Recognizing Unborn Victims Over Heightening Punishment for Crimes Against Pregnant Women

1. INTRODUCTION

Laci Peterson, who was in her eighth month of pregnancy, disappeared on Christmas Eve 2002. She was due to give birth to a son, whom she planned to name Conner, on February 10th of the next year. Over three months after Laci’s disappearance and over two months after she was to have given birth, a full-term fetus was found on the shore of San Francisco Bay. The next day, Modesto police found an unidentified female body in the same area. The Attorney General confirmed that the bodies found were those of Laci Peterson and her unborn son, Conner. Modesto police arrested Laci Peterson’s husband, Scott Peterson, and charged him with murdering his wife and their unborn son. A jury found Scott Peterson guilty of murdering both Laci and Conner and sentenced him to death.

The state of California recognizes the killing of a fetus with malice aforethought as murder. Since California law governed Laci and Conner Peterson’s cases, the State was able to charge Scott Peterson with murdering both of them. Before April 1, 2004, if this were a federal crime, Conner Peterson would not have been recognized as a victim and Scott Peterson could only have been charged with committing Laci’s murder.

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
Prior to that date, when an assailant committed a federal crime of violence against a pregnant woman, federal law recognized an offense with regard to the pregnant woman, but not her unborn child.\textsuperscript{11} To remedy this, legislators wrote the Unborn Victims of Violence Act (UVVA), which recognizes two human victims when an assailant attacks a pregnant woman and injures or kills her and her unborn child during the commission of a federal offense.\textsuperscript{12} Pro-choice groups including the National Abortion and Reproductive Rights Action League (NARAL), Planned Parenthood, and the American Civil Liberties Union (ACLU) vehemently opposed this bill.\textsuperscript{13} As a result, legislators proposed “single-victim substitute” bills.\textsuperscript{14} One of these substitute bills, which legislators named the Motherhood Protection Act (MPA), imposed additional punishment on an assailant who commits certain crimes against women that cause an interruption in the normal course of their pregnancies.\textsuperscript{15} The MPA did not, however, recognize the unborn child as a victim.\textsuperscript{16} Congress rejected this proposed law.\textsuperscript{17} The House of Representatives approved the UVVA, 254-163, and the Senate approved it 61-38.\textsuperscript{18} President George W. Bush signed it into law on April 1, 2004.\textsuperscript{19}

While these bills were under consideration in Congress, a debate arose as to whether the federal government should recognize unborn victims of violence and punish assailants for a separate offense against the unborn child, or simply heighten punishment for those who commit crimes against pregnant women. This Note supports the federal government’s enactment of the UVVA and rejection of the MPA. Part II discusses the common law “born alive” rule and current state homicide laws that recognize unborn victims, either at any point or only during part of prenatal development. This section concludes by examining constitutional challenges to state fetal homicide laws. Part III discusses the UVVA, including its contents, development in Congress, and the arguments in support of and in

\textsuperscript{11} Id. (quoting H.R. REP. NO. 106-332, at 3 (1999)).
\textsuperscript{13} Id.
\textsuperscript{14} Id. (recognizing only one victim as the result of injury or death of a pregnant woman and her unborn child).
\textsuperscript{16} Id.
\textsuperscript{17} Federal Legislative Office of the National Right to Life Committee, supra note 12.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
opposition to it. Part IV discusses the MPA, including its contents, development in Congress, and the arguments in favor of and against it becoming law. Part V is an analysis, which shows the UVVA’s superiority over the MPA and that it does not undermine the decision in Roe v. Wade. This Note concludes in Part VI with the argument that there is an interest in recognizing unborn victims of violence, which the federal government has recognized with its enactment of the UVVA. Ultimately, the passage of this law holds third parties accountable for their actions towards pregnant women and their unborn children. As a result, it provides the survivors of such violence with the acknowledgement that their loved ones, both pregnant mothers and unborn children, are victims who deserve protection under the law. This Note strictly addresses the actions of third parties against the unborn. It is beyond the scope of this Note to discuss the issue of whether the law should hold a woman, making choices with regard to her own body, accountable for the consequences of those choices.

II. STATE HOMICIDE LAWS THAT RECOGNIZE UNBORN VICTIMS

Under the common law “born alive” rule, the law only holds criminals responsible for killing an unborn child if the child is born alive after the assault and later dies because of the injuries sustained while in the womb. Advancements made in medical technology regarding the stage of prenatal development when an unborn child can live outside the womb have caused many states to move away from this common law rule and enact laws that include unborn victims. Presently, thirty states have homicide laws that recognize unborn victims. Those jurisdictions fall into two categories: (1) states whose homicide laws recognize unborn children as victims at any point during prenatal development and (2) those whose homicide laws recognize unborn children as victims only during part of prenatal development.

A. States whose Homicide Laws Recognize Unborn Children as Victims at any point during Prenatal Development

Eighteen states criminalize actions against unborn children at any stage during their development. For example, a Missouri statute provides that

20. United States v. Spencer, 839 F.2d 1341, 1344 (9th Cir. 1988).
23. Id.
the killing of an "unborn child" at any stage of prenatal development constitutes either involuntary manslaughter or first-degree murder. 25 The Missouri Supreme Court upheld this law in State v. Knapp, finding that causing the death of an unborn child is causing the death of a "person" within the meaning of Missouri's involuntary manslaughter statute. 26 A few years later, in State v. Holcomb, the Missouri Court of Appeals held that an unborn child is a "person" for purposes of its first-degree murder statute. 27 The same court additionally held that a mother's legal right to terminate her pregnancy does not preclude the prosecution of a third party for murdering her unborn child, to which she has not consented. 28

B. States whose Homicide Laws Recognize Unborn Children as Victims Only during Part of Prenatal Development

Twelve states criminalize actions against unborn children only during certain stages of prenatal development. 29 The majority of these states recognize unborn children as victims based on theories of quickening and viability. 30 Other states determine whether to prosecute actions against unborn victims based on the specific week of development that the fetus has reached. 31

Six states criminalize actions against an "unborn quick child." 32 Quickness derives from the common law idea that when an unborn child first moves, it attains "animation" or a soul. 33 Quickening occurs before


26. 843 S.W.2d 345, 350 (Mo. 1992).
27. 956 S.W.2d 286, 290 (Mo. Ct. App. 1997).
28. Id. at 291.
30. Id.
31. Id.
viability at the point when the mother feels fetal movement for the first time, usually between the sixteenth and eighteenth week of pregnancy. Florida, Nevada, Oklahoma, Rhode Island, and Washington treat the killing of an "unborn quick child" as manslaughter. Georgia considers the killing of an "unborn child" after quickening as feticide. Rhode Island is the only state that defines "quick child" in its statute as "an unborn child whose heart is beating, who is experiencing electronically-measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state."

Six states criminalize actions against unborn victims that have reached viability. A fetus is viable when it has developed lungs that are capable of breathing air. This usually occurs at the twenty-eighth week of pregnancy, but could happen as early as the twenty-fourth week. Indiana, Tennessee, and Florida have enacted statutes that recognize the killing of an unborn child who has attained viability as a criminal offense. Courts in Massachusetts, South Carolina, and Oklahoma have found that the killing of a viable unborn child is homicide. Massachusetts courts have also


39. Alison Tsao, supra note 33, at 462 (citing Wendy L. Schoen, Conflict in the Parameters Defining Life and Death in Missouri Statutes, 16 AM. J.L. & MED. 555, 565 (1990)).

40. Smith, supra note 34, at 1851 (citing Roe v. Wade, 410 U.S. 113, 162-164 (1973)).


found that the killing of an unborn child after viability is involuntary manslaughter.\footnote{See, e.g., Commonwealth v. Lawrence, 536 N.E.2d 571, 582 (Mass. 1989).}

The Supreme Judicial Court of Massachusetts in \textit{Commonwealth v. Cass} held that a viable fetus is a person for the purposes of its vehicular homicide statute.\footnote{467 N.E.2d at 1330.} In \textit{Cass}, the defendant struck a woman, who was eight and one-half months pregnant, with his vehicle.\footnote{Id. at 1325 (quoting Act of July 2, 1976, ch. 227, St. 1976 (codified as amended MASS. GEN. LAWS ch. 90, § 24G(b) (1982) (omissions in original))).} Due to the accident, the woman's unborn child died prior to being delivered.\footnote{Id. at 1330.} An autopsy showed that the impact from the defendant's vehicle caused its death.\footnote{Id. at 1330.}

The \textit{Cass} court noted that the terms "person" and "human being" are essentially the same.\footnote{Id.} It found that "[a]n offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb."\footnote{Id.} The court rejected the common law "born-alive" rule in finding that "the better rule is that infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide."\footnote{Id. at 1330.} The \textit{Cass} decision stressed the desire to punish violence committed against a pregnant woman that "destroy[s] the fetus within her."\footnote{Id. at 1329.} Consequently, \textit{Cass} created a new common law rule, recognizing that a viable fetus is a "person" for purposes of the Massachusetts vehicular homicide statute.\footnote{Id. at 1329.}

The Supreme Court of South Carolina in \textit{State v. Horne} held that it would permit actions for homicide based on killing of an unborn child.\footnote{319 S.E.2d 703, 703-04 (S.C. 1984).} The defendant in that case stabbed his wife, when she was over nine
months pregnant, in the neck, arms, and abdomen. After the attack, the woman was rushed to the hospital. Upon concluding that the unborn child was still living, the doctors performed a caesarian section in an attempt to save the child’s life. This attempt, however, was unsuccessful as the child was dead when it was removed from the mother’s womb. The mother lived. An autopsy showed that the unborn child was capable of separate and independent existence apart from the mother.

The Horne court cited Fowler v. Woodard, where the court determined that the prosecution could maintain an action for wrongful death “for a viable, unborn fetus, holding a viable child constituted a ‘person’ even before it left its mother’s womb.” The court stated, “[i]t would be grossly inconsistent for us to construe a viable fetus as a ‘person’ for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.” Consequently, the court held that “an action for homicide may be maintained in the future when the state can prove beyond a reasonable doubt the fetus involved was viable, i.e., able to live separate and apart from its mother without the aid of artificial support.”

In Hughes v. State, the Court of Criminal Appeals of Oklahoma abandoned the common law “born alive” rule. The defendant in Hughes was intoxicated, drove her vehicle into oncoming traffic, and collided with another vehicle driven by a woman who was nine months pregnant and expected to deliver in four days. The pregnant woman’s stomach hit the steering wheel in her car with such force that the steering wheel broke. Ultimately, her child did not survive.

Similar to the court in Horne, the Hughes court declared, “in light of the civil liability which can be imposed under Oklahoma law for the wrongful death of a viable human fetus, it would be most unjust to refuse to extend protection to a viable human fetus under Oklahoma’s general homicide statute.” Thus, the court in Hughes stated, “[w]e now abandon the

54. Id. at 704.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id. (citing Fowler v. Woodard, 138 S.E.2d 42 (S.C. 1964)).
61. Id.
62. Id.
64. Id.
65. Id.
66. Id.
67. Id. at 734.
common law approach and hold that whether or not it is ultimately born alive, an unborn fetus that was viable at the time of injury is a 'human being' which may be the subject of a homicide under 21 O.S. 1981, § 691.\footnote{68} The court noted that the Oklahoma legislature enacted Section 691 in an effort to protect human life, and their decision to extend this protection to viable human fetuses is in accord with this legislative intent.\footnote{69}

Arkansas law recognizes an unborn victim after twelve weeks of fetal development.\footnote{70} Under Arkansas law, the killing of an unborn child of twelve weeks or greater gestation could be tried as capital murder, murder in the first degree, murder in the second degree, manslaughter, or negligent homicide.\footnote{71} Arkansas formerly imposed the common law “born alive” rule.\footnote{72} The Arkansas Supreme Court emphasized this rule in its decision in Meadows v. State,\footnote{73} which held that a fetus was not a person for purposes of the state’s manslaughter statute.\footnote{74} Reacting to the Meadows case, Arkansas legislators created a law making it a battery to injure a woman during a Class A misdemeanor by causing a miscarriage or stillbirth, or to cause injury under conditions manifesting extreme indifference to human life resulting in a miscarriage or stillbirth.\footnote{75} Further, Arkansas passed a fetal protection act and changed its code to recognize fetuses at twelve weeks of development as a “person.”\footnote{76}

California recognizes the killing of an unborn child as murder.\footnote{77} California law defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”\footnote{78} In People v. Davis, the California Supreme Court held that viability was not an element of fetal murder under state law.\footnote{79} The Davis court further held that the killing of an unborn fetus with malice aforethought by a third party is murder “as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to
eight weeks."  

C. Constitutional Challenges to State Laws that Recognize Unborn Victims

State supreme courts, the United States Court of Appeals, and the Supreme Court of the United States have decided constitutional challenges to state homicide laws that recognize unborn victims. Part of the basis for these challenges was the Supreme Court's decision in "Roe v. Wade" and/or [the] denial of equal protection. As of 2004, all challenges to the constitutionality of fetal homicide laws were unsuccessful.

In State v. Merrill, a twenty-seven or twenty-eight day old embryo died when the defendant allegedly shot its mother and killed her. The state of Minnesota indicted the defendant for the death of the unborn child under its "Murder of an Unborn Child in the First Degree" and "Murder of an Unborn Child in the Second Degree" statutes. Minnesota law defines "unborn child" as "the unborn offspring of a human being conceived, but not yet born."

The defendant in Merrill argued that Minnesota's unborn child homicide statutes violated the Equal Protection Clause and premised that argument

80. Id.
81. Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987); State v. Merrill, 450 N.W.2d 318 (Minn. 1990); State v. MacGuire, 84 P.3d 1171 (Utah 2004).
82. 410 U.S. 113 (1973).
84. See id.
85. 450 N.W.2d at 320.
86. Id.
87. Id. at 320 n.1 (quoting MINN. STAT. § 609.2661 (1988)).
88. Id. at 320 n.2.

Whoever does any of the following is guilty of murder of an unborn child in the first degree and must be sentenced to imprisonment for life:

(1) causes the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another . . . .

Id. at 320 n.1 (quoting MINN. STAT. § 609.2661 (1988)).
87. Id. at 320 n.2.

Whoever does either of the following is guilty of murder of an unborn child in the second degree and may be sentenced to imprisonment for not more than 40 years:

(1) causes the death of an unborn child with intent to effect the death of that unborn child or another, but without premeditation . . . .

Id. (quoting MINN. STAT. § 609.2662 (1988)).
88. Id. at 320-21 (quoting MINN. STAT. § 609.266(a) (1988)).
on Roe's holding that a nonviable fetus is not a person.\textsuperscript{89} The Supreme Court of Minnesota disagreed with Merrill's contention distinguishing a situation in which a defendant causes the termination of a woman's pregnancy without her consent from one in which a woman chooses to terminate her own pregnancy performed by an authorized medical professional.\textsuperscript{90} Accordingly, the court found that "Roe v. Wade protects the woman's right of choice; it does not protect, or much less confer on an assailant, a third-party unilateral right to destroy the fetus."\textsuperscript{91}

Merrill further explained the limitations of the United States Supreme Court's decision in Roe v. Wade, noting the constitutionality of laws having a direct effect on abortion that do not threaten a woman's right to choose.\textsuperscript{92} In addition, the Merrill court found significance in the Supreme Court's statement in Roe that the State "has still another important and legitimate interest in protecting the potentiality of human life."\textsuperscript{93} Thus, the court concluded that Minnesota's interest in protecting impending life was the purpose of the unborn child homicide statutes and the statutes did not intrude upon a woman's right to choose.\textsuperscript{94}

Moreover, the majority in Merrill found that "[t]he state's interest in protecting the 'potentiality of human life' includes protection of the unborn child, whether an embryo or a nonviable fetus, and it protects, too, the woman's interest in her unborn child and her right to decide whether it shall be carried in utero."\textsuperscript{95} The court further stated that a woman's right to continue her pregnancy prevails over her assailant's interest in terminating that pregnancy.\textsuperscript{96} Therefore, the court noted, "the viability of the fetus is 'simply immaterial' to an equal protection challenge to the feticide statute."\textsuperscript{97} Accordingly, it held that Minnesota's unborn homicide statutes "do not violate the Fourteenth Amendment by failing to distinguish between a viable and a nonviable fetus."\textsuperscript{98}

In Smith v. Newsome, the United States Court of Appeals for the Eleventh Circuit held that Georgia's feticide statute was not unconstitutionally vague and did not violate the Equal Protection Clause.\textsuperscript{99}

\textsuperscript{89.} Id. at 321.
\textsuperscript{90.} Id. at 321-22.
\textsuperscript{91.} Id. at 322.
\textsuperscript{92.} Id.
\textsuperscript{93.} Id. (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).
\textsuperscript{94.} Id.
\textsuperscript{95.} Id.
\textsuperscript{96.} Id.
\textsuperscript{97.} Id. (citing Smith v. Newsome, 815 F.2d 1386, 1388 (11th Cir. 1987)).
\textsuperscript{98.} Id. at 322.
\textsuperscript{99.} Smith v. Newsome, 815 F.2d 1386, 1387-88 (11th Cir. 1987).
In that case, Smith argued that "the feticide statute is unconstitutional because there is no unlawful taking [of] a human life, and because the statute contradicts the Supreme Court decision in Roe v. Wade."\textsuperscript{100} In its decision, the court set Smith's case apart from the finding in Roe that an unborn child is not a person within the meaning of the Fourteenth Amendment and stated that it did not apply in the present context to determine whether a state can prohibit the destruction of a fetus.\textsuperscript{101} The court reasoned that "[t]he constitutional limitations upon a state's right to prohibit the destruction of a fetus come into play when the state's interest conflicts with certain constitutional interests of the mother."\textsuperscript{102} Accordingly, the court, in finding Georgia's feticide statute constitutional, determined that it did not violate a mother's constitutional interests.\textsuperscript{103}

In \textit{Webster v. Reproductive Health Services}, the United States Supreme Court refused to invalidate a Missouri statute, which read:

1. The general assembly of this state finds that:

   (1) The life of each human being begins at conception;

   (2) Unborn children have protectable interests in life, health, and well-being;

   (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state 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, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.\textsuperscript{104}

The Supreme Court invalidated the Eighth Circuit's interpretation of the Missouri law, which said that it was "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations."\textsuperscript{105} In doing so, the Court found that a state is free to enact

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} Id. at 1388 n.2 (citing Roe v. Wade, 410 U.S. 113 (1973)).

\textsuperscript{103} Id.

\textsuperscript{104} Webster v. Reproductive Health Serv., 492 U.S. 490, 504-05 n.4 (quoting Mo. REV. STAT. § 1.205.1(1), (2) (1986)).

\textsuperscript{105} Id. at 503 (quoting Reproductive Health Serv. v. Webster, 851 F.2d 1071, 1076 (1988)).
laws that recognize unborn children so long as the state does not include restrictions on abortion that *Roe v. Wade* forbids.\(^{106}\)

The Utah Supreme Court in *State v. MacGuire*, decided the most recent case involving a constitutional challenge to a state homicide law that recognizes the killing of an unborn child.\(^{107}\) On the morning of January 15, 2001, MacGuire allegedly shot his wife four times.\(^{108}\) The “fourth bullet entered her abdomen and traveled through her uterus, lodging in the right wall of her pelvis” and ultimately killed her unborn child.\(^{109}\) The state charged MacGuire with two counts of aggravated murder for allegedly killing his former wife and her unborn child.\(^{110}\)

MacGuire contended that he could neither be prosecuted for killing the unborn child nor be charged with aggravated murder based on that killing because Utah’s criminal homicide and aggravated murder statutes were unconstitutional.\(^{111}\) He argued that Utah’s homicide law was unconstitutionally vague because it did not define the term “unborn child.”\(^{112}\) The Utah Supreme Court held however that “the term ‘unborn child’ does not render Utah’s criminal homicide and aggravated murder statutes unconstitutionally vague” in violation of due process, either facially, or as applied.\(^{113}\) The court further stated that “[b]ecause the commonsense meaning of the term ‘unborn child’ is a human being at any stage of development *in utero*, the term provides sufficient notice to an ordinary person about what conduct is proscribed.”\(^{114}\) MacGuire also argued that the terms “another” and “persons” in the aggravated murder statute are unconstitutionally vague because the statute does not define the term “unborn child,” and therefore, it is impossible to know when an unborn child is a human being.\(^{115}\) The court concluded, however, “that the terms ‘another’ and ‘persons’ are not rendered unconstitutionally vague in the aggravated murder statute by the fact that they encompass the term

\(^{106}\) *See* id. at 521-22.

\(^{107}\) 84 P.3d 1171, 1173 (Utah 2004).

\(^{108}\) *Id.*

\(^{109}\) *Id.*

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 1174.

\(^{112}\) *Id.*

\(^{113}\) *Id.* at 1177-78.

\(^{114}\) *Id.* at 1178.

\(^{115}\) *Id.* at 1177. Utah’s aggravated murder statute “provides that ‘*criminal homicide* constitutes aggravated murder if the actor intentionally or knowingly causes the death of *another*’ under any one of the seventeen circumstances, including killing two or more *persons* during the same criminal episode.” *Id.* at 1176 (citing *Utah Code Ann.* § 76-5-202 (1)(b) (1999)).
III. THE UNBORN VICTIMS OF VIOLENCE ACT

The House of Representatives approved the UVVA on February 26, 2004 (254-163) and the Senate approved it on March 25, 2004 (61-38). President George W. Bush signed it into law on April 1, 2004. The UVVA provides that any person who commits a federal offense causing death or bodily injury to a child in utero is guilty of a separate federal crime.

Under the UVVA, “the term ‘unborn child’ means a child in utero . . . [which] means a member of the species homo sapiens [sic], at any stage of development, who is carried in the womb.” It states that whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

The punishment for killing the “child in utero” is the same as the punishment for killing the unborn child’s mother.

The UVVA does not require that the defendant knew or should have known the victim was pregnant, nor does it require that the defendant intended to kill or injure the unborn child. As the National Right to Life Committee (NRLC) maintains: all that is required under this Act is proof that the defendant intended to commit a crime against someone. Once this is proven, under the doctrine of transferred intent, the defendant will also be held responsible for the crime committed against the unborn child.

In order to win a conviction under the UVVA, the prosecution must

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116. Id. at 1178.
118. Id.
120. Id. § 1841(d).
121. Id. § 1841(a)(1).
122. Id. § 1841(a)(2)(A).
123. Id. § 1841(a)(2)(B)(i).
124. Id. § 1841(a)(2)(B)(ii).
126. Under the doctrine of transferred intent, “if one person intends to harm a second person but instead unintentionally harms a third, the first person’s criminal or tortious intent toward the second applies to the third as well.” BLACK’S LAW DICTIONARY 1536 (8th ed. 2004).
prove beyond a reasonable doubt that a human being (1) already existed and (2) was "carried in the womb."\textsuperscript{128} Once the prosecution meets this burden, it must also prove beyond a reasonable doubt that a defendant had criminal intent towards some victim, had violated one of the federal laws enumerated in the statute and that this criminal conduct caused the death of the unborn child.\textsuperscript{129} Even if it is probable that a defendant's criminal conduct caused the unborn child's death, such probability will not satisfy this burden of proof.\textsuperscript{130}

There are exceptions to the UVVA.\textsuperscript{131} It does not allow prosecution for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law; ... of any person for any medical treatment of the pregnant woman or her unborn child; ... or of any woman with respect to her unborn child.\textsuperscript{132}

Advocates of the UVVA such as Sharon Rocha (Laci Peterson's mother and Conner's grandmother), Tracy Marciniak, and Serrin Foster (President of Feminists for Life of America) made statements to Congress arguing in favor of the bill.\textsuperscript{133} In supporting the UVVA, Laci and Conner Peterson's family used their daughter and grandson's cases to urge Congress to pass the law, which lawmakers have now dubbed "Laci and Conner's Law."\textsuperscript{134} In a letter to members of Congress, Sharon Rocha said "adoption of a single-victim amendment would be a painful blow to those, like me, who are left alive after a two-victim crime, because Congress would be saying that Conner and other innocent unborn victims like him are not really victims — indeed, that they never really existed at all."\textsuperscript{135}

Another supporter of the UVVA is Tracy Marciniak, for whose case legislators wrote the law.\textsuperscript{136} Tracy was five days away from her son's

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\textsuperscript{128} \textit{Id.} (defining "carried in the womb" as meaning once the embryo implants itself in the womb and sends out the chemical signals that announce its presence).

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{See 18 U.S.C.A. § 1841(D)(c)(1) (Supp. 2004).}

\textsuperscript{132} \textit{Id.} § 1841(D)(c)(1)-(3).


\textsuperscript{134} \textit{Id.} at 44-45 (letter written by Sharon Rocha).

\textsuperscript{135} \textit{Id.} at 44.

delivery date when her husband brutally attacked her at her home.\(^\text{137}\) He punched her with great force twice in her abdomen and refused to call for help or let her call for help.\(^\text{138}\) She nearly died, and tragically, her unborn son, whom she planned to name Zachariah, did die as he bled to death inside her from blunt-force trauma.\(^\text{139}\) On July 8, 2003, Tracy made a statement to the Subcommittee on the Constitution of the Committee on the House Judiciary regarding the UVVA.\(^\text{140}\) In addition to describing her story, she asked the Committee Chairman and other committee members to look at a photograph of herself holding her deceased son at his funeral.\(^\text{141}\) She then asked, \"[d]oes it show one victim or two?\"\(^\text{142}\) Ms. Marciniak then stated, \"[i]f you look at this photo and see two victims, a dead baby and a grieving mother who survived a brutal assault, then you should support the Unborn Victims of Violence Act.\"\(^\text{143}\)

Serrin Foster, President of Feminists for Life of America, urged in her statement to Congress that \"[t]he Unborn Victims of Violence Act will also avoid multiplying the pain of survivors of horrendous federal crimes of violence such as the bombing in Oklahoma City or the terrorist attacks of September 11.\"\(^\text{144}\)

Supporters of the UVVA rebut criticism that it will threaten a woman's right to abortion by pointing out that the bill exempts prosecution for abortion.\(^\text{145}\) Specifically, the UVVA does not make it a crime for a woman to have an abortion or for a doctor to perform an abortion when it is medically necessary.\(^\text{146}\) Accordingly, it does not permit prosecution of the woman seeking an abortion nor the physician conducting the abortion procedure.\(^\text{147}\)

Advocates also maintain that unborn victim laws are written in accord with the decision of \textit{Roe v. Wade}.\(^\text{148}\) The Court noted in \textit{Roe} that the State "has still \textit{another} important and legitimate interest in protecting the

\begin{itemize}
\item \textit{Hearing}, supra note 133, at 11 (statement of Tracy Marciniak).
\item Id.
\item Id. at 11.
\item Id. at 10-15.
\item Id. at 10.
\item Id. at 10.
\item \textit{Hearing}, supra note 133, at 10 (statement of Tracy Marciniak).
\item Id. at 10-11.
\item Id. at 20-21 (statement of Serrin M. Foster, President of Feminists for Life of America).
\item Id. § 1841(c)(2).
\item See id. §§ 1841(c)(1)-(3).
\item See Federal Legislative Office of the National Right to Life Committee, \textit{supra} note 12.
\end{itemize}
potentiality of human life." Moreover, as the Minnesota Supreme Court concluded in *State v. Merrill*, "[t]he state’s interest in protecting the ‘potentiality of human life’ includes protection of the unborn child, whether an embryo or a nonviable fetus, and it protects, too, the women’s interest in her unborn child and her right to decide whether it shall be carried in utero." The court in *Merrill* also noted that "*Roe v. Wade* protects the woman’s right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus." Therefore, the UVVA in recognizing unborn victims preserves the interest in protecting the potentiality of human life.

Those in favor of the UVVA contend that many opponents misunderstand its true nature. One of the misconceptions that organizations, such as the NRLC, seek to correct is that "the law would punish harm to the unborn child ‘utterly ignoring the harm to the pregnant woman.’" Another misconception is that "the law would ‘separate the mother from her fetus.’" As the NRLC contends "[i]n reality, the law allows the government to prosecute for harm to an unborn child only if the offender violated one of sixty-eight enumerated federal laws that already cover the mother."

Opposition to the enactment of the UVVA comes from pro-choice groups including NARAL, Planned Parenthood, and the ACLU. NARAL set out three reasons to oppose the UVVA. First, NARAL argued that the UVVA is deceptive. They contended that its purpose is not to protect pregnant women from violence but to attack a woman’s right to have an abortion. Moreover, they argued “women are notably absent from the bill” and “proponents candidly admit that their purpose is to recognize the existence of a separate legal ‘person’ where none currently exists.”

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
Second, NARAL contended that the UVVA "erodes the foundation of a woman’s right to choose." Noting that this legislation recognizes any unborn child as a "‘person,’ with rights separate and equal to those of a woman and worthy of legal protection,” they argued that “[t]his legislation is part of a deliberate, coordinated anti-choice campaign to undermine Roe v. Wade by endowing embryos and fetuses with ‘personhood’ rights.”

Lastly, NARAL claimed that the UVVA “does nothing to help solve the real problem: violence against women.” They maintained, “this legislation does nothing to address the epidemic of domestic violence,” and “could even make matters worse for women by encouraging zealous prosecutors to pursue charges for harm to an embryo or fetus while utterly ignoring the woman who has also been harmed.”

IV. THE MOTHERHOOD PROTECTION ACT

As a reaction to the UVVA of 1999, Senator Diane Feinstein and Congresswoman Zoe Lofgren proposed alternative legislation, which included the MPA. If enacted, the MPA would have provided for added punishment for crimes against women that “cause an interruption in the normal course of their pregnancies.” Section 2(a) of the law states,

[w]hoever engages in any violent or assaultive conduct against a pregnant woman resulting in the conviction of the person so engaging for a violation of any of the provisions of law set forth in subsection (c), and thereby causes an interruption to the normal course of the pregnancy resulting in prenatal injury (including termination of pregnancy), shall, in addition to any penalty imposed for the violation, be punished as provided in subsection (b).

Both the House of Representatives and the Senate rejected this alternative legislation.

The punishment imposed for violation of the MPA depended upon whether the assailant terminated the pregnancy of the woman assaulted. It provided for punishment by fine under title 18 of the United States Code,

161. Id.
162. Id.
163. Id.
164. Id.
166. Id.
167. Id.
or imprisonment for more than twenty years, or both if the assailant did not
terminate the pregnancy.\textsuperscript{170} If the assault terminated a woman's pregnancy,
the MPA imposed a fine under title 18 or imprisonment for any term of
years, or for life, or both.\textsuperscript{171}

Supporters of the MPA argued that it was tough on crimes against
women.\textsuperscript{172} They maintained that it focused on the more important issue of
violence against pregnant women and would result in deterrence of this
problem.\textsuperscript{173} NARAL stated, "[t]he 'Motherhood Protection Act' creates a
separate federal criminal offense for harm to a pregnant woman; recognizes
the pregnant woman as the primary victim of a crime; and provides for a
maximum 20-year sentence for injury to, and a maximum life sentence for
terminating, a woman's pregnancy."\textsuperscript{174}

Criticism of the MPA began with the language of the law itself.\textsuperscript{175} Those
who challenged the MPA criticized it for proposing to additionally punish
crimes that cause an "interruption in the normal course of a woman's
pregnancy."\textsuperscript{176} As Serrin Foster, President of Feminists for Life of
America, stated in her congressional testimony regarding the UVVA on
July 8, 2003, an interruption "implies something temporary, as if it were
possible for the victim's pregnancy to start back up again."\textsuperscript{177} She also
argued that "[m]otherhood is neither protected nor honored through the
proposed Motherhood Protection Act. Instead, it tells grieving mothers that
their lost children do not count. It ignores these mothers' cries for
recognition of their loss and for justice. It is a step backward in efforts to
reduce violence against women."\textsuperscript{178}

Additionally, opponents condemned the MPA because it created a
presumption that there is only one victim in these crimes.\textsuperscript{179} Critics argued
that "when an unborn child loses his or her life in a criminal attack, the
parents and society mourn the death of a separate individual, rather than
viewing it simply as an additional injury to the mother."\textsuperscript{180}

In a letter to key congressional sponsors of the UVVA Sharon Rocha

\begin{footnotes}
\item[170.] Id.
\item[171.] Id.
\item[172.] NARAL Pro-Choice South Dakota, supra note 157.
\item[173.] Id.
\item[174.] Id.
\item[175.] See generally Hearing, supra note 133.
\item[176.] Id. at 20.
\item[177.] Id.
\item[178.] Id. at 23.
\item[179.] Id.
\item[180.] Id.
\end{footnotes}
condemned the MPA. In her letter, she argued that the MPA would be even more insulting to mothers who are attacked and lose their babies as a result. She wrote, "I don’t understand how any legislator can vote to force prosecutors to tell such a grieving mother that she didn’t really lose a baby — when she knows to the depths of her soul that she did." She further maintained that, “[a] legislator who votes for the single-victim amendment, however well motivated, votes to add injury to injury.”

Before closing her letter to the congressional sponsors of the UVVA, Ms. Rocha addressed the issue of heightened punishment, which the MPA proposes. She stated “[t]he advocates of the single-victim amendment seem to think that the only thing that matters is how severe a sentence can be meted out — but they are wrong.” She argued that,

[i]t matters even more that the true nature of the crime be recognized, so that the punishment — which should indeed be severe — will fit the true nature of the crime. This is a question not only of severity, but of justice. The single-victim proposal would be a step away from justice, not toward it.

V. ANALYSIS

Prior to April 2004, Congress was faced with the issue of whether federal law should recognize unborn victims of violence and punish assailants for a separate offense against the unborn child or simply heighten punishments for those who commit crimes against pregnant women. Congress chose to recognize unborn victims and enacted the UVVA. Opponents of the UVVA contend that it “erodes the foundation of a woman’s right to choose.” Challengers maintain that the UVVA deliberately undermines the decision in Roe v. Wade by giving unborn children the same rights as a person and recognizing an unborn child as a person with rights separate from and equal to those of a woman. Thus, they believe that in order to protect a mother’s rights, Congress should have enacted the MPA.

A careful analysis of the decision in Roe v. Wade reveals a significant

181. See Hearing, supra note 133, at 50 (letter written by Sharon Rocha).
182. Id.
183. Id.
184. Id.
185. Id.
186. Id. (letter written by Sharon Rocha).
187. Id.
188. NARAL Pro-Choice South Dakota, supra note 157.
189. See id.
The decision in _Roe_ sets out two principles with regard to crimes against the unborn. First, the _Roe_ Court determined that an unborn child was not a person within the context of the Fourteenth Amendment. Outside the context of the Fourteenth Amendment, the states can give the unborn child the same rights as a person within other federal law and state constitutional limits. Second, in a circumstance in which a woman’s constitutionally protected right to have an abortion does not outweigh the state’s right to protect potential life, the state’s protection of the unborn will prevail. Evidence of this exists in the many unsuccessful challenges to state laws that recognize unborn victims such as those discussed in Part I, section C of this Note.


192. _Id._ at 162 (emphasis added).

193. Parness, _supra_ note 190, at 144.

194. _Id._

195. _Id._ at 103.

196. _Id._ at 112.

197. _Id._

198. _Id._

199. _Id._

200. See _Webster v. Reproductive Health Services_, 492 U.S. 490 (1989); _Smith v. Newsome_, 815 F.2d 1386 (11th Cir. 1987); _People v. Davis_, 872 P.2d 591 (Cal. 1994); _State v. Merrill_, 450 N.W.2d 318 (Minn. 1990); _State v. MacGuire_, 84 P.3d 1171 (Utah 2004).
In *State v. Merrill*, the Minnesota Supreme Court stated, "*Roe v. Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."\(^1\) The *Merrill* decision distinguished a situation in which a defendant causes the termination of a woman's pregnancy without her consent from one in which a woman chooses to terminate her own pregnancy performed by an authorized medical professional.\(^2\)

The majority of the court in *Merrill* stated that "[t]he state's interest in protecting the 'potentiality of human life' includes protection of the unborn child, whether an embryo or a nonviable or viable fetus, and it protects, too, the woman's interest in her unborn child and her right to decide whether it shall be carried *in utero*."\(^3\) The court also noted that a woman's right to continue her pregnancy prevails over her assailant's interest in terminating that pregnancy.\(^4\)

Similarly, in *Smith v. Newsome*, the United States Court of Appeals for the Eleventh Circuit determined that "[t]he constitutional limitations upon a state's right to prohibit the destruction of a fetus come into play when the state's interest conflicts with certain constitutional interests of the mother."\(^5\) The court ultimately determined that Georgia's feticide statute did not violate a mother's constitutional interests and held that it was not unconstitutionally vague and did not violate equal protection.\(^6\)

All challenges to state laws recognizing unborn victims of violence have been unsuccessful.\(^7\) Even the United States Supreme Court found that states are free to enact laws that recognize unborn children so long as the state does not include restrictions on abortion that *Roe v. Wade* forbids.\(^8\) It follows that courts faced with a challenge to a federal law that recognizes unborn victims of violence would find it constitutional as well. Thus, in passing the UVVA, Congress has not threatened a woman's constitutional right to have an abortion.

Further support for the contention that the UVVA does not pose a threat to a woman's reproductive freedom is in its express exception for abortion.\(^9\) It is not a crime under the UVVA for a woman to have an

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\(^1\) Merrill, 450 N.W.2d at 322.

\(^2\) Id. at 321-22.

\(^3\) Id. at 322.

\(^4\) Id.

\(^5\) Newsome, 815 F.2d at 1388 n.2.

\(^6\) Id.

\(^7\) Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Newsome, 815 F.2d 1386; People v. Davis, 872 P.2d 591 (Cal. 1994); Merrill, 450 N.W.2d 318; State v. MacGuire, 84 P.3d 1171 (Utah 2004).

\(^8\) See Webster, 492 U.S. at 521-22.

abortion or for a doctor to perform an abortion in a medical emergency.\textsuperscript{210} Therefore, the federal government can neither prosecute a woman seeking an abortion nor the physician conducting the abortion procedure under the UVVA.\textsuperscript{211} Since these provisions are contained in the UVVA, it is evident that legislators invoked the Supreme Court's decision in \textit{Roe v. Wade} and wrote the law accordingly. Consequently, it preserves the holding in \textit{Roe} and does not pose a threat to a woman's right to have an abortion.

Critics of the UVVA contend that it does nothing to solve the issue of violence against women or address the epidemic of domestic violence.\textsuperscript{212} Opponents argue that it is the MPA that is tough on crimes against women and focuses on the more important issue of violence against pregnant women, which will result in deterrence of this problem.\textsuperscript{213} However, it is a major misconception to believe that the UVVA does nothing to address the issue of violence against women.\textsuperscript{214} The government in order to win a conviction for harm to an unborn child must first prove that the defendant violated one of the federal laws contained in the UVVA with respect to the mother.\textsuperscript{215} Accordingly, the UVVA protects both women from domestic violence and unborn children from third-party attackers.

Opposition to the MPA emanated from its failure to acknowledge an unborn child as a victim deserving protection under the law.\textsuperscript{216} As the NRLC stated, "when an unborn child loses his or her life in a criminal attack, the parents and society mourn the death of a separate individual, rather than viewing it simply as an additional injury to the mother."\textsuperscript{217} Sharon Rocha said of the MPA, "I hope that every legislator will clearly understand that adoption of such a single-victim amendment would be a painful blow to those, like me, who are left alive after a two-victim crime, because Congress would be saying that Conner and other innocent unborn victims like him are not really victims – indeed, that they never really existed at all."\textsuperscript{218} Therefore, the interest in protecting the potentiality of human life as set out in \textit{Roe v. Wade} would have been offended by enacting a law that does not protect unborn victims of violence.

\textsuperscript{210} Id. § 1841(c)(1)-(2).
\textsuperscript{211} Id. § 1841(c).
\textsuperscript{212} NARAL Pro-Choice South Dakota, supra note 157.
\textsuperscript{213} See id.
\textsuperscript{214} See Federal Legislative Office of the National Right to Life Committee, supra note 12.
\textsuperscript{215} See id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Hearing, supra note 133 (letter written by Sharon Rocha).
VI. CONCLUSION

Congress, faced with the issue of whether federal law should recognize unborn victims of violence or simply heighten punishments for those who commit crimes against pregnant women, chose to enact the UVVA. In passing the UVVA, Congress realized the federal government’s interest in protecting the potentiality of human life as recognized in Roe v. Wade. Legislators knew they could not turn away when an assailant injured or killed an unborn child during the commission of a federal offense. They also acknowledged that the MPA offended this interest by recognizing only one victim when a third party victimized a pregnant woman and injured or killed her unborn child. The UVVA protects the potentiality of human life and holds third parties accountable for crimes against unborn children. It provides survivors of such violence with recognition of the loss of their loved ones, both pregnant mothers and unborn children, as victims deserving protection under the law. Finally, despite opposition to the UVVA, it will not—in any way—affect a woman’s right to choose to terminate her own pregnancy or infringe upon her privacy rights.

Shannon M. McQueeny