va. Code § 18.2-32.2; 18.2-76), and West Virginia (W. Va. Code § 61-2-30; West Virginia Code 61-2-8).

[3] Alabama Code § 13A-6-2.

of unborn life, however, are only present in cases of feticide. If the child dies in a legal abortion, the stringent state law's value for the fetus dissipates.

Alabama's abortion laws begin protections only once the fetus reaches the twentieth week of gestation, as opposed to from conception in the case of criminal feticide. Furthermore, even when abortionists fail to meet the legal requirements of performing only pre-viable abortions (or post-viable abortions under the threat of the woman's health), the law only permits up to a year of imprisonment.[4] Not only does the state wait longer to implement safeguards, but it also enforces those safeguards with far less vigor. It is surprising then that Alabama still utilizes the same value language in its abortion law as is cited in its feticide laws. The provision on illegal abortion states that "to permit otherwise [that is, to expand past the boundaries of its abortion law] is a wanton disregard of human life."[5] While it claims that the termination of the unborn shows a disregard for the value of life, the state significantly contradicts itself by providing a far greater protection of that value in cases of feticide versus cases of abortion. Utilizing the same phrase—"a wanton disregard of human life"—in both laws, but applying it in an entirely incongruous manner portrays the failure of that state to uphold its value for unborn life.[6]

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[4] Alabama Code § 13A-13-7.

[5] AL Code § 26-22-1.

[6] It is important to note that Alabama upholds explicitly the value of protecting unborn life itself in both its abortion and feticide law, rather than only protecting the woman's right to choose to maintain that life. Therefore, while its abortion law certainly factors in the woman's right to choose, it also must weigh in its explicit value of life. The balance is wholly inconsistent when it describes feticide as an act of murder, rather than a violation of the woman's right to choose. The next chapter will address this contradiction more fully.

Florida is another state whose treatment of its explicit value language contradicts itself between its feticide and abortion statutes. Under its feticide laws, Florida claims that the unborn child should be legally treated on equal standing with the mother, holding that state should punish those convicted to the same degree as if the perpetrator had ended the mother's life.[7] As with Alabama, the state protects unborn children from the moment of conception and permits a death sentence if convicted of feticide. Consequently, Florida's feticide laws demonstrate a significant state interest in preserving unborn life.

The great contradiction between Florida's laws is the difference in when the state assigns rights to the fetus. As with many state abortion laws, Florida holds that any child born alive during an attempted abortion is immediately "entitled to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive in the course of natural birth."[8] According to its feticide laws, however, that child's right to life should be held on equal ground as his or her mother's from the moment of conception. Does the fetus have equal legal rights in the womb, or must it wait to be born alive (whether that live birth is intentional or not) to assume its right to live?

It is inconsistent for states such as Florida to delegate fetuses the right to life at different stages of gestation. To withhold rights from a fetus in the case of abortion but allow him or her that right in the case of feticide presents the possibility of violating an unborn child's right to life. Furthermore, it presents great confusion for state courts in deciding whether the unborn possess any level of rights and immunities from such crimes

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[7] Fla. Stat. Ann. § 782.09.

[8] Fla. Stat. Ann. § 390.0111.

and the degree to which the government should punish criminals.[9] Florida must either treat unborn children on equal standing with their mothers in its abortion law or remove the feticide provision holding that equal standing in order to prevent this dangerous inconsistency. Unfortunately, Florida and Alabama are not alone in inconsistently applying their value language.

Blaming the Supreme Court

Several states show substantial irregularities within their abortion statutes. They affirm the legislature's intent to protect unborn life to the greatest extent possible, yet simultaneously the laws permit an ample opportunity for legal abortions and short sentences for those violating these broad boundaries. For example, an Indiana statute simply states, "Childbirth is preferred, encouraged, and supported over abortion."[10] North Dakota's law phrases it more resolutely by claiming that its abortion law "reaffirms the tradition of the state of North Dakota to protect *every human life whether unborn or aged*, healthy or sick."[11] Similarly, a Utah statute recognizes that "life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution."[12] These three states are among

[9] The following chapter will elaborate further on this point.

[10] Indiana Code § 16-34-1-1.

[11] N.D. Cent. Code § 14-02.1-01.
Italics added.

[12] Utah Code Ann. § 76-7-301.

several that declare an explicit state interest in preserving unborn life, some even going so far as to acknowledge fetal rights.

A crucial aspect of these mentioned value claims is their location within the states' laws. This strong language is not only limited to areas of feticide law, as the previous chapter analyzed, but it is also found within abortion laws. It is apparent then that state interests do not change, but rather the application of the interest changes. Of the states mentioned here, all five of them permit abortion in the vast majority of cases.[13] However, these same states strictly prohibit criminal feticide with strict penalties. Significantly altering how the state applies its interests, particularly if it is to protect rights and immunities, poses several legal questions. How are courts to treat that interest under challenging cases? How should future legislatures treat that interest when drafting laws? Most importantly, to what degree does a misapplication of that interest affect the wellbeing of citizens? These questions place a burden on states whose laws unevenly employ their declared values.

Certain states openly acknowledge the inconsistencies between their value language and its implementation under abortion statutes and cast blame on the federal courts. Kentucky law blatantly states that if the Court overturns *Roe v. Wade* and returns the right to proscribe abortion to the states, its state statutes to "recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored."[14] Here, Kentucky's legislature suggests that it permits abortion only to the extent that it is constitutionally required to do so by the United States Supreme Court.

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[13] That is, they permit elective abortion for more than half of a pregnancy's natural duration.

[14] Kentucky Revised Statutes § 311.710.

Because it is not similarly required to allow for feticide, the state holds inconsistent laws in order to offer as much protection for unborn life as it is constitutionally able.

Missouri similarly recognizes its statutory discrepancies by stating that the legislature intends to "grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes."[15] In effect, the state legislature will restrict abortion as much as possible under federal requirements. Missouri recognizes that it has a stronger value for unborn life than the federal government permits it to regulate, thus conceding that the state must implement its interest less stringently in cases of abortion.

Going a step further, Nebraska directly calls out the *Roe* decision under its abortion law, stating, "The members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973."[16] Not only does Nebraska explain that it is unable to protect its value of unborn life, it offers a direct and emotional criticism of the *Roe* decision. The diction of the statute exemplifies not only the legislature's opinion of the case but also their resentment of the inability to legislate according to the state's principles.

This inability for some states to reconcile their values with those of the federal courts points to a more significant problem. Not only must states gain consistency between their own laws, but they must ensure it aligns with the constitutional

[15] Missouri Rev Stat § 188.010.

[16] Neb. Rev. Stat. § 28-325.

requirements the Supreme Court set forth. However, as Chapter One mentioned, these requirements are ambiguous and lack any specific standards. If the federal government has failed to provide a standard for protecting unborn life, it is unreasonable to expect states to be able to be consistent within their local laws and with federal law. The following chapter will further expand on this complication.

When Protection Begins

Just as there are discrepancies between states in where their protections for unborn life begin, there is also discrepancy within each state's laws. Thus, there is a double layer of inconsistency between abortion and feticide law—those from state to state, as well as those within an individual state. The first layer (the interstate layer) potentially poses a threat by basing any state protection on the geographical location of the fetus. The second layer (the intrastate layer) poses a threat by basing protection on circumstance.[17] This section will address both layers in turn, focusing on the dangers of having various starting points for legal protections.

Interstate Inconsistencies

Amongst these thirty-eight states, there exists a broad spectrum of when in the gestational period laws begin to proscribe abortion procedures. Furthermore, there is significant variation in the exceptions that states offer to these limits.[18] Figure 2 shows

[17] That is, based on whether it is a case of criminal feticide or an abortion. This layer points to the overarching fact that individual states are inconsistent in how they protect fetuses between the two scenarios.

[18] While exceptions for cases such as rape and incest vary amongst states, each state offers exceptions for the physical health and life of the mother.

how these provisions fluctuate amongst the states. Eighteen states proscribe abortion at twenty-weeks of pregnancy.[19] This is the earliest stage at which states begin to prohibit abortion, though states can punish criminal feticide as early as conception.[20] Six states begin abortion proscriptions even later at twenty-four weeks, the point at which most fetuses are viable.[21] Twelve additional states identify viability as their point of proscription, rather than specifying twenty-four weeks, mandating that the physician either test the fetus for viability or use his or her best judgment.[22] Virginia has the latest specified proscription point at the third trimester (the twenty-eighth week of pregnancy), a point by which all fetuses are viable. Alaska is the only state with a criminal feticide law that does not specify a point of proscription, therefore technically permitting abortion up until childbirth.[23]

Considering the earliest and latest point of initiating protections, there can be a seventeen to twenty-two-week disparity amongst states and their protections of fetuses.[24] This broad spectrum indicates that one of two issues exists: either states unjustly protect the life of the fetus in certain states or the woman's ability to opt for an abortion is

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[19] "An Overview of Abortion Laws," Guttmacher Institute, October 03, 2018, accessed October 19, 2018.
These statues include: Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, Wisconsin.

[20] Refer to Chapter 2.

[21] Ibid.
These states include: Florida, Massachusetts, Nevada, New Hampshire, Pennsylvania, and Rhode Island.

[22] Ibid.
These states include: Arizona, California, Idaho, Illinois, Maryland, Michigan, Minnesota, Missouri, Montana, Tennessee, Utah, and Washington.

[23] Ibid.

[24] This claim rests on the fact that pregnancies last from thirty-seven to forty-two weeks.

Figure 2: Comparison Between State Feticide and Abortion Laws

	Protections Begin		Maximum Punishment	
State	**Feticide Law**	**Abortion Law**	**Feticide Law**	**Abortion Law**
Alabama	Conception	20 weeks	Death	1 year or Life[*]
Alaska	Conception	No specification	Life in Prison	5 years
Arizona	Conception	Viability	Death	5 years
Arkansas	Conception	20 weeks	Death	6 years
California	8 weeks	Viability	Death[ς]	30 days or 1 yr[ν]
Florida	Conception	24 weeks	Death	5 or 15 years[μ]
Georgia	Conception	20 weeks	Life in Prison[ε]	10 years
Idaho	Conception	Viability	Death	5 years[ν]
Illinois	Conception	Viability	Life in Prison	7 years
Indiana	Conception	20 weeks	20 years	6 years
Kansas	Conception	20 weeks	Death	1 year
Kentucky	Conception	20 weeks	Life in Prison	10[*] or 20[ν] years
Louisiana	Conception	20 weeks	15 years	2 years
Maryland	Viability	Viability	Life in Prison[*]	No sentence
Massachusetts	Viability	24 weeks	N/A	5 years
Michigan	Conception	Viability	15 years	4 or 15[μ] yrs
Minnesota	Conception	Viability	Life in Prison	1 year
Mississippi	Conception	20 weeks	20 years	10 years
Missouri	Conception	Viability	Life in Prison	10 years
Montana	8 weeks	Viability	Death[ς]	5 years
Nebraska	Conception	20 weeks	Life in Prison[ε]	3 mths or 2[*] yrs
Nevada	Quickening	24 weeks	10 years[Ω]	No sentence
New Hampshire	20 weeks	24 weeks	Life in Prison[ρ]	1 year
North Carolina	Conception	20 weeks	Life in Prison[ε]	10 years
North Dakota	Conception	20 weeks	Life in Prison	1 or 10[ν] years
Ohio	Conception	20 weeks	Life in Prison	6 months
Oklahoma	Conception	20 weeks	Death	2 years or Life[*]
Pennsylvania	Conception	24 weeks	Life in Prison[ε]	7 years
Rhode Island	Quickening	24 weeks	30 years[Ω]	No Sentence
South Carolina	Conception	20 weeks	Life in Prison	5 years
South Dakota	Conception	20 weeks	Death	2 years
Tennessee	Conception	Viability	Death	15 years
Texas	Conception	20 weeks	Death	5 years[σ]
Utah	Conception	Viability	Life in Prison	15 years[* or ν]
Virginia	8 weeks	3rd Trimester	40 years[ς]	10 years
Washington	Quickening	Viability	Life in Prison[Ω]	5 years
West Virginia	Conception	20 weeks	Life in Prison[ε]	10 years
Wisconsin	Conception	20 weeks	6 or 15[Ω] yrs	6 or 15[Ω] yrs

ρ - After 20 weeks
ν - If unlicensed
μ - If the mother dies
σ - If killed in womb during childbirth
No demarcation – conception
ε - Required sentence

unjustly limited in certain states. One may argue that it is up to individual states to assign values to these two considerations. However, when a legal issue poses a potential neglect to protect life, an examination of the issue warrants further inspection. Though it may pose a burden, a woman can travel to another region to receive an abortion not permitted in her home state. A fetus, however, does not have the luxury of traveling to another state to secure a chance at life. While it is essential to consider a woman's potential reproductive rights, any legal issue that has the potential to deprive someone of life deserves special attention.

Intrastate Inconsistencies

The second layer of inconsistencies to analyze are the contradictions in an individual state's feticide and abortion laws and the point of gestation in which these statutes begin to protect unborn life. The majority of states, who begin their feticide protections at the moment of conception, show particular discrepancy because they fail to protect fetuses until much later in gestation in cases of abortion. In a wanted pregnancy, the state protects an unborn child from the moment of conception. In an unwanted pregnancy, the state fails to protect an unborn child for most of the pregnancy. This contradiction demonstrates an inconsistent value for unborn life.

Looking to states with criminal feticide laws, it is clear that almost everyone has significant statutory contradictions. By examining whether or not there is a gap between when feticide law assigns personhood and when abortion law does so, and also

discovering how great that gap is, it becomes clear whether there are inconsistencies between these areas of law.[25]

Eighteen states prohibit abortion procedures after the twentieth week of gestation; however, all eighteen begin their feticide protection at the moment of conception.[26] Each of these states, therefore, allow a potential five-month gap in gestation in which they will begin defending the rights of fetuses in different circumstances. The determining factor is whether the mother values the fetus in a wanted pregnancy, or she does not and opts for an abortion. In essence, it is the opinion of the mother who determines whether the government should view the fetus as a human life with legal rights or something less significant under her sole jurisdiction. Each mother, then, is able to determine the legal standing of her unborn child. This consideration is distinct from the right to determine whether or not to carry a pregnancy to term—it is instead the right to legally determine the personhood of an individual, and thus whether someone else may receive heavy punishment if they bring harm to that individual. This flexibility of personhood, left at the sole discretion of the mother, is a significant consideration to make in resolving these inconsistencies. The next chapters will analyze this issue in greater detail.

There are states with even broader discrepancies in their starting-point for legal protection for fetuses. Amongst the states proscribing abortion at twenty-four weeks or

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[25] As will be discussed later, however, even when abortion laws do begin to protect fetuses, they do not assign personhood to the degree that feticide law does. Feticide law often connotes the act under some form of homicide, which thus implies that the victim is a person. Abortion law, however, very rarely terms an illegal late-term abortion as a form of homicide. Therefore, even when prohibitions under abortion law do kick it, it does not appear to be for reasons of protecting a person under the law.

[26] These states include: Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, Wisconsin.

viability, ten of them begin their feticide protections at conception.[27] This gap shows a greater inconsistency, one in which an unborn child can develop for six months and still not receive the same protection in a case of abortion as he or she would in a case of feticide. Alaska has the most contradictory laws in that it guards the unborn from the moment of conception in cases of feticide but does not specify any point of gestation for proscribing abortion, thereby allowing for legal abortions up until childbirth. Thus, Alaska's abortion and feticide law contradict one another for the entire length of pregnancy.

Most states with feticide laws that begin protections at some point after conception still contradict their respective abortion statutes. Of the three states that mark the eighth week of pregnancy as the beginning point of protection in their feticide provisions, two do not proscribe abortion until viability, some sixteen weeks later in gestation.[28] Virginia, the third state, does not proscribe abortion until the third trimester, twenty weeks later in gestation. This gap in protection for fetuses is similar to those of states which begin their feticide protections at conception. By allowing this sixteen to twenty-week limbo in which fetuses may or may not have legal personhood, the government risks the possibility of withholding legal protections that individuals deserve under the law.

Even shorter periods of inconsistency still pose a danger to fetuses who could potentially be persons deserving of rights. The three states that base their feticide laws on the old common law principle of quickening also do not proscribe abortion until twenty-

[27] These states include: Arizona, Florida, Idaho, Illinois, Michigan, Minnesota, Missouri, Pennsylvania, Tennessee, and Utah.

[28] These states are California and Montana.

four weeks or viability, some five to nine weeks later in gestation.[29] New Hampshire does not implement its feticide law until the twentieth week of pregnancy, despite not proscribing abortion until the twenty-fourth week, a four-week discrepancy. Though this gap is not as enormous as those of the previously mentioned states, even a short period in which there is a potential denial of the fundamental right to life is something surely deserving of legal attention.

The remaining two states, Maryland and Massachusetts, do not begin feticide protection until the fetus is deemed viable. The former proscribes abortion also at viability, and the latter proscribes abortion at twenty-four weeks (typically the point at which a fetus is deemed viable). Of the thirty-eight states with criminal feticide laws, only these two states can claim to be consistent regarding the point of gestation in which protections for unborn life begin. Nevertheless, even if a state can claim that it is consistent at when its securities for unborn life start, it must also show consistency in the severity to which it punishes the destruction of unborn life in cases of feticide and abortion.

Greatest Possible Punishment

As with feticide penalties, there is a vast breadth to the extent to which states punish illegal abortions.[30] Furthermore, the penalties can increase within a state according to factors surrounding the procedure. For example, several states increase their

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[29] Assuming that quickening occurs somewhere between the fifteenth and twentieth weeks of pregnancy, though this can occur earlier. These states include: Nevada, Rhode Island, and Washington.

[30] As with the previous chapter, this paper will consider the greatest *possible* punishment one can receive when convicted of unlawful abortion. It will not give weight to how often states actually give these most severe punishments to those convicted.

rates of punishment if the abortionist was not properly licensed or if the mother died as a result of the procedure, both of which can be interpreted much more as a protection for the mother than for her unborn child. Other states increase penalties according to the fetus's stage of gestation, the point of which varies amongst states.[31] This aspect should be a significant consideration in analyzing the inconsistencies between abortion and feticide law because the severity of the punishment is a reliable indicator of how the state interprets the severity of the crime. In the case of feticide, punishment is severe because the state interprets the act as one of homicide, the unlawful taking of a life. If abortion also takes a life, though in different circumstances, surely the punishment must be relatively similar in severity. Upon further consideration, however, it becomes clear that state punishments are highly inconsistent between feticide and abortion law. An analysis of the penalties provided for under the laws will demonstrate the magnitude of these inconsistencies.

Three of the states considered here do not identify punishments for unlawful abortion, but instead, leave the individual to be condemned by state medical organizations or sued in civil courts.[32] This lack of criminal punishment in these states is a great deviation from those detailed under their respective feticide law, which ranges from ten years to life in prison.[33] To fluctuate from a possible life punishment for killing

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[31] Aggravating factors that increase punishments will be detailed in footnotes unless that aggravating factor is also given weight in feticide law as well.

[32] These states include Maryland (Maryland Code § 20-209), Nevada (Nevada RS § 442.257), and Rhode Island (RI Gen L § 23-4.8-4, § 23-4.7-7).

[33] As demonstrated in Table Y, Maryland's feticide law allows for a life sentence if the fetus was viable; Nevada allows for ten years in prison if the fetus had quickened; Rhode Island allows for thirty years in the fetus had quickened.

a fetus in the case of feticide, but then offering no criminal punishment whatsoever in the case of feticide by unlawful abortion, demonstrates an unthinkable statutory contradiction. In both scenarios, the result is an illegally killed fetus. Does the opinion of one individual have enough power to change the penalty of this crime from a slap on the wrist from a medical board to a lengthy prison sentence that could extend up to life behind bars? To not have any criminal penalties for illegal abortions, yet to have criminal penalties for feticide, embodies the very definition of illogicality and legal inconsistency.

Three other states limit their maximum prison sentences to mere months for unlawful abortion—Ohio and Nebraska allow for six months and three months respectively.[34] For the same crime, California allows for a mere thirty days.[35] These three states' feticide laws allow for far harsher punishments for terminating an unborn child's life. Ohio and Nebraska allow a life sentence for feticide (Nebraska actually requiring it), and California permits a death sentence upon conviction. There is an apparent and significant discrepancy between the severity of abortion and feticide here, the former allowing mere months in prison and the latter taking away the life of the person convicted.

Five states permit a prison sentence of up to one year for those convicted of unlawful abortion.[36] All five states diverge significantly from the punishments permitted

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[34] Ohio RS § 2919.12; Nebraska RS § 71-6907.
Nebraska's maximum penalty increases to two years if the fetus was viable at the time of its abortion.

[35] CA Health and Safety Code - Section 123420-123450: Article 2.
California's penalty increases to one year if the convicted abortionist was unlicensed.

[36] These states include Alabama (Alabama Code § 13A-13-7), Kansas (Kansas S.A. 65-6703), Minnesota (Minn. Stat. § 617.20), New Hampshire (NH Rev Stat § 132:35), and North Dakota (N.D.

under their feticide laws: Alabama and Kansas allow for the death penalty, Minnesota and North Dakota allow for a life sentence, and New Hampshire allows for a life sentence if the fetus has reached the twentieth week of gestation. Three additional states allow a slightly greater sentence, permitting up to two years in prison for unlawful abortion.[37] Two of these states, Oklahoma and South Dakota, allow for the death penalty under their feticide laws—still a significant leap from the two years permitted in the case of unlawful abortion. Louisiana, the third state, allows for up to fifteen years in prison for feticide—a thirteen-year difference from an unlawful abortion. Michigan allows for a slightly longer sentence for an unlawful abortion conviction at up to four years, an eleven-year increase from the fifteen-year sentence allowed for under its feticide laws.[38]

Nine states have marginally stricter penalties for unlawful abortions, permitting up to five years in prison.[39] However, two of these states, Idaho and Texas, only allow this penalty under certain circumstances—the former if the physician is unlicensed and the latter if the abortion occurs during childbirth. Of these nine states, five allow a death sentence in cases of feticide.[40] Massachusetts does not specify a penalty, as its feticide

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Cent. Code § 14-02.1-04). Alabama offers up to a life sentence if the fetus was viable at the time of the unlawful abortion. North Dakota offers up to ten years in prison if the abortionist was unlicensed.

[37] These states include: Louisiana (Louisiana RS 40:1061.2), Oklahoma (Oklahoma Stat. § 63-1-738.5; OK Stat §219), and South Dakota (SD Codified L § 34-23A-69).
Oklahoma allows for up to a life sentence if the fetus was viable at the time of the unlawful abortion.

[38] Mich. Comp. Laws Ann. § 750.14.
Michigan increases this penalty to fifteen years if the mother dies as a result of the unlawful abortion.

[39] These states include: Alaska (Alaska. Stat. § 18.16.010), Arizona (Ariz. Rev. Stat. Ann. § 13-3603), Florida (Florida Stat. § 390.0111), Idaho (Idaho Code § 18-605), Massachusetts (Massachusetts Code Ch. 112§§12N), Montana (Montana Code § 50-20-112), South Carolina (SC Code § 44-41-80), Texas (Texas Rev. Civ. Stat. Art. 4512.5), and Washington (RCW § 9.02.20).
Florida's penalty increases to fifteen years if the mother dies as a result of the illegal abortion.

[40] These states include: Arizona, Florida, Idaho, Montana, and Texas.
Montana allows for the death penalty in cases of feticide if the fetus had reached the eighth week of gestation.

laws depend on case law rather than statutory law. The remaining three states allow for a life sentence—Alaska and South Carolina at any stage of gestation, Washington if the fetus had quickened.[41] All nine of these states hold grave inconsistencies by allowing a life sentence or the death penalty in cases of feticide but only a five-year sentence in cases of unlawful abortion.

Three states allow up to six years in prison for unlawful abortion.[42] Two additional states increase this penalty marginally by allowing up to a seven-year prison sentence.[43] Of these five states, Arkansas is the only one that allows for the death penalty in cases of feticide. Illinois and Pennsylvania permit life sentences within under their feticide laws, the latter actually requiring it upon conviction. Indiana allows up to a twenty-year prison sentence, a fourteen-year increase from its criminal abortion laws. Unlike these other states, however, Wisconsin's penalty for unlawful abortion is consistent with its penalty for feticide, both allowing for six years or fifteen if the fetus had quickened at the time of the crime.[44] Nevertheless, the state is still inconsistent between these laws in that, as the previous section mentions, feticide protections begin much earlier than abortion protections.

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[41] These states include: Alaska, South Carolina, and Washington.

[42] These states include: Arkansas (Ark. Stat. Ann. § 5-61-102), Indiana (Indiana Code 16-34-2-7), and Wisconsin (Wisconsin Stat. § 940.04).
Wisconsin's penalty increases to fifteen years if the fetus had quickened by the time of the unlawful abortion.

[43] These states include: Illinois (Ill. Rev. Stat. § 720 510/2) and Pennsylvania (Pa. Cons. Stat. Ann. tit. 18 § 3204).

[44] Wisconsin Stat. § 940.04

Seven states allow for a harsher sentence compared to other states, enabling up to ten years in prison for committing an unlawful abortion.[45] Five of these states, however, allow for life sentences under their feticide laws, three of them actually requiring a life sentence upon conviction.[46] The remaining two states still demonstrate wide discrepancies between their laws, even though they do not permit life sentences. Virginia allows up to forty years in prison if the act of feticide occurred past the eighth week of pregnancy—a thirty-year jump from its maximum penalty for an illegal abortion. Mississippi allows for a twenty-year sentence for feticide, a ten-year jump from its illegal abortion penalty.

The last two states, Tennessee and Utah, allow for up to a fifteen-year sentence for those convicted of unlawful abortion, though in the case of the latter, the abortionist must either have been unlicensed or performed the abortion when the fetus had reached viability.[47] Despite this relatively long prison sentence compared to those offered by other states, both states still demonstrate sentencing discrepancies. In Utah, an individual convicted of feticide can receive a life sentence if he or she kills an unborn child at any stage of gestation. In Tennessee, an individual can receive a death sentence for killing an unborn child at any point of gestation. Despite a relatively heavier sentence for unlawful

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[45] These states include: Georgia (Georgia Code § 16-12-140), Kentucky (Kentucky S.A. § 311.780), Mississippi (Miss. Code Ann. § 41-41-45), Missouri (Missouri Rev Stat § 188.030), North Carolina (NC Gen Stat § 14-44), Virginia (Code of Virginia § 18.2-71), and West Virginia (WV Code § 61-2-8). Kentucky allows for an increased penalty of twenty years if the abortionist was unlicensed and the illegal abortion occurred when the fetus was viable.

[46] These states include: Georgia, Kentucky, Missouri, North Carolina, and West Virginia. States requiring a life sentence include: Georgia, North Carolina, and West Virginia.

[47] Tenn. Code Ann. § 39-15-201; Utah Code 76-7-314.

abortion, both states hold dangerous contradictions within their state laws, as do states with lighter penalties.

It is important to note, however, that Alabama and Oklahoma's abortion laws permit life sentences for performing an illegal abortion.[48] Despite what may seem like uniformity with feticide law, consistency is still lacking. Both states only allow for this maximum sentence if the fetus was viable at the time of the illegal abortion. In cases of feticide, however, both states permit a death sentence from the moment of conception. While offering circumstantial life sentences in the case of illegal abortion may seem comparatively *less* inconsistent, there is still a significant difference in allowing a death sentence for killing an unborn child in its first weeks of gestation and giving a life sentence for killing an unborn child that has the capacity to live independent of his or her mother. Thus, it is clear that each state with criminal feticide laws offers far harsher punishment for feticide than for unlawful abortion. This aspect is an essential consideration for lawmakers when considering these overall inconsistencies, as it implies that the illegal loss of life in the case of abortion matters far less than in cases of feticide. This devaluing confuses whether or not the law should view unborn children as persons.

As Table Y demonstrates, there is significant inconsistency in how states treat cases of criminal feticide compared to cases of unlawful abortion. Such contradictions are not merely an abstract issue, but rather pose grave threats to Americans' foundational freedoms. The rest of this project will examine the real-life consequences that these inconsistencies have on the lives of Americans, further demonstrating the need for urgency amongst lawmakers to address these widespread statutory contradictions.

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[48] Alabama Code § 26-22-3; Oklahoma Stat. § 63-1-738.5; 219).

CHAPTER FOUR

The Impact of Statutory Inconsistencies Today

Thus far, this project has examined the abstract issues that state laws present in their inconsistencies. Nonetheless, these problems are not merely abstract—they have had real-world consequences that threaten foundational freedoms. The deviations in how each state treats cases of feticide from cases of abortion demonstrate one of two things:

1. The state does not adequately administer justice on behalf of the unborn child killed in an unlawful abortion, and therefore penalties for abortion are inadequate. Current law, therefore, violates a fetus's inalienable right to life. Or,
2. A person convicted of feticide is punished much too harshly for his or her crime by being charged under homicide law rather than a crime against the mother. Feticide law, therefore, violates the right to be free of cruel and unusual punishment.

By varying the severity of the implications of their abortion and feticide laws, states neglect the rights of a group—either the unborn child's right to life or the defendant's right to be free from cruel and unusual punishment. Both of these rights are fundamental to the laws of the United States. This chapter will explore the interaction between these two rights and the implications of the inconsistencies between abortion and feticide law.

A Threat to the Right to Life

Widespread statutory contradictions do not only affect criminal courts and their rulings for those facing feticide charges or women seeking to abort their pregnancies

illegally. These inconsistencies have also led to confusion in policymaking and philosophical questions regarding the point at which unborn life gains true value deserving of legal protection. By not creating a rigid standard that designates when life begins during the gestational period, the government has left a gap which scholars, policymakers, and activists have attempted to fill with their own judgments. Many judgments, particularly those on the radical ends, typically shock most Americans. The following examples are meant to do just that—to shock the reader into a realization that this confusion is not an abstract one. It has all too real consequences; by allowing these logical inconsistencies go unexamined, the government has left the door open to speculation that can pose a threat to the right to life. An example of this speculation is the justification of infanticide that several in the academic and activist fields argue is compatible with attitudes regarding the unborn.

In their 1985 book *Should the Baby Live? The Problem of Handicapped Infants*, Helga Kuhse and Peter Singer delve into the morality of infanticide of disabled and disfigured children. Their main thesis centers around that claim that "keeping a badly damaged child alive" likely causes a burden on the family and society. They argue that it should therefore be entirely permissible for families to value their own future, one without the inconvenience of a disabled child, instead of prioritizing the survival of the newborn.[1] While their argument focuses on disabled children, their logic as to when the right to life begins expands to all infants by asserting that, "No newborn infant has a right to life…Whichever way we decide this factual question, infants will be deemed not to

[1] Helga Kuhse and Peter Singer, *Should the Baby Live?: The Problem of Handicapped Infants* (Oxford: Oxford University Press, 1985), 65.

have a right to life at birth, nor for some time afterwards."[2] Because the government has refused to answer when fetuses attain a right to life, scholars such as Kuhse and Singer stepped in to fill that gap. While this may seem radical, the professors are not the only ones in their field with such beliefs.

Another pair of scholars wrote a more recent article that goes even further in its validation of infanticide than Kuhse and Singer's thesis. In 2012, Alberto Giubilini and Francesca Minerva published "After-birth abortion: why should the baby live?" in the *Journal of Medical Ethics*. This controversial piece argued from a philosophic standpoint that if feticide is morally permissible in the case of abortion, infanticide should be considered a moral practice as well. The professors write:

> We propose to call this practice 'after-birth abortion,' rather than 'infanticide,' to emphasize that the moral status of the individual killed is comparable with that of a fetus…rather than to that of a child. Therefore, we claim that killing a newborn could be ethically permissible in all the circumstances where abortion would be...Accordingly, a second terminological specification is that we call such a practice 'after-birth abortion' rather than 'euthanasia' because the best interest of the one who dies is not necessarily the primary criterion for the choice, contrary to what happens in the case of euthanasia…If a potential person, like a fetus and a newborn, does not become an actual person, like you and us, then there is neither an actual nor a future person who can be harmed, which means that there is no harm at all.[3]

While this argument may seem shocking to the average American, it is not wholly unreasonable in its logic. According to current abortion law, children that are born extremely prematurely and survive, as early as twenty-two weeks,[4] can often be legally

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[2] Ibid, 134.

[3] Alberto Giubilini and Francesca Minerva, "After-birth Abortion: Why Should the Baby Live?" Journal of Medical Ethics, January 01, 2012, accessed October 27, 2018.

[4] Belluck, Pam. "Premature Babies May Survive at 22 Weeks If Treated, Study Finds." The New York Times. May 06, 2015, accessed October 29, 2018.

aborted at the same stage in gestation. What is the moral difference between a child who is born at this stage versus one that remains in the womb, aside from location? Does a fetus suddenly become a person deserving of legal protection once it is born, no matter how far along in gestation that birth occurs?

While this argument for infanticide may seem grotesque, it does bring to light the confusion these legal contradictions produce. Because the government neglects to specify at which point unborn life is worthy of protection, and because some states permit abortion well past potential viability, the overall question the professors base their argument on is not logically unreasonable. What is wrong with killing an infant if it would have been legally permissible to do so had the child remained in the womb? Such philosophical discussions and nuances are not the focus of this paper. However, the influence of these arguments is not constrained to abstract, scholarly work. Though the professors were neither American nor policy experts, their work surely had some impact on the nation's abortion debate. Only a year after Giubilini and Minerva published their article, the United States' largest provider of reproductive health services argued against legislation that protected children born alive during an attempted abortion, making infanticide permissible.

Planned Parenthood, the nation's principal abortion provider has significant influence over public policy, donating well over $2.6 million since 2012 to political campaigns and delegating over $8.8 million to lobbying efforts.[5] In 2013, one of the

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Matthew A. Rysavy et al., "Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants," *New England Journal of Medicine* 372, no. 19 (May 07, 2015), accessed November 02, 2018, doi:10.1056/nejmoa1410689.

[5] "Planned Parenthood: Summary," OpenSecrets.org, accessed October 30, 2018.

reproductive services provider's lobbyists Alisa LaPolt testified against a proposed Florida abortion law that would require abortionists to provide medical care to an infant who survived an attempted abortion. One state legislator asked LaPolt, "If a baby is born on a table as a result of a botched abortion, what would Planned Parenthood want to have happen to that child that is struggling for life?" Her response, which she stood by throughout the rest of her testimony was, "We believe that any decision that's made should be left up to the woman, her family, and the physician."[6]

Only after a public outcry did the national organization release a statement that noted that in the "extremely unlikely and highly unusual" event that a baby was born alive in an attempted abortion, Planned Parenthood would "provide appropriate care to both the woman and the infant."[7] However, if the organization was willing to provide such care, why would they lobby against the bill that required such measures? The largest abortion provider in the country was attempting to expand its practice past legal feticide to legal infanticide.[8] Nonetheless, the logical concerns behind their reasoning remain valid—why should an abortionist be legally required to save the life of a child who, just seconds ago, he or she was legally able to kill? The government's failure to pinpoint when a child's humanity begins leads to these logical contradictions which,

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Planned Parenthood, "Planned Parenthood Annual Report," Planned Parenthood, accessed November 02, 2018.

[6] Marc A. Thiessen, "Marc Thiessen: Planned Parenthood Defending Infanticide," The Washington Post, April 08, 2013, accessed October 30, 2018.

[7] Ibid.

[8] This statement, of course, assumes the literal definition of "feticide" which intentionally causes the death of a fetus, rather than criminal feticide discussed in prior chapters. As abortion intends to terminate the fetus, this therefore qualifies it as feticide by definition.

when brought to light in such examples as these, turns theoretical statutory arguments into real-world issues.

It is fair to assume that the viewpoints of Planned Parenthood and the mentioned scholars are not those of the average American, nor that the legalization of infanticide is soon approaching. These certainly are examples that push the envelope of social norms. Nonetheless, even mainstream pro-choice arguments can portray the degree to which the statutory inconsistencies can create moral confusion. American philosopher Mary Anne Warden is well-known for her defense of abortion rights, in which her argument centers on the separation of genetic humanity and moral humanity. While unborn children are indeed human in the genetic sense, they are not in the moral sense because they lack features that Warren identifies as necessary to personhood.[9] The most significant of these indicators are consciousness and reasoning, both of which Warren claims are not characteristics belonging to unborn children. Therefore, the unborn lack moral personhood and therefore do not have a right to life that outweighs the mother's liberty to choose to abort the fetus.[10]

Unlike the previous examples, Warren's logical reasoning is in line with a typical pro-choice doctrine that places the value of maternal liberty over that of any right to life of the child. However, when her conclusions are pressed further, it becomes apparent that her argument does not only declare the non-personhood of fetuses but also of newborn infants. After all, of the necessary traits for moral human significance that Warren lists, newborns also do not meet the qualifications. Warren addressed this

[9] Mary Anne Warren, "On the Moral and Legal Status of Abortion," *Monist* 57, no. 1 (1973), doi:10.5840/monist197357133.

[10] Ibid.

critique nearly ten years later, agreeing that her argument does logically lead to the conclusion that infanticide is just as morally permissible as abortion since neonates are no different from fully developed, unborn children.[11]

She continues to argue, however, that government forbids infanticide because of other societal considerations. Once born, the mother is no longer the sole mandatory caretaker, and it can no longer pose a threat to her health. It seems unjust to many people, then, that should another family be able to care for the infant instead, that the mother still chooses to kill it.[12] The government legislates on the belief that if an unwanted infant who no longer poses a burden on its mother, the mother should give the child to another caretaker rather than taking its life. It is because of this belief, not because of the inherent personhood of an infant, that the government has outlawed infanticide. She holds to her notion that, just like fetuses in utero, infants are not persons with moral significance. Warren fails to reconcile her original reasoning with the immorality of infanticide, and her philosophical model still justifies infanticide. Because the government has not specified the point at which unborn life deserves legal protection, individuals can skew this ambiguity towards the side they most prefer. This ability can permit justifications for appalling acts such as infanticide.

As Chapter One identified, societal attitudes regarding the moral standing of unborn life have fluctuated significantly over time. While it may not seem to be in the near future, can one definitively say that infanticide, even if only circumstantially, could not become legal in the country's future? Without the government definitively drawing

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[11] Joel Feinberg, *The Problem of Abortion* (Belmont: Wadsworth Publishing Company, 1984), 118.

[12] Ibid, 117-118.

the line at when life begins and implementing firm protections for it, the gap derived from statutory inconsistencies between feticide and abortion law will remain. Until that time where this gap is filled, influential persons and groups will continue to climb up the side of the chasm they most prefer.

A Threat to Freedom from Unjust Charges

This paper will not delve into whether pro-choice or pro-life arguments should conquer the field of American public policy. Rather, it should be a pressing matter that the struggle between the two creates more than a mere disagreement amongst political parties. Instead, it leads to a dilemma of if and how to protect unborn life. If, as the above examples portray, unborn life does not carry moral significance and the mother's liberty should reign supreme, it is against any logical sense to have criminal feticide laws on record. While perhaps there should be some laws to protect the choice of the mother and punish any person that terminates her wanted pregnancy, there should surely be no law declaring such an act *murder*. If an unborn child has no moral significance, then it is unjust to classify its intentional death as any form of homicide. To use this classification poses a threat to the individual who commits feticide's right to be free from cruel and unusual punishment. In addition to considering the rights of the fetus and the mother, it is also important to weigh the rights of a third party—the perpetrator of feticide.

The Eighth Amendment to the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[13] Based on this amendment, it is fair to state that the government should not

[13] U.S. Const. amend. VIII.

convict someone of an act of homicide if the act committed was not one of homicide. If the government does charge the individual with a more severe crime than they committed, it violates that person's right to be free from excessive punishment. If a fetus does not have legal personhood, then the government should not charge a perpetrator of feticide with any allegation of homicide. As stated earlier, it is possible that those guilty of feticide should face some crime. However, sentencing the individual to a charge under homicide law is a violation of the Eighth Amendment.

As Chapter Three demonstrated, when abortionists commit an unlawful abortion, their punishment is far less than criminal feticide statutes allow. Furthermore, these charges generally do not fall under the branch of homicide law as feticide statutes do. This differentiation in the treatment of offenders conveys that there is an ambiguity in whether or not a fetus is a person under the law. It is consequently unclear whether the government should seek retribution on those who kill fetuses. By not establishing the appropriate punishment for feticide, there is a serious potential for government to issue charges and penalties that far outweigh what the crime of feticide warrants.

Though many may view feticide as a heinous act, even criminals have certain rights that the government must protect. By looking to recent examples of Americans charged with feticide crimes, the seriousness with which states handle feticide cases becomes apparent. In 2009, New York police arrested and charged Joshua Woodard with attempted murder after he gave his pregnant girlfriend misoprostol, an abortion-inducing

drug, without her knowledge. Only hours later, the woman miscarried their thirteen-week old unborn child. The state eventually sentenced Woodard to nine years in prison.[14]

Sikander Imran, a physician in Virginia, committed a similar crime by slipping an abortion pill into his girlfriend's drink, killing her seventeen-week old fetus. In early 2018, the state sentenced him to twenty years in prison for fetal homicide. After requesting a lighter sentence, all but three of these years were suspended, in addition to revocation of his medical license and immediate deportation to his native country of Pakistan after serving out his term.[15]

A comparable case in Florida occurred when John Andrew Welden tricked his partner into ingesting an abortion drug, killing her not yet seven-week-old embryo. Though this situation was almost identical to the other two, aside from the unborn child being at a much earlier stage of gestation, Welden was charged with first-degree homicide and faced a potential life sentence.[16] Welden eventually took a plea bargain for lesser charges and a nearly fourteen-year sentence in prison.[17]

Is it fair that the states charged these men with homicide? After all, the mothers of each of these unborn children could legally have sought an abortion at the time of the crime. Nevertheless, the state charged these men with homicide of a fetus. While it is

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[14] Nancy Dillon, "Restaurateur Joshua Woodward Gets Nine-year Sentence for Inducing Pregnant Girlfriend's Miscarriage with Abortion Drug - NY Daily News," Nydailynews.com, November 15, 2015, accessed November 02, 2018.

[15] "Doctor Gets 3 Years for Spiking Drink to Induce Abortion," AP News, May 19, 2018, accessed November 01, 2018.

[16] Welden was charged under the Unborn Victims of Violence Act, a federal law that proscribes intentional feticide, rather than Florida's feticide law.

[17] Patty Ryan, "Welden Gets Nearly 14 Years in Tampa Abortion Pill Case," Tampa Bay Times, January 28, 2014, accessed November 01, 2018

widely agreed that the crimes of these men were inexcusable and atrocious, does it make logical sense to charge them with homicide rather than a crime against the mother?

It is not only third parties that can fall victim to hefty charges and penalties under feticide laws, but also the mothers themselves. While most feticide laws exempt mothers from being charged under state feticide laws in cases involving their pregnancies, there have been several situations in which courts were unequipped to handle cases of feticide in which the mother was the accused.

Indiana is one state that does not explicitly provide exemptions for mothers. In a case that national media widely followed, Indiana resident Purvi Patel was charged with feticide and neglect after aborting her pregnancy with abortion-inducing drugs. Patel delivered her one-and-a-half-pound son (around twenty-five weeks in gestation) in her family's restaurant bathroom and dumped his body in a trash bin behind the establishment. She was arrested at the hospital after seeking treatment for profuse bleeding.[18] Patel's twenty-year prison sentence resulted in an uproar from abortion-rights activist, and the case was appealed. The Indiana Court of Appeals decreased her charges to a lower-level neglect charge, and Patel was released from prison the same day.[19]

Indiana also charged resident Kelli Leever-Driskel with murder when she delivered a stillborn baby boy who had died in the womb from her excessive drug use. The doctor's report showed that the child had seven different drugs in his system, all of which led to a placental abruption and a premature stillbirth. While Leever-Driskel did

[18] Jessica Glenza, "Purvi Patel Case: Legal Experts Warn on Reproductive Rights in Indiana," The Guardian, April 02, 2015, accessed November 02, 2018.

[19] Associated Press, "Purvi Patel Is Released after Feticide Conviction Overturned," Indianapolis Star, September 02, 2016, accessed November 01, 2018.

not necessarily intend to abort her baby, she showed little remorse for her actions. While she knew about her pregnancy, she continued to regularly use drugs and even claimed she was surprised the report did not find more drugs in her dead child's system. The court has since lessened her charges to feticide, involuntary manslaughter, and possession of methamphetamines. The case is still pending in court, with the mother of four facing up to twenty years in prison if convicted.[20]

Aside from her illegal drug use, Leever-Driskel presents a borderline case. Pro-choice advocates believe women should be in charge of whether they carry a pregnancy to term. It logically, then, should not be the government's place to condemn a woman for acting in a way that results in the death of her fetus. After all, she could have chosen to procure an abortion that resulted in the death of the fetus only a few weeks earlier. Even if she had exceeded the legal gestational range for an abortion, the government could only reasonably charge her with procuring an unlawful abortion, a much lesser crime. It is not logically consistent, however, to issue a feticide conviction with a penalty of twenty years in prison. Indiana does not declare that a fetus is a person under the law, and therefore any charge of homicide in this case is unfounded.

While conniving actions such as third-party feticide or late-term self-inflicted abortion may warrant a criminal charge, it is illogical for such a charge to be on any level of homicide since the law does not assign personhood to fetuses. Either the government must assign personhood to fetuses, and specify precisely when they attain this status, or they must rid criminal feticide laws of the penalty of homicide charges. To remain in an

[20] Haley Bull, "Anderson Mother No Longer Accused of Murder, Now Facing Feticide, Involuntary Manslaughter Charges in Baby's Death," FOX59, February 15, 2018, accessed November 01, 2018,

ambiguous limbo does a disservice to the rights of Americans to both life and the freedom from excessive penalties.

CHAPTER FIVE

The Reconciliation of State Inconsistencies

How to Reconcile Statutory Contradictions

This final chapter will summarize the significance of state statutory contradictions, as well as suggest how the government can resolve them. As the previous chapter identified, there are two options for the government to choose on the path to resolving its statutory discrepancies:

1. The state must properly administer justice on behalf of the unborn child killed in an unlawful abortion, and therefore implement stricter penalties to protect the right to life. Current law, therefore, violates a fetus's inalienable rights.
2. The state must appropriately penalize a person convicted of feticide. Current feticide law punishes much too harshly because it is considered homicide rather than a crime against the mother. Government must change current feticide law to prevent a violation of the right to be free of cruel and unusual punishment

If the government finds that the statutory inconsistencies demonstrate the first consideration, it implies that the unborn are persons deserving of legal protections. Therefore, abortion law should be amended to look more akin to feticide law to prevent a violation of the right to life. If it finds that second consideration to be true, then it implies that unborn children are not persons deserving of legal protections. Therefore, feticide law should be amended to look more akin to abortion law. Regardless, the government must decide which path to pursue in order to prevent inconsistencies that pose threats to these rights. This chapter will look at the repercussions of both options.

Option One: Declaring Universal Personhood for the Unborn

If the state decides to pursue the first option, it must pinpoint the moment in which fetuses attain legal personhood. This point cannot be subject to circumstance, but instead it must apply to cases of both criminal feticide and abortion alike. Take the case of two fetuses, both at the same stage in development. The first fetus dies from an abortion procedure, and the second dies as a result of its biological father secretly giving the mother an abortion-inducing drug. In both cases, the abortionist and the father alike deserve to be charged with homicide because both intentionally killed an unborn child. If an unborn child carries a status of legal personhood, that child should have that status independent of the circumstance surrounding its death.

The state must identify a point in gestation in which this legal status begins. By doing so, the government clarifies whether abortion is legal and in what circumstances it can be justified. For example, the government could argue that after the unborn child develops a heartbeat, it establishes legal personhood. Therefore, abortion after the detection of a fetal heartbeat is illegal and should be punished as unlawful homicide.[1] Regardless of the when the state identifies a fetus as having legal personhood, it is imperative that the government do so. Without this specification, the government leaves open the opportunity for ambiguity and a trespass on fundamental rights.

[1] Although the state may include exceptions, such as for the mother's immediate health. It could justify this as homicide as a form of self-defense.

Option Two: Taking the Homicide out of Feticide

The legal definition of homicide is, "When someone takes the life of another, regardless of intent."[2] There are varying degrees of homicide, and not all definitions warrant a criminal charge. Self-defense and state-sanctioned executions, for example, are two legal forms of homicide. Intent and aggravating factors are dynamics that the government considers when convicting an individual of homicide in court. Except for cases where the mother's life is immediately threatened by her pregnancy, the intent of any abortion is the death of the unborn child. After all, an abortion is said to have "failed" if the child lives through the procedure. How can the state reconcile abortion with criminal feticide laws? The only way to do so is to declare abortion a legal form of homicide.

Even then, however, it is unclear as to why feticide in the case of abortion would be legal homicide, but in cases of criminal feticide it would be illegal homicide. What is the difference if both the same intent and same consequence remain? In both situations, the actor has the sole intent to kill the unborn child and when successful, both situations result in a terminated pregnancy. Is the mother's consent the only deciding factor as to whether it can be deemed illegal or legal homicide? This cannot be so, as the charge is not related to a crime against the mother but against the child itself. Fetal homicide is a crime that seeks justice for the unborn child by charging the convicted with unjustly taking the fetus's life, rather than a crime against the mother; therefore, the opinion of the mother cannot determine the legality of the action.

[2] "Homicide," FindLaw, accessed November 01, 2018.

If the government chooses this option, it must change the status of a feticide charge to a crime against the mother rather than a crime against the fetus. All relation to an act of homicide must then be dropped from feticide law. The government must still identify the point in which the fetus gains legal personhood. By doing so, the state prevents ambiguity that can lead to justifying acts such as feticide. It also provides clarity when cases of criminal feticide arise in court. If the government explicitly states the point in gestation where an unborn child gains legal significance, it does not leave the rights of Americans in an ambiguous limbo that is up for interpretation. Instead, it applies its value for unborn life equally in cases involving feticide.

What Must Happen Next

In whichever route the government chooses, it is required to identify the point in gestation that warrants legal protections for unborn life. To fail to do so results in an abundance of legal contradictions, threatening unborn children's right to live or a criminal's right to be charged appropriately.

Some people may speculate that requiring the government to identify when life begins can pose a dangerous governmental overstep. In his *Roe v. Wade* majority opinion, Justice Blackmun stated:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[3]

This aspect of the *Roe* opinion still stands today, as the Court has refused to resolve the dispute of when life begins. Ironically, however, by overturning nearly every state's

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[3] *Roe v. Wade*, 410 U.S. 113 (January 22, 1973).

abortion proscription laws, the Court did in fact take a position on when life began, as it certainly was not during the first trimester in which the woman's right to an abortion could not be touched by government. Perhaps Blackmun is correct in saying that the judiciary is not in any position to arrive at a consensus. An unelected body whose rulings are exclusive to a group of nine individuals—potentially just one of them deciding the outcome—surely could not be the best resource for a consensus on this contentious matter.

Nonetheless, it is imperative that the government no longer ignore these contradictions. The national legislature must discuss this pressing issue and reach a consensus on how to reconcile abortion and feticide laws. While abortion laws are typically reserved to the states, though there are federal abortion and feticide laws, the federal government should not delegate such a vital discussion to the individual states. As previous chapters conveyed, interstate inconsistency was just as much of a problem as intrastate inconsistency. Declaring feticide to be first-degree homicide that could warrant the death penalty in one state yet declaring it a minor felony with a small prison sentence in another, has a dangerous potential to undermine the most fundamental right to life. Furthermore, a conviction in the former state has the potential to violate the defendant's right to a reasonable charge and punishment.

It is vital that the United States Congress has a discussion on the balance of these competing rights and decide universally what these rights mean to the American people. It is undoubtedly a contentious topic, and they are unlikely to reach a swift consensus. The nation has its foundation in the inalienable rights to life, liberty, and the pursuit of happiness. It must reconcile the first two of these rights in order to ensure the last. How

must the right to life, and the point at which it begins, interact with the right to liberty, both in women's bodily autonomy and a convict's ability to be reasonably charged? If, in the case of feticide and abortion law, we resolve the disparities between the right to life and the right to liberty, we will be better able to secure every American's right to the pursuit of happiness.

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