Criminal Law and Procedure

The Unborn Victims of Violence Act and State Legislative Reform

*By Jack Wade Nowlin**

In April of 2004, President George W. Bush signed into law a significant piece of federal legislation regarding the legal status of unborn children, the Unborn Victims of Violence Act of 2004 ("Laci and Conner's Law").[1] This legislation extends the basic protections of the federal criminal law to unborn children, criminalizing acts of fetal homicide and fetal battery which would be federal crimes if committed against newborn infants or other persons. The Unborn Victims of Violence Act may come to serve as a model for state legislative reform efforts.

A majority of states do not extend the basic protections of the criminal law equally to unborn children even in those areas where such protections can be provided consistent with the Supreme Court's abortion jurisprudence. In fact, the Court's abortion decisions[2] do not place any serious constitutional obstacle in the path of jurisdictions wishing to criminalize third-party assaults on pregnant women and their unborn children. Laws of this kind do not interfere with judicially-created reproductive rights such as the right to abortion. Quite the contrary, they actually reinforce reproductive rights by providing additional bases of liability for criminals who attack pregnant women and thereby deny them free "choice" in the area of reproduction. Nor does the Court's refusal in the abortion context to recognize unborn children as constitutional persons for purposes of the Fourteenth Amendment[3] preclude states from recognizing unborn children as persons for purposes of the application of their state criminal or civil laws. The legal distinction between federal constitutional personhood and state legal personhood should be very clear, as should be the principle that states may extend legal protections beyond the federal constitutional minimum. Finally, the Court's balancing of interests in decisions such as *Roe* and *Casey*, which led the Court to rule in favor of a broad right to abortion, carries no necessary implication that fetal rights are of less than a very high order of importance. Quite the contrary, *Roe* and *Casey* plainly accorded great weight to the decisional autonomy of pregnant women, which suggests that the state interest in fetal life may have been viewed as of a very high order of magnitude, though still outweighed by the even higher order interest in the mother's reproductive autonomy.

As many as twenty states still provide unborn children with *no* individual legal protection from homicidal acts committed by persons who attack them and their mothers. More than a dozen other states deny unborn children, as individuals, the legal protections of the criminal law until the child reaches some particular stage of development, such as viability or "quickening." Significantly, of the remaining eighteen or so states that provide fuller protection for unborn children, a substantial number classify fetal homicide as "manslaughter" even when the homicide is intentional or felony-related and would have been classified as murder if the victim had been a newborn baby, child, or adult. Other states provide no clear protection to unborn children for assault or battery not causing death but perhaps causing serious and irreparable injuries to the fetus. In sum, only a handful of states provide unborn children with anything like the full extent of the protection of the criminal laws. Since the vast majority of criminal acts causing harm to unborn children fall outside the jurisdiction of the federal government and thus outside the reach of the Unborn Victims of Violence Act, state legal reform reflecting the equal worth and dignity of the unborn is of the utmost importance.

Six aspects of the Unborn Victims of Violence Act may be considered by state legislatures and state courts. First, the Unborn Victims of Violence Act recognizes the unborn child as a potential *victim* of crime rather than as a mere "reproductive interest" of the mother who is, of course, also a potential victim of crime. An unborn child, as an individual member of the human species, possesses his or her own individual moral right to equal concern and respect.[4] It is a biological mistake to view an unborn child as a mere extension of the mother's body, and it is a concomitant moral mistake to view an unborn child as a mere object in which the mother has an interest. This is, of course, not to deny that mothers have an interest in the life and health of their children, born and unborn; rather it is to recognize that the criminal law protects our interests in the health and safety of *persons*, such as our family members, by extending to those persons their own legal rights as individuals to the protections of the criminal law. Thus we do not treat the mother as the principal or sole legal victim of the murder of her newborn child, and we should not treat the mother as the principal or sole legal victim of the murder of her unborn child. Not surprisingly, many grieving mothers of unborn murder victims share this view and believe the law should recognize their children, as well as themselves, as victims.[5]

Second, the Unborn Victims of Violence Act does not discriminate against unborn children based on their age or their stage of physical and mental development. Instead, the Act extends the protections of the federal criminal law to the "child in utero" and defines that term as a "member of the species homo sapiens, at any stage of development, who is carried in the womb."[6] The Act thus identifies the possession of natural rights to life, liberty, and the pursuit of happiness as an intrinsic attribute of human existence and thus as worthy of protection through the criminal law from the moment a new person comes into being. In short, the Act recognizes that *all* human beings have human rights worthy of legal protections, not merely a sub-set of human beings who possess certain advanced physical or mental capabilities. The Act therefore avoids the pitfall of an arbitrary denial of the protection of the criminal laws to unborn children merely

because they are at earlier stages of fetal development. Indeed, by this latter line of reasoning, it is unclear why newborn infants are entitled to the protections of the criminal law.[7]

Third, the Unborn Victims of Violence Act extends the protections of the criminal law to prohibit conduct that causes "bodily injury" to the unborn child as well as "death."[8] Thus, unlike a number of state fetal protection laws, the Act does not limit its scope of protection to homicide, but also protects the unborn child from potentially grievous bodily harm falling short of death, reflecting the view that the right to protection from bodily injury as well as from death is an essential part of the protections of the criminal law and thus an essential part of respect for the equal dignity and worth of unborn children.

Fourth, the Unborn Victims of Violence Act requires no special or arbitrary mental state with respect to the presence of the child in utero, but rather follows in the path of well-settled principles of criminal law in providing for the "transfer" of the criminal mental state of the attacker from the mother to the unborn child. The Act thus states that if the attacker is not intentionally attempting to kill the unborn child, then the punishment for harming the child is "the same as the punishment provided under federal law for that conduct had that injury or death occurred to the unborn child's mother."[9] For example, if an individual attacks a pregnant woman without knowing that she is pregnant, the attacker's criminal mental state with respect to the woman (such as an "intent to kill") is "transferred" to the fetus as well. Such a transference or replication of mental state is not uncommon in the criminal law and ensures that a criminal who intends to kill A but who instead kills B is open to both a murder charge (of B) and a potential attempted murder charge (of A).[10] The Act, by following a version of the doctrine of "transferred" intent, makes certain that a criminal defendant can receive punishment commensurate with his or her actual culpability in terms of both the defendant's mens rea and actus reus.

Fifth, the Unborn Victims of Violence Act expressly exempts from its reach both abortion[11] and acts of an unborn child's mother causing harm to the unborn child.[12] Quite obviously, any fetal homicide law placing restrictions on abortion would trigger the heightened scrutiny associated with the Supreme Court's abortion jurisprudence. The likely result would be invalidation of the fetal homicide law. Additionally, laws that criminalize actions by the mother which harm the fetus raise legal issues concerning state interference with the bodily integrity and reproductive autonomy of the mother. Invalidation by the courts is a possibility here as well. Plainly, then, the questions of abortion and of harm to an unborn child inflicted by his or her own mother raise legal and moral concerns quite distinct from those involved in the case of third-party attacks on mothers and their unborn children. These former issues are thus best dealt with by laws specifically addressing their particular concerns rather than by general fetal battery and homicide legislation. The Unborn Victims of Violence Act is written with clarity to ensure that these issues do indeed remain distinct from the general prohibition of fetal battery and homicide.

And, sixth, the Unborn Victims of Violence Act avoids the imposition of capital punishment for fetal homicide, stating that "[n]otwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section."[13] On prudential grounds, states with capital punishment should *avoid* extending the death penalty to cases of fetal homicide, settling instead for the substantial equality of the imposition of life imprisonment in cases of feticide that would warrant the death penalty under state law if the victim were a newborn child. While this does deny the unborn child perfect equality of treatment under the law, prudence dictates this course of action for two principal reasons. Initially, as a political matter, the invocation of the death penalty in the context of fetal homicide may split the "culture of life" coalition, given that many pro-life advocates are opposed to the death penalty, and thus may potentially cause the defeat of legislation designed to protect unborn children from assaultive crimes. Furthermore, the imposition of the death penalty in fetal homicide cases will provoke the much more rigorous application of "proportionality" analysis accorded to capital punishment under the Eighth Amendment as opposed to the more permissive application used by the courts in the context of non-capital sentencing.[14] Obviously, the stricter application of the Eighth Amendment standard would make it much easier for reviewing courts to invalidate fetal homicide laws, perhaps holding, mistakenly, that the intentional destruction of an unborn child in his or her earlier stages of development is insufficiently serious as a criminal offense to justify imposition of the death penalty. In sum, avoiding the imposition of capital punishment maximizes the chances that fetal protections laws will be passed by legislatures and upheld by courts.

Significantly, a number of states in recent years have expanded the reach of their criminal laws to provide greater protection for the unborn. Now the federal Unborn Victims of Violence Act serves as a roadmap for action expanding the protection of federal criminal law to unburn children, to the extent allowed by the decisions of the U.S. Supreme Court.

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Footnotes

[1] 18 U.S.C. § 1841.

[2] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Stenberg v. Carhart 530 U.S. 914 (2000).

[3] *See* Roe v. Wade, 410 U.S. 113, 158 (1973) (stating that "the word 'person', as used in the Fourteenth Amendment, does not include the unborn.").

[4] For discussions of fetal personhood, see JOHN FINNIS, ABORTION,

NATURAL LAW, AND PUBLIC REASON, IN NATURAL LAW AND PUBLIC REASON (Robert P. George & Christopher Wolfe, eds., 2000); ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 66-74 (2001)

[5] As one mother put it: "I know that some lawmakers and some groups insist that there is no such thing as an unborn victim, and that crimes like this only have a single victim — but that is callous and it is wrong. Please don't tell me that my son was not a real victim of a real crime. We were both victims, but only I survived." Testimony of Tracy Marciniak, Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, On the Unborn Victims of Violence Act of 2003 (H.R. 1997), July 8, 2003.

[6] 18 U.S.C. § 1841(d).

[7] *Cf.* PETER SINGER, PRACTICAL ETHICS 182 (2nd ed., 1993) Singer states that: "[B]eing a human being, in the sense of a member of the species homo sapiens, is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self-consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings. *Id.* at 182.

[8] 18 U.S.C. § 1841(a)(1).

[9] 18 U.S.C. § 1841(a)(2)(A).

[10] *See*, *e.g.*, Poe v. State, 341 Md. 523, 671 A.2d 501 (1996) (holding a criminal defendant liable for both the attempted murder of the intended victim and the murder of an unintended victim).

[11] 18 U.S.C. § 1841(c)(1).

[12] 18 U.S.C. § 1841(c)(3).

[13] 18 U.S.C. § 1841(a)(2)(D).

[14] On the differences in application of the Eighth Amendment's prohibition of cruel and unusual punishments in capital and non-capital contexts, see Harmelin v. Michigan, 501 U.S. 957, 996- 1001 (1991)(Kennedy, J., concurring in part and concurring in the judgment).