

# Feticide In California: A Proposed Statutory Scheme

*The California law proscribing non-consensual feticide is defective in both application and theory. This article proposes the adoption of a separate feticide statute that properly recognizes the unique status of the human fetus and proscribes a sufficiently wide scope of criminal conduct.*

Although the human fetus<sup>1</sup> is a human entity, its status as a "person" is the subject of considerable dispute.<sup>2</sup> This issue becomes especially significant with respect to attempts to provide legal protection for the fetus. Hence, many states have recognized the importance of fetal protection and have enacted criminal statutes prohibiting the non-consensual killing<sup>3</sup> of the fetus.<sup>4</sup>

The California legislature formulated its version of a fetal protection statute in 1970 by explicitly designating the fetus as a potential victim of murder.<sup>5</sup> Thus in California, a person who

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<sup>1</sup> "Fetus" in this article includes the unborn human entity at any stage in gestation.

<sup>2</sup> For a thorough discussion of the personal status of the human fetus, see P. DEVINE, *THE ETHICS OF HOMICIDE*, (1978). For purposes of this article, "person" is equated with "human being."

<sup>3</sup> As used in this article, "killing" connotes nothing more than destruction. The phrases "fetus-killing" or "feticide" refers to the criminal conduct on which this article is focused. The conduct addressed in this article is typified by violent assault upon a pregnant woman.

<sup>4</sup> For examples of other states' feticide statutes, see note 63 *infra*.

<sup>5</sup> The California murder statute provides in pertinent part:

a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with § 25950) of Division 20 of the Health and Safety Code.

2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code,

intentionally and with malice aforethought kills a fetus is guilty of murder. There are two significant limitations to this rule. First, the statute expressly excludes consensual abortions from its scope.<sup>6</sup> Second, California appellate courts have interpreted the word "fetus" to include only a viable fetus, one that is capable of independent existence.<sup>7</sup>

In addition to the murder statute, the California criminal abortion statute,<sup>8</sup> which primarily regulates consensual abortion, may also provide some protection against non-consensual feticide.<sup>9</sup> Whether this statute indeed affords effective protection for the fetus is uncertain.<sup>10</sup>

The California criminal law provides no direct form of protection for the unborn other than through the murder and, arguably, the abortion statutes. This article first evaluates the adequacy of current protection. In discussing the existing California statutes' effectiveness, Part I addresses the following general issues: 1) the inadequacy of the current law, 2) the form of its proscriptions, and 3) the points along the gestation continuum that should result in criminal liability. Part I also suggests that the California statutes neither provide adequate protection for the fetus nor

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in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus, or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any provision of the law.

CAL. PENAL CODE § 187 (West Cum. Supp. 1979).

<sup>6</sup> CAL. PENAL CODE § 187 (West Cum. Supp. 1979) subparagraph (b). See note 5 *supra*.

<sup>7</sup> *People v. Smith*, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (2d Dist. 1976). For a discussion of the case, see text accompanying note 57 *infra*.

<sup>8</sup> The California abortion statute reads as follows:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Cal. Health and Safety Code §§ 25950-25957 (West Cum. Supp. 1979) is punishable by imprisonment in the state prison.

CAL. PENAL CODE § 274 (West Cum. Supp. 1979).

<sup>9</sup> See note 3 *supra*.

<sup>10</sup> For a discussion of the abortion statute in the context of feticide, see text accompanying notes 30-40 *infra*.

properly recognize the distinction between the fetus and the person.

In view of the shortcomings of the current legislation, Part II develops an alternative by proposing the creation of a separate feticide statute. Such a statute would recognize the unique character of the fetus and would avoid the problems of the present statutes.

### I. PROBLEMS WITH THE CURRENT CALIFORNIA LAW

The California law provides inadequate legal protection for the fetus. Since the traditional criminal categories in California such as homicide and abortion have normally focused on the "person" as the victim, they cannot easily accommodate the unique character of the fetal victim.<sup>11</sup> As a result, in California, a gap exists between protection afforded through the murder statute and the relatively innocuous abortion statute.

The California law also fails to properly treat the conceptual distinction between the fetus and the person. The present law recognizes the fetus as a non-person, yet paradoxically includes the fetus as a victim of murder.<sup>12</sup> The inclusion of the fetal victim in the murder statute forces the law to initiate criminal liability at some discrete point along the gestation continuum. As a result, the current standard for initiating liability is subject to the essentially arbitrary determination of viability.

#### A. *The Manslaughter Gap*

Although the non-consensual killing of a fetus is included in California's murder statute, it is not included in the manslaughter statute.<sup>13</sup> Since the California Supreme Court has decided to

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<sup>11</sup> Prior to 1970, the fetus was not an explicit victim of any crime in California. In 1970, the legislature amended the murder statute to include the fetus as a victim. For further discussion, see text accompanying note 14 *infra*.

<sup>12</sup> The United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 158 (1973), concluded that a fetus is not a person for Constitutional purposes. See text accompanying note 52 *infra*. The amended California murder statute does not explicitly equate the fetus with the person or human being. See note 5 *supra*. for the text of the statute.

<sup>13</sup> The California manslaughter statute reads as follows:

Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

- 1) Voluntary—upon a sudden quarrel or heat of passion.
- 2) Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which

narrowly construe the statutory language concerning the fetus, the unavoidable conclusion is that the fetus can be the victim of murder but not of manslaughter or other lesser homicidal offenses.<sup>14</sup> This article designates this current situation as the "manslaughter gap."

No other statutory law fills the manslaughter gap. The criminal abortion statute prohibits certain consensual fetal killings.<sup>15</sup> The extent of this statute's application to non-consensual feticide, however, is uncertain. The following discussion points out the logical inconsistency of the manslaughter gap and illustrates some of its potentially adverse consequences with recent case law.

The legislative intent for the murder statute's inclusion of the fetal victim in murder but not in manslaughter relates to the heinousness of the defendant's conduct.<sup>16</sup> The legislature may have come to this conclusion by reasoning that since a reasonable person may view the victim as something different from or less than a person, liability should follow only in the contexts involving evidence of extreme criminal intent. This alone cannot justify the legislature's action. In addition, as will be seen below, by including the fetus as a possible victim of murder, the legislature

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might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle.

3) In the driving of a vehicle—

a) In the commission of an unlawful act, not amounting to a felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

b) In the commission of an unlawful act, not amounting to a felony, without gross negligence or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

This section shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to a felony, or of the commission of a lawful act which might produce death in an unlawful manner.

CAL. PENAL CODE § 192 (West 1970).

<sup>14</sup> In *Justus v. Atchison*, 19 Cal. 3d 564, 578, 139 Cal. Rptr. 97, 106, 565 P.2d 122, 132 (1977), the California Supreme Court concluded that "when the Legislature determines to confer legal responsibility on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms."

<sup>15</sup> For the text of the abortion statute, see note 8 *supra*.

<sup>16</sup> For a report of the legislative intent behind this phrase of the 1970 murder modification, see Comment, *Intentional Killing of An Unborn Child*, 2 PAC. L.J. 170, 172 (1971).

only aggravated the sensitive problem that prompted its initial concern.

The most significant negative effect of the manslaughter gap is its failure to prohibit intentional fetal killing accompanied by the mental element associated with voluntary manslaughter.<sup>17</sup> Under the present law, for example, if a person with diminished mental capacity intentionally kills a fetus, the court cannot reduce the charge to manslaughter. Because this conduct is entirely outside the scope of present homicide statutes, it is inherently defective as a deterrent for intentional fetal killings.

Recent case law involving non-consensual feticide illustrates concrete effects of the manslaughter gap. The inconsistency in the present law has an adverse impact on both the fetal victim deserving protection and on the criminal defendant. The case of *People v. Apodaca* demonstrates the effect of the manslaughter gap on a defendant charged with the murder of a fetus.<sup>18</sup>

In *Apodaca*, the trial court convicted the defendant of murder of a fetus after he, in a fit of anger, had sexually assaulted and beat his pregnant, former wife. On appeal, the defendant claimed that the trial court had violated his right to due process and a fair trial by instructing the jury only on murder and not on manslaughter.<sup>19</sup> *Apodaca* contended that the jury was given a choice between convicting him of murder of a fetus or acquitting him completely. The defendant argued that the jury would be more likely to choose murder in this case than in a situation where manslaughter was an available alternative. The defendant maintained that, since manslaughter is a lesser, included offense of murder, a jury in a murder trial should always have this lesser alternative available for its consideration.

The appellate court rejected the defendant's argument for two reasons. First, the court suggested that it was to the defendant's advantage that manslaughter not be applied. Since manslaughter was not available, it was a crime for which he could not be convicted.<sup>20</sup> Second, the court noted that the California legislature

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<sup>17</sup> For the text of the manslaughter statute, see note 13, *supra*. Rage, jealousy, or pain along with adequate provocation often characterize that mental element. Voluntary manslaughter is also the appropriate charge when a defendant kills with diminished mental capacity. Intoxication, mental defects or illness generally characterize those circumstances. See generally 1 WITKIN, CALIFORNIA CRIMES § 330-337, (Supp. 1978).

<sup>18</sup> 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (5th Dist. 1978).

<sup>19</sup> *Id.* at 490, 142 Cal. Rptr. at 838.

<sup>20</sup> *Id.* at 491, 142 Cal. Rptr. at 839.

had fully intended to omit the fetus as a victim of manslaughter.<sup>21</sup>

The first reason for the court's decision may have theoretical merit, but in practice, the defendant's fears in *Apodaca* may be justified. In a close case, an all-or-nothing instruction could easily influence a vengeful jury to convict the defendant of murder. This is especially so in light of such emotional issues as the unlawful assault of a woman and the intentional killing of a human fetus.<sup>22</sup>

With respect to the court's second reason for rejecting the defendant's argument, the fact that the statutory omission was not due to legislative oversight is irrelevant to whether there was a violation of defendant's due process rights. Since an intended act by the legislature can have an unintended impact, the lawmakers' intent at the time of the statute's creation does not shield the statute from possible constitutional attack.<sup>23</sup>

Another recent case reveals further problems of the manslaughter gap. *People v. Carlson*<sup>24</sup> illustrates a prosecutor's unsuccessful attempt to circumvent the manslaughter gap using the felony murder rule and the doctrine of transferred intent. In *Carlson*, a jury found the defendant guilty of manslaughter of his pregnant wife and the second degree felony-murder of the fetus she carried. The jury's resort to the felony-murder rule implied that the defendant had not acted intentionally toward the fetus. An issue on appeal was the legality of a conviction for felony-murder of the fetus.<sup>25</sup> The California Court of Appeals decided that the felony-murder rule was inapplicable since the underlying felony, manslaughter, was not independent of the fetal killing.<sup>26</sup>

The appellate court also declined to apply the doctrine of transferred intent since it allows transfer only of the specific intent held by the defendant. Since the jury found that the defendant had only the lesser intent characteristic of manslaughter, the specific intent required for murder was unavailable for transfer. Thus, since the doctrine of transferred intent was inapplicable,

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<sup>21</sup> *Id.* at 491, 142 Cal. Rptr. at 839.

<sup>22</sup> See Brief for Appellant at 31-32 for a discussion of the influence of the manslaughter gap on a jury.

<sup>23</sup> The constitutional ramifications of the manslaughter gap are outside the scope of this article.

<sup>24</sup> 37 Cal. App. 3d 349, 112 Cal. Rptr. 321 (1st Dist. 1970).

<sup>25</sup> The felony-murder rule is codified under CAL. PENAL CODE § 189 (West 1970).

<sup>26</sup> The reasoning of the *Carlson* case, however, does not rule out the felony murder rule's application with respect to the fetus as long as the underlying felony is independent of the fetal killing.

no criminal sanction existed for the feticide itself.<sup>27</sup>

The *Carlson* and *Apodaca* rulings illustrate the impact of the manslaughter gap on both the intentional and non-intentional killing of a fetus resulting from a violent attack on the mother. In such situations, manslaughter is not an available criminal sanction. Therefore, unless a defendant has the malicious intent characteristic of murder, the killing of the fetus escapes coverage under the homicide statutes.

The manslaughter gap is logically at odds with the intrinsic relationship between murder and manslaughter. Manslaughter is inherently a lesser and included offense of murder. By definition, the only difference between the crimes of murder and manslaughter is the mental state of the actor.<sup>28</sup> If a subject can be a murder victim, then logically that subject can be the victim of manslaughter if certain circumstances result in a mitigation of malice.<sup>29</sup> The status of the victim should be irrelevant in distinguishing between the two crimes. To distinguish the crimes in terms of the victim's status is tantamount to acknowledging a qualitatively significant distinction between the mental state of a murderer of a fetus and the murderer of a human being. Such a distinction has no basis in fact or reason.<sup>30</sup>

### B. *The Abortion Overlap*

In order to close the manslaughter gap and remove its adverse consequences, judicial opinions suggest that the criminal abortion statute establishes liability for non-consensual feticide.<sup>31</sup> If applicable to feticide cases, the abortion statute might encompass conduct that a fetal manslaughter statute would proscribe. Use of the abortion statute to close the manslaughter gap, therefore, would eliminate the need to include fetal killings under

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<sup>27</sup> In a case involving a newborn child as a victim, the manslaughter statute would apply directly since the child is a "human being." Note also that had the victim been a child, the transferred intent doctrine would be available.

<sup>28</sup> In *People v. Ray*, 14 Cal. 3d 20, 28, 120 Cal. Rptr. 377, 381, 533 P.2d 1017, 1021 (1975), the court found that "[t]he critical factor in distinguishing the degrees of homicide is . . . in the perpetrator's mental state." See also *People v. Domingo*, 210 Cal. App. 2d 120, 26 Cal. Rptr. 315 (3d Dist. 1962).

<sup>29</sup> It might be helpful to view murder and manslaughter, at least voluntary manslaughter, as opposite ends of the same pole. A particular mental state as a factor in a homicide case is used solely for the purpose of tipping the pole one way or the other.

<sup>30</sup> For a discussion of the legislative intent behind the current feticide scheme, see text accompanying note 16 *supra*.

<sup>31</sup> See note 32 *infra*.

manslaughter. This position, however, is defective for two reasons. First, it is doubtful that the abortion statute in fact covers non-consensual fetal killings. Second, the abortion statute is not an effective substitute for manslaughter.

Although questionable, the first assumption, that the abortion statute covers non-consensual feticide, is bolstered by the literal wording of the statute and dicta from two California cases.<sup>32</sup> The abortion statute may include non-consensual fetal killing within its purview when it proscribes "any . . . other means whatever, with intent to procure a miscarriage. . . ."<sup>33</sup> Dicta from the California Supreme Court case of *Keeler v. Superior Court* supports this interpretation.<sup>34</sup> In *Keeler*, the court held that the murder statute, before the 1970 amendment, did not proscribe the non-consensual killing of a fetus.<sup>35</sup> Justice Mosk, speaking for the majority, commented that the state could, however, use the abortion statute to convict a defendant accused of killing a fetus maliciously or by nonconsensual means. This language was dictum since the prosecutor did not charge the defendant with criminal abortion. Dictum in *People v. Smith*, a case with facts similar to *Keeler*, suggests the same.<sup>36</sup>

An equally strong argument, however, weighs against the proposition that the abortion statute proscribes non-consensual killings. First, the language of the statute in reference to the "means" of abortion proscribed is ambiguous. Arguably, the phrase "any other means" is restricted in scope by the more specific proscriptions before it which relate only to consensual miscarriages.<sup>37</sup> Second, an analysis of the abortion statute, as origi-

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<sup>32</sup> *Keeler v. Superior Court*, 2 Cal. 3d 619, 636, 470 P.2d 617, 627, 87 Cal. Rptr. 481, 491 (1970); *People v. Smith*, 59 Cal. App. 3d 751, 759, 129 Cal. Rptr. 498, 503 (2d Dist. 1976).

<sup>33</sup> For the text of the abortion statute, see note 8 *supra*.

<sup>34</sup> *Keeler v. Superior Court*, 2 Cal. 3d 619, 636, 470 P.2d 617, 627; 87 Cal. Rptr. 481, 491 (1970).

<sup>35</sup> The defendant, *Keeler*, could not be convicted of a fetal murder since the murder statute was not yet modified. As a result of this case, the California legislature quickly acted to modify the murder statute so that it would address the *Keeler* conduct. See Comment, *Infanticide in California: The Impact of Keeler v. Superior Court*, 7 CAL. W. L.R. 272 (1970).

<sup>36</sup> *People v. Smith*, 59 Cal. App. 3d 751, 759, 129 Cal. Rptr. 498, 503 (2d Dist. 1976). In *Smith*, the language concerning abortion was dictum since abortion was not at issue on appeal.

In both *Keeler* and *Smith*, a defendant assaulted a pregnant woman with the intent to kill the fetus.

<sup>37</sup> For the applicable text of the abortion statute, see note 8 *supra*.

The effect of the *Roe v. Wade* abortion decision by the United States Supreme



nally drafted in 1850, fails to show evidence of an intent to encompass non-consensual conduct within the scope of the statute.<sup>38</sup> Third, the mere fact that the sentences for criminal abortion are considerably lower than those for fetal murder is evidence that the legislature intended the abortion statute to have a limited scope.<sup>39</sup> Fourth, even though the California courts have spoken on this issue, the comments have only been dicta.<sup>40</sup> Furthermore, the

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Court was to recognize the mother's right to privacy as superior to a non-viable fetus' right to life. *Roe v. Wade*, 410 U.S. 113 (1973). The criterion of consent then becomes the important signpost of the right to privacy. At least, as far as *Roe* is concerned, consent is a new factor taking on deeper significance after 1973. The California abortion statute should reflect the significance by explicitly distinguishing consensual cases from non-consensual cases.

<sup>38</sup> The original abortion statute provided in pertinent part:

Every person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: *Provided*, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.

1850 Cal. Stats. 233 Ch. 99, § 45. This language tends to address solely the problem of illegal abortions performed on women who consent to them. The statute has since been modified to apply to abortions procured by "any means whatever." This change may have been a result of New York's abortion law's influence in 1872. See CAL. PENAL CODE § 274 (West Cum. Supp. 1979) for a reference to the legislative history of the statute. Note, however, that in 1872, a New York statute addressed to non-consensual cases and a separate statute, similar to the present California codification, addressed consensual cases only. See Means, *The Law of New York Concerning Abortion and the Status of the Fetus*, 14 N.Y.L.F. 411, 486 (1968). Since 1872, the California Penal Code §§ 274, 275 have used substantially the same wording in the statutes addressing abortionists and mothers who consensually solicit abortionists. In each, the punishments have been and still are the same. In each, abortions "by any means whatever" are at issue.

<sup>39</sup> For a discussion of the disparity in sentencing, see note 46 *infra*.

<sup>40</sup> Because no other statute was available before 1970, the *Keeler* court probably intended to employ the abortion statute as a stopgap measure until the legislature did something about the problem. Likewise, in *Smith*, the court mentioned abortion's applicability since it was the only statute available to address the circumstances in the case. In *Smith*, the fetus involved was non-viable and, hence, not protected under the murder statute. Both *Keeler* and *Smith* seemed to represent signals by the courts that the legislation required modification. Had a proper feticide statute existed, resort to the abortion statute as a means of proscribing non-consensual conduct would not have been necessary.

dissent in *Keeler* indicates disagreement among the California Supreme Court justices as to the correct interpretation of the pertinent language of the abortion statute.<sup>41</sup>

The result is that only a blurred guideline exists in applying the abortion statute to situations involving non-consensual feticide. For example, despite the existence of the dicta in *Keeler* and *Smith*, prosecutors in recent cases involving non-consensual feticide have not charged the defendant under the abortion statute although the defendant's conduct arguably fell within the statute's proscription.<sup>42</sup>

Even if the California abortion statute does address non-consensual fetus killings, it is an inappropriate vehicle for doing so. For instance, the problems exposed in *Carlson*, involving the inapplicability of both the felony-murder rule and the transferred intent doctrine to unintentional feticide, still remain.<sup>43</sup> Non-intentional killing is not included within the scope of the abortion statute.<sup>44</sup> Hence, in California, the sanctions of criminal abortion are unavailable for a person who unintentionally kills a fetus through manslaughter of the mother.

Similarly, the contention espoused in *Apodaca*, that an "all-or-nothing" charge would influence a jury to a defendant's detri-

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<sup>41</sup> 2 Cal. 3d 619, 641, 87 Cal. Rptr. 481, 495 (1970). In his dissent, Justice Burke emphasized that "we cannot assume that the Legislature intended a person such as defendant charged with the malicious slaying of a fully viable child, to suffer only the mild penalties imposed upon mild abortionists who, ordinarily, procure only the miscarriage of a nonviable fetus or embryo." Note that the court in *Keeler* suggested that since the defendant intended to "stomp it [the fetus] out of her," he thereby intended to "procure a miscarriage." The court seemed to suggest that the defendant must actually intend that the fetus miscarry, not merely that it die within the womb of the mother. It is doubtful, however, that defendants in the *Keeler* mode ever intended to accomplish anything but the killing of the fetus.

<sup>42</sup> In *Keeler v. Superior Court*, 2 Cal. 3d 619, 624, 87 Cal. Rptr. 481, 483 (1970), after beating his former wife with the intent to kill her viable fetus, the defendant was not charged with criminal abortion. The defendant in *People v. Apodaca*, 76 Cal. App. 3d 479, 483, 142 Cal. Rptr. 830, 833 (5th Dist. 1978), under similar facts, was also spared the abortion charge. Brief for Appellant at 1. Under similar circumstances, the defendant in *People v. Smith*, 59 Cal. App. 3d 751, 753, 129 Cal. Rptr. 498, 499 (2d Dist. 1976) was charged with criminal abortion as well as with murder of the fetus. In contrast to the above two cases, the victim in *Smith* was a pre-viable fetus and hence could not be the victim of murder.

<sup>43</sup> For a discussion of the *Carlson* case, see text accompanying notes 24-27 *supra*.

<sup>44</sup> The statute explicitly states ". . .with intent thereby to procure a miscarriage. . . ." CAL. PENAL CODE § 274 (West Cum. Supp. 1978). See note 8 *supra*.

ment, is likely to persist even with the applicability of the abortion statute.<sup>45</sup> Since the penalty for murder is disproportionate to the relatively light penalty for abortion, a defendant who violently assaults a pregnant woman with the intent to kill the fetus faces conviction of two crimes separated by a wide gap in applicable sentences.<sup>46</sup> Faced with the prospect of inflicting either a substantial penalty or a relatively insignificant one, the jury may unfairly convict the defendant of the greater offense.

### C. *The Fetus As Non-Person*

Notwithstanding the adverse consequences of the manslaughter gap, the proscription of feticide through the murder statute by itself, creates ambiguity and further legal problems. Feticide and murder clash conceptually. Inclusion of the fetus as a victim of murder, therefore, leads to logical difficulties. Under the murder statute, the fetus' status as a person or non-person is unclear. Further, judicial resort to viability as a means of initiating liability for feticide leads to problems of arbitrariness. The result is that the current statutory framework does not properly address the problems and thus affords inadequate protection against feticide.

Murder is a "crime against the person" in California.<sup>47</sup> Murder of a fetus consequently must be one of the crimes "against the person." Other crimes "against the person" include battery<sup>48</sup> and mayham.<sup>49</sup> All such crimes are designed to operate along a con-

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<sup>45</sup> For a discussion of the *Apodaca* case, see text accompanying notes 18-21 *supra*.

<sup>46</sup> The penalty for abortion, CAL. PENAL CODE § 274 (West Cum. Supp. 1979) is "imprisonment in the state prison" which amounts to sixteen months, two, or three years. See CAL. PENAL CODE § 1168(b) (West Cum. Supp. 1979). A person convicted of murder in the first degree shall "suffer death, confinement to state prison for life without possibility of parole, or confinement in state prison for life. . . . Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, seven, or eleven years." CAL. PENAL CODE § 190 (West Cum. Supp. 1979). A person convicted of manslaughter shall be punished for two, four, or six years. CAL. PENAL CODE § 193 (West 1970).

The legislature recently expanded the sentences for murder and manslaughter in S.B. 709 Reg. Sess. (1978) which amended §§ 190 and 193. The legislature, however, left untouched the penalty for abortion.

<sup>47</sup> Murder is grouped under the general heading called "Crimes Against the Person" under CAL. PENAL CODE §§ 187-198 (West 1970).

<sup>48</sup> "Battery is any willful and unlawful use of force or violence upon the person of another." CAL. PENAL CODE § 242 (West 1970).

<sup>49</sup> The California mayhem statute reads as follows: "Every person who unlaw-

tinuum proscribing particular conduct commanding proportionate penalties. Hence, a consistent statutory framework requires that this entire range of crimes and penalties be available to the state. Such symmetrical application of the law should be available equally to all potential victims. The current law, however, unjustifiably excludes the fetus from all but one of the crimes on the continuum. If a fetus can be killed, logically it can be injured. Therefore, if the murder statute protects the fetus from death, logic would demand that a statute protect it from injury.

A danger exists, however, in a scheme that incorporates the fetus into all crimes "against the person." If the legislature incorporates the fetus into crimes normally employed for protecting persons, the legal concept of the fetus will tend to merge with the concept of the person.<sup>50</sup> This result is undesirable. Giving the fetus status as a person conflicts with one of the conclusions of the United States Supreme Court in *Roe v. Wade*.<sup>51</sup> Holding that a woman has a fundamental right, deriving from her right to privacy, to terminate her pregnancy, the Court in *Roe* concluded that the fetus is not legally a person.<sup>52</sup>

There is an important policy justification for distinguishing between the fetus and the person. As seen in *Roe*, liberalized abortion depends upon such a distinction. The mother's right to privacy would have no substance if balanced against the right to life of a fetus deemed to be "person." The Court in *Roe*, aware of the categorical predicament surrounding the "person" and the "fetus," was nevertheless able to appropriately distinguish the two terms. The fetus need not be considered a person in order to

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fully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." CAL. PENAL CODE § 203 (West 1970).

<sup>50</sup> If victims of crimes are historically limited to "persons," then the addition of the "fetus" as a victim may tend to personify the fetus. This result is aided especially when temporal cut-offs for liability are employed.

In the murder statute, liability is precluded unless the fetus is viable. *See* text accompanying note 54 *infra*. By explicitly marking off a point in time when a fetus becomes vulnerable to murder, the statute seems to essentially substitute viability for the original and previous cut-off point, i.e., birth, which happens to mark the point in time when legal personhood begins. It is worth noting also that the California legislature did, however, distinguish "fetus" from "human being," at least nominally, in the murder statute. *See* note 5 *supra* for the text of the murder statute.

<sup>51</sup> 410 U.S. 113 (1973).

<sup>52</sup> *Id.* at 158.

be understood as a human entity deserving of protection.<sup>53</sup>

Another logical predicament resulting from the current statutory treatment of fetus-killing is the requirement that a fetus be viable in order to merit criminal protection. A California appellate court in *People v. Smith* adopted viability as the initiation point of liability for the murder of a fetus.<sup>54</sup> It defined a viable fetus as one that has "the potentiality for survival outside the body of the parent. . . ."<sup>55</sup> The court's only rationale was that once a fetus has "developed to the point at which it is capable of independent human existence," its right to criminal protection is clear.<sup>56</sup> Thus, the court rationalized the viability standard by definition.

Viability is an attractive cut-off point since it seems to carry more justification for such purposes than a bare age cut-off. Given that the law must decide a particular time in gestation when the fetus is first recognized as a victim of murder, the viability stage seems no worse than any other. Even the viability cut-off, however, suffers from being unnecessarily arbitrary.

In *People v. Smith*, the court used viability as a cut-off for liability since, at viability, the fetus is capable of independent existence.<sup>57</sup> This reasoning suggests that the court chose viability as the cut-off point because of some special significance attached to it. Because viability serves to define a relatively special point in gestation, its attainment suggests that the fetus too has suddenly taken on a special significance.<sup>58</sup> As a result, it is easy to

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<sup>53</sup> *Id.* at 162. The Court in *Roe* recognized the need to protect the potentiality of human life even if it requires protecting by law a non-person.

<sup>54</sup> 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (2d Dist. 1976). The California Supreme Court has yet to speak to the issue regarding the meaning of "fetus" in the murder statute.

<sup>55</sup> *Id.* at 755, 129 Cal. Rptr. at 502. The United States Supreme Court, in *Roe v. Wade*, had defined viability as "the capability of the fetus to live outside the mother's womb, albeit with artificial aid." 410 U.S. 113, 160 (1973).

<sup>56</sup> *Id.* at 757, Cal. Rptr. at 502. The conclusion is questionable since independence, by itself, holds no special significance. Many adult human beings are dependent on life support machines. A person dependent on a kidney dialysis machine is no less capable of being murdered than a person who is "independent."

<sup>57</sup> 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (2d Dist. 1976).

<sup>58</sup> The problem of initiating liability has no easy solution. It is easy to equate the viable fetus with the human being since both are treated equally under the murder statute. If a human being is deemed to arise at conception, the courts would be forced to deal with the difficult notion of microscopic persons. If a human being is deemed to arise after six months of gestation, an arduous task would lie ahead in explaining why the fetus is not a human being the day before

exclude from criminal protection the whole class of "non-special" fetuses that have not yet attained viability. This result, however, is unjustifiable since there is, in reality, no special significance in the fetus attaining viability especially for purposes of a law proscribing non-consensual feticide.<sup>59</sup> Nevertheless, in California today, a viable fetus is protected under the murder statute, while a less advanced fetus is not.<sup>60</sup>

## II. A PROPOSAL FOR STATUTORY FETICIDE

A less problematic alternative to the present codification of a fetal protection statute is available. This article proposes the following feticide statute as an alternative in California. The statute would consist of a new and independent category of feticide, wholly separate from the classifications of homicide and criminal

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the six-month span passes. The law should distinguish the concepts of the fetus and the person or human being in order to avoid problems better left to philosophers.

<sup>59</sup> For consensual abortion, a viability standard may make sense. Abortionist-physicians who unexpectedly find a viable, live fetus in the womb can conceivably save the unborn child by taking emergency measures. That situation does not arise in non-consensual cases. Note that a recent United States Supreme Court decision struck down a Pennsylvania abortion statute that required a physician to use a particular surgical technique when the fetus "is viable" or "may be viable." *Colautti v. Franklin*, 99 S.Ct. 675 (1979).

<sup>60</sup> Practical difficulties, including its ambiguity, render "viability" an inappropriate cut-off point for murder. The court in *Smith* considered significant the ability of the fetus to live outside the uterus. 59 Cal. App. 3d 751, 757; 129 Cal. Rptr. 498, 503 (2d Dist. 1976). It is unclear, however, what the courts consider to be a sufficient length of time alive before a child is considered living for purposes of the viability test. See Comment, *The Non-Consensual Killing of An Unborn Infant: A Criminal Act?* 20 BUFFALO L.R. 535, 545 (1970). Is several days alive enough? or several seconds of breathing? or the detection of a heartbeat? The recent United States Supreme Court case of *Colautti v. Franklin*, 99 S.Ct. 675, 681 (1979) sheds some light on the definition of "viability." There the Court emphasized the "potentiality of 'meaningful life,' . . . not momentary survival." Still, the absence of elaboration on the time element involved sustains the previous confusion.

Another problem the viability standard raises is one of causation. It is unclear whether a fetus injured before viability is the victim of murder if it dies after viability. For further discussion of this issue, see Comment, *Medical Responsibility for Fetal Survival Under Roe and Doe*, 10 HARV. C.R.-C.L. L. REV. 444 (1975); Comment, *Towards a Practical Implementation of the Abortion Decision*, 25 DEPAUL L. REV. 676 (1976); Comment, *The Non-Consensual Killing of An Unborn Infant: A Criminal Act?* 20 BUFFALO L. REV. 535 (1970); Comment, *Choice Rights and Abortion*, 51 SO. CAL. L. R. 877 (1978); Comment, *Viability and Abortion*, 64 KY. L. REV. 146 (1975).

abortion.<sup>61</sup> The statute would confine its scope to non-consensual conduct. Thus, the criminal abortion statute could remain essentially intact but would apply only to consensual fetal destruction.

The proposed feticide statute would encompass non-intentional as well as intentional fetal killing. For example, it could contain the following two sections: 1) intentional killing of a fetus without consent<sup>62</sup> and 2) non-intentional killing of a fetus

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<sup>61</sup> The feticide statute should at least be separate from homicide and abortion. A case might be made for its being separate from the whole body of crimes "against the person." Note that the Therapeutic Abortion Act which addresses fetuses is codified under the CAL. HEALTH & SAFETY CODE, §§ 25950-25957 (West Cum. Supp. 1979). Nevertheless, since feticide is arguably a crime against the mother as well as the fetus, the more reasonable alternative might be inclusion under "Crimes Against the Person."

Explicit recognition of non-consensual fetal killing in the abortion statute would eliminate the problems of the fetal protection clause in the murder statute. Still, the conceptual difference between consensual and non-consensual killings warrants separate treatment of each. The only significant point the two notions have in common is that a fetus is killed in every case. Otherwise, the crimes are distinct and should be treated as such in the Penal Code.

If all killings, consensual or not, were treated as "abortion," it is likely that a jury might be confused in a non-consensual case when presented with an instruction on abortion. If the word "abortion" ever was a neutral term, it is not anymore. "Abortion" in the legal sense, as fruit for media debate today, implies a consensual course of conduct.

Though not a crucial requirement, a modern criminal code's recognition of this linguistic phenomenon would help keep the law in stride with the modern use of the language. For an example of an interesting and similar theory see Comment, *Non-Consensual Destruction of the Fetus: Abortion or Homicide?* 1 U.C.L.A.-ALASKA L. R. 80, 98-100 (1971-72). The commentator felt the incorporation of all phases of feticide into an all-encompassing abortion statute would answer the problems concerning the viability cut-off point and the rough application of the law from abortion to murder. The author would construct an abortion statute that acted like a problem-solving computer. With any situation of intentional fetal killing, be it consensual or non-consensual, the statute should be able to absorb data concerning degree of malice, age of the fetus, and degree of consent involved. The statute would call for an analysis of all the factors which would theoretically lead to a conclusion presumably based on length of sentence. The statute, however, would involve problems in reconciling itself with the determinate sentencing policy in California, see note 71 *infra*, and the policy of *Roe v. Wade*, 410 U.S. 113 (1973); see text accompanying notes 51-53 *supra*. If California is to follow *Roe*, viability must be used as a factor at least in consensual abortions.

<sup>62</sup> "Consent" must be defined specifically since in consensual abortion, the act consented to can be seen as either the surgical procedure as a whole, or the killing *per se*. By defining consent as consent to the killing *per se*, the statute would clearly avoid the ambiguity and properly subject the medical practitioner to liability under feticide rather than criminal abortion in a situation where surgery intentionally destroys an unexpectedly viable fetus.

accompanied by intentional injury to or killing of the mother.<sup>63</sup> Such a feticide statute would avoid the problems of the manslaughter gap, including those concerned with transferred-intent, since the statute includes both intentional and non-intentional conduct as facets of the same crime.<sup>64</sup> Also, since the statute explicitly covers only non-consensual conduct, there is no further need for the present exceptions listed in conjunction with the murder statute.<sup>65</sup>

The statutory scheme proposed above is superior to the alternative of incorporating the words "or a fetus" into all applicable crimes against the person.<sup>66</sup> As noted earlier, incorporation of the

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<sup>63</sup> The proposed scheme does not recognize situations involving non-intentional acts upon the mother resulting in the non-intentional killing of the fetus. It is felt that, since the fetus is not easily noticeable, defendants should not be subject to penalties so unforeseeably distant. Compare the popular feticide statute of Florida, § 782.09: "The willful killing of an unborn child by any injury to the mother of such child would be murder if it resulted in the death of the mother is manslaughter. . ." FLA. STAT. ANN. (1976). The statute, however, excludes a whole class of circumstances, e.g., fetal killings where the accused lacked the malicious intent necessary to convict him or her of the murder of the mother.

Compare Nevada's feticide statute, NEV. REV. STAT. Ch. 200.210 (1973): "Any person who willfully kills an unborn quick child, by any injury committed upon the mother of such child, commits manslaughter. . ." Although included under homicide, this statute stands apart from the general murder, manslaughter, and abortion statutes.

<sup>64</sup> For example, in a situation like *People v. Carlson*, 37 Cal. App. 3d 349, 112 Cal. Rptr. 321 (1st Dist. 1970), where the defendant kills the mother in manslaughter and the fetus unintentionally, the issue of transferred intent would not arise since the feticide statute specifically addresses such conduct. The statute would also include in its coverage acts carrying the mental state analogous to voluntary manslaughter since intentional conduct is specifically addressed without the qualification seen in the current murder statute.

<sup>65</sup> For the text of the murder statute, see note 5 *supra*. Since "consent" language is built into the feticide language, no need exists to except consensual killings. The remaining exceptions under the murder statute [acts complying with the Therapeutic Abortion Act, CAL. HEALTH AND SAFETY CODE §§ 25950-25957 (West Cum. Supp. 1978), or for the purpose of saving the mother's life] are unnecessary exceptions since they follow from the consent clause.

Along with the implementation of the proposed feticide statute, this article likewise urges that the provision for fetal murder be eliminated from the current statutory scheme.

<sup>66</sup> See discussion accompanying notes 47-50 *supra*. Each crime under the incorporation alternative would indicate an exception for consensual cases, and the abortion law would be changed to explicitly recognize only consensual abortions. The rubric "Crimes Against the Person" would be changed to "Crimes Against Life" to more easily accept the fetus as a technical non-person. Compare WIS. STAT. ANN. § 940 et seq. (West 1958) which describes the



fetus as a victim into crimes against the person would foster confusion and would disregard the distinction between the separate concepts of a fetus and a person.<sup>67</sup> If the fetus and the person were merged as victims of the same crimes, their necessarily distinct natures would tend to be more compatible. This compatibility would risk semantic and legal confusion between the two concepts. As noted above, this is an undesirable result in view of the policy underlying the *Roe v. Wade* abortion decision.<sup>68</sup>

On the other hand, the proposed feticide statute retains the necessary and significant distinction between the concepts of a fetus and a person. This statute does not join fetuses with persons in the set of possible victims, as does the present murder statute.<sup>69</sup> By affording the fetus an independent status, the feticide statute would have the added advantage of recognizing the unique nature of the conduct and victims involved in non-consensual feticide.<sup>70</sup>

The proposed feticide statute would also eliminate the notion of viability as a cut-off point for criminal accountability. Rather, the statute would encompass the non-consensual killing of an

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section covering homicide, battery, mayhem, and kidnapping as "Crimes Against Life and Bodily Security." The definition of malice would be modified to recognize fetuses as well as "fellow creatures." See CAL. PENAL CODE § 188 ". . . [malice] is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. . . ." Finally, viability as a cut-off would be eliminated in deference to the less arbitrary age classification described under the proposed statute.

This scheme would involve the least re-shuffling of major categories. The contentions expressed in *Apodaca*, 76 Cal. App. 3d 349, 142 Cal. Rptr. 830 (5th Dist. 1978), i.e., that the injury may be influenced by an all or nothing decision, see text accompanying notes 18-22 *supra*, would disappear under this alternative. Likewise, the problems in *Carlson*, 37 Cal. App. 3d 349, 112 Cal. Rptr. 321 (1st Dist. 1970) concerning the law's applicability to non-intentional conduct would not arise. For a discussion of *Carlson*, see text accompanying notes 24-27 *supra*.

<sup>67</sup> For a discussion of the personal status of the fetus, see text accompanying note 50 *supra*.

<sup>68</sup> 410 U.S. 113 (1970). For a discussion of the importance of the independent fetal status, see text accompanying note 50 *supra*.

<sup>69</sup> It is felt by the author that a human fetus, although a human entity, is not necessarily a person or human being. The human fetus is more like an entity that may become a person. For an extended discussion of the personal status of the human fetus, see P. DEVINE, *THE ETHICS OF HOMICIDE*, 1978.

<sup>70</sup> The focus of homicide statutes is on a single victim, the decedent. Criminal abortion, if it has a victim at all, focuses on the relatively advanced fetus; a week-old embryo cannot be seriously considered the victim of an abortion.

A fetus-killing statute could be seen to address battery as a lesser included offense since injury to the mother is an almost inevitable result of the attack on the fetus. This notion is not reflected in either consensual abortion or murder.

unborn human fetus at any age. Sentencing would reflect factors such as the age of the fetus and the nature of the defendant's conduct.

The judge should have the discretion to determine sentencing based on the facts of each case. The new policy in California of determinate sentencing, however, must affect the scheme of punishment.<sup>71</sup> The most liberal legislatively sanctioned scheme of punishment is a three tier approach with three possible prison terms, each specific in length, separately determined for each crime.<sup>72</sup>

A feasible structure for implementing the policy of determinate sentencing would be to assign one set of three possible sentences for intentional feticide and another set for non-intentional feticide.<sup>73</sup> For example, intentional feticide might carry a sentence of three, four, or five years in prison. On the other hand, because of its involuntary nature, non-intentional feticide might carry a sentence of sixteen months, two, or three years in prison.<sup>74</sup>

This sentencing scheme would comply with the policy of determinate sentencing while still allowing a sufficiently wide spectrum of punishment. Hence, mitigating and aggravating factors could be taken into account in determining the appropriate prison term for each case. Factors such as the age<sup>75</sup> of the fetus

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<sup>71</sup> CAL. PENAL CODE §§ 1168-1170 (West Cum. Supp. 1979). The California legislature now requires specific sentences for each crime listed in the Penal Code. The new policy is intended to eliminate descriptions of sentences that allow a wide selection of possible prison terms, e.g., state prison terms from one to fifteen years.

<sup>72</sup> For further discussion of determinate sentencing, see Parnas & Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. DAVIS L. REV. 29 (1978).

<sup>73</sup> The proposed scheme parallels the sentencing structure of manslaughter. Involuntary manslaughter draws a different and lesser penalty from that in voluntary manslaughter. CAL. PENAL CODE § 193 (West Cum. Supp. 1979).

<sup>74</sup> Since the fetus in some situations is prone to being unnoticeable, even late in pregnancy, unintentional killings should ideally draw lighter sentences than those for intended killings. A requirement that the defendant has or should have knowledge of the victim's existence might act to soothe the problems surrounding non-intentional killings early in pregnancy.

<sup>75</sup> The Court in *Roe v. Wade*, 410 U.S. 113 (1973) left the abortion decision up to the mother during the first trimester of gestation. The Court ruled that states may regulate abortions, however, further on in the pregnancy. The opinion suggests that the fetus' right to be born increases as the fetus ages. Otherwise, the distinctions between trimesters outlined in *Roe* would be of no significance. An age-scale for feticide would be consistent with this policy.

The *Roe* policy is logically sound. The gestation of a fetus is essentially a continuum, but the two ends of the continuum are hardly similar. In the short

and the degree of violence involved would weigh in the balance.<sup>76</sup> For example, a non-intentional killing of a fetus in the first month of pregnancy may carry a sixteen month sentence, whereas the intentional killing of the same fetus may carry a two-year sentence.<sup>77</sup>

This sentencing scheme avoids the arbitrariness of the viability cut-off point present in the murder statute. The proposed feticide statute is consistent with the notion that a fetus need not be a "person" to receive criminal protection. Hence, the proposed

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span of nine months, a mere microscopic group of cells becomes a fully formed human infant. Notwithstanding the essential nature of gestation as a continuum, the quickness of the process allows the different ages of the entity to reflect strikingly different stages in its physical development. As a fetus grows in age, the probability that it will be safely born increases. It is not unreasonable to assert that as the fetus grows older, it becomes more like a human being. A fetus at eight months is almost a human being; it is then arguably more human than its two-day-old counterpart. It is reasonable then to give more legal protection to an older fetus than to a younger one.

The reasoning, however, must be delicately applied to the feticide statute. Heavy reliance on such an argument may subject it to the counter-argument that a new-born child, for the same reasons, becomes more human and more deserving of protection as it ages.

<sup>76</sup> An alternative structure in which to fit the policy above consists in splitting the gestation period into trimesters and assigning a different set of sentences for each successive period. In order to give the judge a broad enough spectrum of punishment with respect to the above-described problems, the three-part sentencing structure should be further broken down into variably ranged sentences within each trimester division. For example, the punishment for killings in the first trimester should vary depending on the circumstances of the crime. Such a sentencing scheme does not suffer from the arbitrariness displayed by the viability cut-off point present in the murder statute. The indices represented by age would reflect appropriate increases in punishment as the fetus ages. They in no way serve to define any basic or especially moral points in time along the gestational scale. Any set of indices for increasing punishment will be in some sense arbitrary. The dangers of arbitrariness, however, only arise when arbitrary decisions purport to reflect some underlying significance or assumption that simply has no basis in fact: No such danger exists in an age-determinative sentencing scheme for a feticide statute.

The difficulty with this scheme is that it assumes the fetus becomes more human in discrete steps as it ages and hence deserves protection correlated to those stages. In order to be logically consistent, however, this reasoning would extend to the new-born infant as well. It too could be said to become more human as it ages.

<sup>77</sup> The scope of this scheme would incidentally cover killings of unborn products of conception *in vitro*. The intentional destruction of an artificially conceived embryo in an artificial environment would be criminally sanctioned. See NEWSWEEK, August 7, 1978, at 67 for details of the advancing state of biology in regard to artificial conception and gestation.

statute has the advantage of proscribing criminal conduct directed at a fetus of any age and eliminating the need for a discrete cut-off point for liability.

#### CONCLUSION

Statutory provisions prohibiting fetal killing should reflect the notion that a fetus, though not in every sense a person, is a human entity deserving protection. This article has suggested that the current codification of crimes against the fetus has failed to provide this protection. It suggests an alternative in the form of an independent feticide statute which would alleviate many of the deficiencies in the present statutory scheme.

In an area of the law so controversial and so closely tied to problems in philosophy and religion, no legal scheme will be ideal. Nevertheless, a statute that avoids incompatible criminal categories such as homicide and abortion can more logically handle the problems involved. With the recognition implicit in the proposed statute that a fetus is not a person, but is conceptually similar to one, the statute can overcome the philosophical difficulties involved in the issue of personhood. Finally, in treating the gestation period as a continuum with penalties imposed in proportion to fetal age, the ethical and logical tangles of the viability doctrine disappear. The legislature should change the California law concerning fetal protection in order to comport with these suggestions.

*John P. Nagra*