Improperly Performed Abortion as Fetal Homicide: An Uneasy Coexistence Becomes More Difficult

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I. INTRODUCTION

The scenario is a nightmare: A woman wants to terminate a pregnancy, and although Roe v. Wade\(^1\) protects her legal right to an abortion, the practical difficulties of obtaining one are prohibitive. In desperation she seeks, as many women have done whenever medical abortions have been unavailable, to induce miscarriage, and with the help of a third party, she succeeds. Often, such nightmare scenarios end with the woman’s death or serious injury, but here she survives. Instead, it is her assistant whose life is lost at the hands of the state’s fetal homicide laws. These laws treat killing a fetus identically to killing a live human: as a capital crime. They seek to satisfy Roe by excluding from their reach the pregnant woman herself and any doctor who performs a medical abortion. Despite that, a teenager who assists his girlfriend in a desperate situation is treated identically to a third-party assailant.

This may not be a hypothetical situation. In a recent Texas case, a defendant convicted of fetal homicide claimed precisely these facts, with the corroboration of the pregnant woman. In June 2005, Gerardo Flores, a 19-year-old from Lufkin, Texas, was convicted of two counts of homicide for killing the fetuses carried by his girlfriend, Erica Basoria.\(^2\) Flores was

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2. Ashley Cook, Teen Guilty of Fetal Murder, LUFKIN DAILY NEWS June 7, 2005 [hereinafter Teen Guilty].
sentenced to two life terms of incarceration, which was a minimum of 40 years imprisonment. This sentence was enacted despite Ms. Basoria’s testimony at trial that she had wanted an abortion and that Flores had acted to assist her.

According to news reports of Ms. Basoria’s story, she had realized when she was four months into her pregnancy that she did not want to continue it. She initially attempted to induce a miscarriage herself by jogging against her doctor’s advice, ceasing to take vitamins, and hitting herself in the stomach. Ultimately, Flores helped her by repeatedly stepping on her stomach. Reports suggested a variety of reasons Ms. Basoria may have been unwilling or unable to seek a medical abortion, including expense, parental opposition, misinformation from her doctor, and distance to the nearest abortion providers.

Mr. Flores’ conviction was made possible by the Texas Prenatal Protection Act, which took effect on September 1, 2003. The Act defines the term “individual” in the Texas Penal Code to include fetuses, thereby making them subject to the same protections that the code provides to living persons. In its application to criminal homicide, the Act provides certain abortion-related exceptions. A pregnant woman herself cannot be criminally charged for conduct resulting in the death of her fetus, and “homicide” is deemed to exclude “a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure.” Ms. Basoria herself could not be charged under the statute, but the exception protecting medical abortions did not apply to Mr. Flores.

The version of the facts presented by Mr. Flores’ defense is contested. Evidence existed that Mr. Flores had been physically abusive toward Ms.

4. Ashley Cook, Mom defends her boyfriend, babies’ father, LUFKIN DAILY NEWS June 3, 2005.
6. Id.
7. Id.
8. Eye, supra note 3.
9. Id.
11. The Houston Press reports that the nearest abortion providers to Lufkin are in Houston and Bryan. Stomped Out, supra note 5. The distance to each of these cities from Lufkin is over 100 miles.
15. TEX. PENAL CODE ANN. § 19.06(2) (Vernon 2006).
Basoria on previous occasions, which suggests that her miscarriage may have resulted from a particularly brutal assault. However, no report indicates that the jury was required to find that the facts were other than those testified to by Mr. Flores and Ms. Basoria. As a result, whatever the truth of what happened to Ms. Basoria, the case establishes that someone who assists a woman in terminating a pregnancy can be charged with murder, provided only that the narrow abortion-provider exception does not apply.

In this paper, I explore the constitutional bases for challenging such a result. Part II begins with background on the Supreme Court’s abortion jurisprudence and the law of fetal homicide. As I discuss in part III, the principles established by abortion jurisprudence do allow the state to prohibit non-medical abortions, but these principles can be applied in combination with Eighth Amendment proportionality or equal protection analysis to mitigate the harshness of the resulting sentence. However, I conclude that what is fundamentally objectionable in this scenario can be addressed only by a constitutional approach that recognizes the importance of the terms in which a prohibition is phrased. I outline the basis for this approach in part IV.

Throughout the ensuing discussion, I will occasionally make use of the Flores case, as treated by the Texas courts, as an example. My arguments pertain to the legal questions raised by Mr. Flores’ account of his situation, not to the factual question of that account’s veracity. I do not intend to endorse that version of the facts over any other account of what happened, and I mean no disregard for the possibility that Ms. Basoria was in fact the victim of a brutal assault, or for the serious problem of domestic violence in general.

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16. See Stomped Out, supra note 5 (reporting bruises “under [Ms. Basoria’s] right eye and on her right arm, right wrist and abdomen” as well as an old bruise on her left breast, and quoting a statement by Mr. Flores that he had previously hit Ms. Basoria, but “always aimed for the arms”).

17. The likely role of domestic violence in the Flores case has prompted its criticism on other grounds in feminist circles. See generally, e.g., “Boyfriend Gets Life Sentence Under ‘Fetal Protection’ Law,” Alas, a Blog, http://www.amptoons.com/blog/archives/2005/06/07/boyfriend-gets-life-sentence-under-fetal-protection-law/#more-1608 (June 7, 2005). If Flores was indeed guilty of a brutal assault on Ms. Basoria, what does it signify that the law has disregarded her victimhood in favor of a focus on the fetuses she was carrying? Posting of Kim (basement variety!) to “Boyfriend Gets Life Sentence Under ‘Fetal Protection’ Law,” Alas, a Blog, http://www.amptoons.com/blog/archives/2005/06/07/boyfriend-gets-life-sentence-under-fetal-protection-law/#more-1608 (June 10, 2005, 7:35pm) (“Erica Basoria is treated as a non-entity within the whole ordeal, despite it being her body that was abused into aborting. She was simply a damaged incubator”). While I do not take up this question here, other commentators have addressed the choice of legislatures to focus on the interests of fetuses when prosecuting crimes against pregnant women. See generally, e.g., Amy J. Sepinwall, Defense of Others and Defenseless “Others”, 17 YALE J.L. & FEMINISM 327 (2005) (arguing that the law should emphasize the loss experienced by the pregnant woman, rather than fetal personhood, when a fetus is harmed through violent crime).
II. BACKGROUND: ABORTION JURISPRUDENCE AND FETAL PROTECTION LAWS

Roe v. Wade established that a pregnant woman has a right to choose to terminate a pregnancy prior to fetal viability.\(^\text{18}\) Although acknowledging the complexity and controversy surrounding the issue,\(^\text{19}\) it held that the abortion decision fell within a woman’s established constitutional right of privacy.\(^\text{20}\) As such, it treated the right as “fundamental,” requiring that any infringement on it be narrowly drawn to serve a compelling state interest.\(^\text{21}\) Although the state argued that it had a compelling interest in protecting prenatal life from the time of conception,\(^\text{22}\) the Court noted that legal and societal views on when life began varied widely.\(^\text{23}\) It held that the state could not justify its infringement on a pregnant woman’s rights “by adopting one theory of life.”\(^\text{24}\) Instead, the Court declared viability to be the point at which the state interest in protecting fetal life became compelling.\(^\text{25}\)

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court revisited the abortion right.\(^\text{26}\) Although the Court’s opinion did not speak in terms of fundamental rights, it claimed to “reaffirm” the “essential holding” of Roe and asserted “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.”\(^\text{27}\) It described the protected freedom as a “constitutional liberty” interest.\(^\text{28}\)

18. Roe, 410 U.S. at 165.
19. See id. at 116:
   We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion. In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.
20. Id. at 155.
21. Id. at 155-56.
22. Id. at 159.
23. Id. at 160-62.
24. Id. at 162.
25. Id. at 163.
27. Id. at 846.
28. Id. at 869. See also id. at 852, where the Court discusses the nature of the woman’s interest in more detail:
   These considerations begin our analysis of the woman’s interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the
holding emphasized the principle that a state has a legitimate interest “from
the outset of the pregnancy” in protecting not only the health of the
pregnant woman, but “the life of the fetus that may become a child.”
Nonetheless, the court concluded that prior to viability, the decision to
continue or terminate the pregnancy rests with the pregnant woman.

In Casey, the Court established an “undue burden” standard to balance
a pregnant woman’s protected liberty with the legitimate state interests at
stake in the abortion context. Under this standard, a regulation on
abortion is invalid only if “its purpose or effect is to place a substantial
obstacle in the path of a woman seeking an abortion before the fetus attains
viability.” Accordingly, while the pregnant woman has the right “to
make the ultimate decision,” it is “not a right to be insulated from all others
in doing so.”

The Casey Court identified two legitimate interests which a state might
seek to advance within the undue burden framework. First, it authorized
the state to regulate pursuant to its interest in the pregnant woman’s
health. Such regulations are valid provided they do not constitute an
undue burden.

The second area in which the Supreme Court identified a permissible
role for state regulation was in asserting its interest in fetal life, not by
prohibiting the pregnant woman from making the choice to terminate the
pregnancy, but by seeking to inform that choice. This right on the state’s

implications of her decision; for the persons who perform and assist in the
procedure; for the spouse, family, and society which must confront the
knowledge that these procedures exist, procedures some deem nothing short
of an act of violence against innocent human life; and, depending on one’s
beliefs, for the life or potential life that is aborted. Though abortion is
conduct, it does not follow that the State is entitled to proscribe it in all
instances. That is because the liberty of the woman is at stake in a sense
unique to the human condition and so unique to the law. The mother who
carries a child to full term is subject to anxieties, to physical constraints, to
pain that only she must bear. That these sacrifices have from the beginning
of the human race been endured by woman with a pride that ennobles her in
the eyes of others and gives to the infant a bond of love cannot alone be
grounds for the State to insist she make the sacrifice. Her suffering is too
intimate and personal for the State to insist, without more, upon its own
vision of the woman’s role, however dominant that vision has been in the
course of our history and our culture. The destiny of the woman must be
shaped to a large extent on her own conception of her spiritual imperatives
and her place in society.

29. Casey, 505 U.S. at 846.
30. Id. at 872 (“[T]he woman has a right to choose to terminate or continue her
pregnancy before viability . . . .”).
31. Id. at 878.
32. Id.
33. Id. at 877.
34. Id. at 878.
35. Id.
36. Id. at 877 (“[T]he means chosen by the State to further the interest in potential
part includes the right to express its own "profound respect for the life of the unborn" to the pregnant woman.\textsuperscript{37} The Court elaborated:

Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.\textsuperscript{38}

Provided that mechanisms imposed by the state for this purpose do not unduly burden the pregnant woman's right to make the ultimate decision, the state is free to impose measures designed "to persuade the woman to choose childbirth over abortion."\textsuperscript{39}

Within the context of these protections of pregnant women's rights, a substantial body of state law exists to protect fetuses against third-party assailants. In 1994, one state Supreme Court justice reported that at least 24 jurisdictions criminalized the killing of a fetus.\textsuperscript{40} Since then, the apparent trend in the United States has been toward increasing recognition of fetuses as potential crime victims, including enactment of the Texas Prenatal Protection Act in 2003\textsuperscript{41} and the 2004 passage of the federal Unborn Victims of Violence Act (UVVA).\textsuperscript{42}

Generally, fetal protection laws are applied against defendants who assault pregnant women, resulting either in miscarriage or in the death of the mother and therefore also the fetus.\textsuperscript{43} While a number of jurisdictions define the crime of killing a fetus separately from an ordinary homicide and apply lesser penalties,\textsuperscript{44} some jurisdictions, including Texas, treat fetuses identically to other victims for purposes of the criminal law.\textsuperscript{45} The federal UVVA falls in the latter category.\textsuperscript{46} Furthermore, while some jurisdictions

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life must be calculated to inform the woman's free choice, not hinder it.").

38. \textit{Id.} at 872.
39. \textit{Id.} at 878.
42. Sepinwall, \textit{supra} note 17, at 328.
43. See, e.g., \textit{Davis}, 7 Cal. 4th at 800 (mother survived gunshot wound but miscarried); State v. Merrill, 450 N.W.2d 318, 320 (Minn. 1990) (woman killed in attack was discovered to have been pregnant with a pre-viability fetus).
44. \textit{See Davis}, 7 Cal. 4th at 841-42.
45. \textit{TEX. PENAL CODE ANN.} § 1.07(a)(26) (Vernon 2006) (defining "individual" for penal code purposes as "including an unborn child").
46. 18 \textit{U.S.C.A.} § 1841(a)(2)(a) (West 2006) (providing that punishment for injury or death of a fetus shall be "the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother").
limit protection to post-viability fetuses, paralleling Roe v. Wade's assessment of when state interests in protection of potential life become "compelling" for purposes of abortion law, both the Texas statute and the UVVA apply to fetuses at any stage of development.

Ordinarily, these laws are not deemed to be in overt conflict with the principles established by the Court in Roe and Casey. Challenges rejected by state courts have generally fallen into two categories: arguments that because, under Roe, a fetus is not a person with a legally protectable interest, fetal homicide prohibitions are in conflict with Roe, and arguments that the prohibitions violate the equal protection rights of fetal homicide defendants by treating them differently from pregnant women or abortion providers.

The Roe Court determined that since a fetus was not a person for purposes of the Fourteenth Amendment’s protections, it had no constitutional right to life that must be factored into the Court’s analysis of the abortion right. However, state courts considering the issue have found that Roe’s holding is immaterial to statutes protecting fetuses from third-party assailants. For example, the California Supreme Court has argued that although Roe construes the scope of Fourteenth Amendment protection to exclude the unborn, it acknowledges independent state interests in “potential life,” and it prohibits states from asserting those interests only where doing so would violate the protected rights of another. Because prosecution of third-party assailants generally promotes, rather than infringes upon, the pregnant woman’s interests, Roe would seem to constitute no bar to a state’s assertion of its own interests in fetal protection in this context.

State courts have also rejected challenges of fetal protection statutes

47. Davis, 7 Cal. 4th at 841.
50. See, e.g., People v. Smith, 59 Cal. App. 3d 751, 757 (1976) (finding that Roe held that a state had no interest in protecting a fetus from abortion or murder prior to viability). The California Supreme Court disapproved this reasoning in Davis, 7 Cal. 4th at 810.
51. Merrill, 450 N.W.2d at 321.
52. Roe, 410 U.S. at 157-158.
53. E.g., Davis, 7 Cal. 4th at 807.
54. The Merrill court, for example, noted that its fetal homicide statute, in protecting the fetus’s life, “protects, too, the woman’s interest in her unborn child and her right to decide whether it shall be carried in utero.” Merrill, 450 N.W.2d at 322.
55. Notwithstanding this conclusion, advocates of abortion rights may legitimately fear that statutes classifying fetuses as “persons” for purposes of state law threaten Roe, because changing legal and societal understandings of that term may make ripe for review the Roe Court’s interpretation of the term as used in the 14th Amendment. The larger holding of that case rested on this interpretation of the 14th Amendment. See Roe, 410 U.S. at 158.
based on equal protection grounds. In State v. Merrill, a defendant before the Minnesota Supreme Court argued that punishing him for killing a fetus, when the law would have permitted the pregnant woman herself to do so, violated his Fourteenth Amendment right to equal protection of the laws. The court rejected this argument, holding that the defendant was not similarly situated to the pregnant woman. The distinction rested on the fact that, while a pregnant woman seeking an abortion acts pursuant to her own constitutionally protected interests, a third-party assailant has no like interests implicated by a prohibition on fetal homicide. Furthermore, the defendant was not similarly situated to an abortion provider who acted on the woman’s behalf and in furtherance of her constitutional rights. This disposition of the equal protection issue is, of course, unpersuasive in the consensual non-medical abortion context.

III. CONSTITUTIONAL ISSUES IN PROHIBITING AND PENALIZING NON-MEDICAL ABORTIONS

The essential prohibition effected by the Texas Prenatal Protection Act in the abortion context is a provision which bans abortions outside a medical context. In general, restricting the performance of abortions to licensed physicians is not considered an undue burden, and thus does not offend the Roe or Casey standard. The Court has upheld such a restriction based on the state’s interest in ensuring that the procedure be performed safely, even where the person banned from performing abortions was a physician’s assistant who had previously been licensed to perform abortions in the state. The safety concerns can be assumed to be substantially greater when an abortion is performed at home by someone with no medical training whatsoever. As a result, the prohibition is even more defensible under the circumstances of the Flores case.

In addition to asserting its interest in the woman’s safety, a state seeking to defend such a restriction may claim that prohibiting abortions performed at home by non-licensed persons advances its interest in exposing women to the state’s persuasive machinery before they make the decision to terminate a pregnancy. Based on the state’s interest in persuasion, the Casey court approved a requirement that a physician provide certain information and offer the woman certain additional materials at least 24 hours prior to the procedure. Texas imposes a

56. Merrill, 450 N.W.2d at 321.
57. Id.
58. Id. at 322.
59. “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.” Id. (emphasis added).
61. Id. at 974-75.
62. Id. at 970-71.
63. Casey, 505 U.S at 881-83.
similar requirement on abortion providers. Given the state’s right to impose such requirements, it can reasonably assert that limiting the performance of abortions to licensed providers is necessary to give effect to its policies because of the practical impossibility of enforcing them against individuals performing abortions at home.

Although there were genuine problems with the method of abortion allegedly chosen by Mr. Flores and Ms. Basoria, commentators discussing the Flores case have argued that the harshness of Mr. Flores’ sentence was unacceptable. The harshness of a sentence is subject to constitutional review under the Eighth Amendment, made applicable to state sentences by the 14th Amendment’s due process clause. In the remainder of this section, I show how the principles established by Roe and Casey can be carried over into an Eighth Amendment analysis of a sentence like that of Mr. Flores.

The Eighth Amendment prohibits sentences which are “grossly disproportionate to the severity of the crime.” This rule has primarily been used to invalidate death sentences, but the court has recognized its applicability to non-capital cases as well. The court’s analysis is “guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the

64. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(2) (Vernon 2006):
[T]he physician who is to perform the abortion or the physician’s agent informs the woman that:
(A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;
(B) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion;
(C) public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest; and
(D) the woman has the right to review the printed materials described by Section 171.014, that those materials have been provided by the Texas Department of Health and are accessible on an Internet website sponsored by the department, and that the materials describe the unborn child and list agencies that offer alternatives to abortion[.]

The printed materials referred to must include “materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a woman can be known to be pregnant to full term, including any relevant information on the possibility of the unborn child’s survival” and “color pictures representing the development of the child at two-week gestational increments.” TEX. HEALTH & SAFETY CODE ANN. §§ 171.016(a)-(b) (Vernon 2006). This information must be provided at least 24 hours prior to the procedure. TEX. HEALTH & SAFETY CODE ANN. § 171.012(b)(2) (Vernon 2006).

65. Eye, supra note 3.
67. Id. at 272-73.
same crime in other jurisdictions. No one of these factors is dispositive in isolation. Past cases warn that successful proportionality challenges to non-capital sentences will be "exceedingly rare."

Complicating the proportionality analysis is the fact that states may base punishments on any of a variety of penological theories. This gives rise to several possible approaches to the proportionality analysis. Justice Scalia has argued for an outright rejection of any proportionality requirement, asserting that the concept of proportionality is inherently tied to a retributive theory of punishment, and that states must be free to pursue penological goals apart from retribution. Elsewhere, it has been suggested that a rule of proportionality based on retributive principles appropriately operates as a "side constraint" on a state's application of other penological theories. Under an approach to proportionality rooted in retributive principles, the key inquiry is whether a defendant's moral culpability is sufficient to justify subjecting the defendant to the punishment in question.

The alternate, "disjunctive" approach to proportionality merely requires that the harshness of the punishment be justified by any traditional penological theory. This approach was used by the plurality of the Supreme Court in its opinion in Ewing v. California. That opinion argued that, in view of the particular state interest in preventing recidivism, a life sentence administered under California's "three strikes" law was reasonably related to the state's goals of incapacitation and deterrence. The opinion emphasized the importance of deferring to a state's legislative policy choices.

The traditional proportionality analysis requires that courts "judge the gravity of an offense, at least on a relative scale." Among the factors considered may be the distinction between violent and nonviolent offenses, the "absolute magnitude" of an offense, and the defendant's mental state in carrying out the offense. Where the court considers non-retributive justifications for punishment, it seems to consider more generally the seriousness of the state interests motivating the policy in question. In Ewing, the plurality emphasized the magnitude of California's recidivism

69. Solem, 463 U.S. at 292.
70. Id. at 290 n.17.
71. Id. at 289-90.
73. Id. at 31 (Scalia, J., concurring in the judgment, dissenting in part).
75. Id. at 682-83.
76. Ewing, 538 U.S. at 25-27.
77. Id.
78. Id. at 25.
79. Solem, 463 U.S. at 292.
80. Id. at 292-93.
problem.\textsuperscript{81} It also observed the existence of some empirical evidence supporting the policy’s effectiveness at achieving its aims.\textsuperscript{82} However, the Court emphasized that its objective was not to second-guess the policy choices of the California legislature by stating, “It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons ‘advance[s] the goals of [its] criminal justice system in any substantial way.’”\textsuperscript{83}

Against this backdrop, consider how \textit{Roe} and \textit{Casey} affect the way a state like Texas could justify the application of a life sentence for an abortion performed in an unlawful manner. Whatever penological theories the state emphasizes, it is constrained by the fact that it cannot legitimately aim to save the life of a non-viable fetus when the pregnant woman is determined to end her pregnancy. The abortion decisions have made clear that, ultimately, the power to determine the fetus’ fate rests with the pregnant woman alone.

To the extent that the state may act to promote its interest in the potential life of the fetus, it is limited to attempts to influence the woman’s choice. As the \textit{Casey} plurality emphasized, “the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”\textsuperscript{84} Estimates suggest that as a practical matter, relatively few women who seek to terminate their pregnancies will actually be dissuaded by the state’s informed consent machinery.\textsuperscript{85} Moreover, when a woman is so determined to end her pregnancy that she resorts to a dangerous at-home abortion, it seems especially unlikely that she could be easily persuaded to carry the pregnancy to term. The significance of the state’s interest in its informed consent requirements therefore stands in sharp contrast to the interests states have asserted in more typical fetal homicide cases.\textsuperscript{86}

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  \item \textsuperscript{81} \textit{Ewing}, 538 U.S. at 26 (“Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one ‘serious’ new crime within three years of their release.”).
  \item \textsuperscript{82} \textit{Id.} at 27 (“Four years after the passage of California’s three strikes law, the recidivism rate of parolees returned to prison for the commission of a new crime dropped by nearly 25 percent.”).
  \item \textsuperscript{83} \textit{Id.} at 28.
  \item \textsuperscript{84} \textit{Casey}, 505 U.S. at 877.
  \item \textsuperscript{85} One physician, for example, has estimated that state-provided propaganda seeking to discourage abortion may change the minds of one to three percent of women. Planned Parenthood League of Mass. v. Bellotti, 499 F. Supp. 215, 219 (D. Mass. 1980), \textit{aff’d in part and vacated in part}, 641 F.2d 1006 (1st Cir. 1981).
  \item \textsuperscript{86} In \textit{Merrill}, for instance, the Minnesota Supreme Court noted that not only did the application of its fetal homicide statute not interfere with the pregnant woman’s rights, the statute actually protected her interest in continuing her pregnancy if she chose. The court stated, “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.” \textit{Merrill}, 450 N.W.2d at 322.
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Furthermore, recall that the restriction under which Mr. Flores was convicted, a restriction on who may perform abortions, does not address directly the avoidance of informed consent procedures. At best, it indirectly promotes the state’s interest in potential life by making its informed consent procedures easier to enforce. This further mitigates the degree to which the state’s potential life interests are promoted by the statute. It may also mitigate the level of moral culpability associated with the restriction. The woman’s freedom to terminate her pregnancy shields the abortion itself from moral condemnation by the law, and the defendant’s mere lack of a medical license does not itself suggest any hostility toward or even disregard for potential life.

Finally, consider that the penalty imposed on a physician who intentionally violates the state’s informed consent requirements is a fine of no more than $10,000 and no imprisonment. 8 When a defendant indirectly subverts this regulatory regime by performing an abortion without a medical license, life imprisonment is a grossly disproportionate punishment, under either a retributive or utilitarian view.

In spite of this, it must be recalled that the state has another interest in protecting the pregnant woman’s own health which may provide a basis for regulation of abortions which is far more significant in this context. The facts alleged in the Flores case are egregious in this regard because the dangerousness of non-medical abortions may vary greatly with circumstances, but one achieved by stomping on the pregnant woman’s stomach must surely be extraordinarily risky. It is suggestive of a highly culpable level of recklessness on the part of the person performing it.

Consider how these facts compare to an ordinary criminal assault posing a similar danger to the victim. 88 Here, Ms. Basoria allegedly asked Mr. Flores to attack her in order to end her pregnancy which may reflect substantially on Mr. Flores’ moral culpability. A person who causes serious harm to another out of violent motivations is quite different from one who responds to a request for assistance under desperate circumstances, even where a significant degree of recklessness is involved.

Neither is it clear why any utilitarian consideration would justify higher penalties than those given for an ordinary assault. It is presumably no more important to deter or incapacitate those who might perform dangerous abortions than those who commit violent nonconsensual assaults. 89 Furthermore, it is improbable that the state has any basis for concluding

87. TEX. HEALTH & SAFETY CODE ANN. § 171.018 (Vernon 2006).
88. Recall again that I am addressing the facts of the Flores case as alleged by Mr. Flores’ defense, and as testified to by Ms. Basoria herself in court. It is of course possible that the incident in question was in actuality nothing other than an ordinary criminal assault.
89. Cf. Ewing, 538 U.S. at 24 (commenting that three-strikes laws “responded to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals”).
that an unusually harsh sentence is necessary to achieve deterrence in this particular context.\textsuperscript{90}

Texas' penalty for aggravated assault therefore provides a ceiling on the punishment appropriate under the facts alleged by Mr. Flores. Texas law treats assault resulting in bodily injury as a second degree felony under most circumstances.\textsuperscript{91} Prison sentences for second degree felonies under Texas law range from 2 to 20 years.\textsuperscript{92} While a 20-year sentence may still seem unduly harsh for performing a dangerous abortion at the woman's request, it is substantially less than both the capital sentences that fetal homicide prohibitions may permit, or than the two consecutive life sentences to which Mr. Flores was sentenced.\textsuperscript{93}

The foregoing analysis suggests that even under a narrow approach to the Eighth Amendment proportionality requirement — one which allows for wide state discretion in determining what penological theory will support the harshness of its punishment, and which still leaves the state substantial latitude in drawing parallels between offenses — a fetal homicide sentence may be impossibly harsh. Although Texas does not unduly burden the abortion right by requiring that a person performing an abortion must have a medical license, proper consideration of the fundamental right to an abortion nonetheless limits the state's ability to impose harsh punishments for violations of that requirement.

A similar analysis could also be applied to a challenge brought under the Equal Protection Clause of the 14th Amendment. As I discussed in Part III, equal protection challenges to fetal homicide prohibitions have failed when a third-party assailant claims to be similarly situated to a pregnant woman or an abortion provider. However, a defendant who performs a consensual non-medical abortion, an act legitimately prohibited by law, may argue that he is denied equal protection by being subjected to a harsher sentence than a defendant who undermines the same legitimate state interests and is subjected to a lesser penalty under a charge of assault,

\textsuperscript{90.} Cf. Ewing, 538 U.S. at 24 (observing that those affected by three-strikes laws were those "whose conduct has not been deterred by more conventional approaches to punishment").
\textsuperscript{91.} TEX. PENAL CODE ANN. § 22.02 (Vernon 2006).
\textsuperscript{92.} TEX. PENAL CODE ANN. § 12.33(a) (Vernon 2006).
\textsuperscript{93.} Recall that Mr. Flores' punishment resulted from his conviction on two counts, one for each aborted fetus. If the justification for punishment rests on the state's interest in the woman's safety, it makes little sense to punish Mr. Flores' act twice as harshly because Ms. Basoria was carrying twins, absent some showing that the number of fetuses involved substantially affected the danger to her. Such a result seems improbable.
practicing medicine without a license, or performing an abortion without providing the required information to the pregnant woman. Here again, the *Roe* and *Casey* standards for permissible state interests in the abortion context limit the interests the state may claim to be serving by treating a defendant who provides a non-medical abortion so much more harshly than similarly situated defendants not charged with fetal homicide. Without relying on a state interest in preventing abortion, the state may find it difficult to justify a harsh fetal homicide sentence in a non-medical abortion case.

IV. THE IMPORTANCE OF THE LANGUAGE DEFINING THE CRIME

The foregoing analysis addresses the inappropriate harshness of applying fetal homicide penalties to improperly performed abortions. However, I believe that the harshness of the penalty involved is not the central problem with this application of fetal homicide laws. Rather, the designation of the crime as “fetal homicide,” makes a statement that is inconsistent with the basic abortion right. Even if an appropriate penalty were applied, conviction of a defendant for the crime of fetal homicide, under facts like those alleged by Mr. Flores, cannot be reconciled with *Roe*’s essential holding that abortion is a protected right.

The problem is that applying a homicide prohibition to the facts alleged by Mr. Flores fundamentally misstates the nature of the prohibition. It suggests that what is primarily at issue in the crime is the death of the fetuses. In fact, the state has no legitimate interest in preventing this when the pregnant woman chooses to end her pregnancy. The permissibility of the regulation hinges on its having as its central element the defendant’s lack of a medical license. Therefore, the terms of the Texas statute, prohibiting the killing itself, appear to seek an objective which the state has no right to seek. It relegates the provision dealing with its permissible objective, the requirement of a medical license, to the language of a side issue or an exception. It accurately represents the elements of the crime: the defendant who had no medical license acted to terminate a woman’s pregnancy. However, in its structure and its choice of terms, it misrepresents what, if it is to survive analysis under the undue burden standard, must be its central objectives.

The difficult question that arises is whether the manner in which a state describes a criminal prohibition is a matter for constitutional scrutiny. Because the essential elements of the crime are discernible from the Texas statute, it does not suffer from vagueness. However, I argue that the misplaced emphasis nonetheless leads to a violation of the defendant’s due process rights. Consider, in this light, one news report’s discussion of the prosecutor’s closing statement in Mr. Flores’ trial:
No one would ever know the potential those unborn lives could have held, [Assistant District Attorney Art Bauereiss] said. Family would never get to see the boys’ first steps, teach them to tie their shoes or take prom pictures. Worst of all, he said, Flores’ own children could not save themselves. “Those babies could not raise their hands in self-defense to say, No, Daddy, no, Daddy!” Bauereiss said, emotion nearly choking his words.\textsuperscript{94}

Such comments have no place in a prosecution for an improperly performed abortion. They rely on the jury’s sorrow over the termination of the pregnancy, which the pregnant woman had a constitutional right to terminate. When the legitimate state interests justifying the prohibition are properly understood, the jury’s feelings about whether the woman obtained an abortion at all, rather than how, or by whom, the abortion was performed, are irrelevant. In urging a conviction based on these feelings, the prosecutor introduces improper prejudice.

By terming the crime a homicide, however, the state obscures this issue. The law implies that the essence of the crime was in terminating the woman’s pregnancy, and it therefore encourages prosecutors and juries to emphasize this element. In my view, this introduces an element of unfairness sufficient to constitute a due process violation.

Nevertheless, the defendant is not the only one affected by such an application of the law. The imposition of a criminal punishment has significant effects on society as a whole. Justifications for criminal punishment based on general deterrence recognize that potential wrongdoers may be influenced to obey the law by their awareness of the possibility of punishment. However, criminal punishments also serve to express to law-abiding members of society that the society’s values, as codified in its criminal law, can and will be enforced through application of that law.\textsuperscript{95}

This facet of criminal prohibition and punishment is commonly termed denunciation. Its role in criminal sentencing is “implicit in our laws,” according to one commentator.\textsuperscript{96} However, like other aspects of the criminal law, it is prone to abuse. Just as the law overreaches when it punishes conduct within the protected realm of individual liberty, it also overreaches when it conveys to society that values unenforceable in the criminal law are in fact protected by it. A society’s disapproval of abortion is such a value. However the society as a whole may feel about a woman’s choice to terminate her pregnancy, the Supreme Court has made clear that

\begin{footnotes}
\item[94] Teen Guilty, supra note 2.
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the U.S. Constitution vests that choice not in society, but in the pregnant woman herself. When the state communicates through its use of criminal punishment that society will not tolerate a pregnant woman’s free choice, it comes into conflict with the Constitution’s protection of that liberty.

The Supreme Court previously considered the constitutional significance of a state abortion law’s expressive effects in Webster v. Reproductive Health Services. In that case, the Court addressed the language of the preamble to a Missouri statute:

The Act’s preamble, as noted, sets forth “findings” by the Missouri Legislature that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life, health, and well-being.” Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986). The Act then mandates that state laws be interpreted to provide unborn children with “all the rights, privileges, and immunities available to other persons, citizens, and residents of this state,” subject to the Constitution and this Court’s precedents.

The court of appeals had held that this language indicated the state’s intent to base the regulations contained within the act on the theory of when life began. The court of appeals relied on language from a previous decision, based on the holding of Roe, which asserted that a state could not justify its abortion laws by adopting a particular theory regarding the beginnings of life. On this reasoning, it invalidated the Missouri statute.

However, the Supreme Court found no basis for the lower court’s conclusion in the absence of an authoritative interpretation of the statute by the Missouri courts. The Court emphasized that the state was free to make and express its own value judgments. It also interpreted the language on which the court of appeals had relied, which, it emphasized, had only been dicta, to mean only that an otherwise invalid regulation would not be upheld because it embodied the state’s theory of life.

This holding could be read to suggest that no basis exists for invalidation of a statute’s language when an impermissible prohibition is not at issue. However, ample support exists for distinguishing the specific holding of Webster from the issue I address here. In applying a criminal prohibition, the state courts interpret the state’s law, so a reviewing federal court need not rely on its own speculative interpretation of state statutory language. Furthermore, there is an important distinction between the

98. Id. at 504.
99. Id. at 504-505.
100. Id.
101. Id.
102. Id. at 506.
103. Id.
104. Id.
holding that a state is permitted to express its own values and one that allows the state to express the position that those values can and will be enforced through the criminal justice system.

In my view, the application of Texas’s Prenatal Protection Act to the facts alleged by Mr. Flores does the latter. Though the state has legitimate reasons for prohibiting the conduct at issue, it expresses through the terms of its prohibition an entirely different purpose. It effectively states that, notwithstanding the pregnant woman’s choice, the taking of the fetus’ lives was itself unacceptable to society and that society has acted to enforce that value. It has thereby not merely expressed the state’s disapproval of a woman’s choice to terminate her pregnancy, but denied the existence of her right to do so. To tell someone that her liberty does not exist may be to effectively deprive her of it. The state’s use of its statutory language to effect an act of criminal punishment is therefore an expression of an entirely different character than that assessed in *Webster* and should be viewed as irreconcilable with *Roe*.

It is my conclusion, therefore, that courts and constitutional scholars can and must concern themselves not merely with the conduct that a law prohibits, or the punishment it imposes, but with the terms in which the law expresses its prohibition. To call an abortion a homicide, based solely on the state’s permissible interest in the manner in which the abortion was performed, is offensive to the Constitution and to the principles delineated by the *Roe* and *Casey* decisions.

V. CONCLUSION

In view of this discussion, then, what should happen to Gerardo Flores, or others convicted under similar circumstances? In my view, a conviction for fetal homicide cannot stand where a jury has not found, beyond any reasonable doubt, that the act resulting in the fetus’s death was not solicited by the pregnant woman herself in an effort to terminate her pregnancy. In the Flores case, of course, this fact was controverted. An appellate court might appropriately choose to remand the case for a new trial, in which the jury is instructed appropriately. Alternately, defendants like Mr. Flores may be convicted of violating other criminal laws with provisions and penalties more accurately reflecting the justifications behind them. Any such law must have as its central element the violation of state mandated abortion procedures or the dangerousness of the committed act to the pregnant woman herself.

At a time when the continued recognition of the right itself has been called into question, there is, perhaps, something quixotic in arguing for more thorough treatment of the fundamental right to an abortion when considering a state law implicating that right. Nonetheless, in the

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105. At the time of this writing, South Dakota has just enacted a ban on all abortions,
absence of an outright reversal of *Roe*, pro-choice advocates must remain vigilant against efforts to chip away at the recognition of the fundamental nature of the right as well as against more direct attacks.

Moreover, the principles illustrated by the foregoing discussion have applicability beyond the abortion right alone. In general, I believe that a basic awareness of any fundamental liberty interest must pervade any analysis of state action pertaining to that interest, even where the state has established the power to regulate. All state action pertaining to that regulation must be consistent with a recognition of the liberty interest involved. It is necessary that the basic nature of the regulations be justified by permissible state interests under a level of scrutiny appropriate to the nature of the liberty interest at stake, but consideration must not end there. When a regulation is violated, the nature of the underlying right affects which purported state interests do and do not justify punishment. In my view, it also affects the terms in which the state may frame its regulation, and the message it may seek to send via its enforcement.

The alternative, an approach which disregards essential liberties as soon as a permissible role for state regulation is identified, threatens a dangerous "boxing in" of our rights. It is a regime wherein any protection accorded to our rights is treated as a narrow exception to the state's otherwise free ranging power. It must be remembered that a fundamental liberty interest is essential, not exceptional, lest the shadow of the state's hand over its exercise have a dangerous chilling effect that ultimately permits a perceptual leap to the viewpoint that our fundamental liberties are only allowances granted to us by the state and not fundamental at all.

save those necessary to save the life of the mother, within the state. John Holusha, *South Dakota Governor Signs Abortion Ban*, N.Y. TIMES, (Mar. 6, 2006), http://www.nytimes.com/2006/03/06/politics/06cnd-abort.html?ex=1299301200&en=6bfae1957bc1dc1a&ei=5088. The governor who signed the bill into law has acknowledged that it is in direct conflict with the holding of *Roe v. Wade*. Id. The bill "is in the forefront of an effort by abortion opponents to test whether a more conservative Supreme Court will reconsider, and possibly reverse, the *Roe* decision." Id.