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The Unborn Victims of Violence Act of 2003

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Summary

The Unborn Victims of Violence Act of 2003 (S. 146, S. 1019, H.R. 1997) would create a separate offense for harming or killing an “unborn child” in utero during the commission of specified violent crimes. This report examines the Act’s provisions, and reviews existing state laws that criminalize the killing of a fetus or unborn child. The report also discusses selected cases that have considered the legitimacy of state fetal homicide and unborn child homicide statutes. These cases provide some guidance as to how a reviewing court may consider a future case involving the Act if it were enacted.

The Unborn Victims of Violence Act of 2003 (“UVVA” or “the Act”) would create a separate offense for harming or killing an “unborn child” in utero during the commission of specified violent crimes. Introduced in the Senate as S. 146 on January 10, 2003 by Senator Michael DeWine, and in the House as H.R. 1997 on May 7, 2003 by Representative Melissa A. Hart, the Act seeks to ensure that “the most vulnerable in our society are in fact protected.”¹ Although statutes that criminalize the killing of a fetus or “unborn child” exist at the state level, the sponsors of the Act maintain that no protection exists for an unborn victim of a federal crime.²

This report examines the Act’s provisions, and reviews existing state laws that criminalize the killing of a fetus or unborn child. The report also discusses selected cases that have considered the legitimacy of state fetal homicide and unborn child homicide statutes.

The UVVA would amend title 18 of the U.S. Code and the Uniform Code of Military Justice to add new sections for the “protection of unborn children.”³ Under the Act, any person who injures or kills a “child in utero” during the commission of certain specified crimes would be guilty of an offense separate from one involving the pregnant woman.

¹ 149 Cong. Rec. S192 (daily ed. Jan. 10, 2003) (statement of Sen. DeWine). The Unborn Victims of Violence Act was reintroduced in the Senate as S. 1019 on May 7, 2003.

² *Id.*

³ The Uniform Code of Military Justice is codified in chapter 47 of title 10, U.S. Code.

Such crimes include drive-by shootings in furtherance of or to escape a major drug offense, and violations of the Freedom of Access to Clinic Entrances Act.⁴ Punishment for the separate offense would be the same as if the offense had been committed against the pregnant woman. In addition, an offense would not require proof that the person engaging in the misconduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the child in utero. The phrase “child in utero” is defined by the Act to mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”⁵

Certain individuals are exempt from prosecution under the UVVA. The pregnant woman may not be prosecuted under the Act. Any person administering a consensual abortion may not be prosecuted. Finally, any person providing medical treatment to the pregnant woman or the unborn child may not be prosecuted.

The UVVA has been introduced during the past two Congresses, and was passed by the House during the 106th and 107th Congresses. During the 106th Congress, the House passed H.R. 2436 by a vote of 254-172. During the 107th Congress, the House passed H.R. 503 by a vote of 252-172. The Senate did not consider the Act during either Congress.⁶

Although physicians who perform consensual abortions would not be subject to prosecution under the UVVA, organizations that support a woman’s right to choose oppose the Act.⁷ These organizations assert that the UVVA is part of a campaign to undermine the right to abortion. They contend that recognition of a fetus or embryo as an entity separate from the pregnant woman could obscure the U.S. Supreme Court’s finding in *Roe v. Wade* that the word “person” does not include the unborn.⁸ If personhood could be established for a fetus or embryo, such entities’ right to life under the Fourteenth Amendment would seem to be guaranteed.⁹

⁴ See S. 146, 108th Cong. §§ 2, 3 (2003); H.R. 1997, 108th Cong. §§ 2, 3 (2003); S. 1019, 108th Cong. §§ 2, 3 (2003).

⁵ *Id.*

⁶ See S. 1673, 106th Cong. (1999); S. 480, 107th Cong. (2001).

⁷ See Center for Reproductive Rights, *Fetal Personhood*, at http://www.crlp.org/hill_pri_uvva.html (last visited June 12, 2003); NARAL Pro-Choice America, *The “Unborn Victims of Violence Act”: A Misguided Bill That Threatens Women’s Rights*, at <http://www.naral.org/facts/prosecutors.cfm> (last visited June 12, 2003).

⁸ See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“... the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

⁹ See *Roe*, 410 U.S. at 156-57 (“If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”).

Supporters of the UVVA insist that the measure is not meant to have an impact on abortion.¹⁰ They emphasize that the Act was drafted narrowly to not interfere with a woman's ability to have an abortion under current law. Instead, the Act seeks to protect the unborn from criminal assailants, and attempts to impose a penalty when "acts of violence against unborn victims fall within Federal jurisdiction."¹¹

At least twenty-seven states have statutes that criminalize the killing of a fetus or "unborn child". These statutes vary with respect to the point at which criminal liability will attach; that is, the states identify different gestational stages at which the killing of an embryo or fetus will result in criminal liability.

In three states, the killing of a viable fetus will result in criminal liability.¹² A fetus becomes viable when it is "potentially able to live outside the mother's womb, albeit with artificial aid."¹³ Viability usually occurs at the twenty-eighth week of pregnancy, but may occur as early as the twenty-fourth week.¹⁴

Seven states criminalize the killing of a "quick" fetus.¹⁵ Quickening refers to the period prior to viability when the mother first feels the fetus move in her womb.¹⁶ Quickening usually occurs between the sixteenth and eighteenth weeks of pregnancy.¹⁷

In thirteen states, the killing of an "unborn child" or the termination of a human pregnancy without the consent of the mother will result in criminal liability.¹⁸ Like the UVVA, these statutes do not appear to identify a specific gestational stage at which criminal liability attaches.

Finally, in four states, the killing of an unborn child at a specified gestational stage will result in criminal liability. For example, in Arkansas, the killing of an unborn child

¹⁰ 149 Cong. Rec. S5875 (daily ed. May 7, 2003) (statement of Sen. Hatch).

¹¹ 149 Cong. Rec. S193 (daily ed. Jan. 10, 2003) (statement of Sen. DeWine).

¹² Ind. Code §§ 35-42-1-1(4), 35-42-1-6; Mich. Comp. Laws § 750.322 (limited by judicial decision to apply only to unborn children who are viable, see *Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973); Tenn. Code Ann. § 39-13-214.

¹³ *Roe*, 410 U.S. at 160.

¹⁴ *Id.*

¹⁵ Fla. Stat. Ann. § 782.09; Ga. Code Ann. § 16-5-80; Miss. Code Ann. § 97-3-37; Nev. Rev. Stat. Ann. § 200.210; Okla. Stat. Ann. tit. 21, § 713; R.I. Gen. Laws § 11-23-5; Wash. Rev. Code § 9A.32.060.

¹⁶ See Michael Holzapfel, *The Right to Live, The Right to Choose, and The Unborn Victims of Violence Act*, 18 J. Contemp. Health L. & Pol'y 431 (2002).

¹⁷ *Id.* at 454.

¹⁸ Ariz. Rev. Stat. § 13-1103(A)(5); 720 Ill. Comp. Stat. 5/9-1.2; Iowa Code § 707.8; La. Rev. Stat. Ann. § 14:32.5; Minn. Stat. § 609.266 *et seq.*; Mo. Ann. Stat. §§ 1.205, 565.020, 565.024; Neb. Rev. Stat. § 28-391; N.D. Cent. Code § 12.1-17.1-01 *et seq.*; Ohio Rev. Code Ann. § 2903.02; 18 Pa. Cons. Stat. § 2603; S.D. Codified Laws § 22-16-1; Utah Code Ann. § 76-5-201; Wis. Stat. §§ 939.75, 940.04.

of twelve weeks or greater is murder, manslaughter, or negligent homicide.¹⁹ In California, the killing of an unborn child after the embryonic stage is murder.²⁰ Idaho defines a murder to be “the unlawful killing of a human being including, but not limited to, a human embryo or fetus . . .”²¹ And, in New York, the killing of an unborn child after twenty-four weeks of pregnancy is homicide.²²

Courts have declined to invalidate state fetal homicide statutes. In *State v. Merrill*, the Minnesota Supreme Court concluded that the state’s unborn child homicide statutes did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and were not unconstitutionally vague.²³ Merrill shot a woman who was pregnant with a twenty-seven or twenty-eight-day-old embryo. With respect to his equal protection claim, Merrill argued that the statutes subjected him to prosecution for ending a pregnancy while allowing a pregnant woman to terminate a nonviable fetus or embryo without criminal consequences.²⁴ Merrill contended that the statutes treated similarly situated persons differently.

The court rejected Merrill’s equal protection claim on the grounds that the defendant and a pregnant woman are not similarly situated: “The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act.”²⁵ Unlike the assailant who has no right to kill a fetus, the pregnant woman has a right to decide to terminate her pregnancy. The actions of the woman’s doctor are based on the woman’s constitutionally protected rights under *Roe*.

Merrill advanced two arguments for finding the statutes to be unconstitutionally vague. First, he contended that the statutes failed to give fair warning of the prohibited conduct. Merrill maintained that it was unfair to punish an assailant for the murder of an unborn child when neither he nor the pregnant woman may be aware of the pregnancy. However, the court found that the statutes provided fair warning based on the doctrine of transferred intent.²⁶ The court noted that even if the offender did not intend to kill a particular victim, he should have fair warning that he would be held criminally accountable given that the same type of harm would result if another victim was killed.

Merrill’s second argument was that the statutes encouraged arbitrary and discriminatory enforcement by using the phrase “cause the death of an unborn child” to

¹⁹ Ark. Code Ann. §§ 5-1-102(13)(B)(i)(a), 5-10-101 *et seq.*.

²⁰ Cal. Penal Code § 187(a).

²¹ Idaho Code § 18-4001.

²² N.Y. Penal Law § 125.00.

²³ 450 N.W.2d 318 (Minn. 1990).

²⁴ *Merrill*, 450 N.W.2d at 321.

²⁵ *Merrill*, 450 N.W.2d at 321-22.

²⁶ *Merrill*, 450 N.W.2d at 323.

identify prohibited conduct without actually defining when death may occur.²⁷ Merrill believed that the failure to identify when death occurs for the unborn child would result in judges and juries providing their own definitions. Moreover, Merrill asserted that because an embryo is not alive, it could not experience death.²⁸

The court determined that to have life means “to have the property of all living things to grow, to become.”²⁹ The court avoided the question of whether the unborn child should be considered a person or human being. Instead, the court observed that criminal liability “requires only that the embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life.”³⁰ Thus, the trier of fact would simply have to determine whether an assailant’s acts caused the embryo or unborn child to stop growing or stop showing the properties of life.

In *People v. Ford*, the Appellate Court of Illinois concluded similarly that the state’s fetal homicide statute did not violate the Equal Protection Clause of the Fourteenth Amendment and was not unconstitutionally vague.³¹ Like Merrill, Ford argued that the statute treated similarly situated people differently. While a pregnant woman could terminate her nonviable fetus without punishment, an assailant would face criminal penalties for killing such a fetus. Following the Minnesota Supreme Court, the Illinois court found that the defendant and a pregnant woman are not similarly situated.³² In addition, the court determined that the statute could be upheld as rationally related to a legitimate governmental purpose. Because the statute did not affect a fundamental right held by the defendant, and because it did not discriminate against a suspect class, the validity of the statute could be considered under the rational basis standard of review. The court concluded that the statute was rationally related to a legitimate governmental interest in protecting the potentiality of human life.³³

Ford’s vagueness argument focused on the statute’s use of the phrase “cause the death of an unborn child.” Ford contended that the absence of statutory definitions for when life begins and death occurs would result in the application of subjective definitions by the trier of fact, and lead to the arbitrary and discriminatory enforcement of the statute.³⁴ Citing *Merrill*, the court maintained that the trier of fact would be required only to determine whether there was an embryo or fetus that was growing into a human being, and whether because of the acts of an assailant, that growing was stopped. The statute did not require the trier of fact to apply its subjective views.

²⁷ *Id.*

²⁸ *Merrill*, 450 N.W.2d at 324.

²⁹ *Id.*

³⁰ *Id.*

³¹ 581 N.E.2d 1189 (Ill. 1991). In a subsequent proceeding, *Ford v. Ahitow*, 104 F.3d 926 (7th Cir. 1997), the U.S. Court of Appeals for the Seventh Circuit determined that habeas corpus relief was not appropriate for Ford.

³² *Ford*, 581 N.E. at 1199.

³³ *Ford*, 581 N.E. at 1200.

³⁴ *Id.*

Passage of the UVVA would likely result in similar cases that challenge the validity of the Act. Equal protection and vagueness claims, like those alleged in *Merrill* and *Ford*, would probably be asserted. For that reason, the two cases provide some guidance as to how a court may consider a future case involving the UVVA.