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Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws, The

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NOTES

THE MYTH OF FETAL PERSONHOOD: RECONCILING ROE AND FETAL HOMICIDE LAWS

INTRODUCTION

On the cold morning of February 20, 2009, Kenzie Houk, a young mother and bride-to-be, was found dead in her western Pennsylvania farmhouse. She had been shot in the back of the head while she lay sleeping. It took police but a day to find and charge their prime suspect: Jordan Brown, the son of Kenzie’s fiancée. Police reported that Jordan allegedly, like any good criminal, shot Kenzie, ditched the shotgun shell, got on the school bus, and went on to another day in fifth grade. Jordan Brown was eleven years old. Kenzie Houk was twenty-six and pregnant with Christopher Houk, who was at eight and a half months gestation.

As the Houk family grieves, the law must grapple with the questions of “Who?” and “How many?” How many “persons” really

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2 Plushnick-Masti, supra note 1.

3 Id.

4 Martinez, supra note 1; Plushnick-Masti, supra note 1.

5 Plushnick-Masti, supra note 1.

died that day? How many murders should Jordan Brown have to account for? Currently, Pennsylvania law provides that the “criminal homicide of an unborn child” can be classified as either murder or voluntary manslaughter. Accordingly, Pennsylvania charged Jordan Brown not just with the murder of Kenzie Houk, but with the murder of Christopher Houk as well.

Many, including the Houks, probably laud this double charge. Others, including some abortion-rights activists and organizations, may condemn it. For decades now, states have been proliferating statutes like the one in Pennsylvania—so-called “fetal homicide” statutes. Even the federal government passed such a law, the Unborn Victims of Violence Act of 2004. This act, like its state analogues, makes it a separate crime to kill or injure a “child . . . who is in utero.” These laws establish one controversial principle: the unprovoked killing of a fetus is murder. This idea stirs up strong reactions from both sides of the abortion debate. For instance, Gloria Feldt, president of the Planned Parenthood Federation of America, bemoaned the Unborn Victims of Violence Act as “creating legal personhood for the fetus.” The pro-life movement embraced this legal result. Richard Land, president of the Southern Baptist Convention’s Ethics & Religious Liberty Commission, proclaimed, “It is another reminder we are slowly but surely winning the battle . . . when it comes to the personhood of unborn human beings.”

These hopes and fears are part of a much larger debate about fetal personhood in American society. The law is not clear on exactly who or what counts as a person, but many are already taking sides. Pro-choice advocates worry that, if the law declares the fetus

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7 18 PA. CONS. STAT. ANN. § 2603 (West 1998).
8 Plushnick-Masti, supra note 1.
9 See, e.g., sources cited infra notes 13–14.
10 See infra notes 50–72 and accompanying text.
12 18 U.S.C. § 1841(a)(1). The relevant text reads:

Whoever [during the commission of an enumerated federal offense] causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense . . . . [T]he punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother.

Id. § 1841(a)(1)–(a)(2)(A).

15 See discussion infra Part II.A.1.
a “person,” then the war for reproductive rights will be lost. The pro-life population, on the other hand, welcomes such an interpretation as a means to wage their own war on the legality of abortion.17

Fetal murder laws like the one Jordan Brown was charged with are ostensibly about violence against pregnant women. However, in protecting women, these laws classify the killing of a fetus as “murder,” and necessarily imply, if they do not directly state, that the fetus is a “person” under the law. Several scholars and politicians worry that feticide laws turn the fetus into an untouchable, and thus an unabortable, entity. They claim that fetal laws necessarily prompt a “reduction of pregnant women’s rights.”20 Pro-life scholars have also noted this supposed inconsistency in the law, claiming that, “[t]he discrepancies in the law regarding an unborn fetus’s legal status represent an overall disingenuousness, and perhaps even dishonesty.”21 They suggest that “[i]t makes no sense for courts to say an ‘abortion’ of an unborn child is legal, but the ‘wrongful death’ of the same child by someone other than the mother is not legal.”22

This fear of fetal legislation assumes a hypocrisy in the law. Opponents of feticide laws wonder, “How can the U.S. Supreme Court’s declaration in Roe that a fetus is not a person . . . and the Unborn Victims of Violence Act that makes killing a fetus . . . a crime be reconciled?”23 Few scholars have attempted such a

16 See Carolyn B. Ramsey, Restructuring the Debate over Fetal Homicide Laws, 67 OHIO ST. L.J. 721, 724 (2006) (“Proponents of legal abortion have much to lose by agreeing to conduct the debate about reproductive rights within a framework that hinges on the status of the fetus . . . .”).
17 See, e.g., supra note 14 and accompanying text.
18 See Ramsey, supra note 16, at 721 (arguing that fetal homicide laws should be viewed as “the pregnant woman’s defense of her bodily autonomy, rather than . . . the personhood or non-personhood of the unborn”).
23 Wagner, supra note 19, at 1088.
reconciliation. This Note shows, however, that laws surrounding fetal personhood do not challenge abortion rights and argues that so-called “fetal rights” laws will not and do not live up to their hype. Contrary to suggestions by advocates on both sides of the abortion debate, when a state confers “personhood” to an unborn human, it does not sound the death knell for reproductive rights. Personhood as conferred through feticide legislation is not the same as natural personhood, and does not garner the protection of the Fourteenth Amendment. Moreover, it is entirely logical for a state to punish the same act (termination of a pregnancy) differently in different circumstances. Abortion by the mother is simply not the same as an unprovoked assault on the fetus by a third party.

This Note begins in Part I by examining the present state of fetal treatment under the law. Currently, fetuses are not persons for the purposes of abortion jurisprudence, but many state laws nevertheless still refer to fetuses as “persons.”

Part II illustrates how these seemingly contradictory notions can be reconciled. First, theories of personhood, federalism, and linguistics are examined to demonstrate that constitutional fetal personhood\textsuperscript{25} does not exist. Second, Part II discusses more specific ways in which fetal statutes do not conflict with Roe or abortion rights. Namely, fetal laws recognize state interest, not fetal interest. State protection does not imply personhood; states can and do protect non-persons quite often. Feticide laws also do not pit mother against state, as abortion laws do. Rather, the laws logically distinguish between the rights of a pregnant woman and the non-rights of third-party attackers.

Finally, this Note concludes by arguing that feticide laws actually promote reproductive autonomy. The right to carry a child to term is an oft-forgotten corollary of the right to abortion. These laws protect women in that sacred interest.

I. CURRENT FETAL “RIGHTS”

A. Criminal Law

American law has had a troubled relationship with the fetus and abortion. Legislation regarding abortion began appearing in the early-nineteenth century, growing largely out of English common

\textsuperscript{24} Professor Carolyn Ramsey, however, has made great strides in addressing this query. See generally Ramsey, supra note 16.

\textsuperscript{25} Throughout this Note, “constitutional personhood” means personhood under the Fourteenth Amendment. Constitutional personhood would grant the fetus the right to life and equal protection of the laws. See U.S. CONST. amend. XIV, § 1.
law. At that time, states severely punished abortions performed after the quickening of a fetus, but were more lenient when abortion occurred pre-quickening. As the century wore on, states began eliminating the quickening distinction and increasing punishments for all abortions. By the 1950s, a majority of jurisdictions had completely banned all non-therapeutic abortions. This, of course, all changed with the Supreme Court’s decision in Roe v. Wade.

In Roe, the Supreme Court recognized that the decision to reproduce is a protected privacy interest. The case legalized abortion in America, although not without restriction. Part of the Court’s reasoning was based on the finding that the fetus was not a “person” for the purposes of the Fourteenth Amendment, and was therefore not guaranteed a right to life. Roe also held that a state has important interests; namely, promotion of potential life. Thus, a state could, if it so chose, prohibit abortion past the point of fetal viability, except where necessary to save the life or health of the mother. Although Roe has been modified somewhat by subsequent Supreme Court cases, its essential holding remains intact.

The destruction of a fetus by a third-party aggressor has followed a different trajectory. Outside of the abortion context, the law has historically recognized penalties for both homicide and wrongful death of a fetus. Traditionally, criminal common law began by following what is known as the born-alive rule. Under this rule as it was applied by the states, murder charges could be brought against

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27 Quickening is the point in pregnancy at which the mother first feels the fetus move. This normally occurs between seventeen and twenty weeks gestation. Keith L. Moore et al., Color Atlas of Clinical Embryology 54 (2d ed. 2000).
28 Roe, 410 U.S. at 139.
29 Id.
30 Id. A therapeutic abortion is one done to protect the life or health of the mother. Id.
31 410 U.S. 113.
32 See id. at 153 (finding that the “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).
33 Id. at 165–66.
34 Id. at 156–59.
35 Id. at 164.
36 Id. at 164–65. Viability is the developmental point in gestation “at which there is a realistic possibility of maintaining and nourishing a life outside the womb.” Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).
37 Roe, 410 U.S. at 165.
38 See Casey, 505 U.S. at 846 (rejecting Roe’s trimester framework but upholding its essential doctrine). See generally Buelow, supra note 21, at 965–71 (giving an overview of abortion decisions and current law).
39 As opposed to a physician performing an abortion.
one who caused injury to a fetus in the womb, but only if the fetus
survived birth and later died because of the inflicted injuries.41
William Blackstone, in his Commentaries on the Laws of England,
expressed this long-standing rule as follows: "To kill a child in it's
[sic] mother's womb, is now no murder, but a great misprision: but if
the child be born alive, and dieth by reason of the potion or bruises it
received in the womb it seems, by the better opinion, to be murder."42
The rationale was that murder referred only to the killing of a person,
and if a fetus died in utero, it was not yet a person and therefore
could not be a victim of murder.43 Many post-Roe cases held to this
rule.44 For example, the Illinois Supreme Court, in People v. Greer,45
refused to find that the in-utero killing of a full-term fetus was
murder. The Greer defendant beat his pregnant girlfriend with his
fists and a broomstick, killing her and causing her unborn child to die
in utero.46 The defendant's girlfriend was eight-and-one-half months
pregnant.47 Although the fetus died as a result of the beating, the
court reversed the defendant's murder conviction on the grounds that
"taking the life of a fetus is not murder . . . unless the fetus is born
alive and subsequently expires as a result of the injuries inflicted."48

The born-alive rule is still good law in some states.49 However,
many states have moved away from the common law and have begun
specifically recognizing fetal murder as a crime even if the fetus dies
before birth.50 States have done away with the born-alive rule in two
key ways: either through the legislatures or the courts.

First, many states have enacted laws that specifically apply to
the injury or killing of a fetus. Some do this by inserting terms
like "fetus" or "unborn child" into their existing murder statutes.

41 Buelow, supra note 21, at 972; Forsythe, supra note 40, at 563.
42 5 WILLIAM BLACKSTONE, COMMENTARIES *198.
43 See Wagner, supra note 19, at 1100-01 ("The idea was that to have breathed was to
have lived; therefore, to not have breathed was to not have lived.").
44 See, e.g., State v. Green, 781 P.2d 678, 683 (Kan. 1989) (holding that a stillborn child
had not yet become a human being for purposes of the state's homicide statute); Hollis v.
Commonwealth, 652 S.W.2d 61, 63-64 (Ky. 1983) (holding that, until a fetus is born alive, it is
not a person and cannot not be a victim under the homicide statutes), overruled by
45 402 N.E.2d 203 (Ill. 1980).
46 Id. at 206.
47 Id.
48 Id. at 209. For a more thorough analysis of the born-alive rule and its use in judicial
decisions, see Buelow, supra note 21, at 972–76; Forsythe, supra note 40.
the common law born-alive rule for homicide actions, but ultimately refusing to apply to it
because the defendant was charged with child abuse, not homicide); State v. Beale, 376 S.E.2d
1, 4 (N.C. 1989) (holding that the killing of an unborn viable fetus was not chargeable under the
state's murder statute).
50 Buelow, supra note 21, at 974–78.
California, for example, added the term “fetus” to its murder statute, so that it now reads: “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.” Similar to Ohio’s murder statute reads: “No person shall purposely cause the death of another or the unlawful termination of another’s pregnancy.” Some states have enacted entirely new statutes, separate from their current murder laws, to cover crimes against a fetus. Georgia, for example, defines the assault of an unborn child as a separate punishable offense: “A person commits the offense of assault of an unborn child when such person, without legal justification, attempts to inflict violent injury to an unborn child.” Battery of an unborn child is similarly a crime.

Other states have achieved the same ends via the common law without amending or adding to their existing criminal codes. These states have simply chosen to define a “person” under their existing homicide or manslaughter statutes to include fetuses. The first state to do so was Massachusetts in Commonwealth v. Cass. In Cass, the court held that the defendant could be criminally liable, under the state’s vehicular homicide statute, for the death of a fetus. The defendant had hit a pregnant pedestrian with his car. As a result of the injuries sustained in the accident, the fetus died in the womb. The court opined that the term “person” as used in the Massachusetts penal code was synonymous with “human being,” which included fetuses. Cass established that all fetal murders would fall within the purview of the Massachusetts homicide law.

More recently, the Supreme Court of Kentucky overruled the born-alive rule in Commonwealth v. Morris. There, the defendant struck and killed a pregnant woman who was on her way to the hospital to give birth. Her unborn child died as well. The court recognized that Kentucky already allowed recovery for the wrongful death of a fetus, and reasoned that it would be “inherently illogical”

52 OHIO REV. CODE ANN. § 2903.02(A) (West 2006) (emphasis added).
53 GA. CODE ANN. § 16-5-28(b) (2007).
54 GA. CODE ANN. § 16-5-29(b) (2007).
56 Id. at 1329. The court noted that all other jurisdictions that had already decided the same issue had deemed that a fetus could not be a victim of homicide. Id. at 1328.
57 Id. at 1325.
58 Id.
59 Id.
60 142 S.W.3d 654 (Ky. 2004).
61 Id. at 655.
not to extend the same protections to criminal killings of fetuses. The court also considered that, after the defendant’s actions, but before the resolution of the case, the Kentucky legislature had passed a fetal homicide act. With the weight of precedent and legislative intent behind it, the Supreme Court of Kentucky did not hesitate to reject the born-alive rule. Decisions like Morris and Cass extend the same status to fetuses as do statutes. However, these decisions can be considerably more controversial than statutes because they specifically define the fetus as a person.

Currently, at least thirty-eight states recognize some sort of penalty for fetal homicide. Ten require the fetus to have reached some developmental landmark, such as viability, before victimhood applies. At least twenty-one others recognize fetal homicide as a crime throughout the entire gestational period. These states make no distinction between the killing of an eight-month-old fetus and an eight-week-old fetus. In Minnesota, for example, the state Supreme Court found criminal liability for the killing of a pre-viable embryo in State v. Merrill. Merrill was accused of shooting and killing a woman carrying a twenty-seven- to twenty-eight-day-old embryo.

The court rejected the defendant’s equal protection challenge to the state feticide law, finding that the statute did “not violate the Fourteenth Amendment by failing to distinguish between a viable and nonviable fetus.” The court held that the statute could be applied as long as there was the killing of a live embryo that was growing into a human being. Likely, Merrill-type cases will be rare, but criminal protection of fetuses itself appears to be the norm. And while this area of law is constantly evolving, the fact remains that at present this evolution has favored criminal penalties for fetal murder.

63 Id. at 660.
64 See id. at 661.
65 See id. at 660.
67 These states are: Arkansas, California, Florida, Indiana, Maryland, Massachusetts, Nevada, Rhode Island, Tennessee, and Washington. Id.
68 These states are: Alabama, Arizona, Arkansas, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin. Id.
69 450 N.W.2d 318 (Minn. 1990).
70 Id. at 320.
71 Id. at 322.
72 Id. at 324.
B. Tort Law

The right to recover in tort for injury to a fetus has followed a trajectory similar to the criminal recognition of fetal murder. Until the mid-twentieth century, the common law generally did not recognize tort recovery for the unborn child.\textsuperscript{73} \textit{Dietrich v. Inhabitants of Northampton}\textsuperscript{74} was the seminal case that established the old rule that no recovery was available in tort for premature terminations of pregnancies. In \textit{Dietrich}, a pregnant woman slipped and fell due to a “defect in a highway” she had been walking on.\textsuperscript{75} The fall caused her to miscarry.\textsuperscript{76} The court, in an opinion by the famed Justice Holmes, refused to allow the mother to recover for the loss of her child’s life.\textsuperscript{77} The court was concerned about setting the precedent that someone might have a tort duty “to one not yet in being.”\textsuperscript{78} It also mused that the fetus was merely “a part of the mother,” and that any damages for injuries could be and should be recovered by her directly.\textsuperscript{79} Thus, the separate loss of the fetus was not yet viewed as compensable.

This common law held until 1946, when the District of Columbia recognized recovery for an infant who sustained injuries in utero due to a negligent delivery in \textit{Bonbrest v. Kotz}.\textsuperscript{80} The \textit{Bonbrest} court took issue with the \textit{Dietrich} notion that the fetus was merely a part of the mother’s body, especially when the fetus was viable at time of injury.\textsuperscript{81} The court therefore departed from the common law, and allowed tort recovery out of concern for the “sacrosanct” rights one has in the “possession and enjoyment of his life, his limbs and his body.”\textsuperscript{82}

Today, all jurisdictions recognize tort claims for a child’s prenatally inflicted injuries.\textsuperscript{83} However, the same legal issues courts had with homicide statutes still prevail: is the fetus a “person” within the wrongful death or harm statutes? Does the fetus have to be viable at the time of the injury in order to pursue recovery?\textsuperscript{84} Although states

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\textsuperscript{73} Klasing, \textit{supra} note 22, at 934 & n.12.
\textsuperscript{75} \textit{Id.} at 14.
\textsuperscript{76} \textit{Id.} at 14–15.
\textsuperscript{77} \textit{See id.} at 17.
\textsuperscript{78} \textit{Id.} at 16.
\textsuperscript{79} \textit{Id.} at 17.
\textsuperscript{81} \textit{Id.} at 140.
\textsuperscript{82} \textit{Id.} at 142.
\textsuperscript{83} \textit{See} Klasing, \textit{supra} note 22, at 935. While all jurisdictions allow recovery for infants who are born alive, some also allow recovery for prenatal injuries resulting in stillbirths. \textit{Id.}
\textsuperscript{84} \textit{See generally} Buelow, \textit{supra} note 21, at 979–84 (surveying the inconsistencies that
previously applied the same born-alive rule that exists in criminal law, most jurisdictions no longer require live birth for the purpose of wrongful death actions.\textsuperscript{85} If a tortfeasor’s negligent actions cause the death of a fetus, either after birth or in the womb, that person is liable for wrongful death. However, a large number of states still require viability for the imposition of liability.\textsuperscript{86}

II. THE RECONCILIATION

There is palpable discord between abortion rights, on the one hand, and fetal murder and wrongful death statutes, which both cite the fetus as a "person," on the other. Many believe that the right to abortion exists only so long as the fetus is not a person. In fact, dictum in \textit{Roe} suggested that abortion rights necessarily depended on the fetus not being a person under the Fourteenth Amendment.\textsuperscript{87} Justice Blackmun stated: "If [the] suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’s right to life would then be guaranteed specifically by the [Fourteenth] Amendment."\textsuperscript{88} With this in mind, it is not hard to see why many abortion-rights activists shudder at the mention of a law that recognizes the fetus as a "person." They fear that this sort of declaration necessarily impinges on women’s liberties by granting the fetus a Fourteenth Amendment right to life (and thus, freedom from abortion).\textsuperscript{89}

Despite the seeming conflict, there are a number of reasons why fetal murder laws do not threaten abortion rights. First, even though fetal murder laws use the word "person," they do not confer \textit{constitutional} personhood. They confer only an artificial type of personhood, one that is not protected by the Fourteenth Amendment and that does not carry with it a "right to life."\textsuperscript{90} Second, feticide laws

\begin{footnotesize}
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\item\textsuperscript{85} See Klasing, \textit{supra} note 22, at 940–41 (noting that thirty-five states have replaced the born-alive rule with a rule of viability).
\item\textsuperscript{86} Roe v. Wade, 410 U.S. 113, 156–57 (1973).
\item\textsuperscript{87} Id.
\item\textsuperscript{88} Klasing, \textit{supra} note 22, at 950–51; Wagner, \textit{supra} note 19, at 1101.
\item\textsuperscript{89} A few scholars have countered this suggestion by arguing that, even if the fetus is a person, abortion could still be constitutional. See, e.g., John Hart Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 \textit{Yale L.J.} 920, 926 n.48 (1973) (arguing that even if the fetus were a person, this would not mandate that the fetus win—courts would still have to balance the rights of the woman against the rights of the fetus); Ramsey, \textit{supra} note 16, at 754–65 (suggesting that, even if the fetus is a person, abortion may not be murder because pregnant women could claim necessity or self-defense).
\item\textsuperscript{90} Id.
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are not grounded in fetal rights; they are based on the interests of the state. States can, and do, act to protect certain entities, even when those entities themselves have no rights. Moreover, whereas abortion mediates between the opposing interests of the state and the woman, feticide laws pursue the same goals for both the woman and the state. In these scenarios, the state and the woman have similar interests, so the state can be more aggressive about pursuing its goals. Finally, there is a clear difference between a pregnant woman consenting to an abortion and a nonconsensual attack on a woman that results in the loss of her pregnancy. The woman has a right to act; the attacker does not. Once we look below the surface, then, it becomes apparent that fetal legislation need not be viewed as a threat to women's rights.

A. The Personhood Myth

1. Types of Personhood and Analogy to Corporate Law

Colloquially, personhood is an unequivocal, obvious notion. Legally, it is a slippery, uncertain concept. There is no one legal definition of "person." Nor has the Supreme Court ever given any framework for personhood under the United States Constitution. When confronted with the issue, the Court has typically dealt with personhood in an ad-hoc fashion, granting or denying it in order to achieve some desired social goal. For example, the Court denied personhood status to slaves in *Dred Scott v. Sandford.* It also denied personhood to fetuses in *Roe v. Wade.* On the other
hand, the Court has granted personhood to children for some constitutional purposes.\textsuperscript{55} Most of the Court’s decisions appear merely result-oriented, and leave the legal community with no clear definition of “personhood.”\textsuperscript{96}

Though the concept of personhood is a fuzzy one, the benefits of legal personhood are clear. If a being (or entity) is considered a person under the Fourteenth Amendment, then he (or it) is entitled to certain rights. The Fourteenth Amendment guarantees that no state may “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{97} These sacrosanct rights establish the very high stakes of constitutional personhood battles.

Given the consequences of the Fourteenth Amendment, the very term “person” in the fetal context appears to be an absolute affront to abortion rights. After all, if the fetus is labeled “person,” how does it not automatically receive the right to live? The answer depends entirely on what is meant by “person.” Personhood is not a one-dimensional construct. In fact, there are different types of legal personhood, and not all of them fall within the Fourteenth Amendment. In other words, the fetus can be a “person” in some legal ways, but not a “person” of the type contemplated by the Constitution. Thus, we can refer to the fetus as a person without necessarily granting it a constitutional right to life.

Theories of personhood generally acknowledge two types of persons: natural and juridical.\textsuperscript{98} Natural persons are the most obvious type—you, me, your mother, father, neighbor, spouse, and the like. Blackstone characterized natural persons to be those “[s]uch as the God of nature formed us.”\textsuperscript{99} Presently, natural persons include only that it has any possible pre-natal application.

\textit{Id.} at 157 (quoting U.S. CONST. amend. XIV, § 1).

\textsuperscript{55} See, e.g., Levy v. Louisiana, 391 U.S. 68, 70, 72 (1968) (overturning, on equal protection grounds, a state law based on “the premise that illegitimate children are not ‘nonpersons’”); In re Gault, 387 U.S. 1, 13 (1967) (holding that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”).

\textsuperscript{96} Rivard, supra note 92, at 1450; see also Note, \textit{What We Talk About When We Talk About Persons: The Language of a Legal Fiction}, 114 HARv. L. REV. 1745, 1747 (2001) [hereinafter \textit{Language of a Legal Fiction}] (stating that judges do not have a consistent theory to apply in the realm of personhood, and instead “approach[] it more as a legal conclusion than as an open question”).

\textsuperscript{97} U.S. CONST. amend. XIV, § 1 (emphasis added).

\textsuperscript{98} Berg, \textit{Of Elephants and Embryos}, supra note 91, at 372–74 (discussing the concepts of both natural and juridical personhood).

\textsuperscript{99} I \textsc{William Blackstone}, \textsc{Commentaries *119}. 
human beings post-birth. Although it is difficult to say exactly which rights attach to natural personhood, natural persons generally receive full constitutional liberties and the highest level of legal protection. Unlike juridical persons, natural persons do not have to be judicially granted constitutional personhood because the status attaches from birth. It flows from humanity’s “very dignity and existence.”

We are due the designation because of our inherent moral nature, character, and worth. The rights of natural persons are “vested in them by the immutable laws of nature.” Ultimately, then, the natural person is an entity with full entitlement under the Constitution, one whose rights and status vest automatically because of what nature morally recognizes the entity to be.

Juridical persons, on the other hand, are entities, other than born human beings, to whom the law gives protections that are similar to those protections given to natural persons. Juridical persons are also known as “artificial” persons. This category includes corporations and other collective bodies such as governments and

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101 See Philippe Ducor, The Legal Status of Human Materials, 44 Drake L. Rev. 195, 198–99 (1996). Ducor does suggest that, at a minimum, the rights of natural personhood include “the right to due process, the right to own property, the right to bodily integrity, the right to live, and the right not to be owned.” Id. (footnotes omitted). On the other hand, Blackstone argued that the primary rights of natural personhood are “the right of personal security, the right of personal liberty; and the right of private property.” 1 William Blackstone, Commentaries *125.

102 Of course, the government reserves the ability to limit rights for good reason, so long as due process is given. For instance, prisoners are persons, but clearly have limited rights. See Ducor, supra note 101, at 199. Thus, while all natural persons are at least born with a right to full constitutional liberty, these liberties can either be postponed (as in the case of minority) or removed when necessary to promote superseding interests.

103 See Berg, Of Elephants and Embryos, supra note 91, at 373 (“Certain legal rights adhere automatically upon birth, and the designation of ‘natural person’ may be taken as shorthand for identifying entities that are entitled to the maximum protection under the law.”).

104 See id.

105 Ducor, supra note 101, at 199.

106 1 William Blackstone, Commentaries *120.

107 Throughout this Note, this definition applies when the term “natural person” is used. Not all scholars agree with this approach, however. Professor Jessica Berg, for instance, believes that natural personhood can also attach to an entity because of the rights other persons have in that entity. See Berg, Of Elephants and Embryos, supra note 91, at 377–79. This Note also argues that personhood can attach in this way, but sees this as an instance of juridical, not natural, personhood. See discussion infra text accompanying notes 123–33.

108 See Berg, Of Elephants and Embryos, supra note 91, at 373 (“Corporations are the best example of [juridical persons], but juridical persons may also include other entities.”).

109 See 1 William Blackstone, Commentaries *119 (“Persons also are divided by the law into either natural persons, or artificial. . . . [A]rtificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic.”).
labor unions. Since juridical persons are not natural persons, the law does not give them equal rights or protections. They are creatures of the state, and as such are limited to whatever rights the state chooses to give or not give them. Unfortunately, because juridical personhood is often applied by courts without a framework or rationale, it is difficult to determine the rules and reasons for conferring juridical personhood.

Typically, though, juridical personhood is a result-oriented status, the desired result being to confer material benefit upon a natural, human person. For instance, most corporate personality literature reveals that the juridical personhood of corporations derives from the need to recognize the rights of natural persons, not the desire to exalt the corporate form. Ultimately, the key distinction between natural and juridical persons turns on why the law recognizes an entity’s personhood status in the first place. In some cases, the law grants personhood because of the entity’s interests (creating natural persons), and in other cases, the law grants personhood because of the interests natural persons have in the entity (creating juridical persons).

Because corporations are among the most well-known juridical persons, an analogy to corporate personality should be instructive. The law has long afforded corporations juridical person status. Such awards were often quick and unjustified. Before hearing the parties’ arguments in Santa Clara County v. Southern Pacific Railroad Co., Chief Justice Waite instructed: “The court does not wish to hear argument on the question whether the . . . Fourteenth Amendment . . . applies to . . . corporations. We are all of [the] opinion that it does.” Although the earliest courts generally did not explain their reasons for granting juridical personhood to corporations, later courts and scholars did. One of the earliest rationales for granting juridical personhood was the need to protect shareholders as the owners of the company. Although the company,
as an artificial entity, had no rights itself, the shareholders had personal property rights in the company that needed protection.\textsuperscript{119} In \textit{The Railroad Tax Cases},\textsuperscript{120} Justice Field observed that “[t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value.”\textsuperscript{121} Courts were, in effect, granting personhood to a non-person entity in order to protect the natural person owners of the non-person entity. This is precisely the picture of the juridical person: an entity that derives its personhood not from the moral status or rights of the entity itself, but from the rights and interests of already existing natural persons.\textsuperscript{122}

Fetal personhood can be perceived in much the same way. The fetus, like the corporation, is not entitled to protections because of what it is innately. Instead, the law recognizes that there is a natural person, the mother, who has fundamental interests at stake. Her rights are invested in another entity, the fetus. The law gives that entity juridical personhood to ensure that the rights of the mother may be secured, just as the law gives the corporation juridical personhood to protect the rights of the shareholders.\textsuperscript{123}

Fetal personality, like corporate personhood, is also outcome oriented. Corporate personality theory often holds that “person” is a legal fiction; it means whatever the law wants it to mean.\textsuperscript{124} In this way, courts were able to characterize corporations as persons in order

\textsuperscript{119} See id. (observing that granting “personhood” to corporations helped guarantee “that the owners of property held in the name of a corporation would receive the same constitutional protections as the owners of property held in their own name”).

\textsuperscript{120} 13 F. 722 (C.C.D. Cal. 1882).

\textsuperscript{121} Id. at 747.

\textsuperscript{122} But see id. at 381–82 (again arguing that juridical personhood may stem from the rights of the entity itself). Again, this Note departs from Professor Berg’s framework for legal personhood, instead contending that the reason for conferring personhood (whether due to the entity itself having interests or other natural persons having interests in the entity) must be a part of what distinguishes natural and juridical personhood. It would make no sense to turn the distinction entirely on whether or not the entity is human; fetuses are not natural persons, but are clearly genetically human. To then begin classifying this personhood based on what kinds of human beings (born or not born, etc.) count as persons merely begs the question of what constitutes a natural person in the first place. Finally, it seems odd to speak of some juridical entities as having interests. When we say that a corporation has interests, we are really saying that its shareholders’ and officers’ (natural persons) have interests in the corporation.

\textsuperscript{123} This Note does not mean to assert that the interests are also the same, i.e., that the mother, like the corporation, is protecting mere property interests. Some scholars do argue for this approach. See, e.g., Jessica Berg, \textit{Owning Persons: The Application of Property Theory to Embryos and Fetuses}, 40 \textit{WAKE FOREST L. REV.} 159, 159–60 (2005); Ducor, supra note 101, at 206–08, 210. However, the analogy is equally applicable if it is assumed that the mother is protecting her fundamental reproductive rights, rather than her property rights.

to achieve a desired outcome. As Blackstone wrote long ago, “artificial [persons] are such as created and devised by human laws for the purposes of society.” The way we define “person,” then, depends on the consequences society wishes to achieve from such a designation. The personhood comes from the desire for a specific result, not from the metaphysical characteristics of the entity. The desired outcome for a corporation is to protect the rights of its shareholders. Similarly, society hopes to achieve social good by conferring juridical personhood on fetuses. Such a designation will reduce violence against women, vindicate women’s rights, provide for monetary recovery through wrongful death awards, and punish criminal assailants. Society defines in order to achieve a certain social state, not to recognize an existing social being.

Limitations on fetal personhood also mirror the limitations on corporate personhood. Because the impetus for the designation is not the nature of the thing, but the desired social result, states are free to limit personhood designations as they see fit. This limitation is a consequence of the artificial entity theory of corporate personality. The artificial entity theory holds that the corporation is merely “a creature of state law, entitled only to rights the state chooses to grant, and subject to the removal of those rights.” In essence, juridical personhood applies only insofar as it is needed to solve the problem or achieve the social good at hand. This is why corporations receive some, but not all, property, due process, equal protection, and other personhood rights. For instance, the corporation cannot vote, it has no right to bear arms, and it is not protected against Fifth Amendment self-incrimination. None of those rights would be necessary to a corporation’s ability to sue in order to protect its assets in court. In the same way, fetal personhood need not be seen as a threat to Roe because it is limited to whatever legal capacities are needed in order to secure the discrete rights of the fetus’s mother. Arguably, all the

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125 See Rivard, supra note 92, at 1450–51 (arguing that the Supreme Court’s decision to grant corporations personhood was purely pragmatic and results oriented).
126 WILLIAM BLACKSTONE, COMMENTARIES *119 (emphasis added).
127 This type of definition is discussed by Dewey, supra note 124, at 660–61. But see Sanford A. Schane, The Corporation Is a Person: The Language of a Legal Fiction, 61 TUL. L. REV. 563, 594 (1987) (arguing that the Supreme Court must have taken into account the similarities between corporations and natural persons when deciding to confer personhood upon corporations).
128 See Dewey, supra note 124, at 661 (“[I]t is a matter of analysis of facts, not of search for an inhering essence.”).
129 See Rivard, supra note 92, at 1456.
130 Id.
131 See Berg, Of Elephants and Embryos, supra note 91, at 380–81.
132 See Rivard, supra note 92, at 1452–53.
133 See id. at 1454–55.
mother needs to vindicate those rights are penalties against the transgressor and recovery for loss. Feticide and fetal wrongful death statutes achieve both of these goals without reaching beyond their ken.

These different personhood theories help categorize fetal personhood so as not to conflict with reproductive rights. The law may call the fetus a person, but it does not mean a natural person with all of the guaranteed constitutional liberties (namely, the right to life). Instead, it refers to juridical personhood, a designation stemming not from the essence of the fetus but from the need to protect the interests of an existing natural person, the mother. The designation is based purely on desired consequences, and its reach can be limited as needed to achieve those discrete consequences. The key, then, is this: the law can logically refer to the fetus as a “person” and, at the same time, not grant it a constitutional right to life.

2. The Supremacy Clause: A Legal Trump Card

Even if a legislature wanted to create full fetal personhood, it would be without power to do so. Simply put: fetal laws do not confer personhood upon the fetus because procedurally, they cannot. No legislature is free to promulgate legislation that is incompatible with the federal Constitution; the Constitution is the “supreme Law of the Land.” The Supreme Court has already made clear that the fetus is not a “person” under the Constitution, and thus is not entitled to protection from deprivation of “life, liberty, . . . [or] equal protection of the laws.” Legislatives cannot declare otherwise, since this would be in derogation of the Constitution, as interpreted by the Supreme Court in Roe v. Wade.

Thus, if a legislature attempted to establish natural fetal personhood, its law would simply have no effect unless Roe’s essential holding was overturned. The Constitution is what the Court says it is, and legislatures are bound by the Constitution. This is true regardless of whether the offending statute is a state statute or a federal statute such as the Unborn Victims of Violence Act.

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134 U.S. CONST. art. VI, cl. 2; see also M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326–27 (1819) (“The constitution . . . declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land . . . .”)


136 U.S. CONST. amend. XIV, § 1.

137 Roe, 410 U.S. at 158.

138 Marbury v. Madison, 5 U.S. 137, 177 (1803) (establishing the principle of judicial review, that the courts have the power to decide whether a law conflicts with the Constitution).

139 See sources cited supra note 134.

Congress cannot pass legislation that is inconsistent with the Constitution any more than a state can. Congress has no power to contradict the Supreme Court’s interpretation of the Constitution, and the states cannot contradict any federal law at all (including the Constitution and its judicial interpretations). Ultimately, despite their best efforts, neither Congress nor any state may declare the fetus to be a natural person with Fourteenth Amendment rights. Quite plainly, a legislature cannot “add[] new persons to the constitutional population.” Because constitutional law is already settled on fetal non-personhood, and since the Supremacy Clause upholds the Constitution over all other law, no fetal personhood statute can have an effect that is contrary to Roe. Professor Ronald Dworkin puts it best: “If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.” Legislatures may speak as they wish, but the Supremacy Clause prevents their words from having any practical effect.

This argument is not purely theoretical; the Supreme Court has already reviewed statutory fetal personhood language and agreed that the language does not offend the Constitution. In 1986, the Missouri legislature passed a law declaring that “[t]he life of each human being begins at conception” and that the state shall “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.” Soon after the passage of this act, a group of abortion providers, including Planned Parenthood, brought

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141 See, e.g., City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (overturning the federal Religious Freedom Restoration Act as applied to state and local governments because it exceeded Congress’s enforcement power, as interpreted by the Court, under the Fourteenth Amendment).

142 See, e.g., Gonzales v. Raisch, 545 U.S. 1, 29 (2005) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”).

143 See supra note 19, at 173–74 (stating that Congress may not define fetuses as persons under the Fourteenth Amendment).


145 See id. (“[S]o long as [a] law does not purport to curtail constitutional rights . . . a declaration that a fetus is a person raises no more constitutional difficulties than states raise when they declare, as every state has, that corporations are legal persons . . . .”).

146 Id. at 401. Though Professor Dworkin is speaking about states, Congress is equally powerless to overrule the “national constitutional arrangement.” See supra note 143 and accompanying text.

147 MO. ANN. STAT. § 1.205(1)(1) (West 2000).

148 Id. § 1.205(2).
suit challenging the law as an unconstitutional restriction on abortion services and privacy rights.\(^\text{149}\) In upholding the statute, the Supreme Court reasoned that the law was merely enforcing tort and probate protections for fetuses, and that it could “do no more than that.”\(^\text{150}\) The Court stated that the Missouri legislature was simply expressing a “value judgment” through its statutory language.\(^\text{151}\) States are free to communicate their opinions on when life begins.\(^\text{152}\) However, such opinions do not confer personhood or challenge abortion rights. They are merely value judgments that do not, and because of the Supremacy Clause, cannot, threaten abortion jurisprudence.\(^\text{153}\)

3. \textit{One Word, Many Definitions}

Those who assume that feticide laws and abortion rights are irreconcilable overlook the fact that one word can have different meanings in different settings. They assume that if a state categorizes a fetus as a “person” under one discrete statute, the state must be designating the fetus a full, natural, and moral person in all settings—thus laying the foundation for fetal rights and abortion challenges. But wishing does not make it so. As Professor Walter Wheeler Cook warned long ago:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against.\(^\text{154}\)

The meaning of a word, especially one as nebulous and loaded as “person,” depends largely on narrow statutory context, and not broad lay connotations.

When the \textit{Roe} Court first took on the question of whether a fetus was a person under the Fourteenth Amendment, it was only concerned with a narrow interpretation of the word as used in the Constitution.\(^\text{155}\) Justice Blackmun looked first at the legal treatment of abortion during and after the ratification of the Fourteenth


\(^{150}\) Id. at 506.

\(^{151}\) Id.

\(^{152}\) See id.

\(^{153}\) Id.


\(^{155}\) Roe v. Wade, 410 U.S. 113, 158 (1973) (noting that an unborn child is not a “person” as that word is used in the Fourteenth Amendment).
Amendment. Then he looked to the Constitution for an interpretation of the word "person" and found that, although the Constitution gives no definition, it uses the word only in a postnatal sense. Essentially, Justice Blackmun's inquiry was two-fold: (1) whether the drafters of the Fourteenth Amendment would have considered the fetus a person and (2) whether the rest of the Constitution in fact considered the fetus a person. He was applying general principles of construction to interpret a word in one, and only one, context: the Fourteenth Amendment. Pro-life and pro-choice advocates should take such care today when considering the import of the word "person" as used in state fetal laws. Its meaning comes from legislative history and purpose, and applies only within that same legislation.

Another example may be illustrative. Consider Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, where the Supreme Court had to interpret a contextualized use of the word "person." The Court was faced with the task of determining whether a Native American tribe constituted a "person" under the federal § 1983 civil rights statute. Justice Ginsburg held that resolution of the issue did not depend "upon a bare analysis of the word 'person,'" but instead on "the legislative environment" surrounding the statute. The Court determined that the purpose of the statute was not consistent with a determination that the tribe counted as a "person," and it therefore declined to adopt such an interpretation. The majority also recognized that "the meaning of the same words well may vary to meet the purposes of the law."

Thus, it would be foolhardy for us to extrapolate constitutional personhood from the designation of a fetus as a person under a state criminal or tort statute. The purposes and implications of federal constitutional law are very different from those of state criminal and tort law. State fetal laws have a discrete social purpose. The laws punish violence against women, hold criminal defendants responsible for the full import of their acts, and recognize the rights of a mother in carrying her pregnancy to term. The Fourteenth Amendment,

156 Id. at 129–52.
157 Id. at 157.
158 See id. at 158.
160 See id. at 704.
161 Id. at 711 (quoting Pfizer Inc. v. Gov't of India, 434 U.S. 308, 317 (1978)).
162 Id. (quoting Georgia v. Evans, 316 U.S. 159, 161 (1942)).
163 Id. at 712.
164 Id. at 711 (quoting United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213 (2001)).
however, is a civil rights amendment that was enacted after the Civil War with the broad goal of establishing the full rights of constitutional personhood for those that did not already have them, namely, former slaves. Feticide laws are not in place to establish the general rights of personhood, or even to define who counts as a person for purposes of the Constitution. Indeed, courts have already recognized the discrete purposes of fetal laws. For instance, the Supreme Court of Illinois rejected an argument that Illinois’ feticide statute conflicted with its abortion statute, writing that the Fourteenth Amendment, as applied to abortion, is about “a woman’s right of privacy,” whereas feticide statutes are about “protect[ing] a pregnant mother and her unborn child from the intentional wrongdoing of a third party.” Simply put, just because two different sources of law (here, fetal homicide statutes and the Constitution) both use the same word (“person”) does not also mean that they both imply the same meaning of the word. That a fetus is a person for the purpose of state homicide charges does not make it a true, constitutional person. Those who advocate or bemoan such state legislation should beware their “tendency to forget the purpose of a classification and to assume without adequate discussion that a given word . . . has the same meaning in a number of different rules.”

States themselves already recognize that a statutory personhood designation only goes so far. In Wartelle v. Women’s and Children’s Hospital, Inc., the Supreme Court of Louisiana observed that “person” could mean one thing in one statute, and another thing within a different statute. In Wartelle, the plaintiff mother went to the defendant hospital to deliver her child. Due to poor monitoring by the hospital staff, the child was stillborn. The parents filed both a survival action and a wrongful death action against the hospital. The Supreme Court of Louisiana decided that, although a fetus was a person under the Louisiana wrongful death statute, it was not a person for purposes of a survival action, even though the two

165 Aljalian, supra note 110, at 496–97.
166 Of course, this does not stop certain legislators or pro-life groups from claiming, for the purposes of their agendas, that the laws do exactly that. See, e.g., Ramsey, supra note 16, at 723 & n.9.
167 See, e.g., People v. Shum, 512 N.E.2d 1183 (Ill. 1987).
168 Id. at 1199–1200.
169 Cook, supra note 154, at 338.
170 704 So. 2d 778, 782, 784 (La. 1997).
171 Id. at 779.
172 Id.
173 Id.
174 Id. at 782.
175 Id. at 782, 784.
claims are closely intertwined. The court was willing to consider the fetus a person for the purposes of only one statute. No meaning beyond that one statute was implied.

If the personhood designation in *Wartelle* could not even be extrapolated from a wrongful death action to a survival action, how can it possibly carry its meaning all the way to the United States Constitution? The Supreme Court of Louisiana correctly realized that “the classification of ‘person’ is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties,” and that it is not a “moral or philosophical judgment on the value of the fetus.” In other words, classifying a fetus in one statute does not determine what the status of the fetus is in a broader sense.

States passing fetal homicide laws actually make significant efforts to avoid being in conflict with abortion jurisprudence. Many, including California, condemn feticide without classifying the fetus as a person or human being. The California murder statute reads, in part: “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.” The drafting is not sloppy: the obvious implication is that California intended to indicate that the fetus was a separate entity, apart from a human being, that is protected from destruction. In fact, California courts have held that other statutes that include merely the words “human being” specifically do not apply to fetuses. For example, the California manslaughter statute states simply that “[m]anslaughter is the unlawful killing of a human being without malice.” The California Supreme Court made clear that this “human being” statute explicitly does not apply to fetuses, writing: “[T]he unlawful killing of a human being, or a fetus, with malice aforethought is murder, but only the unlawful killing of a human being can constitute manslaughter. There is no crime in California of manslaughter of a fetus.” Thus, at least in the state homicide laws, California intended to clearly distinguish between human beings on the one hand and fetuses on the other. This allows the state to punish

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176 See id. at 781 (noting that, although wrongful death and survivorship actions arise from a common tort, they are actually “separate and distinct” actions).
177 Id. at 780.
178 See, e.g., People v. Davis, 19 Cal. Rptr. 2d 96, 103 (Ct. App. 1993) (“While a previable fetus may not be a person for purposes of due process comparison with other fundamental rights, we see no impediment to the Legislature’s enlargement of the crime of ‘murder’ to include feticide.”), aff’d, 872 P.2d 591 (Cal. 1994).
179 See, e.g., CAL. PENAL CODE § 187(a) (West 2008).
180 Id. (emphasis added).
181 See, e.g., People v. Dennis, 17 Cal. 4th 468, 506 (1998) (holding that manslaughter does not apply to fetuses).
183 People v. Dennis, 17 Cal. 4th at 506 (internal citations omitted).
feticide but avoid the classification of the fetus as a full-on “human being.”

Other states, such as Kentucky and Louisiana, also distinguish the murder of a fetus from the murder of a person, but do so by drafting entirely new statutes to condemn the separate crime of feticide.\footnote{See KY. REV. STAT. ANN. §§ 507A.020-.030 (West 2006) (denominating fetal homicide as a different crime than murder); LA. REV. STAT. ANN. § 14:32.5 (2002) (defining feticide as its own separate crime).} Over sixty percent of states with fetal murder laws designate the fetus as a “human being” and not a “person” to avoid the personhood issue.\footnote{Ramsey, supra note 16, at 737.} In many instances, then, state statutes fail to even implicate personhood in the charge of feticide.

The majority of feticide laws also explicitly make an exception for abortion and refuse to punish any actions taken by the pregnant mother herself. Maryland does so frankly: “Nothing in [this fetal murder statute] applies to or infringes on a woman’s right to terminate a pregnancy.”\footnote{MD. CODE ANN., CRIM. LAW § 2-103(d) (LexisNexis 2002).} Similarly, Kentucky law provides that fetal homicide does not apply to “acts [that] were committed . . . during any abortion . . . [or] to any acts of a pregnant woman that caused the death of her unborn child.”\footnote{KY. REV. STAT. ANN. § 507A.010(2)-(3) (West 2006).} Wisconsin’s fetal murder statute likewise sets out that the law does not apply to any act “committed during an induced abortion.”\footnote{WIS. STAT. ANN. § 939.75(2)(b)(1) (West 2005).} Even Missouri, whose statutes have arguably the most pro-life language of all fetal laws,\footnote{See Ramsey, supra note 16, at 741 (noting that the Missouri statute “defines an ‘unborn child’ as a ‘person’ for purposes of homicide . . . and does not contain an explicit exception for abortion”).} proclaims that it will not act in abrogation of the Constitution or the decisions of the Supreme Court.\footnote{See Mo. REV. STAT. § 188.010 (2000) (noting the state legislature’s intent to regulate “to the full extent permitted by the Constitution of the United States [and] decisions of the United States Supreme Court”).} It would be strange to assume that laws which explicitly recognize abortion rights somehow craftily undermine them.

Ultimately, the word “person” is a legal term of art.\footnote{Cf. Wartelle v. Women’s & Children’s Hosp., Inc., 704 So. 2d 778, 782 (La. 1997) (holding that a fetus was a “person” under the state wrongful death statute but not the state survival action statute).} To say that it means the same thing in all contexts “would be to argue that because a wine is called ‘dry,’ it has the properties of dry solids.”\footnote{Dewey, supra note 124, at 656.} The term has no obvious or ordinary legal meaning, and courts must therefore construe it “in light of [the] purpose for which [a] statute

\begin{footnotesize}
\begin{enumerate}
\item See KY. REV. STAT. ANN. §§ 507A.020-.030 (West 2006) (denominating fetal homicide as a different crime than murder); LA. REV. STAT. ANN. § 14:32.5 (2002) (defining feticide as its own separate crime).
\item Ramsey, supra note 16, at 737.
\item MD. CODE ANN., CRIM. LAW § 2-103(d) (LexisNexis 2002).
\item KY. REV. STAT. ANN. § 507A.010(2)-(3) (West 2006).
\item WIS. STAT. ANN. § 939.75(2)(b)(1) (West 2005).
\item See Ramsey, supra note 16, at 741 (noting that the Missouri statute “defines an ‘unborn child’ as a ‘person’ for purposes of homicide . . . and does not contain an explicit exception for abortion”).
\item See Mo. REV. STAT. § 188.010 (2000) (noting the state legislature’s intent to regulate “to the full extent permitted by the Constitution of the United States [and] decisions of the United States Supreme Court”).
\item Cf. Wartelle v. Women’s & Children’s Hosp., Inc., 704 So. 2d 778, 782 (La. 1997) (holding that a fetus was a “person” under the state wrongful death statute but not the state survival action statute).
\item Dewey, supra note 124, at 656.
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was passed." Since different statutes have different objectives, what counts as a person for statute X may not count as a person for statute Y. This is especially so when a term is used in different pieces of legislation by two completely different legislative bodies (i.e., a state legislature and the federal Congress). Though the bodies use the same word, they do not necessarily apply the same meaning to that word. States may thus label a fetus as a person for any number of their laws, but this interpretation goes no farther than that specific state and its own statutes. It does not have implications for the meaning of "person" under the United States Constitution.

4. Personhood Is Categorization, Not Recognition

Fetal personhood designations are purely semantic. While states categorize the fetus in particular scenarios as it suits them, they do not recognize a general fetal status. If the fetus were generally considered a constitutional person, we would expect to see the law take a top-down approach. Courts and legislatures would begin with the maxim that the fetus is a full person and interpret or pass all laws accordingly. As discussed, this is not what most states are doing. Courts and legislatures do not ask once "Is the fetus a person?" and then apply their "Yes" or "No" answer uniformly to every situation they encounter. Instead, they ask again and again, "Is the fetus a person for the purposes of this statute?" It is those purposes that drive the laws, not the fetuses themselves. The fetus is recognized as a juridical entity that may be categorized as X or Y depending on the societal good that will result.

Again, consider California. The California homicide statute includes the killing of a fetus as murder. The California manslaughter statute, however, does not. Can we then claim that California is establishing natural fetal personhood, and waging war on Roe and its progeny? Certainly not. If California enacted its murder statute because of some moral notion that the fetus is a full constitutional person, then all state statutes would fall in line with this notion, and they clearly do not. The explanation must be that California, and other states like it, are not imposing or even

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193 O’Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983) (finding that, in light of legislative objectives, a fetus was a "person" under the Missouri wrongful death statute).

194 Arguably, there are some outliers, such as Missouri, which does attempt to impose a uniform treatment of the fetus throughout its entire code. Mo. REV. STAT. § 1.205(2) (2000) (stating that "[u]nborn children have protectable interests in life, health, and well-being").

195 See CAL. PENAL CODE § 187(a) (West 2008).

196 See CAL. PENAL CODE § 192 (West 2008); see also People v. Dennis, 17 Cal. 4th 468, 506 (1998) (stating that California does not recognize fetal manslaughter, only fetal murder).
recognizing fetal personhood; instead, they are categorizing in order to achieve discrete social benefits in narrow circumstances.

Imagine a new state, State X, has recently come into being and is developing a penal code. State X has a big crime problem: its criminals are rampantly killing both citizens and pet dogs. The legislature decides to do something about this problem. It passes a murder statute, which states in part: “The killing of a person is murder.” Imagine that the state’s supreme court, in line with documented legislative intent, subsequently decides that a pet dog counts as a “person” under the murder statute. Either one of two things has happened here. First, the state may have acted because it believes that pet dogs are so morally similar to humankind that they, are actually and innately persons. Second, and considerably more likely, the state acted because it wanted to achieve a noble good: to stop the killing of pets. Undeniably, this second possibility shows that the state clearly values dogs, and places considerable importance on their life and worth. What it does not mean, however, is that the state is recognizing dogs as “persons” in any natural, much less constitutional, sense of the word. The state is merely categorizing. It is using an easily applicable and pre-existing mode of punishment to reach its goals. Categorization does not confer personhood rights. Similarly, when states punish feticide as murder or categorize the unborn as “persons,” they punish a bad act, they protect pregnant women, and they work towards a laudable social goal. They do not, however, give fetuses personhood rights any more than State X created full dog personhood.

B. Why Fetal Statutes Are Not at Odds with Roe

1. What Roe Recognizes

To understand why fetal statutes do not conflict with Roe, one must first look, in general terms, at what the seminal abortion cases did and did not do. Roe v. Wade established a trimester framework for abortion regulation. During the first trimester, the state cannot interfere with a woman’s ultimate choice to obtain an abortion. Past the point of fetal viability, however, Roe gives states the right to regulate and even prohibit abortion. In Planned Parenthood of


\[198\] Id. at 164.

\[199\] Id. at 164-65. However, the states are not allowed to do so if abortion is necessary to protect the life or health of the mother. Id. at 165.
Southeastern Pennsylvania v. Casey, the Supreme Court again upheld the right of the mother to choose abortion pre-viability and the right of the state to regulate or proscribe abortion post-viability. Both cases recognize that states have an "important and legitimate interest in potential life." Although this interest does not become compelling enough to override the mother's right to privacy and abortion until the point of viability, states still have interests in fetal life throughout the duration of the pregnancy. What neither decision states, however, is that the fetus has an interest in life. The interests belong to the state, not the fetus. In their strictest terms, Roe and Casey are not cases pitting fetal rights against women's rights. Instead, they put women's rights up against the government's interests. The Supreme Court explicitly described the fetus as a "potential life," and made no mention of the rights of such a potential human. As Professor Jed Rubenfeld noted, the fetus has at most "potential interests," which are those "interests that the potential life would have if it became actual." By designating the fetus as potential, and not actual, life, the Court implicitly denied the notion that fetal rights are at stake. "A potential thing cannot be said to possess the very attributes that distinguish it from the actual." The only interest that can trump women's privacy is a state's compelling interest in potential life, not a fetus's interest in actual life. In sum: (1) the state has an interest in fetal life, but the fetus does not have its own interest in life; and (2) that right exists throughout pregnancy and is only limited by the competing rights of the mother herself.

2. Detached State Action: The State as the Holder of Rights

Perhaps part of the inability of commentators to reconcile abortion rights with fetal laws is that they assume that when states legislate to protect potential life, they do so on behalf of the potential life. Actually, when a state legislates about the fetus, it does not

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201 See id. at 846.
202 Roe, 410 U.S. at 163; see also Casey, 505 U.S. at 846 ("[T]he State has legitimate interests . . . in protecting . . . the life of the fetus that may become a child.").
203 Roe, 410 U.S. at 163.
204 Casey, 505 U.S. at 846. This means that the state has a cognizable interest in fetal life even pre-viability. See id. (noting that the state has a legitimate interest in protecting the life of the fetus "from the outset of the pregnancy"); Webster v. Reprod. Health Servs., 492 U.S. 490, 519 (1989) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability . . . ").
206 Id.
207 See Casey, 505 U.S. at 846.
necessarily do so for the fetus, but for itself. Roe and Casey both recognize that the state has its own legitimate interests in potential life. Professor Ronald Dworkin has termed this kind of state action “detached,” as opposed to “derivative,” action. He notes that states may assert two very different motives for criminalizing murder. First, they may act derivatively, in order to protect the rights of citizens for the citizens. Here the state acts because the citizen himself has rights to assert, and the state is a vehicle for the protection of the citizen’s own natural liberties. In contrast, the state may also act detachedly, to protect human life as a good in and of itself, “quite apart from its value to the person whose life it is.” If the state is acting derivatively in passing fetal legislation, then yes, the state may be assuming the fetus has rights already. But this is not necessarily the case. The state can act in its detached capacity, where it takes the same action without recognizing any rights in the object of its law. Therefore, feticide statutes do not automatically imply a grant of fetal rights. They simply suggest a state assertion of interest in fetal life. The state can assert its own interests, apart from any the fetus may or may not have. It is entirely possible, then, as Roe and Casey both recognize, that states can protect fetuses even in the complete absence of fetal rights.

3. Protection Does Not Imply Personhood

In the same vein, to reconcile abortion rights with fetal laws, we must recognize the simple principle that merely protecting an entity from destruction does not mean that the entity itself has rights. Natural tendency may be to assume that if a state protects an entity from death, it must be doing so because that entity has a right to life. However, the state can, and legitimately does, protect non-persons from destruction. Personhood is not a prerequisite to state protective action; being a non-person does not equate to being a “legal nonentity.” The Eleventh Circuit recognized that fetal

208 Dworkin, supra note 144, at 396.
209 Id.
210 Id.
211 Id.
212 Id. at 397.
213 See Rubenfeld, supra note 205, at 610 (noting that a state has several identifiable interests in the potential life of a fetus that are independent of any rights that the fetus may have).
214 See Dworkin, supra note 144, at 402.
215 See, e.g., O’Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983) (holding that Roe does not mandate that a fetus be considered a non-person or “legal nonentity” under state wrongful death statutes). The late Professor John Hart Ely also pressed the point that even non-persons deserve protection: “Come to think of it, draft cards aren’t persons either.” Ely, supra note 89, at
personality "is simply immaterial . . . to whether a state can prohibit the destruction of a fetus."216 This is because the state can have interests in non-persons, and destruction of those non-persons may offend these state interests to such a degree that the state has a legitimate reason to act.217

Take, for example, endangered species laws. One cannot kill an endangered species,218 but that does not automatically make the animal a possessor of rights, much less a "person." After all, we still lock endangered species in zoos without giving them "due process." Instead, what is at work here is the state protecting its own interests. The state takes an independent interest in the preservation of our planet and its wildlife. It is not acting as a surrogate for mother earth to assert her own rights.219

We can view fetal murder laws in the same light. Communities have an important interest in "protecting the sanctity of life [and acknowledging] that human life in any form has enormous intrinsic value."220 These ideals promote compassion and welfare. Upholding these ideals does not mean that the object of destruction has rights, just that the state hopes to achieve a social good by prohibiting the object's termination. Roe explicitly gave states the right to pursue such social goals with regard to fetuses: the Court clearly asserted that the state can have a "detached" interest in fetal life.221 When we recognize that feticide laws express that state interest, instead of any interest of the fetus itself, it again becomes clear that fetal murder laws do not challenge abortion rights.

4. The Woman and the State Are Not at Odds

Another central tenet of abortion case law helps elucidate how fetal murder laws do not conflict with abortion jurisprudence. The Supreme Court has concluded that the state interest in potential life exists throughout pregnancy and is limited only by the rights of the...
Abortion is a balancing act: whoever's rights are the most compelling gets to make the decision. Fetal statutes, in contrast, do not deal with this balance. When a pregnant woman is the victim of violence and loses her pregnancy, her rights are not at odds with the interests of the state. Both have the same goal of protecting the potential life. Where there is no conflict with the mother's autonomy, the state may act as it wishes to vindicate its recognized interests in fetal life, and its action does not implicate Roe. As one scholar has observed, "[I]n those settings where the state's interest in potential life is not counterpoised by any individual's constitutionally-protected interest, the state's interest could easily prevail." If the mother is not interested in abortion, and her rights are not in play to limit the state interest, the state may act to protect the potential life at any point, without challenging reproductive rights.

Courts have already used this line of reasoning when asked to rule against fetal personhood designations. Many decisions have recognized that limits on the state apply only when the mother's autonomy is at issue, which is not the case with fetal murder laws. In Smith v. Newsome, the Eleventh Circuit refused to find a Georgia feticide statute at odds with Roe. The defendant in Newsome claimed that the statute was unconstitutional because it contradicted Roe's holding that a fetus was not a person under the Fourteenth Amendment. The court quickly and easily dismissed this argument, claiming that Roe's holding was "immaterial" as applied to the case at bar.

The constitutional limitations upon a state's right to prohibit the destruction of a fetus come into play when the state's

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223 See Patricia A. King, The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn, 77 MICH. L. REV. 1647, 1678 (1979) ("Where the protectable interests of fully mature members [of society] do not conflict with those of less mature members, there is no justification for ignoring the latter's claims. . . . In tort, property, and criminal law, when that interest does not oppose a protected interest of the mature mother, the state should not hesitate to vindicate it.").
225 In fact, as I will argue later on, feticide statutes actually promote the reproductive interests of the mother. See infra Part III.
226 See, e.g., State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990) (upholding the constitutionality of unborn child homicide statutes because the statutes "seek to protect the 'potentiality of human life,' and they do so without impinging directly or indirectly on a pregnant woman's privacy rights."); Bailey v. State, 191 S.W.3d 52, 55 (Mo. Ct. App. 2005) (denying defendant's argument that a fetal murder charge is at odds with Roe or Webster).
227 815 F.2d 1386 (11th Cir. 1987).
228 Id. at 1388.
229 Id.
interest conflicts with certain constitutional interests of the mother. . . . A mother’s interests are in no way infringed upon by the statute in question. 230

The Supreme Court of California reached the same result in People v. Davis. 231 There, the defendant had shot a pregnant woman during an armed robbery. 232 As a result of the woman’s injuries, her fetus was stillborn. 233 The defendant argued that the state could not prosecute him for fetal murder because the stillborn fetus could have been otherwise legally aborted under Roe. 234 The California Supreme Court rejected this argument, writing: “Roe . . . forbids the state’s protection of the unborn’s interests only when these interests conflict with the constitutional rights of the prospective parent. The [Roe] Court did not rule that the unborn’s interests could not be recognized in situations where there was no conflict.” 235 The Roe decision only deals with the specific situation of abortion, where a mother’s rights are at issue. 236 Fetal murder statutes, however, deal with the state’s recognized interests, where the mother’s rights against the state are not being challenged. These statutes are outside the scope of Roe and do no injustice to its holding.

5. The Woman and the Attacker Are Not Similar Actors

Furthermore, fetal laws do not challenge abortion rights because, although each act results in the same end (the destruction of the fetus), the actor is different in each scenario. Feticide laws and the right to abortion are based on the rights of the actor, not the rights of the object. In each scenario, the actor is a different person with a different set of rights. With abortion, the woman, through her authorized doctor, is the actor. With fetal murder, a third person, who does not have the same rights as the woman, is the actor.

Throughout the law, when different actors engage in exactly the same behavior, one may get penalized while the other may not. The reason is because Actor A may have affirmative rights to act in a certain way, whereas Actor B has no rights to perform the same act. Obvious examples abound. I can drive a car on public roads. My eleven-year-old niece cannot, even if she does so perfectly. We each

230 Id. at 1388 n.2.
231 872 P.2d 591 (Cal. 1994).
232 Id. at 593.
233 Id.
234 Id. at 597.
235 Id. (quoting Pamess, supra note 224, at 144).
236 See Forsythe, supra note 40, at 616; Pamess, supra note 224, at 97.
do the exact same thing. One act is criminal, one is not. Note that the penalty does not depend on the right of the car to be driven. If it did, there would not be a meaningful distinction between my niece and me, except insofar as the car gave either of us its consent. The penalty depends on the rights of the actor, not the rights of the object.

Here is another example. If my dogs grow old and sickly, I may (reluctantly) choose to put them to sleep. My neighbor, who may see my dogs suffering, cannot come in and euthanize them on her own. Although the end-result (destruction of the dogs) is the same, the act is not the same in character. I have the right to put my dogs down. Someone else does not possess that same right. It would be foolish to claim that because my neighbor cannot put my dogs down, my ability to do so is somehow threatened. This would be true only if the prohibition against my neighbor was due to the legal status of the dog, and not the legal rights of the actor.

Now apply this scenario to fetal murder laws. The law says that the woman can abort her fetus, but a third party abuser cannot. Is this hypocrisy? Is it legal schizophrenia? Do the limitations on the aggressor somehow imply limitations on the mother? No, no, and no. The permissions of the mother and the limitations on the criminal depend on the rights of the respective parties, not the rights of the object being acted upon. Roe grants the mother alone the right to consent to abortion. She, and only she, holds that right. An abusive third party does not. We need not assume that limitations on a criminal abuser create constitutional fetal personhood. They mean nothing more than the simple fact that different actors have different rights; a third party bad actor has no right to terminate someone else's pregnancy.

This idea has been used again and again by courts to quash equal protection challenges to fetal murder laws. Criminal and civil defendants, when faced with charges of either feticide or fetal wrongful death, often plead that the charges are a violation of equal protection. In People v. Ford, for example, an Illinois court

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237 See State v. Holcomb, 956 S.W.2d 286, 292 (Mo. Ct. App. 1997) (“It is basic doctrine . . . that Roe limited to the mother the legal right to consent to the destruction of the unborn child.”).

238 See Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 791 (S.D. 1996) (“A choice to abort sanctions a mother’s decision, not someone else’s.”).

239 See, e.g., Holcomb, 956 S.W.2d at 290–91 (“Holcomb argues that his rights under the . . . equal protection clause of the fourteenth amendment are violated by an arbitrary and unreasonable decision to prosecute him for murder when someone else performing an unlawful abortion would not be so prosecuted.”); State v. Alfieri, 724 N.E.2d 477, 482 (Ct. App. Ohio 1998) (arguing that state’s fetal manslaughter statute violated equal protection since a pregnant mother was exempt but the defendant was not); Commonwealth v. Bullock, 913 A.2d 207, 215 (Pa. 2006) (analyzing the defendant’s argument that the state feticide statute violated equal
relied on the differences between a mother and a criminal attacker to find that feticide and abortion do not require the same penalty. The Ford defendant argued that the Illinois fetal homicide statute violated his federal equal protection rights because a woman could legally end her pregnancy, while he faced serious penalties for doing the same thing. Essentially, the defendant was arguing that he and the pregnant woman were "similarly situated persons being treated dissimilarly." The Illinois court disagreed: "Clearly, a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated. . . . A woman has a privacy interest in terminating her pregnancy; however, defendant has no such interest." Ultimately, the decision of the court rested on the respective rights of the parties, and simply put, the third-party did not have the same privacy liberties as the pregnant woman. As noted by the Supreme Court of Minnesota, "Roe v. Wade protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus." Fetal rights are not even a factor, much less a potent reality.

If we take this actor distinction one step further, we come to the issue of consent. Forgetting entirely that the fetus even exists, abortion is a medical procedure performed on the autonomous body of a pregnant woman. Bodily invasion requires consent. This is the very difference between a battery and a hug. When a woman chooses abortion, she consents to the actions taken upon her body. Women do not consent to brutal attacks that end their pregnancies.

Consent alone is enough to distinguish the act of abortion from the act of feticide. A Missouri appellate court recognized this same consent distinction when faced with an equal protection challenge to a feticide charge. Instead of arguing that he should be treated the

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241 See id. at 1199–1200.
242 Id. at 1199.
243 Id.
244 Id.
245 See also State v. Coleman, 705 N.E.2d 419, 421 (Ct. App. Ohio 1997) ("[Q]uite simply, there has never been any notion that a third party . . . has a fundamental liberty interest in terminating another's pregnancy.").
246 State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990) (denying the defendant's equal protection challenge to a fetal homicide charge).
247 See Winston v. Lee, 470 U.S. 753, 764–66 (1985) (holding that police could not force a suspect to submit to surgery without his consent in order to extract a bullet as evidence).
same as a pregnant woman, the defendant in the case argued that he
should receive the same penalty as one who performs an illegal
abortion.\textsuperscript{249} In Missouri, it is a felony for anyone other than a licensed
physician to perform an abortion.\textsuperscript{250} The defendant claimed that he
was simply performing an unlicensed abortion, not committing a
murder, and that it violated his equal protection rights to treat the two
arguably identical acts with drastically different penalties.\textsuperscript{251} The
court held that the difference in treatment was not arbitrary, and thus
not unconstitutional, because the mother did not consent to his
actions.\textsuperscript{252} In contrast, “the [Missouri] abortion statutes assume the
actual or apparent consent of the mother.”\textsuperscript{253} Over and over, courts are
acknowledging the differences between feticide laws and abortion
rights; here the distinction is based on lack of consent of the pregnant
woman.

\textit{C. The Power of Language}

Although this Note contends that a personhood designation is little
more than a signal of legal protection for those other than the fetus, it
is not blind to the weight of the word itself. The term “person” is
morally, religiously, historically, and socially loaded. It may be
legally non-judgmental, but it certainly has moral undertones. As one
writer claims, “When law uses the metaphor ‘person’ to define its
object, that metaphor acts as a vehicle for expressing beliefs and
values about persons, both [juridical] and natural.”\textsuperscript{254} This, of course,
is undeniable. Imagine if the President of the United States renamed
himself the “God” of the United States. The name change might not
alter the legal rights and duties of the President, but it definitely
packs a heavier punch. This does not mean that feticide laws are
normatively neutral on the issue of abortion; it merely shows that the
laws do not have the legal force of conferring natural personhood on
the fetus, or of diminishing the rights of women. Opponents of these
laws would be quite justified in attacking the value, status, or morals
that may be lurking behind the designation. However, a mere pro-life
motive does not translate into a legal threat to \textit{Roe}. States are allowed
to express their preferences and beliefs, but personal values do not
create legal capacity.\textsuperscript{255}

\begin{footnotes}
\textsuperscript{249} Id. at 292.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 290–91.
\textsuperscript{252} Id. at 292.
\textsuperscript{253} Id.
\textsuperscript{254} \textit{Language of a Legal Fiction}, supra note 96, at 1761.
\textsuperscript{255} But see id. at 1765–66 (arguing that state language may not only express values, but
\end{footnotes}
III. Fetal Laws Actually Promote Reproductive Autonomy

It is not enough to say simply that fetal murder laws do not conflict with abortion rights. In truth, feticide laws actually promote and protect the reproductive autonomy of women. Colloquially, phrases such as "reproductive choice" or "women's rights," have become synonymous with "abortion rights." Almost always, when people speak of a woman's "choice," they refer to her choice to abort. Of course, abortion is an integral part of reproductive choice. However, it is not the only part. An equally essential component of reproductive choice is the right to bear a child, to be pregnant, and to carry one's child to full term.

True, Roe was a decision about abortion, but it also affirmed a larger "liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child." Reproductive liberty extends to the decision to continue a pregnancy as much as it does to the decision to end one. Otherwise, "the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." As the Supreme Court noted in Casey, judges have previously relied on Roe to support a woman's right to bear children. In Avery v. County of Burke, for example, the Fourth Circuit recognized Roe's "right of procreation" in condemning a county agency that wrongfully pressured a young girl to undergo sterilization. Likewise, the Eleventh Circuit, in Arnold v. Board of Education, relied on Roe when holding that school officials violated the Constitution when they induced a minor to have an abortion. The court recognized procreation as a corollary-Roe right, asserting:

Resolution of the childbearing decision embraces two alternatives, those of aborting the child or carrying the child.
to term. Both alternatives enjoy constitutional protection from
unwarranted governmental interference. While the cases in
this area have dealt primarily with governmental interference
with the abortion alternative, we fail to see how the attention
given the decision to abort in any way diminishes the
protection which should be given the decision to carry the
child to term. We need not create a new constitutional right
to protect Jane Doe’s freedom to choose to carry her child
to term; we merely refocus the emphasis concerning this
freedom of choice from the alternative of abortion to the
alternative of procreation. There simply can be no question
that the individual must be free to decide to carry a child to
term.\footnote{Id.}

The rights of privacy and reproductive liberty encompass the right
to bear children.\footnote{See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means
anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion
into matters so fundamentally affecting a person as the decision whether to bear or beget a
child.” (second emphasis added)).} Without these rights, the state would have a better
argument for forcibly sterilizing people or subjecting “unfit” women
to involuntary abortion.\footnote{State sterilization is of course illegal, again because of a concern for personal liberty.
Justice Douglas wrote that state sterilization amounted to an eternal “depriv[ation] of a basic
liberty,” Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).} Would this not also be an affront to
women? Fetal murder and wrongful death laws are a legitimate way
for the state to protect this aspect of reproductive autonomy. If Roe
primarily holds that the state cannot force pregnancy on women,
fetal laws promote an equally important converse: that third-party
assailants cannot force a woman not to have a child.

If reproductive law is about autonomy, we should expect it to
protect any reproductive future a woman holds for herself. Justice
Ginsburg has expressed how reproductive autonomy is, at its most
basic level, about putting a woman “in control of her destiny and
her place in society.”\footnote{Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. REV. 1185, 1199
(1992). Justice O’Connor also wrote from the bench in Casey that reproductive decisions
implicate the overall destiny of a woman. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S.
833, 852 (1992); id. at 869 (O’Connor, Kennedy & Souter, J.J.).} Part of what abortion decisions recognize
is the right of a woman to be in charge of how her life unfolds.\footnote{See Ruth Bader Ginsburg, Essay, Some Thoughts on Autonomy and Equality in Relation
to Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985).} For some women, this means not having children at a certain time,
with a certain person, or ever. However, for many other women, this
means a future with children. Fetal laws only protect women seeking such a life.

Imagine for a moment that the states concede to the arguments of some feminist scholars and activists that fetal laws are bad for women's autonomy. Assume that these states then decide to redact all feticide laws and overturn all decisions allowing recovery for the wrongful death of a fetus. Under the new law, fetuses are defined purely as pieces of property, or extensions of a woman's own body. Then, if a woman was attacked and lost her pregnancy, she may have a case for personal battery, and maybe even destruction of her personal property. Is this a victory for women? Query who stands to lose the most from this approach. Abusive husbands? Murderers? Rapists? Arguably those populations would gain from such a change in the law. Those who would be most adversely impacted, however, are the very people feticide laws seek to defend: the pregnant women.

Consider a woman who is two, five, or even eight months pregnant, and who suffers a stabbing, beating, and raping at the hands of a jealous ex-boyfriend who decides that "his woman" will not be having another man's baby. How does the law best value her fundamental right, her innate liberty, to reproduce? By not recognizing the destruction of her unborn? By treating it as though it were any other piece of property—a car, a bracelet, a T.V. perhaps? By chalking it up to just another episode of domestic violence? Compare how the law will make her whole under such an interpretation versus under the application of a feticide charge. Imagine the insult she may suffer if the law fails to punish those who take away the other half of her reproductive liberty. The irony is that those who oppose fetal laws in the name of women's rights risk cutting at the very liberty they presume to promote.

**CONCLUSION**

America need not polarize every issue regarding pregnancy into a debate over abortion rights. Yet, in the realm of fetal legislation, a fearful pro-choice contingent and a hopeful pro-life community have each done their part to insert abortion politics into otherwise clear issues of state interests and women's safety. Fetal laws are not inherently opposed to *Roe* or abortion rights. Although statutes and judges use the language of personhood, their words do not have constitutional ramifications. This shallow personhood categorization is merely a shorthand way of "describing a complex network of rights and duties that it would be impossible to describe in any other way, not . . . a means of curtailing or diminishing constitutional rights that
real people would otherwise have.”\textsuperscript{271} The fetus is not a person in the natural sense, and no legislature has the power to declare otherwise. Instead, the fetus is a juridical person, designated as such so that a state may assert its own interests in life and achieve certain social goods. Labeling the fetus a “person” for purposes of these state interests does not mean that the fetus is a person under the Fourteenth Amendment.

Women’s-rights activists should not reject feticide laws—they should embrace them. Those who do violence to pregnant women do not have the same rights with respect to the fetus as the mother does. Their punishment is just, and does not affect a woman’s right to otherwise consent to abortion. If we refuse to fully protect the unlawful termination of pregnancy, we do a great disservice to the much-ignored corollary of Roe: the right of women to enjoy and complete their pregnancies.

Pro-choice Americans have been led, unnecessarily, to fear fetal legislation for years, and for years, states have extended protection to fetuses through homicide and tort laws. The question that arises is exactly how direct is a threat that has existed for decades but has never had any hope of overturning Roe? In the end, reconciliation of feticide laws and abortion rights is entirely possible for those who want it. Unfortunately, lawyers and politicians have a hard time resisting a good fight, especially when they think there is ground to be gained. And so the myth of fetal personhood drags on, not as a legal reality, but as a divisive and impassioned political tool.

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\textsuperscript{271} Dworkin, \textit{supra} note 144, at 400.
\textsuperscript{†} J.D. 2010, Case Western Reserve University School of Law.