

2. *Statutory Recognition*

As Justice **Blackmun** pointed out in *Roe v. Wade*, courts have generally considered **killing** a fetus to be substantially different from **killing** a person who **was** born alive. **This** is reflected in the different penalties that usually attach to feticide and other forms of homicide and the fact that feticide itself **has** been distinguished from murder or manslaughter in most **jurisdictions**. Over the past several years, however, several states have made the penalties for feticide commensurate with the penalties for homicide, and several have **promulgated** new homicide statutes that explicitly include fetuses **as** those whose death may give **rise** to homicide prosecutions. In 1986 the Minnesota legislature passed its "unborn child homicide" statute which provides, in part:

Minn.Stat. Ann. § 609.2661 (1988):

Whoever does any of the following is guilty of murder of an unborn child in the first degree and must be sentenced **to** imprisonment for life:

- (1) causes the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another • • •.

Minn.Stat. Ann. § 609.2662 (1988):

Whoever does either of the following is guilty of murder **of** an unborn child in the second degree and may be sentenced to imprisonment for not more than forty years:

- (1) causes the death of an unborn child with the intent to effect the death of that unborn child or another, but without premeditation • • •.

The statute found its way to the Minnesota Supreme Court in 1990.

STATE v. MERRILL

Supreme Court of Minnesota, 1990.
450 N.W.2d 318.

SIMONETT, JUSTICE.

Defendant **has** been indicted for **first-** and **second-degree** murder of **Gail** Anderson and also for **first-** and **second-degree** murder of **her** "unborn child." The trial court denied defendant's motion to **dismiss** the charges relating to the unborn child but certified for appellate review two questions:

1. Do **Minn.Stat. §§ 609.2661(1)** and **.2662(1)** (1988) [the unborn child homicide statutes] violate the fourteenth amendment of the United States Constitution **as** interpreted by the **United States** Supreme Court in **Roe v. Wade**, by failing to distinguish between viable fetuses and nonviable fetuses and embryos, and by treating fetuses and embryos as **persons**?

2. Are [said statutes] void for vagueness?

On November 13, 1988, **Gail** Anderson died from gunshot wounds allegedly inflicted by the defendant. An autopsy revealed **Ms.** Anderson was pregnant with a 27- or **28-day-old** embryo. The **coroner's** office concluded that there was no **abnormality** which would have caused a miscarriage, and that death of the embryo resulted from the death of **Ms.** Anderson. At this stage of development, a 28-day-old embryo is 4- to **5-millimeters** long and, through the umbilical cord, completely dependent on its mother. The Anderson embryo was not viable. Up to the eighth week of development, it appears that an "unborn **child**" is referred to as an embryo; thereafter it is called a fetus. The evidence indicates that medical science generally considers a fetus viable at 28 weeks following conception although some fetuses as young as 20 or 21 weeks have survived. The record is unclear in this case whether either **Ms.** Anderson or defendant **Merrill** knew she was pregnant at the time she was assaulted.

Defendant was indicted for the death of Anderson's "unborn child" under two statutes entitled, respectively, "Murder of an Unborn Child in the First Degree" and "Murder of **an** Unborn Child in the Second Degree." These two statutes, enacted by the legislature in 1986, follow precisely the language of our murder statutes, except that "unborn child" is substituted for "human being" and "person." The term "unborn child" is defined as "the unborn offspring of a human being conceived, but not yet born." **Minn.Stat. § 609.266(a)** (1988).

This legislative approach to a fetal homicide statute is most unusual and raises the constitutional questions certified to us. **Of** the 17 states that have codified a crime of murder of an unborn, 13 create **criminal liability** only if the fetus is "viable" or "quick." Additionally, two **noncode** states have expanded their **definition** of common law homicide to include viable fetuses. [] **[Two states]** impose criminal liability for causing the death of a fetus at any stage, as does **Minnesota**, but the statutory penalty provided upon conviction is far less severe. Arizona [] (**5-year** sentence); Indiana [] (**2-year** sentence).

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I.

Defendant **first** contends that the unborn child homicide statutes violate the **Equal** Protection Clause. Defendant **premises his** argument on *Roe v. Wade*, which, he **says**, holds that a nonviable fetus is not a person. He then **argues** that the unborn child criminal statutes have **impermissibly** "adopted a classification equating viable fetuses and nonviable embryos with a person."

Assuming the relevance of defendant's stated premise, defendant **has** failed to show that the statutory classification impinges upon any of **his** constitutional **rights**. • • •

If we understand defendant correctly, he is **claiming-the** statutory **classification**, by not distinguishing between viable and nonviable fetus-

es, exposes him to conviction as a murderer of an unborn child during the **first** trimester of pregnancy, while others who intentionally destroy a nonviable fetus, such as a woman who obtains a legal abortion and the doctor who performs it, are not murderers. In other words, defendant claims the **unborn** child homicide statutes expose him to serious penal consequences, while others who intentionally terminate a nonviable fetus or embryo are not subject to criminal sanctions. In short, defendant claims similarly situated persons are treated dissimilarly.

We disagree. The situations are not similar. The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act. In the case of abortion, the woman's choice and the doctor's actions are based on the woman's constitutionally protected right to privacy. **This** right encompasses the woman's decision whether to terminate or continue the pregnancy without interference from the state, at least until such time as the state's important interest in protecting the potentiality of human life predominates over the right to privacy, which is usually at viability. *Roe v. Wade* []. *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.

As defendant points out, the United States Supreme Court **has** said that an unborn child lacks "personhood" and is not a person for purposes of the Fourteenth Amendment. *Roe v. Wade* []. The focus of that **case**, however, was on protecting the woman from **governmental** interference or compulsion when she was deciding whether to terminate or continue her pregnancy. **Significantly**, the *Roe v. Wade* court also noted that the state "has still **another** important and legitimate interest in protecting the potentiality of human life." . . . * **In our case**, the fetal homicide 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.

The state's interest in protecting the "potentiality of human life" includes protection of the **unborn** child, whether an embryo or a nonviable or viable fetus, and it **protects, too**, the woman's interest in her **unborn** child and her right to decide whether it shall be **carried in utero**. . . . *

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II.

A more **difficult** issue, as the trial court noted, is whether the **unborn** child criminal statutes **are** so vague as to violate the **Due Process** Clause of the Fourteenth Amendment.

* * *

A.

Defendant first contends that the statutes fail to give fair warning to a potential violator. Defendant argues it is **unfair** to impose on the murderer of a woman an additional penalty for murder of her unborn child when neither the assailant nor the pregnant woman may have been aware of the pregnancy.

The fair warning rule has never been understood to excuse criminal liability simply because the defendant's victim proves not to be the victim the defendant had in mind. Homicide statutes generally provide that a person is guilty of **first-** or **second-degree** murder upon **proof** that the offender caused the death of a person with intent to **cause** the death of that person or another. [] Because the offender did not intend to **kill** the particular victim, indeed, may not even have been aware of that victim's presence, does not mean that the offender did not have fair warning that he would be held **criminally** accountable the same as if the victim had been the victim intended. []

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B.

Defendant next contends that the unborn child criminal statutes are fatally vague because they do not define the phrase "causes the death of an unborn child." As a result, defendant argues, the statutes invite or permit arbitrary and discriminatory enforcement. []

Defendant argues that the statute leaves uncertain when "death" occurs, or, **for that** matter, when "life" begins. People will differ on whether life **begins** at conception or at viability. People may differ on whether death is the cessation of brain activity (an activity not present in an embryo) or the cessation of a functioning circulatory system. The problem, says defendant, is that absent statutory criteria, judges and juries will provide their own definitions which will differ, leaving the statutes **vulnerable** to arbitrary and discriminatory enforcement. **This** argument, we think, attempts to prove too much.

* * * Traditionally, the crime of feticide imposed criminal liability for **the** death of a "viable" fetus, that is, a fetus at that stage of development which permits it to live outside the **mother's** womb, or a fetus that **has** "quickened," that is, which moves within the **mother's** womb.

[Our legislature] **has** enacted very **unusual statutes** which go beyond traditional feticide, both in expanding the definition of a fetus and in the severity of the penalty imposed. The statutes in question impose **the** criminal penalty for murder on whoever **causes** the death of "the **unborn** offspring of a human being conceived, but not yet born."

Whatever one might **think** of the wisdom of this legislation, and notwithstanding the difficulty of **proof** involved, we do not **think** it **can** be said the offense is vaguely defined. An embryo or **nonviable** fetus when it is within the **mother's** womb is "the unborn offspring of a **human** being." Defendant argues, however, that to **cause** the death of

an embryo, the embryo must first be living; if death is the termination of life, **something** which is not alive cannot experience death. In short, defendant argues that **causing** the death of a **27-day-old** embryo **raises** the perplexing question of when "life" **begins**, as well as the question of when "death" occurs.

The difficulty with this argument, however, is that the statutes do not raise the issue of when life as a *human* person begins or ends. The state must prove only that the implanted embryo or the fetus in the mother's womb was living, that it had life, and that it has life no longer. To have life, as that term is commonly understood, means to have the property of all living things to grow, to become. It is not necessary to prove, nor does the statute require, that the living organism in the womb in its embryonic or fetal state be considered a person or a human being. People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is **ensouled** or acquires "personhood". These questions are entirely irrelevant to criminal liability under the statute. Criminal liability here requires only that the genetically human embryo be a living organism that is growing into a **human** being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life.

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KELLEY, JUSTICE (concurring in part, dissenting in part):

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Each of the statutes under attack in this appeal employs the phrase "causes the death of an unborn child." As appellant **points** out, neither statute defines the phrase, nor does either set out particularized **standards** to afford guidance to a court or a jury for **use** in **construing** the **phrase**. In short, both statutes leave when "death" occurs, or, for that matter, when "life" commences undefined. Absent such definition, it **seems** to me the phrase "**causes** the death of an **unborn** child" is burdened with ambiguity which, by its very nature, invites arbitrary and discriminatory enforcement. The result, as I see it, is that by necessity trial courts are left to wrestle with metaphysical, medical and legal concepts relative to the commencement and cessation of life in order to apply these statutes in a **criminal** prosecution.

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It cannot be gainsaid that few topics today compel **as** fierce public debate and evoke the passionate convictions of **as** many of our citizens as does the issue of when "life" in a fetus **begins**. In view of the stridency of that debate, it appears conceivable, perhaps even predictable, that two juries having the same evidence could arrive at the same **factual** conclusions, but due to divergent and strongly held beliefs arrived at a dissimilar legal result. By way of **example**, in the **case** before us, one **jury sharing** a common viewpoint of when life commences could find the defendant **guilty** of fetal murder, whereas **another**

er whose members share the view that life was nonexistent in a 26 to 28-day-old embryo; could exonerate the appellant.

The likelihood of discriminatory enforcement is further enhanced when the discretionary charging function possessed by a grand jury is considered. The decision to charge must be **concurred** in by only a majority of the panel. Minn.R.Crim.P. 18.07. Thus, the decision to charge or not may well pivot on the personal philosophical and moral tenets of a majority of the potential panel—a majority whose beliefs may vary from grand jury panel to grand jury panel.

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WAHL, JUSTICE (dissenting).

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* * * The constitutional requirement of due process not only concerns matters of **criminal** procedure, but also limits "the manner and extent to which conduct may be **defined** as criminal in the substantive criminal law." []

By failing to distinguish between viable fetuses and nonviable fetuses and embryos, [the statute] **run[s]** afoul of the **defendant's** right to substantive due process.

Defendant is charged with murder of an unborn child * * *. [T]he actor, to be guilty of murder and to be sentenced for murder, must cause the death, not of a human being, but of an unborn child. An unborn child is the unborn offspring of a human being conceived, but not yet born [] Thus an unborn child **can** be a **fertilized** egg, an embryo, a nonviable fetus or a viable fetus.

The law with regard to murder is clear. Murder is the "**unlawful** killing of a human being by another * * *." [] The term murder implies a felonious homicide, which is the wrongful killing of a human being. [] A nonviable fetus is not a human being, nor is an embryo a human **being**, nor is a fertilized egg a human being. None has attained the **capability** of independent human life. [] * * *

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* * * "When a fundamental right is involved, due process requires a state to **justify** any action **affecting** that right by demonstrating a **compelling** state interest." * * *

The fundamental right involved in the **case** before us as far as defendant is concerned is his liberty. He is charged with two counts of murder of a woman who was 26 to 28 days pregnant at the time of her death. * * * The state does not have a compelling interest in this potential human life until the fetus **becomes** viable. [] [The statute is] not **narrowly** drawn to distinguish between viable fetuses, nonviable fetuses and embryos, so **as** to express "only the legitimate state interests at stake." **Unless** the words "unborn child" are construed to read "viable unborn child," the reach of these statutes is **unconstitutionally** broad. * * *

Notes and Questions

1. The majority distinguishes human life from "personhood" and determines that the statute was designed to protect **human** life, not persons. Would the majority permit the legislature to protect other forms of human life—human blood cells, for example—in the same way that it has decided to protect the "nonperson" human life in this **case**, or is the potential personhood of the embryo fundamental to the majority's decision that this statute's protection of human life is constitutional?

2. In this case the court could have depended upon the interests of several different parties and nonparties. The pregnant woman has an **interest**, as do the criminal defendant, the state, and, perhaps, the embryo or fetus. The majority depends upon the pregnant woman's interest in being able to maintain her pregnancy, while the dissent looks to the interest of the criminal defendant. None of the justices depends independently upon the interest of the embryo or the fetus. Could you craft an opinion that would depend upon that interest rather than the interest of the pregnant woman, the criminal defendant or the **state**?

3. In her dissent, Justice Wahl argues that *Roe v. Wade* forbids a state from treating a nonviable fetus like a person, at least for purposes of **criminal** law. Is she right? For purposes of the homicide laws, is there any reason to draw a line between a viable and nonviable fetus when the mother of each intends to **carry** the fetus in utero full term? **Courts** have had little trouble upholding harsh feticide statutes that protect only viable fetuses; perhaps this is **because** by the point of viability the fact of the pregnancy is likely to be obvious to the **assailant**. Are any goals of the **criminal** law **served** by the application of this Minnesota statute to a case where neither the pregnant woman nor the **assailant** knew of the pregnancy? In *People v. Smith*, 188 **Cal.App.3d** 1495, 234 **Cal.Rptr.** 142 (1987), a man who killed a woman he knew to be pregnant was held to be on notice that he could be convicted for two murders under California law. **See also**, *United States v. Spencer*, 839 **F.2d** 1341 (9th Cir.1988); *Smith v. Newsome*, 815 **F.2d** 1386 (11th Cir.1987).

4. **Minnesota** is not alone in extending its homicide statute to protect fetuses before viability. The **former** feticide statute in Illinois, which applied only to fetuses whose viability was proven beyond a reasonable doubt, carried a penalty that was "the same as for murder, except that the death penalty may not be **imposed**." Shortly after the statute was upheld in *People v. Shum*, 117 **Ill.2d** 317, 111 **Ill.Dec.** 546,512 **N.E.2d** 1183 (1987), the **Illinois** legislature replaced the feticide statute with a statute prescribing "intentional homicide of an **unborn** child!" In that statute "**unborn** child" is defined as "any individual of the human species from fertilization **until** birth." **Ill.—S.H.A.** ch. 38, § 9-1.2 (1988 Supp.) Although the **Illinois** statute applies to **previable** fetuses and embryos, it is narrower than its Minnesota counterpart in that it can be applied only when the assailant **knows** that **his** victim is pregnant. Is this **mens** rea requirement reasonable? Is it reasonable to have a statute, like Minnesota's, without this **knowledge** requirement?