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FROM STATE OF CALIFORNIA V. SCOTT PETERSON TO STATE OF UTAH V. MARK HACKING WILL MORE STATES ADOPT FETAL PROTECTION LAWS?

April Walker*

Introduction

Roe v. Wade sparked the flame igniting widespread interest in the issue of fetal protection.¹ Much of the debate centered on a woman's right to choose. *Roe* exhibited a prevalent sentiment toward individual rights that existed during the 1970s. The individual rights of persons were paramount during this time period and many individual rights movements were enjoying success. The *Roe* court cemented the sentiment by recognizing that women have an individual right to determine whether or not to have an abortion.² Consequently, *Roe* diminished the standing of many abortion laws.³

However, since the 1970s, fetal protection laws have reclaimed some of the standing lost within the *Roe* decision, specifically in criminal codes and statutes addressing third party action against the fetus. Today, however, fetal protection laws differ in their focus. The issue of a woman's choice is not at the heart of the debate, because in many cases, the woman's choice is preempted by a third party murdering of the fetus.⁴ A recent rise in spousal homicides has highlighted state implementation of fetal protection laws throughout the country, and indeed, in February of 2005, ABC News reported that with the exception of medical complications, murder was the primary cause of death of pregnant women.⁵ Although fetal protection laws differ from state to state, each seems to share a common goal of protecting the mother and unborn fetus from third party harm.⁶ Therefore, crimes against a pregnant woman and her unborn child have been included in fetal protection statutes.⁷

Attention to fetal protection laws has increased with the rise in spousal homicide rates. Widely publicized incidents of the murders of pregnant women by their significant others have inflamed public passions and reignited interest in the issue of fetal protection. In 1999, many people were astonished when news reports revealed that professional athlete Rae Carruth was charged with conspiracy to murder his pregnant girlfriend and unborn

child because of her refusal to have an abortion.⁸ In 2002, Paul Nino Tarver of Ohio was convicted of aggravated murder of his unborn child and felonious assault of the mother of the child.⁹ Perhaps the most famous incident was the December 2002 murder of Laci Peterson and her unborn child.¹⁰ In 2004, the world was shocked again when Mark Hacking of Utah was arrested and charged with the aggravated murder of his pregnant wife Lori Hacking.¹¹ In Texas in May of 2004, Gerardo Flores was convicted of two counts of capital murder and sentenced to life in prison for the death of his two unborn children.¹² Unfortunately, high profile murder cases have been an important factor in recent scholarship regarding the validity and possibility of fetal homicide. Particularly, can one murder a fetus? Constitutionally, can a third party be punished for an act that a mother can commit? This article will explore these questions. It will also address the differences in fetal protection laws across the country while analyzing some of the aforementioned highly publicized cases. To explore this conundrum, some background on feticide and its legal elements is necessary.

Defining When Fetal Protection Laws Apply

As noted above, the application of fetal protection laws is becoming more prevalent.¹³ The controversy lies in whether or not a fetus is legally considered a person and, therefore, can be considered a victim of a crime. Concurrent with analyzing the fetus' status as a person is the consideration of the definition of life. More specifically, the 'life' analysis addresses the instant at which a fetus is considered a person and therefore becomes subject to victim status. Courts have attempted to outline a definitive standard for determining the fetus' status as a person. However, the earliest instance of human status for fetuses can be traced to common law principles.¹⁴

In traditional common law, the doctrine of 'quickening' was introduced to help determine the moment at which a fetus gained human

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status.¹⁵ ‘Quickening’ is defined as the “period prior to viability when the mother first feels the fetus move in the womb, which is usually between the sixteenth and eighteenth week of pregnancy.”¹⁶ Further, once ‘quickening’ occurred, the traditional common law jurisdictions provided basic criminal protections for fetuses.¹⁷ Because ‘quickening’ was not precisely dispositive of the fetus’ viability, the common law required that the child be born alive and subsequently die of injuries sustained because of the defendant’s actions to receive protection under homicide laws.¹⁸ Therefore, the ‘born alive’ rule was created and became the first barometer for determining the fetus’ human status for purposes of charging defendants with homicide. In 1850, American jurisdictions began to adopt the ‘born alive’ rule.¹⁹ In *Roe*, however, the Supreme Court defined viability as “the period at the end of the second trimester of pregnancy when the fetus is capable of surviving outside of the womb.”²⁰ The *Roe* court seems to determine the human status of a fetus from a more scientific and objective calculation. Conversely, the common law ‘quickening’ doctrine suggests a less scientific calculation of human status. Because of the certainty attendant to the *Roe* test of human status, states have since used the *Roe* test as the barometer for determining the viability of fetuses when crafting fetal protection laws.²¹

Feticide Laws/Fetal Protection Laws

The treatment of feticide by statute varies from state to state. Some states apply murder statutes to punish persons for killing fetuses while other states adhere to the “born alive rule.”²² For example, in Massachusetts, South Carolina, and Oklahoma, common law murder has been applied to the killing of a fetus.²³ In Minnesota²⁴ and California, however,²⁵ statutes classify the killing of a fetus as murder.

The law in Minnesota represents the most radical treatment of the killing of a fetus because it applies murder statutes at the time the fetus is conceived.²⁶ The Minnesota statute has been reviewed by the Minnesota court system in *State v. Merrill*.²⁷ In *Merrill*, the court addressed whether the appellant’s due process and equal protection rights were violated due to doctors and mothers being exempt from the Minnesota statute.²⁸ The court held that Minnesota’s interest in protecting unborn fetuses is distinguishable from a mother’s abortion rights and therefore, the appellant’s due process and equal protection rights were not violated.²⁹ The court

went on to say that the viability of a fetus is not dispositive because criminal liability only requires conception.³⁰ This illustrates Minnesota’s unique version of feticide.³¹

The classic California case, *Keeler v. Superior Court of Amador County*, set the tone for punishment of the crime of infanticide.³² The *Keeler* court was unwilling to exceed its judicial and constitutional authority. This was probably due to the first impression nature of the *Keeler* case. As previously mentioned, the *Carruth*, *Peterson* and *Hacking* cases are all relatively new cases compared to the 1970 ruling of *Keeler*. Therefore, the unprecedented opinion in *Keeler* set the tone, via Justice Burke’s dissent, to amend §187 of the California Penal Code to include fetuses.³³ In *Keeler*, a husband confronted his wife who was pregnant with another man’s child and kneed his wife in the abdomen.³⁴ The husband told his wife that he was going to stomp the baby out of her: “‘I hear you’re pregnant,’ glanced at her body and added, ‘You sure are. I’m going to stomp it out of you.’”³⁵ The woman was thirty-five weeks pregnant.³⁶ When she arrived at the hospital,³⁷ the emergency room health care providers performed a caesarean procedure, which produced a stillborn child with a fractured skull.³⁸ Keeler was charged with murder pursuant to California’s Penal Law §187, which defines murder as “the unlawful killing of a human being, with malice aforethought.”³⁹ In a 5-2 decision, the California Supreme Court held that § 187 could not apply to the *Keeler* case because the child was not born alive.⁴⁰ Up until that time, the act committed in the *Keeler* case was classified as feticide, “which was not a crime under California law.”⁴¹ As a result of the *Keeler* decision, §187 was amended.⁴² Since *Keeler*, the California Supreme Court has applied the crime of murder to the killing of a fetus as young as seven weeks old.⁴³

Generally, states are divided into those with a “born alive rule” and those who punish defendants convicted of killing a fetus. The origin of the common law born alive rule can be traced to England.⁴⁴ The rule is premised on the medical technology of the sixteenth and seventeenth centuries.⁴⁵ The common law born alive rule set forth that live birth, regardless of the age of the fetus, was the moment when actual life could be observed from a clinical standpoint.⁴⁶ It was difficult for early medical technology to distinguish between death from natural causes and injuries inflicted on the fetus while still in the womb.⁴⁷ This common law notion persisted into the seventeenth century, and it was generally held that the killing of an unborn fetus was not murder.⁴⁸

This common law born alive rule continued on into the eighteenth century as well.⁴⁹

Many American states adopted the English born alive rule.⁵⁰ A North Carolina court considered applying the born alive rule in *State v. Beale*. Mr. Beale was indicted for the murder of his wife and unborn child when he fired a shotgun at his wife.⁵¹ The North Carolina Supreme Court held that the state's murder statute did not include the killing of an unborn viable fetus, even though the court previously recognized a viable fetus as a person under the state's wrongful death statute.⁵² The court held that the state's criminal statute specifically excluded a fetus as a victim and noted that the legislature could have amended the murder statute to correct this problem, but it did not.⁵³ Courts in Alabama, Kentucky, Maryland, New Jersey, New York and Texas maintain the born alive rule, but have held that if a fetus is injured prior to birth and then dies, the offender may be charged with homicide.⁵⁴ Additionally, some states require the fetus reach a certain stage of development.⁵⁵ The issue of determining whether a fetus is a human being relates to the debate surrounding the abortion controversy.⁵⁶ More illustrative, the *Roe* court outlined the standards on which many jurisdictions base their fetal homicide laws.⁵⁷ Furthermore, the *Roe* Court announced and cemented the government's interest in protecting fetal rights.⁵⁸ Consistent with the Court's public policy argument, twenty-six states permit homicide charges for the death of fetuses.⁵⁹ The laws in fourteen states set forth that an individual may be charged with the murder of a fetus at any stage of development.⁶⁰ The laws in the remaining twelve states, including California, assert that the fetus must reach a certain stage of development before an individual may be charged with its murder.⁶¹ In California, a fetus only has to pass the embryonic stage, which is approximately seven or eight weeks.⁶²

The advent of fetal protection legislation has not been limited to states; the debate has persisted in federal legislative circles as well. Nine conservative Republican senators backed legislation that would allow federal homicide or manslaughter charges to be filed against an individual who kills a fetus while committing another violent federal crime.⁶³ In 2001, the House of Representatives approved similar legislation by a vote of 252 to 172.⁶⁴ However, the debate regarding abortion rights has muddied the waters and the proposed legislation did not advance without contention.⁶⁵ Some organizations, like the National Organization for Women, believed that the bill was an attempt to elevate fetal rights over a

woman's right to abortion.⁶⁶ These groups feared that women's individual rights would be diminished and that fetal rights would be disproportionately amplified.⁶⁷ This notion highlights the confluence of the abortion debate and fetal protection laws.

The Infamy of Fetal Homicide

State of California v. Scott Peterson

Background – Facts

On Tuesday, December 23, 2002, the search began for a woman who was eight months pregnant. She was reported missing from her home on Coven Avenue in the La Loma neighborhood of Modesto, California.⁶⁸ The missing woman was later identified as twenty-seven year old Laci Denise Peterson.⁶⁹ Scott Peterson, Laci's husband, was later convicted of murdering Laci and their unborn son.⁷⁰ Scott told police that he went on a fishing trip on Tuesday, December 23, 2002 and that Laci indicated that she was going to go grocery shopping and walk the dog.⁷¹ People reported seeing Laci in the park at about 10:00 a.m. Tuesday morning.⁷² The Petersons' neighbor reported that she spotted the Petersons' dog at about 10:30 a.m. on Tuesday and that the dog's leash was attached and muddy.⁷³ The neighbor returned the dog to the Peterson's yard and did not think that anything was wrong.⁷⁴ Laci last spoke to her mother, Sharon Rocha at approximately 8:30 p.m. on December 23, 2002.⁷⁵ Scott reported that he attempted to contact Laci on her cell phone upon completing his fishing trip, but was unable to reach her.⁷⁶ Scott further reported that when he arrived home, he found Laci's automobile in the driveway and her purse in the house.⁷⁷ Scott called Laci's father and Laci's father called the police.⁷⁸ Despite the darkness, police officials immediately went into the park to search for Laci.⁷⁹ The Stanislaus County Sheriff's Department dispatched pilots, helicopters, searchlights and heat-sensing devices.⁸⁰ Firefighters searched Dry Creek in inflatable rafts with water rescue equipment.⁸¹ The police searched on horseback and bicycle⁸² and canine units were dispatched in the initial search that began on Tuesday evening and continued into Wednesday, December 24, 2002.⁸³ However, Laci was not found.⁸⁴ The lives of the Peterson family were relatively normal and the murder of Laci Peterson rocked their California community.

Laci Peterson grew up in Modesto and graduated from a Modesto area high school in 1993.⁸⁵ Laci and

Scott met while they were students at California State Polytechnic University in San Luis Obispo, California.⁸⁶ At the time Laci was reported missing, she was a substitute teacher.⁸⁷ Laci and Scott lived at their home on Coven Avenue for about two years.⁸⁸ Laci was described as cheerful and friendly.⁸⁹ Family and friends reported that Laci took daily walks a short distance from her home to East La Loma Park in the Dry Creek Regional Park.⁹⁰

Scott Peterson was born on October 24, 1971, in San Diego, California.⁹¹ Scott was the youngest of his parents' seven children.⁹² It is reported that Scott enjoyed a normal happy childhood.⁹³ Scott's father was a sportsman who enjoyed hunting, fishing and golf, and he shared these hobbies with Scott and his other sons.⁹⁴ Scott learned the value of community service in school and was reported as someone who helped others.⁹⁵ Scott became a good golfer and made the golf team at University High in San Diego.⁹⁶ Scott briefly played golf at Arizona State University, but eventually ended up at California State Polytechnic University where he met Laci.⁹⁷ Scott and Laci met one day when Scott worked as a waiter at the Pacific Café.⁹⁸ They became friends and quickly fell in love.⁹⁹ Scott and Laci opened a restaurant together in San Luis Obispo.¹⁰⁰ The restaurant was called The Shack and was a popular hangout for college students.¹⁰¹ Scott and Laci sold the restaurant two years later and moved to Modesto to be closer to family.¹⁰² Soon after, the otherwise normal Peterson family would inspire a community to become involved in the search for Laci.

As of December 30, 2002, more than 600 volunteers distributed leaflets, answered phones, and searched portions of the park and river in an effort to find Laci.¹⁰³ Authorities even questioned registered sex offenders and violent offenders on parole who lived in the La Loma neighborhood.¹⁰⁴ Nevertheless, no new information was obtained.¹⁰⁵ At some point, FBI officials arrived at the Peterson home and took the Petersons' vehicles.¹⁰⁶ The police even brought in a bloodhound.¹⁰⁷ However, the bloodhound led authorities away from Dry Creek, which is the location that authorities believed Laci had disappeared.¹⁰⁸ In addition, the handler of the bloodhound indicated that Laci left her home in a car and not by walking.¹⁰⁹ A woman reported that she heard screams at about 10:15 a.m. on Christmas Eve in an area of the park.¹¹⁰ Scott provided authorities with a receipt from the Berkeley Marina where he reported that he was fishing when his wife disappeared.¹¹¹ At the time, authorities would not confirm whether Scott Peterson had

been asked to take a polygraph test.¹¹²

Meanwhile, a burglary occurred at the home across the street from the Peterson home around the same period of time that Laci went missing.¹¹³ Authorities contemplated the idea that maybe Laci interrupted the burglary.¹¹⁴ The police did not know the exact day and time of the burglary – they only knew that it occurred around Christmas while the homeowners were out of town.¹¹⁵ Eventually, authorities determined that the burglary had nothing to do with Laci's disappearance because the burglary took place between 4 and 7 a.m. on December 26, 2002, which was several days after Laci had already been reported missing.¹¹⁶ Psychics, tarot card readers and pet communicators began to speculate about what caused Laci's disappearance.¹¹⁷ However, law enforcement officials believed the information provided by these individuals was too general and in some cases inaccurate.¹¹⁸

During the investigation, officials began to suspect that Scott was responsible for the disappearance of Laci.¹¹⁹ Officials determined that Scott attended California State Polytechnic University in San Luis Obispo, California at the same time as Kristin Smart, who disappeared on May 25, 1996.¹²⁰ In addition, Scott denied an accusatory report that he was having an affair and that he took out a \$250,000.00 life insurance policy on Laci the summer prior to her disappearance.¹²¹ After this information was revealed, Laci's family began to distance themselves from Scott.¹²² It was reported that Laci's father asked Scott if he was having an affair and Scott denied it.¹²³ Those close to Laci maintained that she opened the drapes in her home every morning.¹²⁴ An unidentified family member stated that she did not think that Laci had made it through the night because if she were alive on the morning of December 23, 2002, she would have opened the drapes.¹²⁵ Investigators did not believe that Laci left her home voluntarily because her cell phone, purse and other such belongings were still at her house; they believed that Laci would have taken these items if she had left the house voluntarily.¹²⁶

More shocking information was revealed when Amber Frey, a 28-year-old Fresno woman revealed that she had had an affair with Scott.¹²⁷ Frey reported that she met Peterson on November 20, just prior to Laci's disappearance and Scott told her that he was not married.¹²⁸ Frey reported that when she learned Scott was Laci's husband, she immediately contacted the police.¹²⁹ Frey was eliminated as a suspect.¹³⁰ Brent Rocha, Laci's older brother, reported that Scott admitted to him that he was having an affair with a Fresno woman.¹³¹ Scott

also stated that he told Laci about the affair because he was consumed with guilt.¹³² Police finally revealed Frey's identity because reporters were beginning to contact her.¹³³ In an attempt to curtail suspicion, Scott Peterson began to speak out about the tragic disappearance.

Peterson began to conduct television interviews in an effort to dispel suspicions that he may have killed Laci.¹³⁴ On one occasion more than twelve media vans had set up outside of the Peterson home.¹³⁵ However, Scott's actions were contradicting his story.¹³⁶ He was observed at a New Year's Eve vigil for Laci, laughing and smiling.¹³⁷ The media began to employ experts to opine about Scott's actions and their effect on his status as a suspect. Experts stated that Scott's eyes often shifted to the side when he was asked a difficult question.¹³⁸ Experts also opined that his change of past-tense to present-tense when speaking of his wife and child was also a sign of deception.¹³⁹ For example, when Scott tried to explain the \$250,000.00 life insurance policy, the reason the drapes were closed and the cuts on his hands, he made statements such as "she was amazing – she is amazing."¹⁴⁰ In addition, when Scott was asked about his baby boy that was due within weeks, Scott replied "that was, it's so hard." Nick Flint, President of the Behavior Analysis Training Institute in Santa Rosa, California, stated that the more Scott talked, the better it was for the investigation.¹⁴¹ Flint states that people have a tendency to talk when they are trying to hide the truth.¹⁴² Flint teaches interviewing and deception-detection techniques and instructs his students on how to look for the misuse of tense and other deception.¹⁴³ Flint states that grief is the hardest emotion to fake.¹⁴⁴ The deceptive acts and circumstantial evidence continued to pile up against Scott Peterson. During the investigation, Scott traded in Laci's Land Rover for a 2002 Dodge pickup before it was confirmed that she was dead.¹⁴⁵ Authorities searched the Peterson home and hauled away approximately 50 bags of evidence from a 10-hour search.¹⁴⁶ By all accounts, it appeared as if the State was preparing the case for trial.¹⁴⁷ The compounding circumstantial evidence against Scott Peterson was directly aligning itself with the recent trends of California homicide rates.

Statistics indicated that if Laci had been killed, it was likely that someone close to her killed her.¹⁴⁸ According to the California Department of Justice, more than 63% of victims of homicide knew their attacker.¹⁴⁹ This is why officials usually initiate their investigation by investigating a family member when they suspect

homicide.¹⁵⁰ It follows that investigators ultimately focused their investigation on Scott Peterson.¹⁵¹ According to California homicide statistics, approximately 46% of victims were related to their killers and nearly 7% of victims were killed by their spouse.¹⁵² According to several studies on marriage, including a 1998 study conducted by the Center of AIDS Prevention Studies at the University of California at San Francisco, nearly 20% of spouses will have affairs during their marriage, although few end in homicide.¹⁵³ However, Laci's situation was different – she was pregnant. According to a 2001 study conducted by the American Medical Association, the leading cause of death of pregnant women is homicide.¹⁵⁴ Researchers studied 247 cases of pregnant women who died and found that 50 of them were murdered.¹⁵⁵ Generally, pregnant women do not engage in risky activities therefore, their deaths would most likely be a result of something outside of their control.¹⁵⁶ These statistics lend credence to why investigators began to look at Scott Peterson as a potential suspect.

As a result of Laci's prolonged disappearance, investigators began to believe that Laci was the victim of homicide.¹⁵⁷ Local journalists began to reach out to criminal law experts to help explain the repercussions of a conviction under California's murder statute, which includes a feticide component. Jeanette Sereno, an attorney and assistant professor of criminal justice at California State University, Stanislaus, opined that if there was an arrest, the individual would likely be charged with a double homicide and the possibility of the death penalty.¹⁵⁸ Although the law varies by state, "California law defines murder as the unlawful killing of a human being or a fetus with malice aforethought."¹⁵⁹ Charging a defendant with feticide requires that the unborn child pass "the embryonic stage – between 6 and 8 weeks."¹⁶⁰ "Anyone convicted of more than one first or second degree murder is eligible for special circumstances, which can include the death penalty."¹⁶¹ Sereno states that an individual harming a woman of childbearing years assumes the risk of the possibility that the woman may be pregnant.¹⁶² Laci's pregnancy was obvious because she was nearly full term. Consequently, any homicidal act against her would be committed with full knowledge that two deaths could occur.¹⁶³ Subsequent to the media speculation, Laci Peterson's body was found.

East Bay Area Regional Park police notified the Modesto Police that two bodies were discovered near Point Isabel Regional Shoreline.¹⁶⁴ One of the bodies was a full-term male fetus discovered by two people

walking their dog.¹⁶⁵ Two days later, a female body was found approximately one mile south of the male fetus' body.¹⁶⁶ The bodies were found in the same area where Scott claimed he went boating on the day of Laci's disappearance.¹⁶⁷ Investigators had to rely on DNA testing to determine the identities of the two bodies, since there was no fingerprint or dental evidence.¹⁶⁸ In the meantime, a human bone was found in the area of Berkeley Marina.¹⁶⁹ After weeks of studying the bodies, tests confirmed that the bodies were those of Laci and her unborn son, Connor.¹⁷⁰ Sources confirmed that when Laci's body was found, it was missing her head and feet.¹⁷¹ In addition, it was reported that most of her torso was missing and there were no organs or skin.¹⁷² Two forensic pathologist offering differing opinions on whether the body was mutilated before or after being dumped in the San Francisco Bay.¹⁷³ New York forensic pathologist, Dr. Michael Baden believed the body was mutilated before it was placed in the Bay.¹⁷⁴ Baden opined that a body has the ability to stay intact well under water.¹⁷⁵ Baden stated that marine animals do not have a tendency to chew through tough ligaments and that although extremities separate in water, it is not common for this to occur in four months.¹⁷⁶ Baden stated that this type of separation would take years to occur.¹⁷⁷ On the other hand, Santa Clara Coroner, Dr. Gregory Schmuck, opined that it was perfectly natural for such separation to occur because the body may have encountered boat propellers or feeding animals.¹⁷⁸

Arrest – Trial

A week later, FBI agents and San Diego law enforcement officials arrested Scott Peterson on April 18, 2003.¹⁷⁹ It was reported that Scott had \$15,000.00 in cash with him and his hair and goatee appeared to have been dyed.¹⁸⁰ However, Scott stated that his hair was bleached as a result of swimming in a friend's pool.¹⁸¹ Prosecutors probably intended to prove that Scott had attempted to conceal his identity because he intended to flee the country after killing Laci and his unborn son.¹⁸² Scott pled not guilty to two capital murder charges during his arraignment.¹⁸³ At this arraignment, Scott requested the court appoint him an attorney.¹⁸⁴ Prosecutors intended to argue that both killings were premeditated.¹⁸⁵ Under California law, when an individual is charged with capital murder, he or she is not eligible for bail if there is a great presumption of guilt.¹⁸⁶ Judges must weigh the safety of the public, the serious-

ness of the charge, the defendant's criminal record and the defendant's probability of being present for trial when considering the issue of bail.¹⁸⁷ California law allows a prosecutor to seek the death penalty when an individual is charged with more than one murder.¹⁸⁸ After consulting with Laci's family, the prosecution team and the defense team, the prosecutor decided that he would seek the death penalty.¹⁸⁹ It is reported that within weeks of Laci's disappearance, the prosecution offered Scott a deal to take the death penalty off the table if Scott led them to the bodies.¹⁹⁰ Experts stated that they had never heard of a case where prosecutors had offered a plea deal to a suspect prior to the suspect's arrest, although prosecutors could have made the offer to induce Scott into making incriminating statements on wiretaps.¹⁹¹

The death of Baby Girl Vogt over thirty-five years ago led to the California law allowing Scott Peterson to be charged with the murder of his unborn son, Connor.¹⁹² Vogt died stillborn after her 8-month pregnant mother, Teresa Keeler was attacked by ex-husband, Robert Harrison Keeler.¹⁹³ Physicians testified that they were reasonably certain that the fetus was viable and as such, Mr. Keeler was charged with murder.¹⁹⁴ However, Associate Justice Stanley Mosk wrote in the Supreme Court opinion that Mr. Keeler could not be found guilty of murder because the fetus was not a human being within the meaning of the statute.¹⁹⁵ In response to this decision, outraged California legislators updated the statute to include killing a fetus as murder.¹⁹⁶ This case is very similar to the 1988 case of *People v. Bunyard*.¹⁹⁷ Jerry Bunyard's story is similar to Scott Peterson's story. Bunyard's wife was pregnant with their first child, and he was having an affair. Bunyard was not excited about the arrival of the baby.¹⁹⁸ It was reported that Bunyard wanted a divorce, but was afraid that his wife would "take him for everything he had."¹⁹⁹ Bunyard's wife was within days of giving birth when Bunyard killed his wife and their unborn child.²⁰⁰ Bunyard hired a friend to kill Elaine in exchange for \$1,000.00.²⁰¹ Bunyard's accomplice worked out a deal with the prosecution and received a 25-year sentence in exchange for his testimony against Mr. Bunyard.²⁰² Although California law provides for a death sentence on a finding of murder for hire, the prosecution opted instead to convict Bunyard under the legislation that resulted from the *Keeler* case.²⁰³

Experts have stated that it would take a great deal of compelling evidence to prove that both murders were committed with the premeditation and malice required for a death sentence because it is hard to prove

premeditation when there are no witnesses.²⁰⁴ Experts speculated that it would be hard for a jury to return a verdict of guilty on anything more serious than manslaughter, which would allow a sentence of no more than eleven years.²⁰⁵ Experts opined that even if it could be shown that Scott killed Laci, severed her head and dumped her body in the river, it would still not be sufficient to prove premeditation.²⁰⁶ Nevertheless, Scott could still be found guilty of murdering his unborn son.²⁰⁷ California's statute provided two alternate theories on which the prosecution could base murder for the fetus' death.²⁰⁸ If the baby were still alive after he killed her, Scott would have a duty to try to save the baby by calling the police.²⁰⁹ Scott's failure to do so could be found to show a conscious disregard for the life of his son.²¹⁰ To help with his defense, Los Angeles defense attorney Mark Geros took over as Scott's defense attorney.²¹¹ Until that time, a court appointed attorney represented Scott.²¹² Now represented by counsel, the evidence against Scott was clear.

The prosecution began weighing the evidence and formulating potential arguments that could directly connect the deaths of the baby and the female body found near the river. For example, toxicology reports indicate that Laci had caffeine in her system when she died, but her unborn son did not.²¹³ This could suggest that the baby was born before Laci was killed and would assist in Scott's defense.²¹⁴ However, St. Louis County Chief Medical Examiner, Dr. Mary Case, opined that she has never seen an unborn child with measurable amounts of caffeine in its system and that such caffeine levels just would not show up in a fetus.²¹⁵ After the state received favorable toxicology reports, the trial of Scott Peterson was inevitable.

Jury selection in the trial began on March 4, 2004.²¹⁶ The prosecution began its opening statement on June 1, 2004.²¹⁷ The trial lasted 23 weeks and 184 witnesses testified. Scott's attorney asserted in his closing argument that the prosecution had not introduced any direct evidence that Scott killed anyone and asked the jury to put aside their feelings about Scott and weigh only the evidence.²¹⁸ The prosecution told the jury that Scott was the only person who could have killed Laci and Connor. The six men-six women jury began deliberating on November 3, 2004.²¹⁹ The judge instructed the jury that it could convict Scott Peterson of first-de-

gree murder, which carried the possibility of the death sentence or life without parole or second-degree murder, which carried the possibility of two fifteen years to life sentences.²²⁰ The judge explained that the jury could convict Scott of first-degree murder only if it found that intent to kill and premeditation were present.²²¹ The judge further explained that second-degree murder meant that Scott killed Laci and her unborn child, but did not plan the killings.²²² After three days and eleven and a half hours of deliberations, the jury convicted Scott Peterson of first-degree murder with special circumstances.²²³ On March 16, 2005, the judge upheld the jury's recommendation and sent Scott to death row at San Quentin State Prison.²²⁴

After the trial, Laci's family voiced support for legislation that would categorize the killing of a fetus as a federal crime.²²⁵ The bill was introduced in the House of Representatives and reintroduced in the Senate as the Unborn Victims of Violence Act.²²⁶ Lawmakers had been working on this legislation for several years.²²⁷ In 1999 and 2001 the House passed similar legislation but the Senate did not approve it.²²⁸ This law would allow the federal gov-

ernment to charge individuals with killing a fetus if the fetus dies during the commission of a federal crime.²²⁹ California's laws are similar to the federal legislation in that California Penal Code §187 allows defendants to be convicted of murder when found guilty of killing a fetus.²³⁰ As previously noted, *Keeler* set a precedent that allowed other states and to some extent the U.S. Congress to enact similar feticide laws. The proposed federal version of the law is intended to protect a fetus at any stage of development, distinguishing it from California's §187.²³¹ The federal and state implementation of feticide laws has spawned discourse over the rights given to fetuses and the implications of curtailing abortion rights.²³² Therefore, this legislation has revitalized the *Roe v. Wade* debate.²³³

State of Utah v. Mark Hacking

Background – Facts

Utah was recently presented with the opportu-

nity to test its fetal protection laws in the case of Mark Hacking. However, as will be shown below, the State of Utah was not able to apply its fetal protection laws to Mark Hacking's case due to lack of physical evidence.²³⁴ The controversy began on July 19, 2004 at approximately 10:07 a.m. when Mark Hacking contacted police and reported that his wife, Lori Hacking, was missing and that she had not returned home from a morning jog.²³⁵ Mark called some of Lori's friends at approximately 10:00 a.m. indicating that Lori was missing.²³⁶ Mark purchased a new mattress at approximately 10:23 a.m. and contacted the police again at approximately 10:46 a.m. indicating that he found Lori's car at the park.²³⁷ Lori's car was found near the area where she normally went on her morning jog.²³⁸ However, police detectives found Lori's car keys and wallet in her purse at home.²³⁹ Detectives discovered that Lori's car seat and mirror's were adjusted for a large man.²⁴⁰ These revelations would eventually prove to be byproducts of Mark Hacking's deceptive behavior.

Mark Hacking was born April 24, 1976, and was the fifth of seven children in a Mormon family.²⁴¹ Mark grew up in Orem, Utah where he met Lori in High School.²⁴² Mark and Lori were described as high school sweethearts, but the attraction between the two did not prevent Mark from exhibiting a deceptive nature.²⁴³ It was reported that earlier in Mark and Lori's relationship, Mark was expelled from a church mission trip after the church learned that Mark seduced a young woman in the church.²⁴⁴ Mark hid this secret relationship from Lori.²⁴⁵ He also kept his consumption of alcohol and tobacco a secret from Lori.²⁴⁶ When Mark returned home from the mission trip, he was treated for depression.²⁴⁷ At the time of the affair, Lori and Mark had been dating for about three years.²⁴⁸ Subsequently, on August 7, 1999, Lori and Mark married.²⁴⁹ Their troubles continued into the marriage and through Lori's pregnancy. There were reports that Lori was five weeks pregnant at the time of her disappearance.²⁵⁰ Lori told friends that she had taken a home pregnancy test, which revealed that she was pregnant.²⁵¹ Lori's mother, Thelma Soares, stated that Lori never told her that she was pregnant, but Mark admitted to police that his wife was pregnant.²⁵² The evidence began to pile up against Mark Hacking. A convenience store video camera captured the image of Mark visiting the store at approximately 1:30 a.m. on July 19.²⁵³ The videotape showed Mark driving away from the store in Lori's car.²⁵⁴ Prior to the discovery of the videotape, Mark told police that he was asleep at that time.²⁵⁵ The convenience store videotape also revealed

that Lori and Mark visited the store at approximately 9:30 p.m. on July 18.²⁵⁶ During that visit, Mark gestured to the clerk so that the clerk would not tell Lori that Mark was frequently in the store buying cigarettes.²⁵⁷ On July, 19, Mark called police to a hotel in Salt Lake City where he had rented a room.²⁵⁸ The police found Mark running around outside of the hotel naked and took him to a psychiatric hospital where Mark was admitted for observation and psychiatric care.²⁵⁹

Arrest – Sentencing

Although Lori's body had not yet been found, police arrested Mark prior to his scheduled release from the psychiatric hospital and charged him with aggravated murder.²⁶⁰ At that time, formal charges had not been filed.²⁶¹ A judge set Mark's bail at \$500,000.00 cash.²⁶² Prior to Mark's arrest, police found a mattress in a garbage dumpster near the Hackings' apartment that matched the serial number on a box spring detectives seized from the Hackings' apartment.²⁶³ In addition, authorities found blood on a knife in the bedroom and blood on the headboard of the couple's bed and the bedrail.²⁶⁴ This blood matched blood found in Lori's car.²⁶⁵

At the time of his arrest, Mark made no admission of guilt.²⁶⁶ Nevertheless, it was reported that Mark told one of his brothers while in the psychiatric hospital that he killed Lori while she was sleeping and threw her body in the dumpster.²⁶⁷ In addition, Mark told his brothers, Scott and Lance Hacking that he shot Lori in the head while she slept then placed her body and the .22-caliber gun in separate garbage dumpsters at about 2:00 a.m. on July 19.²⁶⁸ Since Mark made the statements while he was a patient in the psychiatric hospital, his attorney indicated that he would use a mental illness defense to combat the charges.²⁶⁹

Detectives uncovered disturbing facts, which showed problems in the Hacking's relationship and could provide a motive for Lori's murder.²⁷⁰ Specifically, the police uncovered facts that Hacking's deceptive lifestyle started to become known to his wife and friends, thus, in order to escape the disappointment of his wife's decision to leave him, Mark took her life.²⁷¹ Lori and Mark had been making plans to move to North Carolina so that Mark could attend medical school.²⁷² Lori's co-workers reported that the Friday prior to Lori's disappearance, Lori was seen sobbing after a telephone conversation with a medical school administrator who notified Lori that Mark had not enrolled in the school.²⁷³

In addition, Lori discovered that Mark had dropped out of the University of Utah in 2002, so he did not have a bachelor's degree and could not have been accepted into any medical school.²⁷⁴ Mark's brother believed that Mark suffered a great deal of pressure to obtain professional success because Mark's father and brother are physicians and Mark's other brother is an electric engineer.²⁷⁵ It is believed that Lori discovered Mark's deception and confronted him. Mark's brother thought Mark felt as if his house of cards was crashing down around him.²⁷⁶ Investigators also found a letter in the Hackings' apartment written by Lori in which she stated that she hated coming home from work and that she did not want to spend the rest of her life with Mark unless things changed.²⁷⁷

Although Lori's body still had not been found, the prosecution decided it would file first degree felony murder charges against Mark, which could carry a sentence of five years to life in prison.²⁷⁸ Mark was also charged with three counts of obstructing justice, which carries a sentence of one to fifteen years in prison.²⁷⁹ However, the prosecution was unable to substantiate a homicide charge for Lori's unborn child because it was unable to confirm that Lori was pregnant.²⁸⁰ After two months of intensive search efforts including sifting through 3,000 tons of garbage in a 20-foot deep landfill, Lori's body was found on October 1, 2004.²⁸¹ Although the prosecution's case was strengthened by the discovery of Lori's body, the medical examiner was unable to determine whether Lori was pregnant.²⁸² Notwithstanding Mark's confession to family members that he killed Lori in her sleep, Mark's lawyers entered a plea of not guilty at the arraignment hearing on October 30, 2004.²⁸³ However, the case was later brought to a close when Mark Hacking admitted that he shot Lori in the head while she slept.²⁸⁴ The judge sentenced Mark to six years to life in prison, which is the only penalty allowed under Utah law.²⁸⁵ The mandatory minimum sentence of five years to life was increased to six years to life because Mark used a firearm during the commission of the crime.²⁸⁶ It will be left up to the Utah parole board to determine if Hacking will ever be set free.²⁸⁷

The prosecution was not able to apply Utah's fetal protection law because of insufficient evidence.²⁸⁸ Nevertheless, in Utah, an individual may be charged with murder for the killing of a fetus of any stage of development.²⁸⁹ As stated above, it was reported that Lori was approximately 5 weeks pregnant and the prosecution would have pursued the charge if there was evidence that Lori was pregnant.²⁹⁰

The significant differences in the fetal protection laws can cause disparities in the punishment and application of fetal protection laws amongst states. Approximately half of U.S. states have fetal protection laws.²⁹¹ Congress has also passed the Unborn Victims of Violence Act which provides federal penalties, including imprisonment, for the deaths of fetuses committed in act of a federal crime.²⁹² However, the problem lies in when different jurisdiction choose to apply fetal protection laws. Moreover, a more definitive and uniform determination of the application of fetal protection is needed. Otherwise, fetal protection laws can be prosecuted in a discriminatorily manner. The possibility of punishing a citizen with life sentences or even the death penalty is not sufficiently protected by the differing standards of fetal application. Therefore, states should adopt a uniform standard of application of fetal protection laws, especially when such laws involve murder or homicide. Currently, states have total autonomy to enact fetal protection laws that prosecute individuals with homicide, or some variant thereof, without regard to the fetus' status as a human being.²⁹³ The autonomy originates from the legitimate state interest imputed from the *Roe* decision, which notes that states have a significant interest in protecting fetuses, at any stage of development.²⁹⁴ But, several citizens, as petitioners, have challenged state actions based upon due process and equal protection violation claims.²⁹⁵ The courts have been unwilling to rule in favor of the petitioners in *Merrill* and *Ford* because of the state's interest in protecting fetuses, when the mother's right to an abortion is not at issue.²⁹⁶ The Minnesota Supreme Court, in *Merrill*, dispensed with the petitioner's claim that his due process rights were violated and noted that the State had an interest in protecting a fetus from third-party harm, distinguishable from a mother's right to an abortion.²⁹⁷ Therefore, the states' interest provides an umbrella right to arbitrarily determine when fetal protection arises. And, arbitrarily determined statutes provide an appearance of the potential disparity in application.

The Unborn Victims of Violence Act should be the barometer for state implementation of fetal protection laws that include homicide. The inconsistent definition of fetal protection laws diminishes the expectation that many citizens expect. The expectation of a definitive crime standard should be transparent and the inconsistencies of the differing fetal protection statutes

undermine this principle. Further, these inconsistencies are the problems that face non-uniform state fetal protection laws. The federal fetal protection law is effective in curing the potential harm incurred as a result of inconsistent state statutes, but the states must take independent action in correcting the problem. Further problems lie in the erosion of *Roe*'s significance in defining human status.

Erosion of *Roe*'s Importance

The court in *Roe* noted, "...the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."²⁹⁸ The *Roe* decision has also gained significance through the failure of the Court to recognize fetuses as persons and therefore, leaves them unprotected under the inherent rights of persons. However, the implementation of state fetal protection laws erodes the *Roe* court's fetus analysis and suggests that fetuses are persons and therefore are subject to the same rights as persons who are defined under the Fourteenth Amendment. Because states have wide latitude in determining when to apply fetal protection laws, fetuses have gained 'quasi-human' status for purposes of applying fetal protection laws.

As previously noted, twenty-six states have fetal protection laws.²⁹⁹ These states have based their fetal protection laws on the legitimate state interest basis that the *Roe* court outlined. But, the legitimate state interest analysis has bypassed and successfully undermined the denial of human status to fetuses, under the Fourteenth Amendment, advanced in *Roe*.³⁰⁰ Pro-choice advocates who believe that the application of murder statutes to fetal protection laws is inconsistent with *Roe* have also argued against such statutes.³⁰¹ The pro-choice argument directly aligns with the 'Erosion of *Roe*' argument that advances the unwarranted 'quasi-human' status that fetuses are given under modern fetal protection laws.³⁰² Further, pro-choice advocates contest that a woman's right to an abortion will be restricted by the 'quasi-human' status, because fetuses are given more rights than the Fourteenth Amendment provides.³⁰³ One critic of fetal protection laws commented, "[f]etal murder of a non-viable fetus recognizes that what resides in the womb is a person...If we are prosecuting a third party for killing an unborn child, it's schizophrenic that a woman can choose an abortion for a child at the same date and we don't call abortion murder."³⁰⁴ The public sentiment against the disparate application of fetal protection laws highlights a prevalent problem of non-uniform fetal protection laws.

Conclusion

Modern fetal protections laws have significantly increased the rights of fetuses.³⁰⁵ Currently twenty-six states have fetal protection laws.³⁰⁶ In addition, Congress has created the federal Unborn Victims of Violence Act.³⁰⁷ The standing on which many of the statutes are based reside in the *Roe v. Wade* decision.³⁰⁸ Therefore, the *Roe* debate has reignited the debate surrounding fetal protection.³⁰⁹ *Roe* determined that women have a right to decide to have an abortion.³¹⁰ A woman's right to an abortion and the initial effect of *Roe*, recognized that fetuses are not afforded human status.³¹¹ But, the dicta of *Roe* and state statutes have, unexpectedly, given fetuses rights that resemble quasi-human status.³¹² Further, the statutes gain additional support through high profile cases such as the Mark Hacking and Laci Peterson. These trials have encouraged states to enforce the fetal protection laws. Therefore, due to the recent upsurge of violence toward pregnant women ranging from harm committed by husbands and fathers to harm committed by individuals seeking to steal the baby from the mother's womb, it is inevitable that more states will enact fetal protection laws in the future.³¹³ At the very least, more states will enforce the fetal protection laws currently enacted.³¹⁴

¹ See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (finding states' interest in protecting potential life "compelling" when a fetus is viable because the fetus would be capable of surviving outside of the womb).

² *Id.* at 165-66 (holding that states can only proscribe abortion after the point of viability because abortion is inherently a medical decision).

³ See *id.* at 164-65 (defining states' role in the abortion decision at each stage of fetal development by allowing states to regulate the abortion procedure after the end of the first trimester and allowing states to proscribe abortion after viability).

⁴ Bryan Robinson, *Why Pregnant Women Are Targeted*, Feb. 24, 2005, <http://abcnews.go.com/print?id=522184>. (finding that homicide was the "leading cause of death among pregnant women" based on a 2005 study by the American Journal of Public Health).

⁵ *Id.*

⁶ Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 461 (1997-1998) (discussing the purpose of state enacted fetal homicide statutes as punitive measures to prevent "violent assaults against pregnant women").

⁷ *Id.*

⁸ *PRO FOOTBALL; Murder of Carruth's Girlfriend Detailed*. <http://query.nytimes.com/gst/fullpage.html?res=9502E5DA1638F931A15751C1A9669C8B63>, December 22, 2000 (reporting an account by Van Brett Watkins, Carruth's hired hit man, detailing how he murdered Carruth's girlfriend and unborn child).

⁹ *State v. Tarver*, 105 Ohio St. 3d 1452 (2005).

¹⁰ AMBER FREY, *WITNESS FOR THE PROSECUTION OF SCOTT PETERSON*, (Regan Books, Harper Collins Publishers) (2005).

¹¹ STEVEN LONG, *EVERY WOMAN'S NIGHTMARE: THE TRUE STORY OF THE FAIRY-TALE MARRIAGE AND BRUTAL MURDER OF LORI HACKING*, (St. Martin's Press) (2006).

¹² Ashley Cook, *Teen Guilty of Fetal Murder*, THE LUFKIN DAILY NEWS, June 7, 2005 (alleging that nineteen-year-old Gerardo Flores stepped on his seventeen-year-old pregnant girlfriend's stomach more than once a week in hopes that she would miscarry and they would be able to continue their college plans).

¹³ Tsao, *supra* note 6, at 461.

¹⁴ *Id.* at 460 (finding that homicide laws only applied to children who were born alive).

¹⁵ *Id.*

¹⁶ Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1855 (1999).

¹⁷ Tsao, *supra* note 6, at 460.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Smith, *supra* note 16, at 1851 (citing *Roe v. Wade*, 410 U.S. at 162-64 (citation omitted)).

²¹ See *id.* at 1851-54 (describing how various jurisdictions have criminalized feticide since *Roe v. Wade* by statute or through the courts).

²² Tsao, *supra* note 6, at 461.

²³ MASS. GEN. LAWS ANN. ch. 265, §1 (West 2009); Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) ("Viable fetus is human being for purpose of common law crime of murder."); S.C. CODE ANN. § 16-3-1 (2006); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) ("The word 'person' as used in a criminal statute includes viable fetuses."); OKLA. STAT. tit. 21, § 691 (2007); see *Hughes v. State*, 868 P.2d 730 (Okla. Cir. 1994) (holding "that a viable human fetus was a human being against whom a homicide as defined by OKLA. STAT. tit. 21 §691 could be committed").

²⁴ MINN. STAT. ANN. § 609.2661 (1986).

²⁵ CAL. PENAL CODE § 187 (2008).

²⁶ MINN. STAT. ANN. § 609.2661.

²⁷ *State v. Merrill*, 450 N.W.2d 318, 320 (Minn. 1990) (considering the constitutionality of the Minnesota fetal homicide statutes §§ 609.2661 and 609.2662 in comparison to the Supreme Court's interpretation of the Fourteenth Amendment in *Roe v. Wade*).

²⁸ See *id.* at 320-21.

²⁹ *Id.* at 321-22.

³⁰ *Id.* at 324.

³¹ *Id.*

³² See *Keeler v. Super. Ct. of Amador County*, 470 P.2d 617, 618 (Cal. 1970) (concluding that an "unborn but viable" fetus was not within the meaning of "human being" in the California murder statute).

³³ *Id.* at 630. (Burke, A.C.J., dissenting) (arguing that the Court's exclusion of viable unborn fetuses from the definition of "human being" in the California murder statute went against the common

law understanding that a viable fetus was, in fact, a human being).

³⁴ *Id.* at 618.

³⁵ *Id.*

³⁶ *Id.* at 619.

³⁷ *Id.* at 618.

³⁸ *Id.* at 618.

³⁹ *Id.* at 619.

⁴⁰ *Keeler*, 470 P.2d at 624.

⁴¹ *Id.*

⁴² CAL. PENAL CODE §187 (1970).

⁴³ See *People v. Davis*, 872 P.2d 591, 602 (Cal. 1994) (acknowledging that "viability is not an element of fetal homicide" under §187, but finding that a fetus killed by a third party with malice aforethought falls under §187 if the fetus progressed beyond seven or eight weeks).

⁴⁴ Tsao, *supra* note 6, at 460.

⁴⁵ Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 567 (1987).

⁴⁶ *Id.* at 568-69.

⁴⁷ *Id.* at 575.

⁴⁸ *Id.* at 583.

⁴⁹ See Stephanie Ritivi McCavitt, Note, *The "Born Alive" Rule: A Proposed Change to the New York Law Based on Modern Medical Technology*, 36 N.Y.L. SCH. L. REV. 609, 612 (1991) (asserting that by 1850 a considerable number of states supported murder charges with the "born alive rule").

⁵⁰ Forsythe, *supra* note 49, at 595-96.

⁵¹ *State v. Beale*, 376 S.E.2d 1, 1 (N.C. 1989) (describing Mr. Beale's two count indictment to include the unlawful murder of his wife, Donna Beale, and the unlawful use of a shotgun on Mrs. Beale and her unborn child).

⁵² *Id.* at 2, 4 (distinguishing *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987) (citation omitted)).

⁵³ *Id.* at 4.

⁵⁴ Smith, *supra* note 16, at 1850.

⁵⁵ *Id.* at 1851.

⁵⁶ Michael Doyle, *Fetal Death Charges Add Fuel to Fire*, MODESTO BEE, Apr. 25, 2003, at B1 [hereinafter Doyle, *Fetal Death*].

⁵⁷ See *Roe*, 410 U.S. at 164-65.

⁵⁸ *Id.*

⁵⁹ Doyle, *Fetal Death*, *supra* note 56.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

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⁶⁴ *Id.*

⁶⁵ Doyle, *Fetal Death*, *supra* note 56.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Molly Dugan & Judy Sly, *Woman Vanishes on Walk Police Start Widespread Search*, MODESTO BEE, December 26, 2002, at A1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

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⁷³ *Id.*

- ⁷⁴ Dugan & Sly, *supra* note 68.
- ⁷⁵ Ty Phillips, *2nd Case Reviewed Peterson Eyed for Link to Missing Student*, MODESTO BEE, Jan. 18, 2003, at A1 [hereinafter Phillips, *2nd Case*].
- ⁷⁶ Dugan & Sly, *supra* note 68.
- ⁷⁷ *Id.*
- ⁷⁸ *Id.*
- ⁷⁹ *Id.*
- ⁸⁰ *Id.*
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- ⁸² *Id.*
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- ¹⁸⁶ CAL. PENAL CODE §1270.5 (2006). A defendant charged with an offense punishable with death cannot be admitted to bail, when the proof of his or her guilt is evident or the presumption thereof great. *Id.* The finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom. *Id.*
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²⁸² *Id.*

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²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

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²⁹¹ Tsao, *supra* note 6, at 468.

²⁹² *President Bush Signs Unborn Victims of Violence Act of 2004*, <http://www.whitehouse.gov/news/releases/2004/04/20040401-3.html>, April 1, 2004.

²⁹³ *People v. Davis*, 872 P.2d 591, 597 (Cal. 1994).

²⁹⁴ *Id.*

²⁹⁵ *Id.* In Illinois, the Legislature eliminated an express viability requirement from its murder statute. The amended statute states that a "person commits the offense of intentional homicide of an unborn child" if he or she, (1) either intended to cause the death of or to do great bodily harm to the pregnant woman or her unborn child . . . [defined as "any individual of the human species from fertilization until birth." Ill. Rev. Stat. ch. 38, § 9-1.2(b)(1) (1987). This statute was challenged in *People v. Ford* (1991) 221 Ill.App.3d 354, involving a defendant convicted (under the amended statute) of killing his 17-year-old stepdaughter's 5 1/2-month-old fetus. The defendant contended the statute violated equal protection and due process principles because it failed to distinguish between a viable and nonviable fetus.

²⁹⁶ *Id.*

²⁹⁷ *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990).

²⁹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁹⁹ Tsao, *supra* note 6.

³⁰⁰ *Roe*, 410 U.S. at 113.

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³⁰³ *Id.*

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³⁰⁶ *Id.*

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³¹⁰ *Id.*

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³¹³ Alison Tsao, *supra* note 6.

³¹⁴ *Id.*

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