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NOTE

The Unborn Victims of Violence Act: Addressing Moral Intuition and the Right to Choose

Pub. L. No. 108-212, 118 Stat. 568 (2004).

Amid heated political rhetoric from both sides of the abortion debate, President Bush signed the Unborn Victims of Violence Act ("the Act")[1] into law on April 1, 2004.[2] The Act, also referred to as "Laci and Connor's Law,"[3] makes the killing of a fetus during the commission of certain Federal crimes a separate offense punishable in varying degrees.[4] Pro-life campaigners maintain that the Act is necessary to reduce the ever-increasing numbers of violent attacks against pregnant women.[5] Pro-choice advocates, on the other hand, argue that the Act is nothing more than an attempt to "erode the foundations of the right to choose as recognized by the Supreme Court in *Roe v. Wade*."[6]

In analyzing the ramifications of the Act, both critics and advocates are quick to bring abortion into the discussion. However, given the explicit language of the statute and its legislative history, appealing to abortion is an

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[1] Pub. L. No. 108-212, 118 Stat. 568 (2004) (to be codified at 18 U.S.C. § 1841).

[2] *See* Nat'l Right to Life Comm., *Key Facts on the Unborn Victims of Violence Act, available at* http://www.nrlc.org/Unborn_Victims/keypointsuvva.html (last updated Apr. 1, 2004).

[3] In memory of Laci Peterson and her unborn child, Connor, who disappeared Christmas Eve, 2002. Ms. Peterson and Connor were later found dead. *See* H.R. REP. NO. 108-420 pt. 1, at 8, *reprinted in* 2004 U.S.C.C.A.N. 533, 538.

[4] *See* Unborn Victims of Violence Act, § 2(a).

[5] H.R. REP. NO. 108-420, at 4.

[6] H.R. REP. NO. 108-420, at 81; *Roe v. Wade*, 410 U.S. 959 (1973).

unnecessary, unsupported step. It is a misunderstanding of the Act for either side of the abortion debate to use the Act's language as a tool to advance any position on abortion or fetal rights. Despite an express exception to cases of medically legal abortion[7], many continue to attack the Act because they feel that the Act infringes dangerously on the constitutionally guaranteed right to choose.

Although an overwhelming majority of Americans polled expressed support for a fetal crime law,[8] abortion rights groups have propounded four main arguments in their opposition to the Act.[9] First, they argue that the Act's lack of a *mens rea* requirement violates principles of due process. Second, they claim the Act will lead to extensive litigation concerning the fetus. Third, they argue the Act does not address the crimes against pregnant women, which it set out to remedy. Finally, abortion rights groups argue that the Act is an attack on a woman's right to choose.[10]

This note defends the Unborn Victims of Violence Act in an attempt to reconcile the need for a fetal homicide law with a woman's constitutionally protected right to choose. The analysis addresses each of the four above-mentioned arguments and demonstrates why each is without merit. A fetal homicide law is not inconsistent with the principles set forth in *Roe v. Wade*[11] concerning a woman's right to choose.

At common law, the "born alive" rule governed

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[7] *See* H.R. REP. NO. 108-420, at 4.

[8] Michael Holzapfel, Comment, *The Right to Live, The Right to Choose, and the Unborn Victims of Violence* Act, 18 J. CONTEMP. HEALTH L. & POL'Y 431, 436 (2002)(stating 2001 poll revealed 90 percent of Americans would support a fetal crime law).

[9] *See* H.R. REP. NO. 108-420, at 81-88.

[10] *Id.*

[11] 410 U.S. 959 (1973).

conviction for the death of an unborn child.[12] This rule was articulated by Sir Edward Coke, who wrote:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be borne alive and dieth of the potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, in *rerum natura*, when it is born alive.[13]

Thus, under this rule, one who caused the death of an unborn fetus was punished only if the fetus was born alive and later died from the injuries sustained while in the womb.[14] The punishment for this offense was the same as the punishment for killing another person.[15] The killing of a quickened fetus before birth, however, was considered only a "great misprision," or misdemeanor, while the killing of a fetus before quickening was not a punishable offense at all.[16]

Over time, state legislatures began changing their laws on fetal homicide in response to what many viewed as moral deficiencies in current homicide statutes. Perhaps the most famous instance of this phenomenon was the California legislature's response to *Keeler v. Superior*

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[12] Hilary A. Converse, Note, *The Fetal Homicide Fallacy: A Comparison of California's Inconsistent Statutes to Other States*, 25 T. JEFFERSON L. REV. 451, 453 (2003).

[13] Holzapfel, *supra* note 8, at 443 (quoting E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1628)).

[14] Converse, *supra* note 12, at 453.

[15] *Id.*

[16] Alan S. Wasserstrom, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5TH 671, 686 (2004) (stating that quickening was generally held to occur between the sixth and eighth week of pregnancy).

Court.[17] Keeler became enraged after discovering that his ex-wife was pregnant by another man.[18] Keeler followed his ex-wife on a mountain road, blocked her vehicle, and told her to get out of her car.[19] He told her he knew she was pregnant, and after looking at her stomach, became visibly upset.[20] Referring to the unborn child, Keeler said he was going to "stomp it out of [her]."[21] He then pushed her against her car, kneed her in the abdomen, and hit her in the face several times.[22]

The fetus was delivered stillborn via Caesarian section; it had severe skull fractures and was devoid of air in the lungs.[23] A doctor testified with reasonable medical certainty that the fetus had reached the stage of viability.[24] Keeler was charged with the murder of the fetus; however, at that time the California homicide statute required the "unlawful killing of a human being with malice aforethought."[25] The court held that, because the California legislature's definition of murder applied only to those who were born alive,[26] Keeler could not be convicted for the murder of the fetus. Such a conviction, the court reasoned, would deny Keeler's due process rights since it would require a construction of the homicide statute which Keeler did not anticipate.[27]

In response to *Keeler,* the California legislature amended its homicide statute to include the killing of a

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[17] 470 P.2d 617 (Cal. 1970).
[18] *Id.* at 623.
[19] *Id.* at 618.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 619.
[25] *Id.* (quoting CAL. PENAL CODE § 187).
[26] *Id.* at 622.
[27] *Id.* at 630.

fetus.[28] Since *Keeler,* other states addressed similar cases of intentional fetal homicide, and many of them responded with similar statutory amendments.[29] Currently, 31 states have homicide laws that make it a crime to kill a fetus.[30] Eighteen of these states punish the killing of a fetus at any prenatal stage of development; however, 12 of these states recognize the fetus as a victim only after a certain stage of prenatal development.[31] The prenatal stage at which the fetus is recognized as a victim varies by state. Of the 19 states that do not have fetal homicide statutes, 13 adhere to the common law "born alive" rule.[32] The remaining six

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[28] CAL. PENAL CODE § 187(a) (West 2004).

[29] *See* Nat'l Right to Life Comm., *A Vote for the Lofgren "One-Victim" Substitute is a Vote Against Protection for Unborn Victims of Violence*, *available at* http://www.nrlc.org/Unborn_Victims/ShiwonaPaceStandard.pdf (statement by Shiwana Pace discussing how she was attacked by hit-men hired by her ex-boyfriend to kill her unborn baby. As she was being beaten, the attackers said to her, "Your baby is dying tonight." An Arkansas court convicted the ex-boyfriend of murdering the baby based on a state law enacted just one month earlier).

[30] *See* Nat'l Right to Life Comm., *available at* http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (listing 31 states with laws which recognize the killing of a fetus, at varying stages of development, as homicide: Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, & Wisconsin).

[31] *Id.*

[32] *See* Ala. Code § 13A-6-1(2) (1994); Alaska Stat.§ 11.41.140 (Michie 22000); Colo. Rev. Stat. § 18-3-101(2) (32001); Conn. Gen. Stat. Ann.§ 53(a)-3(1) (West 2001); Haw. Rev. Stat. Ann. § 707-700 (Michie 1999 & Supp. 2001); Md. Code Ann., Criminal Law § 1-101(h) (year) Code, art. 27 407 (1996); Me. Rev. Stat. Ann. tTit. 17-A, §§ 2(20), 201 (West 1993); Mont. Code Ann. § 45-2-101(28) (2001); N.J. Stat. Ann. § 2C:1-14(g), :11-2 (West 1995); N.C. Gen. Stat. § 14-17 (1999); Or. Rev. Stat. § 163.005(3) (1999); Vt. Stat. Ann. tit. 13, § 5301(4) (Supp. 1998); W. Va. Code § 61-2-1 (1997).

states follow the "born alive" rule, but still criminalize actions that cause injury or death to a fetus.[33] This rule has been referred to as the "born alive with a caveat" rule.[34] States in this category avoid the question of whether a fetus can be classified as a separate victim by punishing, as a crime against the mother, the act of injuring or killing her fetus.[35]

Until passage of the Act, federal criminal law followed the common law "born alive" rule.[36] In an effort to keep federal law on pace with quickly evolving state laws by following the legal trend of "dismantling the common law born alive rule,"[37] Representative Melissa Hart[38] proposed the Unborn Victims of Violence Act. The argument for passing the Act is congruent with the rationale behind the adoption of similar laws by 31 state legislatures. Moral intuition seems to suggest that the killing of a fetus, when done maliciously and without the mother's permission, should not go unpunished merely because the fetus is not "born alive."[39]

Five years after it was first introduced, the bill was signed into law, to recognize fetuses as separate and distinct victims of crime for the first time under federal

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[33] *See* Del. Code Ann. tit. 11, § 222(22) (Supp. 19992002); Iowa Code Ann.§ 707.8 (West Supp. 2000); Kan. Stat. Ann. §§ 21-3440, 21-3441 (1995); N.H. Rev. Stat. Ann. §§ 631:1(I)(c), 631:2(I)(e) (1999); N.M. Stat. Ann. § 66-8-101.1 (Michie 1998); Wyo. Stat. Ann. § 6-2-502(a)(iv) (Michie 1999).

[34] Holzapfel, *supra* note 8, at 457 (creating a category for states who do not have fetal homicide laws, but punish the act of killing a fetus as a crime against the mother).

[35] *Id.*

[36] H.R. REP. NO. 108-420, at 5.

[37] *Id.* at 5-6.

[38] Melissa Hart is a Member of Congress representing the 4th Congressional District of Pennsylvania. She sponsored the proposed Unborn Victims of Violence Act in the U.S. House of Representatives.

[39] H.R. REP. NO. 108-420, at 8-13.

law.[40] On April 1, 2004, H.R. 1997 became Public Law 108-212.[41] Following passage of the Act, the killing or injuring of a fetus, under certain circumstances, became punishable as a federal crime. In so doing, Congress also filled the void in the 19 states that do not have state laws recognizing a fetus as a potential homicide victim. Feticide also became a crime in federal jurisdictions—such as the military—that previously adhered to the "born alive" rule.[42]

As mentioned above, the Unborn Victims of Violence Act aligns federal law with the homicide statutes of 31 states.[43] The law amends the United States Code and the Uniform Code of Military Justice to make it a federal crime to cause the injury or death of a fetus during the commission of any of 68 enumerated federal offenses.[44]

While the Act filled what many viewed as a moral void, its passage stirred up issues within the broader abortion debate. Pro-choice and pro-life advocates agreed that the Act as a small step towards attacking the legality of

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[40] *Id.* at 434. In fact, two Congressional sessions passed before the Act began to move through the House of Representatives. *Id.* at 437-38.
[41] Nat'l Right to Life Comm., *supra* note 2, *available at* http://www.nrlc.org/Unborn_Victims/keypointsuvva.html.
[42] H.R. REP. NO. 108-420, at 1-4.
[43] *See* Nat'l Right to Life Comm., *supra* note 30.
[44] 118 Stat. 568 § 1841. If a fetus is killed during the commission of one or more of sixty-eight enumerated Federal crimes, criminal homicide liability for the death of the fetus may attach to the actor. Among the more common of those specifically listed sixty-eight crimes are: drug related drive by shootings, 18 U.S.C.A. § 36; deprivation of Constitutional rights under color of law, 18 U.S.C.A. § 242; possession of firearms or dangerous weapons in a Federal facility, 18 U.S.C.A. § 930; murder, 18 U.S.C.A. § 1111; manslaughter, 18 U.S.C.A. § 1112; attempted murder, 18 U.S.C.A. § 1113; kidnapping, 18 U.S.C.A. § 1201; bank robbery, 18 U.S.C.A. § 2113; aggravated sexual abuse, 18 U.S.C.A. § 2241; section 408(e) of the Controlled Substance Act of 1970, 21 U.S.C. 848(e); and section 202 of the Atomic Energy Act of 1954, 42 U.S.C. 2283.

abortion.[45] Ultimately, however, each side is mistaken as to the legal and moral effects the Act will have on abortion rights.

In an attempt to protect constitutional rights guaranteed in both the Fourteenth Amendment[46] and under *Roe v. Wade*,[47] pro-choice supporters presented various arguments to reveal what they feel are inadequacies and legal flaws within the Act.[48] While both the constitutional and practical arguments attacking the Act are without merit, such arguments are nonetheless unnecessary because the Act suggests nothing about the nature of the fetus that would make the Act inconsistent with current abortion rights.

I. Due Process Implications

Opponents of the Act argue that the lack of a *mens rea* requirement renders it unconstitutional.[49] Because the Act requires neither knowledge of a woman's pregnancy nor intent to cause injury or death to a fetus, opponents argue that an accused's due process rights are violated because there is no criminal intent element and no knowledge of whether one is actually committing a violation of the Act.[50]

Supporters of the Act look to the familiar criminal law doctrine of transferred intent, which, they argue, saves the constitutionality of the Act by supplying the requisite *mens*

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[45] *Id.*

[46] U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws").

[47] 410 U.S. 113 (1973).

[48] H.R. REP. NO. 108-420, at 81-88.

[49] *Id.*

[50] *Id.*

rea element.[51] Under this approach, if one intends to injure person A, but instead injures person B, the actor can be punished for the crime against person B even though he had no intention to harm person B. The intent to injure person A transfers to person B. Thus, the actor can be punished for committing a crime against a person who was never an intended victim.

The theory, as applied to a fetus, is that the intent to commit one or more of the 68 enumerated federal crimes upon *anyone* transfers to the fetus of an expectant mother.[52] Under this transferred intent analysis, the appropriate *mens rea* exists to convict a person for injuring or killing a fetus without a violation of the perpetrator's due process rights.

Opponents argue that transferred intent fails to remedy the due process issues in the Act because such intent can be transferred only to another person, thus a fetus would be given the classification of a distinct victim of homicide.[53] But this is precisely what the Act does – it legally recognizes the fetus as an independent victim of crime.[54] To argue that transferred intent does not apply to the Act ignores the fact that the Act was to *make* transferred intent to apply to a fetus.

Opponents also argue that transferred intent applies only to a "person;" but classifying a fetus as a "person" is inconsistent with *Roe v. Wade.*[55] Again, this argument misses an important linguistic point. If the language of a homicide statute is properly worded, there is no reason that transferred intent could not apply to a person and a fetus as

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[51] *Id.*

[52] H.R. REP. NO. 108-420 (stating that transferred intent was recognized at common law as early as the 16th century).

[53] H.R. REP. NO. 108-420, pt. 1, at 85 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 559.108-420.

[54] Holzapfel, *supra* note 8, at 434.

[55] H.R. REP. NO. 108-420, pt. 1, at 85 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 559.108-420.

a separate category. This would prevent the need to force a "fetus" into the classification of "person." For instance, a statute could be worded, "Murder is the intentional killing of another person or fetus with malice aforethought. If one intends to kill another person with malice aforethought and, in the commission of that act, kills a fetus, such malicious intent will transfer from the intended other person to the fetus."

While this is not how most current homicide statutes are worded, there is nothing to prevent a future homicide statute from being so worded. In fact, this is exactly what the Act did. Given the current shift in fetal homicide laws from the old common law "born alive" rule towards the recognition of a fetus as a victim, crafting such a statute would not only be permissible, it would be logically consistent with the current jurisprudential shift.

However, invoking the doctrine of transferred intent may not be necessary. The framework for convicting such actors already exists under many homicide statutes without recourse to transferred intent. For example, many homicide statutes follow some variation of the common law definition of murder as "the intentional killing of another with malice aforethought."[56] Thus, if one has "malice aforethought" and intentionally kills another, he has committed murder. The language of such statutes does not require the actor to maliciously intend to kill the person who is actually killed. This language only requires that the actor maliciously intend to kill someone, and that someone be killed during the *actus reus* of the crime. The person killed need not be the object of the malicious intent. Thus, a linguistic analysis of many homicide statutes makes transferred intent an unnecessary tool.

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[56] *See*, *e.g.*, Cal. Penal Code § 187(a) (West 1999) stating that "murder is the unlawful killing of a human being, or a fetus, with malice aforethought").

Furthermore, the lack of *mens rea* is not necessarily crucial since criminal law recognizes strict liability offenses. For example, most states' statutory rape laws make it a crime to engage in sexual acts with someone under the age of consent, regardless of whether the perpetrator actually knows the victim's age.[57] The fact that a person can commit one of the sixty-eight enumerated offenses within the Act without ever knowing that he or she is committing a second crime bears great similarity to conviction under a statutory rape law.[58]

For example, a 19-year-old man can be convicted for having sex with a 14-year-old girl, even though the man had no intention of committing statutory rape. In fact, even if the girl told the man that she was 18, he could still be convicted. Analogously, a man can be convicted for killing a fetus, even though he had no intention of committing fetal homicide. If mistake of fact and mistake of law are no defense to strict liability offenses such as statutory rape, then why not interpret fetal homicide laws as strict liability offenses as well. Not only would this negate the need for a *mens rea* requirement, but given the harsh punishment that could attach without any intent to injure the fetus, it would greatly advance the underlying purpose of the Act – to prevent violent attacks against women. Most men are cognizant of statutory rape laws, and the fear of such prosecutions often provides the basis for refraining from sex with a partner of questionable age. Many men may also fear a fetal homicide law, and would thus refrain from carrying out violent acts against women.

In short, the lack of a *mens rea* requirement is not fatal to the Unborn Victims of Violence Act. In fact, from a criminal law standpoint, it is far less of an issue than the Act's opponents allege. The argument that the Act is

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[57] *See, e.g.,* Tenn. Code Ann. § 39-13-506 (West 2000).

[58] *See* H.R. REP. NO. 108-420, pt. 1, at 13, 85 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 543.

unconstitutional because it violates due process rights is simply not compelling.

II. Potential for Excessive Litigation

Opponents of the Act also argue that it will open the door to a flood of litigation concerning the nature and rights of the fetus.[59] One of the main arguments is that the Act confers upon a fetus legal rights equivalent to those of the mother, and litigation over those rights could result in fetal rights surpassing those of the mother.[60] This trumping of women's rights, they fear, could one day lead to a system in which legally responsible, mentally intact women are civilly committed for no other reason than to protect the rights of a fetus.[61] There is no indication that courts are ready to deprive women of their Fifth and Fourteenth Amendment due process rights in order to protect a fetus.

First, nothing in the Act attempts to confer upon a fetus rights equal to those of the mother. While the Act may confer *some* rights upon a fetus, it does not, nor could it, confer rights equal to that of the mother without violating *Roe v. Wade.* Thus, while the mother's rights may, at some point, come into conflict with the rights of the fetus, *Roe v. Wade* has already mandated that the mother's rights prevail, and *Roe* is controlling precedent.[62] The Act does,

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[59] *Id.* at 86.
[60] *Id.*
[61] *Id.* (arguing that "[a] future statute might require a woman to be prosecuted for any act or 'error' in judgment during her term, for her consumption of wine or cigarettes, or for her decision to fly during pregnancy. When expanded to cover fetuses, child custody provisions may be used as a basis for allowing a biological father awarded custody of the fetus to control the women's behavior, or in some cases, civilly commit pregnant women to protect their fetuses.").
[62] *See Roe v. Wade*, 410 U.S. 113 (1973).

however, confer upon a fetus the right not to be injured or killed without the mother's consent.[63]

Second, many argue that the judiciary could view the rights of a fetus as so important that they must protect them under every circumstance. The fact is, however, that if the justice system should ever reach the point where judges, at the request of a biological father, civilly commit an otherwise sane woman in order to protect her fetus, then our legal system will have far more serious issues than the legal status of a fetus. If that day should ever arrive, the Constitution and the freedoms it once granted will be in desperate need of resurrection.[64]

Thus, the argument that fetal rights will one day trump mothers' rights relies on a misinterpretation of the rights conferred upon a fetus by the Act. In addition, proponents of the argument paint an irrational, worst-case scenario picture of the justice system, which makes the argument entirely unconvincing. For theoretical purposes, one may argue that, if a fetus is given *any* protections, our Constitutional system of justice will decline to a point where judges imprison women in violation of due process – a degeneration to a 16th Century English royal prerogative without support in and contrary to established law.

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[63] *See* 18 U.S.C. § 1841. (2004).

[64] Having said that, opponents point to two cases as examples of this kind of judicial overreaching. In the first, a federal case, a judge ordered a pregnant woman refusing medical care because of her religious convictions into custody in an attempt to ensure that the baby be safely born. In the second, a judge sent a student to prison to prevent her from obtaining a midterm abortion. *See* H.R. REP. NO. 108-420, pt. 1, at 87, n.27 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 560 (citations omitted). While these instances are disturbing, they should be addressed as violations of the tenets of *Roe v. Wade* as well as Due Process. It should also be noted that these instances occurred prior to the passage of the Act, meaning that these cases were in no way affected by the new law. If this type of occurrence is a problem, it is one that pre-dated the Act and, thus, cannot be said to have been a product of the Act.

However, for practical purposes, this argument is based on fallacy. It reveals a grossly pessimistic view of American criminal procedure. Further, it ignores an important point – that the Act was not created for the purpose of endowing rights upon a fetus, it was created for the purpose of protecting pregnant women who want to carry their fetuses to full term birth. Given that endowing the fetus with rights is not the purpose of the Act, there is no reason to assume that, if fetal rights ever conflict with a mother's rights, *Roe* will not be followed.

III. Failure to Address Violence Against Women

Opponents of the Act next argue that it does not address the problem it was intended to cure.[65] The Act was designed in response to the ever-increasing occurrences of violence against pregnant women.[66] However, opponents argue that the Act "[f]ails to recognize that an injury to a fetus is first and foremost an injury to the woman."[67] Specifically, they argue that the Act "[f]ails to address the vast number of domestic violence acts perpetrated against women and prosecuted under state statutes."[68] Thus, according to those opposing a federal fetal homicide law, the Act altogether fails in its attempt to address or reduce the problem it was created to remedy.

This argument's primary flaw is its failure to consider the deterrent effect that the Act will have on potential perpetrators of crimes against pregnant women. While the Act does not discuss the problem in its express language, it does provide a means for reducing the number of crimes against women. The case of Tracy Marciniak provides an

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[65] *See* H.R. REP. NO. 108-420, at 87.
[66] *Id.* at 5.
[67] *Id.* at 87.
[68] *Id.*

example of the possible deterrent effect the Act may have on potential offenders.[69]

Tracy Marciniak was four days from delivering her son, Zachariah, when she was brutally attacked by her then-husband, Glendale Black.[70] Black was fully aware that Tracy was pregnant and that she wanted to have the child.[71] In a successful attempt to end the pregnancy, Black punched Tracy twice in the abdomen.[72] He refused to call for paramedics and prevented Tracy from obtaining help for herself.[73] Eventually, he relented and permitted Tracy to go to the emergency room, where Zachariah was delivered stillborn by Caesarian section.[74] Tracy herself was given only 48 hours to live.[75]

Despite the loss of her child, Tracy managed to survive the incident and went on to press charges against Black.[76] At the time, Wisconsin did not have a fetal homicide statute, so Black could be charged only with assault on his wife. Ultimately, he was convicted on that charge, but he was not punished in any way for Zachariah's death,[77] even though his sole purpose was to cause the death of the fetus.

After recovering from her attack, Tracy spoke at a hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary. In her testimony, Tracy said, "Before his trial, my attacker said on TV that he would never have hit me if had thought that he could be charged with the killing of his child."[78] Black's statement

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[69] *Id.* at 9.
[70] *Id.*; Holzapfel, *supra* note 8, at 431.
[71] *Id.;* H.R. REP. NO. 108-420.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 9.
[77] *Id.*
[78] H.R. REP. NO. 108-420, pt. 1, at 534 n.3 (2004).

reveals that he was more concerned with being *punished for* killing his child than with actually *killing* his child.

While there are cases in which fetuses are killed unintentionally,[79] the cases in which fetuses are intentionally killed[80] spark in many a desire to punish such reprehensible behavior. It is this type of violence against women – violence that intentionally harms the fetuses and the mother – that proponents of the Act seek to prevent through the enforcement of a federal fetal homicide law.

Thus, certain types of violence against women likely will be reduced with the passage of the Act. As Tracy Marciniak's attacker confessed, he would not have "hit [Tracy]" if he thought he could have been punished for the death of "his child."[81] Black did not say that he would not have killed his child if he knew he could be punished – he said he would not have *hit his wife* if he knew he could be punished. Thus, had the Act been in existence and within Black's knowledge in 1992, he may well not have attacked Tracy. This is the deterrent effect that proponents of the Act are quick to point out.

The success of this deterrent effect seems to rest on the unfortunate fact that attackers are more worried about being punished than about killing a fetus that the mother wants to carry to delivery. Because some attackers fear punishment, at least some may refrain from committing acts that would otherwise result in death or serious bodily injury to a pregnant woman. Inasmuch as this deterrent effect exists,

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[79] For example, on April 19, 1995, Carrie Lenz, a Drug Enforcement Agency employee, was killed in the Oklahoma City bombing. The day before, Carrie and her husband had chosen the name "Michael" for the child she was carrying. H.R. REP. NO. 108-420, pt. 1, at 539 (2004). In this case, it is probable that the death of the fetus was not within the specific intent of the bomber.

[80] For others, *see* Nat'l Right to Life Comm., *supra* note 8; H.R. REP. NO. 108-420, pt. 1, at 545.

[81] H.R. REP. NO. 108-420, pt. 1, at 534 n.3 (2004).

the argument that the Act fails to address its goal of preventing violence against women is without merit.

IV. The Assault on a Woman's Right to Choose

Finally, opponents of the Act argue that it is inconsistent with *Roe v. Wade* in that it impinges on a woman's right to choose.[82] In *Roe,* the Supreme Court held that "the unborn have never been recognized in the law as persons in the whole sense" and concluded that "person," as used in the 14th Amendment, does not include the "unborn."[83] Opponents argue that state legislatures have made every effort to "secure the recognition of fetuses as full legal persons,"[84] and that the Act is a further attempt to confer rights upon the fetus equal to those of the woman.[85] This, they feel, is at direct odds with *Roe.*[86]

Such opponents also argue that the term "unborn child," as used in the Act, "implies that personhood begins prior to birth or viability, as early as the moment of conception."[87] According to this argument, the use of the term "unborn child" in the Act is in conflict with both the Constitution and *Roe*, in which the Supreme Court held that "the use of the word 'person' is such that it has application only post-natally."[88] While opponents of the Act have correctly interpreted *Roe,* they have misinterpreted the nature and metaphysical implications of the Act.

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[82] *Id.* at 547.
[83] *Roe*, 410 U.S. at 158, 162.
[84] H.R. REP. NO. 108-420, pt. 1, at 555 (2004) (listing two state court cases where the court held that 1) a human being exists from the moment of fertilization and implantation, and 2) a viable fetus is, biologically speaking, a presently existing person and a living human being). H.R. REP. NO. 108-420, pt. 1, at 555 n.5 (2004).
[85] *Id.* at 557.
[86] *Id.*
[87] *Id.*
[88] *Roe,* 410 U.S. at 157.

Here, opponents of the Act are essentially making three distinct arguments in suggesting that the Act conflicts with *Roe*. First, they argue that the Act is an attempt to confer personhood upon fetuses. Second, they argue that the Act attempts to confer rights upon fetuses equal to the rights of the mother. Third, they argue that by attempting to confer personhood on fetuses, the Act is at odds with *Roe*, which says that unborn children are not persons for purposes of the 14th Amendment.[89]

As to the first argument, nothing in the Act attempts to confer personhood upon a fetus. In section (d) of the Act, "unborn child" is defined as "a child in utero," and "a child in utero" is further defined as a "member of the species *homo sapiens*, at any stage of development, who is carried in the womb."[90] Thus, for the purpose of the Act, a fetus is a member of the species "homo sapiens." This does not imply personhood.

While the philosophical discussion of "personhood" is far beyond the scope of this analysis, one should note that personhood implies characteristics beyond mere classification as a particular species. For example, many philosophers argue that "personhood" is contingent upon moral agency. Others argue that personhood is contingent upon conscious self-awareness as a subject in the objective world. Both moral agency and subjective self-awareness are themselves contingent upon rational thought. Thus, for many philosophers, the ability to think rationally is a prerequisite for "personhood."

To say that an "unborn child" is a member of the species *homo sapiens* merely recognizes that a fetus has a diploid genome consisting of forty-six chromosomes and is the reproductive progeny of *homo sapien* parents.[91] Such

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[89] *Id.*

[90] Unborn Victims of Violence Act, § 2(d).

[91] University of Washington, *Chromosomes*, *available at*: http://www.park.edu/bhoffman/courses/bi231/recaps/chromosomes.htm

nominalization and classification of a fetus in no way implies the characteristics of personhood. In fact, given the abovementioned characteristics of "personhood," many philosophers would argue that even infants and young toddlers are not "persons." If infants and young toddlers are not "persons," in the philosophical sense, then certainly a fetus is not a "person." To say that something has the capacity for personhood is not to say that it is *currently* a person. Thus, to say that the Act confers or attempts to confer "personhood" upon a fetus is a misunderstanding of the metaphysics of personhood and a misinterpretation of the language in the Act.

As to the second argument, the Act does not attempt to confer rights upon a fetus which are equal to the rights of the mother. This was discussed earlier in this analysis. To confer upon a fetus the right not to be killed except at the election of the mother under medically legal abortion procedures in no way suggests that such a fetus has rights equal to or greater than those of the mother. In fact, as discussed earlier, *Roe* still controls when the rights of the fetus conflict with the rights of the mother.[92] Thus, the Act simply makes it a crime to injure or kill a fetus during the commission of one of the sixty-eight listed offenses, which only confers upon a fetus a limited right not to be injured or killed without the mother's consent.

As to the third argument, if the Act does not confer "personhood" upon a fetus, then it cannot be at odds with the proposition in *Roe*, which stated that an "unborn child" is not a person for purposes of the 14th Amendment. As discussed two paragraphs above, the Act does not attempt to confer personhood upon a fetus. Thus, there is nothing inconsistent in classifying a fetus as a member of the species *homo sapiens* while respecting the Supreme Court's holding that "unborn" children are not persons. The Act

[92] *See Roe*, 410 U.S. 113 (1973).

and *Roe* are completely consistent on this point.

Finally, an affirmative argument can be made in defense of the Act. In 1987, Richard Smith appealed his conviction under Georgia's fetal homicide statute to the 11th Circuit.[93] He argued that the fetal homicide law conflicted with *Roe v. Wade*.[94] The court rejected this argument, saying, "The proposition that Smith relies upon in *Roe v. Wade* – that an unborn child is not a 'person' within the meaning of the Fourteenth Amendment – is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus."[95] Thus, a fetal homicide statute can prohibit the destruction of a fetus without ever addressing issues of personhood or fetal rights.

The Supreme Court has also upheld a state conviction under a fetal homicide law in *Webster v. Reproductive Health Services*.[96] This case discussed the constitutionality of Missouri's fetal homicide law.[97] The law declared that "the life of each human being begins at conception," that "unborn children have protectable interests in life, health, and well-being," and that all state laws "shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," to the extent permitted by the Constitution and U.S. Supreme Court rulings.[98] The Court refused to invalidate the law and held that states are free to enforce such laws as long as they do

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[93] Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987).
[94] *Id.* at 1388.
[95] *See id.* at 1388.
[96] 492 U.S. 490 (1989).
[97] *Id.*
[98] Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986).

not restrict abortion in a manner forbidden by *Roe.*[99]

Thus, the Act does not confer rights upon a fetus that are equal in any way to those of the mother, nor does it confer personhood upon a fetus. In fact, the Act does not go as far as some states' fetal homicide laws that were upheld by the Supreme Court. Given this, there is no reason why the Act cannot co-exist with *Roe v. Wade.* The Act prohibits the unwanted destruction of a fetus by a third person without the mother's consent during the commission of certain federal crimes. *Roe* protects a mother's right to medically terminate a fetus with her permission and within the parameters of the law. Thus, the argument that the Act is an assault on a woman's right to choose is misguided.

The Unborn Victims of Violence Act offers needed protection to both fetuses and expectant mothers. Past cases reveal the shocking trauma suffered by women at the hands of men seeking to terminate their wanted pregnancies. While abortion is divisive on a normative level, most would agree that wrongful acts against a fetus such as those described above should be punished. In fact, an overwhelming majority of Americans agree that fetal homicide laws are needed.[100]

These laws, however, should not be mistakenly interpreted in such a way as to threaten current abortion rights. The Act is not only consistent with the tenets of *Roe v. Wade,* it also unequivocally excludes abortion from its scope of prosecution by express language.[101] Thus, while

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[99] *See* Nat'l Right to Life Comm., at http://www.nrlc.org/Unborn_Victims/statechallenges.html (*quoting Webster v. Reproductive Health Svcs.*, 492 U.S. 490 (1989)).

[100] H.R. REP. NO. 108-420, pt. 1, at 535 (2004) (quoting a survey in which 84 percent of Americans polled believe that "prosecutors should be able to bring a homicide charge on behalf of an unborn child killed in the womb").

[101] Unborn Victims of Violence Act § 2(c) (stating that abortion for which consent of pregnant woman has been obtained is exempt from prosecution).

pro-choice advocates should not feel threatened by the Act, pro-life advocates should not exaggerate its influence. In fact, both parties should be content with the purposeful results of the Act: for pro-lifers, the Act punishes the unwanted destruction of a fetus; for pro-choice advocates, the Act further preserves a woman's right to choose because, if the right to choose includes the right to terminate an unwanted pregnancy, it should also include the right to protect and preserve a wanted pregnancy.

In closing, the Act is logically and legally consistent with all of the propositions set forth in *Roe v. Wade*. For that reason, the abortion debate should turn attention away from the Act itself, and activists' efforts should focus a unified effort on carrying out the Act's intended purpose – the prevention of injury and death to people like Tracy and Zachariah Marciniak.

- W. DEREK MALCOLM