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S V MSHUMPA: A TIME FOR LAW REFORM

By

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SUMMARY

S v Mshumpa dealt with the very controversial issue of third party foetal violence that terminates prenatal life. The decision of the Eastern Cape Division emphasised that, until live birth, a foetus is not a legal subject with constitutional rights. As a result of its position in the law, a foetus cannot be the victim of criminal conduct. The court refused to develop the common law crime of murder to include a foetus and referred this issue to the legislature to address.

Concerns raised by the research task relate to the most effective method of law reform and the implications of law reform for well established legal principles concerning legal subjectivity, vestment of constitutional rights and female reproductive rights. In order to avoid these concerns, the introduction of a statutory crime is determined as the preferred method for law reform. The aim of the study is to develop a suitably defined statutory crime, with definitional elements that conform to the Constitution and criminal law principles.

Before embarking on the mission of exploring possible grounds that justify law reform, the research first examines the extent of inability of the law to impose criminal liability in cases of third party violence that terminates prenatal life. Aspects that are specifically investigated include the common law crime of murder, contravention of the Choice on Termination of Pregnancy Act, attempting the impossible and the common law crime of abortion. A further purpose of this examination is to determine the reasons why foetal interests are not taken into account.

Appreciating the lack of criminal remedy, private law principles are considered in order to determine whether there are any principles available to supplement the deficiencies in criminal law. This research found that the value of dignity established by the founding principles of the Constitution and applied in the Choice on Termination of Pregnancy Act

demonstrates that the state has an interest in prenatal life. The value of dignity serves as the foundation for law reform.

Having established the existence of a sound legal basis which justifies law reform, the research requires an investigation into foreign jurisdictions where the crime of third party foetal violence exists as a result of a state interest in foetal life. The purpose of the investigation is to determine whether the crime is effectively implemented. The United States of America is the selected country to study because third party foetal violence receives attention at both state and federal level. The research found that the implementation of foetal homicide laws in the United States infringes on female reproductive rights and to a certain extent, the foetal homicide laws also grants a foetus legal subjectivity. The United States fails to effectively implement the crime of third party foetal violence in line with its own established legal principles.

The research benefits from the study conducted on the United States in that the United States demonstrates the definitional elements the proposed crime should contain in order for the statutory crime to be harmonious with established constitutional and criminal law principles.

The study concludes with the recommendation that a statutory crime be developed in the context of female reproductive rights rather than considering the foetus as the victim of crime. The statutory crime is a response to unauthorised third party violence that terminates a woman's pregnancy. The definitional elements include foetal viability for purposes of causation and will only be applicable to intentional conduct. The value of dignity in relation to prenatal life serves as a support structure for the driving force of female reproductive rights.

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ABBREVIATIONS AND ACRONYMS

ALR	American Law Review
Am J Com L	American Journal of Comparative Law
Cardozo J L & Gender	Cardozo Journal of Law and Gender
Choice Act	Choice on Termination of Pregnancy Act
Cooley L Rev	Cooley Law Review
CPA	Criminal Procedure Act
ECHR	European Convention of Human Rights
Harv Hum Rts	Harvard Human Rights Journal
Harv J on Legis	Harvard Journal on Legislation
HRLR	Human Rights Law Review
HSTCLQ	Hastings Constitutional Law Quarterly
ICA	Iowa Code Annotated
J Contemp Health L & Pol'y	Journal on Contemporary Health Law and Policy

La Rev Stat Ann	Louisiana Revised Statutes Annotated
Legal Aff	Legal Affairs
NPA	National Prosecuting Authority
NY Code	McKinney's Consolidated Laws of New York Annotated
Rutgers L Rev	Rutgers Law Review
SACJ	South African Journal on Criminal Justice
SALJ	South African Law Journal
SAJHR	South African Journal on Human Rights
SAPR/PL	SA Publiekreg/ Public Law
Sydney L Rev	Sydney Law Review
SYRLR	Syracuse Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
T M Cooley L Rev	Thomas M Cooley Law Review
TXJWL	Texas Journal of Woman and the Law
UFLJLPP	University of Florida Journal of Law and Public Policy
UNESCO	United Nations Educational, Scientific and Cultural Organisation

UVVA	Unborn Victims of Violence Act
Val U L Rev	Valparaiso University Law Review
Wash U L Q	Washington University Law Quarterly
WLLCRSJ	Washington and Lee Journal of Civil Rights and Social Justice
Yale J L & Feminism	Yale Journal of Law and Feminism

CHAPTER ONE Introduction

1.1 Contextual background

In *S v Mshumpa*[1], the Eastern Cape Division had to deal with the topic of third party foetal violence that terminates prenatal life. Accused one, Mshumpa and accused two, Best plotted to have Best's pregnant girlfriend, Shelver, shot in the stomach under the guise of a hijacking.[2] In carrying out the plan, Mshumpa shot Shelver in the stomach twice.[3]

As a consequence of the gunshot wounds, the 38 week old foetus was stillborn.[4] The state showed, through the use of expert medical evidence, that prior to the incident the foetus was viable.[5] It was proved further that as a result of being shot the foetus had tried to breathe in reaction to the pain causing it to drown in its own blood and amniotic fluid.[6] Parts of the foetus's cervical spinal had also been shattered.[7]

Both Mshumpa and Best were charged with murder of the foetus and attempted murder of Shelver.[8]

[1] 2008 (1) SACR 126 (E).
[2] *Mshumpa* 134E.
[3] Ibid.
[4] *Mshumpa* 133H.
[5] *Mshumpa* 148D.
[6] Ibid.
[7] *Mshumpa* 133H.
[8] *Mshumpa* 134B. Various other charges were filed, but are irrelevant here.

The court referred to the definition of the common law crime of murder[9] and decided that that the intentional killing of a foetus does not fall within the scope of the definition of murder as the person being killed has to have been born alive.[10] The principles of legality found in section 35(3)(l) of the Constitution prevented the court from extending the definition of murder to include the killing of a foetus and the court was not prepared to make a prospective declaration of a new or extended crime as this task was best suited for the legislature.[11] The court reiterated that the Constitution does not bestow any fundamental rights on a foetus and there hasn't been a South African court that has held to the contrary.[12]

The court found that the two accused were guilty of attempted murder of the pregnant woman and that the aggravation of the assault, in the form of assault on the foetus, would be taken into consideration at the sentencing stage.[13] The court stated that the common law crime of assault as it stands offers sufficient protection to the pregnant woman; this is as a result of the "unique togetherness" shared by the pregnant woman and the foetus.[14] Consequently, an assault on one is an assault on both and the nature of the assault plays a more important role in determining an appropriate sentence rather than the formal name given to the particular crime involving the assault.[15]

Mshumpa and Best were found guilty of attempted murder of Shelver and sentenced to 15 and 20 years imprisonment respectively.[16] In addition, both accused were found guilty of assault on Shelver and sentenced to 6 months imprisonment respectively.[17]

Mshumpa confirms a well established fact that foetal interests are not afforded any protection in the South African legal system. Further, *Mshumpa* clarifies that a crime

[9] See chapter two.
[10] *Mshumpa* 149E-F.
[11] *Mshumpa* 148F-I; 150A; 152C-E.
[12] *Mshumpa* 150B-C; 151G.
[13] *Mshumpa* 150F-G; 152F-G.
[14] *Mshumpa* 515I.
[15] *Mshumpa* 151J; 152A.
[16] *Mshumpa* 156F-G.
[17] Ibid

cannot be committed directly against a foetus but only against the pregnant woman, regardless of the intention of the perpetrator. This decision deals with core aspects of South African criminal law and the courts duty to develop the common law. *Mshumpa* plays a central role in the process of demonstrating the need for law reform through the introduction of a statutory crime that will satisfactorily address third party foetal violence.

1.2 Purpose and significance of the research

The starting point of the research is to accept that *Mshumpa* is an example of the correct application of existing legal principles in the context of prenatal life. The purpose of the research is to determine the best route to take in order to legitimately tackle third party foetal violence that terminates prenatal life since there is an obvious a gap in law concerning this topic.

If the judiciary were to freely extend the application of existing legal principles to include a foetus it would introduce numerous problems, especially in terms of fundamental rights contained in the Constitution. Should the common law definition of murder be extended to include a foetus, invariably the foetus would be considered a live person and constitutional rights would attach to it in its unborn state. A foetus would be vested with the constitutional right to life, human dignity, freedom and security of the person and the right to bodily and psychological integrity. This route will have a detrimental impact on the rights of pregnant women. Regardless of their pregnancy status, women are legal subjects with vested constitutional rights. If a foetus is granted personhood, the courts will be faced with the task of determining whose rights can be justifiably limited in terms of section 36 of the Constitution.

The exercise of weighing the competing rights of a foetus against that of the pregnant woman will lead to a complete limitation of female autonomy for the duration of her pregnancy. A pregnant woman may face criminal liability for smoking cigarettes, drinking alcohol, excessive eating or even participating in sports activities because in her pregnant state these activities may be found to infringe on the foetus's constitutional rights to life and bodily and psychological integrity. Further, the Choice on Termination

of Pregnant Act[18] will face severe constitutional scrutiny because the termination of a pregnancy will infringe on the foetus's right to life and bodily integrity.

This argument sets the scene to demonstrate that whatever law reform is suggested it must not afford a foetus any constitutional rights or impose on established termination laws. Additionally, for purposes of legitimacy, the proposed law reform must be founded on sound legal principles so that when law reform is implemented it does not create a controversial and contradictory backlash on any established legal principles found in the Constitution, private law or criminal law.

In light of these aims, a preferable solution to circumstances similar to *Mshumpa* is adequate legislative intervention in the form of a statutory crime. The statutory crime can offer legal protection to a foetus in its unborn state, recognising that the foetus is not yet born alive and is not the bearer of constitutional rights. The statutory crime can be developed in such a way that a woman's right to terminate her pregnancy can stay out of harm's way, ultimately avoiding the problem of weighing foetal "rights" up against pregnant women's constitutional rights.

Presently, the Constitution advances female autonomy and a foetus has no legal standing, these are the reasons why third party foetal violence cannot be treated as a separate crime or adequately punished. However, this consideration need not be the demise of the development of South African criminal law. This study will show that the need for law reform can be addressed without limiting female autonomy or developing the definition of a live person to include a foetus. It is not the purpose of the study to promote the rights of a foetus but rather, it serves the purpose of introducing an instrument to adequately punish perpetrators who inflict violence on a foetus by affording a foetus statutory protection over constitutional protection.

1.3 Research questions

[18] Act 92 of 1998. Hereinafter this Act will be referred to as the Choice Act.

Based on the background and purpose of the research task, the following questions are posed:

1. In light of the *Mshumpa* decision, are there any criminal or private law principles available that can aid in tackling third party foetal violence that terminates prenatal life?
2. If not, does the state have an interest in extending criminal law to protect developing a developing foetus?
3. If there is such an interest, can this interest be used as a foundation to criminalise conduct that terminates prenatal life through the infliction of violence, and when should this protection establish itself?
4. What form should protective measures take?
5. How can protection against third party foetal violence co-exist with the Choice on Termination of Pregnancy Act?[19]

1.4 Methodology

To adequately answer the posed research questions, a desk top research will be conducted with an analytical approach on legal systems of both the United States of America and South Africa.

In order to establish whether there are any existing foetal protection measures in South Africa, case law, legislation and journal articles will be consulted in both the criminal and private law sphere. The purpose of this task is to determine whether South Africa embraces a culture of foetal protection against third party violence.

To justify law reform, it will need to be determined whether the South African state has a legitimate interest in prenatal life. Accordingly, a study on a number of constitutional principles will be conducted. Specific attention will be placed on female reproductive rights, the Choice on Termination of Pregnant Act and the constitutional value of dignity.

[19] It must be recognised that tackling third party foetal violence through the implementation of a statutory crime introduces a conflict in the context of termination laws. On the one side, a third party faces criminal liability for terminating prenatal life, however under the Choice Act a woman may lawfully terminate her pregnancy. In both scenarios prenatal life is being terminated – the very consequence that law reform seeks to address. This research will investigate how to establish a situation where the statutory crime of third party foetal violence that terminates prenatal life can co-exist with termination laws.

Case law, journal articles and textbooks will be consulted in order to establish how these principles have been interpreted and are applied.

A comparative study will focus on the United States of America. The federal government and a number of states in the United States have introduced legislation that deals with the specific topic covered by *Mshumpa*. The purpose of the comparative study is to determine whether the foetal homicide adopted by the federal and state's governments offer a workable solution especially in light of the fact that the United States recognises a woman's right to terminate her pregnancy and has a recognised state interest in prenatal life.

In order to comprehensively understand the scope of the foetal homicide adopted in the United States and how the legislative provisions are implemented, case law, the various legislative provisions and journal articles will be consulted. Criticisms lobbied against foetal homicide laws will be researched since these will highlight the drawbacks of the various legislative provisions. It is important to look into suggestion made by the various authors on how to overcome the found drawbacks because this will aid in developing sound recommendations for law reform in South Africa since this offers the opportunity to learn from another country's legislative mishaps.

In the context of foetal homicide, elements that will receive considerable amount of attention are the definitional elements of the crime and the ability of the various legislative provisions to co-exist with termination laws in the United States.

After having obtained a holistic perspective on South Africa and the United States, consideration will be given to legislative provisions found in the United States can be transplanted and used in South Africa. This process requires the performance of a compatibility test with regard to South African constitutional law and criminal law principles. This compatibility test will lead to recommendations for law reform in South Africa.

1.5 Chapter overview

Chapter two is dedicated to a discussion of the legal arguments presented by the state in *S v Mshumpa* and the court's findings. The chapter also looks at the definitional elements of the common law crime of murder and the principle of legality and how these elements stand in the way of including a foetus in the application of the crime of murder.

Chapter three examines whether there are any criminal law principles available that can be used to address third party foetal violence that terminates prenatal life. Specifically, this chapter looks at attempting the impossible in the context of murder, common law abortion and criminal sanctions imposed for the contravention of the Choice Act.

Chapter four moves beyond criminal law and turn to private law sphere. This chapter examines whether there are any private law principles available that can aid in justifying the criminalisation of third party foetal violence that terminates prenatal life. Chapter four looks at the nasciturus fiction. Wrongful life claims and the role of the Choice Act in advancing and limiting female reproductive rights.

Chapter five is a study of the application of foetal homicide laws in the United States at federal and state level. It will be investigated whether these laws have been successfully implemented in light of termination of pregnancy laws. Criticisms lobbied against the implementation of foetal homicide laws will be discussed and consideration will be given to any suggested alternatives.

Chapter six is dedicated to examining whether the position in the United States can be adopted in South Africa and what adjustments should be made or whether alternative should be considered.

Chapter seven concludes the research task with a reflection on the issues highlighted throughout the research. In light of these reflections, chapter seven sets out recommendations for law reform of the criminal law in South Africa.

1.6 Study limitations and difficulties

1.6.1 Study limitations

This research task is limited to addressing the factual circumstances where a pregnancy is terminated as a result of third party foetal violence. Accordingly, possible implications for prenatal injuries where a foetus is later born alive will not receive attention. Additionally, criminal liability for those cases where a pregnant woman terminates her own pregnancy outside the scope of the Choice Act will also not be considered.

As a result of time and space constraints, it is unrealistic to research possible defences that can be raised against the proposed statutory crime.

As a result of the vast amount of information found in the United States relevant to foetal homicide laws and the fact that there is not a unified approach to foetal homicide laws, the research will not include every state in the United States. The study will consider the federal government's approach to deal with third party foetal violence and number of selected states that represent the divergent approaches adopted by the various states.

1.6.2 Difficulties experienced

Very little literature is available in South Africa that directly deals with third party foetal violence that terminates prenatal life. Aside from *S v Mshumpa* only two published articles could be sourced that discussed possible solutions to circumstances found in *Mshumpa*.[20] This lack of literature paved the way to search for and use existing principles found in criminal law and private law, and to creatively manipulate these in order to have a solid foundation to work with. The lack of published work on this topic in South Africa inspired the strategic collection of information from beyond the criminal law sphere and outside South African borders, in order to develop a workable solution in a South African context.

[20] Kruuse "Fetal 'rights'? The need for a unified approach to the fetus in the context of feticide" 2009 *THRHR* 126; Buthelezi and Reddi "Killing with impunity: The story of an unborn child" 2008 *De Jure* 429.

The study on the United States of America introduced a unique problem because each state exists independently of the federal government and each other, effectively passing their own legislation over and above that legislation passed by the federal government and other states. Consequently, each state has its own foetal homicide laws with different definitional elements and different degrees of punishment being attached. The disadvantage of this, from a research perspective, is that not every state can receive independent attention with regards to its laws concerning murder, foetal homicide and the regulation of termination of pregnancies. This abundance of information did introduce an advantage to the extent that it made up for the lack of literature in South Africa. The study conducted on the United States required a process of systematically sorting through the information and categorising each approach adopted by numerous states and to then finding states that can be considered a representative of the divergent approaches found in the United States with regard to foetal homicide laws.

1.7 Assumptions underlying the study

Since it is the purpose of this study to propose law reform to address third party foetal violence that terminates prenatal life, the debate surrounding the moral or ethical implications of permissive termination of pregnancy laws will not be engaged with. Nor will this study endeavour to determine when life begins beyond that which the law prescribes.

This research accepts that a termination of a pregnancy performed in terms of termination laws in the United States or South Africa is a lawful medical procedure and does not constitute violence against a foetus.

Further, this research accepts that life for purposes of the law begins once there has been a live birth. Accordingly, legal subjectivity and constitutional rights will not attach to a foetus prior to that moment.

1.8 Definitions

Abortion, common law abortion and termination of a pregnancy: This research will not refer to the termination of a pregnancy as *abortion* unless discussing the position in the United States or when referring to the South African crime of common law abortion. Termination of a pregnancy is the preferred term to use since this is in line with the definitions provided for under the Choice Act.

Foetus: This term is generally used in the text to describe an unborn developing human being of any gestational age unless a specific gestational age is relevant. The United States has adopted the method of spelling foetus as *fetus*, however the United States spelling will be avoided unless directly quoting from another source.

Foetal homicide laws: This is generic term used to describe the various enactments in the United States that address third party foetal violence and includes feticide which is a separate crime to that of murder and foetal homicide which is a form of murder.

Foetal interests: This term is generally used to describe any possible benefits that could accrue to a foetus in its unborn state.

Foetal viability: This is the point at which it is medically possible for a foetus to survive independently of the pregnant woman, with or without the aid of medical intervention. This research accepts that a foetus is viable from roughly 22 weeks gestation notwithstanding the differing views found amid various authors and case law.

Prenatal life: This term describes prenatal life at any stage of gestation and is specifically designated to the developmental life of a foetus that is not recognised as life in terms of the legal system.

Third party foetal violence: This term describes violent conduct inflicted upon a pregnant woman by someone other than the pregnant woman and without her consent which causes the termination of her pregnancy.

CHAPTER TWO *S v Mshumpa*: Third party foetal violence as the criminal offence of murder

2.1 Introduction

This chapter addresses itself to the decision of *S v Mshumpa* in the context of the position of third party foetal violence in South African criminal law. It endeavours to lay the foundation to the central issues of murder and the principle of legality when the courts are called upon to develop the common law.

It will be illustrated that the unauthorised termination of a pregnancy as a result of third party violence cannot rationally be accommodated in the well established principles of the common law crime of murder. Further, in the very unlikely event that third party foetal violence could find application in the definitional elements of murder, through a certain degree of language manipulation, the judiciary is prohibited from developing murder to the extent required since the principle of legality acts as a fundamental restriction in that regard. This discussion serves to justify the need to rather opt for law reform through the introduction of a statutory crime specifically developed to address the unique situation of prenatal life in relation to third party violence in the criminal law sphere.

The *Mshumpa* judgment serves as the starting point since this case brought to light the inability of the criminal law to address third party foetal violence and consequently the need to develop the appropriate means to effectively tackle the issue. Due consideration is given to the various arguments presented by the prosecution

advocating the extension of the definition of murder,[21] however, the grounds cited by the Eastern Cape division for declining to extend the definition to encompass the facts before it are more significant at this point. The reasons provided by the court expressly sets the scene of how a foetus is viewed in the legal realm and also illustrates the extent of the deficiency of existing criminal law principles in addressing the possible offence of third party foetal violence in terms of which prenatal life is terminated.

For purposes of clarification, the principles relevant to the common law crime of murder and legality will be explored. The objective is to demonstrate that from the start, the prosecution was destined to fail in their attempt to secure a murder conviction for the termination of Shelver's pregnancy. Further, the discussion of the crime of murder and the principle of legality will lay the groundwork for chapters to follow where legally sound suggestions will be proposed for the criminalisation of third party foetal violence.

Consideration will be given to the constitutional duty to develop the common law in terms of sections 39(2) and 179. This theme is merely an acknowledgment of the duty to develop the common law, what constitutes development of the common law and the interpretational issues linked thereto. For purposes of this discussion, a solution is not sought after but the flaws present in the prosecution's assertion that the definition of murder can be developed to the level required to include third party foetal violence are illuminated.

2.2 *S v Mshumpa*

The case of *Mshumpa* deals with core aspects of South African criminal law and the court's duty and ability to develop the common law. Further, it plays a central role in the process of showing the need for law reform through the introduction of a statutory crime that will satisfactorily address third party foetal violence.

[21] The value of these arguments will become apparent in chapters to follow since they contribute towards the justification for the introduction of a statutory crime of feticide.

2.2.2 Legal questions[22]

i. Does the conduct of Mshumpa and Best fall within the ambit of the common law crime of murder?

ii. If not, is the court in the position to develop the common law definition of murder to include the termination of prenatal life as a result of third party violence?

2.2.3 Arguments by the state

It is necessary to dissect and analyse the arguments placed before the court by the state, as this allows for sufficient understanding of the court's decision.

From the onset, it's clear that the state sought a murder conviction for Best and Mshumpa.[23] In an attempt to secure the desired conviction, the state focused on the intention of the accused by showing that they held the required intention to kill the foetus. This is also evident from the fact that both Mshumpa and Best, upon being questioned at trial, felt that their conduct amounted to murder.[24]

However, a conviction based on the intention of the each of the accused to murder the foetus fell short of the definition of murder. Over and above the required intention to murder, the person being killed had to have been born alive.[25] In an attempt to overcome this obstacle, the state endeavoured to provide the court with grounds that justified the need to develop the common law definition in order to cover the circumstances at hand.

The state attacked the born alive principle. It was argued that the time had come for the law to give proper reflection to medical reality and convictions of the community, and to declare the killing of a foetus in the circumstances such as the present as murder.[26] It was further argued by the state that the born alive rule had been discarded and

[22] The facts of the case were discussed in ch 1 1.1.
[23] *Mshumpa* 134B.
[24] *Mshumpa* 148H.
[25] *Mshumpa* 149F. The judgment does not specify which countries the state relied on as authority. However, the court does briefly mention Californian case law, from this it is assumed that one of the countries considered by the state is the United States of America.
[26] *Mshumpa* 149A.

developed in other countries where murder is a common law crime.[27] It is evident that there were three grounds that the state relied upon to nullify the born alive rule that therefore necessitates the development the common law: medical advancements, convictions of the community and the development of the born alive principle.

To support the argument of medical advancements, the evidence of a neonatal medical expert was led to show that the foetus was alive in the womb at the time of the shooting and by doing so, it was illustrated that medical advancements invalidates the born alive principle.[28] To prove that the foetus was a live entity before its birth, the neonatal expert showed that at 38 weeks, the foetus was viable in the sense that had it been born on the day of the incident, it would have been born alive and able to survive.[29]

Further, the neonatal expert showed that the foetus experienced pain in the same manner as a normal living baby would that had already been born alive.[30]

> Her reaction to the pain inflicted upon her by the two bullet wounds that entered her body caused a reaction that would normally manifest only itself (sic) in normal birth, upon being expelled from the womb, by a baby inhaling air. When a living person is shot and experiences great blood loss one of the compensatory mechanisms of the body to cope with this crisis is accelerated breathing in an effort to obtain more oxygen. The same happened to the baby in Ms Shelver's stomach. In reaction to the pain caused by the bullets, she tried to breathe, but obviously she was unable to breathe in oxygen. Instead, the evidence of her attempt at breathing was the fact that amniotic fluid and red blood cells were found in her lungs afterwards-it meant that in her distress caused by the pain of the bullet wounds she inhaled some of her own blood. In medical terms she was alive in the womb of her mother and died there as a result of the gunshot wounds to her body. Medically speaking, her life and death inside the womb did not differ in nature from the life and death of a

[27] *Mshumpa* 150C-D.
[28] *Mshumpa* 148C.
[29] Ibid.
[30] *Mshumpa* 148D.

normal person living in the outside world, but only in the location where that life and death occurred.[31]

With regards to convictions of the community[32], it is unclear from the judgment what evidence the state relied upon to show that the community was in favour of the crime of murder being redefined or extended. The court mentions that the facts of the case brought about wide public reaction that had been extensively reported on, but the reports or the exact public reactions were not mentioned.[33] The court further stated that Mshumpa's conduct "causes revulsion to ordinary members of society".[34] In her article, Kruuse briefly discusses a 10 000-strong march in support of Best and Shelver and in protest against violence occurring in the city, this was obviously before it had become known that Best was involved in the shooting.[35]

The third portion of the state's argument relied on the assertion that the born alive principle had been discarded or developed. The evidence brought before the court to show this alleged development is not referred to in the judgment. However, Kruuse, having access to the prosecution's heads of argument, states that for historical reasons

[31] *Mshumpa* 148E-H.
[32] Convictions of the community, which includes that of the legislature and judges, are used as a legal standard for determining the unlawfulness of a person's conduct. The root of unlawfulness lies in a value judgment based on the considerations of morality and policy. The value judgment requires a balancing of two interests and a decision is made to protect one interest against one kind of invasion and not another. Wrongfulness is tested according to society's legal convictions, opposed to moral convictions. However, the community's moral convictions do play a role in shaping their legal convictions and the law is considered to be a translation of the community's fundamental values into policies regulating its members conduct. When the court determines the limits of the concept of unlawfulness it must have regard to the prevailing values of the community. The concept of legal convictions under a constitutional dispensation must incorporate the norms, values and principles contained in the Constitution since all law inconsistent with the Constitution is invalid. The application of the legal convictions of the community, as an agent in shaping and improving the law when facing new challenges, is not nullified by the Constitution. The fundamental rights and values in the Constitution enhances the protection and status this criterion in the sense that all principles of law are subject to and given content in light of the basic values in the Bill of Rights. See *Clarke v Hurst* 1992 (4) SA 630 (D) 651A-D; *Director of Public Prosecutions v Fourie* 2002 (1) All SA 269 (C) 272E-G; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) 395C-397B.
[33] *Mshumpa* 154C.
[34] *Mshumpa* 155E.
[35] Kruuse 2009 *THRHR* 126 127.

the born alive principle as a result of medical advancements is now a legal anachronism.[36]

2.2.4 Decision

First and foremost, the accuseds' intention aside, the court found that their conduct fell outside the ambit of the definition of murder, as the person being killed had to have been alive at the time of the murder.[37] Mshumpa and Best's conduct therefore did not amount to the common law crime of murder.[38]

Having decided on the application of the definition of murder, the court had to consider the possibility of extending the definition of murder or its application to the new circumstances.[39]

Faced with the issue of whether to develop the common law to fit the circumstances of the case, the court relied heavily on the constitutional court judgment in *Masiya v Director of Public Prosecutions*[40] and summed it up as meaning that the "development of the common law of crimes must be done incrementally and cautiously in accordance with the dictates of the Constitution ... that the development should not have retrospect effect ... because that would offend the principle of legality, but that it is competent to effect the development prospectively".[41]

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[36] Kruuse 2009 *THRHR* 126 133.
[37] *Mshumpa* 149E.
[38] Ibid.
[39] *Mshumpa* 149F-G.
[40] 2007 (5) SA 30 (CC). The constitutional court decided that the common law definition of rape was constitutionally valid to the extent that it excluded anal penetration and extended the definition to include non-consensual anal penetration of a female by a male, effective prospectively as to avoid infringing the principle of legality. This decision was reached despite the 2003 Bill on Sexual Offences being before parliament for approval. For criticism against this decision see Snyman "Extending the scope of rape – a dangerous precedent" 2007 *SALJ* 677; Snyman *Criminal law* (2008) 46; Ramosa "The limit of judicial law-making in the development of common-law crimes: Revising the *Masiya* decisions" 2009 *SACJ* 353 where the authors argue that the court contravened the principle of legality when passing its judgment. See 2.4.3 for a detailed discussion.
[41] *Mshumpa* 150I-151A.

With regards to extending the definition of the crime of murder to accommodate the facts of the case, the court, citing *S v Von Molendorff*[42] and *R v Sibiya*[43] as authority, held that even in pre-constitutional common law such extensions were frowned upon because they offended against the principle of legality.[44]

Now, in a constitutional era, the principles regarding the high court's duty to develop the common law and the principle of legality are expressly provided for in the Constitution.[45] In terms of sections 8, 39 and 173, the Constitution places a duty the high court's to develop the common law in order to bring it in line with its foundational values.[46] On the other hand, as one of the rights of an accused to a fair trial, it was noted that section 35(3)(l) of the Constitution prohibits an accused from being convicted of a crime that did not exist at the time of the accuseds' conduct.[47]

The court stated

> [i]t is one thing to develop the common law in civil matters to eradicate patterns of unequal personal, social and economic domination on the ground that these patterns offend against the foundational values of the Constitution, but it is quite another thing to bring about this development in the face of the legality principle explicitly recognised as a fundamental right itself in s 35(3)(l) of the Constitution.[48]

[42] 1987 (1) SA 135 (T). The appeal court found that for extortion to take place the benefit obtained must be a patrimonial benefit and on the principle of legality, the court refused to extend the definition to include non patrimonial benefit. This case was decided before the General Law Amendment Act 139 of 1992 in terms of which s1 states that any advantage may be extorted.
[43] 1955 (4) SA 247 (A). The appeal court found that for the crime of theft to be committed, total deprivation was necessary and the court refused to extended definition to include temporary deprivation based on the principles of legality.
[44] *Mshumpa* 149F.
[45] *Mshumpa* 151D.
[46] *Mshumpa* 149H.
[47] *Mshumpa* 149I-150A.
[48] *Mshumpa* 150A.

Further, relying on *Road Accident Fund v Mtati*,[49] the court reiterated that the Constitution does not afford an unborn child any fundamental rights; especially the right to life and South African courts have never held an unborn child to be the bearer of constitutional rights in its unborn state.[50]

Giving due recognition to the convictions of the community it was stated

> I have no doubt that if I have to give expression to what is described in the legal language as the 'legal convictions of the community' it might result in the view that the killing of an unborn child not by the mother, but by an outsider in the circumstances described in this case, amounts to murder.[51]

However, the argument regarding the development of the born alive principle was not accepted. The court found that in other jurisdictions where foetal killing has been criminalised the dominant trend was to enact "feticide laws" specifically aimed creating an offence regarding the killing by a third party and not to change the definition of murder to accommodate such instances.[52]

The court could not retrospectively declare the killing of a foetus to constitute murder and consequently refused to find Mshumpa and Best guilty of murder because it would offend the principle of legality.[53] When the foetus was killed the acts or omissions of the two accused did not constitute the offence of murder at the time, they can therefore not be guilty of murder.[54]

Seemingly, in an attempt to reconcile its decision with the convictions of the community, the court stated

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[49] 2005 (6) SA 215 (SCA). The court allowed a claim for damages through the application of the *nasciturus* rule since damage is suffered by the child once that child achieves personality and inherits a damaged body. The events prior to its birth were merely links in the chain of causation between the defendant's lack of care and skill and the child's damage. This right of action only becomes complete once the child is born alive.
[50] *Mshumpa* 150B.
[51] *Mshumpa* 148H-I.
[52] *Mshumpa* 150D.
[53] Ibid.
[54] *Mshumpa* 151E.

> [f]ailure to develop the law in order to include the killing of an unborn child as murder will not leave such act unpunished and thus bring the law into disrepute. The act may still be punished as part of the offence committed against the mother, whether that may be murder, attempted murder or any other kind of assault upon the mother. The aggravation of the assault on the mother, in the form of harm to the foetus in her stomach, may suitably be taken into consideration at the sentencing stage.[55]

Further, it was found that should a retrospective declaration be made, a number of practical difficulties would be encountered.[56] These include formulating a reasonably precise definition of murder to include a foetus, issues linked to foetal viability, whether the crime should be restricted to third parties and how the new definition of murder will co-exist with the criminal offence and sanction for illegal abortion under the Choice Act.[57]

Having decided against retrospectively developing the common law, the court was faced with the task of exploring the possibility of making a prospective declaration.[58] On practical and substantive grounds, the court declined to do so.[59]

In an effort to find which circumstances need to be present in order to justify a prospective declaration, the court turned to the *Masiya* judgment.[60] In terms of *Masiya*, the constitutional court justified its prospective extension of the definition of rape by affording extended protection to women, an already existing class of persons, in order to adequately protect their fundamental rights to dignity, privacy and physical integrity, as expressly required by the Constitution.[61] Comparing the *Masiya* judgment to the present facts, the court found that there is not a counterpart in the Constitution for the

[55] Ibid.
[56] *Mshumpa* 150G.
[57] Ibid.
[58] *Mshumpa* 151E.
[59] *Mshumpa* 151F.
[60] Ibid.
[61] *Mshumpa* 151F-G.

protection of the rights of a foetus.[62] Consequently, there are no grounds to justify the prospective development of the common law to extend the definition of murder to include a foetus, since a foetus is not a bearer of constitutional rights.

However, in terms of sections 12(1), (2)(a) and (b) of the Constitution, the right to bodily and psychological integrity, reproductive rights and right to security and control over one's body are protected.[63] It was found that these rights are infringed when a third party terminates a woman's pregnancy through violence.

The court stated that

> [t]he case of assault, in whatever form, by a third party on a pregnant woman with a view to injuring the child in her womb, is an outrage even if viewed simply from the perspective of the injury to the mother. The wonder of pregnancy lies not in the separateness of the mother and the child in her womb, but in their unique togetherness during that period. An assault by an outsider on one is at the same time an assault on both, in their togetherness. Our existing common law of crimes of assault, in its various forms, already provides protection in this regard. And, as pointed out in *Masiya*, the extent and nature of the particular assault in any given case may have a more important role to play in determining an appropriate sentence, rather than the formal name given to the particular crime involving the assault.[64]

The development sought by the prosecution was decided to be unnecessary since a suitable form of punishment could be found within the ambit of the existing crime of assault against the pregnant mother.[65] This approach, the court conceded, would avoid the difficulties of formulating a precise extended definition of murder and that it would also avoid making punishment dependant on the stage the pregnancy has reached.[66]

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[62] *Mshumpa* 151G.
[63] *Mshumpa* 151H.
[64] *Mshumpa* 151H-152A.
[65] *Mshumpa* 152A.
[66] *Mshumpa* 152B.

Pragmatically, the court was faced with the difficulty of providing an adequate definition for the extended crime and the uncertainty that a prospective declaration of a new or extended crime by a high court of first instance would create.[67]

The judgment concludes with

> I am not saying that there is no merit in making the killing of an unborn child a crime, either as part of the crime of murder or as a separate offence, only that in my view the legislature is, as the major engine for law reform..., better suited to effect that radical kind of reform than the courts.[68]

2.3 Common law crime of murder

This section serves as an extension to the discussion of *Mshumpa*, to illustrate that the principles relevant to murder cannot be applied to third party foetal violence.

2.3.1 Definition of murder

Murder, as a materially defined crime, prohibits the consequence of a perpetrator's conduct or action, rather that the conduct itself.[69] Snyman defines murder as "unlawfully and intentionally causing of the death of another human being."[70]

2.3.2 Definitional elements of murder[71]

2.3.2.1 Unlawfulness

The content of unlawfulness includes conduct that unjustly violates the community's perception of justice or causes more harm than good.[72] Further, the right to human dignity, equality and the advancement of human rights and freedoms are of paramount importance when deciding this issue.[73]

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[67] *Mshumpa* 152C.
[68] *Mshumpa* 152D.
[69] Snyman (2008) 79.
[70] (2008) 447. *R v Ndhlovu* 1945 AD 369 373- 374; *R v Valachia* 1945 AD 826 829; *S v Sigwahla* 1967 (4) SA 566 (A) 569G-570E.
[71] Milton *Criminal law and procedure* (1996) 320; Burchell & Milton *Principles of criminal law* (2005) 668; Snyman (2008) 447.
[72] Snyman (2008) 98.
[73] Ibid.

Conduct that conforms to the definitional elements of murder can only be conclusively regarded as unlawful if it cannot be justified through the application of the accepted grounds of justification available.[74] Private defence, necessity, official capacity and obedience are grounds excluding unlawfulness.[75]

2.3.2.2 Intention to kill

Snyman defines intention as "the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful."[76]

Intention is tested subjectively which may be inferred from objective facts proven by the prosecution.[77] The perpetrator's intention must be aimed at the killing of another human being as well as the causal chain of events between the perpetrator's conduct and the death of the deceased.[78] Accordingly, intention will be lacking where there is a material deviation between what was foreseen and what actually occurred.[79] Awareness of unlawfulness forms a fundamental part of intention to the point that should the perpetrator make a mistake concerning a material element of the crime, such as killing something other than a human being, it will exclude intention.[80]

Intention to kill can take the form of *dolus directus*[81], *dolus inderectus*[82] and *dolus eventualis*[83].[84] *Dolus indeterminatus*[85] is not a separate form of intent.[86]

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[74] Snyman (2008) 96; *Clarke* 650G-653G; *S v Fourie* 2001 SACR 674 (C) 678A-679H; *S v Engelbrecht* 2005 (2) SACR 41 (W) 105H-106C.
[75] Snyman (2008) 449. This is not a closed list but the various defences available against a murder charge fall beyond the scope of this research.
[76] (2008) 182.
[77] Burchell & Milton (2005) 671; Snyman (2008) 449; *Sigwahla* 170C-E.
[78] Milton (1996) 325.
[79] As above.
[80] Snyman (2008) 449.
[81] The will of the perpetrator is directed at killing the deceased, Milton (1996) 324; *Sigwahla* 168H.
[82] The perpetrator directly intended one consequence but at the same time has knowledge that the death of the deceased will inevitably occur. See Neething *et al Law of Delict* (2006) 113.
[83] The perpetrator, while not desiring the death of the deceased, subjectively foresees the possibility of death but reconciles himself to that possibility. Snyman (2008) 184 & 449; *S v Mini* 1963 (3) SA 188 (A)

The crime of murder is defined as such because of the intention of the perpetrator to kill the victim, the relationship between the perpetrator and the victim is irrelevant for the purposes of the commission of murder.[87] Therefore, if a foetus were to be included in the definition of murder, it would not be possible to restrict its application to third parties only since the law is more concerned about the intention of the perpetrator and not the perpetrator's relationship to the foetus.[88]

2.3.2.3 Causation

The perpetrator, through a voluntary act or omission must cause the death of another human being,[89] or hasten another's death.[90] The act or omission will qualify as the cause of death if it can be shown that the perpetrators conduct was the factual and legal cause of the resultant death.[91]

In relation to the *Mshumpa* facts, the requirement of causation brings to light the problem of how one would prove that the conduct of the third party factually caused the death of the foetus. Sufficient certainty is lacking in two aspects: The exact moment that it can be accepted that a foetus is alive in the womb in order to qualify as a victim of murder; the exact moment it could be accepted that the foetus has died in the womb as a result of third party violence. With this in mind it is relevant to consider the role of causation in the context of murder.

i. Factual causation

192E-H; S*igwahla* 170B; *S v Mtshiza* 1970 (3) SA 747 (A) 752A-B; *S v Ngubane* 1985 (3) SA 677 (A); *S v De Oliveira* 1993 (2) SACR 59 (A) 67G-J; *S v Lungile* 1999 (2) SACR 597 (SCA) 602E-H.

[84] Milton (1996) 324; Snyman (2008) 449.

[85] The perpetrator's will is directed at the result which is caused but has no specific victim in mind. See Neething *et al* (2006) 114; *S v Mavhungu* 1981 (1) SA 56 (A) 66F-H.

[86] Snyman (2008) 201.

[87] Kruuse (2009) *THRHR* 126 133.

[88] Ibid. The various consequences of including a foetus within the definition of murder is discussed are chapters to follow.

[89] Snyman (2008) 448.

[90] Milton (1996) 326; *R v Makali* 1950 (1) SA 340 (N); *S v Hartmann* 1975 (3) SA 532 (C).

[91] Milton (1996) 327; Snyman (2008) 448; *S v Daniels* 1983 (3) SA 275 (A) 278; *S v Mokgethi* 1990 (1) SA 32 (A) 33; *S v Tembani* 2007 (1) SACR 355 (SCA) 360H-361A.

To determine whether the perpetrator's conduct is the factual cause of death, it is required of the court to apply its knowledge and experience when examining all the relevant facts and circumstances of the case. If a causal link has been identified, the "but-for causation" formula or theory should be applied as a means of examining the correctness of the court's conclusion.[92]

In terms of a commission, the *conditio sine qua non* theory is applied, whereby the conduct of the perpetrator is a necessary condition of the deceased's death.[93] In terms of an omission, where a legal duty is placed on the perpetrator to act and he or she subsequently fails to do so, the *conditio cum qua non* theory can be applied.[94] Thus, the court would enquire whether the death of the deceased would have occurred had the perpetrator positively performed as required.[95]

ii. Legal causation

Upon the establishment of factual causation, legal causation must be investigated.[96] Snyman states that the legal criteria applied to determine legal causation are narrower than those used in terms of factual causation and are "based upon normative value judgments or policy considerations ... such as whether it is reasonable or just to regard the act as a cause of the forbidden situation."[97] Milton states that the law is concerned for policy reasons, however expressed, to impose a reasonable limit to the consequences attributed to a perpetrator because the tests applied for factual causation casts the net of criminal liability too widely.[98]

[92] Snyman (2008) 81. This is the English equivalent to *conditio sine qua non* and the *conditio cum qua non* theories discussed directly below.
[93] Milton (1996) 328; Snyman (2008) 448; *Makali* 344; *Daniels* 278; *Tembani* 2007 360H-361A.
[94] Milton (1996) 327; Burchell & Milton (2005) 212; Snyman (2008) 81.
[95] Snyman (2008) 89; *S v Van As* 1967 (4) SA 594 (A) 595.
[96] (2008) 83, Milton (1996) 327.
[97] (2008) 84.
[98] (1996) 330; *Daniels* 278; *Mokgethi* 33.

Policy considerations can be guided by the various theories[99] of individualisation[100], adequate causation,[101] *novus actus interveniens*[102] and foreseeability[103].[104]

2.3.2.4 Another living person

The victim of murder must have been alive at the time of the perpetrators conduct.[105] Two aspects of this element need consideration namely, the circumstances under which it can be accepted that a foetus is born alive and the point at which death occurs in order for criminal liability to attach.

i. Live birth

In order to qualify as a victim of murder, the person concerned must have been born alive. According to Jolicoeur-Wonnacott the common law born alive rule developed as a result of lack of advanced medical technology and a primitive understanding of the female body during pregnancy.[106] Prenatal mortality was very high during these less technologically advanced eras and it was an accepted fact that some pregnancies would not result in live birth because pregnancies could not be monitored with any

[99] Snyman submits, relying on *Mokgethi*, that when considering which theory should be applied, a flexible approach should be adopted and one should be guided by what is fair and just rather than following one prescribed theory (2008) 84.
[100] This generic concept encompasses a number of theories that generally determine legal causation in a similar fashion, by taking into account all the actions that constituted factual causation and search for the most operative action taken and only that one action can be singled out as the legal cause of the death, Snyman (2008) 84. *R v De Bruyn* 1953 (4) SA 206 (SWA) 214I-216H; *S v Tembani* 1999 (1) SACR 192 (W) 199B-F, 203A-D.
[101] In terms of this theory, the perpetrators conduct will be the legal cause of the deceased's death if it can be said that according to human experience and in the normal course of events, the perpetrator's conduct has the tendency to cause death, it must be seen as the natural and probable consequence, Snyman (2008) 85; *S v Counter* 2000 (2) SACR 241 (T) 250B-C.
[102] Milton states that an event will be regarded as a *novus actus interveniens* if it is abnormal or unlikely, in the light of human experience, to stem from the act committed by the perpetrator, (1996) 331-332; *R v Motomane* 1961 (4) SA 569 (W) 571; *S v Hibbert* 1979 (4) SA 717 (D) 722E-H; *Lungile* 605H-606B; *Counter* 250A-C; *Tembani* 2007 366E-B. The moment the unlikely or abnormal event is foreseen by the perpetrator, it can not constitute a *novus actus interveniens*, *Hibbert* 721B-E.
[103] In terms of this theory, the perpetrator's conduct can be seen as the legal cause of the deceased's death if causing the death of another is reasonably foreseeable for a person with normal intelligence, Snyman (2008) 88; *R v Van den Berg* 1948 (2) SA 836 (T) 837-838; *S v Stavast* 1964 (3) SA 617 (T) 621A-D.
[104] Milton (1996) 331; Snyman (2008) 87-88, 448; *S v Mandikane* 1990 (1) SACR 377 (N) 384F-H.
[105] Snyman (2008) 448.
[106] "The Unborn Victims of Violence Act: Friend or foe to the unborn?" 2000 Thomas M *Cooley Law Review (T M Cooley L Rev)* 563 569.

certainty.[107] Live birth was required by the prosecution because it was impossible to prove causation unless the foetus was born alive and later died of its prenatal injuries.[108] The author argues that as a result of recent medical advancements there is a better understanding of the stages of pregnancy and it is now presumed that most pregnancies will result in the live birth of a healthy child.[109] Accordingly, Jolicoeur-Wonnacott argues that the common law born alive rule is outdated and as a result of medical advancements, causation can be easily proved.[110]

However, for purposes of proving live birth, section 239(1) of the Criminal Procedure Act provides

> [a]t criminal proceedings at which an accused is charged with the killing of a newly born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.[111]

The hydrostatic test is employed to test whether a child breathed or not, by placing the lungs in water to see if they float as a result of holding air.[112]

Placing section 239(1) requirement within the context of prenatal life creates some challenges. The concept of live birth would either need to be developed or completely discarded since life would no longer be determined by the act breathing because a foetus is not capable of breathing inside the womb or leading a life independently of the pregnant woman.

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[107] Ibid.
[108] Jolicoeur-Wonnacott 2000 *T M Cooley L Rev* 563 569.
[109] Ibid.
[110] 2000 *T M Cooley L Rev* 563 569. On the topic of the role of the born alive rule in criminal law see Forsythe "Homicide of the unborn child: The born alive rule and other legal anachronisms" 1987 *Valpariso University Law Review* (*Val U L Rev*) 563; Savell "Is the 'born alive' rule outdated and indefensible?" 2006 *Sydney Law Review* (*Sydney L Rev*) 621.
[111] 51 of 1977. Whether this serves as a rebuttable presumption of live birth is still to be decided. Milton states that if it is proved that the child breathed it is irrebuttably presumed that the child was born alive and this section establishes a substantive rule of law that the breathing test is preferred (1996) 358.
[112] Snyman (2008) 449.

ii. Moment of death

The common law does not define the moment of death.[113] Traditionally, death was defined as the moment when there was cessation of the heart and the lungs, determined by the cardio-pulmonal test.[114] Medical developments rendered this definition inadequate through the introduction of mechanical means of performing bodily functions which aid in maintaining and prolonging a person's life without curing the defect.[115] A heart-lung machine can artificially keep a person alive for an indeterminate period of time, questioning the adequacy of the cardio-pulmonal test.[116]

In terms of section 1 of the National Health Care Act[117] death is now defined simply as "brain death". Carstens and Pearmain state this "modern moment of death" includes whole brain death, brainstem death and neo-cortical death.[118] Burchell & Milton define the moment of death as the point where there is irreversible destruction of the vital functions of the brain.[119] Accordingly, where the heart and lungs of a victim have ceased due to irreversible brain damage and revived through mechanical means, the fact that breathing continues does not mean the person is alive in the legal sense of the word, and the heart-lung machine can be disconnected without this action being the cause of death.[120]

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[113] Carstens & Pearmain *Foundational principles of South African medical law* (2007) 204.
[114] Burchell & Milton (2005) 669; Carstens & Pearmain (2007) 204 n431.
[115] Carstens & Pearmain (2007) 200.
[116] Carstens & Pearmain (2007) 204.
[117] 61of 2003.
[118] (2007) 204. Whole brain death occurs when all the brain cells have died, n432. Brainstem death occurs when all brainstem functions (the heart, circulatory and digestive system and the respiratory tract) cease irreversibly n433. Neo-cortical death occurs where a person suffered damage to the cortex and left in a permanent vegetative state without any cognitive and conative functioning, n434.
[119] (2005) 669.
[120] In *Clarke*, the patient was in a permanent and irreversible vegetative state due to extensive damage to his brain after suffering from a heart attack and his wife sought an order authorising her to withhold nutrition which would consequently starve the patient to death. All the patient's biological functions were present but he lacked self awareness and intellectual functioning, on a biological level the patient was still alive but had no means to experience life. The court stated "the brain has permanently lost the capacity to induce physical and mental existence at a level which qualifies as human existence ... judged by society's legal convictions; the feeding of the patient doesn't serve the purpose of supporting human life as is commonly known". The court also found, relying on *S v Williams* 1986 (4) SA 1188 (A) that merely restoring a person's biological functions cannot be regarded as saving a life, where cortical and cerebral functioning is lacking, it cannot be equated with living in the human or animal context. Burchell and Milton ((2007) 670), state that the court, by treating the patient as a live person, tacitly supports the notion that, for legal purposes, irreversible brain stem damage constitutes brain death. Cortical brain death as a form

The concept of brain death introduces difficulties when placing a foetus into the equation. Depending on the week of gestation, it is accepted that the foetus has not fully completed development so brain death would be difficult to prove since there would not be any conclusive prior knowledge of the condition of the foetus's body or brain functionality. It would need to be determined what would be a sufficient indication that prenatal life has ceased.

2.4 The principle of legality

2.4.1 The rule of law and legality

In terms of section 1(c), the Constitution provides that the Republic of South Africa is founded on the values of supremacy of the Constitution and the rule of law, among others. As founding values, this section does not give rise to enforceable rights but rather informs the interpretation of and gives substance to the rights contained in the Constitution.[121]

> If we read FC s 1 holistically – so that the coupling of the rule of law to constitutional supremacy signifies the value of legal-systemic unity in the service of human dignity, non-racialism and the rest – then 'the rule of law' signifies not just the rule of rules but the rule of justice, as the Final Constitution envisions justice. 'Supremacy of the constitution and the rule of law' signifies the unity of a legal system in the service of transformation by, under and according to law.[122]

According to *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of South Africa*[123] the adoption of the Constitution saw the inclusion of the common law principles of the rule of law and separation of powers, to the extent they were relevant, and as a result they now gain their force from the Constitution as

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of death can serve as a ground which justifies withdrawal of treatment resulting in eventual death without the omission constituting the cause of death.

[121] Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman *et al* *Constitutional law of South Africa* (2007) 11-34.

[122] Michelman (2007) 11-38.

[123] 2000 (2) SA 674 (CC) 692E-G, 693C.

supreme law. Consequently, the doctrine of legality, as an incident of the rule of law, is an implied provision of the Constitution that requires the exercise of all public power to comply with the Constitution as supreme law and with the doctrine of legality which is part of that law.[124] Resultantly, the Constitution places significant restraints upon the exercise of public power through the Bill of Rights and the founding principles ultimately preserving the rule of law.[125]

In *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* the court held

> [I]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality. There is of course no doubt that the common-law principles of ultra vires remain under the new constitutional order ... they are underpinned (and supplemented where necessary) by a constitutional principle of legality.[126]

Although the above decisions relate to disputes arising from administrative law they are nevertheless applicable to public law as a whole, including criminal law where the principle of legality plays a vital role.[127]

2.4.2 The principle of legality in the context of criminal law

The principle of legality is also known as *nullum crimen sine lege*, directly meaning: no crime without law.[128] Broadly, legality prevents capricious punishment by state officials

[124] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of South Africa* 687A-B, H.
[125] *Pharmaceutical Manufacturers Association of South Africa* 707G-H.
[126] 1999 (1) SA 374 (CC) 400D-F.
[127] Ramosa (2009) *SACJ* 353 363.
[128] Snyman (2008) 36.

and ensures that criminal liability and punishment are in accordance with existing rules of law in force before the contravention occurred.[129] The basis for the principle of legality lies in "the policy consideration that the rules of the criminal law ought to be as clear and precise as possible so that people may find out, with reasonable ease and in advance, how to behave in order to avoid committing crimes."[130]

According to Snyman,[131] legality encompasses five rules that become relevant when deciding on the guilt of the accused and the applicable punishment to be imposed. As will become evident, these rules do not exist in complete isolation from each other and a certain degree of overlapping takes place.

i. The law must recognise the perpetrators conduct as a crime (*ius acceptum*)

This principle requires there to be a closed list of common law crimes which may only be adapted by the judiciary to meet modern-day requirements and the only source of new crimes is by legislative enactment.[132] Although this rule prevents the extension of common law crimes, it does permit the creation of new defences or the extension of existing defences against common law crimes.[133]

In order for a statutory provision to create a crime, it must hold a legal norm stipulating a rule of law, a criminal norm labelling such conduct as criminal and attach a criminal sanction for noncompliance.[134] It can only be assumed that a new crime has been created where it appears unambiguously from the wording in the Act and in cases of doubt the court should interpret the provision in favour of the accused.[135]

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[129] Burchell & Milton (2005) 94; Snyman (2008) 36.
[130] Snyman (2008) 38.
[131] (2008) 36-37.
[132] Burchell & Milton ((2005) 96-97) state there is a certain degree of controversy surrounding this principle as there is a thin line between adaption and extension of common law crimes as well as the constitutional duty place on courts to develop the common law in order to bring it in line with the spirit, purport and object of the Constitution; *S v Malagas* 2001 (1) SACR 469 (SCA) 472C-I.
[133] Snyman (2008) 40.
[134] Ibid.
[135] Snyman (2008) 40; *S v Majola* 1975 (2) SA 727 (A) 735C-D. However in *R v Forlee* 1917 TPD 52 the court held that in those cases where a penalty provision is lacking, punishment is left to the discretion of the court where the wording of the provision was not merely exhorting or advising. Contrary to this approach, Burchell & Milton ((2005) 98) state that crimes should be stated in express terms. *S v La*

In terms of section 35(3)(l) of the Bill of Rights an accused cannot be convicted of a crime that was not an offence at the time it was committed. Snyman contends that although this provision gives express recognition to the principle of legality that proscribes retrospective creation of crimes, by implication it also incorporates the principle that where the conduct of the accused was not recognised as a crime the courts do not have the power to create a crime because "if the court had the power to create crimes, it would mean that a court had the power to convict a person of a crime even though X's act did not constitute a crime at the time it was performed." [136]

ii. The perpetrators conduct must have been recognised as a crime prior to its commission (*ius praevium*)

The creation of a crime with retrospect effect is prohibited.[137] This rationale stems from the principles of fairness and the concept of deserved punishment.[138] Adequate notice of what constitutes criminal behaviour allows for individuals to make informed decisions whether or not to engage in certain conduct.[139]

In terms of section 35(3)(l) of the Bill of Rights, an accused person has the right to a fair trial, which includes the right to not be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. This provision gives express recognition to the principle of legality.[140]

Judicial decisions operate retrospectively since the new rule is merely found, as if it had always been inherent in the law.[141] Thus a decision to recognise a new crime or extend an existing definition will operate retrospectively and infringe on the principle of

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Grange 1991 (1) SACR 276 (C) 277A and *S v Theledi* 1993 (2) SA 402 (T) 40A-D are considered to be the correct application of the principle of legality.

[136] (2008) 38.

[137] Snyman (2008) 42.

[138] Burchell & Milton (2005) 104.

[139] Steytler *Constitutional criminal procedure* (1998) 371.

[140] Steytler (1998) 368; Burchell & Milton (2005) 105; Snyman (2008) 38; *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) 651F-652B.

[141] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 888D.

legality.[142] Furthermore, the doctrine of separation of powers under the constitutional dispensation prohibits the judiciary from creating new crimes and usurping the function of the legislature, endorsing the notion that the list of common law crimes must be viewed as closed.[143]

It is presumed that national legislation does not operate retrospectively in cases where vested rights under existing laws are removed but this can be rebutted by express terms or clear implication.[144] In those cases where doubt exists regarding the nature and effect of the statute's retrospect effect, the law existing before the enactment must be applied.[145]

iii. The law must be stated in clear terms (*ius certum*)

The principle of legality prohibits vaguely defined crimes and as a result the use of ambiguous language is barred.[146] The ground for the inclusion of this rule lies once again in the concept of sufficient notice. In cases where the definition of a crime is so vaguely or ambiguously formulated an individual cannot be said to have received adequate notice of the proscribed field of activity.[147] Clearly defined crimes prevent the state from exercising a wide prosecuting discretion which may be subject to abuse.[148]

A certain measure of uncertainty exists in terms of the exact ambit and scope of common law crimes.[149] Burchell & Milton attribute the uncertainty to the different interpretations and understanding among various judges and scholars but advance that definitions of common law crimes find their authoritative expression in judicial precedents and in books of authority.[150]

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[142] Burchell & Milton (2005) 104.
[143] Burchell & Milton (2005) 105. This will be discussed later in the chapter
[144] *National Director of Public Prosecutions v Carolus* 1999 (2) SA 607 (SCA) 614A-615C.
[145] *Carolus* 615C-D.
[146] Burchell & Milton (2005) 100; Snyman (2008) 42; *Sibiya* 256G where the court stated that there should be a high rigidity in the definitions of crimes and the more precise the definition the better.
[147] Steytler (1998) 374.
[148] Ibid.
[149] Burchell & Milton (2005) 100.
[150] (2005) 100; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (2) SACR 102 (W) 117G-119E.

Accepting the measurable degree of uncertainly linked to common law crimes Burchell & Milton state

> certain principles are clear: the existing common-law crimes should not be replaced by new or different definitions; in cases of conflict or uncertainty the interpretation favouring the established definition of the crime or an element should be preferred; the use of analogy as to extend the definition of a crime to include analogous conduct must be avoided; where there is a lacunae in the law the courts should not usurp the function of Parliament nor rush in where the legislature declines to tread.[151]

The principle of legality requires statutory crimes to be worded clearly to the extent that individuals of ordinary intelligence need not speculate in order to determine whether or not their conduct attaches criminal liability.[152] However, even in the case of statutory crimes, it is impossible to strictly adhere to the requirements of complete clarity and certainty because legal rules, by their very nature are formulated in general terms to encompass more than one individual person or more than a single event.[153] Further, it must be acknowledged that there will always be a difference of opinion regarding the interpretation of statutory crimes and their application,[154] nevertheless it is the principle of legality and the generally accepted rules of interpretation that aid in the successful implementation of penal statutes.

The Bill of Rights does not give express recognition to the barring of vaguely and ambiguously defined crimes in terms of the principle of legality,[155] but various sections do aid in its application. Snyman argues that section 35(3)(l) of the Bill of Rights can be interpreted in such a way, rendering a vague provision void either based on the premise

[151] (2005) 100-101.
[152] Burchell & Milton (2005) 101.
[153] Snyman (2008) 43.
[154] Ibid.
[155] Burchell & Milton (2005) 106; Snyman (2008) 43.

of the accused general right to a fair trial,[156] or that prior to the court's interpretation of the vaguely worded provision it cannot be said that a criminal offence existed due to the uncertainty created by its vagueness.[157]

In terms of section 35(3)(a) of the Bill of Rights an accused has a right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it. It was held in *S v Lavhengwa*[158] that section 35(3)(a) means that the accused must know the necessary particulars of the charge and the charge itself must be clear and unambiguous. Snyman asserts that the requirement for sufficient clarity can only be met if the nature of the crime is sufficiently clear and unambiguous.[159] Sufficient clarity echoes reasonable clarity and in deciding whether that criterion has been met the court must approach the legislation on the basis that it is dealing with reasonable and not foolish individuals.[160]

Burchell & Milton suggest that vaguely worded legislation which infringes a right in the Bill of Rights could be held to impose an unreasonable and unjustified limit on the exercise of that right ultimately failing to satisfy the requirements of the limitation clause contained in section 36 of the Bill of Rights.[161]

> While the doctrine on vagueness is connected to a number of specific rights in the Bill of Rights, it flows directly from the overarching value of the rule of law. Whatever its source provision, its rationale is the same: fair notification to those subjected to the law and adequate guidance for law enforcement agencies.[162]

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[156] Burchell & Milton ((2005) 106) also assert that vaguely defined crimes infringe on an accused right to a fair trial, citing *S v Friedman (1)* 1996 (1) SACR 181 (W) as authority. In this case it was argued that the common law crime of fraud was too wide resulting in the accused right to a fair trial being infringed. The court held that although the definition was wide is was not difficult or impossible to ascertain the type of conduct which fell within its ambit.
[157] Snyman (2008) 43.
[158] 1996 (2) SACR 453 (W) 482F.
[159] (2008) 43.
[160] *Lavhengwa* 484C-D.
[161] (2005) 106, the authors concede that this approach can only be accepted as correct if the concept of vagueness is equated with reasonableness.
[162] Steytler (1998) 375.

iv. Penal provisions must be interpreted strictly (*ius strictum*)

The principle of strict interpretation prohibits the judiciary from extending the definition of a crime through wide interpretation of a criminal provision or common law crime as well as extending the scope of an existing crime by means of analogy.[163] This is based on the premise that the common law and statutory provisions creating crimes should not have their range extended beyond the plain meaning of the language of the law or statute and the action of extending the meaning of words to cover crimes of equal atrocity goes beyond the competency of the court.[164]

In the circumstances where there is doubt concerning the interpretation of a penal provision it is required of the court to interpret the criminal provision narrowly or strictly in favour of the accused advocating liberty.[165]

S v Augastine[166] states that

> [t]here are always people to be found who invite and favour "extensions" by the Court of the existing principles of the common law to encompass situations which they feel "should" be encompassed, even if they have not hitherto been so encompassed. I do not think the Courts should respond too readily to such invitations. Fundamental innovations of this kind are for the Legislature (if so advised) and not the Courts ... That being so, I certainly have no desire to rush in where other Courts have feared to tread.

In terms of common law crimes, where there is doubt concerning the definition of one of the elements or the applicability of a definition, the consistent application of the principle of legality requires of a court to accept that the conduct of the accused does not fall

[163] Burchell & Milton (2005) 101;Snyman (2008) 44-45.
[164] *R v Oberholzer* 1941 OPD 48 60 the court, on the grounds that more than one meaning could be attached to the specific criminal provision, favoured the accused by following a narrow interpretation of the provision.
[165] Burchell & Milton (2005) 101; Snyman (2008) 44; *R v Sachs* 1953 (1) SA 392 (A) 399H; *S v Stassen* 1965 (4) SA 131 (T) 134B; *S v Claasen* 1997 (1) SACR 675 (C) 680F.
[166] 1986 (3) SA 294 (C) 302I-303A where the court dealt with the continuous nature of the crime of theft before the Constitutional regime. The *Masiya* decision is contrary to this approach.

within the ambit of the definition of that particular crime, affording the accused the benefit of the doubt.[167] However, Snyman asserts that

> the principle of legality does not mean that a court should so slavishly adhere to the letter of old sources of the law that common-law crimes are deprived of playing a meaningful role in our modern society ... which in many respects differs fundamentally from the society of centuries ago in which our common-law writers lived.[168]

v. No penalty without a statute or legal rule (*nulla poena sine lege*)

All the principles mentioned above have equal application to the imposition of punishment once the perpetrator has been found guilty.[169]

In terms of section 35(3)(n) of the Bill of Rights the right to a fair trial includes the right to the benefit of the least severe punishments if the punishment for that offence has changed since the crime was committed.

2.4.3 Judicial development of common law crimes in terms of the Constitution

In terms of sections 39(2) and 179 of the Constitution, higher courts are afforded the inherent power to develop the common law and while doing so, it is required that the spirit, purport and objects of the Bill of Rights be promoted. These provisions provide the necessary tools needed by the judiciary to extend the applicability of the definitions of existing common law crimes to novel situations necessitated by social change. It is accepted that the principle of legality places a very essential constraint on the judiciary's inherent powers in the performance of their obligations.

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[167] Snyman (2008) 44; *Sibiya* held that temporary use of another's property does not amount to the common law crime of theft; *Von Molendorf* 170A.

[168] (2008) 45. As authority, Snyman cites *S v Kotze* 1965 (1) SA 118 (A) where the court extended the application of the common law crime of theft beyond the required corporeal movable property element to include an abstract sum of money. In *S v Burger* 1975 (2) SA 601 (C), also cited as authority by Snyman, the court extended the common law crime of defeating or obstructing the course of justice to include false statements made to police by the accused outside a court, before any commencement of court proceedings and even before a charge had been laid against the accused. Ramosa (2009 *SACJ* 353 367-368) gives a good example of how the courts extended the applicability of the definition of rape to new factual situations as necessitated by new social changes without actually altering the common law definition as it stood prior to *Masiya*.

[169] Snyman (2008) 48-49.

The judgment of *Carmichele v Minister of Safety and Security* provides valuable directives regarding the development of the common law.[170] It was held that in those circumstances where the common law deviates from the spirit, purport and objectives of the Bill of Rights, the courts are under a general[171] obligation to develop the common law and remove the deviation.[172] This obligation rests on all courts and arises in respect of both criminal and civil law.[173] However, the judiciary should confine itself to those incremental changes which are necessary to keep the common law in line with the ever evolving fabric of society, and be attentive to the fact that the legislature is the major engine for law reform.[174]

K v Minister of Safety and Security clearly sets out those characteristics that constitute "development of the common law" for purposes of fulfilling the section 39(2) duty.[175] Relevant to the discussion is the overall purpose of this section in relation to the position of common law under the constitutional dispensation.

The constitutional court held that the common law develops incrementally through the rules of precedent which enshrine the essential principle of justice that like cases should be determined alike.[176] Accordingly, development takes place in those circumstances when a new rule is introduced or when a rule has changed altogether.[177] However, it is more of a common occurrence that a decision is reached within the framework of an existing rule and in this situation two possibilities arise.[178] In the first instance, the facts

[170] 2001 (4) SA 938 (CC).
[171] *Carmichele* 955F-G, meaning that the courts are not given a discretion to develop the common law, however this does not require the court to dive into an independent investigation on constitutionality of a common law principle in every case where a litigant relies on the common law.
[172] *Carmichele* 954A. The court set out a two stage investigation to determine whether development of the common law is warranted. Firstly, it must be determined whether the existing common law, having regard to s39(2) objectives, requires development to meet those objectives. If affirmatively answered, the second stage necessitates consideration of how much development is required in order meet s39(2) objectives, 956A-B.
[173] *Carmichele* 945B; 955A.
[174] *Carmichele* 954F; D.
[175] 2005 (6) SA 419 (CC).
[176] *K* 429B-C.
[177] *K* 429C.
[178] Ibid.

clearly fall within the ambit of the common law rule and ultimately development is not required.[179] The second possibility arises in those circumstances where the court is faced with a new set of facts without precedent, requiring the determination of whether the facts fall within or beyond the scope of the existing common law rule obliging the court to clarify the precise ambit of each rule in relation to each set of new facts.[180] The common law will be developed either through the extension of the rule to accommodate the new facts or through the restriction of the rule where it is found that the facts fall beyond its scope.[181]

The court found that the purpose of section 39(2) is "to ensure that our common law is infused with the values of the Constitution."[182] "Infusion" of constitutional values is not only required where a common law rule is blatantly inconsistent with the Constitution but "must be felt throughout the common law" including those cases which involve its incremental development.[183] The Constitution, in terms of section 39(2), imposes an extensive obligation upon the courts requiring of the judiciary to be alert to the normative framework of the Constitution when dealing with the common law.[184]

Masiya, according to Snyman, is a "fly in the ointment" with regards to the application of the principle of legality.[185] Snyman's main criticism against *Masiya* is that because the court considered forced anal penetration to be analogous to forced vaginal penetration, that both types of conduct violate the same fundamental rights and that forced anal penetration should be punished in the same fashion as forced vaginal penetration, then the court is free to broaden the definition of rape to include conduct not previously punished under that common law crime.[186] This decision leads to legal uncertainty.[187] The method of interpretation adopted by the court explicitly violates two rules embedded

[179] *K* 429D.
[180] *K* 429D-E.
[181] *K* 429E-F.
[182] *K* 429F.
[183] *K* 429G; *S v Thebus* 2003 (6) SA 505 (CC) 525D-526A.
[184] *K* 429H.
[185] (2008) 46.
[186] (2008) 46-47; Masiya 48D-E; 49E-50C.
[187] Snyman 2007 *SALJ* 677 680.

in the principle of legality: Definitions and elements of crimes must be certain and criminal provisions must be interpreted strictly.[188] In relation to the purpose of section 39(2), Snyman asserts that the courts are empowered to clear up existing points of doubt and restrict the field of application or fill a lacuna in terms of the definitions of crimes.[189]

Ramosa considers the *Masiya* judgment to be a departure from legitimate judicial development of the common law that amounts to an unconstitutional violation of the rule of law and the principle of separation of powers.[190]

> Given the elevated status of the rule of law as a founding value of our constitutional order, and the principle of constitutional supremacy, it follows that the inherent power of the courts to develop common-law crimes does not include the power to extend the definitional ambit of a common-law crime.[191]

To interpret section 39(2) as creating the obligation to develop the common law to such a degree would lead to a contradiction of the founding values of the constitution that provide the framework for its interpretation and goes beyond the limits imposed by the rule of law.[192]

One the other hand, *Masiya* is criticised for not extending the definition of rape in gender neutral terms allowing for the ambit of protection to include male victims.[193] Freedman,[194] on the concept of legality, states that Snyman's assertions are based on the traditional methods of development of the common law which were unequivocally

[188] Snyman 2007 *SALJ* 677 680.Contrary to Snyman's approach, see Dersso "The role of courts in the development of the common law under s39(2): *Masiya v Director of Public Prosecutions Pretoria (The state) and another* CCT case 54/06 (10 May 2007)" 2007 *SAJHR* 373; Pheips & Kazee "The constitutional court gets anal about rape - gender neutrality and the principle of legality in *S v Masiya*" 2007 *SACJ* 341; Mienie "Child rape and the development of the common law" 2007 *SAPR/PL* 576; Freedman "Constitutional application" 2008 *SACJ* 233; Maseko "The impact of the principle of separation of powers on the development of common law and the protection of the rape victims' rights" 2008 *Obiter* 53.
[189] 2007 *SALJ* 677 679.
[190] 2009 *SACJ* 353 370-367.
[191] Ramosa 2009 *SACJ* 353 364.
[192] Ramosa 2009 *SACJ* 353 365.
[193] Ramosa 2009 *SACJ* 353 365 see n180.
[194] 2008 *SACJ* 233 251.

rejected by *K v Minister of Safety and Security*[195] when the court stated development takes place when a new rule is introduced or when a rule has changed altogether. Dersso argues that section 39(2) places a duty on the courts to develop the common law to the extent that the rights in issue are given their full effect and to the extent that is required to place the common law in line with the spirit, purport and objects of the Bill of Rights in general.[196] Further, the only point at which is can be said that the courts have been overactive in their function are in those cases where the common law has been developed beyond what is required to give effect to the rights in issue or to make it consistent with the objects of the Bill of Rights.[197]

It is submitted that the established extensive or general obligation imposed on the courts does not stand without limits. As mentioned above, the principle of legality forms part and parcel of the foundational value of the rule of law. Accordingly, when interpreting the Constitution the interpreter must be guided by the founding values underlying the Constitution since these values serve as the motive for the provisions contained within the Constitution.[198] Consequently, the exercise of unrestrained judicial development of the common law as a means to fulfil the obligation created by section 39(2) is in direct conflict with the value of the rule of law contained in section 1(c) in those cases where the principle of legality is not duly regarded and applied.

2.5 Conclusion

In light of *S v Mshumpa*, it becomes manifestly clear that third party foetal violence is not a criminal offence. It cannot be considered as an offence under the guise of murder. Currently a foetus is not a legal person, constitutional rights are not afforded to it in that state and until its birth the law will consider it as part of its mother's anatomy.

The definitional elements of murder cannot accommodate a foetus without being developed or redefined altogether and the present tests applicable to prove live birth

[195] 429C.
[196] 2007 *SAJHR* 373 380.
[197] Dersso 2007 *SAJHR* 373 381.
[198] Michelman (2007) 11-35.

and the moment of death are incompatible with the foetal environment. Further, considering that the requisite elements of murder are fortified by the principle of legality, the prosecution's attempt in securing a murder conviction for the intentional termination of Shelver's pregnancy through the infliction of violence proved to be hollow.

The court rightly deemed those issues of viability, limitation of perpetrator's and the co-existence of offences under the Choice Act as issues that require specific and specialised attention when approaching the notion of criminalising third party foetal violence.

The principle of legality very obviously prohibits judicial development of the definition of murder to the extent required by the prosecution. However, the legislature is empowered to step in and address the criminalisation of third party foetal violence without infringing on the principle of legality.

The *Mshumpa* judgment offers its worth by showing why the law does not consider third party foetal violence as an offence. Resultantly, it highlights the degree of reform required and the approach to be adopted in order to criminalise third party foetal violence that causes the termination of prenatal life.

CHAPTER THREE Third party foetal violence beyond the context of murder

3.1 Introduction

This chapter directs itself to establishing whether third party foetal violence can be the object of existing criminal sanctions beyond the crime of murder. Kruuse states that in reaction to the *Mshumpa* decision the National Prosecuting Authority[199] seemed to scramble in an effort to find the best approach to address the position of a foetus in the law as was brought to light by Froneman J.[200] First the NPA, in terms of section 333 of the Criminal Procedure Act, tried to appeal the decision based on the correctness of a question of law regarding the position of a foetus in relation to the crime of murder.[201] Then NPA wanted to approach the South African Law Reform Commission for the creation of a separate statutory offence. These two approaches are in noticeable contradiction to one another, an appeal of the *Mshumpa* decision illustrates that the NPA accepted the foetus as a legal subject. However, later turning to the Law Reform Commission for the creation of a new offence shows that the NPA accepted the foetus was not a legal subject and the circumstances called for specifically enacted law to adequately address the issue.

Buthelezi and Reddi criticise the *Mshumpa* judgement submitting that the court should, at the very least, have considered whether attempted murder would have been a competent verdict for the charge of murder of the foetus in terms of attempting the

[199] Hereinafter "NPA".
[200] 2009 *THRHR* 126 128.
[201] As above. S333 of the Criminal Procedure Act provides that whenever a Minister has any doubt regarding the correctness of any decision given by any superior court in a criminal matter on a question of law, the Minister may submit the decision to the appellant division for the determination of that question of law for the future guidance of all courts.

impossible.[202] Further, it was argued by the authors that the state should have preferred alternative charges as a backup in the case where the murder charge failed.[203] The alternative charges suggested were the crimes of common law abortion and contravention of the Choice Act.

It will be shown that the suggestions of Buthelezi and Reddi are flawed in respect of the determination and correct application of the various legal principles applicable to the crimes of attempt, common law abortion and contravention of the Choice Act. Neither of the proposed alternatives can adequately address third party foetal violence to the point of branding it as criminal, as will be demonstrated in the following discussion.

3.2. Attempted murder: attempting the impossible

According to *R v Davies* a perpetrator can be convicted of attempting to commit the impossible, provided that whatever is attempted is factually impossible and not legally impossible.[204] A subjective test is employed for factual impossibility;[205] however the accused's conduct must objectively pose harm to the community.[206] The court held that this approach to the crime of attempt is necessary since steps were taken to the fullest in order to complete the intended criminal consequence.[207] The perpetrator cannot avoid responsibility by showing that because of an unknown fact present at the time of the attempt the intended consequence could not be carried into effect.[208]

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[202] 2008 *De Jure* 429 431.
[203] Ibid.
[204] 1956 (3) SA 52 (C) 61F. In terms of this case Miss de Waal sought an abortion from the first and second appellants. After receiving continual treatment from the appellants for roughly 10 days, Ms de Waal died of septicaemia caused by a septic foetus. The post-mortem examination revealed that the foetus had been dead for a week or more before the death of de Waal. Consequently, the actions of the two appellants were the cause of the foetus's death. In terms of the law applicable at that time, a foetus had to be alive at the time of the act of procuring an abortion and the appellant division was therefore faced with the question whether there can be an attempt to procure an abortion where a foetus is already dead, which was answered in the affirmative.
[205] In these circumstances the courts are concerned with the guilty mind of the accused and not the lack of any consequences of his actions.
[206] 77A. The objective test illustrates that the accused's conduct went beyond acts of preparation and into acts of consummation. See Snyman (2009) 286.
[207] *Davies* 77A.
[208] *Davies* 77C-D.

Legal impossibility relates to ignorance of the law regarding the requisite elements of a crime or the intention to commit a putative crime.[209] The reason for this lies in the principle of legality.[210] If the intended consequence does not exist as a crime, a conviction based on that conduct would result in the creation of a new crime which is prohibited, regardless of the accused's intention.

Placing these principles in the context of the *Mshumpa* decision, both Mshumpa and Best intended to commit the crime of murder when Mshumpa shot at Shelver's uterus but the definition of murder does not include the termination of prenatal life. Accordingly, the impossibility relates to the law and conviction of (impossible) attempted murder is simply not feasible. It is uncertain why Buthelezi and Reddi require the court to give attention to this issue at all, especially since later in the article they concede that attempting the legally impossible is not a crime.[211]

3.3 Common law abortion

The common law crime of abortion was committed by "any person who, with the object of defeating the ordinary course of gestation, wilfully applies to a pregnant woman any means by which the untimely expulsion of the foetus is effected".[212]

According to *S v Kruger*[213] section 2 of the Abortion and Sterilisation Act 2 of 1975 replaced the common law position.[214] This Act was then repealed by the Choice Act in 1996 in terms of section 11(2)(a). The prohibition of abortion found in section 2 of the Abortion and Sterilisation Act was not included the Choice Act and the Choice Act abolished the statutory offence of abortion.[215]

[209] Burchell & Milton (2005) 638; Snyman (2009) 288.
[210] Burchell & Milton (2005) 637.
[211] Buthelezi and Reddi 2008 *De Jure* 429 432-433.
[212] Lansdown C *et al* (eds) *South African criminal law and procedure* (1957) 1598.
[213] 1976 (3) SA 290 (O).
[214] S2 provides that an abortion may not be obtained unless in accordance with the provisions of the Act and s3 lists the circumstances under which an abortion may be procured.
[215] Kruuse 2009 *THRHR* 129.

Buthelezi and Reddi state that it is unclear whether the crime of abortion still exists because, apart from the decision of *Kruger*, there is no other jurisprudential evidence that indicates that the common law crime of abortion was abolished.[216] Further, Buthelezi and Reddi state that legal authors are unclear on the topic of whether the crime of common law abortion has been abolished and rely on the fact that Snyman does not discuss the topic at all and Burchell and Milton do not mention anything other than the history of the offence of abortion.[217] In case of uncertainty, Buthelezi and Reddi argue that unless there is an express or tacit intention found in the relevant statute, the statute does not alter the common law more than necessary and that the common law and legislation should co-exist as far as possible.[218] Accordingly, Buthelezi and Reddi conclude that because there is no express or tacit intention evident in the Choice Act and in light of the common law presumption, it can hardly be said that the Choice Act intended to abolish the crime of abortion altogether.[219]

The approach taken by Buthelezi and Reddi is unsound, as rightly pointed out by Kruuse.[220] Section 12(2)(a) of the Interpretation Act addresses itself to the theme of the effect of repealed laws.[221] Botha explains this provision as encompassing the circumstances where law is repealed by legislation and the repealing legislation is later repealed itself, the originally repealed law does not gain its force back as a result of section 12(2)(a).[222]

Worthy of notice, Kruuse mentions three further issues linked with common law abortion: Should this crime be proved to have been revived it would be necessary to show that it has not been abrogated by disuse; it may not stand constitutional scrutiny since it is based on the Roman law concept of violating a father's right to his children

[216] 2008 *De Jure* 429 433.
[217] 2008 *De Jure* 429 433.
[218] Ibid.
[219] 2008 *De Jure* 429 433.
[220] 2009 *THRHR* 126 129.
[221] 33 of 1957. S12(2)(a) provides that where a law repeals any other law, then unless the contrary appears the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect.
[222] (2005) *Statutory interpretation: An introduction for law students* 42.

and the various common law definitions are so divergent[223] to one another that it renders the application of the crime unworkable.[224]

It is evident that Mshumpa and Best could not have been charged for the common law crime of abortion since this crime is no longer part of South African law.

3.4 Contravention of the Choice Act

Buthelezi and Reddi submit that Mshumpa and Best could have been charged with contravening the Choice Act, specifically section 2(2) read with section 10.[225] Section 2(2) prescribes that only a medical practitioner may terminate a pregnancy unless it is within the first twelve weeks of gestation. Section 10(1) discusses the circumstances that will give rise the commission of an offence, particularly contravention of the authorised parameters found in section 2.

The authors contend that the unlawfulness of Mshumpa and Best's conduct stems from three areas: the fact the Shelver's consent was not obtained as required by section 5(1); the termination did not take place in the prescribed location and that the termination took place at 38 weeks of gestation without the presence of the ground of justification of necessity.[226] Further, Buthelezi and Reddi assert that securing a conviction for contravention of the Choice Act for the circumstances in *Mshumpa* would be less of a mammoth task than the state having to persuade the court to extend the common law definition of murder.[227]

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[223] Kruuse states that there are definitions that make no mention to the actual killing of a foetus as a requirement for the completion of the crime of abortion but only to the method of termination, see Voet 47 11 3 "the untimely forcing out or getting rid of an embryo" and Milton *South African criminal law and procedure* (1990) 332 "any means by which the untimely expulsion of the foetus is effected" (as cited by Kruuse 2009 *THRHR* 126 129). Whereas, according to Hunt *South African criminal law and procedure* (1970) 312 the author states that the common law crime of abortion does not only consist of merely killing a foetus but that actual expulsion from the uterus is required to constitute a complete crime of abortion (as cited by Kruuse 2009 *THRHR* 126 129).
[224] 2009 *THRHR* 126 129.
[225] 2008 *De Jure* 429 434.
[226] 2008 *De Jure* 429 435-436.
[227] 2008 *De Jure* 429 436.

This argument forwarded by Buthelezi and Reddi seems to be based on the assumption that the Choice Act is applicable to circumstances where consent for the termination of a woman's pregnancy is lacking. This creates a fundamental flaw in their assertions.

It is submitted that the Choice Act was not enacted to address those circumstances where consent is lacking or where a pregnancy is terminated as a result of unlawful violent conduct. Rather, the Choice Act is only applicable to those circumstances where a woman has voluntarily decided to terminate her pregnancy and then actively seeks to give effect to that decision.

The provisions of the Choice Act have to be read within the historical context of female autonomy and reproductive rights. In the past women were subject to marital power of their husbands and held the status of a minor.[228] Only in 1993, were women afforded equal guardianship rights over their children.[229] Under the Apartheid regime, women were subject to racist population control policies that sought to control black women's fertility through the use of contraceptives that violated their bodily integrity, dignity and equality.[230]

O´Sullivan states that the restrictive approach adopted by the Abortion and Sterilisation Act forced pregnant women to procure unsafe and induced abortions resulting in thousands of deaths.[231] The Choice Act, a direct consequence of our constitutional dispensation, promotes a woman's right to freedom and security over her own body and affords every woman the right to choose to safely and lawfully terminate her early pregnancy.[232] The Choice Act further recognises that a woman is better positioned to make the decision to terminate her pregnancy in accordance with her own beliefs.[233]

[228] O´Sullivan "Reproductive rights" in Woolman *et al* (2009) 37-17.
[229] O´Sullivan (2009) 37-17.
[230] O´Sullivan (2009) 37-17.
[231] (2009) 37-8.
[232] O´Sullivan (2009) 37-18. Reproductive rights of women will be discussed in more detail in ch 4.
[233] Ibid.

The Preamble to the Choice Act stipulates that, in acknowledgment of a person's constitutional right to make decisions concerning reproduction, the Act recognises that women have the right of access to appropriate health care services and that the decision to have children is fundamental to women's physical, psychological and social health. Further, the preamble recognises that universal access to reproductive health care services includes terminating a pregnancy. The Preamble recognises that the State has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised.

According to *Christian Lawyers Association v Minister of Health*, section 5 of the Choice Act requires women to be capable of providing their informed consent in order for the termination procedure to progress.[234] Informed consent consists of three elements: knowledge, appreciation and consent. Knowledge requires a woman to be aware of the nature and extent of the risk and appreciation requires a woman to understand the extent of the risk inherent in termination procedures.[235] Consent means that a woman must subjectively consent to the risk and her consent must be comprehensive to the extent that she consents to the entire transaction inclusive of all its consequences.[236]

Section 5 empowers pregnant women to exercise their freedom of choice and ensures that the exercise of this right is not unduly inhibited by third parties.[237] Hence the inclusion of section 10(1)(c) which provides that any person who prevents a lawful termination of a pregnancy or obstructs access to a facility is guilty of an offence and

[234] 2005 (1) SA 509 (T) 515B. The plaintiff sought an order declaring s5(2) and (1) of the Choice Act unconstitutional to the extent that it permitted a minor to consent to the termination of her pregnancy. The Transvaal Provincial Division held that a minor may consent to the termination of her pregnancy in terms of the Choice Act, provided she is has the capacity to develop a mature intellectual and emotional will to be able to give informed consent. Although this decision deals with the capacity of a minor to consent to the termination of her pregnancy, it proves its worth in describing the purpose of the consent provision found in the Choice Act.
[235] *Christian Lawyers Association* 515F-I.
[236] *Christian Lawyers Association* 516A.
[237] The court in *Christian Lawyers Association* found that s5 is a useful provision that prevents frustration of a constitutional right when a minor is able to provide informed consent for the termination procedure. See 517C.

liable on conviction to a fine or imprisonment.[238] This construction of section 5 is in line with the recognition of the various rights mentioned in the Preamble.

Clearly the Choice Act only becomes applicable once a pregnant woman has decided to exercise her right of choice and to terminate the pregnancy. It requires medical personnel who provide termination services to act within the parameters of the Choice Act in order to safely achieve the desired result giving effect to reproductive rights of women.

3.5 Conclusion

This chapter further justifies the need for law reform since it is evident that the uniqueness associated to third party foetal violence cannot be addressed by Buthelezi and Reddi's suggested application of current crimes. Common law abortion is no longer applicable in South African law, the Choice Act is irrelevant to the circumstances where a termination occurred without the woman's consent and attempting the legally impossible is not a crime.

Academics and legal professionals seem to be pushing the boundaries of general rules of interpretation and disregarding basic principles of law in an effort to find existing criminal sanctions and forcing third party foetal violence within the ambit of the definition of an existing crime. Although these efforts are criticised in this chapter, the process of questioning, criticising and justifying the criticism illuminates the inadequacy of the law to appropriately respond to perpetrators of third party foetal violence that terminates prenatal life.

Criminal law does not accommodate prenatal life and consequently a foetus cannot qualify as a victim of the commission of any crime let alone third party violence that terminates prenatal life. The facts of *Mshumpa* require a specialised approach, none of which can be found in existing crimes.

[238] Worthy of notice is the fact that section 10, dealing with offences and penalties for non-compliance, does not address itself to those circumstances where a pregnancy was terminated without the woman's consent.

CHAPTER FOUR Private law principles and foetal interests

4.1 Introduction

This chapter looks at the private law principles relating to the *nasciturus* fiction, wrongful life actions[239] and the Choice Act in an attempt to find a workable solution that would aid in justifying the criminalisation of third party foetal violence that terminates prenatal life in criminal law.

In the previous chapters relating to criminal law, the purpose was to examine whether a foetus and its unique environment could be accommodated into the application of criminal law principles. It was determined that there is absolutely no room for a foetus to be included as a victim in any established crimes, and this is accepted as the correct application of the law relating to those crimes. The next step in the process is to search for a solution that does not reengineer established legal principles but rather turn to those principles in an effort to discover any underlying grounds that may exist that can aid in justifying law reform. This is done to avoid restructuring and impacting negatively on those established principles. In light of this, it is necessary to mention that it is not

[239] Wrongful life claims under delict are actions brought by a child born with defects on the basis that the doctor was negligent in failing to adequately inform his or her parents of the risk that the foetus may be born disabled. The argument presented is that but for the inadequate advice, the child would not have been born to experience the pain and suffering linked to the disability. See *Friedman v Glicksman* 1996 (1) SA 1134 (W) 1138C.

the purpose of the chapter to consider when life begins and whether the Choice Act is constitutional or not. It is accepted that the Choice Act is constitutional and that in law life begins at birth and constitutional rights do not attach until that moment. Accordingly, it is important to find a way to criminalise third party foetal violence without changing any principles relevant to legal subjectivity or hindering the effective application of the Choice Act.

The only instance where the *nasciturus* fiction receives attention is where there is an attempt to invoke the fiction to prevent the lawful termination of a pregnancy because if successfully applied this would create a direct interest in keeping prenatal life intact. This however has not proved to be the case and the exercise has merely illuminated the fact that the *nasciturus* fiction can only be applied successfully if the foetus is later born alive, which is of limited use in the context of third party foetal violence since the violent conduct usually terminates prenatal life.

In terms of wrongful life claims, it is worthwhile to explore whether the judiciary is prepared to recognise this form of delictual claim and reasons given in cases of rejecting the claims. This discussion highlights the fact that the courts are not prepared to recognise foetal interests and have ultimately refused such claims partly due to the fact that it would require of the courts to accept that never being born was the better option for the child concerned. Although such claims have failed, the courts indirectly recognised the value of human life by refusing such claims.

Exploration into the application of the Choice Act serves many essential purposes to the research task. The starting point is to interpret its purpose and decipher who the Act ultimately serves in the end. On the surface, it is obvious that the Choice Act affords a woman with the means to exercise her constitutional rights but it can also be said to take into account foetal interests because the woman's right to terminate is gradually limited as the pregnancy progresses. The reasons presented for the limitations imposed on women are of fundamental importance since this can serve as a ground to justify the criminalisation of third party foetal violence because these limitations illustrate that the

state has a legitimate interest in prenatal life. The research will show that this state interest is constitutionally enriched through the constitutional value of human dignity, and being a constitutional value is it applicable to all law, including principles relevant to criminal law in terms of section 2 of the Constitution. Further, examining the extent that the Choice Act advances female rights and defining the scope of the limitations will aid in setting the range for which the law may be reformed so that the Choice Act and the statutory crime of third party foetal violence can coexist.[240]

4.2 The *nasciturus* fiction and its role of taking foetal interests into account

This discussion will consider the definition of the *nasciturus* fiction and its general application when taking a foetus's interests into account. There are two different approaches concerning the interpretation of this doctrine. The *nasciturus* doctrine can be viewed as a fiction which means that benefits are kept open and made dependant on the live birth of the foetus involved, this approach recognises that the foetus is a potential legal subject and accordingly keeps the benefit in abeyance and therefore assumes that legal subjectivity always starts at birth.[241] On the other hand, the *nasciturus* doctrine can be viewed as rule in which case it is accepted that legal subjectivity begins at birth but if it is to the advantage of the foetus legal subjectivity will begin at conception, ultimately allowing the foetus to be the bearer of rights prior to its birth.[242] It is accepted that the *nasciturus* doctrine is a fiction and will be referred to as the *nasciturus* fiction.

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[240] The issue of coexistence was raised in *S v Mshumpa* (see ch 2 for details) and is a vexatious issue in the United Stated and this will be addressed in detail in ch 5.

[241] Boezaart *Child law in South Africa* (2009) 6.

[242] Boezaart (2009) 6. In *Pinchin v Santam Insurance* 1963 (2) SA 254 (W) the court allowed the application of the *nasciturus* fiction in a delictual claim where the foetus suffered prenatal damages and was later born alive with physical defects, the plaintiffs however could not prove causation and their claim was dismissed. In this case the court applied the fiction as a rule since legal subjectivity predated live birth. In *van Heerden v Joubert* 1994 (4) SA 793 (A) the court had to decide whether a foetus was a "person" for purposes of the Inquest Act 58 of 1959. Looking at the ordinary grammatical meaning of the word "person", the court found that it did not include an unborn foetus, viable or not. The court also looked at the application of the nasciturus fiction but never actually decided on whether it is a rule or fiction. In *Road Accident Fund v Mati* 2005 (6) SA 215 (SCA) the right of a child to sue for prenatal injuries was recognised without having to apply the *nasciturus* fiction. The Supreme Court of Appeal rejected the contention that the recognition of an action for prenatal injuries is logically impossible without the conferment of legal rights through the application of the *nasciturus* fiction. It was found that the damage is suffered by the plaintiff at the moment that, in law, the plaintiff achieves legal personality and inherits the damaged body for which the defendants are responsible. The events prior to the foetus's birth were

At common law, legal subjectivity starts at birth which requires that that the foetus must be separate from the mother's body and the foetus must have lived independently of the mother after separation.[243] However, in terms of the *nasciturus* fiction, if it is to the advantage of the foetus, it will already be deemed to have been born alive and its interests will be kept open.[244] Three elements need be present for the fiction[245] to apply: The foetus must gain a benefit from the application of the fiction, the benefit must accrue to the foetus after its conception and the foetus must later be born alive in terms of the common law requirements relating to birth.[246]

In *Ex parte Boedel Steenkamp* the *nasciturus* fiction was successfully applied in a case regarding the law of succession.[247] The court found that even though the testator had bequeathed his estate to his daughter and her children that were alive at the time of his death, it decided that the pregnant daughter's foetus had to be presumed to be alive for purposes of inheritance and it was entitled to inherit equally with its mother and siblings.

On the other hand, in *Christian League of Southern Africa v Rall*[248] the *nasciturus* fiction was unsuccessfully applied.[249] This case was heard in terms of the Abortion and Sterilisation Act where the respondent's daughter sought to terminate her pregnancy

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merely links in the causal chain of events between the defendant's lack of skill and the plaintiff's consequential damage. The right of action only becomes complete once the child is born alive. On the ordinary principles of the law of delict, unlawfulness and damages must be treated as separte elements for delictual liability. This decision treats the *nasciturus* fiction as a fiction and not a rule since it accepts that legal subjectivity always begins at birth, which is contrary to the *Pinchin* decision. See Meyer "A delictual remedy for the unborn child" 1962 *SALJ* 447 where the author criticises the application of the *nasciturus* fiction to cases of delict and states that it only has application in cases of status and succession.

[243] Boezaart (2009) 4-5.

[244] Boberg *Law of persons and the family* (1999) 31.

[245] The full Latin term states *nasciturus pro iam nato habetur quotiens de commodo eius agitur*, which translated means that the unborn can be regarded as having been born when it is to its advantage. See Boezaart (2009) 6.

[246] Robinson & Horsten *Introduction to the South African law of persons* (2008) 21; Boezaart (2009) 6.

[247] 1962 (3) 954 (O).

[248] 1981 (2) 821 (OPA).

[249] The *nasciturus* fiction has been applied in a number of other cases but it is not necessary to delve into all possible scenarios where the fiction can be applied. Only case law where the parties have attempted to invoke the fiction to prevent the termination of a pregnancy will be considered. This would be useful to the to the overall investigation because if the fiction is successfully applied to prevent the termination of a pregnancy, the fiction may be used as a ground to prevent a foetus from third party foetal violence.

that was a result of a rape and the applicants tried to prevent the termination through the application of the *nasciturus* fiction. The applicants also applied for the appointment of a *curator ad litem* to represent the interests of the foetus. The court held that the *nasciturus* fiction does not clothe a foetus with legal personality; it only ensures that the benefits accruing to the foetus are held in suspension until its birth.[250] Where the foetus is not born alive there can be no suggestion of any rights being afforded to it on the grounds of the foetus being a legal subject.[251] The court held further that where the foetus dies, the rights attached to it in terms of the application of the *nasciturus* fiction, die along with it and there is no scope for the extension of the fiction to protect a foetus against abortion.[252] Regarding the appointment of a *curator ad litem*, the court found that there were no legal grounds for the appointment of a curator to represent a foetus in connection with the termination of the mother's pregnancy.[253]

It is evident that the principles applicable to the *nasciturus* fiction cannot assist in determining a ground that justifies law reform in the context of criminal law dealing with third party foetal violence. In the case of third party foetal violence that terminates prenatal life, the condition that the foetus must be born alive will never materialise.

4.3 Wrongful life actions

Two cases deal with the delictual claims for wrongful birth[254] and wrongful life, where damages are claimed as a result of parents having to rear disabled children and children having to live with disabilities, as a result of their physicians inadequately informing parents of any possibilities of the foetus suffering from any defects. The discussion here will focus on the child's delictual claim for wrongful life based on the doctor-patient contract where the duty to inform was entered into before the child was born.

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[250] *Christian League of Southern Africa* 822H.
[251] *Christian League of Southern Africa* 823E.
[252] *Christian League of Southern Africa* 823E.
[253] *Christian League of Southern Africa* 821H.
[254] Wrongful birth claims are brought by parents who claim that they would have avoided conception or terminated the pregnancy had they been properly advised of the risk of birth defects to the potential child. See *Friedman* 1138B.

Where applicable, other issues relevant to foetal interests will also receive attention but only to provide a holistic overview of the extent that foetal interests will be taken into account by the courts.

4.3.1 Freidman v Glicksman

In *Freidman*, the plaintiff consulted with the defendant gynaecologist and entered into an agreement in terms of which the defendant undertook to provide advice in order for the plaintiff to make an informed decision on whether to terminate the pregnancy due to the possibility of giving birth to a deformed child.[255] Based on this, the plaintiff claimed that had the defendant advised her of the defects present in the foetus she would have made the informed decision to terminate the pregnancy and save the child any suffering associated with the deformities.[256] The plaintiff lodged a claim in her personal capacity for wrongful birth and another claim in her capacity as mother of the child, Alexandra, for wrongful life. The court allowed the plaintiff's claim against the defendant for damages suffered in her personal capacity but disallowed the claim for wrongful life.

Relevant to the general topic of foetal interests, it is the defendant's argument regarding the plaintiff's submission that she has a right to terminate her pregnancy upon being made aware of the possibility that the foetus may suffer from deformities. It was argued that it would be contrary to public policy to enforce the contract because it would encourage termination of pregnancies and infringe the sanctity of life and the constitutional right to life.[257] However, the court found no substance in this submission since the termination of a pregnancy under the circumstances of physical and mental defect is sanctioned by legislation.[258] It is in the interests of society to, at times, not allow a foetus to develop into a person with serious defects, causing financial and emotional problems to those who are responsible for that person's maintenance and well being.[259] The court stated that it must be stressed that the election to proceed with

[255] *Friedman* 1136H.
[256] *Friedman* 1137C.
[257] *Friedman* 1138D-G.
[258] At this time it was the Abortion and Sterilization Act.
[259] *Friedman* 1138G.

or terminate the pregnancy under these circumstances rests solely with the mother, who bears the moral and emotional burden of making such election.[260]

Regarding the claim for wrongful life the court found that the plaintiff could not enter into a contract on behalf of Alexandra prior to her birth or even make an election on Alexandra's behalf, since an agent cannot act on behalf of a nonexistent principal.[261] Further, it was held that Alexandra's legal personality only commenced at birth and the allegation that the plaintiff acted on Alexandra's behalf is legally unsound since she was, at that time, unborn.[262] The court also disregarded the argument that the contract entered into between the plaintiff and defendant was a contract to the benefit of a third party since the party that is intended to benefit from the contract will not be in a position to accept the benefit because the contracted benefit would be the termination of the pregnancy.[263]

The court found that the child's claim held two weaknesses: The first weakness relates to the fact that the child has no fundamental right to be born as a whole, functional human being and the question whether it is better to have never been born at all or rather to have been born with mental defects is a question better left to philosophers and theologians.[264] Secondly, this claim is not merely a matter of taking into account the various degree of imperfections of life, it is the improbability of placing the child into the position it would have been had the negligent conduct not occurred, which would result in making the child nonexistent.[265]

Agreeing with English case law, the court found that the defendant medical practitioner was not under any duty towards the child to give the child's mother an opportunity to terminate the child's life and that even though that duty is owed to the mother, it cannot

[260] Ibid.
[261] *Friedman* 1140F.
[262] *Friedman* 1140G.
[263] *Friedman* 1140G-H.
[264] *Friedman* 1141F.
[265] *Friedman* 1141G.

be owed to the child.[266] Allowing a duty towards a child would be contrary to public policy since it would mean that regarding the life of a handicapped child is less than the life of a normal child, to the extent that it is a life is not worth preserving.[267]

In concluding, the court in *Friedman* found that it is impossible to calculate damages being the difference between an impaired life and no life at all and warned that allowing a wrongful life claim would open the door to a disabled child being entitled to sue its parents because they allowed the child to be born knowing there were certain risks inherent in their decision. [268]

4.3.2 Stewart v Botha[269]

In *Stewart* it was claimed that the respondent medical practitioners were under a duty to detect abnormalities in the foetus and to inform the appellant's wife of the possibility that she might give birth to boy with serious physical defects, of which they had failed to do. As a result of the respondents' failure to inform, the appellant, on behalf of his son and in the alternative to his wife's claim for the same damages, instituted a claim for special damages relating to maintenance, special schooling and past and future medical expenses.[270] The first respondent excepted to the appellant's claim on the grounds that the son's claim for special damages was invalid since there is no duty on the respondent to ensure that the child was not born and that a claim that recognises such a duty is *contra boni mores*.

The court conceded that this topic has been widely debated with arguments in favour and arguments against these sorts of claims. If the child's claim was to succeed, the court is required to evaluate the existence of the child against his nonexistence and find that his nonexistence is preferable.[271] The court found that it is the nature of delictual damages to compensate the appellant by placing him or her in the position he or she

[266] *Friedman* 1142D.
[267] *Friedman* 1142E.
[268] *Friedman* 1142F; 1143A.
[269] 2008 (6) SA 310 (SCA).
[270] *Stewart* 313A.
[271] Ibid.

would have been in had the negligent conduct not occurred.[272] Applying this principle to the facts would result in the child never being born.[273] This would consequently lead to the questionable assessment of whether the child would have been better off to not have ever been born.[274]

The court found that making a choice in favour of non existence not only involves a disregard for the sanctity of life and the dignity of the child found in sections 10 and 11 of the Constitution, but also involves subjective preference for some policy considerations and the denial of others.[275] The question of whether it is better that a child was never born at all goes to the heart of what it means to be human and it should never be asked of the law and for that reason the court refused the claim.

The judgments of *Friedman* and *Stewart* highlight the fact that a foetus has no protectable interest prior to birth. However, these decisions indirectly ascribe value to prenatal life in the sense that a foetus holds something worth respecting, the potential to be a human, hence the court's refusal to acknowledge the appellant's son's claim because it would require the court to pass judgment that the child would be better off never being born.

In light of the sanctity of human life and dignity, courts are not prepared to recognise that a child born with defects has a claim against a negligent doctor because it would result in the court finding that defective prenatal life is worth no life at all.

4.4 The role of the Choice on Termination of Pregnancy Act in denying and advancing foetal interests

Viewed from the perspective of women, the Choice Act plays a role in advancing and limiting constitutional rights. The Act advances female autonomy by providing a means for women to exercise their reproductive rights and at the same time it limits these rights

[272] *Stewart* 317A.
[273] Ibid.
[274] *Stewart* 315G.
[275] *Stewart* 319D.

as the pregnancy progresses and foetal viability sets in. This granting and limiting of rights implies that the Choice Act is performing a balancing act. The decision taken to limit female reproductive rights is also a decision taken to recognise foetal interests based on constitutional values.

This section of the chapter is concerned with exploring how the courts and legislature deal with competing interests of women in light of female autonomy on the one hand and foetal interests on the other. Female reproductive rights will receive attention to demonstrate that the Choice Act is directly advancing female constitutional rights and how important a role these rights play in society which serves as the foremost reason why foetal interests are limited. Further, it will be investigated when the limitation of rights takes effect and how these limitations actually facilitate taking foetal interests into account.

The values invoked to justify limiting the right to terminate a pregnancy can serve to illustrate that the state has a sufficient interest to protect prenatal life against third party violence, and accordingly criminalise conduct that terminates a pregnancy as a result of third party foetal violence.

4.4.1 Case law

The two decisions of *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T)[276], and *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T)[277] both deal with constitutional issues directly linked to the successful application of the Choice Act. It will be evident that female autonomy and the legitimate exercise of reproductive rights directly coincide with the ability of the courts to take into account foetal interests. However, the case law demonstrates that reproductive freedom is not boundless.

4.4.1.1 *Christian Lawyers 1*

[276] Hereinafter this case will be referred to as *Christian Lawyers 1*.
[277] Hereinafter this case will be referred to as *Christian Lawyers 2.*

In this case the plaintiff sought an order declaring the Choice Act unconstitutional in light of section 11 of the Constitution which provides that everyone has the right to life. The plaintiffs contended that the right to life applied to a foetus from the moment of conception. An exception was raised by the defendants on the grounds that the plaintiff's summons did not disclose a cause of action since a foetus is not a bearer of constitutional rights in terms of section 11 and that section 11 does not preclude the termination of a pregnancy in the circumstances contemplated by the Choice Act. Section 11 of the Constitution specifically states that "everyone has the right to life".

The Transvaal Provincial Division had to determine whether the word "everyone" includes a foetus because the validity of the plaintiffs action was dependant on the assertion that "everyone" applies to a foetus from the moment of conception.[278] Here, the court stated that it is not concerned with medical or scientific evidence regarding when life begins and foetal development, nor is it the function of the court to decide the issue on religious or philosophical grounds. This issue is a legal one that must be decided on proper legal interpretation given to section 11.[279]

The court considered the common law status of a foetus as being relevant to the task of properly interpreting section 11. The direction of the task was not to focus on whether a foetus is human but rather whether a foetus is afforded the same legal protection as those persons born alive. Reference was made to various judgments where the interests of a foetus were at the forefront. *Christian League of South Africa*[280] and

[278] *Christian Lawyers 1* 1118B-C. The court found "everyone" used in the final constitution and "every person" used in the interim constitution, to be synonymous. It was found that these terms are used interchangeably and the Bill of Rights generally protects everyone, but frequently refers to holders of those rights as "people" or "persons". The court uses s7 which refers to "people" and s8 which refers to "everyone" as examples of how the terms are used interchangeably. See 1117G-I.
[279] The court referred to *Tremblay v Daigle* (1989) 62 DLR (4th) 634 (SC), a Canadian supreme court decision that dealt with the topic of the right to life in the context of a foetus and it was held that the argument regarding the right to life must be viewed in the context of the legislation in question. The question is a legal one requiring the determination of whether the Quebec legislature accorded the foetus personhood. The task of properly classifying a foetus in law and science are different pursuits, in law it is a normative task and results in the recognition of rights and duties which falls outside the concerns of scientific classification.
[280] See 4.2 for details.

Friedman[281] both denied a foetus legal personality. The court applied the dictum of *Van Heerden v Joubert*[282] where it was decided that an unborn child, viable unborn child or living foetus did not fall within the meaning of "person" as found in the various dictionary meanings of the word "person".[283] However, in *van Heerden* the court pointed out that there are a number of jurists who argue that the *nasciturus* fiction predates the legal subjectivity of a foetus.[284] After considering the case law on the common law status of a foetus, the court in *Christian Lawyers 1* concluded that, if anything, the status of a foetus under the common law is uncertain, especially in light of the fact that *van Heerden* never conclusively answered whether a foetus is a legal person under the common law.[285] The court found it unnecessary to make any firm decision on whether a foetus is a legal person or not.[286] However, it is important for purposes of interpreting section 11 of the Constitution, that the status of a foetus under the common law is uncertain.[287]

Looking at the Constitution, the court held that there are no express provisions affording a foetus legal personality or protection.[288] Further, it was stated that it can hardly be said that the drafters of the Constitution intended to cure the uncertain common law position of a foetus by not expressly affording it any rights in the Bill of Rights, especially in light of case law denying the foetus legal personality.[289]

The court also turned to section 12(2) of the Constitution which provides that everyone has the right to make decisions concerning reproduction, and found that nowhere in the

[281] See 4.3.1 for details.
[282] See 4.2 for details.
[283] *Christian Lawyers 1* 1121A.
[284] Ibid.
[285] *Christian Lawyers 1* 1121F. The court in *Christian Lawyers 1* (1121D) states that van Heerden pushed aside deciding on the status of a foetus under the common law and found that for purposes of the Inquest Act 58 of 1959, a foetus was not a person.
[286] *Christian Lawyers 1* 1121F.
[287] Ibid.
[288] *Christian Lawyers 1* 1121G.
[289] *Christian Lawyers 1* 1121H. . See 1121I where the court also stated that constitutional rights afforded are not even on a conditional basis as with the *nasciturus* fiction where protection can be afforded on condition that the foetus is later born alive.

Constitution can it be said that this right is qualified in order to protect a foetus.[290] However, this does not restrict the state from enacting legislation that limits and regulates the termination of pregnancies.[291]

Had the drafters of the Constitution intended to protect a foetus, the court expected that it would have been done so in terms of section 28 relating to the rights of children.[292] The court refers to various subsections of section 28 that clearly indicate that section 28 cannot be extended to protect a foetus, subsection (1)(f) relates to work conditions; subsection (1)(g) regulates detention of children and subsection (1)(i) deals with protection of children during armed conflict. Further, in terms of section 28(3) a child is defined as a person under 18.[293] The court found that age begins at birth therefore excluding a foetus from the provisions of section 28 since a foetus is not a child of any age.[294] Concluding on the position of a foetus in terms of section 28 the court found that if section 28 does not include a foetus within the ambit of its protection then it can hardly be said that other provisions of the Bill of Rights, including section 11, were intended to protect a foetus.[295]

To further validate the conclusion reached, the court turned to other provisions in the Constitution where "everyone" is referred to and not where a specific class of person is singled out.[296] It was demonstrated that in those cases where the term "everyone" was

[290] *Christian Lawyers 1* 1211I.
[291] *Christian Lawyers 1* 1122A.
[292] *Christian Lawyers 1* 1122B.
[293] *Christian Lawyers 1* 1122C.
[294] *Christian Lawyers 1* 1122D. It is not clear what the court relies to come to the conclusion that age begins at birth. However, to justify this statement the court states that there are certain rights that could not have been intended to protect a foetus. These rights include the rights that relate to working conditions, detention or armed conflict. The court concludes that the other rights found under ss1 must also exclude a foetus.
[295] *Christian Lawyers 1* 1122E.
[296] The sections relied on were sections 12(1)(a) everyone has the right not to be deprived of freedom and (b) everyone has the right not to be detained without a trial; s12(2)(a) everyone has the right to make decisions concerning reproduction and (b) everyone has the right to security in and control over their body; s13 everyone has the right not to be subject to slavery, servitude and forced labour; s14 everyone has the right to privacy; s15(1) everyone has the right to freedom of conscience, religion, thought, belief and opinion; s16(1) everyone has the right to freedom of expression; s17 everyone has the right to peace assembly, demonstrate, picket and present petitions; s18 everyone has the right to freedom of association; s21 everyone has the right to freedom of movement and to leave the Republic; s30 everyone

used it cannot be applied to or include a foetus in its ambit.[297] If the court were to include a foetus when interpreting "everyone" in section 11 it would ascribe to it a meaning different from that which it bears everywhere else in the Bill of Rights.[298]

The court took a step further and stated that if section 11 were to be interpreted as affording constitutional protection to a foetus far reaching and inconsistent consequences would ensue.[299] To start with, the foetus would enjoy the same protection as the mother and would result in termination of pregnancies being constitutionally prohibited even when the pregnancy poses serious threats to the mother's life or where there is a likelihood that the foetus will suffer from a serious mental or physical defect after birth, or when the pregnancy is the result of rape or incest.[300] The court held that the drafters of the Constitution could not have contemplated such far reaching results without expressing themselves in no uncertain terms.[301] The court found itself in agreement with the defendants' argument that the Constitution is primarily an egalitarian Constitution and transformation of society along egalitarian lines involves the eradication of systemic forms of domination and disadvantage based on race, gender, class and other grounds of inequality.[302] It is required of the court to have regard to woman's constitutional rights and affording legal personality to a foetus will undoubtedly impinge on these rights.[303]

The exception was upheld.[304]

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has the right to use the language and participate in the cultural life of their choice and s35 provides for numerous rights of every arrested, detained or accused person.

[297] *Christian Lawyers 1* 1122G-H.

[298] *Christian Lawyers 1* 1122H.

[299] *Christian Lawyers 1* 1122I.

[300] *Christian Lawyers 1* 1123A.

[301] *Christian Lawyers 1* 1123B.

[302] Ibid.

[303] *Christian Lawyers 1* 1123E. The rights referred to by the court include s9; s12; s10; s11; s14; s15 and s27 of the Constitution.

[304] This decision has been criticised. See O´Sullivan (2005) 37-8 where the author argued that the constitutional enquiry does not end with determining whether a foetus has a right to life and the court should have had regard to the detached interest "in fostering the sanctity of human life by protecting potential life and by regulating abortion in the late stages of pregnancy". Further, the author argues that the state's detached dignity interest in prenatal life is relevant to the question of validity of the Choice Act. Naude "The value of life: A note on *Christian Lawyers Association of SA v Minister of Health*" 1999 *SAJHR* 54 also criticises this decision from numerous angles but only a few prominent arguments will be

4.4.1.2 *Christian Lawyers 2*

Once again the Choice Act came under constitutional scrutiny, here the plaintiffs sought an order declaring section 5(1), (2) and (3) read with the definition of woman, to be declared unconstitutional and struck down.[305] The Choice Act defines a woman as any female of any age and in terms of section 5(1) of the Act the termination of a pregnancy may only take place with the informed consent of the pregnant woman. In terms of sections 5(2) and (3), no consent other than that of a pregnant woman is required for the termination of her pregnancy and in the cases of a minor it is required of the medical practitioner or midwife to advise the minor to consult with her parents, guardian or family member. Should she decide against consulting with either, the termination of her pregnancy will not be denied on those grounds. The essence of the plaintiff's case was that females under the age of 18 years are not capable, without parental consent or control, to make an informed decision on whether or not to terminate her pregnancy which serves their best interest.[306] The defendants raised an exception on the grounds that the plaintiff's particulars of claim did not disclose a cause of action.[307]

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considered. The author argues that Constitution should be used as the yardstick against which the common law and legislation should be tested and that the Constitution cannot be used as a yardstick if the courts point of departure is to establish the meaning of the constitutional provision with reference to the common law and ordinary legislation. Had the court adopted the correct approach to interpreting constitutional provisions, it would have had to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Naude argues that if the court had recognised that the Constitution creates a duty to recognise the value of human dignity it may have resulted in permissive termination legislation being declared unconstitutional, even if the foetus is not the bearer of constitutional rights. Accordingly it was submitted by Naude that the court did not approach the issue of whether a foetus has constitutional rights correctly and that the conclusion reached by the court that the foetus is not a bearer of the right to life does not conclude the enquiry into the constitutionality of the Act. The topic of constitutional values in relation to a foetus is discussed further at 4.4.3 below.

[305] *Christian Lawyers 2* 512B.

[306] *Christian Lawyers 2* 514A-B. The plaintiff relied on the following sections of the Constitution: 28(1)(b) which provides that every child has the right to family or parental care; 28(1)(d) which provides that that everyone has the right to be protected from maltreatment, neglect, abuse or degradation; 28(2) provides that a child's best interests are of parmount importance in every matter concerning that child; 9(1) that provides that everyone is equal before the law and has the right to equal protection and benefit of the law and 7(1) which provides that the Bill of Rights is the cornerstone of our democracy, it enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom.

[307] *Christian Lawyers 2* 513C.

The Transvaal Provincial Division held that instead of using age as a measure of control, the legislature rather opted to use capacity to give informed consent[308] as the yardstick.[309] Where capacity to give informed consent does not exist, despite the age of the woman, the termination of her pregnancy cannot be effected.[310] It was held that in the context of the Choice Act, capacity to give informed consent is determined on a case by case basis by the medical practitioner, based on the emotional and intellectual maturity of the individual concerned rather than being based on an arbitrarily predetermined and inflexible age.[311] The approach adopted by the Choice Act prevents frustration of the minor's constitutional rights where she is emotionally and intellectually capable of giving informed consent for the termination of her pregnancy.[312]

It was held that the rationale behind the requirement for informed consent in medical procedures brings the court very close to the founding principles from which the right to terminate a pregnancy in itself arises: an individual's fundamental right to self determination.[313] The court found that the fundamental right to individual self determination "lies at the very heart and base of the constitutional right" to terminate a pregnancy.[314] The court found that sections 10; 12(2)(a) and (b); 14 and 27(1)(a) provide the foundation for the right to terminate a pregnancy.[315] Further, the court stated that the "commonality of the source of the right to termination of pregnancy with the ratio for informed consent, make informed consent not only a viable and desirable principle for the regulation of the right, but also the most appropriate."[316]

[308] See ch 3 3.4 for the definition of informed consent.
[309] *Christian Lawyers 2* 516E.
[310] Ibid.
[311] *Christian Lawyers 2* 516H. The court further stated that the requirement that the medical practitioner or midwife, who is to perform the termination procedure, must advise the minor to consult with her parents or guardian is a regulatory measure of the Act but certainly not a cornerstone of regulation under the Act. This regulation is subject to the provisio that if the minor decides against consulting with her parents, the termination procedure cannot be denied. See 517C.
[312] *Christian Lawyers 2* 517C.
[313] *Christian Lawyers 2* 517G-H.
[314] *Christian Lawyers 2* 518A.
[315] *Christian Lawyers 2* 518D.
[316] *Christian Lawyers 2* 518E.

The court found that the right to terminate a pregnancy, like all constitutional rights is not absolute and that the state has a legitimate role in the protection of prenatal life as an important value in our society, to limit a woman's right to termination.[317] Since the right to terminate a pregnancy is a fundamental constitutional right, state regulation cannot amount to a denial of the freedom to exercise the right, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required in terms of section 36 of the Constitution.[318]

To summarise the court's conclusion, it was found that the Choice Act allows a woman with the capacity to give informed consent, to consent to the termination of her pregnancy. Since the right to terminate a pregnancy stems from fundamental constitutional rights it would be unjustified and irrational to limit the exercise of that right based on the woman's age. The constitutional rights afforded in terms of section 12(2)(a) and (b), 10, 14 and 27(1)(a), are afforded to "everyone", including girls under the age of 18 and accordingly these girls are entitled to protection of their right to self determination.

The exception was upheld.

These two decisions clearly indicate the subordinate role that foetal interests play in relation to a pregnant woman's constitutional rights. First and foremost, a foetus is denied the right to life and as a result, denied all other rights contained in the Constitution.[319] Further, female autonomy and reproductive rights are so deeply entrenched that even females under the age of 18 can consent to the termination of their pregnancy, free from the constraints of parental control.[320] This gives the illusion that foetal interests, when competing against female autonomy and reproductive rights, are not eligible for constitutional task of balancing conflicting constitutional interests.

[317] *Christian Lawyers 2* 527D.
[318] *Christian Lawyers 2* 527E.
[319] *Christian Lawyers 1*. See Carstens & Pearmain (2007) 27 n 19, where the authors quote the decision of *S v Makwanyane* 1994 (3) SA 868 (A), and state that the right to life is antecedent to all other rights since without life it would be impossible to exercise or be the bearer of rights.
[320] *Christian Lawyers 2*.

The word illusion is used because, although a foetus does not have constitutional rights, *Christian Lawyers 2* states that the state has an interest in the protection of prenatal life since it is an important value in our society.[321] Based on this value, female reproductive rights, as with most constitutional rights, can be limited in terms of section 36 of the Constitution. There is no denying that the rights contained in the Bill of Rights are not applicable to a foetus however, constitutional values do come to the aid of foetal interests, and this notion is discussed directly below.

4.4.2 Giving shape to constitutional rights

The Choice Act gives effect to numerous constitutional rights conveniently grouped together as female reproductive rights. According to O´Sullivan the Constitution does not expressly deal with the right to terminate a pregnancy.[322] However the author states that the rights to life, privacy, religion, freedom and security of the person, dignity, equality, access to information, expression and children's rights affect the right to terminate a pregnancy in South Africa.[323] Each of these rights will be considered briefly but where relevant an in depth discussion will be presented.

It is important to recognise that these rights must not be negatively affected in any way by the call for law reform. The statutory crime of third party foetal violence should not further limit female reproductive rights and in order to avoid this it is necessary to look at the extent that each right has contributed to advancing female autonomy.

4.4.2.1 The right to equality

The right to equality is contained in section 9 of the Constitution and in terms of section 9(1) everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(2) provides that the right to equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures may be taken in order to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Section 9(3) and (4)

[321] 527D.
[322] (2005) 37-2.
[323] O´Sullivan (2005) 37-2.

provides that the state or person may not unfairly discriminate directly or indirectly on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation age, disability, religion, conscience, belief, culture, language and birth. National legislation must be enacted to prevent unfair discrimination.

According to Birenbaum,[324] the Bill of rights is committed to a substantive understanding of equality and the goal of the equality provision is to ensure substantive equality in light of sections 1(a) and (b), 7(2), 9, 36 and 39(1)(a) of the Constitution.[325] The author distinguishes substantive equality from formal equality. In the latter equality is established by treating individuals with similar characteristics equally. However, formal equality may lead to inequalities nonetheless[326] and substantive equality "addresses the forces of systemic discrimination which, in the case of gender discrimination, often result in 'neutral' or 'equally applied' rules having an adverse impact on women" since

[324] "Contextualising choice: Abortion, equality and the right to make decisions" 1996 *SAJHR* 485 488. This article was published before the passing of the Choice Act. S1(a) and (b) of the Constitution state that South Africa, as a democratic state is founded on the values of human dignity, achievement of equality, non racialism and non sexism. S7(2) provides that the state must protect and promote the rights in the Bill of Rights. S36 provides that rights may only be limited if it is reasonable and justifiable in an open and democratic state based on human dignity, equality and freedom, taking into account the provisions mentioned in ss(a)-(e). S39(1)(a) provides that a court, when interpreting the Bill of Rights, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

[325] 1996 *SAJHR* 485 488. This article was published before passing of the Choice Act. S1(a) and (b) of the Constitution state that South Africa, as a democratic state is founded on the values of human dignity, achievement of equality and non racialism and non sexism. S7(2) provides that the state must protect and promote the rights in the Bill of rights. S36 provides that rights may only be limited if it is reasonable and justifiable in an open and democratic state based on human dignity, equality and freedom, taking into account the provisions mentioned in ss(a)-(e). S39(1)(a) provides that a court, when interpreting the Bill of Rights, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

[326] Birenbaum uses the example of male and female employees at a mining company who are all subject to the employment rules of the company equally as "mine workers". One of the rules states that only those employees that have never been absent from work for two months or longer will qualify for a promotion. This rule would adversely affect female employees since this rule does not take into account the biological fact of pregnancy and the result of the rule would be unequal allocation of promotions. See 488 n5. Also see Albertyn and Goldblatt "Equality" in Woolman *et al* (2007) 35-6 where the authors discuss the difference between formal and substantive equality. Albertyn and Goldblatt state that formal equality entails a formal approach to law and can best be described as "an abstract prescription of equal treatment for all person, regardless of their actual circumstances", the social and economic differences between individuals and groups of people are not seen to be essential to the legal enquiry. Substantive equality recognises that it is not the fact of difference that is the problem but rather the harm that stems from the differentiation. Albertyn and Goldblatt state that the focus of the legal enquiry is on the impact of the act and on the nature of the harm that the act creates, rather than on the difference, at 35-7.

the biological fact of pregnancy and the consequences attached thereto are not taken into account.[327] Birenbaum asserts that the focus of the equality provision is not only on equal treatment of those similarly positioned but it is also focused on rectifying the disadvantages stemming from discrimination.[328]

O´Sullivan states that from a substantive perspective, the right to equality requires the state to intervene positively and provide the minimum resources necessary for the enjoyment of certain rights.[329] The author argues that reproductive autonomy is a precondition for sexual and social equality of woman, and that women should be entitled to call upon state resources so that they can exercise their choices safely and securely.[330] Equality provides women with the freedom to choose whether to have intercourse or to choose how many children to have and when, and that permissive termination legislation is an issue of social justice and sexual equality.[331]

The demand for substantive equality in the sphere of reproductive rights makes the connection between systemic discrimination against women and women's reproductive role.[332] The fact that section 9(3) embraces pregnancy, in addition to sex and gender, as a prohibited ground of discrimination acknowledges that women are members of a systematically disadvantaged group whose historical and current condition require enhanced judicial consideration.

The Choice Act recognises that in order to achieve equality, women must be able to decide whether to terminate a pregnancy since they are best placed to make this decision.[333] In terms of the Preamble of the Choice Act specific reference is made to the recognition of the values of human dignity, achievement of equality, non racialism and non sexism. Section 2(a) of the Choice Act allows for the termination of a pregnancy on

[327] Birenbaum 1996 *SAJHR* 485 488.
[328] 1996 *SAJHR* 485 489.
[329] (2005) 37-12.
[330] (2005) 37-12 – 37-13.
[331] (2005) 37-13.
[332] O´Sullivan (2005) 37-14.
[333] O´Sullivan (2005) 37-14 – 37-15.

request during the first 12 weeks of gestation without having to consult with medical practitioners or midwives.[334]

4.4.2.2 The right to dignity

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. O´Sullivan asserts that "(d)enying a woman the freedom to make and to act upon a decision concerning reproduction treats her as a means to an end and strips her of her dignity".[335]

The right to dignity has, according to Woolman, revolutionised the body of law that deals with state regulation of termination of pregnancies.[336] Woolman states that the court in *Christian Lawyers 1* and *2* expressly recognise that the right to dignity encapsulates two definitions specifically relevant to women in relation to reproductive rights: "equal concern and equal respect" and "self actualisation".[337] In terms of equal concern and equal respect, this is primarily a negative obligation not to treat another merely as a means and to recognise in the other person the ability to act as an autonomous moral agent.[338] This approach underwrites a conception of dignity as a formal entitlement to equal concern and equal respect.[339] In terms of viewing dignity as self actualisation, an individual's capacity to create meaning generates an entitlement to respect for the unique set of ends that an individual pursues and dignity secures the space for self actualisation.[340]

4.4.2.3 The right to life

[334] As the pregnancy progresses, terminating a pregnancy does become more difficult. See below 4.4.3.
[335] (2005) 37-23. On this topic Woolman states that in terms of being an individual as an end in herself, a woman should not be treated as a mere instrumental object of the will of others over entire social interaction and that the definition of dignity sets the standards below which ethical and legal behaviour may not fall see "Dignity" in Woolman *et al* (2005) 36-9.
[336] (2005) 36-31.
[337] (2005) 36-34.
[338] Woolman (2005) 23-10.
[339] Woolman (2005) 23-10.
[340] Woolman (2005) 36-11.

According to O´Sullivan, section 11 of the Constitution is promoted by the Choice Act to the extent that its less restrictive provisions[341] provide women with access to reproductive health care services which will prevent or dramatically reduce the majority of deaths associated with the illegal and unsafe termination of pregnancies.[342] The Choice Act ultimately protects a woman's right to life and improves the quality of life.[343]

4.4.2.4 The right to bodily and psychological integrity

In terms of section 12(2)(a) and (b) of the Constitution, everyone has the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction and to security in and control over their body. Bishop and Woolman state that the specific recognition of reproductive freedom was likely intended to leave little room for the courts to prohibit the termination of pregnancies and this section gives recognition to the fact that socially entrenched forms of physical oppression and exploitation relate to reproduction and sexuality.[344]

According to O´Sullivan, section 12(2) directly confronts the fact that women do not enjoy security in and control over their own bodies, taking into account the high rates of sexual violence against women and that circumstances under which women become pregnant are often beyond their control. [345]

In terms of *Christian Lawyers 2*, section 12(2) provides a woman with the constitutional right to terminate her pregnancy.[346] O´Sullivan states that the freedom of choice entrenched in section 12(2) is reinforced by the constitutional rights to life, dignity,

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[341] As opposed to the Abortion and Sterilisation Act 2 where, in terms of s3(1)(a)-(d), a pregnancy could only be terminated in cases where it was as a result of rape, incest, or where the pregnancy constitutes a serious threat to the woman's life, physical or mental health, it was required that two medical practitioners certify that abortion is necessary in the provided circumstances. S3(1) provisions were further qualified in terms of s3(2) where it was required that the medical practitioner that certified that the termination was necessary could not be the practitioner to perform the termination procedure, or even fall under the same partnership or employer.
[342] (2005) 37-7.
[343] (2005) 37-8.
[344] "Freedom and security of the person" in Woolman *et al* (2006) 40-80.
[345] (2005) 37-17.
[346] See above 4.4.1.2.

equality, privacy and to access to reproductive health care.[347] Further, the author states that the Choice Act promotes a woman's right to freedom and security of her body by affording her with the right to choose to terminate her pregnancy safely and that only the woman concerned is in the best position to make that decision, hence only her consent is needed.[348]

4.4.2.5 The right to privacy

The Constitutional right to privacy in terms of section 14[349] is the right to be "left alone" and to exist free from state interference.[350] Referring to a landmark American decision *Roe v Wade*[351] as authority, O´Sullivan states that a balance must be reached between the women's right to privacy and the state's interest in potential human life.[352] In this judgment the court made use of a approach linked to the trimesters of a pregnancy and stated that as the pregnancy advances from the first into the second and finally the third trimester, the state's interest in protecting prenatal life becomes more and more compelling to justify interference in a woman's personal life and decisions she made.[353]

4.4.2.6 The right to freedom of religion

Section 15 of the Constitution provides for the freedom of religion, belief and opinion. Section 31 provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy

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[347] (2005) 37-15.
[348] (2005) 37-18.
[349] Everyone has the right to privacy, which includes the right not to have (a) their person or home searched; (b) their property searched; (c) their possessions seized or (d) the privacy of their communications infringed.
[350] O´Sullivan (2005) 37-8. Also see McQuoid-Mason "Privacy" in Woolman *et al* (2003) 38-22 where the author refers to personal autonomy privacy rights as substantive privacy rights which permit individuals to make decisions about their lives without state interference ultimately empowering individuals to exercise control over procreation, contraception and childrearing.
[351] See Ch 5 where the position of the United States is discussed in great detail regarding law on the termination of pregnancy and the federal crime of feticide.
[352] (2005) 37-9. Approaching the right to terminate a pregnancy as stemming from the right to privacy helps the American state deny the existence of a duty to intervene in order to protect the choice that this non-intervention guarantees: The right to privacy has been used by the American state to justify its failure to provide the necessary funding to make the choice to terminate more meaningful. It has been argued that if the right to terminate a pregnancy is seen as a right stemming from equal protection of the law it would make it more difficult for the state to refuse funding and thus enable woman who have made the decision to terminate, to have access to safe termination facilities. See 37-11- 37-12.
[353] O´Sullivan (2005) 37-9.

their culture, practice their religion and use their language and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. O´Sullivan argues that section 15 together with section 31 protects the moral autonomy of two groups: when the state prohibits the termination of a pregnancy it imposes a notion of morality that infringes on the moral autonomy of women protected by section 15.[354] However, the converse is not true since the Choice Act does not coerce anyone into terminating their pregnancy and therefore does not infringe on others right to religion.[355]

4.4.2.7 The right to freedom of expression

O´Sullivan asserts that the termination of pregnancies involves the right to freedom of expression. In terms of section 16 of the Constitution, everyone has the right to freedom of expression.[356] The right to freedom of expression in relation to the termination of a pregnancy allows for open distribution of information that assists or deters women from terminating their pregnancies.[357]

4.4.2.8 The right to have access to health care

Section 27(1)(a) and (2) provides that everyone has the right to have access to health care, including reproductive health care, and that the state must take responsible legislative and other measures to achieve the progressive realisation of each of these rights. According to O´Sullivan reproductive health implies that people have the ability to practice safe sexual relationships and that woman can safely progress through their pregnancies.[358] Further, access to safe termination services contributes to reproductive health through the reduction of maternal morbidity and mortality.[359]

4.4.2.9 Children's rights

[354] (2005) 37-21.
[355] O´Sullivan (2005) 37- 21.
[356] (2005) 37-25.
[357] O´Sullivan (2005) 37-25.
[358] (2005) 37-24.
[359] O´Sullivan (2005) 37-24.

Children's rights are also advanced by the Choice Act to the extent that even a female under the age of 18 may terminate her pregnancy without having to obtain parental consent.[360]

4.4.2.10 The right to have access to information

Section 32(1) of the Constitution states that everyone has the right of access to any information held by the state or held by another person and that is required for the exercise or protection of any rights. O´Sullivan argues that the lack of access to information concerning reproductive health will prevent woman from exercising their right to reproductive decision making and will ultimately limit the control women have over their bodies. The Choice Act, in terms of section 6, obliges medical practitioners and midwives to provide women with information concerning their rights in relation to the Act.[361]

4.4.3 Limiting constitutional rights and the value of human dignity

This section of the dissertation serves a dual purpose. By determining the grounds used to justify limiting female reproductive rights, it will provide a foundation that can be used to validate law reform through the introduction of a statutory crime. Further, by determining the scope of the limitation, boundaries will be illuminated which can be used as a barrier which the statutory crime of third party foetal violence may not cross. This is significant because as it stands, the notion of criminalising conduct that terminates prenatal life is in conflict with the principle of the Choice Act which accommodates the lawful termination of prenatal life.[362]

The Choice Act provides women with the legal framework to exercise their reproductive rights in a responsible manner. However, as pointed out in *Christian Lawyers 2*, the

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[360] *Christian Lawyers 1*. See 4.4.1.1.
[361] S6 states that a woman, who requests a termination from a medical practitioner or registered midwife, shall be informed of her rights under the Choice Act by that person concerned.
[362] This conflict will not be directly addressed in this chapter but it is important to be aware of the conflict while working through the Choice Act because the answer is actually found in the Act provided the statutory crime is developed in line with the principles encompassed by the Choice Act: that is advancing female reproductive rights with the value of dignity as a foundation.

right to terminate a pregnancy is not absolute and can be reasonably and justifiably limited.[363]

Section 2 of the Choice Act sets out the circumstances and the conditions that allow for the termination of a pregnancy. Section 2(1)(a) states that a pregnancy may be terminated upon the request of a woman during the first 12 weeks of gestation. In terms of section (2)(1)(b) from the 13th week up to and including the 20th week of gestation, a pregnancy may only be terminated once a woman has consulted with a medical practitioner and that medical practitioner is of the opinion that continued pregnancy would pose a risk to the mother's physical or mental health; there is a substantial risk that the foetus will suffer from severe physical or mental abnormality; the pregnancy is a result of rape or incest or the continued pregnancy will severely affect the woman's social or economic circumstances. In terms of section 2(1)(c), a pregnancy that has reached 20 weeks of gestation may only be terminated if a medical practitioner, after consulting with another medical practitioner, is of the opinion that the continued pregnancy will endanger the woman's life, will result in severe malformation of the foetus or would pose a risk of injury to a foetus.

It is clear that up to 12 weeks, the decision to terminate a pregnancy is the woman's decision alone and as the pregnancy progresses her freedom of choice is curtailed and the decision is shared with a medical practitioner and must fall within one of the stipulated grounds. As the pregnancy progresses into the second and third trimesters, a termination becomes more and more difficult to procure.[364]

According to O´Sullivan, this approach balances the need for later termination, especially with regard to young rape survivors who are unaware that they are pregnant.[365] Further, these provisions balance the need to encourage women who present early to act in the interests of their own health and wellbeing.[366] As the

[363] See 4.4.1.2.
[364] Meyerson "Abortion: The constitutional issues" 1999 *SALJ* 50 57.
[365] (2005) 37-27.
[366] O´Sullivan (2005) 37-27.

pregnancy progresses, O´Sullivan[367] states that the restrictions contained in the Act are an attempt by the legislature to balance the increasingly compelling interests of the foetus at and after viability.[368]

From this point on, the purpose of the discussion is to explore the notion that the state has an interest in protecting prenatal life from third party foetal violence and to determine where this interest stems from if it is accepted that a foetus is not the bearer of constitutional rights. Further, the concept of foetal viability will also receive attention, since this seems to be the trigger for state interest to be vested in prenatal life thus justifying the limitation of female reproductive rights.

4.4.3.1 State interest in prenatal life based on the value of human dignity

It is accepted that a foetus is not the bearer of constitutional rights, however Meyerson rightly points out that this is clearly not the end of the matter.[369] If it were the end of the issue under consideration, Meyerson states that

> (t)he state would pass laws permitting a foetus to be killed for any reason whatsoever right up to the moment of birth. It would likewise permit the creation of embryos for research purposes and license experimentation on them long past the point at which it is generally believed that such experimentation is acceptable. It could pay women to have abortions in order to ensure a ready supply of cadaver foetal brain tissue, such tissue having known therapeutic value in the treatment of disease.[370]

[367] Viability is regarded as the stage of development which it can be said that the foetus can exist independently without the aid of its mother. See Meyerson 1999 *SALJ* 50 57.
[368] O´Sullivan (2005) 37-27. One of the justifications not discussed in this chapter but worthy of mention is the fact that as the pregnancy advances the more risky a termination becomes. Bishop and Woolman ((2006) 40-81) argue that in a society where people are free to bungee jump, sky dive and undergo voluntary major surgery for cosmetic purposes, the argument about risk on the mother is a rather "pernicious form of paternalism" and risks turning women into foetal incubators, at.
[369] 1999 *SALJ* 50 55.
[370] 1999 *SALJ* 50 55.

There is without a doubt some form of obstacle. O´Sullivan relies on Ronald Dworkin[371] where he argues that arguments about termination of pregnancies should not revolve around whether a foetus is the bearer of constitutional rights and that any argument to afford a foetus constitutional rights merely grants the state a derivative interest in prohibiting or regulating abortion.[372]

It is Dworkin's assertion that the argument is not whether we object to termination of pregnancies because it is believed that a foetus is a bearer of constitutional rights, but whether we attach some intrinsic value to life and the potential for human life.[373] Accordingly, the interest of the state in potential life stems from the state's interest in protecting the sanctity of human life therefore justifying the regulation of termination laws on grounds that are independent of the rights bearing capacity of the foetus itself.[374] Dworkin argues that the state has a detached interest in regulating termination of pregnancies.[375]

Meyerson addresses this issue by questioning whether the state has a constitutional duty to protect prenatal life. In order to give a substantive answer to this enquiry, the author turned to the following provisions in the Constitution: sections 1, 7(2), 36(1) and 39(1) and (2). Firstly, the Constitution recognises that human dignity, the achievement of equality and the advancements of rights and freedoms are some of the specified values that the Republic of South Africa is founded on. Further, the Bill of Rights affirms the democratic values of human dignity, equality and freedom, any limitations to rights contained n the Bill of Rights must be reasonable and justifiable in light of the founding values. These founding values also play a central role when interpreting the Bill of Rights, legislation or developing the common and customary law.[376] Meyerson states

[371] *Life's dominion: An argument about abortion, euthanasia, and individual freedom* (1993). Further authors relying on Dworkin are Meyerson 1999 *SALJ* 50 53; Kruuse 2009 *THRHR* 126 134.
[372] (2005) 37-6. A derivative interest is an interest based on the presumption that the entity involved is a person with rights and interests and the state's interest in protecting it stems from the fact that it is a bearer of rights. See Dworkin (1993) 11; Kruuse (2009) *THRHR* 126 135.
[373] (2005) 37-7.
[374] (2005) 37-7.
[375] (2005) 37-7. A detached interest is an interest based on the fact that human life is itself intrinsically valuable regardless of the status of the person. See Dworkin (1993) 11; Kruuse 2009 *THRHR* 126 135.
[376] 1999 *SALJ* 50 55.

that there is more to the Constitution than granting and protecting the rights since it explicitly distinguishes between rights and freedoms on the one hand and the values of human dignity, equality and freedom on the other.[377] Here is where Meyerson puts forward her contention that even if there are no human rights protected prior to birth it is necessary to consider whether the value of human dignity might operate as a constitutional constraint on legislation governing the termination of pregnancies.[378]

Meyerson states, with rather emotive words, that it is the value of human dignity that is under threat because

> it is hard to deny that the destruction of prenatal life, although it violates no constitutionally protected subject's right to life, nevertheless undermines human dignity. A foetus is not just a bit of human tissue, comparable to something like an appendix. It is a living organism, whose destruction is not a morally trivial matter but something to be regretted.[379]

4.4.3.2 Foetal viability and the inception of state interest in light of the value of dignity

[377] Ibid. To support this argument, Meyerson (1999 *SALJ* 50 56) refers to s36(1). The author argues that the fact that the limitation clause states that the rights in the Bill of rights can only be limited if it is reasonable and justifiable in a society based on dignity, equality and freedom. Inclusive in the rights in the Bill of Rights are the rights to dignity, equality and certain freedoms, so clearly these rights can be limited. However, Meyerson questions "how can an infringement of the right to dignity... pass the test set by the limitation clause, requiring, as the clause does, that the infringement should be reasonable and justifiable in a society *based* on dignity?" To answer this, Meyerson argues that the concepts of human dignity, equality and freedom in the limitation clause have a different function from that of the rights found in the Bill of Rights and she concludes that there must be more to the Bill of Rights than merely protecting specific rights which it enshrines.

[378] 1999 *SALJ* 50 56. Also see Woolman ((2005) 36-19; 36-22 - 36-25), who states that the value of dignity can be invoked in three types of cases: where the value of dignity guides the interpretation of the right and by doing so, shapes the ambit of the right; the value of dignity can be used to justify the limitation of a right and the value of dignity can be used in those cases where the Bill of Rights does not directly apply to the circumstances and in this case the value of dignity will inform the development of the common law or the interpretation of the statute, at 36-24. This chapter falls in the ambit of the second and third type of cases mention by Woolman.

[379] 1999 *SALJ* 50 59.

Foetal viability is said to occur at around 22 weeks of gestation.[380] At this point a foetus will be capable of living independently of its mother should it be born since all its vital organs are developed and able to sufficiently perform their functions.[381]

Accepting that the value of dignity serves as the grounds for the state to limit female reproductive rights in terms of the Choice Act, it raises a vexatious issue of why the Choice Act permits early termination on demand since it can be claimed that early terminations also offend the value of human dignity. Dealing with this issue, Meyerson refers to rather controversial examples where a woman decides to terminate her early pregnancy because the foetus is the wrong gender or for some other frivolous reason, she asserts that these issues are too controversial for the state to translate into law where the foetus is still very under developed.[382] Further, the limitation clause prevents the state from limiting rights for intractably disputed reasons since a person's own moral judgments do not justify legal interference by the state when a woman decides to exercise her choice to terminate her pregnancy.[383]

However, beyond early prenatal life, once the foetus becomes more developed it is capable of feeling pain as it approaches viability and at this point its destruction becomes less tied to intractably disputed views and the weight to be afforded to human dignity in competition with female reproductive rights becomes less controversial.[384]

The approach taken by Meyerson falls squarely in line with the provisions of the Choice Act. Section 2(1)(c) requires the life of the mother or foetus to be at risk before a termination may be granted where the pregnancy has advanced into the 20th week of

[380] Sarkin-Hughes "A perspective on abortion legislation in South Africa's Bill of Rights era" 1993 *THRHR* 83 89. In *S v Mshumpa*, the court accepted that a foetus was viable from the 25th week of gestation at 148D.
[381] Sarkin-Hughes 1993 *THRHR* 83 89.
[382] (1999) 50 57.
[383] Meyerson 1999 *SALJ* 50 57-58. Sarkin-Hughes (1993 *THRHR* 83 89), on the topic of female reproductive rights, states that "despite the fact that not every woman's decision will be in accordance with another's individual sense of morality, society's interest must only be an advisory one. Otherwise we will be left with the dangerous and oppressive situation of the state imposing a preconceived moral stance, which has been created in part from stereotypes of women's intellectual and physiological capabilities."
[384] Meyerson 1999 *SALJ* 50 58.

gestation. Sarkin-Hughes states that it is preferred to set the cut-off line at 20 weeks rather than 22 weeks because estimates of gestational age have an approximate two-week margin of error.[385] O´Sullivan states that there are good reasons for the state to progressively limit the termination of a pregnancy after viability. Foetal brain development is sufficient to feel pain which indicates that it has protectable interests of its own and by the time the pregnancy has reach that stage of development, the female concerned has had ample time to decide whether termination is the best option for her.[386] Further, she argues that at the stage of viability the termination of a pregnancy becomes more problematic because as the foetus has developed towards being an infant and the difference between being a foetus and infanthood is only a matter of location of the unborn in the womb rather than its development.[387]

To conclude on the findings, there is a detached state interest in prenatal life that strengthens as the pregnancy progresses to the point that it is accepted that the foetus is viable. Further, even under these circumstances the state does not completely limit female reproductive rights since in terms of the Choice Act a pregnancy may be terminated provided the circumstances calling for a termination fall within the ambit of the Act.

Examination of the Choice Act and the constitutional provisions relating to female reproductive rights, it is clear that female autonomy is the state's first and foremost concern. However, having given women the opportunity to exercise their rights during early pregnancy, the state's interest in female autonomy weakens in favour of the foetus. Subsequently, the state's detached interest, based on the value of human dignity serves as a reasonable and justifiable ground to limit female reproductive rights.

4.4.3.3 The value of dignity beyond the South African Constitution

Beyond the South African constitutional value of dignity, various conventions and preambles to declarations were cited by Kruuse as examples where dignity serves as a

[385] 1993 *THRHR* 83 89.
[386] (2005) 37-9.
[387] O´Sullivan (2005) 37-10.

ground to protect a foetus from harmful activities and are worthy of attention.[388] In terms of the preamble to the Council of Europe's Convention for the Protection of Human Rights and Biomedicine (1996) where it states that the Convention is convinced of the need to respect the human being, both as an individual and as a member of the human species, and it recognises the importance of ensuring dignity of the human being. Further the Convention is conscious that the misuse of biology and medicine can lead to endangerment of human dignity. In terms of article 18(1) and (2) the Convention allows for the research on embryos where the law permits, provided that the embryo is adequately protected and the creation of human embryos for research purposes is prohibited.

The preamble of UNESCO Universal Declaration on Human Genome and Human Rights (1997) states that the declaration recognises that research on the human genome and the resulting application opens up prospects for progress in improving health of individuals but emphasis is placed on the fact that research should fully respect human dignity, freedom and human rights. In terms of article 1, the declaration states that the human genome underlies the fundamental unity of members of the human family, as well as the recognition of their inherent dignity and diversity. Symbolically the human genome is the heritage of humanity.

The German federal Constitutional Court, on the topic of legislation that decriminalised early terminations,[389] decided that the potential capabilities residing in human existence from its inception onwards is sufficient to justify human dignity.[390] The federal Constitutional Court held that a foetus, from the moment of implantation possesses

[388] 2009 *THRHR* 126 135.
[389] *BVerfGE* 88 203 (255) (1993) (as cited by Kruuse). The matter before the court revolved around the Pregnancy and Family Assistance Act which provided that, before 12 weeks, a pregnancy may be terminated after partaking in mandatory counselling (to make the woman more aware of the consequences of her decision to terminate) and having waited three days thereafter. After 12 weeks, terminations would not be unlawful if a third party established a serious birth defect or a threat to the woman's life or health. After 22 weeks a termination may not be sought. See Neuman "*Casey* in the mirror: Abortion, abuse and the right to protection in the United States and Germany" 1995 *The American Journal of Compartive Law* (*Am J Comp L*) 273.The decision dealt with numerous aspects relating to this Act however, only those portions relevant to dignity will be considered, briefly.
[390] 2009 *THRHR* 126 135.

human dignity and that the state owes it a duty to protect its life.[391] This finding was based on articles 1(1) and 2(2)(1) of the German Basic Law which provides that human dignity is inviolable and it is the duty of all state authorities to respect and protect it and that everyone has the right to life and bodily integrity.[392]

Protection in this regard was held to also include protection against the foetus's mother but this duty to protect was not absolute.[393] Accordingly, the termination of a pregnancy had to be forbidden unless its continuation involved unreasonable demands on the pregnant woman.[394] A further aspect stemming from the state's duty to protect prenatal life was the requirement to take steps to prevent situations arising in which a pregnancy would place unreasonable demands on women.[395] Accordingly, women are placed under a legal duty to carry their pregnancies to term however; this legal duty could not place unreasonable demands on the woman concerned.[396]

Vo v France[397] deals with a case heard by the European Court of Human Rights[398] where Mrs Vo's pregnancy was terminated as a result of negligent conduct of her physician. The physician, as a result of mistaken identity, thought Mrs Vo was present for the removal of a contraceptive coil and without examining her, he attempted to remove the coil and as a result punctured the amniotic sac which lead to the termination of Mrs Vo's pregnancy. After the court failed to convict the physician in France for the

[391] Neuman 1995 *Am J Comp L* 273 279.
[392] Ibid.
[393] Neuman 1995 *Am J Comp L* 273 279.
[394] Neuman 1995 *Am J Comp L* 273 280. Unreasonable demands include the situation where continued pregnancy will endanger the woman's life, the pregnancy was a result of sex crimes or the foetus suffered from severe defects.
[395] Neuman 1995 *Am J Comp L* 273 281. Characteristics of this duty on the state include financial subsidies so that women would not terminate their pregnancies out of fear that they would not be able to afford the cost of rearing a child and to protect women against educational and occupational disadvantages resulting from pregnancy. Ultimately the state was required to create a child friendly society.
[396] Neuman 1995 *Am J Comp L* 273 281.
[397] Available at http://www.echr.coe.int (accessed on 18 June 2010). Also see Plomer "A foetal right to life? The case of *Vo v France*" 2005 *Human Rights Law Review* (*HRLR*) 311 and Goldman "*Vo v France* and fetal rights: The decision not to decide" 2005 *Harvard Human Rights Journal* (*Harv Hum Rts*)277.
[398] Hereinafter referred to as the ECHR.

unintentional homicide of the foetus in terms of the French Criminal Code,[399] Mrs Vo filed a claim with the ECHR claiming that France violated article 2(1)[400] of the European Convention of Human Rights in that France failed to enact criminal legislation preventing and punishing unintentional homicide of a foetus. The French government responded by claiming that article 2 does not protect a foetus's right to life and that the word "everyone" only applies to born persons.

The ECHR declined to decide whether a foetus was protected under article 2 and relying on one of its former decisions where it held that where the right to life has been infringed unintentionally a criminal law remedy may be unnecessary as long as an adequate remedy is provided and in this instance France had provided sufficient administrative remedies.[401] The ECHR recognised that at a European level, there is no consensus on the nature and status of the foetus, however they are beginning to receive some protection in light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation.[402] The ECHR stated that at best, the common ground between states is that a foetus belongs to the human race and the potentiality of the being and its capacity to become a person requires protection in the name of human dignity without making it a person with the right to life for purposes of article 2.[403]

4.5 The state's detached interest in prenatal life to justify the call for law reform in criminal law

It is necessary to link the value of dignity as applied in private law to criminal law and to determine how it can be used to justify law reform by criminalising third party foetal violence that terminates prenatal life.

[399] Mrs Vo's criminal action failed because a foetus is not considered a foetus under the French Criminal Code, see pars 19-22.
[400] Art 2(1) states that everyone's right to life shall be protected by law.
[401] Par 85. Also see Goldman (2005) 278-279.
[402] Par 84.
[403] Par 84.

Kruuse sites Meyerson's argument[404] with approval, and uses the notion of constitutional values as the ground to criminalise conduct that terminates prenatal life.[405] Also relying on Dworkin, Kruuse argues that in the context of feticide[406] emphasis should be placed on the value of dignity which requires us "to respect and to value the intrinsic humanness of the fetus and its potential to become a human person."[407] Further, recognition of this value equips the law with the means to recognise and protect a foetus from third party foetal violence.

If criminal law reform were to take shape through the introduction of a statutory crime founded on the value of human dignity, the foetus need not be the bearer of constitutional rights. Kruuse argues that by using the value of dignity to protect a foetus from third party violence the issues around termination laws are avoided since it is not the foetus's right to life which is at stake but the value of human dignity.[408] Accordingly, in the context of third party foetal violence, foetal interests are not capable of being outweighed by the woman's right to choose. This approach aids in dealing with the with the impression that criminalising third party foetal violence that terminates prenatal life will be in conflict with existing termination laws, since under the proposed law reform terminating prenatal life will be faced with criminal liability. Using the value of dignity as the foundation for law reform instead of granting constitutional rights to a foetus prevents the situation of having to weigh up the constitutional rights of the foetus and pregnant woman. From this perspective, the problem of completely limiting female reproductive rights in favour of foetus's right to life is evaded.

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[404] See 4.4.3.1.
[405] 2009 *THRHR* 126 134. It must be noted that Kruuse looks at the value of dignity in the context of criminal law in reaction to the *Mshumpa* decision, whereas Meyerson looks at the value of human dignity in the context of private law termination legislation.
[406] Kruuse describes feticide as conduct that terminates prenatal life through a form of unlawful action. An example of what would constitute feticide would be the conduct of Mshumpa and Best in terms of *Mshumpa*, refer to ch 2 for the full details of the case.
[407] 2009 *THRHR* 126 135.
[408] Ibid. It needs to be mentioned here that the assertion made by Kruuse will be explored in detail in ch 7 but at this point it is necessary to state that this statement is not entirely correct. The crime of feticide, as Kruuse calls it, can be introduced as a result of constitutional values but this alone will not reconcile the tension between the Choice Act which permits terminating a pregnancy, and feticide which prohibits the termination of a pregnancy even though both approaches rely on the same values.

In recognition of the supremacy clause found in section 2 of the Constitution, the value of dignity is applicable to all law, private or public. The application of the value of dignity in private law gave the perfect example of how it can be applied in criminal law, specifically in light of the need for law reform in the context of third party violence that terminates prenatal life.

4.6 Conclusion

The reason why third party foetal violence is preferred as a statutory crime is because the law in general, including both criminal and private law principles, is accepted as sufficiently serving the purpose for which it exists. Accordingly, the statutory crime should require absolutely no amendments to existing principles. However, the statutory crime cannot simply be enacted without any foundation. This indicates the need to acknowledge prenatal life as something that can be the subject of a crime. Criminal law principles do not indicate any foundation on which this can be achieved, hence the need to consider private law.

In consideration of the need not to reengineer the law but still find principles that can establish a foundation that justifies law reform, private law relating to termination of pregnancy offers the most workable solution. However, the *nasciturus* fiction does not play any constructive role in determining how to take foetal interests into account in the context of criminal law because of the requirement of live birth. The denial of wrongful birth claim gives a very faint glimpse of the court's appreciation and recognition of dignity and sanctity of life but this still did not provide anything concrete.

The most significant portion of this chapter focused on the Choice Act. The Choice Act balances the need to advance female autonomy and take foetal interests into account. This balance was shown to emphasise the role of constitutional values in the limitation of fundamental rights. Further, it illuminated that on the basis of constitutional values, viable prenatal life is recognised as something worthy of legal recognition. From this understanding the principles encompassed in the Choice Act serve as the foundation to validate law reform on the grounds of the value of dignity and also a gauge clearly

demarcating the reach of the proposed statutory crime. Ultimately, the Choice Act gave the value of dignity as the foundation and female reproductive right as the statutory crime's limitation to the extent that this proposed crime cannot impinge on female reproductive rights and only advance them.[409]

Adopting this approach avoids all the issues of extending the scope of the common law crime of murder, the issue of when life begins and the consequences of life beginning before actual birth and the attachment of constitutional rights to foetuses to the detriment of the women carrying them. This approach embraces the law as it stands and recognises that a foetus is not alive until birth, it is not the bearer of constitutional rights and that female autonomy is paramount in the context of taking foetal interests into account.

CHAPTER FIVE Third party foetal violence in the United States of America: The possibility of a solution for South Africa

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5.1 Introduction

Chapter five looks at third party foetal violence that terminates prenatal life in the United States. The United States was the decided candidate for study because it recognises that women have a constitutional right to terminate their pregnancies and the United States federal and state governments have nonetheless enacted legislation specifically criminalising conduct that terminates prenatal life as a result of third party foetal violence.

Accepting that the right to terminate a pregnancy directly conflicts with the idea of criminalising third party foetal violence that terminates prenatal life, the purpose of this chapter is to explore the extent of the right to terminate a pregnancy in light of the

[409] The notion of advancing female reproductive rights through the development of a statutory crime of third party foetal violence will be discussed in ch 6. Briefly this covers the idea that if a woman's pregnancy is terminated without her consent, that termination violates her reproductive rights to the extent that she had made the conscious decision to have a child.

United States Supreme Court decision in *Roe v Wade*[410] and to further investigate how both federal and state governments have developed the crime concerning the unlawful termination of prenatal life. More importantly, it needs to be determined whether the United States has legitimately introduced the crime of third party foetal violence that terminates prenatal life on sound legal principles because if this has been accomplished it can serve as a valuable guide for any proposed criminal law reform in South Africa.

In order to fully appreciate the adequacy of the Unites States criminal provisions pertaining to third party foetal violence an analysis will be conducted into the various arguments for and against the relevant statutory criminal provisions. The majority of this discussion will stem from federal legislation of the Unborn Victims of Violence Act.[411] The courts are yet to hear a case pertaining to the application or constitutionality of the UVVA and consequently, case law pertaining to state legislation with similar provisions will be considered.

5.2 A basic overview of the United State's judicial and legislative system

Before discussing the various positions adopted by states and the federal government concerning third party foetal violence, a brief overview of the legislative and judicial system is required. This will assist in illustrating why it is necessary to undertake simultaneous research of both the federal laws and state laws concerning third party foetal violence since legislation is in place at both federal and state level.

5.2.1 The judiciary

Each state in the United States has its own Constitution, legislation and judiciary. The judiciary consists of superior courts, district courts[412], special courts[413], justice of peace courts[414] and courts of appeal.[415] The federal system functions wholly under the United

[410] 410 US 113, 93 SCt 705 (1975).
[411] Act of 2004. Hereinafter this Act will be referred to as the UVVA.
[412] Both state and federal district courts have general jurisdiction to hear civil and criminal matters.
[413] Special courts have limited jurisdiction and include criminal courts, domestic relations or family courts, to name a few. See Farnsworth *An introduction to the legal system of the United States* (1997) 38.
[414] Justice of the peace courts hear relatively trivial matters and include county courts, municipal courts or traffic court to mention a few.
[415] Farnsworth (1997) 38.

States Constitution and consists of federal legislation and a federal judiciary.[416] The federal judiciary consists of district courts, special courts, courts of appeal and the Supreme Court of the United States.[417]

The federal judiciary system only has those powers granted to it under the constitution and whatever judicial jurisdiction the federal courts do not have, falls onto state courts.[418] In some cases Congress has made the jurisdiction of federal courts exclusive, for example, cases under federal criminal law cannot be brought before state courts.[419] Where exclusive jurisdiction is not granted, the federal and states courts have concurrent jurisdiction.[420] The most important jurisdictional limitation on federal courts is that jurisdiction only extends to "cases and controversies", where parties involved must have a real interest at stake in a ripened controversy.[421] Further, federal questions must be substantial in order to confer jurisdiction onto the Supreme Court.[422]

As a result of the federal system deriving its powers from the Constitution, federal law is supreme in only limited circumstances.[423] Farnsworth states that courts are plagued with complex problems that involve accommodating state and federal law; in either a state or federal court an action based on a right stemming from state law can be faced with a defence based on federal law and vice versa.[424] Based on the limited constitutional authority of federal courts, in the absence of applicable federal legislation, the federal courts are bound to apply state case law or legislation.[425]

5.2.2 The legislative system

[416] Farnsworth (1997) 37.
[417] Farnsworth (1997) 38.
[418] Morrison *Fundamentals of American law* (1996) 33.
[419] Farnsworth (1997) 40.
[420] Ibid. The Supreme Court can be the court of first instance in disputes that arise between states or between a state and the federal government, see 39.
[421] Morrison *Fundamentals of American law* (1996) 34. This is known as "diversity jurisdiction".
[422] Morrison (1996) 34. A federal question involves cases where issues of federal law are presented and the case must actually arise under federal law.
[423] Farnsworth (1997) 43.
[424] (1997) 43.
[425] Farnsworth (1997) 44.

The Constitution of the United States is the supreme law to which all other legislation is subject and the Supreme Court is the ultimate authority in terms of constitutional disputes.[426] Federal statutes are only subject to the Constitution and enacted by the United States congress.[427] State constitutions are subject to valid federal legislation but each state's constitution is the supreme authority within the state itself.[428] State legislation is subject to federal legislation and that state's constitution.[429]

Valid federal laws are superior to conflicting state and local laws, and when a federal law prevails, it is said to pre-empt the conflicting state laws.[430]

5.3 Third party foetal violence in the United States

In the United States 38 States have foetal homicide laws.[431] These states are acting on the need to criminalise conduct that terminates prenatal life; however this issue is not done with a united vision. As a result, foetal violence that terminates prenatal life is dealt with differently in states and between some states and the federal government.

The dividing lines between states and the federal government relates to the legal means adopted to address third party foetal violence and whether the state requires the foetus to be viable at the time the perpetrator inflicts violence on the pregnant woman.[432]

Concerning viability, in 21 states foetal homicide laws are applicable from the early stages of pregnancy.[433] To further deepen the divided approach to foetal violence laws,

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[426] Morrison (1996) 31.
[427] Farnsworth (1997) 62.
[428] Ibid.
[429] Farnsworth (1997) 63.
[430] Morrison (1996) 31.
[431] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. See http://www.ncsl.org/IssuesResearch/Health/FetalHomicideLaws/tabid/14386/Default.aspx (accessed 22 September 2010).
[432] According to Tsao, where viability is not a requirement, the application of feticide statutes is not linked to the life of the foetus but rather the harm inflicted on the pregnant woman. Tsao "Fetal homicide laws: A shield against domestic violence or sword to pierce abortion rights?" 1998 *Hastings Constitutional Law Quarterly* (*HSTCLQ*) 457 464.

under a number of state statutes, the termination of prenatal life falls under the crime homicide, while other states have developed a new crime and designated the non consensual termination of prenatal life as a special type of murder, namely feticide.[434] Accordingly, once it has been determined how the state has approached the criminalisation of third party foetal violence, it will further need to be determined whether the particular state requires the foetus to be viable or not.[435]

Given that states differ in their approach it is not feasible to discuss each individually, rather, it is preferred to select a representative state from each of the divergent approaches.

5.3.1 State level

5.3.1.1 Homicide

At common law and in the absence of any state statute, if a prenatal life is terminated before birth as a result of violence inflicted upon the pregnant woman, a crime has not been committed.[436] If the foetus is born alive and later dies as a result of injuries sustained while in utero, the perpetrator's criminal liability is the same as if he or she had killed any other human being.[437]

There are states that have extended the application of homicide laws so far as to include a foetus in the definition of homicide. The extension to include a foetus is

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[433] Alabama; Arizona; Arkansas; Georgia; Idaho; Illinois; Kansas; Kentucky; Louisiana; Massachusetts; Minnesota; Nebraska; North Dakota; Ohio; Oklahoma; Pennsylvania; South Carolina; South Dakota; Texas; Utah; West Virginia and Wisconsin. See http://www.ncsl.org/IssuesResearch/Health/FetalHomicideLaws/tabid/14386/Default.aspx (accessed 22 September 2010).

[434] Gimeno *et al Corpus Juris Secundum: A Contemporary statement of American law as derived from cases and legislation* (2006) section 71 451. When discussing third party foetal violence in the context of the United States, the term 'foetal homicide laws' to describe both foetal homicide and feticide.

[435] Wasserstrom "Homicide based on killing of unborn child" originally published 1998 *American Law Review* (*ALR*) 671 682. Wasserstrom as a practice pointer states that council for parties is cases involving the death of a foetus must examine the statutes of that particular jurisdiction and should research the following questions: Do any of the state statutes expressly define homicide as to include the killing of a foetus, or does the state merely codify the common law? Does the state have feticide statute and if so, does it require the foetus to be viable at the time the injuries that cause the death were inflicted? Is intent to kill the pregnant woman an element necessary for a conviction?

[436] Wasserstrom originally published 1998 *ALR* 671 680.

[437] Ibid.

divided between those states that afford protection at any stage of foetal development and those states that afford protection only from the point of viability onwards.

Section 13A.6.1(a)(2) of the Code of Alabama states that a person commits homicide if he or she intentionally, knowingly, recklessly or with criminal negligence causes the death of another person. "Person" means a human being, including an unborn child in utero at any stage of development, regardless of viability.[438]

Section 35.42.1.1(4) of the Indiana Code states that a person, who knowingly and intentionally, kills a viable foetus commits murder. Viability means the ability of a foetus to live outside the mother's womb.[439] Interestingly, if a pregnancy is terminated prior to viability, the crime of feticide becomes applicable.[440] Feticide is committed when a person knowingly and intentionally terminates a human pregnancy with the intention other than to produce a live birth or to remove a dead foetus.[441]

McKinney's Consolidated Laws of New York Annotated section 40.125.00 defines homicide as conduct which causes the death of a person[442] or an unborn child with which a female has been pregnant for more than 24 weeks under the circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, self abortion in the first degree[443] or abortion in the first degree.

[438] S13A.6.1(a)(3) of the Code of Alabama.
[439] S 16.18.2.367 of the Indiana Code.
[440] Williams Indiana Law Encyclopaedia: Homicide (database updated August 2010) 1.
[441] S 35.42.1.6. This section does not apply to an abortion performed in accordance with specified statutory provisions.
[442] NY Code s40.125.50.1 defines a person as when referring to the victim of homicide, means a human being who has been born and is alive.
[443] A woman will be guilty of first degree self abortion when, being pregnant for more than 24 weeks, she commits or submits to an abortional act upon herself which causes her miscarriage, unless such abortion is justified. S125.50 defines second degree self abortion as encompassing the circumstances where the pregnant woman commits to an abortion upon herself, unless the abortional act is justified. According to NY Code s40.125.50.3, an abortional act is justified when committed upon a female with her consent by a duly licensed physician acting under a reasonable belief that the abortion is necessary to preserve the pregnant woman's life or the abortional act falls within 24 weeks from the commencement of the pregnancy. NY Code s40.125.50.2 defines abortional act as an act committed upon or with respect to a female, whether by another person or with the female herself, whether she is pregnant or not, whether

5.3.1.2 Feticide[444]

The state of Louisiana has introduced the crime of feticide. In terms section 14.1.32.5.A of the Louisiana Revised Statutes Annotated[445] feticide is defined as the killing of an unborn child, procurement or culpable omission of a person other than the mother of the unborn child and the offence of feticide shall not include acts which cause the death of an unborn child if those acts were committed during an abortion to which a pregnant woman or her legal guardian has consented or which was performed in an emergency. Further, the offence of feticide will not include acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.[446] The Louisiana Revised Statute defines a person as a human being from the moment of fertilisation and implantation,[447] and an unborn child is defined as any individual of the human species from fertilization and implantation, until birth.[448]

Punishment for the commission of feticide depends on the degree of guilt of the perpetrator. In cases of first degree feticide, the perpetrator will face imprisonment for not more than 15 years with hard labour.[449] For second degree feticide, the perpetrator faces 10 years imprisonment with hard labour.[450] Third degree feticide is punished with

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directly upon her body or by administering, taking of prescribing drugs or any other manner, with the intent to cause a miscarriage of the pregnancy concerned.

[444] For an overview of the various approached of states concerning feticide see Mans "Liability for the death of a fetus: Fetal rights or woman's rights?" *University of Florida Journal of Law and Public Policy* (*UFLJLPP*) 2004 296. This article discusses state feticide legislation with particular attention placed on whether a state requires a foetus to be viable, quick or non viable in order to qualify for protection under legislation.

[445] Hereinafter referred to as the La Rev Sta. Ann.

[446] La Rev Stat Ann s14.1.32.A.

[447] La Rev Stat Ann s14.1.2(7).

[448] La Rev Stat Ann s14.1.2(11).

[449] La Rev Stat Ann s14.32.6A(1) and (2). A perpetrator will be guilty of first degree feticide where he or she had the specific intention to kill or inflict bodily harm or under the circumstances where the offender killed the foetus while he or she was engaged in the perpetration or attempted perpetration of specifically listed crimes including rape, robbery, arson and kidnapping.

[450] La Rev Stat Ann s14.32.7B. Second degree feticide is committed in sudden passion or heat of blood, immediately caused by provocation of the pregnant woman which is sufficient enough to deprive the perpetrator of his or her self control and cool reflection.

a fine of not less than $2000 and imprisonment for five years with or without hard labour.[451]

Feticide holds a different meaning under the Iowa Code. Murder is defined as the killing of another person with malicious aforethought either expressed or implied.[452] Separate from the crime of murder but still within the same chapter title *Homicide and related crimes*, a distinction is made between two types of conduct that terminate prenatal life namely, feticide which criminalises conduct that terminates a viable foetus with the pregnant woman's consent and conduct that terminates prenatal life without the consent of the pregnant woman.

In terms the Iowa Code section 16.707.7(1), a person commits the crime of feticide when he or she intentionally terminates a human pregnancy with the knowledge and voluntary consent of the pregnant woman, after the end of the second trimester of the pregnancy where death of the foetus results.[453] Under these circumstances the perpetrator commits a class C felony.[454] In Iowa the crime of feticide is not concerned with violence or harm on the pregnant woman since her consent to the termination is present and the purpose of this section is to criminalise the wilful termination of a

[451] La Rev Stat Ann s14.32.8B. Third degree feticide is the killing of a foetus through criminal negligence. In *State of Louisiana v Brown* 379 So.2d 916 (1979) the court found that homicide is not the killing of a person but is the killing of a human being, and the fact that the legislature amended the definition of person in the Criminal Code to include a human being from the moment of fertilization and implantation did not broaden homicide to include feticide. In *State of Louisiana v Keller* 592 So.2d 1367 (1992) the court found that if a person kills a person who is born alive while possessing the intention to kill or inflict great bodily harm on two persons, then the conduct constitutes first degree murder regardless of whether the other person is born alive or a foetus and a foetus is a person for those purposes. It must be noted that the death of the foetus is not an issue in this case but rather whether a foetus can be regarded as a person in order for the crime to qualify as first degree murder since La Rev Stat Ann s14.30A(3) provides that first degree murder is the killing of a human being when the offender has the specific intention to kill or inflict great bodily harm upon more than one person.

[452] ICA s16.707.1.

[453] ICA s16.702.20 defines viability as that stage of foetal development when the life of the foetus can be continued indefinitely outside the womb by natural or artificial life support systems. The time when viability is achieved may vary with each pregnancy and the determination of whether a particular foetus is viable is a matter of responsible medical judgment.

[454] ICA s16.707.7(1). The Iowa Code also makes provision for attempted feticide where the perpetrator attempts to terminate a viable foetus's life but death does not result. Attempted feticide constitutes a class D felony. See I.C.A s16.707.7(2).

pregnancy that has developed into the third trimester.[455] It further prohibits a person who is not licensed to practice medicine or surgery from performing a termination of a pregnancy and classifies this conduct a class C felony.[456]

Non-consensual termination or serious injury to a human pregnancy is criminalised in section 16.707.8. Serious injury to a human pregnancy means, relative to the human pregnancy, means disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ, and includes but is not limited to skull and rib fractures and metaphysical fractures of the long bone.[457]

In terms of the Iowa Code section 16.707.8(1) a person who terminates a human pregnancy without the consent of the pregnant woman during the commission of a felony or felonious assault is guilty of a class C felony. Section 8 goes on to list all the intentional or unintentional conduct that constitutes various classes of felonies and notably the crime of non-consensual termination or serious injury to a human pregnancy is characterised by violence or harm on the pregnant woman.[458] For illustrative purposes subsection (3) states that a person who intentionally terminates a human pregnancy without the knowledge and voluntary consent of the pregnant woman is guilty of a class C felony. Subsection (5) provides that a person commits a class C felony if he or she by force or intimidation procures the consent of a pregnant woman to a termination of a human pregnancy. Subsection (7) provides that a person who unintentionally terminates a human pregnancy without the knowledge and voluntary consent of the pregnant woman by the commission of an act in a manner likely to cause

[455] See Rigg "Homicide" in *Iowa Practice Series: criminal law: Homicide* (2009 update) 3:51 (Abortion and Homicide – Feticide and Penalties). The crime of feticide will not apply to the termination of a pregnancy if the pregnancy is terminated by a licensed physician and the termination is required to preserve the life or health of the pregnant person or the foetus and every reasonable medical effort is made, without putting the pregnant woman's life at risk. See ICA s16.707.7(4).
[456] ICA s16.707.7(4).
[457] ICA s16.707.8(11). The stage of development of the foetus is not mentioned under this section.
[458] See Rig (2009 update) 3:52 (Abortion and Homicide – Non-consensual Termination – Serious injury to a human pregnancy).

the termination of or serious injury to a human pregnancy is guilty of aggravated misdemeanour.

The actions of the pregnant woman concerned which cause the termination of or serious bodily injury to a pregnancy do not fall within the ambit of this section.[459]

5.3.2 Federal law: the Unborn Victims of Violence Act of 2004

According to Fitzpatrick the drive to pass the UVVA stems from the need to protect pregnant women from domestic violence and to deter perpetrators from committing violent acts against pregnant women generally.[460] Bruchs states that the goal of the UVVA is to satisfy the need for punishment and protection, "criminals need to be punished for crimes committed against pregnant women and unborn victims, and unborn victims need to be protected from harm."[461] According to Hickcox-Howard, pregnancy is a key risk factor for domestic violence and victims of domestic violence commonly describe a history of domestic violence that either began during a pregnancy or escalated during a pregnancy.[462] It was found that on an average of 3.9% - 8.3% of all pregnant women in the United States experienced violence during their pregnancy, mainly committed by an intimate partner or other family member.[463]

[459] ICA 16.707.8(12)(a).
[460] "Fetal personhood after the Unborn Victims of Violence Act" 2005 *Rutgers Law Review* (*Rutgers L Rev*) 553 555. In 2002 Laci was 8 months pregnant when she went missing, roughly four months later she was found dead and her husband was arrested for her murder. This case prompted the passing of the UVVA since it created public support to recognise that there were two victims under these facts and there needs to be a law to give effect to this sentiment. Accordingly, the UVVA is also known as the Laci and Connor's Act. Connor was the name chosen for the foetus, had it been born alive.
[461] "Clash of competing interests: Can the Unborn Victims of Violence Act and over thirty years of settled abortion law co-exist peacefully?" 2004 *Syracuse Law Review* (*SYRLR*) 133 138. This stance was taken because before the implementation of the UVVA, the federal government only prosecuted defendants for crimes committed against pregnant women and the only added consequence was the increase in the penalty imposed under the Federal Sentencing Guidelines. The federal government was criticised since the increased penalties were regarded as trivial and were not reflective of the seriousness of the violent crimes committed against pregnant women.
[462] "The case for pro choice participation in drafting fetal homicide laws" 2008 *Texas Journal of Woman and the Law* (*TXJWL*) 317 323- 324.
[463] Hickcox-Howard 2008 *TXJWL* 317 324.

The UVVA only applies to a specified list of federal crimes and does not apply to states.[464] The intention behind the Act is to bring the United States Code in line with other states that have foetal homicide laws, it is not intended that the UVVA will supersede existing state statutes.[465]

According to section 1841(a)(1), a person who causes the death of a "child who is in utero" at the time the conduct takes place will be guilty of a separate offence. Section 1841(2)(A), the perpetrator will receive the same punishment provided under federal law for that conduct had the injury or death occurred to the unborn child's mother. Section 1841(B)(i)(ii) states that this offence does not require proof that the perpetrator had knowledge or should have had knowledge that the woman was pregnant or that the defendant intended to cause death or bodily injury to the unborn child. However, section 1841(C) provides that if the perpetrator intentionally kills or attempts to kill the unborn child, the perpetrator will be punished as if he or she intentionally killed or attempted to kill a human being. The only limitation on the possible punishments that may be imposed is held in section 1841(D) where it is stipulated that the death penalty may not be imposed for the offence contained in section 1841.

Section 1841(c)(1) – (3) provides that section 1841 shall not be construed to permit the prosecution of any person for terminating a pregnancy where the consent of the mother has been obtained, for medically treating a pregnant woman or the unborn child or the prosecution of any woman with respect to her unborn child.

An unborn child is defined by section 1841(d) as a child in utero and a child in utero is defined as a member of the Homo Sapiens species at any stage of development that is carried in the womb.

5.4 Criticism of foetal homicide laws in the United States

[464] Bruchs 2004 *SYRLR* 133 139.
[465] Ibid.

As a starting point, the United States Supreme Court's decision in *Roe v Wade* will be discussed. Although this case deals with a woman's constitutional right to terminate her pregnancy, for purposes of criminal law, this case also explicitly sets out the scope of the state's interest in prenatal life. Further, *Roe* confirmed that a foetus is not a bearer of constitutional rights and accordingly, a foetus does not have a claim to the right to life.

Most of the criticism lobbied against foetal homicide laws relate to the fact that these laws breach the boundaries set in the *Roe* case relating to viability. Further, concern is raised by the fact that the relevant legislative provisions do not require intention on part of the perpetrator to terminate the pregnancy and that the provisions have been accused of creating the situation of attaching personhood to a foetus.

Most of the criticism discussed is directed at the UVVA and will mainly be discussed in light of the UVVA provisions. However, criticisms raised against state law will be considered and will be equally applicable to federal law where the relevant provisions are similar.

5.4.1 *Roe v Wade*

In *Roe*, the Supreme Court held that Texas laws prohibiting the termination of pregnancies at any stage of development of the foetus, except to save the life of a woman, are unconstitutional.[466] The court held that the due process clause of the Fourteenth Amendment protected a person's privacy rights against state interference which includes a woman's right to terminate her pregnancy.[467] The court also stated that a foetus has never been recognised in law as a person, and at most the courts have, in limited circumstances, viewed a foetus as a representative of the potentiality of life.[468]

[466] 708.
[467] *Roe* 708.
[468] *Roe* 731.

Working on a trimester framework, the court held that in the first trimester, the decision to terminate a pregnancy is the woman's decision alone.[469] However, the right to terminate a pregnancy is not absolute and as the pregnancy develops into the second trimester a state may only limit the decision to terminate if it is in the interests of the health of the mother.[470] The Supreme Court states that at the point of viability and onwards, the state's interest becomes sufficiently compelling to sustain the regulation of factors that govern the termination of pregnancies.[471]

The court found that a state has an interest in preserving and protecting the health of pregnant woman and a legitimate interest in protecting the potential life that the foetus represents.[472] Although these interests are separate and distinct each grows significantly as the woman approaches term and a compelling state interest develops. With regard to a pregnant woman, a state's interest becomes compelling once the pregnancy has reached the end of the first trimester since it is the courts submission that mortality in the early termination of a pregnancy is less than mortality in normal childbirth.[473] With respect to the state's compelling interest in the potentiality of life represented by the foetus, the interest is compelling once the foetus is viable because at this point, a foetus is capable of meaningful life outside the uterus.[474] Accordingly, if a state is interested in protecting the potentiality of life after viability, a state may go as far as prohibiting the termination of a pregnancy except when it is necessary to preserve the life or health of the mother.[475]

It is noteworthy that in *Planned Parenthood of Southern Pennsylvania v Casey*[476] the United States Supreme Court rejected *Roe's* trimester framework and found that the

[469] *Roe* 732.
[470] Ibid.
[471] *Roe* 727.
[472] *Roe* 731.
[473] *Roe* 732.
[474] Ibid.
[475] *Roe* 732.
[476] 505 US 833, 112 SCt 2791 (1992) 2799. A Pennsylvania statute placed restrictions on the right to terminate a pregnancy to the extent that a physician is required to give a woman information advocating childbirth over terminating a pregnancy in order to equip the pregnant woman to provide her informed consent and to wait at least 24 hours after the information has been given before the pregnancy may be

courts should rather employ the undue burden standard to protect the right to terminate a pregnancy, as recognised in *Roe*.

The Supreme Court found that a state has an interest throughout the pregnancy and to promote this interest, a state may take measures to ensure that a woman's choice in informed but these measures cannot place an undue burden on the woman's right to terminate her pregnancy. Moreover, the measures adopted in the Pennsylvania statute cannot be invalidated if the purpose is to persuade a woman to choose childbirth over the termination of her pregnancy, provided that the measures do not create an undue burden on the freedom to exercise her rights.[477] The court reaffirmed the sentiment of *Roe* and stated that a state cannot prohibit any woman from deciding to terminate her pregnancy before viability.[478]

The trimester framework is no longer applicable as a result of the decision of *Planned Parenthood* but the right to terminate a pregnancy as a privacy right and the distinction between viable and non viable foetuses as decided in *Roe* remains intact.[479]

Cook states that the common theme found in *Roe* and *Planned Parenthood* is that the courts must always weigh the interests of the state in protecting prenatal life against an individual's right to privacy.[480]

5.4.2 Criticisms

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terminated. The statute also required the physician to obtain parental consent regarding the termination of a minor's pregnancy and to ensure that a married woman has notified her husband of her decision to terminate her pregnancy. In terms of all termination procedures performed, physicians are further required to keep record of procedures.

[477] *Planned Parenthood* 2799.

[478] *Planned Parenthood* 2799. The requirements of informed consent, the 24 hour waiting period, the parental consent provision and recordkeeping requirements were found to not be an undue burden on the exercise of the right to terminate a pregnancy. However, the court found that the requirement of spousal notification was an undue burden and invalid.

[479] Tsao 1998 *HSTCLQ* 457 466.

[480] "From conception until birth: exploring the maternal duty to protect fetal health" 2002 *Washington University Law Quarterly* (*Wash U L Q*) 1307 1332.

At first glance, a number of issues can be identified with the UVVA.[481] The Act is extremely far reaching in the sense that a perpetrator need not be aware that the woman is pregnant or even have the intention to terminate the pregnancy or harm the foetus through the infliction of violence.[482] Further, viability of the foetus is irrelevant which contradicts *Roe* and creates a problem for the prosecution to prove causation.[483] These issues have been identified as fundamental flaws in the federal crime and criticism against the UVVA is extensive, especially in light of female reproductive rights entrenched by *Roe*.

5.4.2.1 Foetal viability

Viability as a prerequisite for criminal liability serves a dual purpose, it ensures that the relevant criminal provisions are in line with *Roe*'s constitutional specifications and it aids in establishing causation to the extent that it can be found that the perpetrator factually and legally caused the termination of the pregnancy as a result of his or her unlawful conduct.

5.4.2.1.1 Constitutional considerations of viability and the extension of personhood to a foetus

Foetal homicide laws that do not require foetal viability are accused of infringing a woman's constitutional right to terminate her pregnancy since states illegitimately begin to act on their interest in prenatal life before the foetus is capable of meaningful life outside the womb.[484] Pro choice activists are concerned that the courts may interpret the UVVA as a congressional declaration that a foetus is a person from the moment of conception which could lead to the demise of the *Roe* decision and termination of pregnancy rights.[485]

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[481] This statement is equally applicable to state laws where their criminal provisions are similar.
[482] Contrary to this approach, the state of Alabama requires that the perpetrator has the intention to cause the termination of the pregnancy, see 5.3.1.1.
[483] Contrary to this approach, the state of Indiana requires that a foetus is viable, see 5.3.1.1.
[484] Tsao 1998 *HSTCLQ* 457 470.
[485] Rosen "A viable solution: Why it makes sense to permit abortion and punish those who kill fetuses" 2003 *Legal Affairs* (*Legal Aff*) 20. Also see Holzapfel "The right to live, the right to choose, and The Unborn Victims of Violence Act" 2002 *Journal on Contemporary Health Law and Policy* (*J Contemp Health L & Pol'y*) 431 439 where according to the Planned Parenthood Association of America the UVVA

Those states that require a foetus to be viable in terms of foetal homicide laws assert that this requirement is dictated by the *Roe* decision.[486] These foetal homicide laws fall within the boundaries of *Roe* and are harmonious with the constitutional significance of foetal viability that once a foetus is viable and capable of meaningful life outside the mother's womb, the state's interest in prenatal life develops into a compelling interest and state interference with the exercise of female autonomy and in terms of limiting third parties' conduct, is logically and biologically justified.[487]

On the other hand, those states that do not require foetal viability argue that *Planned Parenthood* held that a state has a legitimate interest in prenatal life throughout the pregnancy and as long as the adopted protective measures do not cause an undue burden on the pregnant woman concerned the state is free to legitimately protect prenatal life.[488]

On the topic of foetal viability and female reproductive rights, Bruchs illustrates that by failing to distinguish between a viable and non viable foetus, the provisions of the UVVA collides with thirty years of established abortion laws.[489] Bruchs argues that despite the abortion exception contained in section 1841(c),[490] the UVVA expressly confers legal personhood to both pre viable and viable foetuses because the Act, in section 1841(d) defines an unborn child as a child in utero at any stage of development.[491]

Further, *Roe* recognised that a state has a compelling interest to protect potential life and that the word person does not include a foetus, consequently the termination of a pregnancy was never considered to be the termination of life.[492] However, the wording

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is solely designed with the intention to erode the foundation of *Roe* and the Act has shifted the focus away from violence against women to violence against a foetus as if it is a legally recognised person.
[486] Tsao 1998 *HSTCLQ* 457 467.
[487] Ibid.
[488] Tsao 1998 *HSTCLQ* 457 467.
[489] Bruchs 2004 *SYRLR* 133.
[490] See 5.3.1.
[491] Bruchs 2004 *SYRLR* 133 136.
[492] Bruchs 2004 *SYRLR* 133 143.

of the UVVA explicitly states that if through the perpetrators conduct, he or she "causes the death of ... a child in utero" which gives the impression that a person is murdered.[493]

The extension of legal personhood conflicts with termination of pregnancy laws in two ways. Firstly, the failure to distinguish between pre viable and viable foetuses is in direct contrast with the treatment of foetal interests as established in case law.[494] Secondly, granting legal personhood to a foetus is unprecedented in the history of federal abortion law and is incompatible with the existing definition of the term person which has remained unchanged since *Roe*.[495]

Further, Bruchs states that US abortion law requires a balancing act between life interests and liberty interests under the Fourteenth Amendment.[496] On the one hand the Supreme Court of America in *Roe* recognises a woman's right to privacy and her right to have an abortion as a protected liberty interest under the Fourteenth Amendment and on the other hand the court also recognises potential life of a foetus to be legitimately protected by the state.[497] The standard set out in Roe aids in reconciling the differences between the interests of women and the interest in potential life, and prevents a situation of including one interest at the expense of the other.[498] The balanced relationship is put at risk by the UVVA recognising a complete life interest in prenatal life which would force a court to choose one interest over the other.[499] When a court is faced with the situation of having to decide which interest is deserving of greater

[493] S1841(a)(1).
[494] Bruchs 2004 *SYRLR* 133 148
[495] Ibid. Bruchs (150) states that "there is a value judgement inherent in recognising a distinction between a pre-viable and a viable fetus. By allowing greater regulation and limitation of abortion subsequent to viability, the Court has in effect determined that the State's interest in protecting potential life has greater value at that stage, and may even supersede the liberty interests of women under the Fourteenth Amendment. Prior to that stage, however, the courts have recognized that the liberty interests of women have greater value, and has determined not to allow any regulations or limitations which will place an undue burden on these interests."
[496] Bruchs 2004 *SYRLR* 133 154.
[497] Ibid.
[498] Bruchs 2004 *SYRLR* 133 154. Bruchs refers to the *inclusio unius est exclusio alterius* principle, which is translated to mean to express or include one thing implies the inclusion of another.
[499] Bruchs 2004 *SYRLR* 154.

protection, the court would almost certainly take the necessary steps to protect the life interest.[500]

In order to avoid the possibility of including one interest at the expense of another, Bruchs recommends that the UVVA should distinguish between the treatment of pre viable and viable foetuses by redefining an unborn child as a viable foetus.[501] The wording of the Act should also be reconsidered and move away from separate victim and separate offence language and rather deal with this topic as crimes against pregnant women.[502]

Contrary to Bruchs position, Holzapfel argues that the fear of the demise of *Roe* in light of the UVVA is unfounded because the Act specifically exempts conduct related to the lawful termination of pregnancies and by doing so the Act has remained within the parameters of the *Roe* decision.[503] In addition, nothing in the UVVA can be interpreted as constituting an unfair burden on a woman's right to terminate her pregnancy but rather enforces her right of choice.[504]

Rosen questions whether there is a tension between foetal homicide laws and *Roe* and finds that foetal homicide laws reach a compromise in that states should be free to define a legal person from conception as long as a foetus is not considered to be a constitutional person in a way that would infringe on women's rights.[505] The author argues that it is not novel that a legal person does not have all the rights of a

[500] Bruchs 2004 *SYRLR* 133 154. See Alongi "The Unborn Victims of Violence Act and its impact on reproductive rights" 2008 *Washington and Lee Journal of Civil Rights and Social Justice* (*WLLCRSJ*) 285 292, where the author makes use of a hypothetical situation where two children exist, one is six and the other is three. "If you were forced to choose, which one of these children should die? Which child has the lesser rights and thus would be sacrificed?" Alongi states that it is not possible to choose between two human beings which one has a greater right. To change the facts of the hypothetical situation where there is a six year old child and a foetus, it cannot be accepted that the foetus has rights equal to that of the six year old child, or that the six year old child can be spared in favour of the foetus.
[501] Bruchs 2004 *SYRLR* 133 157.
[502] Ibid.
[503] 2002 *J Contemp Health L & Pol'y* 431 464.
[504] Holzapfel 2002 *J Contemp Health L & Pol'y* 431 465.
[505] Rosen 2003 *Leg Aff* 20 21.

constitutional person and cites a corporation as an example.[506] As legal persons, a corporation can own property, enter into contracts and be party to lawsuits, however, the corporation cannot invoke its legal status as an apparatus to restrict woman's right to terminate her pregnancy.[507]

Fitzpatrick states that state legislation dealing with foetal homicide laws that do not require foetal viability have survived constitutional challenges in light of *Roe*'s specifications because the courts have held that *Roe* never conferred any rights onto a third party to unilaterally terminate a pregnancy without the pregnant woman's consent.[508]

5.4.2.1.2 Viability and the role of causation in criminal law

Fundamental to criminal liability is the requirement that it must be proven beyond a reasonable doubt that the perpetrator's conduct caused the death of the victim.[509]

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[506] Ibid.

[507] Rosen 2003 *Leg Aff* 20 21. Bruchs (2004 *SYRLR* 133 156) disagrees with Rosen's position regarding constitutional persons and states that the distinction between a legal and constitutional person is easily blurred in the situation that includes a foetus and the comparison with a corporation is flawed. Bruchs states that it is inherently difficult to distinguish between a person under the law and a person under the constitution, especially with respect to the issue of terminating a pregnancy which prevents continued development. Comparing a non human entity with a foetus, as a developing human being, is a poor analogy.

[508] Fitzpatrick 2006 *Rutgers L Rev* 553 562. Fitzpatrick relied on the *Davis* decision and *State v Merrill* 450 N.W.2d 318 (1990).

[509] Tsao 1998 *HSTCLQ* 457 474. On the topic of extending personhood to a foetus *People v Kurr* 253 Mich App.133, 318 (2002) is relevant because this case gives an indication that viewing prenatal life as an individual live entity worthy of legal protection. The court extended the application of private defence to circumstance where a pregnant woman uses force to protect a viable or non viable foetus. The court justifies this extension by relying on foetal homicide laws. The court states that foetal homicide laws penalise conduct that causes harm to or terminates prenatal life, leading the court to conclude that a foetus is worthy of protection as a living entity as a matter of public policy. Discussing this decision, Estrada ("Defensive mechanisms: A father's right to defend the unborn" 2009 *Cardozo Journal of Law and Gender* (*Cardozo J L & Gender*) 617) argues that by implication private defence should also be available for soon-to-be fathers. The author states that private defence in the context of prenatal life must be examined within the framework of foetal homicide laws. Estrada argues that the advent of foetal homicide laws on both state and federal level signalled an ideological shift on legislative level which *Kurr* took into account. Prior to this ideological shift and introduction of foetal homicide laws, defendants were unsuccessful when the right to defend the foetus was raised. The author relies to two cases of *Ogas v State* 655 S.W.2d 322 323 (1983) and *People v Gaines* 292 N.E.2d 500, 502 (1973). In both these cases the pregnant women involved killed their partners in response to assault of threat of assault, private defence was raised and failed (Estrada 2009 *Cardozo J L & Gender* 617 618). In Ogas the defence failed because the foetus was not a person born alive and in Gaines the pregnant woman failed to establish that she had a right to kill in her own defence (Estrada 2009 *Cardozo J L & Gender* 617 619-620).

Given the inherent fragility of prenatal life before viability, it is arguable that proving causation would be impossible.[510] A non viable pregnancy is wrought with uncertainties; many women face spontaneous abortions due to a number of factors, including genetic or developmental defects in the foetus, uterine abnormalities, maternal trauma, illnesses, substance abuse or the presence of toxins in the foetal or maternal environment.[511] If any of these factors are present, it is questionable whether it can be successfully proved that the perpetrator's conduct caused the termination of the woman's pregnancy.

In addition, those cases where the pregnancy terminates hours after contact with the perpetrator, it will be difficult to prove that the termination of the pregnancy was not a result of natural complications,[512] that is, that the inherent fragility of the non viable foetus was a *novus actus interveniens*.

In *People v Davis* the Supreme Court of California found that killing a foetus, whether viable or not, constituted murder provided it developed beyond embryonic stage.[513] The defendant, during the course of a robbery, assaulted a 23 – 25 week pregnant woman by shooting her in the chest, the woman survived but a day later gave birth to a still born child.[514]

Dissenting with the majority, Mosk J states that including a non viable foetus in the definition of murder raises difficult questions of causation.[515] Even though a felony murder does not require proof of a strict causal relation between the felony and the killing, at least some act of the defendant during the commission of the felony must have been a substantial factor contributing to the death of the foetus.[516] The problem with a non viable foetus and causation is a medical reality since, by lowering the

[510] Ibid.
[511] Tsao 1998 *HSTCLQ* 457 473.
[512] Ibid.
[513] 7 Cal.4th 797 (1994).
[514] 800.
[515] *Davis* 840.
[516] Ibid.

required gestational age of the foetus to seven weeks, the majority overlook the fact that the more immature the foetus, the more likely it is to die by spontaneous abortion.[517] Mosk J states that the incidence of spontaneous abortion is generally believed to be 15 – 20% of all pregnancies, however substantial numbers of spontaneous abortions are unreported or are very early and subclinical[518] and are estimated to be as high as 50 – 78% of all pregnancies.[519]

Accordingly, the mere fact that a foetus spontaneously aborts itself after being attacked by the perpetrator does not mean that the perpetrator's action was a substantial factor in cause the termination of the pregnancy.[520] Mosk J states that the prosecutor may mislead the jury into convicting the perpetrator of foetal murder without establishing causation with certainly.

Kole states that the force of Mosk J's argument may be compromised by medical advancements that can show, with conclusive results, the origin of the termination of the pregnancy. [521]

Bearing all these developmental factors in mind, viability illustrates that a foetus is capable of independent meaningful life and this should logically be the starting point concerning the criminalisation of third party foetal violence. For evidentiary purposes, a post mortem can conclusively illustrate that the foetus was viable and pregnancy was terminated as a result of the perpetrators conduct.

5.4.2.2 Intention

[517] *Davis* 840.
[518] Subclinical relates to the stage of development of a disease before any symptoms occur. See http://wordnetweb.princeton.edu/perl/webwn?s=subclinical (accessed 17 September 2010). In the case of an early pregnancy, the pregnancy is spontaneously aborted before the woman knows she is even pregnant.
[519] *Davis* 841.
[520] Ibid.
[521] "Recent developments: The Unborn Victims of Violence Act" 2002 *Harvard Journal on Legislation* (*Harv J on Legis*) 215 232.

In terms of section 1841(B)(i) and (ii) of the UVVA, the prosecution need not prove that the accused, while committing a federal crime, had knowledge or should have had knowledge that the victim of the underlying federal offence was pregnant or that the accused even intended to cause the termination of the pregnancy.

In order to successfully prosecute the perpetrator, the common law doctrine of transferred intent becomes applicable and lack of knowledge of the pregnancy will not succeed as a defence.[522] Under the doctrine of transferred intent, a perpetrator who intends to kill one person but instead kills another "is deemed to be the author of whatever kind of homicide would have been committed had he killed the intended victim."[523]

Accordingly, when a perpetrator commits a crime against a pregnant woman and as a result terminates her pregnancy, the unlawful intent is transferred from the pregnant woman to the foetus.[524] Once the doctrine of transferred intent has been established it is necessary to prove beyond reasonable doubt that the woman was pregnant and the perpetrator's criminal conduct directly caused the harm.[525]

At state level, foetal homicide laws that do not require knowledge that the victim was pregnant have been attacked as unconstitutionally vague and fail to give the perpetrator fair warning.[526] This argument has been rejected by the courts on the grounds of transferred intent and Fitzpatrick asserts that the vagueness challenge should fail but

[522] Jolicoeur-Wonnacott 2000 *T M Cooley L Rev* 563 567.
[523] Ibid. See Sepinwall "Defense of others and defenseless 'others'" 2005 *Yale Journal of Law and Feminism* (*Yale J L & Feminism*) 329 340 where the author argues that the transferred intent doctrine presupposes that the intended and unintended victims are of equal moral worth and it therefore makes sense to transfer intent from one victim to the other. Therefore, the doctrine presumes that the unintended victim is the sort of victim contemplated by the criminal code. Accordingly, the UVVA's provisions suggest that there is a moral equivalence between the pregnant woman and the foetus. This argument is complimentary to the criticisms raised in 5.4.2.1 concerning the extension of legal subjectivity to a foetus.
[524] Jolicoeur-Wonnacott 2000 *T M Cooley L Rev* 563 567.
[525] Ibid. South Africa does not apply the doctrine of transferred intent, see chapter six.
[526] Fitzpatrick 2006 *Rutgers L Rev* 553 562. According to Fitzpatrick a state criminal statute will be stuck down for being unconstitutionally vague if it fails to define the criminal offence with "sufficient definiteness" that ordinary people understand what conduct is prohibited and defined in a manner that does not encourage arbitrary and discriminatory enforcement.

lack of notice is a valid argument against any deterrent effect these statutes are intended to have.[527]

An example of the application of transferred intent can be found in the decision of the Supreme Court of California in *People v Taylor* where the defendant was found to be liable for second degree implied malice[528] murder of a foetus even in the absence of evidence that he knew that the woman he killed was pregnant.[529] The defendant, after a history of subjecting the victim to domestic violence, shot the victim in the face and as a result of her death, the 11- 13 week old foetus also died.[530] The court held that when a defendant commits an act and the natural consequences of that conduct are dangerous to human life, with conscious disregard for life in general, he or she acts with implied malice towards those victims who die and there is no requirement that the defendant must have known of the existence of each victim.[531]

Tsao discusses the implication of the felony murder rule[532] in those cases where state statutes that do not require the perpetrator to be aware that the victim is pregnant and where unlawful termination of prenatal life is defined as murder.[533] Under the application of these provisions, should a perpetrator cause the termination of a woman's pregnancy while committing a felony the perpetrator's conduct may qualify as murder and as a result of the application of the felony murder rule, the perpetrator may face punishment of life imprisonment without the possibility of parole or even the death penalty.[534] The

[527] Fitzpatrick 2006 *Rutgers L Rev* 553 562.
[528] The court states the malice is implied when the killing results from an intentional act, the natural consequences are dangerous to human life and the act was deliberately performed with the knowledge of danger to life and conscious disregard for human life. At 867.
[529] 32 Cal.4th 863. Also see Fitzpatrick 2006 *Rutgers L Rev* 553 562 n 63.
[530] *Taylor* 866.
[531] *Taylor* 868.
[532] The felony murder rule is rule of criminal statutes which provide that any death which occurs during the commission of a felony is first degree murder and all participants in the felony or attempted felony can be charged with and found guilty of murder, even if the murder was accidental. See http://legal-dictionary.thefreedictionary.com/felony+murder+doctrine (Accessed on 11 October 2010). Citing *Davis* as authority, Tsao (1998 *HSTCLQ* 457 474) states that this rule applies to a variety of unintended homicides resulting from reckless behaviour, ordinary negligence, pure accidents, it embraces both calculated conduct and acts committed in panic or rage, or as a result of mental illness, drugs or alcohol and it punishes consequences that are highly probable, conceivable probable or completely unforeseen.
[533] 1998 *HSTCLQ* 457 474.
[534] Tsao 1998 *HSTCLQ* 457 474.

possible punishment that follows is disproportionate and may constitute cruel and unusual punishment in terms of the Eighteenth Amendment. [535]

In *Davis*, Mosk J, dissenting from the majority, states that this rule is controversial without the added dimension of making a foetus the victim of murder and if criminal intent lies at the base of the criminal justice system then the felony murder rule with its harsh consequences will be constitutionally challenged especially if the defendant didn't intend to terminate the pregnancy or did not even know the pregnancy existed.[536] The severity of this principle will be extensive if under the relevant statute foetal viability does not play a role because the felony murder rule will make such conduct a capital offence for even an invisible victim.[537]

5.4.2.3 Determining the correct victim in cases of violence against pregnant women

To illuminate the fact the foetal homicide laws have fallen off their intended track of tackling violence against pregnant woman, Tsao quotes an argument made by Wayne Johnson who is a strong supporter of foetal homicide laws,

> Why should society punish someone who kills a fetus against the mother's will? To ask the question is to answer it: because it is against the mother's will. That is, the protected interest is the mother's will, not the life of the fetus ... [Feticide laws] simply preserve the right of a pregnant woman to control the outcome of her pregnancy ... It protects pregnancy termination prerogatives ... By giving one individual the right to unilaterally end the existence of another human being (fetus or child) for any reason, we cannot say that the latter has any independent value.[538]

[535] Ibid.
[536] *Davis* 7 Cal.4th 797 (1994) 838.
[537] *Davis* 837.
[538] Tsao 1998 *HSTCLQ* 457 470.

Tsao submits that Johnson's argument is not entirely correct because foetal homicide laws are criminal statutes and perpetrators are prosecuted for ending prenatal life and not for depriving a woman of her reproductive choice.[539]

As an alternative to the approach adopted by the UVVA, Fitzpatrick suggests that the focus should be placed on harm caused to the pregnant woman alone, rather than directly on the foetus.[540] Focusing on the pregnant as the victim avoids the possibility of granting a foetus legal status and there will be no need to re-determine when life begins in order for the foetus to be regarded as a victim.[541]

An alternative considered by Fitzpatrick is the Bill introduced in 2003, the Motherhood Protection Act of 2004 which focuses on establishing a criminal offence of causing harm to a pregnant woman.[542] Section 2(a) states that whoever engages in any violent or assaultive conduct against a pregnant woman resulting in the conviction of the perpetrator for a violation of any section provided for in subsection (c),[543] and causes an interruption to the normal course of the pregnancy resulting in prenatal injury or termination of a pregnancy will face further punishment in addition to that imposed in terms of subsection (c). The perpetrator can be sentenced to payment of a fine or imprisonment for not more than 20 years, or both.[544] However, if the conduct causes the termination of a pregnancy, the perpetrator could face a fine or any term of imprisonment including life imprisonment.[545]

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[539] Ibid.
[540] Fitzpatrick 2006 *Rutgers L Rev* 553 578.
[541] Ibid.
[542] Fitzpatrick 2006 *Rutgers L Rev* 553 578. Another alternative is the Enhanced Sentencing for Crimes Against Pregnant Woman Act of 2004. Sepinwall (2005 *Yale J L & Feminism* 329 347) states that this Act was to provide an appropriate sentencing enhancement when a crime is committed against a pregnant woman which causes bodily injury or her death. This is not considered to be an appropriate alternative to the UVVA since it does not specifically tackles third party violence that as a consequence terminates prenatal life.
[543] All the listed sections relate to federal crimes, similar to the approach taken by the UVVA. See Alongi 2008 *WLLCRSJ* 285 293.
[544] S2(b)(1).
[545] S2(b)(1).

Hickcox-Howard states that one of the reasons why the attempt to substitute the Motherhood Protection Act for the UVVA failed is because there was concern that someone who assaulted a pregnant woman and caused the termination of her pregnancy, would not be punished harshly enough because the attack on the pregnant woman did not result in the pregnant woman's death.[546] Additionally, even though a woman grieves over the loss of the prospect of a child and not over the loss of a child, "culturally the message is often that the mother has experienced her baby's death" and this loss demands a state response which is on par with the state's response to murder.[547] Another reason forwarded for the failure of the Motherhood Protection Act is that it considered the woman as the only victim and this approach would strip the law of its ability to provide dignity to victims, including unborn victims.[548]

Alongi discusses the differences between the UVVA and the Motherhood Protection Act and states that the distinguishing factor between the two relates to the issue regarding who are the victims of this crime.[549] The UVVA identifies two victims: a foetus at any stage of development and the pregnant woman, whereas the Motherhood Protection Act does not create a two victim crime. The Motherhood Protection Act encompasses two crimes as with the UVVA but it provides that both crimes are committed against the pregnant woman only.[550] The two crimes committed against the pregnant woman are the underlying federal crime and the interference with her constitutional right to choose, which is to carry her pregnancy to full term without any third party interference.[551] As a result of this approach, the Motherhood Protection act has successfully steered away from providing a foetus with any kind of legal personhood to the extent that the Act does not even mention any legal subject other than the pregnant woman.[552]

Recognising that a foetus is not a person, alternatively, a constitutional person, the UVVA, and all other similar state laws are fundamentally flawed by regarding a foetus

[546] 2008 *TXJWL* 317 326.
[547] Hickcox-Howard 2008 *TXJWL* 317 326.
[548] Ibid.
[549] 2008 *TXJWL* 285 294.
[550] Alongi 2008 *WLLCRSJ* 285 294.
[551] Ibid.
[552] Alongi 2008 *WLLCRSJ* 285 294.

as a completely separate victim of crime. Violence against pregnant women should be addressed with regard to the pregnant woman as the victim and the loss of a pregnancy is her loss and must be remedied through her, rather than bypassing her.

5.5 Conclusion

Holistically, third party foetal violence in the United States is a complex maze of legal principles and statutory provisions that vary from one jurisdiction to the next.

The divergent approaches adopted by various states and the federal government, albeit complex, successfully illustrate the wide range of possible solutions that could be used by South Africa for purposes of law reform in order to deal with third party foetal violence that terminates prenatal life.

For purposes of clarity, the various possibilities can be delineated into the following:

a) Murder without the requirement of foetal viability
b) Murder with the requirement of foetal viability
c) Feticide without the requirement of foetal viability
d) Feticide with the requirement of foetal viability
e) Violence against pregnant woman where foetal viability is not an element and the severity of the punishment depends on whether the pregnancy is terminated as a result of the unlawful conduct.

To ascertain the legitimacy of each of the approaches to tackling third party foetal violence, all the listed options will be critically analysed. This analysis will be guided by the criticisms raised against foetal homicide laws which were discussed in this chapter.

Before moving on to the analysis, it needs mentioning that the criticisms are considered to be justified to the extent that each author has relied sound legal principles and case law where necessary. The criticisms lobbied against foetal homicide laws are highly beneficial to this research because they are based on actual laws in place with an *ex post facto* element in the sense that the authors can look back and critically review the

effectiveness of foetal homicide laws. Collectively, the criticisms play a significant role in illustrating whether or not the foetal homicide provision legitimately deals with third party foetal violence in light of constitutional principles set out in *Roe*.

After examining the criticisms raised against foetal homicide laws a legitimacy test has been devised to test the effectiveness of the foetal homicide provisions to legitimately address third party foetal violence in light of established legal principles in the United States. In order to pass the legitimacy test, the foetal homicide provision cannot grant a foetus legal status in order to avoid infringing on female reproductive rights. Consequently, a foetus cannot be the victim because victimhood presupposes personhood and viability must be a definitional element for purposes of proving causation and to ensure that the provision falls in line with the state interest described in *Roe*. Intention to terminate the pregnancy is not fundamental to this test since the transferred intent doctrine is applicable in the United States.

Critically analysing the legitimacy of the foetal homicide provisions with the aid of the test set out, it will be demonstrated that all options listed above fail, mainly because the provisions grant a foetus personhood.

In the case of murder where foetal viability is not a requirement, the legitimacy test is failed because a foetus is granted personhood consequently infringing on established female reproductive rights. It further fails the legitimacy test with respect to the requirements of causation. Even in cases where the definitional elements of murder require foetal viability, the test is failed because the foetus is the victim of the crime resulting in the extension of personhood. This conclusion is defensible especially when considering the definition of murder where a foetus is included, words like “person” and “unborn child” are used to describe a foetus.[553]

Feticide fails the legitimacy test for the same reasons specified under murder. Whether viability is required or not, feticide regards the foetus as the victim of the crime, giving it

[553] See the Alabama and New York Codes. See 5.3.1.1.

legal status.[554] Even if foetal viability is included as an element of the crime for purposes of proving causation, the provision would still fundamentally flawed because it considers the foetus as a victim.

As stated by Tsao, under foetal homicide laws in the United States a perpetrator faces criminal liability for terminating prenatal life through the infliction of violence and not because he or she infringed on the pregnant woman's reproductive rights.[555]

Dealing with third party foetal violence from the perspective of violence against women, as an infringement of her reproductive rights, assists in moving away from considering the foetus as the victim.[556] This stance does not jeopardise the state's ability to act on its interest in prenatal life and the state can achieve the same result it would have under foetal homicide laws but through another avenue. However, for purposes of passing the legitimacy test, foetal viability must be a definitional element in order for the provision to accurately conform with *Roe's* principles and for purposes of proving causation.

The analysis of the United State's position regarding third party foetal violence highlighted the key role that legal subjectivity and female reproductive rights play when considering statutory law reform to address this topic. Initially is was believed that if law reform were to take the form of a statutory enactment all constitutional issues regarding the right to life and female reproductive rights could easily be avoided. The study on the United States has demonstrated that this is certainly not the case. However, for purposes of law reform in South Africa, it will only be possible to reach any convincing conclusion once the principles found in the United States have passed the tests required by the South African Constitution.

Considering how to legitimately bring about law reform in South Africa, it is clear that foetal viability, personhood extending to a foetus and female reproductive rights must all

[554] See the position in Louisiana stated in 5.3.1.2 where a foetus is also defined as an "unborn child".
[555] Tsao 1998 *HSTCLQ* 457 470. See 5.4.2.2.
[556] The Motherhood Protection Act is an example of this approach.

form part of identifying a workable solution in the context of the Constitution and current criminal law principles.

CHAPTER SIX Law reform: Criminalising third party foetal violence in South Africa in light of the position in the United States

6.1 Introduction

The intention of the research is to determine whether it is possible to protect a developing foetus from harm. In line with this approach all efforts in the previous chapters were foetus orientated: A state interest in prenatal life had to be established, the extent of the state's interest had to be determined and when the interest actually vested in prenatal life. However, the research on the position in the United States, has demonstrated that any law reform solely based on the foetus as a separate entity from

the pregnant woman will not be feasible since this will grant the foetus personhood which this study aims to avoid.

It is not the purpose of the research to introduce controversy around reproductive rights and the right to life, as has occurred in the United States. Rather the purpose for proposing law reform is to introduce a legally sound statutory crime that prevents the termination of a pregnancy through the infliction of third party violence without disturbing the established legal principles. The research aims not at extending legal subjectivity to a foetus of any gestational age, but rather explores whether there are means available to offer protection to a developing foetus without having to take the route of giving it a claim to constitutional rights.

Looking at the United States and critically evaluating the purpose, role and consequence of the UVVA, the research has shown that law reform cannot focus on protecting a foetus alone since it is not a legal person and cannot qualify as a victim of crime. There are less radical means to achieve the desired result of law reform without having to develop a whole new class of possible victims, or extending personhood, or to go so far as to redefine the moment of life as the fertilization of a human egg.

In light of the United States position, chapter six is aimed at showing that it is not feasible for South Africa to introduce foetal homicide laws similar to those in United States. It has already been established that the crime of murder in South Africa cannot be extended to include a foetus; this will therefore not be discussed here. This chapter will focus on showing that the Unites States approach does not offer a workable solution for law reform in South African in the context of state interest in prenatal life, culpability and causation, with reference to the Constitution, legislation, case law and the common law. The federal law is used as a representation of foetal homicide laws in the United States; however, the discussion is equally applicable to state law where there is a similarity in the provisions.

Inadvertently, female reproductive rights provide the solution to circumstances found in the *Mshumpa* case. Although reproductive rights are the limiting factor to foetal victimhood or personhood, such rights are also the key element in justifying state intervention where a pregnancy is terminated as a result of third party violence. It is not the UVVA with its far reaching provisions that offers an acceptable solution but rather the Motherhood Protection Act. A continued pregnancy is a conscious decision to bear children, it amounts to a woman exercising her reproductive rights and where a pregnancy is terminated as a result of unauthorised conduct it amounts to an infringement of her constitutional right to self determination. From this point of view third party foetal violence can receive sufficient legal support to justify law reform.

6.2 Rejection of the UVVA[557]

It will be demonstrated that the UVVA and similar state laws do not offer a solution to cases like *Mshumpa*. In fact, all foetal homicide laws that either refer to a foetus as the

[557] South Africa will not be the first country to reject the notion of law reform similarly embodied as the UVVA. In Canada Bill C-484, the Unborn Victims of Crime Act is strongly opposed by pro choice organisations for substantially the same reason why the UVVA is criticised in the United States. The Unborn Victims of Crime Act proposes to amend the Canadian Criminal Code and was introduced in 2007 but is yet to be passed. In terms of s238.1 the Bill proposed that the Criminal Code be amended by adding that every person who directly or indirectly causes the death of a child during birth or at any stage of development before birth while committing or attempting to commit an offense against the mother of the child, who the perpetrator knows or ought to know is pregnant. The perpetrator will be guilty of an indictable offence if he or she means to cause the child's death or injure the child or mother that the person knows is likely to cause the child's death and is reckless as to whether death ensues or not. Further, the Bill stipulates that the claim that the child is not a human being is not a valid defence under this Act. The Bill concludes with excluding lawful termination of a pregnancy and any act or omission by the pregnant woman. Generally, criticisms raised against the Bill are indistinguishable from those raised against the UVVA. See Abortion Rights Coalition of Canada 2008 "Talking points against the 'Unborn Victims of Violence Act'" http://www.arcc-cdac.ca/action/unborn-victims-act.htm (accessed 20 October 2010); Public Service Alliance of Canada 2008 "Oppose Bill C-484! Stand up for a woman's right to choose. Protect women's equality rights" http://psac.com/documents/issues/c484_fact_sheet-e.pdf (accessed 20 October 2010). Both organisations are pro choice organisations trying to lobby support to have the Bill thrown out and in each instance both organisation list a number of reasons why the Bill should not be accepted to amend the Criminal code. The Bill is accused of granting a foetus personhood because a foetus is considered to be a child at any stage of development and is considered a human being. This extension of personhood introduces a conflict with termination laws and creates an adversarial relationship which would require one interest to be preferred over another. Further, the Unborn Victims of Violence Act does not deal with domestic violence issues or protect the women who are better positioned to protect their pregnancies, instead is focuses on the foetus and whether it is a victim of crime or not. The Unborn Victims of Crime Act is considered to be a "feel good" Bill designed to satisfy emotional needs for punishment and vengeance and instead of being driven be sound legal principles applied by objective role players, the victim's families are those who seem to determine legal remedies.

victim of crime, that do not require a foetus to be viable or to go so far as not even requiring the perpetrator to intend to terminate the pregnancy will not hold any ground under the South African constitutional regime.

6.2.1 State interest in prenatal life

It has been established that in terms of section 12(2)(a) and (b) of the Constitution, the Choice Act and *Christian Lawyers* 1 and 2 collectively, the state has a legitimate interest in viable prenatal life and that this interest is sufficient enough to limit female reproductive rights as the pregnancy progresses to full term.[558]

The fact that the UVVA takes effect from the moment of conception will prove fruitless in South Africa, since the state does not have an interest in prenatal life prior to viability. This is very clear from section 2(1)(a) and (b)(iv) of the Choice Act where it states that during the first 12 weeks a pregnancy may be terminated at the request of the pregnant woman and where the pregnancy has progressed passed 13 and up to 20 weeks the pregnancy may still be terminated if the continued pregnancy will significantly affect the social or economic circumstances of the woman. There is noticeably a lack of a state interest in prenatal life prior to viability and it would be hard to justify criminalising conduct that terminates a pregnancy before the state even has an interest in the foetus.

6.2.2 Culpability

In South Africa transferred intent takes the form of the doctrine of *versari in re illicit* and concerns the following: If the person engages in an unlawful activity, he or she will be criminally liable for all consequences following from that activity, regardless of whether he acted intentionally or negligently in respect of the consequences.[559] However*, S v Bernardus* rejected this doctrine since it was in conflict with the requirement of culpability.[560] The principle of culpability is the blameworthiness of an accused; it

[558] See ch 4 4.4.
[559] Snyman (2002) 148. This doctrine is also known as the taint doctrine.
[560] 1965 (3) SA 287 (A). Prior to this decision culpable homicide was defined as the unlawful causing of another person's death, without any culpability. Due to the fact that the doctrine of transferred intent is not applicable in South Africa, the legitimacy test set out in 5.5 must be adapted to include the requirement of intention.

presupposes freedom of will and includes intention or negligence.[561] Further, the perpetrator's intention or negligence must be present at the time of the unlawful act.[562]

In addition, a person's liberty rights are relevant here. According to section 12(1)(a) a person may not be deprived of their freedom arbitrarily or without just cause. The requirement of just cause embodies substantive protection and Bishop and Woolman state that any deprivation of freedom must be in accordance with the basic tenets of the legal system.[563]

The primary purpose of section 12(1) of the Constitution is to protect a person's physical liberty and unwarranted intrusion by the state.[564] According to Currie and de Waal, essentially, this section protects people from physical restraints of imprisonment or detention and although this section offers protection in a limited area, its protection is comprehensive.[565] Section 12(1) offers substantive and procedural protection: Substantive protection requires the state to have good reason for depriving a person of their freedom and the procedural component requires deprivation to take place in accordance with fair procedure.[566]

Currie and de Waal state that it should be asked whether the grounds upon which freedom has been limited are acceptable with regard to the requirement of "just cause" which must be read in light of the values of the Constitution's founding principles and gathered from the Constitution as a whole.[567]

Ramraj argues that substantive due process is concerned with the substantive content of criminal law and deals with conduct criminalised by the state.[568] Substantive due

[561] Snyman (2002) 145-146. Snyman states that freedom of will must be interpreted as a human being's ability to control the influences which his impulses and environment have on him or her and that he or she is able to direct the course of his or her life.
[562] Snyman (2002) 147. Snyman describes this requirement as the principle of contemporaneity.
[563] In Woolman *et al* (2006) 40-38.
[564] Currie and de Waal *The Bill of Rights handbook* (2005) 292.
[565] (2005) 292.
[566] Currie and de Waal (2005) 292.
[567] (2005) 296.
[568] "Freedom of the person and the principles of criminal fault" 2002 *SAJHR* 225 231.

process may also be used to limit the criminal law to the extent that it can be used to impose constraints on culpability requirements, whatever the substantive content of the law may be.[569] This is referred to as the criminal fault branch of substantive due process.[570] Accordingly, section 12(1)(a) allows the constitutional court to scrutinise the fairness of fault requirements imposed by criminal law.[571]

Ramraj argues that O´Regan J in *S v Coetzee*[572] expanded the substantive protection of section 12(1) to include a "constitutional doctrine of criminal fault."[573] *Coetzee* dealt with section 332(5) of the Criminal Procedure Act 51 of 1977. This section permits directors and servants of companies to be punished where the state has established that the company is guilty of an offence and a director or servant of the company has failed to satisfy the court on a balance of probabilities that he or she did not participate in the offence and could not have prevented the commission of the offence. O´Regan J states that this raises two constitutional issues: Whether it is constitutionally legitimate for parliament to impose criminal liability on directors or servants under section 332(5) and whether it is legitimate for parliament to impose a reverse onus on the accused.[574] These are two separate questions and raise two different aspects of freedom, firstly, it relates to the reasons for which the state may deprive someone of freedom and secondly it relates to the manner in which that person's freedom is deprived.[575]

Dealing with these questions, O´Regan states that the Constitution recognises that the state may not deprive its citizens of freedom for reasons that are not acceptable and in cases where freedom is limited for acceptable reasons; the state must only do so in a manner that is procedurally fair.[576] Accordingly, the Constitution limits the reasons for

[569] 2002 *SAJHR* 255 231.
[570] Ibid.
[571] 2002 *SAJHR* 255 231.
[572] 1997 (1) SACR 379 (CC).
[573] 2002 *SAJHR* 255 237.
[574] *Coetzee* 473C-D. The focus of this discussion will be the first question concerning the constitutional legitimacy of parliament imposing criminal liability without the presence of culpability.
[575] *Coetzee* 473D.
[576] *Coetzee* 473F.

which the legislature may deprive a person of their freedom and the manner in which it is done.[577]

To determine whether section 332(5) of the Criminal Procedure Act is in breach with section 11 of the Interim Constitution, the court is required to look at the provision as a whole to determine the circumstances in which a person's freedom is limited.[578] At common law, criminal liability will only attach to an accused if there has been unlawful conduct and fault (*mens rea*).[579] The fault requirement is generally met by proof of intent or negligence.[580] The state's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment; this is the core of criminal law.[581]

Going further, culpability does not have to be in the form of direct intent and the law has recognised that even negligence can give rise to criminal liability.[582] O´Regan held that "it is only when the legislature has clearly abandoned any requirement of culpability or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge."[583]

Placing the South African principles relevant to culpability, in the context of the United State's federal foetal homicide laws, a perpetrator would need to be aware of the pregnancy and have an intention to terminate the pregnancy through the infliction of violence on the pregnant woman.[584] Consequently, the fact that the UVVA does not require the intention to terminate a pregnancy makes the application of this provision impossible in the context of South African criminal law.

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[577] *Coetzee* 438A.
[578] *Coetzee* 438G.
[579] 438I. This principle stems from the maxims *actus non facit reum nisi mens sit rea* and *nulla poena sine culpa*.
[580] *Coetzee* 438I.
[581] *Coetzee* 439A.
[582] *Coetzee* 443A.
[583] *Coetzee* 443C.
[584] All forms of intention will be relevant here, namely *dolus directus*, *dolus indirectus* and *dolus eventualis*. See ch 2 2.3.2.2 concerning the discussion on the requirement of intention.

6.2.3 Causation

In order for criminal liability to attach it is a prerequisite that the perpetrator was aware and intended to cause the termination of the pregnancy as a result of his or her unlawful conduct.[585] The fact that the UVVA attaches criminal liability for terminating a foetus prior to it having reached the stage of viability is inconsistent with the accused's right to be presumed innocent in terms of section 35(3)(h) of the Constitution.

According to Currie and de Waal, the recognition for the presumption of innocence is necessary to reduce the possibility of wrongful convictions and it finds expression in the reasonable doubt standard.[586] The reasonable doubt places the burden of proof on the prosecution to prove the accused's guilt beyond a reasonable doubt.[587]

Schwikkard states that the rationale for the presumption of innocence concerns protecting individuals rights from the potentially coercive authority of the state and also includes policy considerations that maintain the legitimacy of the criminal justice

[585] See ch 2 2.3.2.3 for the discussion concerning factual and legal causation and its role in establishing criminal liability. See *S v Thebus* 2003 (2) SACR 319 (CC) where the court finds that the doctrine of common purpose is not unconstitutional. In this case the appellants were convicted on one count of murder and two counts of attempted murder. In convicting the appellants, the trial court applied the doctrine of common purpose. The appellants appealed to the constitutional court on the basis that the common purpose doctrine does not require a causal connection between their actions. The appellants argue that the common purpose doctrine must be developed in terms of sec 39(2) of the Constitution to the extent that the doctrine would require that the action of an accused must be shown to have facilitated the offence at some level. Facilitation would occur when the act of the accused is a contributing element to the criminal result. The court states that under South African law, a prerequisite for criminal liability is the existence of a causal nexus between the conduct of the accused and the criminal consequence. However, the common purpose doctrine dispenses with the causation with the object to criminalise collective criminal conduct and satisfy the need to control crime committed as a joint activity. The court held that if the accused actively associated with the conduct of the group that caused the criminal consequence and that the accused had the required intention in respect of that unlawful consequence, the accused will be guilt of an offence. The court held that a causal nexus is not always a definitional element of every crime and the mere exclusion of causation is not fatal to a criminal norm. Conduct constitutes a crime because that is what the law declares it to be. In line with a constitutional democracy, an authorised legislative body may create new criminal provisions to protect the public's interest. Criminal norms will vary from one society to another depending on the community's convictions on what is harmful and worthy of punishment in the context of the community's social, economic, ethical, religious and political influences. All statutory and common law crimes must fall in line with the principles of the Constitution and provided that the limitation of the accused rights does not amount to an unjustifiable limitation, the removal of a causal nexus will not be fatal to the criminal norm.
[586] (2005) 747.
[587] Ibid.

system.[588] Schwikkard asserts that it is the likelihood of an erroneous conviction that threatens the legitimacy of the criminal justice system and weakens the normative value of criminal law.[589] Placing the burden of proof on the prosecution will keep the frequency of wrongful convictions within tolerable parameters.[590]

In the context of proving that the accused caused the termination of a pregnancy beyond reasonable doubt, foetal viability plays a key role. Sarkin-Hughes discusses foetal viability in connection with brain birth.[591] Brain death is indicative of the end of life and Sarkin-Hughes questions whether brain birth should be the indication of the presence of life.[592] In order for the brain to operate as a functioning organ, neocortical activity is essential because neocortex cells must be developed for thought, emotion and consciousness to occur.[593] At around 24 weeks of gestation, the dendritic spines[594] appear which are essential for brain circuitry and from roughly 19 weeks gestation neural connectors between brain cells also occurs.[595] At roughly 22 weeks gestation thalamocortical[596] connections develop which are essential for neocortical reception of bodily sensation.[597] Accordingly, Sarkin-Hughes states the 22 weeks gestation is important from a brain birth perspective.

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[588] "The presumption of innocence: What is it?" 1998 *SACJ* 396 407.
[589] 1998 *SACJ* 396 407.
[590] 1998 *SACJ* 396 407-408. Also see Paizes ("A closer look at the presumption of innocence in our Constitution: What is an accused presumed to be innocent of?" 1998 *SACJ* 409 419) where the author looks at the presumption of innocence in the context of statutory crimes that house strict liability or reverse onuses. The author relying on the *Coetzee* case states that if the formulation of a statutory provision permitted an accused to be convicted despite the existence of reasonable doubt would infringe on the accused's right to be presumed innocent.
[591] Sarkin-Hughes 1993 *THRHR* 83 88. This article discusses the point at which it can be accepted that the South African government may protect prenatal life in the context of termination of pregnancy laws. Brain birth is defined by Sarkin-Hughes as the presence of brain activity.
[592] Sarkin-Hughes 1993 *THRHR* 83 88. Although Sarkin-Hughes uses the term life, the author prefers to brain activity to be an indication of the presence of prenatal life and not life in the legal sense of the word.
[593] Sarkin-Hughes 1993 *THRHR* 83 88.
[594] Dendritic spines are short outgrowths of neurons that relay electrical impulses to the brain. See http://www.google.co.za/search?hl=en&rlz=1W1PCTC_en&defl=en&q=define:Dendritic+spines&sa=X&ei=uaKyTMegO9GYOqefrPsF&ved=0CBQQkAE (Accessed 10 October 2010).
[595] Sarkin-Hughes 1993 *THRHR* 83 88.
[596] The thalamocortical system relates to connecting cortex and the thalamus. See http://wordnetweb.princeton.edu/perl/webwn?s=thalamocortical (Accessed 10 October 2010). The thalamus forms part of the forebrain and transmits nerve impulses up sensory pathways to the cerebral cortex. See http://www.tuition.com.hk/psychology/t.htm (Accessed 10 October 2010).
[597] Sarkin-Hughes 1993 *THRHR* 83 88.

Sarkin-Hughes states that viability is a fixed moment on foetal development and does not shift as medical science develops and states that viability has always remained at 22 weeks gestation.[598]

> While there have been advancements in medical science which have been perceived as pushing the viability line further back, what has occurred is that the incidence of survival of foetuses born after viability has increased over the years. No actual change to the viability threshold has occurred. Today additional aid can be given to these 22-week-old infants but in foetuses younger than this the organs have not developed sufficiently; so whatever aid, however technologically advanced, is given it will not assist to foetus to survive.[599]

In a non viable foetus, vital organs have not sufficiently developed to allow for proper performance of its usual functions and unless the organs are functioning, life cannot be sustained even with the aid of medical intervention.[600] Sarkin-Hughes asserts that the cut off line for foetal viability is at 20 weeks which takes into account a two week margin of error which may occur when estimating the gestational age of the foetus.[601] Another important factor linked to foetal viability relates to the fact that a foetus can feel pain from viability onwards.[602]

Although Sarkin-Hughes discusses foetal viability in the context of termination laws in South Africa and when the state can legitimately limit female reproductive rights, his arguments are extremely valuable in illustrating the potentially important role viability

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[598] Ibid.
[599] Sarkin-Hughes 1993 *THRHR* 83 89.
[600] Ibid. Sarkin-Hughes uses the circulatory system and lungs as an example to illustrate the how inadequate development prevents non viable foetus surviving once born. In order for oxygen to enter the blood stream which is essential for sustaining life, there must be a network of boundaries between air spaces in the lungs and vessels of the lung and there has to be a barrier or tissues separating red blood cells from the air spaces. In a pre viable foetus, the network has not evolved sufficiently and the barrier is not thin enough to allow the blood to be oxygenated. Since the air sacs in the lungs are not sufficiently developed they will not be able to function even with the most advanced technology.
[601] Sarkin-Hughes 1993 *THRHR* 83 89.
[602] See ch 4 4.4.3.2 where foetal viability is discussed with reference to the position taken by Meyerson (1999 *SALJ* 50) in the context of the inception of the state's interest in foetal life.

can play in the context of proving causation and meeting the burden of proof required by the state for purposes third party violence that terminates a pregnancy.[603]

6.3 The Motherhood Protection Act as an alternative to the UVVA

The approach adopted in the Motherhood Protection Act is preferred over the UVVA because the Act moulds itself with existing legal principles, and is complementary to the principle that a foetus is not a legal subject and female reproductive rights.[604]

From this perspective, the Motherhood Protection Act not only developed in line with established legal principles of legal subjectivity and female reproductive rights in the United States but it used these principles as its driving force to offer a legally sound solution to a rather difficult scenario of addressing criminal conduct that terminates prenatal life – a "life" not legally recognised. On the grounds of advancing female reproductive rights, the Motherhood Protection Act compels the state to intervene and attach criminal liability to third party violence that terminates a pregnancy because it is a woman's right to determine the path of her own pregnancy.

The advantage of the approach adopted by the Motherhood Protection Act is that it faces the issue of third party foetal violence only from the perspective of the pregnant woman and completely avoids the allocation of foetal personhood or victimhood and bypasses the very contentious issue of considering a foetus in a constitutional light.

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[603] Snyman states, with regard to murder and culpable homicide, the perpetrator must precipitate death and the fact that the intended victim suffered an incurable disease which will shortly cause his or her death in any event, does not afford the perpetrator a defence. Placing this principle in the context of the termination of a pregnancy through the infliction of third party violence, regardless of whether the woman is pregnant with a viable but genetically deformed foetus which does not have a good chance of survival, if it can be shown that the perpetrator precipitated the termination of the pregnancy, he or she will not be able to escape liability. This is also known as "take your victim as you find him" or thin skull cases. See Snyman (2002) 75.

[604] It needs mentioning that the Domestic Violence Act 116 of 1998 does not specifically take into account violence committed against pregnant women, nor does it recognise the increased vulnerability of pregnant woman for the duration of the pregnancy. The Act can be used to remedy domestic violence generally. See Artz and Smythe "Bridges and barriers: A five year retrospective on the Domestic Violence Act" 2005 *Acta Juridica* 200.

Consequently the crime is not “third party foetal violence” or “third party violence that terminates prenatal life”. The Motherhood Protection Act involves the scenario where a crime is committed against a pregnant woman and as a consequence of the underlying crime her pregnancy is terminated. The consequential termination of her pregnancy introduces a second crime encompassed in the Act.

In line with avoiding the allocation of legal subjectivity to a foetus, the Motherhood Protection Act is applicable throughout the pregnancy. The gestational age of the foetus is irrelevant because it is not the protection of foetus which is the object of the Act but the protection of the pregnant woman’s reproductive rights. In this sense, the Motherhood Protection Act is solely focused on the pregnant woman and the decision she took to continue with the pregnancy. However, as with the UVVA, this introduces the same problem of proving that the perpetrator’s conduct caused the termination of the pregnancy and viability comes back into the picture.

The Motherhood Protection Act achieves the same result as the UVVA, except with less far reaching controversial and radical provisions. The Motherhood Protection Act attaches criminal liability to third party violence conduct that terminates a pregnancy without encroaching on existing legal subject’s freedoms and rights or redefining the boundaries of the law.

In line with the acceptance that a foetus cannot be the victim of crime the Motherhood Protection Act is the preferred mechanism for law reform in South Africa. The Act fits squarely in line with the intention of this research to criminalise third party violence that terminates prenatal life. Although the foetus is no longer the focal point of law reform, provisions similar to that of the Motherhood Protection Act can still adequately address circumstances like that found in *Mshumpa*.

The Motherhood Protection act also falls in line with the application of our constitutional principles to the extent that the Act does not vest a foetus with legal subjectivity or constitutional rights. The Motherhood Protection Act does not impose on female

reproductive rights in terms of the Choice Act and the principles established in the two *Christian Lawyers* cases.

The Motherhood Protection Act introduces a different option to deal with the circumstances of *Mshumpa* from the perspective of female reproductive rights rather than developing common law crimes to include a foetus, or extending the application of constitutional rights to a newly developed class of persons.

6.4 Conclusion

The United States federal approach to third party foetal violence is incompatible with the South African Constitution and established criminal law principles.

In South Africa the state interest in prenatal life is only established once a foetus reaches the point of viability. Moreover, viability is the essential factor that unquestionably links the perpetrator's conduct with the termination of the pregnancy, without this element, the prosecution cannot meet its burden of proof.

Over and above the issues relating to viability, intention is a constitutional requirement, especially in light of O´Regan's constitutional doctrine of criminal fault.

In an effort to remedy the incompatibility of the UVVA with South African law, it can be amended to include viability and intention as a requirement, but it will still fail constitutional scrutiny because the UVVA grants the foetus personhood by making it a victim of crime.

The realisation that the UVVA is constitutionally unsound does not mean it is the end of the road regarding law reform in South Africa. The investigation of the Choice Act in chapter four revealed that South Africa cultivates a very rich reproductive rights environment. The emphasis of this force can be harvested to justify law reform.

The Motherhood Protection Act embodies an almost perfect solution that moves in the right direction of introducing a statutory crime without disturbing settled legal principles. The Motherhood Protection Act would need to be fine-tuned to include viability as a definitional element so that causation can be proved.

Turning to the amended Motherhood Protection Act as the preferred method of law reform does require a compromise from the original position the research aimed to promote: Directly protecting a foetus from third party foetal violence. This research has shown that a foetus cannot directly be the recipient of legal protection to the extent originally envisaged at the inception of the study. However, protection can be extended to the foetus through protecting a pregnant woman from unauthorised third party intervention with her pregnancy. Using the pregnant woman as the central source of protection, law reform will gain the added benefit of the fact that the pregnant woman is a legal subject with well established constitutional rights, thus placing a duty on the state and the courts to prevent infringements of constitutional rights.

CHAPTER SEVEN Law reform: Conclusion and recommendations

7.1 Introduction

S v Mshumpa highlighted the fact that a foetus, at any gestational stage, is not a legal subject. Until live birth, a foetus does not have a claim to protection under the Constitution or criminal law and any violent act inflicted on a pregnant woman that causes the termination of her pregnancy is only a crime against the pregnant woman in the form of assault or attempted murder.

Although this position is correct in light of current legal principles, there is gap in the law because under those circumstances a woman's pregnancy has been terminated without

her consent, over and above the actual assault or attempted murder committed upon her body.

Keeping the *Mshumpa* decision in mind, the purpose of the research was to explore whether it is possible to legitimately introduce a statutory crime to deal with third party foetal violence and recognise that a foetus can be a victim of crime if the violent conduct causes the termination of the pregnancy. The legitimacy of the statutory crime rests on whether the state has enough of an interest in foetal life to protect it from third party violence before its live birth and whether the proposed law reform can co-exist with established female reproductive rights.

Female reproductive rights played a rather unexpected but highly influential role throughout the research process despite the fact that the main focus of the research was law reform in the criminal law sphere. Firstly, the limitation of female reproductive rights through the enactment of the Choice Act illustrates that the state has an interest in a viable foetus since the right to terminate a pregnancy becomes more restricted as the pregnancy progresses beyond the stage of foetal viability. Secondly, the limitations on exercising the right to terminate a pregnancy also demonstrates that if law reform were to be undertaken, the provisions would have to fall within the boundaries of these recognised limitations imposed on pregnant woman. Thirdly, it is female reproductive rights that stand in the way of introducing a statutory crime that criminalises third party foetal violence where the foetus is the victim of the unlawful conduct, especially after considering the position taken by the foetal homicide laws in the United States. An unpredicted turn in the course of this research showed that female reproductive rights no longer stood as the impediment to finding a legitimate solution, but actually became central the solution for the introduction of law reform in South Africa.

This chapter will reflect on the original position of the research task, namely to introduce a crime to address third party foetal violence where the foetus would be the recognised victim of the crime and analyse how the research actually panned. This introspective analysis will ask what information came to light that caused a compromise to the original

aim of the research position and whether this compromise still achieves the foundational goal of addressing third party foetal violence that terminates prenatal life.

7.2 Foundation of the research

In its entirety, the research was founded on the need to tackle third party foetal violence that terminates prenatal life with a criminal sanction. In line with this foundation, the study sought to determine which route offered the least resistance: Development of common law principles or the introduction of a statutory crime.

In this case, least resistance required that the proposed law reform blends in with current law rather than creating controversial ramifications linked to granting a foetus the right to life. This could be achieved by ensuring that a foetus was not afforded any constitutional rights or that there was absolutely no interference with a woman's ability to exercise autonomy rights for the duration of her pregnancy.

7.3 Research on the South African position concerning prenatal interests to support the call law reform

After concluding a study on the common law crime of murder, it became unquestionably clear that if law reform were to take place through the development of the common law, constitutional rights would invariably attach to a foetus. Should the definitional elements of murder be extended or developed, a foetus would be considered a legal subject with protectable interests and constitutional rights – importantly the right to life. Following this route would place any proposal for law reform at logger heads with well established female reproductive rights, to the extent that the consensual termination of a pregnancy would infringe in foetal constitutional rights. A pregnant woman would only be able to lawfully terminate her pregnancy if continued pregnancy would be fatal to the pregnant woman's life. This approach flies in the face of aim of avoiding resistance or introducing controversy, it would be the demise of the law reform endeavour.

Recognising the deeply rooted problem of including a foetus in the scope of the crime of murder, other possible criminal sanctions that could be used to address third party

foetal violence that terminates prenatal life were explored. The common law crime of abortion, contravention of the Choice Act and attempting the impossible were considered and shown to have nothing to offer under the circumstance of third party foetal violence. This was so because common law abortion is no longer applicable, the Choice Act is irrelevant to the circumstances where a termination occurs without the woman's consent and attempting the legally impossible is not a crime.

To bypass these problems, statutory law reform is the preferred method of law reform that does not impose on existing law but rather merges with it.

In order to justify law statutory law reform it was necessary to find a state interest in prenatal life. Once again, female reproductive rights shed light on this topic with the Choice Act playing a central role in the investigation. Female reproductive rights are encompassed in section 12(2)(a) of the Constitution and the Choice Act adds flesh to those rights. Concerning the application of the Choice Act, the Act advances female reproductive rights by providing women the legal framework under which they can lawfully terminate their pregnancies. However, the right to terminate a pregnancy is limited by the value of dignity linked to prenatal life. The Choice Act is an extension of the state's duty to advance female reproductive rights, but to do so in light of the value of dignity. The limiting ability of the value of dignity serves as a ground to justify the call for law reform for purposes of third party violence that terminates prenatal life.

Beyond providing a ground to justify law reform, the Choice Act also explicitly sets out when the state's interest in prenatal life vests itself. Once a foetus becomes viable, the right to terminate a pregnancy becomes severely limited. From this perspective, the Choice Act also demonstrates the possible scope of the statutory crime.

7.4 Original research position

Initially, the aim of the research was to introduce a statutory crime that considered the foetus to be a victim of third party violence on its own as a separate protectable entity. Further, it was believed that if a statutory crime was used for law reform the issue

around female reproductive rights and constitutional rights of a foetus could be completely avoided. Based on the findings from the study on the South African position, this approach seemed to be proceeding logically.

From this perspective the proposed statutory crime must recognise the extent of female reproductive rights and use the provisions of the Choice Act as the yardstick of what is considered legitimate statutory law reform. In recognition of female reproductive rights, the statutory crime would avoid granting a foetus legal status but grant the foetus statutory protection from third party violence based on the value of dignity. Working in the shadow of the Choice Act, it appeared that the statutory crime of third party foetal violence and female reproductive rights would not be in conflict with one another.

7.5 Compromising the original position in the wake of foetal homicide laws in the United States

The study of the United States proved extremely valuable for the research task because it demonstrates that any statutory crime concerning foetal violence must be accomplished through the pregnant woman, in recognition of her reproductive right to determine the path of her own pregnancy.

Roe v Wade expressly states that foetal viability is the point at which the state has an interest in prenatal life, which indicates the point that the state may legitimately limit a woman's right to terminate her pregnancy. This position is on par with the position in South Africa in relation to the Choice Act.

Federal and state government take their cue from *Roe* and use this state interest to justify state intervention in cases of third party foetal violence that terminates foetal life. Up to this point of the research, the original position was being supported by the United States approach in protecting a foetus from third party violence in accordance with the state interest that limits female reproductive rights.

Investigating what the federal and state governments have done with the state interest in prenatal life showed that they have failed to enact laws that complement *Roe*. This failure is highlighted by criticism lobbied against foetal homicide laws. Generally the failure of foetal homicide laws stem from the fact that some of these laws are applicable to a pre-viable foetus. This completely falls away from the state interest outlined by the *Roe* decision.

This portion of the research on the United States assisted in refining the original position to the extent that if South Africa were to introduce a statutory crime, this crime could only take effect once the foetus had reached the stage of viability. At this stage the original position taken in the study was merely going through a process of refinement, and female reproductive rights was no longer regarded a conflicting issue but rather an embodiment of guiding principles of how to legitimately introduce a statutory crime.

Further study on the criticisms lobbied against foetal homicide laws demonstrated that even those states that require a foetus to be viable are still in violation of the Roe decision. Placing all the emphasis of foetal homicide laws on the foetus essentially makes the foetus a victim and this introduces the notion that a foetus is a legal subject with recognised protectable interests.

This problem runs to the core of everything the study task set out not to do: Namely, to fly in the face of female reproductive rights. Once the law is in the position to recognise the foetus as a victim, separate from the pregnant woman, third party foetal violence and female reproductive rights are in direct conflict with each other because this approach presupposes personhood and places the right to terminate a pregnancy in a rather uncertain position.

Should this approach be adopted in South Africa it may very well be the starting point for the demise of female reproductive rights. Given that the aim of the research is founded on the premise of proposing law reform that blends in with existing law, the United States approach will not suffice. It is with this realisation that the original

research position had to be amended to the extent that a foetus cannot be an independent victim of crime.

7.6 The revised research position

This unpredicted turn of events forced the need to consider alternatives to existing foetal homicide laws. The Motherhood Protection Act really brought to light the fact that female reproductive rights hold the key to solving the problem. Rather than being used to set the boundaries of the proposed crime or being the biggest problem faced when considering the introduction of a new statutory crime, female reproductive rights were revealed as the legitimising factor that justifies law reform in South Africa.

Viewing the state's interest from the side of securing female reproductive rights only, there is a constant interest in women as constitutional subjects, regardless of whether they are pregnant or how far their pregnancy has progressed. This interest is heightened when a woman is pregnant because the state also has an interest in the foetus once it is viable. This heightened interest can be cultivated to address violence against pregnant woman since continued pregnancy is a conscious reproductive decision to bear a child. Reproductive freedom is an interest protected under the Constitution and non-consensual interference by third parties is an infringement on a woman's right to self determination and reproductive freedom.

The starting point here is to use the state's interest in reproductive rights to establish a constitutionally entrenched need to prevent violence against pregnant woman and this need is heightened by the states interest in viable prenatal life. The point is that where a third party, through the infliction of violence, terminates a pregnancy without consent of the pregnant woman, such a person commits a crime against the woman. This keeps the spotlight on the pregnancy and not on prenatal life as a separate consideration but rather on the combination of female reproductive rights and the state's interest in viable prenatal life. This establishes a solid ground to justify the criminalisation of third party violence that terminates a pregnancy.

7.7 Recommendations

These recommendations are based on the foundation that third party foetal violence that terminates prenatal life must be met with criminal liability. In taking the route of least resistance, the proposed statutory crime must be an extension of female reproductive rights and not simply guided thereby.

The recommendations to follow are based on the Motherhood Protection Act with adjustments being made to allow the proposed crime to be compatible with South African criminal law principles of culpability and causation.

In addition the recommendations are guided by the legitimacy test set out in chapter five which was adjusted in chapter six to include culpability for purposes of South Africa. The test requires that the provision cannot grant a foetus legal status or be the protected entity of the provision. Viability and intention must be definitional elements of the crime.

7.7.1 Wording

If focus is to be shifted from the foetus to the pregnant woman wording similar to that of the UVVA and other foetal homicide laws will have to be abandoned. Since it is not the intention of the proposed crime to advance the right to life but to deter the violent termination of a pregnancy, the language in the UVVA should be completely avoided. Phrases like “mother”, “unborn child” and “causing the death of the unborn child” will have be more personhood neutral and refer to the pregnant woman and her pregnancy only. The only point at which the foetus should be referred to relates to the requirement of viability.

The proposed statutory crime will focus solely on the pregnant woman as the victim of the crime of third party violence that terminates her pregnancy. This approach steers away from being foetus orientated and solidifies the notion that the new statutory crime is an extension of female reproductive rights.

7.7.2 Viability

Foetal viability will be a requirement in terms of the new statutory crime. Making foetal viability a definitional element brings the new statutory crime in line with the dictates of the South African Constitution in the context of female reproductive rights and the accused's right to be presumed innocent until proven guilty beyond reasonable doubt.

The inclusion of foetal viability in the statutory crime makes provision for the state's interest in prenatal life. This requirement legitimately brings the value of dignity into play and reaffirms the fact that the new statutory crime is an extension of female reproductive rights in South Africa. Even though the new statutory crime is focused on the pregnant woman, the value of dignity that attaches to prenatal life gives the new statutory crime extra support, over and above the state's interest in female reproductive rights.

The link between foetal viability and proving causation is fundamental for purposes of criminal liability in the context of the new statutory crime. Mosk L in *Davis* and Sarkin-Hughes justify the inclusion of foetal viability as a requirement. Grave uncertainties surround non viable prenatal life in the context of spontaneous self terminations and the effects of genetic defects. If foetal viability is not included, the new statutory crime will be vulnerable to constitutional attack because it will alleviate the prosecution of the duty to prove beyond a reasonable doubt that the accused's conduct is the cause of the termination of the pregnancy.

It would be irrational to strictly define foetal viability in respect of a specific gestational week because there is a certain amount of uncertainty when trying to determine the exact stage of foetal development. Foetal viability should rather be defined as the moment in foetal development that the foetus is capable if living an independent life, separate from the pregnant woman, with or without the aid of medical support.

7.7.3 Culpability

In order to comply with section 12(1)(a) of the Constitution, the proposed statutory crime is intentional crime. The perpetrator must intentionally cause the termination of the pregnancy while committing an underlying common law crime or statutory offence. All forms of intention should be applicable.

The inclusion of the element of intention brings the new statutory crime in line with the tenets of substantive due process and O´Regan's constitutional doctrine of criminal fault.[605] O´Regan specifically stated that when the legislature has excluded any culpability requirement, that statutory provision may be successfully challenged under the Constitution.[606]

7.7.4 Proposed statutory provision

Any person who engages in unlawful conduct in terms of the common law or statute, and thereby intentionally causes the termination of viable pregnancy or interrupts the normal course of a pregnancy, including the termination of the pregnancy other than by live birth, is guilty of an offence under this Act.

7.8 Concluding remarks

To conclude in this research task, it is fitting to look back at the *Mshumpa* decision and consider the reservations that the court expressed when confronted with the approach of addressing third party violence that terminates a pregnancy.

The court recognised that there were practical difficulties with including a foetus in the crime of murder.[607] There is difficulty in determining a reasonably precise extended definition of murder, whether viability should be a requirement, whether the crime should be restricted to only third parties and to what extent the crime will fit with the criminal sanction for illegal abortion.[608] Further the court recognised that everyone has the right to bodily and psychological integrity, which includes the right to make decisions

[605] See 6.2.2.
[606] *Coetzee* 443C, see 6.2.2.
[607] *Mshumpa* 150G-H.
[608] Ibid.

concerning reproduction and assaulting a pregnant woman with the intention to terminate her pregnancy is a violation of these rights.[609] With these concerns in mind the court stated that the legislature is the correct arm of government to bring about this "radical kind of reform."[610]

The answer to the issue of third party violence that terminates a pregnancy was present in that judgment and only after completing the research did this become apparent. The research has revealed that the task of addressing third party violence that terminates a pregnancy is not a radical concept as viewed by the court. Inadvertently, it is female reproductive rights that offers the most effective solution for law reform, which is far from radical. It is merely an extension of woman's right to bear children.

A definition for third party violence that terminates a pregnancy has been developed from the research. This crime can only be applicable to third parties in light of the fact that this is an extension of female reproductive rights. Furthermore, in order to avoid radical law reform, the inclusion of the requirement of viability complements established principles concerning reproductive rights and the criminal law requirement for causation. This approach circumvents the concerns about foetal rights clashing with female reproductive rights and introduces a very stable solution to bridge the gap found in the law.

Word count: 55017

[609] *Mshumpa* 151H
[610] Mshumpa 152D-E.

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