



CENTER *for* HOMICIDE RESEARCH

When Is The Death of a Fetus a Homicide?

This brief will look at the issue of classifying a fetal death as a homicide. Some of the difficulties presented by language in this context will be discussed, as well as the different types of laws currently in place. Issues relevant to homicide investigators and researchers will also be considered.

Historically, it was necessary for an infant to be born alive and then die in order to support a homicide charge for prenatal injuries. By contrast, today at least 36 states have fetal homicide laws.¹ A debate exists regarding whether these laws protect rights belonging to the fetus itself or only to the pregnant woman.² The laws may advance important social policy goals of decreasing domestic violence, drunk driving, and child abuse.³ The laws vary based on the developmental stage of the fetus and the knowledge or intent required of the offender.⁴ An examination of what qualifies as a homicide under the various laws may illuminate which rights are being protected.

This area of law also demonstrates the extent to which the use of a seemingly simple and obvious word in defining a crime may have significant effects. The historical requirement of a live birth to support a homicide charge is one example. If a pregnant woman were assaulted and then gave birth to a dead child, the offender would be guilty only of a misdemeanor for the harm to the woman.⁵ However, if the child were born alive after the assault and then died, it was murder.⁶ Live birth was the only means of proving the fetus was alive at the time of the assault, and murder required the killing of a live human being.⁷ Although medical science has now removed the rationale for this rule, a significant (though decreasing) number of states still follow the “born alive” rule.⁸

I. Is a Fetus a Person?

The Supreme Court determined in 1973 in the landmark case of *Roe v. Wade* that a fetus does not qualify as a “person” for constitutional purposes.⁹ Similarly, a number of homicide convictions have been overturned based on judicial determinations that a fetus is not a “person” or “human being” under general homicide statutes.¹⁰ However, Massachusetts and South Carolina courts have determined that a fetus is a “person” for purposes of a homicide.¹¹ An Arizona court stated that while a fetus is a “person” under a civil wrongful death statute, a fetus is not a “person” under the penal murder statute.¹² Thus, the deceptively simple question of whether or not a fetus is a person may have a different answer under the law based on which state and even which area of law is being discussed.

II. When Does Birth Happen?

In states without fetal homicide laws, a live birth is still required for a homicide. This may appear to be a simple requirement, but disagreement exists about what constitutes “live birth.” Some jurisdictions consider a child in the process of being born a “live” human being.¹³ Others require a child to be completely expelled from the mother’s body and attain a separate and independent existence.¹⁴ A third theory adds the requirement of a showing of

independent circulation and/or respiration,¹⁵ though some argue the third theory is only an attempt to explain “separate and independent existence” rather than a unique theory.¹⁶

An example may help illustrate some of the complexities involved. Patricia Boyd was convicted of second degree murder after delivering a child directly into the toilet and not pulling the child out of the water.¹⁷ On appeal, Boyd argued insufficient evidence existed to prove the child was born alive.¹⁸ The medical examiner estimated the child had a gestational age of 36 weeks and was viable.¹⁹ A “float test” was performed on the child’s lungs and showed the child had taken breaths, and the medical examiner determined the child had drowned.²⁰ Boyd argued the child was only 28 to 31 weeks and therefore premature. She further claimed the child breathed during the birthing process but stopped breathing before achieving a separate and independent existence.²¹ Boyd’s conviction for second degree murder, which required the death of a “human being,” was upheld because the “born alive” issue was not brought up at trial.²² Thus the Court was relieved of the burden of addressing the “knotty issue” of defining “born alive.”²³

III. Legislatures Respond

In the wake of judicial rulings that a fetus is not a “person” or “human being” under criminal homicide statutes, Legislatures began to pass feticide statutes. The California Legislature responded to one such ruling by passing a statute with no viability requirement and no requirement the offender know of the existence of the fetus.²⁴ Therefore in California, it can be a capital offense to cause the death of a nonviable fetus which the actor neither knew or had reason to know existed.²⁵ Arizona, where a fetus was determined to be a “person” for civil wrongful death purposes but not penal homicide purposes, has enacted a statute making it manslaughter to knowingly or recklessly cause the death of an unborn child at any stage of its development by physical injury to the mother.²⁶ Other states have enacted more limited statutes with requirements such as a twelve week gestational age, a quick child (meaning the woman has felt movement), or a viable fetus.²⁷

IV. Classification – Crime Against the Woman or Crime Against the Fetus

In *Roe v. Wade*, in addition to determining a fetus is not a person, the Supreme Court went on to determine that a state does not have a compelling interest in protecting the life of the fetus until viability, when the fetus is capable of surviving outside the mother’s womb.²⁸ For this reason, some argue it cannot be murder to kill a fetus prior to viability.²⁹ Others argue *Roe* merely held that prior to viability any rights belonging to the fetus are outweighed by the rights of the woman.³⁰ In the wake of *Roe*, states requiring viability in a fetal homicide statute appear to be protecting the right to potential life of the fetus.

By contrast, a state which has no viability requirement may be addressing the harm inflicted on the pregnant woman.³¹ One reason these laws are seen as protecting rights belonging to the woman is that many women have miscarriages in the first trimester of pregnancy due to a variety of factors.³² Miscarriages occur in at least 15% to 20% of all pregnancies, and some have estimated the true incidence to be as high as 50% to 78%.³³ Therefore, some consider it unjust to hold an actor who is unaware of a woman’s pregnancy criminally liable for the death of an unborn child that had a significant chance of dying naturally. Further evidence these laws protect the woman rather than the fetus derives from the fact that supporters of the laws include the woman’s right to choose an abortion as among the rights being protected.³⁴

The contrast between protecting the fetus and protecting the woman is clearest when the woman herself is charged with the homicide. The Supreme Court of Florida ruled that the State could not prosecute a teenage woman who shot herself in the stomach during her third trimester.³⁵ The fetus was removed during surgery and died fifteen days later.³⁶ Thus the woman was shielded from criminal

liability even though the fetus was “born alive”. At the opposite extreme, the State of Utah charged Melissa Rowland with murder after she delayed in accepting the advice of her physician to have a cesarean delivery and one of her twins was later stillborn.³⁷ Ms. Rowland was able to avoid the homicide charge, but only after pleading guilty to a lesser child endangerment charge.³⁸ Thus, although Utah allows a homicide charge for the killing of an unborn child at any stage of its development,³⁹ in this case at least the State asserted the rights of the fetus over the rights of the woman.

V. Implications for Investigators and Researchers

Investigators will need to be aware of the law in their jurisdiction. Which facts are most important will depend on the applicable law. In states requiring a live birth, when the death of a newborn child or fetus is being investigated, it will be necessary to prove the child was born alive. Relevant facts then may be whether the child breathed and whether the umbilical cord was severed prior to death. Tests such as a “float test” can determine whether the child breathed. In other states, it will be unnecessary to establish a live birth, but it may be necessary to establish the viability of the fetus. The investigator will then need to determine the gestational age of the fetus. Additionally, a state may require that the perpetrator knew or should have known the victim was pregnant. Relevant evidence would then include whether or not the woman was “showing” or perhaps the extent to which the woman made others aware of the pregnancy. In cases where the offender is the woman herself, in addition to physical evidence, there may be a number of psychological factors relevant to the degree of the crime with which the woman should be charged.⁴⁰ For example, the woman may have been in denial about her pregnancy and may even be in denial that a birth has occurred.⁴¹

Researchers are presented with a somewhat different range of questions. A homicide researcher will need to determine a basis for classifying fetal death as a homicide. Because the same acts may legally result in a homicide in one state but not in another, a researcher interested in studying homicide across multiple states may want to disregard the varied legal definitions. The researcher will then need to decide on his or her own qualifications for classification. In presenting any results, it will be important for the researcher to identify the qualifications used.

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¹ Fetal Homicide Laws, <http://www.ncsl.org/programs/health/fethom.htm> (updated January 2007).

² *Id.*

³ Alison Tsao, Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?, 25 *Hastings Const. L.Q.* 457, 461 (1998).

⁴ *Id.* at 462.

⁵ *Id.* at 461.

⁶ *Id.* at 461.

⁷ *Id.* at 461-62.

⁸ Tsao, *supra* note 3 at 461 (published in 1998 and stating that roughly half of the states still follow the rule); compare Fetal Homicide Laws, *supra* note 1 (updated in 2007 and showing at least 36 states with fetal homicide laws)

⁹ *Roe v. Wade*, 410 U.S. 113, 157-59 (1973).

¹⁰ Alan S. Wasserstrom, Homicide Based on Killing of Unborn Child, 64 *A.L.R.5th* 671, § 4[c] (Originally published in 1998).

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- ¹¹ Fetal Homicide Laws, *supra* note 1 (citing *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984) and *State v. Ard*, 505 S.E.2d 328 (S.C. 1998)).
- ¹² *Vo v. Superior Court In and For County of Maricopa*, 836 P.2d 408, 412-415 (Ct. App. Div. 1 1992), review denied, (Sept. 22, 1992).
- ¹³ *People v. Wang*, 490 N.Y.S.2d 423, 426 (N.Y. Sup. 1985)
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Id.*, n.3.
- ¹⁷ *Boyd v. State*, WL 185250 1 (Minn. App. 1999).
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.* at 2; *Id.* at 4.
- ²² *Boyd*, *supra* note 17 at 4.
- ²³ *Id.*
- ²⁴ Tsao, *supra* note 3 at 465.
- ²⁵ *Id.*
- ²⁶ Fetal Homicide Laws, *supra* note 1
- ²⁷ *Id.*
- ²⁸ *Roe*, *supra* note 9 at 163.
- ²⁹ Tsao, *supra* note 3 at 460.
- ³⁰ *See id.* at 467.
- ³¹ *Id.* at 464.
- ³² *Id.* at 473.
- ³³ *Id.*
- ³⁴ *Id.* at 475.
- ³⁵ *State v. Ashley*, 701 So.2d 338 (Fla. 1997).
- ³⁶ *Id.*
- ³⁷ Howard Minkoff, MD, and Lynn M. Paltrow, JD, Melissa Rowland and the Rights of Pregnant Women, *Obstetrics and Gynecology*, Vol. 104, No. 6 (December 2004).
- ³⁸ *Id.*
- ³⁹ 1953 U.C.A. § 76-5-201.
- ⁴⁰ *See* Elliot L. Atkins, Joseph P. Grimes, Gregory W. Joseph, and Julie Liebman, Denial of Pregnancy and Neonaticide During Adolescence: Forensic and Clinical Issues, from *Psychology of Murder: Readings in Forensic Science*, R. Edward Geiselman, Ph.D, ed. (ACFP Press 2004) (discussing the case of an adolescent who failed to care for a newborn child after being in denial about her pregnancy).
- ⁴¹ *Id.* at 84.

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