NOTE
PROSECUTING WOMEN FOR PARTICIPATING
IN ILLEGAL ABORTIONS: UNDERMINING GENDER EQUALITY
AND THE EFFECTIVENESS OF STATE POLICE POWER

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INTRODUCTION

In May 2009, a seventeen year-old girl in southern Utah made a desperate attempt to prevent her boyfriend from leaving her by paying $150 for a twenty-one year-old male stranger to “terminate” her seven month-old fetus.1 The stranger, Aaron Harrison, took the teenager to his home where she instructed him to make the beating appear as if she had been randomly assaulted.2 According to the girl, Harrison punched her in the stomach five times, slapped her face, and bit her neck as she lay on his bed in the dark.3 The brutal abortion attempt failed, and Harrison was charged with and pled guilty to attempted murder.4 Despite the plea, a Utah judge chose to sentence Harrison to up to five years in prison under Utah’s anti-abortion statute, namely third-degree “attempted killing of an unborn child.”5

Initially, the seventeen year-old girl pled no contest to a charge of solicitation to commit murder and Eighth District Juvenile Court Judge, Larry Steele, placed her in secure confinement until she turned twenty-one.6 But in October 2009, Judge Steele reversed himself and released the teen after her new defense attorney argued that mothers are immune from criminal abortion liability under Utah law.7 Accordingly, Judge Steele dismissed the charges entirely in November.8 In December, the Utah State Attorney General’s Office in conjunction with local

2 Id.
3 Id.
5 Id.
6 Id.
8 Id.
prosecutors appealed this decision to the Utah Court of Appeals where it is currently awaiting review.9

Widely publicized, the teen’s self-abortion attempt and subsequent exoneration evoked a strong response from Utah Representative Carl Wimmer (“Rep. Wimmer”) who introduced House Bill 12 (“H.B. 12”) and its predecessor House Bill 462 (“H.B. 462”), proposing homicide prosecution of pregnant women who participate in illegal abortions.10 The much criticized original bill11 included liability for a woman’s criminally negligent or reckless act inducing miscarriage, but ultimately this language was removed. The subsequent bill limited criminal liability to intentional and knowing acts.12 This latter version was signed by Governor Gary Herbert in March 2010.13 While two other states have similar statutes that criminalize self-abortion,14 these laws were enacted prior to Roe v. Wade when the Supreme Court recognized the right to abortion.15 The Utah bill breathed life into a nationwide controversy regarding immunity for women in abortion prosecutions and whether disregarding this immunity is the appropriate social response to self-abortion.16

The following Note outlines the legal and social history of women’s common law immunity leading up to the passage of Utah’s statute in Part I. Part II analyzes the legislative history of the Utah self-abortion provision prior to its passage as H.B. 462. Part III examines the relationship between state police power and the movement to create gender equality under the law, specifically under the Utah criminal laws involving rape and domestic violence. In Part IV, I posit that the inconsistency of the self-abortion prosecution law with other Utah provisions undermines gender equality and the efficacy of Utah’s police power.
I. EVOLUTION OF WOMEN’S ILLEGAL ABORTION IMMUNITY
IN THE UNITED STATES

While abortion statutes have existed since the early nineteenth century, fetal
homicide statutes are largely a development of the twentieth century. This
development parallels advances in scientific and medical research on fetal
maturation. In the sixteenth and seventeenth centuries, legal punishment for death
of an unborn child was effectively nonexistent due to the common law “born-
alive” standard.17 Later, into the nineteenth century, liability was determined by the
common law concept of “quickening.”18 Overall, fetal homicide liability has
evolved from no liability, to near nationwide third-party liability, and finally to the
recent efforts to impose liability on pregnant women.

A. Third Party Liability for Fetal Homicide

Under the common law “born-alive” standard, a fetus that was not born living
could not be “killed” in a legal sense, thereby obviating almost all feticide
liability.19 In the sixteenth and seventeenth centuries, the prevalence of pregnancy
complications and miscarriages made it necessary to ascertain a child’s viability
prior to imposing liability.20 The practical effect of the “born-alive” standard was
that only in the very rare circumstance that an injured fetus survived birth and died
shortly after could a party be punished.21 While clearly underinclusive and archaic,
the “born-alive” standard has not wholly disappeared from American jurisprudence
and is still cited as an early common law definition of “human being” in the
context of abortion debates.22

Significant in the path towards feticide liability, the United States issued
abortion code revisions in the 1820s and 1840s that imposed punishment for
abortions that occurred “post-quickening.”23 Legally, quickening referred to “the
moment when the pregnant woman first experiences perceptible fetal movement,
occurring approximately sixteen to eighteen weeks into gestation.”24 These code
revisions are evidence of the social and legal shift in focus from the rights of the
mother to the rights of the child that continue to this day. In the mid-1800s, at least

17 Douglas S. Curran, Note, Abandonment and Reconciliation: Addressing Political
and Common Law Objections to Fetal Homicide Laws, 58 DUKE L. J. 1107, 1112–14
(2009).
18 Ashley Gorski, Note, The Author of Her Trouble: Abortion in Nineteenth-
and Early Twentieth-Century Judicial Discourses, 32 HARV. J. L. & GENDER 431, 433–34
(2009).
19 See Curran, supra note 17, at 1112.
20 Id. at 1113–14.
21 Id. at 1115.
22 Id. at 1131–32.
23 Gorski, supra note 18, at 434.
24 Id. at 433–34.
six states enacted statutes declaring feticide to be a crime punishable as manslaughter.\textsuperscript{25} Despite this shift, liability for the death of an unborn child was limited to those that could be reached under anti-abortion statutes, such as those performing abortions or the woman’s former sexual partners.\textsuperscript{26}

Interestingly, the anti-abortion prosecution limitation accompanied the “born alive” standard well into the twentieth century. A good illustration of this is the California Supreme Court’s infamous decision in \textit{Keeler v. Superior Court}.\textsuperscript{27} Mrs. Keeler was approximately seven months pregnant when she was stopped on a mountain road by her ex-husband.\textsuperscript{28} Her ex-husband, upset by Mrs. Keeler’s carrying another man’s child, shoved his knee into her abdomen, crushing the unborn child’s skull.\textsuperscript{29} The ex-husband was then charged with murder.\textsuperscript{30} On appeal, the court interpreted the meaning of “human being” under California’s murder statute, traced the origins of the statute back to 1850, and examined the legislative intent in enacting it.\textsuperscript{31} Finding the “born alive” standard to be the pervasive understanding at the time of statutory enactment, the court ruled that an unborn child was not included in the definition of “human being,” regardless of the stage of viability.\textsuperscript{32} The \textit{Keeler} decision prompted swift action to amend the California homicide statute to include murder of “a human being, or a fetus, with malice aforethought,”\textsuperscript{33} thus making third parties liable for the death of an unborn child.

Hesitance in holding parties, specifically third parties, accountable for feticide has largely been due to conflict over the legal definition of a human being. At the heart of the resistance to feticide laws is the perception that extending the definition of human being to include unborn children restricts a pregnant woman’s personal autonomy.\textsuperscript{34} Realistically, it has taken tragedies such as the facts in the \textit{Keeler} case to motivate legislators to overcome the hesitancy and codify third party feticide liability.\textsuperscript{35} As of 2010, at least thirty-eight states have enacted third party feticide legislation.\textsuperscript{36} Given that public response has been a significant factor in holding third parties accountable for feticide, the reaction to the recent Utah self-abortion incident seems almost appropriate.

\begin{itemize}
  \item \textsuperscript{25} Keeler v. Superior Court, 470 P.2d 617, 621–22 (Cal. 1970) (en banc).
  \item \textsuperscript{26} See Gorski, supra note 18, at 434.
  \item \textsuperscript{27} \textit{Keeler}, 470 P.2d at 618.
  \item \textsuperscript{28} \textit{Id.} at 618.
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} at 619.
  \item \textsuperscript{31} \textit{Id.} at 628.
  \item \textsuperscript{32} \textit{Id.} at 629.
  \item \textsuperscript{33} \textsc{Cal. Penal Code} § 187 historical and statutory notes (emphasis added).
  \item \textsuperscript{34} See id.
  \item \textsuperscript{36} John Leland, \textit{Abortion Foes Advance Cause at State Level}, \textsc{N.Y. Times}, June 2, 2010, at A18.
\end{itemize}
B. Immunity Cures Challenges Faced by Prosecutors in Prosecuting Abortions

Understanding the development of third party feticide liability begs the question of how women procuring and submitting to illegal abortions have escaped liability. While concerns over a woman’s autonomy dominate the current discussion of abortion, whether legal or illegal, such concerns were practically nonexistent in the nineteenth century when the concept of feticide began to emerge. Ironically, at a time when women were still considered a legal entity only by and through their husbands, it seems counterintuitive that women would be entitled immunity from illegal abortion prosecution. 37

While some scholars argue that paternalism regarding women in the eighteenth and nineteenth centuries is the primary root of this immunity, the early procedural practicalities of prosecuting abortions were a contributing factor. 38 In order to convict an abortionist, it was almost always necessary for prosecutors to present the testimony of the woman. 39 In labeling the participating woman as an accomplice to the crime, the prosecution would have been required to adduce corroborating testimony to convict the defendant. 40 By the very nature of performing abortions, particularly illegal ones, the availability of other witnesses would have been unusual, thereby making prosecution under abortion statutes effectively impossible. To avoid this obstacle, courts defined the female undergoing illegal abortion as a victim or simply declared that there was no accomplice. 41

An early example from 1845 of the judiciary’s use of the common law immunity for women is found in Commonwealth v. Parker. 42 In Parker, the Supreme Judicial Court of Massachusetts found that “the use of violence upon a woman” to induce miscarriage carried with it the same “imputation of malice” regardless of whether or not the pregnant woman consented. 43 In other words, the court found that a woman’s involvement in her own abortion was of no consequence in determining the liability of the other actors. This finding suggests

37 See, e.g., Lynne M. Kohm, Sex Selection Abortion and the Boomerang Effect of a Woman’s Right to Choose: A Paradox of the Skeptics, 4 WM. & MARY J. WOMEN & L. 91, 122–25 (1997) (“[T]he genders are unequal in their power over their own bodies, and more importantly, over their own reproduction . . . [a]bortion coerces women to handle crises that they did not create alone. Yet the men, who are at least equally responsible for the crisis, are relieved of any concern . . . by a woman’s choice of abortion.” (internal citation omitted)).

38 See Gorski, supra note 18, at 438; see also 34 A.L.R.3d 858 (originally published in 1970) (woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony).

39 Gorski, supra note 18, at 439.

40 Id. at 443–44.

41 Id. at 444.


43 Id. at 265.
that the court perceived the woman as less of an active participant and more as a victim.

This immunity was further solidified in cases such as *State v. Smith* in 1896.\(^{44}\) The *Smith* court found that Iowa’s criminal abortion statute had no provision for punishing a pregnant woman who underwent an abortion, and therefore the woman could not be an accomplice.\(^{45}\) Some sixty years later, the Supreme Court of Delaware, applying the same rationale, came to the same conclusion that women cannot be held liable as accomplices to their own abortions.\(^{46}\) As discussed in the proceeding sub-part, this common law immunity for women in illegal abortion liability has persisted to present day.

### C. Prosecutorial Attempts to Circumvent Immunity

For the past century, prosecutors took advantage of women’s common law immunity in abortion prosecution to pursue charges against third parties utilizing the woman’s testimony as a “victim.” At the same time, prosecutors attempted to circumvent this immunity by prosecuting women under other statutory provisions such as child abuse statutes. Though circumvention efforts were and are largely unsuccessful, a brief discussion of prominent and recent decisions in this area enhances our understanding of the origins of Utah’s H.B. 462.

Many of the prosecutorial efforts aimed at circumventing immunity involve cases of alleged reckless or criminal acts of the mother during pregnancy, resulting in damage to the fetus. Illustrative of these efforts are cases where prosecutors charge women under child abuse and/or endangerment statutes for illegal drug use during pregnancy.\(^{47}\) This circumvention effort was addressed by the Florida Supreme Court in *Johnson v. State*.\(^{48}\) In *Johnson*, the court refused to hold a mother liable for passing cocaine via the umbilical cord to her fetus, under a Florida statute criminalizing adults giving controlled substances to minors.\(^{49}\) The court examined the legislative intent behind the statute and found that Florida legislators had expressly considered and rejected liability for mothers under the statute.\(^{50}\) Perhaps influenced by the pervasive perception that pregnant women are more of a victim than a perpetrator, the court favored rehabilitation over punishment for pregnant substance abusers.\(^{51}\)

\(^{44}\) *State v. Smith*, 68 N.W. 428, 428 (Iowa 1896).

\(^{45}\) *Id.* at 430–31.


\(^{48}\) *Johnson v. State*, 602 So.2d 1288, 1297 (Fla. 1992).

\(^{49}\) *Id.* at 1288–89.

\(^{50}\) *Id.* at 1292–94.

\(^{51}\) See *id.* at 1296 (citing AMA Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264(20) JAMA 2663, 2667–68 (Nov. 1990)).
Efforts to prosecute pregnant women for causing harm to their fetus is not limited to circumvention, rather, it is becoming increasingly direct. Perhaps this is due to the continued frequency of women who attempt to self-abort, despite the legalization of pre-viability abortions in *Roe v. Wade* and *Planned Parenthood v. Casey*. Due to its illegal nature and subsequent lack of reporting, statistics regarding self-abortion are difficult to obtain but some medical experts suggest that there was resurgence in self-abortion attempts as recently as the 1990s. Despite the lack of empirical data, the Utah case and statute discussed suggests that legislators and prosecutors still struggle with this pertinent issue.

An example of prosecutors’ direct attempts to confront women’s abortion immunity is found in *Hillman v. State*. In *Hillman*, the Georgia Court of Appeals interpreted a criminal abortion statute and exonerated a woman eight months pregnant who shot herself in the abdomen to kill her unborn child. The *Hillman* court stressed the policy ramifications for extending the abortion statute, which did not require a mental state beyond the “intent to produce a miscarriage or abortion,” to encompass pregnant women and stated:

A woman would be at risk of a criminal indictment for virtually any perceived self-destructive behavior during her pregnancy which could cause a late term miscarriage, to wit: smoking or drinking heavily, using illegal drugs or abusing legal medications; driving while under the influence of drugs or alcohol; or any other dangerous or reckless conduct. . . . [t]aken to its extreme, prohibitions during pregnancy could also include the failure to act. . . .

In a strikingly similar case, the state of Florida in 1997 attempted to convict Kawana Ashley of manslaughter and third-degree felony murder with the underlying felony of criminal abortion. In *Ashley*, the defendant shot herself in the third trimester of pregnancy, striking the fetus on the wrist and emergency surgery was used to remove the fetus. The premature child died fifteen days later. In responding to questions certified by the lower court, the Florida Supreme Court reaffirmed the common law immunity for women who harm their unborn

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53 *Id.* at 1014 (citing Benjamin Honigman et al., *Reemergence of Self-Induced Abortions*, 11 J. Emergency Med. 105, 109 (1993)).
55 *Id.*
56 *Id.*
57 *Id.* at 743–44.
58 State v. Ashley, 701 So.2d 338, 339–40 (Fla. 1991) (per curiam).
59 *Id.*
60 *Id.*
Moreover, the Ashley court found that this immunity was “grounded in the wisdom of experience.”

These cases support the assertion that the judiciary is resistant to removing women’s common law abortion immunity, regardless of whether the woman is prosecuted under anti-abortion statutes or other criminal provisions. These cases also show that Judge Steel’s dismissal of the attempted homicide charges against the Utah teenager in 2009 was based on long-standing judicial precedent. In fact, the cited judicial discourse suggests that women’s abortion immunity has and will continue into the foreseeable future but for intervening legislative action.

II. Utah State Criminal Abortion and Homicide Statutes

H.B. 462 amended Utah’s criminal homicide statute to read: “[a] woman is not guilty of criminal homicide of her own unborn child if the death of her unborn child: is caused by a criminally negligent act or reckless act of the woman; and is not caused by an intentional or knowing act of the woman.” This revision effectively eliminated the common law abortion immunity for women in Utah. Along with adding criminal homicide language, the legislature removed, “[n]otwithstanding any other provision of law, a woman who seeks to have or obtains an abortion for herself is not criminally liable.”

The initial bill, H.B. 12, was subject to several amendments and was eventually superseded by H.B. 462 because the Utah governor rejected H.B. 12. Designed as a tack-on to the criminal homicide statute, the bill presented to the House Health & Human Services Committee included liability for intentional, knowing, reckless or criminally negligent acts of a mother, outside of a legal abortion procedure, that resulted in the death of her fetus. Recognizing the spectrum of conduct that could be prosecuted, the House Committee amended H.B. 12, removing homicide liability for fetal deaths resulting from the mother’s refusal to consent to medical treatment or failure to follow medical advice.

Rep. Wimmer acknowledged in committee that the bill could encompass a large number of miscarriages, regardless of the medical consent amendment.

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61 Id.
62 Id. at 341 (quoting Basoff v. State, 119 A.2d 917, 923 (Md. 1956)).
63 See Carlisle, supra note 7.
64 H.B. 0462, 58th Leg., Gen. Sess., ll. 1–23 (Utah 2010) (amending relevant code provisions, UTAH CODE ANN. §§ 76-5-201, -202, -301, -302; 76-7-314 (West 2010)).
66 UTAH CODE ANN. § 76-7-314 (West 2010).
67 Gehrke, supra note 13.
68 House H.B. 12 Committee Hearing, supra note 65.
69 Id.
70 Id.
Before the House committee, the executive director of Planned Parenthood Action Council stated:

[W]e’re still concerned about whether or not the bill would allow a prosecutor to investigate any still birth or miscarriage for violation of the statute . . . most of the time when a woman miscarries she has no idea why, and this bill requires her to prove the sole reason it happened.\(^{71}\)

To address these concerns prior to submission to the Utah House of Representatives, liability for “criminally negligent” acts by a mother was removed from the bill.\(^{72}\) Despite Rep. Wimmer removing the lowest level of criminal culpability, H.B. 12 was met with serious concerns in the full house hearing. Among the objections were: continuing concern for investigations into any miscarriage, the general lack of wisdom in “legislating to outliers,” and the state’s intrusion into the privacy of individuals.\(^{73}\)

H.B. 12 was passed by the Utah House, 59–12, over these objections,\(^{74}\) but discussion in the Utah State Senate hearing brought up additional concerns. For example, senators ruminated on whether a pregnant woman that returned to domestic abuse could be held liable under the bill’s “reckless acts” language.\(^{76}\) This concern was mirrored by Governor Gary Herbert when he vetoed H.B. 12 on March 8, 2010.\(^{77}\) On the same day, Rep. Wimmer introduced H.B. 462, which removed the language for reckless culpability, and moved it through both houses.\(^{78}\) Governor Herbert signed the revised version into law, also on March 8th.\(^{79}\)

In presenting H.B. 462, Rep. Wimmer hinted at making efforts in the future to reevaluate inclusion of the lower mental states in the legislation, and amend the statute back to include reckless acts.\(^{80}\) Rep. Wimmer made it clear that the success of passing the bill, and passing it quickly, was essential to his pro-life agenda.\(^{81}\) He stated that he intended the legislation to serve as a model for other pro-life

\(^{71}\) Id. (statement by Executive Director Melissa Berg).


\(^{73}\) Id.


\(^{75}\) House H.B. 12 Hearing, supra note 72.

\(^{76}\) Id.

\(^{77}\) Gehrke, supra note 13.

\(^{78}\) Id.

\(^{79}\) Id.


\(^{81}\) Id.
Rep. Wimmer’s pro-life advocacy was made apparent when he read a letter to the Utah legislature during the House Hearing on H.B. 12. The letter, written by the adoptive mother of the child born after the failed Vernal abortion attempt, describes the child as “full of life and personality” and asks legislators to join in support for H.B. 12.

Rep. Wimmer’s hearing commentary demonstrates how public outrage over rare incidents can and do shape feticide laws. These comments also flag the underlying concern behind H.B. 462, that is, states struggle with effectively exercising their police power in areas of the law heavily burdened by the changing social constructs of gender. I posit that Utah has undermined its own police power by enacting the self-abortion provision, in direct contradiction to legislative efforts in the areas of rape and domestic violence.

III. UTAH CRIMINAL LAW INFLUENCED BY GENDER

While prosecution of women for self-abortion is arguably unconstitutional, it is inconsistent with efforts in other gender-related prosecutions, such as rape and domestic violence. Largely through feminist self-analysis, the influence of gender on criminal law is well researched. Gender’s influence in Utah is evident by tracing the treatment of criminal offenses with underlying gender implications in recent history. In general, Utah has followed the national trend toward greater protections and harsher punishments for offenses society perceives as gender related.

A. Recent History of Utah’s Treatment of Criminal Rape Prosecutions

The treatment of rape laws in the late nineteenth through the early twentieth century has become one of the most dismal and blatant examples of gender inequality in American history. Owing largely to the perception of women as property, rape laws required women to demonstrate utmost resistance to the rape itself and corroboration of the facts for a prosecution to be successful. Gradually, feminist-based reforms transitioned these laws away from the presumption of female sexual subservience and therefore away from the proof of resistance and

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82 Id.
83 House H.B. 12 Hearing, supra note 72.
84 Id.
85 This Note does not discuss the constitutionality of H.B. 462 under the Supreme Court’s “undue burden” analysis announced in Planned Parenthood v. Casey, 505 U.S. 833 (1992). Nor does this Note address how the “undue burden” analysis might be juxtaposed with the Supreme Court’s analysis of State laws proscribing self-harm as described in Washington v. Glucksberg, 521 U.S. 702 (1997). See Alford, supra note 52 (analyzing whether self-abortion is a fundamental right).
corroboration standards. Though these developments in the law reflected changing social norms, women were still hesitant to confront the persisting social stigmas associated with rape complaints. This stigma was and is particularly prevalent in the lack of reporting non-stranger rape.

Utah rape law has similarly evolved to reflect the changing social perception of female sexuality and autonomy by enacting harsher punishments and expanding protections for rape complainants. For example, on March 18, 1991, the Utah Legislature eliminated the spousal exception to rape prosecutions. Prior to the amendment, Utah’s rape law read in part, “[a] person commits rape when the actor has sexual intercourse with another person, not the actor’s spouse, without the victim’s consent.” The rationale for this exemption was largely to protect the privacy of marriage. The practical result of the exemption was to leave the fourteen percent of married women raped by their husbands without a legal remedy outside of divorce.

The progression of Utah’s rape reform continued in 1994 when Utah adopted Federal Rule of Evidence 412. The corresponding Utah Rule of Evidence 412 (“Rule 412”) made the victim’s sexual behavior and sexual history inadmissible in sexual misconduct proceedings. Before the adoption of Rule 412, some defenses to rape allegations focused the jury on the victim’s lifestyle and appearance in order to excuse the defendant’s behavior. As the Utah Rule Advisory Committee noted,

[[the Utah Supreme Court has recognized that evidence of an alleged victim’s prior sexual conduct gives rise to unique evidentiary problems . . . even where such evidence has some slight relevance, it has “an

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87 See Ronald J. Berger, Patricia Searles, & W. Lawrence Neuman, The Dimensions of Rape Reform Legislation, 22 LAW & SOC’Y REV. 329 (1988) (discussing four areas of rape reform: “(1) redefinition of the offense; (2) evidentiary rules; (3) statutory age offenses; and (4) penalties.”).
88 Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 HARV. L. REV. 1255, 1269 (1986) [hereinafter Marital Rape Exemption].
89 Susan Estrich, Rape, 95 YALE L.J. 1087, 1168 (1986).
91 Id. (emphasis added).
92 Marital Rape Exemption, supra note 88, at 1268.
93 See id.
95 UTAH R. EVID. 412(a).
96 See Shen, supra note 94, at 441–43.
unusual propensity to unfairly prejudice, inflame, or mislead the jury”
and is “likely to distort the jury’s deliberative process.”

More recently, Utah continued the tradition of protecting victims and
promoting gender equality by eliminating the statute of limitations for rape
prosecutions. In 2008, the Utah Legislature amended the statute defining
“[o]ffenses for which prosecution may be commenced at any time,” thus removing
the four to eight year statute of limitations that existed for rape and several other
sexual offenses. Interestingly, the sponsor of House Bill 13 (which eliminated
the statute of limitations) was sponsored by Rep. Wimmer, the same legislator that
sponsored the recently enacted self-abortion homicide provision.

B. Recent History of Utah’s Treatment of Domestic Violence Prosecutions

Though domestic violence, like rape, is not always perpetrated by a man
against a woman, this dynamic is more prevalent than others. In response to this,
the 1970s saw a national surge in the feminist movement to address the issue of
domestic violence through the “battered women’s movement.” The movement
sought to address domestic physical, emotional and economic abuse and focused
on developing women’s autonomy.

The progression of Utah’s domestic violence law, while perhaps less
progressive than Utah’s rape law, has similarly evolved to provide women more
protection. In 1983, the Utah Legislature passed the “Cohabitant Abuse Procedures
Act.” This chapter of the Utah Criminal Code has come to regulate reporting
procedures, protection orders, and police response to victims, and the control and
punishment of domestic violence offenders. In 2010, this Act was amended to
add even more protections for domestic violence victims. For example, it removed
the requirement of showing a possibility of future violence in order to keep the
victim’s location confidential.

97 UTAH R. EVID. 412 Advisory Committee Note (quoting State v. Dibello, 780 P.2d
1221, 1229 (Utah 1989)).
98 UTAH CODE ANN. § 76-1-301(8) (2009).
100 Id.; see also House H.B. 12 Hearing, supra note 72.
101 Joan V. Kelly & Michael P. Johnson, Differentiation Among Types of Intimate
Partner Violence: Research Update and Implications for Interventions, 46 FAM. CT. REV.
102 Margaret E. Johnson, Redefining Harm, Reimagining Remedies, and Reclaiming
103 Id. at 1125–26.
104 UTAH CODE ANN. § 77-36-1 to -10 (2010).
105 Id. §§ 77-36-1.1, -2.1, -2.5, -7.
While Utah’s domestic violence laws may need to further evolve in order to achieve gender equality goals, Utah has progressed outside the statutory codifications as well. In February 1997, Utah developed a particularized Domestic Violence Court. The ultimate concern in creating this specialized court was effectiveness. In particular, there was concern that “defendants were coming up multiple times on the same charges and simply ignoring judicial orders . . . seemingly invincible offenders [ ] reportedly felt they ran the courts[.]” Moreover, at the time, Utah’s leading cause of homicide was domestic violence, a brutal reminder of the state’s need to aggressively address the issue. In her study of the Salt Lake City Domestic Violence Court, Rekha Mirchandani, noted the progressiveness within the court itself, “[j]udges, lawyers, clerks, detectives, victims’ advocates, and others show a devotion to the battered women’s movement’s feminism . . ., their commitment to large-scale social change, and their stress on the participation of battered women.” The domestic violence court was therefore two-fold in its social progression, as an institution itself and within the institution.

IV. CONTRADICTORY TREATMENT OF GENDER-RELATED OFFENSES UNDERMINES THE STATE POLICE POWER

The advances in Utah laws and practices governing rape and domestic violence are state examples of a national trend toward creating remedies for women as the most frequent victims of gender-related offenses. These advances directly conflict with Utah’s new law holding pregnant women accountable for feticide because it attacks the relationship the state has been building with its female citizens. By taking care to protect women statutorily, judicially, and through social programs, Utah has encouraged women to not only exercise their right to seek legal redress for harms, but has also sought to aid in women’s recovery from these harms. Prosecuting women while encouraging them to seek redress is inherently suspect, particularly as self-abortion attempts may also involve domestic and/or sexual violence.

109 Id. at 393.
110 Id.
111 Id. (internal citation omitted).
112 Id. at 409.
H.B. 462 fails to locate and remedy the cause of the self-destructive behavior that would compel a woman to knowingly and intentionally harm oneself to abort a fetus. It is not in dispute that curbing self-abortion is within the legislative purview,\(^{114}\) but enacting criminal prosecution statutes ignores the opportunity the state has to address the numerous social issues intertwined in the case of the Vernal teen.

I suggest that a correct way to formulate a reaction to the incident in Vernal, if a reaction was necessary at all,\(^ {115}\) was to address the socioeconomic difficulties facing women in seeking legal abortions. Instead, the Utah Legislature chose to ignore the limitations that likely played a role in the Vernal incident. Salt Lake City, the nearest metropolitan area to Vernal, Utah is approximately 175 miles away and over a three hour drive.\(^ {116}\) This distance alone would be inhibitory to a Vernal teen seeking a legal abortion.

Compounding the issue, the teen had to obtain parental consent or judicial bypass of consent, make travel arrangements to comply with mandatory waiting periods, and probably obtain financial assistance.\(^ {117}\) Rural minors who wish to obtain a legal abortion may find it relatively impossible to go through this process while retaining their privacy.\(^ {118}\) As a Sixth Circuit judge noted, “confidentiality is a particular problem in rural communities where the minor’s actions can easily be detected by relatives and friends.”\(^ {119}\) The reality is that Utah has made it insurmountably difficult for a rural teen to exercise her right to a legal abortion.\(^ {120}\)

Moreover, in an effort to make women more visible in the eyes of criminal law, the self-abortion homicide statute actually fogs judicial vision by placing the life of the fetus “at any stage of development,” before the woman.\(^ {121}\) H.B. 462 reverts back to the gender perceptions of the early twentieth century. Rep.

\(^ {114}\) State v. Ashley, 701 So.2d 338, 342 (Fla. 1997) (per curiam) (citing separation of powers issues in deciding the illegality of self-abortion attempts and declining “the State Attorney’s invitation to join in th[ei] fray”).

\(^ {115}\) See House H.B. 12 Hearing, supra note 72 (house representative discounting the wisdom in legislating to rare occurrences).

\(^ {116}\) Driving Directions from Vernal, UT to Salt Lake City, UT, GOOGLE MAPS, http://maps.google.com (follow “Get Directions” hyperlink; then search “A” for “Vernal, UT” and search “B” for “Salt Lake City, UT”; then follow “Get Directions” hyperlink).


\(^ {118}\) Id. at 478.

\(^ {119}\) Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 474 (6th Cir. 1999) (Keith, J. dissenting).

\(^ {120}\) Not only does Utah make it difficult for women to exercise their legal right to obtain abortions, but it actively encourages litigation challenging “the legal concept that a woman has a constitutional right to an abortion.” Utah Code Ann. § 76-7-317.1 (2009) (setting up an Abortion Litigation Account).

\(^ {121}\) Utah Code Ann. § 76-5-201(1)(a) (West 2010) (feticide statute for third parties to which the self-abortion provision was attached). See also H.B. 462, 58th Leg., Gen. Sess. (Utah 2010).
Wimmer’s efforts are reminiscent of the Supreme Court’s decision in *Muller v. Oregon*, which held constitutional a law that limited working hours for women due to women’s unique reproductive roles. By prosecuting a woman for the death of her fetus at any stage of development, the legislature discourages the efforts in other areas of the law to encourage women to come forward to the state to help recover from gender-related crimes. For example, Utah recently removed the statute of limitations for rape prosecutions. This legislative action should encourage rape victims to come forward and exercise their right to be free from personal invasion. But, when read with the self-abortion provision, it tells victims they can rely on the state only in certain contexts or face criminal prosecution.

In addition, the legislation ignores the Supreme Court’s decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, which deal expressly with women’s autonomy and place a high value on protecting this autonomy, at least prior to fetal viability. Rather than recognizing the issue as a socioeconomic issue, the Utah Legislature chose to view the Vernal teen’s self-abortion attempt as a criminal issue. To emphasize, the Utah Legislature *did* have this choice. By choosing to formulate the issue as an abortion issue, Rep. Wimmer made his intentions clear: that he, other legislators, and Utah’s Governor are making steps to overrule *Roe* and *Planned Parenthood v. Casey*. As stated by Rep. Wimmer in response to removing “reckless” from the self-abortion legislation, “I intend to take this bill to . . . legislative council national groups and see if I can’t have this bill become a model legislation for the pro-life cause. I didn’t want controversy attached to a model piece of legislation, clearly that would hold up its ability to become such.” This legislation was advancing a personal cause, drawing on outrage garnered from a tragic incident, without due regard for the overall effect on victims of gender-related crimes.

**CONCLUSION**

In March 2010, the Utah Legislature enacted H.B. 462, which allows for the prosecution of women who intentionally or knowingly cause the death of their unborn child, at any stage of the child’s fetal development. The legislation sparked national debate over a woman’s liability for death of her unborn fetus and the

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122 *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908) (holding that physical differences between men and women justify different treatment under labor laws governing work hours).

123 *See supra* Part III(a); *see also* Utah Code Ann. § 76-1-301(8) (2009).

124 *Roe v. Wade*, 410 U.S. 113, 153 (1973) (the right of privacy “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned”).

125 *See House H.B. 462 Hearing, supra* note 80.
rights of pregnant women. This provision was enacted partially in response to charges being dropped against a Utah teen who attempted to self-abort by paying a stranger to beat her. Moreover, this provision was a calculated effort by a representative of the Utah Legislature to further his pro-life agenda.

Prior to passing H.B. 462, women in Utah were immune from liability for harming their unborn child, a common law tradition shared by relatively all other United States jurisdictions. Though feticide laws have come to hold third parties accountable for harm to an unborn child, liability for mothers is considered to be against “the wisdom of experience.”126 A mother harming her unborn child, at great cost to herself, is seen as best remedied by social and psychological means.

With the Utah teen’s brutal self-abortion attempt, the legislature had the opportunity to confront any number of issues, including the socioeconomic limitations that prevent women from obtaining legal abortions. Instead, the legislature chose to examine the incident as a criminal one. This framing directly contradicts Utah’s recent history in promoting gender equality. Utah’s rape and domestic violence reforms have shown that the state encourages victims, who are frequently women, to trust in and align themselves with the state police power. The demonstrated commitment to gender equality is undermined by H.B. 462 which effectively places the life of the unborn fetus above the interests of the pregnant woman.

Rather than use the tragic, self-destructive behavior of a pregnant teen as a platform for a pro-life agenda, the Utah Legislature should have evaluated the cause of her behavior and formulated an appropriate remedy, supposing any legislative remedy was necessary. Overall, H.B. 462 was not the appropriate remedy and shows a lack of regard for the overall effect the provision will have on the victims of gender-related crimes.

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126 State v. Ashley, 701 So.2d 338, 341 (quoting Basoff v. State, 119 A.2d 917, 923 (Md. 1956)).