The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law

Cari L. Leventhal

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol103/iss1/8

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.
The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law

I. Introduction

On June 29, 1997, near Pittsburgh, Pennsylvania, Jeffrey R. Booth ran a stop sign while drunk and wrecked into a minivan driven by Nancy Boehm who was at the time eight months pregnant.\(^1\) Physicians were unable to save the unborn child named Jason who died of head and abdominal injuries.\(^2\) In what can be considered as a landmark case in Pennsylvania, Booth was charged with vehicular homicide for the death of a fetus.\(^3\)

Since colonial times, Pennsylvania criminal law has specifically maintained that it is not murder to kill a fetus.\(^4\) Now, after three centuries, this rule has been dramatically altered in Pennsylvania through the enactment of The Crimes Against the Unborn Child Act (the Act).\(^5\) By passing the Act, Pennsylvania has aligned itself with twenty-five other states, who have also adopted fetal-homicide laws.\(^6\)

Consequently, those who assault a pregnant woman and cause the death of her fetus will no longer escape criminal prosecution.\(^7\) More importantly, while extending the protection of state criminal laws to a human fetus, the Act deems a fetus to be a human being from conception and a person in the eyes of the criminal courts.\(^8\)

---

2. See *id*.
4. See *Death of Fetuses May Set Precedent: Two Drivers Charged with Homicide*, supra note 1, at A3.
5. 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998).
7. See 18 PA. CONS. STAT. ANN. §§ 2603-2605.
This characterization of the fetus as a human being in criminal law has left room for powerful debate.\(^9\) Some have decried the Act as a backdoor attempt to make abortions illegal.\(^10\) For this reason, the issue of fetal rights within the criminal courts could become the next battleground for Pennsylvania's pro-life and pro-choice forces in a state that already boasts one of the harshest abortion laws.\(^11\) Other critics of the law fear that, while intended to protect pregnant women, the law could be used against them by exposing those who are alcoholics or drug addicts to prosecution.\(^12\)

This Comment analyzes the current legal status of a human fetus in Pennsylvania criminal law as a result of the development of The Crimes Against the Unborn Child Act. Part II of this Comment examines the common law "Born Alive" rule. Additionally, this section surveys recent developments in other states regarding the legal status of a fetus in criminal law. Part III discusses the evolution of fetal rights in Pennsylvania prior to the enactment of the Act. Part IV explores The Crimes Against the Unborn Child Act and compares it with the fetal homicide legislation of other states. Part V considers the impact the law will have on society and criminal prosecutions in Pennsylvania. Specifically, this section focuses on the Act's future implications with respect to legalized abortion and the prosecution of pregnant women who have harmed their own fetuses. This Comment contends that upon review in Pennsylvania's criminal courts, the Act will surpass constitutional challenges.

---


\(^10\) See Krebs, supra note 9, at A1.


\(^12\) See id.; see also Aaron Epstein, Rulings Enhancing Fetuses' Legal Status as "Person." At Least Thirty States Allow Prosecutions for Criminally Causing Death or Injury to Someone Else's Unborn Child, PITTSBURGH POST-GAZETTE, Aug. 1, 1996, at A10.
II. Fetal Rights

A. The Common Law "Born Alive" Rule

According to English common law, "homicide" was defined as the killing of one human being by another. Because a fetus was not considered a "person" or a "reasonable creature in being" before birth, the killing of an unborn child was not regarded as homicide. Thus, the child must have been born alive and have existed independently of the mother's body before the child was thought to be a "person" within the confines of the law of homicide. Sir Edward Coke, a noted seventeenth century author on the common law principles governing fetal homicide, maintained that the killing of a quick, but unborn child "is a great misprision, and no murder; but if the childe be born alive, and dyeth... this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.'

The historical basis of the born alive rule was developed out of a lack of sophisticated medical knowledge. Prior to modern medical techniques, whether a woman was pregnant was difficult to determine since many of the symptoms associated with pregnancy had other causes. The live birth of a child removed any doubt...
of actual pregnancy while establishing clinical proof that the child was alive.\textsuperscript{20} The born alive rule was adopted by American courts for numerous reasons.\textsuperscript{21} First, since medical science lacked sophisticated techniques in the area of forensic medicine, the born alive rule conferred "the important nexus between the conduct of the defendant and the death of the fetus."\textsuperscript{22} Furthermore, a presumption existed that the fetus would not be born alive as a result of the high prenatal mortality rates.\textsuperscript{23} Finally, it was presumed that a woman was incapable of acting rationally during childbirth and as a result she was excused from killing her fetus.\textsuperscript{24} In light of medical and scientific technology, however, the rationales for applying the born alive rule are now obsolete.\textsuperscript{25} Medical science has developed to the point that it is presumed that a viable fetus will be born alive.\textsuperscript{26} While some states still apply the born alive rule,\textsuperscript{27} the trend in most states has been to abandon the rule altogether.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{20} See id. at 568.
\item \textsuperscript{21} See Barrazotto, supra note 15, at 45.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} See id.
\item \textsuperscript{24} See id.
\item \textsuperscript{25} See id. at 46.
\item \textsuperscript{26} See Barrazotto, supra note 15, at 46. Today, the unborn child is portrayed as "the second patient." See Forsythe, supra note 16, at 576. Through the use of ultrasound, fetal heart monitoring, fetoscopy, and in vitro fertilization, there is an understanding of fetal development. See id.
\item \textsuperscript{27} See, e.g., Gentry v. Gilmore, 613 So. 2d 1241, 1244 (Ala. 1993) (per curiam) (holding that the term "minor child" under the state's law does not include a fetus that dies before becoming able to live outside the mother's womb); Meadows v. State, 722 S.W.2d 584, 585 (Ark. 1987) (holding that a viable fetus is not a person within the meaning of the manslaughter statute); State v. Trudell, 755 P.2d 511, 517 (Kan. 1988) (holding that a viable fetus was not a "human being" within the meaning of the aggravated vehicular homicide statute); Hollis v. Commonwealth, 652 S.W.2d 61, 65 (Ky. 1983) (stating that destroying the life of a viable fetus was not considered murdering a "person"); State v. Beale, 376 S.E.2d 1 (N.C. 1989) (noting that the state still follows the common law rule that murder does not include killing of a viable, unborn child); State v. Oliver, 563 A.2d 1002, 1003-04 (Vt. 1989) (noting that a viable fetus is not a person for purposes of laws that criminalize the act of causing death as a result of motor vehicle laws); State v. Anonymous, 516 A.2d 156, 157 (Conn. Super. Ct. 1986) (deciding that an unborn, but viable, stillborn fetus was not a "human being" within the meaning of the homicide statute); State v. Cornelius, 448 N.W.2d 434, 437 (Wis. Ct. App. 1989); People v. Vercelletto, 514 N.Y.S.2d 177, 179-80 (Co. Ct. 1987) (indicating that unborn fetus could not be the subject of a charge of manslaughter in the second degree).
\item \textsuperscript{28} See, e.g., infra notes 30-31 and accompanying text. In the criminal law context, the case most frequently cited to support the abandonment of the born alive rule is Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984). In Cass, the Massachusetts Supreme Court expressly rejected the born alive rule. See id. at 1329. While admitting that the common law
B. Survey of Fetal Rights in the States

Without ever seeing the light of day, or extracting a breath of fresh air, a fetus is gradually acquiring legal protection as a "person" in the United States. By way of legislation or court decisions, half the fifty states prohibit the killing of a fetus outside the domain of legal abortion. In every state, infanticide, the killing of a newborn, is considered homicide. If an infant takes one breath, the infant is legally a child who has been murdered.

forbade charging a defendant with homicide for the death of a fetus, Chief Justice Edward Hennessey, quoting Justice Oliver Wendell Holmes, stated:

[The antiquity of a rule is no measure of its soundness. “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”

Id. at 1328 (quoting Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897)).


31. See People v. Davis, 872 P.2d 591, 599 (Cal. 1994) (ruling that it is murder to kill a fetus when the fetus has progressed beyond embryonic state of seven-eight weeks); Commonwealth v. Lawrence, 536 N.E.2d 571, 575-76 (Mass. 1989) (stating that a viable fetus is a person for purposes of common law crime of murder); State v. Merrill, 450 N.W.2d 318, 321 (Minn. 1990) (deciding that unborn child homicide statute was not unconstitutional under the Equal Protection Clause); State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (holding that the killing of a viable fetus constituted homicide); Hughes v. State, 868 P.2d 730, 731 (Okla. Crim. App. 1994).

32. See Delsite, supra note 11, at F1.
33. See id.
Many states have enacted separate fetal homicide statutes that criminalize the killing of a fetus from the time of conception or from the state of quickening. California criminalizes the killing of a fetus that has progressed beyond the embryonic state of seven to eight weeks. A few states have amended their homicide statutes to include the separate category of fetus. In some states it is a crime for a mother to kill her own viable fetus; while others, Minnesota for example, forbid prosecution of the mother. Furthermore, some states including Oklahoma, South Carolina, and Massachusetts do not have fetal homicide legislation, but consider the killing of a viable fetus murder as the result of landmark court decisions.

34. See, e.g., 720 ILL. COMP. STAT. ANN. 5/9-1.2; MINN. STAT. ANN. 609.266-2662.
35. See, e.g., GA. CODE ANN. § 16-5-80(a); OKLA. STAT. ANN. tit. 21, § 731 (West 1983). Quickenning has been defined as "the signs of life felt by the mother as a result of the fetal movements, usually noted from 16-20 weeks of pregnancy." STEDMAN'S MEDICAL DICTIONARY 1479 (26th ed. 1995).
36. See People v. Davis, 872 P.2d 591, 599 (Cal. 1994). In dissent, Justice Moss characterized the court's holding as broadening murder to include the killing of "a tiny alien creature... an object the size of a peanut." Id. at 615 (Moss, J., dissenting).
37. See CAL. PENAL CODE § 187(a) (West 1988) (defining murder as "the unlawful killing of a human being, or a fetus with malice aforethought").
39. See MINN. STAT. ANN. § 609.266(b) (West 1987) (excluding prosecution of "the pregnant woman"); see also CAL. PENAL CODE § 187 (b)(3) (West 1988) (providing that the statute should not apply if "[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus").
40. See Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994). In this case, an Oklahoma Court of Criminal Appeals indicated that the purpose of the state's vehicular homicide statute was to protect human life and that a "viable human fetus is nothing less than human life." Id. at 734.
41. See State v. Horne, 319 S.E.2d 703 (S.C. 1984). In Horne, the Supreme Court of South Carolina held that its previous ruling that a wrongful death action could be maintained for a viable, unborn fetus compelled the conclusion that the state's homicide statute included within its definition of "person" a viable, unborn fetus. See id. at 704. The court noted that "[i]t would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purpose of imposing civil liability while refusing to give a similar classification in the criminal context." Id.
42. See Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984). In this case, the Massachusetts Supreme Court found that the term "person" as used in the vehicular homicide statute included viable fetuses. See id. at 1325. In reaching its conclusion, the court reasoned that in using the term "person" within its wrongful death statute, the legislature did not intend for there to be a distinction between an unborn fetus and a human being. See id. In Cass, the defendant struck a female pedestrian who was nearly nine months pregnant and the fetus was later delivered by Caesarian section stillborn. See id. The autopsy revealed that the fetus was viable prior to the accident and had died as a result of the injuries it sustained from the accident. See id.
With respect to penalties, some states impose the death penalty for fetal homicide, while in others the maximum sentence is mandatory life imprisonment.\footnote{See Bicka A. Barlow, Comment, \textit{Severe Penalties for the Destruction of \textquoteright\textquoteleft Potential Life\textquoteright\textquoteleft - Cruel and Unusual Punishment?}, 29 U.S.F. L. REV. 463, 503 (1995).} For example, California considers the murder of a viable fetus as justification for the imposition of the death penalty.\footnote{See People v. Davis, 872 P.2d 591 (Cal. 1994). The \textit{Davis} Court cited to \textit{People v. Hamilton}, 774 P.2d 730, 752 (Cal. 1989), which held that the killing of a fetus constituted murder within the meaning of the state's "multiple-murder special circumstance." \textit{Davis}, 872 P.2d at 596. Thus, California will consider the murder of a viable fetus as one murder for purposes of the "multiple-murder special circumstance," in turn justifying the imposition of the death penalty. \textit{See Hamilton}, 774 P.2d at 752.} In Massachusetts, a defendant can be punished by death or life imprisonment for the death of a viable fetus;\footnote{See MASS. ANN. LAWS ch. 265, § 1 (Law. Co-op. 1992).} while in Minnesota, a defendant is sentenced to life in prison for killing a fetus anytime after conception.\footnote{See MINN. STAT. ANN. § 609.2661 (West 1987).} Georgia imposes a punishment of life in prison for the death of a quick fetus.\footnote{See GA. CODE ANN. § 16-5-80(b) (1992).}

Until the passage of the Act, Pennsylvania did not criminally penalize a third person for harming a fetus.\footnote{See 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998).} Fetal rights were only recognized in civil law where a viable fetus was permitted to be the subject of a wrongful death suit.\footnote{See infra Part III.}

III. History of Fetal Rights in Pennsylvania

In \textit{Amadio v. Levin},\footnote{See 42 PA. CONS. STAT. ANN. § 8301 (West 1982).} the Pennsylvania Supreme Court was asked to decide whether a viable, stillborn fetus had the same rights under Pennsylvania's Wrongful-Death Statutes\footnote{See \textit{Amadio}, 501 A.2d at 1085.} as an infant who was born alive.\footnote{\textit{See id.} at 1086.} The court held that a wrongful death action could be brought on behalf of a fully developed stillborn fetus.\footnote{\textit{See id.} at 1086.} The court reasoned that it was illogical to permit a cause of action to be maintained on behalf of a child who survived only an instant outside the womb, yet deny the same right to a fully developed fetus that was capable of an independent existence prior to its
In concluding that the "live birth" of a child is not determinative of that child's status as an individual under Pennsylvania's survival and wrongful death statutes, the court provided that, in a civil lawsuit, damages could be sought for the wrongful death of an unborn child. The court did not address the issue of whether a cause of action exists for a non-viable fetus.

Subsequent decisions of the Pennsylvania Supreme Court have found that for purposes of civil liability a "person" is a viable fetus or one capable of taking a breath outside the mother's womb. In Hudak v. Georgy, the Pennsylvania Supreme Court ruled that wrongful death and survival acts did not create a cause of action for non-viable fetuses. In Hudak, the parents attempted to bring a wrongful death and survival action on behalf of their non-viable, triplet fetuses that died shortly after their premature birth. However, the court "reaffirm[ed] the ... proposition that an infant born alive is, without qualification, a person." Likewise, in Coveleski v. Bubnis, a pregnant woman who was injured in an automobile accident brought suit to recover not only for her own injuries, but also for the death of her eight week old fetus that was aborted to avoid the risk of fetal damage. The court found that "in order to maintain an action for wrongful death or survival ... [the child] must be either ... born alive or a viable fetus capable of independent existence at the time of death."

With regard to criminal law, prior to the enactment of The Crimes Against the Unborn Child Act, "intentional malicious conduct which result[ed] in the death of an unborn child [was] not punishable as a crime." Only if the child was "born alive" and

54. See id. at 1089.
55. See 42 PA. CONS. STAT. ANN. § 8302.
56. See id. § 8301.
57. See Amadio, 501 A.2d at 1086-87 ("[W]e conclude that the time has arrived for us to ... recognize that survival and wrongful death lie by the estates of stillborn children for fatal injuries they received while viable children [in the womb]").
58. See id.
59. 634 A.2d 600 (Pa. 1993).
60. See id. at 602.
61. See id. at 600.
62. Id. at 603.
63. 634 A.2d 608 (Pa. 1993).
64. See id. at 609.
65. Id. at 610 (citing Hudak v. Gregory, 634 A.2d 600 (Pa. 1993); Amadio v. Levin, 501 A.2d 1085 (Pa. 1985)).
66. Russell, supra note 9, at 2.
then died as a result of the injuries inflicted upon the child was it possible to convict the perpetrator of a crime. Thus, a person who intentionally set out to kill or seriously injure a pregnant woman's baby and succeeded in doing so could not have been punished for killing or injuring that baby under previous criminal laws.

The only Pennsylvania case that dealt with criminal charges involving an unborn child did not set precedent. In Westmoreland County a woman was charged with delivery of controlled substances after taking drugs while pregnant, thereby addicting her unborn child. The Pennsylvania Superior Court refused to find the woman "guilty of charges of delivering drugs, recklessly endangering another person or endangering the welfare of a child."

In Pennsylvania, the fetus generally has not been recognized as a person under the Criminal Code. Prior to the Act, the only time it was considered a crime to kill a fetus in Pennsylvania was when a pregnant woman underwent an illegal late-term abortion for non-medical reasons. This crime has been rarely prosecuted and has not been classified as homicide. Even when prosecuted, a late-term abortion constitutes a violation of Pennsylvania's abortion law and carries a less-severe penalty. Until the development of the Act, the closest Pennsylvania came to acknowledging the severity of fetal homicide in criminal law was a 1996 law allowing prosecutors to seek the death penalty if a woman is killed in her third trimester of pregnancy. Pennsylvania's views regarding the unborn child, however, have significantly changed in

---

67. See id.
69. See id.
70. See id.
71. See Evans, supra note 3, at D12.
72. See 18 PA. CONS. STAT. ANN. § 3210 (West 1983).
73. See id.
74. See id.
75. See 42 PA. CONS. STAT. ANN. § 9711 (d)(17) (West 1997). The enactment of this law was prompted by the murders of Stephanie McDuffey and Renee Ann Layser. See Delsite, supra note 11, at F1. McDuffey, a twenty-three year old Harrisburg woman, was nearly nine months pregnant when she was murdered. See id. Layser was nearly seven months pregnant with her first child when she was shot to death by her ex-boyfriend after the couple argued about child support payments. See id.
criminal law. By establishing new crimes of homicide against the unborn, the Act is recognition of the fetus as an independent being.\textsuperscript{76}

IV. The Crimes Against the Unborn Child Act

Pursuant to the Act, it is criminal homicide\textsuperscript{77} to intentionally, knowingly, recklessly, or negligently cause the death of an unborn child.\textsuperscript{78} The law establishes that life begins at conception and uses the term "unborn child" to refer to a fetus at any state of gestation.\textsuperscript{79} The legislation establishes the crimes of first,\textsuperscript{80} second,\textsuperscript{81} and third degree\textsuperscript{82} murder as well as voluntary manslaughter\textsuperscript{83} and, in the case of injury to the unborn child, aggravated assault.\textsuperscript{84} With respect to penalties, the Pennsylvania Criminal Code provides that the punishment imposed on individuals who kill an unborn child are equivalent to those that apply to anyone convicted of killing another person.\textsuperscript{85} There is one exception: "the death

\textsuperscript{76} See 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998).
\textsuperscript{77} See id. § 2603(b). "Criminal Homicide of an unborn child [is] . . . classified as murder of an unborn child or voluntary manslaughter of an unborn child." \textit{id.}
\textsuperscript{78} See id.
\textsuperscript{79} See id. § 3203 (defining an unborn child as "an individual [human being] from fertilization until live birth.").
\textsuperscript{80} See id. § 2604(a)(1). "A criminal homicide of an unborn child constitutes first degree murder . . . when it is committed by an intentional killing." \textit{id.}
\textsuperscript{81} See 18 PA. CONS. STAT. ANN. § 2604(b)(1). "A criminal homicide of an unborn child [is] . . . second degree murder . . . when it is committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony." \textit{id.}
\textsuperscript{82} See id. § 2604(c)(1). Third degree murder is all other kinds of murder of an unborn child. \textit{See id.}
\textsuperscript{83} See id. § 2605(a). Section 2605(a) provides that any individual [w]ho kills an unborn child without lawful justification commits voluntary manslaughter of an unborn child if, at the time of the killing, [the individual] . . . is acting under a sudden and intense passion resulting from serious provocation [by either] the mother of the unborn child whom the [individual] . . . endeavors to kill, but he negligently or accidentally causes the death of [an] . . . unborn child or [by] another [person] whom the [individual] . . . endeavors to kill, but he negligently or accidentally causes the death of the unborn child. \textit{Id.} In addition, the legislation provides for unreasonable belief. \textit{See id.} Voluntary manslaughter occurs if an individual intentionally or knowingly kills an unborn child when "at the time of the killing [the individual] . . . believes the circumstances to be such that, if they existed, would justify the killing, . . . but his belief is unreasonable." \textit{id.}
\textsuperscript{84} See id. § 2606(a). "A person commits aggravated assault of an unborn child if he attempts to cause serious bodily injury to the unborn child or [in fact] causes such injury intentionally, knowingly, or recklessly under circumstances [exhibiting] . . . an extreme indifference to the life of the unborn child." \textit{id.}
\textsuperscript{85} See Reeves, \textit{supra} note 8, at B8.
penalty [cannot] be imposed upon someone convicted of first-degree murder of an unborn child.\(^{86}\) Thus, life in prison is the maximum penalty for killing an unborn child.\(^{87}\) In addition, the Act’s criminal provisions do not apply to consensual abortion nor do they apply to doctors engaged in a good-faith medical practice.\(^{88}\) Furthermore, the legislation does not impose any criminal penalty upon the pregnant woman for crimes against her unborn child.\(^{89}\) By passing The Crimes Against the Unborn Child Act,\(^{90}\) Pennsylvania has followed twenty-five other states that have recognized the rights of a fetus in criminal law.\(^{91}\) Similar to Illinois’ and Minnesota’s fetal homicide legislation,\(^{92}\) Pennsylvania’s law renders a defendant liable for homicide when causing the death of a fetus that is no more than the unity of a sperm and an egg.\(^{93}\)

Illinois’ feticide statute provides for five separate offenses including intentional homicide of an unborn child,\(^{94}\) voluntary manslaughter of an unborn child,\(^{95}\) involuntary manslaughter of an unborn child,\(^{96}\) battery of an unborn child,\(^{97}\) and aggravated battery of an unborn child.\(^{98}\) With respect to intentional homicide of an unborn child, the statute provides that a person commits the offense of intentional homicide of an unborn child if “he or she either intended to cause the death of or do great bodily harm to the pregnant woman or her unborn child.”\(^{99}\) “Unborn child” is defined as “any individual of the human species from fertilization until birth.”\(^{100}\) If convicted under the statute, a defendant receives the same sentence as a defendant convicted of first-degree murder, except that the death penalty cannot be implemented.\(^{101}\)

86. 18 PA. CONS. STAT. ANN. § 1102(a)(2).
87. See Reeves, supra note 8, at B8; see also 18 PA. CONS. STAT. ANN. § 1102(a)(1).
88. See 18 PA. CONS. STAT. ANN. § 2608(a).
89. See Reeves, supra note 8, at B8.
90. 18 PA. CONS. STAT. ANN. §§ 2601-2609.
91. See Krebs, supra note 9, at A1.
92. See infra notes 94-105.
93. See 18 PA. CONS. STAT. ANN. § 3203.
94. See 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 1996).
95. See id. at 5/9-2.1.
96. See id. at 5/9-3.2.
97. See id. at 5/12-3.1.
98. See id. at 5/12-4.4.
100. Id. at (b)(1).
101. See id. at (d).
In addition, Illinois requires that the defendant have knowledge that the woman assaulted was pregnant. Similarly, the Minnesota statute includes the crime of murder of an unborn child in the first degree, defining the term "unborn child" as "the unborn offspring of a human being conceived, but not yet born." A defendant convicted pursuant to this statute is sentenced to life in prison.

Wisconsin's fetal homicide bill, which was currently passed by the state Assembly, provides that an individual who harms or kills a fetus would face penalties up to life in prison. The proposal, identical to Illinois' statute, defines an unborn child for purposes of crimes and penalties as any human being from conception until birth. In addition to abortion, exceptions to prosecution under the bill include customary medical acts performed by a physician, an act by a health care provider in accordance with a pregnant woman's power of attorney for health care, an act by a pregnant woman towards her fetus, and the use of any medication or device for birth control or pregnancy prevention.

Thus, the Illinois and Minnesota legislatures have eliminated both the common law "born alive" rule as well as any viability requirement. Pennsylvania, with Wisconsin trailing closely behind, has now joined these states that recognize the rights of a fetus from the moment of conception.

V. Future Implications of the Act

A. A Misunderstanding of Roe v. Wade

While many critics question whether Pennsylvania's fetal homicide legislation is a toe in the door to undermining abortion rights, others are convinced that the law is nothing more than

102. See id. at (a)(1)-(3).
103. See MINN. STAT. ANN. § 609.266-.2662 (West 1997). The Minnesota legislature includes in its definition of first degree murder the killing of "an unborn child with premeditation and with intent to effect the death of the unborn child or of another." Id. § 609.2661(1).
104. Id. § 609.266(a).
105. See id. § 609.2661.
107. See id.
108. See id.
109. See id.; see also 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998).
110. See Reeves, supra note 8, at B8.
a grand scheme of the anti-abortion forces. Pennsylvania's pro-choice forces believe the Act is merely a maneuver by abortion opponents to muddy the legal waters surrounding abortion, while affirming the stance that a fetus has individual guarantees. Although it is evident that the Act acknowledges the individual rights of the fetus in criminal law, contrary to belief, the law's passage will not lead to an erosion of constitutionally protected abortion rights because of one essential distinction: that of a woman's right of choice regarding her health and body versus an assailant's unilateral right to destroy her fetus out of malice or recklessness.

Much of the controversy surrounding the Act is due to a misconception of Roe v. Wade. Critics of the Act contend that establishing that a fetus has "personhood" at any state of gestation threatens to undermine the long-standing principles pronounced in Roe. However, the Supreme Court's ruling in Roe is inapplicable in a state that criminalizes the killing of a fetus without the mother's consent.

The landmark decision of Roe balanced a mother's constitutional privacy interest in her body against a state's interest in protecting fetal life. The Court in Roe determined that in the context of a mother's abortion decision, the state had no compelling interest in protecting a fetus until it reached the point of viability, or when it reached the "capability of meaningful life outside the mother's womb." The Supreme Court, however, refrained from answering the question of when life begins for a

111. See Krebs, supra note 9, at A1.
112. See id.
115. See State Bill on Fetal Death is Mischief, supra note 9, at A22.
116. See Davis, 872 P.2d at 596.
117. See Roe, 410 U.S. at 113.
118. Id. at 163. The Supreme Court held that prior to approximately the end of the first trimester, the decision regarding abortion and its effectuation must be left to the medical judgment of the woman's physician. See id. Subsequent to approximately the end of the first trimester, the State may regulate the abortion procedure in ways reasonably related to maternal health. See id. The Court indicated that at the state subsequent to viability, the State may regulate or proscribe abortion except when it is necessary in appropriate medical judgment for the preservation of life or health of the pregnant woman. See id.
fetus in its mother's womb. Rather, the Court recognized a woman's fundamental right to privacy and found that this right was broad enough to encompass a woman's right to terminate her pregnancy. Thus, the focus of the Supreme Court's ruling in Roe was on protecting a woman from governmental intrusion when deciding whether to carry a pregnancy to term. To truly comprehend the right pronounced in Roe, one must consider both the woman's interest and the nature of the state's interference with that interest.

Subsequent court decisions have confirmed the premise that the well-founded principles of Roe are irrelevant when assessing the constitutionality of their state's fetal homicide legislation. For example, in People v. Davis, the California Supreme Court rejected the claim that the viability principles of Roe must be applied to California's fetal homicide statute. The court emphasized that the Supreme Court's decision in Roe forbids the state's protection of the unborn's interest only when it conflicts with the protected interest of the mother. The court noted that “[w]e conclude, therefore, that when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide.”

119. See id. at 159. In reaching this conclusion, Justice Blackmun stated that “[w]hen those trained in the respective disciplines of medical, 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.” Id.
120. See id. at 170.
121. See State v. Merrill, 450 N.W.2d 318, 321 (Minn. 1990).
122. See id. at 322. In 1992, the United States Supreme Court in Planned Parenthood v. Casey, 505 U.S. 833 (1992), held that “the essential holding of Roe should be retained and once again reaffirmed.” Id. at 846. The Supreme Court reaffirmed the following three aspects of Roe: (1) the right of a woman to choose an abortion before fetal viability; (2) the state's authority to restrict abortions after viability if the law contains exceptions for pregnancies that threaten the health of the mother; and (3) the state has a legitimate interest in protecting the health of a woman and the life of her fetus. See id. Rejecting Roe's trimester framework, the undue burden test was implemented by the Supreme Court in Casey in evaluating abortion restrictions prior to viability. See id. at 874.
124. 872 P.2d at 591. Davis involved a defendant convicted of murdering a fetus during the course of a robbery. See id.
125. See id. at 599.
126. See id. at 596.
127. Id. at 599.
In addition to the California Supreme Court, the appellate courts of Illinois and Minnesota have found that protection of a woman’s privacy interest in the realm of abortion is irrelevant to a nonconsensual homicide of an unborn child.\(^1\) Illinois’ feticide statute was first challenged in *People v. Ford*\(^2\) on the basis that the statute violated equal protection and due process principles for failing to distinguish between viable and nonviable fetuses.\(^3\) The defendant, relying on *Roe,* argued that a woman can destroy her nonviable fetus without incurring criminal liability and has a constitutional right to an abortion within her first trimester.\(^4\) The defendant contended, however, that if he destroys a nonviable fetus he is susceptible to criminal penalties.\(^5\) As such, the defendant insisted that he and a pregnant woman are similarly situated individuals being treated dissimilarly in violation of the Equal Protection Clause of the United States Constitution.\(^6\)

The Illinois appellate court rejected this argument and held that a pregnant woman who chooses to terminate her pregnancy and a defendant who assaults a pregnant woman killing her fetus are not similarly situated.\(^7\) The court, in drawing this distinction, reasoned that a woman has a privacy interest in terminating her pregnancy whereas a defendant who assaults a pregnant woman has no such interest.\(^8\) Likewise, the court disposed of the defendant’s due process challenge by concluding that the statute was not unconstitutionally vague.\(^9\) Because the statute defined an “unborn child” as “any individual of the human species from fertilization until birth,”\(^10\) the court found that it was unnecessary to establish what life is and when life begins.\(^11\) Instead, the court determined that it must assess whether the particular entity once

\(^{128}\) See Merrill, 450 N.W.2d at 321-22; Ford, 581 N.E.2d at 1199.

\(^{129}\) 581 N.E.2d 1190.

\(^{130}\) See id. at 1198. In *Ford,* the defendant stomped on the stomach of his seventeen year old stepdaughter who was five-and-a-half months pregnant thereby killing the fetus. See *id.* at 1190.

\(^{131}\) See *id.* at 1199.

\(^{132}\) See *id.*

\(^{133}\) See *id.*

\(^{134}\) See *Ford,* 581 N.E.2d at 1199.

\(^{135}\) See *id.*

\(^{136}\) See *id.* at 1200.

\(^{137}\) ILL. COMP. STAT. ANN. 9-1.2(b)(1) (West); see also *id.*

\(^{138}\) See *Ford,* 581 N.E.2d at 1200.
had life and no longer does as a result of the defendant's conduct.\textsuperscript{139}

In reaching these conclusions, the Illinois appellate court relied substantially on a decision of the Minnesota Supreme Court that rejected equal protection and due process challenges to a feticide statute by a defendant who had murdered a woman and her four week old embryo.\textsuperscript{140} In dismissing the defendant's constitutional challenge that the statute violated equal protection because an unborn child lacks "personhood" under \textit{Roe}, the Minnesota Supreme Court in \textit{State v. Merrill}\textsuperscript{141} noted that \textit{Roe}'s focus was on protecting the woman from governmental interference when she was deciding whether to terminate a pregnancy.\textsuperscript{142} More importantly, the court emphasized that \textit{Roe} recognized that the state "has still another important and legitimate interest in protecting the potentiality of human life."\textsuperscript{143} The Minnesota Supreme Court further revealed that this interest includes protection of the unborn child, whether viable or not, while extending protection to the woman's right to decide whether to carry the pregnancy to term.\textsuperscript{144} In holding that the viability of the fetus is "simply immaterial" to an equal protection challenge, the court reasoned that the rights of a criminal assailant in terminating a woman's pregnancy were not at issue.\textsuperscript{145}

Like the feticide statutes in California, Illinois, and Minnesota, Pennsylvania's fetal homicide legislation seeks to protect the "potentiality of human life" without impinging upon a pregnant woman's privacy interests. This interest in preserving the "potentiality of human life" includes protection of the unborn child regardless of its stage of development while protecting the woman's interest in her unborn child and her right to choose whether to

\textsuperscript{139} See \textit{id.} at 1200-01.

\textsuperscript{140} See \textit{id.} at 1199-1201. The court relied on \textit{State v. Merrill}, 450 N.W.2d 318 (Minn. 1990). In this case, the victim died from a gunshot wound inflicted by the defendant. \textit{See id.} at 319. At the time, the victim was pregnant with a twenty-seven or twenty-eight day old embryo. \textit{See id.} The coroner concluded that there was not abnormality that would have caused a miscarriage and that the death of the fetus resulted from the death of its mother. \textit{See id.}

\textsuperscript{141} 450 N.W.2d 318.

\textsuperscript{142} See \textit{id.} at 322.

\textsuperscript{143} \textit{id.} at 321 (quoting \textit{Roe v. Wade}, 410 U.S. 113, 158 (1973)).

\textsuperscript{144} See \textit{id.}

\textsuperscript{145} See \textit{id.}
carry her pregnancy to term. Because a woman's privacy interest is not at stake, Pennsylvania may determine whether and at what point it can protect life inside the mother's womb from homicide. Moreover, the imposition of criminal penalties upon those who commit acts against unborn children protects the potentiality of life because the threat of severe penalties for crimes against the unborn will deter others from committing similar crimes. With Pennsylvania's fetal homicide legislation, a woman's freedom of choice concerning abortion is preserved and can exist in conjunction with fetal rights under the Illinois and Minnesota courts' analysis. Thus, if the Pennsylvania criminal courts apply the reasoning set forth by the Illinois and Minnesota courts, The Crimes Against the Unborn Child Act would most likely survive a constitutional attack. Both Ford and Merrill demonstrate that criminalization of the killing of a fetus without regard to viability is not violative of privacy principles. These cases also indicate that the legislature is free to impose upon the murderer of a fetus the same penalty as is prescribed for the murder of a human being. As such, the Pennsylvania criminal courts should find Roe inapplicable since that decision protects a woman's right of choice and does not protect, much less confer on a third party assailant, a right to destroy a fetus.

Furthermore, similar to other states, the Act expressly distinguishes fetal homicide from abortion. Abortion is specifically excluded from the criminal provisions of the Act which provide that the law does not apply to consensual abortion. This language is indicative of legislative intent to ensure that The Crimes Against the Unborn Child Act does not rattle the status quo of legalized abortion in Pennsylvania. Additionally, those

146. See People v. Davis, 872 P.2d 591, 599 (Cal. 1994).
147. See id.
149. See supra notes 129-145 and accompanying text.
150. See Davis, 872 P.2d at 599; Merrill, 450 N.W.2d at 321; Ford, 581 N.E.2d at 1199.
151. See Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994). In Hughes, the Oklahoma Court of Criminal Appeals was adamant in indicating that for purposes of the vehicular homicide statute, a viable fetus is equivalent to human life, stating that "[w]e wish to make it absolutely clear that our holding shall not affect a woman's choice to choose a lawful abortion . . . ."
Id. at 734-35.
152. See 18 PA. CONS. STAT. ANN. § 2608 (West 1998).
153. See id.
154. See Krebs supra note 6, at A1; Reeves, supra note 8, at B8.
representing Governor Ridge have maintained that the law specifically does not apply to abortion but was intended to protect doctors, fertility clinics, and other medical practitioners in their work. The issue, therefore, is whether a woman's choice is denied because of the murder of her unborn child. The Act, in recognizing that when a pregnant woman is attacked there are two victims rather than one, was intended to make it a crime for someone other than the mother to end a pregnancy. In fact, legislators who voted in favor of the Act were motivated by a desire to address the grief felt by a family after the death of their child.

B. Prosecution For Fetal-Endangerment

As previously stated, The Crimes Against the Unborn Child Act expressly exempts from its criminal provisions the prosecution of the pregnant woman with respect to crimes against her unborn child. Nevertheless, advocates for the rights of women vehemently oppose Pennsylvania's new law fearing that the measure could be used against them. Specifically, opponents of the Act fear that expecting mothers who are alcoholics or drug addicts will be exposed to prosecution. These critics point their fingers to instances in other states, such as South Carolina and Wisconsin, where pregnant women have been prosecuted for behavior considered inappropriate for their fetuses.

In 1997, in an unprecedented decision that is most likely bound for the United States Supreme Court, the South Carolina Supreme Court became the first high court in the nation to permit prosecution for child abuse for prenatal conduct that endangered an unborn child. In Whitner v. State, the South Carolina Supreme Court upheld the conviction of twenty-eight year old

155. See Reeves, supra note 8, at B8.
156. See id.
157. See supra note 152.
158. See Bill to Punish Fetal Homicide Poorly Done, supra note 9, at A26.
159. See PA. CONS. STAT. ANN. § 2608 (West 1998).
160. See Delsite, supra note 11, at F1.
161. See id.
164. 492 S.E.2d 777.
Cornelia Whitner for criminal child neglect for ingesting cocaine during her pregnancy. Consequently, Whitner's son was born with cocaine metabolites in his system. The court reasoned that the word "child" as used in South Carolina's Children's Code includes viable fetuses. Furthermore, the court argued that it would be "absurd" to recognize a viable fetus as a person for purposes of homicide laws and wrongful death statutes, but not for purposes of statutes prohibiting child abuse. South Carolina, the court observed, has "long recognized that viable fetuses are persons holding certain rights and privileges."

In a dissenting opinion, Justice Moore argued that the majority's broad interpretation of the Children's Code could impose criminal liability upon women for "myriad acts" during pregnancy such as failing to obtain prenatal care, take vitamins, or eat properly, or for drinking and smoking. Justice Moore further contended that it was unrealistic for the court to ignore the future ramifications the decision could have on pregnant women. Additional critics noted that the effect of the South Carolina Supreme Court's decision is to eliminate third trimester abortions in South Carolina even to save the mother's health. At the time Whitner's fetus was affected by her cocaine use, Whitner was in her final trimester of pregnancy.

---

165. See id. at 786.
166. See id. at 778.
167. See id. at 780. The version of the statute under which Whitner was charged provides:

Any person having the legal custody of any child or helpless person, who shall . . . refuse or neglect to provide . . . the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered, shall be guilty of a misdemeanor and shall be punished.

S.C. CODE ANN. § 20-7-50 (Law Co-op. 1997).

168. See Whiner, 492 S.E.2d at 780.
169. Id. at 779; see also State v. Horne, 319 S.E.2d 703 (S.C. 1984). In Horne, the defendant attacked his wife with a knife wounding her in the abdomen, neck, and arms. See id. at 704. While the mother survived the attack, her full term fetus suffocated as a result of the mother's blood loss. See id. The Supreme Court of South Carolina stated that "[i]t would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purpose of imposing civil liability while refusing to give it a similar classification in the criminal context." Id. The court ultimately concluded that a viable fetus was a person within the confines of South Carolina's homicide statute. See id.
170. See id. at 788.
171. See id.
172. See Denniston, supra note 163, at 1A.
173. See id.
Carolina Supreme Court ruled that, by that time, the fetus had become a "person."  
Likewise, in Wisconsin on June 10, 1996, thirty-five year old Deborah Zimmerman was charged with attempted first degree homicide for her conduct prior to her daughter Meagan's birth. For the first time in the United States, a prosecutor applied a murder statute in a case in which a fetus had not met its demise. Zimmerman, drunk and nearly nine months pregnant, arrived at the hospital screaming, "If you don’t keep me here, I’m just going to go home and keep drinking and drink myself to death and I’m going to kill this thing because I don’t want it anyways." Later that night, Zimmerman gave birth to Meagan whose blood alcohol level was .199, nearly twice the legal limit of intoxication in Wisconsin. As a result, Meagan now suffers from symptoms associated with fetal alcohol syndrome. In this case, the court refused to dismiss attempted murder and reckless injury charges against Zimmerman. Here, Wisconsin made it clear that even prenatal conduct that is not itself illegal could be made criminal.

No one would champion an expectant mother who deliberately inflicts harm on her child by abusing illegal substances and drugs. In fact, the majority of Americans believe that a mother should be held criminally liable when her substance abuse results in impairment of her child. Approximately two hundred women in more than thirty states have been criminally charged for engaging in harmful conduct during their pregnancies. Yet, for the most

174. See id.
176. See id.
177. Id.
178. See id.
181. See Denniston, supra note 163, at 1A.
182. See Julia Elizabeth Jones, Comment, State Intervention in Pregnancy, 52 LA. L. REV. 1159, 1159 n.3 (1992) (citing poll results indicating that 52% of Americans believe that it is acceptable to impose criminal liability on a mother if that mother's substance abuse results in harm to the child).
183. See Denniston, supra note 163, at 1A.
part, prosecutors throughout the country have failed to make charges stick against pregnant women whose behavior harmed their fetuses. 184

Unlike South Carolina and Wisconsin, Pennsylvania acted appropriately when it excluded the prosecution of women for fetal abuse from its legislation. 185 If Pennsylvania should extend the law to encompass the prosecution of pregnant women for harming their own fetuses, the Act would also face an uphill battle in defeating constitutional challenges. Imposing criminal liability upon a pregnant woman for her prenatal conduct is a violation of the right to privacy and the Equal Protection Clause of the United States Constitution. 186

1. Prosecution Violates a Mother’s Right to Equal Protection.—The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” 187 The Equal Protection Clause ensures that similarly situated persons will be treated similarly protecting both women and men from discrimination on the basis of gender. 188 A classification based upon gender exists when a state enacts a maternal drug abuse statute singling out pregnant women for punishment while similar conduct engaged in by men or non-pregnant women remains immune. 189 Pursuant to the Fourteenth Amendment, statutes containing gender-based classifications or discrimination must withstand an intermediate level of judicial review. 190 Thus, a gender-based classification must facilitate an important govern-

---

184. See Courts Refusing to Punish Women Who Hurt Fetuses, St. Louis Post-Dispatch, Nov. 2, 1997, at 3A. Presently, nine states have rejected arguments that pregnant women should be criminally liable for child abuse or for taking drugs. See id. For example, in Florida, criminal charges were brought against a woman who shot herself in the abdomen when she was six months pregnant because she did not want to have another child and could not afford an abortion. See Lyle Denniston, Florida High Court Upholds Woman’s Right Over Fetus; Six Months Pregnant, Woman Shoots Herself in the Abdomen, The Baltimore Sun, Oct. 31, 1997, at 4A. Striking down the criminal charges, the Florida Supreme Court ruled that while someone could be held responsible for killing someone else’s fetus, a pregnant woman could not be prosecuted for taking any action to harm her own fetus. See id.

185. See 18 PA. CONS. STAT. ANN. § 2608 (West 1998).

186. See infra Part V.B.1-2.


190. See Boren, 429 U.S. at 197.
mental objective and must be substantially related to accomplishing this objective.191

Extending Pennsylvania's fetal homicide statute to include pregnant women would have a retroactive effect on women. As such, to survive intermediate level scrutiny Pennsylvania would need to establish a reason to burden only women and not men. While it is evident that this inclusion in Pennsylvania's statute would achieve an important governmental objective of protecting potential human life, it is also evident that a pregnant woman is not the only individual responsible for harming her fetus.192 Third persons as well as the environment can contribute to causing detrimental effects to a fetus.193 For example, studies indicate that the sperm of male substance abusers can cause defects in an unborn child even if the mother herself does not use drugs.194 Further, women may inadvertently be subjected to toxic chemicals in the work environment.195 Evidence also suggests that living with a cigarette smoker may have harmful effects on the fetus.196 Accordingly, imposing criminal liability only upon pregnant women's conduct when there are other factors contributing to adverse effects on the fetus is a violation of the Fourteenth Amendment Equal Protection Clause because such liability is not substantially related to accomplishing its objective of protecting human life.

2. An Infringement on the Fundamental Right to Privacy.—While the United States Constitution does not explicitly mention any right of privacy, this right is an integral right that has been recognized since 1891.197 The United States Supreme Court has indicated that only personal rights deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of personal privacy.198 The state is prohibited from

191. See id.
193. See id.
194. See Jones, supra note 182, at 1165. Studies reveal that morphine or methadone affect sperm. See id.
195. See Romney, supra note 192, at 339.
196. See id.
unjustifiably interfering with personal decisions regarding marriage, family relationships, contraception, child rearing and education, and procreation. Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men."

Although the state may have an interest in protecting a fetus, this interest does not outweigh the mother's right to privacy. If Pennsylvania were to include the prosecution of pregnant women within the confines of the Act, there would be a violation of a woman's right to procreate and her right to autonomy in reproductive decision-making. The imposition of criminal prosecution upon a pregnant addict could force her to either carry her pregnancy to term, thereby facing criminal sanctions, or to have an abortion as the only way to escape prison. In effect, a pregnant addict must choose between continuing her drug habit or ending the life of her unborn child. With this approach, a woman may be better off to illegally abort in her third trimester and face a two year sentence than give birth after taking drugs and face a ten year sentence. More importantly, it is illogical to impose criminal penalties upon a woman for harming a fetus that she could legally abort. The Act has deemed a fetus a "person" from the moment of conception. Allowing a woman to legally have an abortion at this time but to render her criminally liable for harming her fetus through the use of drugs or other inappropriate behavior is inconsistent.

Pregnant drug addicts who seek treatment either face difficulty in obtaining assistance or are unable to receive treatment. Studies reveal that pregnant women are discriminated against in drug treatment programs. Without assistance from a drug treatment program, it is difficult for an addict to stop using drugs.

206. See id.; see also Jones, supra note 182, at 1177 (discussing various obstacles that confront an addicted pregnant woman when seeking treatment).
207. See id. These programs often deny treatment to pregnant women or expel them when discovering the pregnancy. See James Andrew Freeman, Pre-natal Substance Abuse: Texas, Texans and Future Texans Can't Afford It, 37 S. TEX. L. REV. 539, 554 (1996).
Under these circumstances, women are being punished for their choice to carry a pregnancy to term.

In many instances, the threat of prosecuting a mother for her prenatal conduct will deter pregnant women from obtaining prenatal care.\textsuperscript{208} Pregnant women are terrified that they will be punished or have their newborns taken away if there is evidence they acted inappropriately during pregnancy.\textsuperscript{209} As a result, a mother's pregnancy will go unmonitored and any possible defects will go undetected, which in turn increases harm to the fetus. In this scenario, an unborn child that could have received pre-natal care is now denied the opportunity.

A woman's substance abuse while pregnant should be treated as a health problem, not as a crime. Ultimately, the solution should be prevention and treatment. If Pennsylvania were to expand the Act's well drawn boundaries to include maternal conduct as a crime against the fetus, then criminal prosecutions could dangerously spread to any behavior that might be detrimental to the fetus. What behavior would constitute “harm” to a fetus? Drinking? Smoking? Failure to receive prenatal care? Sex? Justice Moore correctly recognized that the government should not be granted a significant role in overseeing pregnancies.\textsuperscript{210}

Pennsylvania should be commended for excluding the prosecution of maternal conduct from its fetal homicide legislation. Holding women criminally liable for their maternal conduct likely would not withstand a constitutional right to privacy challenge. After all, criminal laws are intended to protect, not punish women.

VI. Conclusion

Finally, Pennsylvania is in line with half the states in recognizing potential human life in criminal law. The Crimes Against the Unborn Child Act renders a fetus to be a human being from the moment of conception and a person in the eyes of Pennsylvania criminal law. Accordingly, those who assault a pregnant woman and cause the death of her fetus will no longer remain immune to criminal penalties.

\textsuperscript{208} See Freeman, supra note 207, at 554.


Contrary to belief, the development of the Act will not curtail a woman’s right to terminate a pregnancy. The principles pronounced in *Roe v. Wade* are inapplicable to statutes that criminalize the killing of a fetus without the mother’s consent. The *Roe* decision protects a woman’s right of choice and does not protect, much less bestow on an assailant, the right to destroy a fetus. As such, Pennsylvania has the authority to protect life inside a woman’s womb from homicide. If Pennsylvania’s courts apply the reasoning set forth by the Illinois and Minnesota courts, it is likely that the Act will surpass constitutional challenges.

Further, Pennsylvania’s legislature should be applauded for exempting from its criminal provisions the prosecution of pregnant women with respect to crimes against their unborn children. Pregnancy should not be viewed as a crime; rather, a woman’s substance abuse problem should be perceived as a health problem.

*Cari L. Leventhal*