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Defense of Others and Defensless "Others"

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Abstract

When the Unborn Victims of Violence Act (UVVA) was signed into law on April 1, 2004,¹ the federal government dishonored nothing less pedigree than its founding philosophy. The UVVA criminalizes harm to the fetus and sanctions such harm with the punishment that would have befallen the accused had the women carrying the fetus been the one to sustain the injuries instead.² This Article argues that recent efforts at fetal protection, like the UVVA, defy and defile liberalism, the political theory underpinning this nation's constitution,³ and thereby conduce to the subordination of women.⁴

Disciplines

Civil Rights and Discrimination | Criminal Law | Health Law and Policy | Law | Law and Gender | Legal Theory | Sexuality and the Law

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Amy J. Sepinwall[†]

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INTRODUCTION

A. Fetal Protection and Female Neglect

When the Unborn Victims of Violence Act (UVVA) was signed into law on April 1, 2004,¹ the federal government dishonored nothing less pedigreed than its founding philosophy. The UVVA criminalizes harm to the fetus and sanctions such harm with the punishment that would have befallen the accused had the women carrying the fetus been the one to sustain the injuries instead.² This Article argues that recent efforts at fetal protection, like the UVVA, defy and defile liberalism, the political theory underpinning this nation's constitution,³ and thereby conduce to the subordination of women.⁴

1. Pub. L. No. 108-212, § 1, 118 Stat. 568 (2004).

2. See 18 U.S.C. § 1841(a)(2)(A) (2004) (“[T]he punishment for that separate offense [of injuring or killing the unborn 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.”).

3. Having been cast as the ideology in which Northeastern politicians couch their alleged elitism, liberalism has recently acquired a bad name. See, e.g., Joan Vennoch, *What’s the Matter with Massachusetts?*, THE BOSTON GLOBE, Jan. 11, 2005, at A11; Chris Weinkopf, *John Kerry’s America: Pride, Privilege, and Presumption*, THE AMERICAN ENTERPRISE, October/November 2004, at 14, available at http://www.taemag.com/docLib/20040915_KerrysAmerica.pdf.

Nonetheless, there is ample support for the proposition that liberal values motivated the Founders and informed their drafting of the Constitution. See, e.g., THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that, despite the anti-democratic nature of factions, it is the hallmark of good governance to preserve the robust sense of liberty under which groups arrive at different ideologies); *id.* at 56-65. See generally Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (arguing that liberalism pervaded American political thought from the time of the founding through 1937); James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117 (1999). The influence of liberalism on the Founders was evidenced not only by their commitments to neutrality, see *infra* note 8, and equality, see *infra* notes 9-10, but also in their faith in reason, see FEDERALIST NO. 1, *supra* at 3, and science, see, e.g., Douglass Adair, “*That Politics May Be Reduced to a Science*”: David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343 (1957), reprinted in THE FORMATION AND RATIFICATION OF THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 21 (Kermit L. Hall ed., 1987) (arguing that the enlightenment views of David Hume, the classical liberal theorist, infused the thinking of James Madison). That the anti-Federalists embraced the tenets of liberalism as well demonstrates the pervasiveness of this ideology at the time of the Founding. See, e.g., Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 344 (1982) (reviewing THE ANTI-FEDERALIST (Herbert J. Storing ed., 1982), in which Storing “concludes that the Anti-Federalists were liberals ‘in the decisive sense that they saw the end of government as the security of individual liberty, not the promotion of virtue or the fostering of some organic common good’ (vol. 1, p. 83 n.7)”). But see Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (urging a view of constitutional history more nuanced than one that would hastily align federalism—or anti-federalism, for that matter—with liberal values).

4. For the view that political liberalism provides powerful tools for empowering women, especially as a result of its emphasis on self-determination, see Martha C. Nussbaum, *Rawls and Feminism*, in THE CAMBRIDGE COMPANION TO RAWLS 488 (Samuel Freeman ed., 2003); Linda C. McClain, “*Atomistic Man*” Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171 (1992); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. &

Liberalism makes central commitments to neutrality and equality,⁵ both of which serve liberalism's most fundamental liberty – the liberty of citizens to pursue their life plans and construct their value systems.⁶ To secure this liberty, neutrality mandates a government that forebears from favoring some life plans over others, or from adopting or acting upon values not shared by all.⁷ This commitment to governmental restraint finds support in the Constitution, for example, in the First Amendment's Establishment Clause.⁸ Equality requires that all citizens receive equal treatment before the law. This principle is embodied most transparently in the Privileges and Immunities Clause,⁹ and the Equal Protection Clause.¹⁰

A statutory regime protecting fetuses from harm would seem straightforwardly to violate liberalism's twin commitments to neutrality and

FEMINISM 7 (1989). *But see* Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *FORDHAM L. REV.* 1537 (2004).

5. *See, e.g.*, Steven D. Smith, *The Restoration of Tolerance*, 78 *CAL. L. REV.* 305 (1990) (describing and critiquing various strands of liberal thought including a liberalism of neutrality and equality).

While this Article treats neutrality and equality as distinct, albeit logically related, values the two are often intertwined. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 623 (1996) ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.").

6. *See infra* notes 16-20 and accompanying text.

7. *See infra* note 29 and accompanying text.

8. U.S. CONST. amend. I, cl. 1. For the proposition that the Founders construed neutrality in this way, *see, for example*, *Lee v. Weisman*, 505 U.S. 577, 607 n.10 (1992) (Blackmun, J., concurring) (citing James Madison's "Memorial and Remonstrance," in which Madison argues that "[i]t degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance."). *See generally* Edward B. Foley, *Religion and the Public Schools After Lee v. Weisman*, 43 *CASE W. RES. L. REV.* 963, 980 (1993) (arguing that contemporary political liberalism conforms with the original understanding of the Establishment Clause); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779, 828 (1994) ("Under the Constitution, the Establishment Clause is the key example of the ban on certain kinds of valuation. The Constitution rules out valuations that assume certain conceptions of what is sacred, at least those that invoke religious commitments. For example, a law making Easter a national holiday may not rest on the ground that it reflects the sanctity of Jesus Christ. The Establishment Clause generally rules sectarian justifications for statutes out of bounds, even if other, neutral factors could support the same laws. Political liberalism is constituted in part through the idea that certain kinds of valuation are too contentious to be a legitimate part of public life, even if they are a fully legitimate part of private citizenship."). For the view that liberty of conscience is a paradigmatic basic liberty, *see* JOHN RAWLS, *POLITICAL LIBERALISM* 310-312 (1996) [hereinafter PL].

9. *See* U.S. CONST. art. IV, § 2; U.S. CONST. amend. XIV, § 1. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. 36, 100-101 (1872) (Field, J., dissenting) ("What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L. J.* 1385 (1992) (arguing that the Privileges and Immunities Clause of the Fourteenth Amendment is the natural home for equality-based claims).

10. U.S. CONST. amend. XIV, § 1.

equality. Laws criminalizing harm to the fetus tend to presuppose its personhood and, when they do, contravene neutrality's requirement that liberal governments abstain from staking controversial moral or metaphysical positions.¹¹ And, since protection of fetuses is often wrought at the expense of the women who carry them, fetal protection laws (at least as they have recently been promulgated)¹² threaten to introduce inequality between mothers and their unborn children.

Yet criminal punishment for harm to the unborn is not the only kind of fetal protection currently threatening liberalism's fundamental commitments. The logical extension of fetal protection statutes was drawn out in *People v. Kurr*,¹³ a 2002 Michigan case that held, for the first time at the state or federal level, that these statutes justified a woman's use of deadly force against an attacker who threatened the life of her fetus. This novel interpretation of the doctrine of defense of others violates commitments to neutrality and equality insofar as it, like the fetal protection statute grounding it,¹⁴ presupposes the personhood of the fetus and confers more protection on fetuses than on the women who carry them.

This Article advances a liberal critique of existing attempts at fetal protection. The Article also argues, however, that a regime that ignored harm to fetuses would no better serve liberalism's commitments to neutrality and equality. This Article thus undertakes to offer a new paradigm for conceiving of harm to the unborn that is compatible with liberalism's core values.

Part I is devoted to a critique of the UVVA and other existing alternatives that deny the unborn any protections or advocate enhanced protections for pregnant women rather than the fetuses they carry. All of these legislative efforts, I argue, run afoul of the nation's most fundamental political commitments. In Part II, I draw out the implications of using fetal protection laws to extend the doctrine of defense of others to the fetus. *Kurr* provides a cautionary tale alerting us not only to the inegalitarian consequences of the fetal protection statute undergirding it, but also to the insidious biases that a pretension to neutrality, embodied in the elements of self-defense, can cloak.

I advance a proposal in Part III that is intended to deter violence against all women, while recognizing and repairing the specific harm that a pregnancy terminated through violence can generate. I extend this proposal to the context of self-defense to enhance women's ability to protect themselves without

11. See *infra* notes 29 and 31-33 and accompanying text. Of course, the failure to criminalize harm to the fetus would not be neutral either. What is crucial then is the form that such criminal laws take. I advance a proposal in Part III, *infra*, that is intended to punish and redress the harm to the fetus and its mother while observing the state's commitment to neutrality.

12. See *infra* Parts I and II (discussing, respectively, legislative and judicial attempts at protecting the fetus).

13. 654 N.W.2d 651 (Mich. Ct. App. 2002), *cert. denied*, 655 N.W.2d 552 (Mich. 2003).

14. MICH. COMP. LAWS §§ 750.90(a)-(f) (2005).

relying upon the *Kurr* strategy of implicitly recognizing the personhood of the fetus.

Even before venturing into a discussion of violence against pregnant women and violations of liberal theory, however, it will be useful to present some of the conceptual groundwork that informs my analysis.

B. Liberalism: A Primer

As a political theory, liberalism has a number of moving parts, and their scope and content receive differing constructions in the various accounts of liberalism advanced by political theorists.¹⁵ It would be foolhardy to attempt a comprehensive exegesis of these here. Nonetheless, in order to understand how attempts to protect the fetus through the criminal law transgress liberalism's commitments to neutrality and equality, we will first have to map out some of the conceptual terrain, in order to eventually locate these commitments within liberal political theory. To render the task more manageable, it will be helpful to focus on liberalism's fundamental liberty, and the corollaries of this liberty most relevant here.

The fundamental liberty in liberalism is the freedom, for each citizen,¹⁶ to pursue her "conception of the good"¹⁷ compatible with a like freedom for all, without undue interference from the state.¹⁸ A "conception of the good"

15. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 1 (1989) ("It is probably true to say that no political cause, no one vision of society nor any political principle has commanded the respect of all liberals in any given generation, let alone through the centuries."). For one example of the range of disagreement among liberal thinkers, see the discussion of the concept of "neutrality" advanced, *infra*, notes 30-35 and accompanying text.

16. Citizens, rather than persons more generally, are the subject of liberal political theories insofar as those theories contemplate justice within the liberal state. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 91 (1980); RAWLS, PL, *supra* note 8, at 191-93 (defining neutrality as a disposition the state takes toward its citizens).

17. See, e.g., ACKERMAN, *supra* note 16, at 43; RAWLS, PL, *supra* note 8, at 19.

18. For the proposition that liberals take the freedom to pursue one's conception of the good to be fundamental, see, for example, ACKERMAN, *supra* note 16, at 367-68 (referring to the good of autonomy as "the best thing that there is"); RAZ, *supra* note 15, at 2. Because of this freedom's fundamental status, it is logically prior to the commitment to neutrality; hence, it need not be justified on neutral grounds. Cf. RAWLS, PL, *supra* note 8, at xliv, 192-94 (freeing his theory to endorse autonomy by defending it as a political (rather than a moral) value, and by limiting his conception of neutrality to comprehensive (rather than political) conceptions of the good).

The particular formulation of liberalism's fundamental liberty found in the text accompanying this note reflects a synthesis between Joseph Raz's conception of "political freedom," see, e.g., RAZ, *supra* note 15, at 265 (explaining the value of political freedom as "a concomitant of the ideal of autonomous persons creating their own lives through progressive choices from a multiplicity of valuable options"), and John Rawls's first principle of justice, see RAWLS, PL, *supra* note 8, at 5 ("Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all. . ."). See also *id.* at 30 ("[C]itizens are free in that they conceive of themselves and of one another as having the moral power to have a conception of the good."). Rawls's scheme of basic liberties can be seen as the constellation of forms of governmental restraint that would ensure each citizen's freedom to pursue her conception of the good. See, e.g., *id.*, at

consists of the set of aspirations, commitments, associations and relationships that a person chooses to make her life about.¹⁹

Autonomy is the name variously for the freedom and capacity to adopt, revise, and enact one's conception of the good.²⁰ Many scholars have argued that autonomy is so central to personhood that it is, and ought to be, an "integral part of the body of the Constitution."²¹ Those concerned with

291. For Raz, political freedom is to be assured by a government bound by a variant of John Stuart Mill's harm principle, which "restrains both individuals and the state from coercing people to refrain from certain activities or to undertake others on the ground that those activities are morally either repugnant or desirable," RAZ, *supra* note 15, at 413.

Other theorists give a different name to "political freedom," and its precise bounds differ among them. Nonetheless, they acknowledge that the purpose of liberty is to allow individuals to lead the life and adopt the values of their choosing. See, e.g., ACKERMAN, *supra* note 16, at 362 ("[T]he aim of liberalism is to organize the machinery of government in a way that facilitates informed and flexible exchanges of ideas, property, and love by people who encounter one another under conditions of undominated equality."). See *id.* at 177-80; Ronald Dworkin, *Foundations of Liberal Equality*, in EQUAL FREEDOM 190, 275-305 (Stephen Darwall ed., 2000) (rooting his version of liberalism in the "ethics of challenge," *i.e.*, the view that each individual "is concerned to advance his own interests . . . in leading a life good for him because it responds in the right way to his circumstances as they ought to be").

Notwithstanding the preeminence of liberty in liberal theories, these theories recognize that liberty has some limits. In particular, liberal theorists hold that the state may restrain citizens from acting upon conceptions of the good that either threaten liberal society or democracy itself, see, e.g., RAWLS, PL, *supra* note 8, at 243, or that assert a claim to a greater share of liberty than others enjoy, see, e.g., ACKERMAN, *supra* note 16, at 84-87 (arguing for the use of preventive detention where this is the least restrictive alternative available to ensure that a citizen acts within the bounds that liberalism permits).

19. For a robust definition of a conception of the good, see, for example, RAWLS, PL, *supra* note 8, at 19-20. See also ACKERMAN, *supra* note 16, at 43-44; RAZ, *supra* note 15, at 308; Dworkin, *supra* note 18, at 275-76.

20. For an extended discussion of autonomy as both personal ideal and capacity, see RAZ, *supra* note 15, at 367-78.

Some theorists see autonomy as the ultimate good, while others view it as a means of achieving the ultimate good—*viz.*, a self-chosen life. For the former view, see, for example, ACKERMAN, *supra* note 16, at 367-368; for the latter, see RAZ, *supra* note 15, at 390-92 (arguing that autonomy is valuable insofar as it conduces to a person's well-being). Rawls, in his theory of political liberalism, posits autonomy as the focus of an overlapping consensus, and thereby remains agnostic on the question of what sort of good autonomy is. RAWLS, PL, *supra* note 8, at xlv-xlv. It will not be necessary to adjudicate between these views for purposes of this Article.

21. James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 9 (1995); see also Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) ("[A]utonomy holds unique promise to function as the constitutional value of values."). Cf. JOHN RAWLS, A THEORY OF JUSTICE 493 (2000) [hereinafter TJ] ("The parties' aim in the original position is to establish just and favorable conditions for each to fashion his own unity.").

For the proposition that autonomy cannot be affirmed within political liberalism, see Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 392 (1996) ("[I]ndividual choice of ends [is] simply one among a number of partisan ideals that the state is not justified in privileging. . ."). While it is true, as Gardbaum insists, that the state cannot, consistent with political liberalism, impose the ideal of autonomy upon its citizens' conceptions of the good, it is not true that the politically liberal state cannot guarantee that autonomy will be available for those who wish to affirm it. Indeed, even those who wish to deny the value of autonomy need some amount of freedom to do so. In this way, state assurances of autonomy do not violate the commitment to neutrality. See also Fleming, *supra* at 33 ("It is important to recognize that deliberative autonomy is concerned with securing basic liberties that are preconditions for the development and exercise of persons' capacity for a conception of the good in deliberating about and making decisions concerning certain fundamental matters, and does not guarantee or require actual conscientious deliberation in applying that capacity."). I leave to one side Gardbaum's deeper critique of political liberalism—namely, that it cannot secure citizens' autonomy since it cannot prohibit autonomy incursions more subtle than state coercion, see *supra* at 401-404—

women's rights have special reason to insist upon protections for autonomy, for women's subordination has been marked by incursions into their capacities for self-determination.²² Indeed, recent Supreme Court cases have powerfully and stirringly vindicated a right of autonomy in cases involving sexual freedom. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²³ the Court proclaimed: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."²⁴

As the Court suggested in *Casey*, there is an intimate connection between autonomy and an individual's *identity*. In particular, autonomy provides each individual with the opportunity for self-authorship, as each individual adopts and enacts a conception of the good with which he forges his identity against the background of valuations he inherits from his family, culture, society and so on.²⁵ In short, in assuming and pursuing a life plan, "a person says who he is."²⁶

since I believe that political liberalism has resources adequate (at least) to critique and rule out the forms of fetal protection at issue here.

22. See, e.g., Nedelsky, *supra* note 4 (aiming to rescue autonomy from its atomistic roots in light of the importance of self-determination for the feminist agenda).

23. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

24. 505 U.S. at 851. See also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."). While the assimilation of autonomy and liberty has recently been used to vindicate the causes of the "left," this assimilation may be, and has been, hospitable to the "right," as well. See, e.g., *Pierce v. Society of the Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (protecting a parent's right to send his or her child to a religious school).

25. In light of its project of defining the self against the background of one's family or culture, liberalism is often accused of presupposing an atomistic conception of the individual, see, e.g., RAWLS, PL, *supra* note 8, at xxxi, and this charge is perhaps nowhere more forcefully levied than in feminist circles, see, e.g., Nedelsky, *supra* note 4; Okin, *supra* note 4. While some liberal theories do indeed conceive of man as an entirely self-made creature, with no connection to or trace of those who had a hand in constituting his identity, see, e.g., 2 THOMAS HOBBS, *Philosophical Rudiments Concerning Government and Society*, in THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY 1, 109 (Sir William Molesworth ed., 1841) (likening the individual's emergence to that of a spontaneously sprouting mushroom), this conception is not essential to liberal thought. Instead, liberals can and do acknowledge the debt individuals owe their familial, cultural and societal forebears in contributing to their identities. See, e.g., RAWLS, PL, *supra* note 8, at 41 ("We have no prior identity before being in society: it is not as if we came from somewhere but rather we find ourselves growing up in this society in this social position, with its attendant advantages or disadvantages, as our good or ill fortune would have it."); RAZ, *supra* note 15, at 308-313 (arguing that individuals cannot conceive of comprehensive goals for their lives that are not already embedded in or derivative of existing social forms). The project of self-authorship that the liberal sees as crucial to a good life is thus a project of filling in (or wrestling against) a text that is partially written from birth, rather than a project of creation on a blank sheet.

26. RAWLS, TJ, *supra* note 21, at 358. See also ACKERMAN, *supra* note 16, at 43 ("It is by questioning the colonist about his purposes . . . that we will learn his conception of the good."); RAZ, *supra* note 15, at 385 ("The autonomous person has or is gradually developing a conception of himself . . ."); *id.* at 387 ("In embracing goals and commitments, in coming to care about one thing or another, one progressively gives shape to one's life In that way, a person's life is (in part) of his own making."); Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2070 (1995) (the "requirements of autonomy defined as self-authorship thus are satisfied only when an individual subjectively defines for herself 'who she is, what she wants, and what she will

In a society as diverse as ours, citizens adopt a plurality of reasonable, but irreducibly distinct, conceptions of the good. Given this irreducible pluralism, a citizen may not be able to affirm, from the perspective of his private morality, others' conceptions of the good where these are incompatible with his own.²⁷ For example, a religious adherent may not be able to acknowledge the worth of the life of a non-believer, fearing instead for this heathen's soul. Nonetheless, autonomy can be secured for everyone only if each citizen forgoes imposing his conception of the good upon others. Thus, autonomy requires that each citizen *tolerate* the set of values and way of life adopted by each of her fellow citizens.²⁸ For similar reasons, the state, as the representative of the people, may not favor some conceptions of the good over others. That is, the state must act *impartially* with respect to the various conceptions of the good adopted by its members if each of these members is to be free to select and revise his goals and values.²⁹ *Neutrality* is, to put the point generically, the shorthand term for the commitment embodied in citizens' toleration of, and the state's impartiality toward, citizens' conceptions of the good.³⁰

pursue in her life") (citing Jean Hampton, *Selflessness and the Loss of Self*, 10 SOC. PHIL. & POL'Y 135, 150 (1993)).

27. As Rawls says, "it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion." PL, *supra* note 8, at 58.

28. See, e.g., ACKERMAN, *supra* note 16, at 11 (defining neutrality as, inter alia, the requirement that each citizen accept the proposition that his or her conception of the good is no better than that of any other); RAZ, *supra* note 15, at 401-404; Dworkin, *supra* note 18, at 300-305.

29. See, e.g., RAWLS, TJ, *supra* note 21, at 80 ("Justice as fairness . . . does not . . . evaluate the relative merits of different conceptions of the good. . . . Everyone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands."); RAWLS, PL, *supra* note 8, at 193-95; RONALD DWORKIN, *Liberalism, in A MATTER OF PRINCIPLE* 127 (1985) ("[P]olitical decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life."); Dworkin, *supra* note 18, at 228; Foley, *supra* note 8, at 965 ("[P]olitical liberalism teaches that the government should endeavor to maintain a position of strict impartiality among different religious belief-systems and, most certainly, must not endorse any particular religion as the one true faith."); Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 1 (1992). But see, e.g., RAZ, *supra* note 15, at 424-29 (arguing that political freedom can better be secured by a government that more actively seeks to enable individuals to realize their conceptions of the good, even though such a government mandate would exceed the bounds of neutrality).

Even within a conception of neutrality as governmental impartiality, there are gradations. For example, Will Kymlicka distinguishes between two versions of governmental neutrality, which he terms "consequential" and "justificatory." Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 884 (1989). Consequential neutrality prohibits a government from undertaking any act whose effect is to promote (or disfavor) any particular conception of the good. Justificatory neutrality, on the other hand, prohibits a government from undertaking any act *in order to* promote (or disfavor) any particular conception of the good. Since it would be near impossible for a government to abide by consequential neutrality, most liberals, including Kymlicka, wisely adopt the justificatory form. *Id.*; see also CHARLES LARMORE, *PATTERNS OF MORAL COMPLEXITY* 44 (1987) ("[the liberal state's] neutrality is not meant to be one of *outcome* but rather one of *procedure*. That is, political neutrality consists in a constraint on what factors can be invoked to justify a political decision."); Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. OF POL. 633, 639 (2004). For a similar distinction in Rawls's theory of political liberalism, see *infra* note 33 and accompanying text.

30. While the values of toleration and impartiality will be crucial here, they represent just two of the disparate meanings assigned to "neutrality." There is yet another sense of neutrality, one advanced by Herbert Wechsler in a now famous article relating neutrality to constitutional decision-making.

Some liberal theorists require a more limited form of neutrality than the generic sense just described. John Rawls, for example, has sought to arrive at a principle of neutrality appropriate for citizens who diverge not only with respect to their conceptions of the good but also with respect to the moral, philosophical, and religious beliefs that undergird these conceptions.³¹ Faced with this pluralism between citizens' "comprehensive doctrines,"³² Rawls, in his theory of political liberalism, defines neutrality as the principle that "basic institutions and public policy . . . not . . . be designed to favor any particular 'comprehensive doctrine.'"³³ So expressed, the political liberal conception of neutrality shares with the generic conception the ideal of governmental impartiality.³⁴ Moreover, on both conceptions, governments may use values to

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). There, Wechsler argued that constitutional decisions ought to be constrained by a principle of neutrality, which he defined as "generality," or the treating of like cases alike. Thus, "what Professor Wechsler ha[d] in mind [was] exorcising, once and for all, 'the kadi . . . dispensing justice according to considerations of individual expediency.'" Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PENN. L. REV. 1, 5 (1959) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting)). Wechsler's conception thus differs from, say, the Rawlsian conception because a decision could be neutral in Wechsler's sense and yet rest upon a comprehensive doctrine not shared by all citizens. Neutrality in Wechsler's sense is only tangentially related to autonomy and thus will not occupy us here.

For a critique of Wechsler's conception of neutrality, see Sunstein, *supra* note 29; for a critique of Wechsler's application of his principle of neutrality to the cases he cites, see Pollak, *supra*. For a more comprehensive list of the various senses of neutrality, see RAZ, *supra* note 15, at 114-15; Sunstein, *supra* note 29, at 50-52. For a survey of the epistemic, metaphysical, and pragmatic defenses of neutrality, see Koppelman, *supra* note 29, at 640-45.

31. RAWLS, PL, *supra* note 8. Interestingly, while the political liberal conception of neutrality seems particularly appropriate for and responsive to the broad and deep ideological divides that characterize contemporary western societies, Rawls traces this conception (along with the more generic sense of neutrality) to the Reformation. See *id.* at xxiv-xxix. Thus it is entirely conceivable that the Framers embraced a commitment to neutrality as the only way to achieve peace in a society marked by irreconcilable ideological differences. See generally *supra* note 3.

32. RAWLS, PL, *supra* note 8, at xviii, 13.

33. *Id.* at 194. Rawls refers to this sense of neutrality as "neutrality of aim." *Id.* at 191-94. He states that his theory of justice also adopts a principle of neutrality of appeal insofar as it "hopes to articulate a public basis of justification for the basic structure of a constitutional regime" by seeking common ground between the various comprehensive doctrines that citizens embrace. *Id.* at 192.

34. In recent years, critics have forcefully attacked liberalism's commitment to governmental impartiality on two main grounds. Perfectionists have argued that "some traits, activities, and ways of relating to people really are superior to others, and if there are no defensible reasons for government *not* to promote these, then many citizens of neutral states will end up with the lives that are not as good as they could be." GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* 3 (1997); see also RAZ, *supra* note 15, at 425 ("[T]he state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy."). In what follows, I argue that, when it comes to the moral status of the embryo or fetus, we cannot arrive at the sort of knowledge that perfectionism presupposes. Thus, whatever traction the perfectionist critique has with respect to a conception of neutrality that forbids the government from acting on any determinate sense of the good, the critique falters in the face of the moral uncertainties that will occupy us here.

Communitarians argue that government engagement with morals and values is not just desirable, but also necessary and inevitable. Michael Sandel, for example, argues that a political theory that would exclude particular values—and especially a sense of community—from the set of constituents of a well-ordered society threatens to frustrate the possibility for mutual beneficence. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 183 (1982) [hereinafter LLJ]. Indeed, in a later work, Sandel credits liberalism, which, he claims, cannot attend either to communal identity or to

guide or justify certain policies where there is consensus regarding these values.³⁵

Autonomy sustains a commitment not just to neutrality but also to equality. More specifically, autonomy prohibits discrimination between persons on the basis of their conceptions of the good because such discrimination constrains the range of choices, and hence the capacity for self-authorship, of the members of both the favored and disfavored groups. This is so because, under a discriminatory regime, the disfavored would experience a disadvantage in virtue of the conceptions of the good they had embraced and the favored would feel bound to retain the conceptions they happened to hold lest they join the ranks of the disfavored.³⁶ In this way, we can arrive at a pragmatic justification for liberalism's commitment to equality.

But there is also a principled justification for this commitment, which rests on the fact that liberalism is without the resources to distinguish between persons on the basis of their moral worth. In general, assessments of an individual's moral worth turn either on her possession (or failure to possess) certain ascriptive characteristics or on the content of her conception of the good. Yet the value to be attached to any ascriptive characteristic will itself depend upon the evaluator's conception of the good. Thus, one could judge others' moral worth only if one could determine which conception of the good is best. But the possibility of reaching such a determination is foreclosed by liberalism's starting assumption, namely, that there exists a plurality of reasonable yet incompatible conceptions of the good. In other words, there is no common scale of value that unifies all of the conceptions of the good and allows them to be evaluated one relative to another.³⁷ Thus, liberalism holds

civic virtue, with "democracy's discontents"—"the fear that, individually and collectively, we are losing control of the forces that govern our lives . . . [and] the sense that . . . the moral fabric of community is unraveling around us." MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 3 (1996) [hereinafter DD]. Aimed as it is against liberalism's social welfare agenda, see *id.*, SANDEL, LLJ, *supra*, at 66-103, Sandel's critique is orthogonal to the project that will occupy us here—namely, whether the state can effectively deter and redress violence against women without endorsing a particular conception of the moral worth of the fetus.

35. See, e.g., LARMORE, *supra* note 29, at 67; RAWLS, PL, *supra* note 8, at 194 ("Even though political liberalism seeks common ground and is neutral in aim, it is important to emphasize that it may still affirm the superiority of certain forms of moral character and encourage certain moral virtue," in particular, those that support the principles of justice at which the theory arrives). Thus, to take a very elementary example, the state can legislate against murder consistent with its liberal commitments even though some individuals will justify the prohibition on the ground that life is sacred, and others will do so on the ground that the decent state will deter violent crime to provide security to its citizens.

36. As Dworkin states, citing Hegel, "masters and slaves are prisoners together; equality unlocks the prison for both." Dworkin, *supra* note 18, at 291.

37. This claim about the incommensurability of conceptions of the good can be framed in either epistemic or metaphysical terms. For the former, see, for example, ACKERMAN, *supra* note 16, at 11 (advocating neutrality on the basis of skepticism about our ability to discover the true nature of the good); for the latter, see, for example, RAZ, *supra* note 15, at 321-56 (arguing that the good comes in an irreducible variety of forms). *But cf.* RAWLS, PL, *supra* note 8 at xxvii-xxviii (suggesting that pragmatics—specifically, a recognition of the futility of the venture—led individuals to abandon the task of seeking to convert others to the formers' conception of the good); SHER, *supra* note 31, at 2 ("We

that citizens are equal despite their having embraced different conceptions of the good.³⁸ Indeed, in this way, equality provides an independent ground for the commitment to neutrality.³⁹

Equality and neutrality thus serve as the touchstones against which I will assess recent attempts to protect the fetus through the criminal law, such as the Unborn Victims of Violence Act, and the extension of the doctrine of defense of others to the unborn. In what follows, we will see how these attempts contravene liberalism's core commitments, and how the value of autonomy can guide the way to a policy that protects women, and their fetuses, while honoring these commitments.

I. FETAL PROTECTION

In this Part, I review federal legislative attempts to protect the fetus, focusing first on the Unborn Victims of Violence Act, and then on the alternatives that Democrats in Congress proposed.

A. *The Unborn Victims of Violence Act*

Prior to passage of the Unborn Victims of Violence Act of 2004 (UVVA),⁴⁰ federal criminal statutes incorporated the "born alive" rule, derived from common law,⁴¹ which allowed injuries to the fetus to be prosecuted only if the fetus were born alive and subsequently died.⁴² To alter a state of affairs in

also worry . . . that by tolerating departures from official neutrality, we risk allowing the state's coercive apparatus to be captured by fanatics, bullies, or worse.").

38. Cf. RAWLS, PL, *supra* note 8, at 19 (locating equality in significant part in the fact that all persons have, "to the requisite minimum degree to be fully cooperating members of society. . . [.] the capacity to form, to revise, and rationally pursue to their conceptions of one's rational advantage or good.").

39. See, e.g., Ronald Dworkin, *Neutrality, Equality, and Liberalism*, in LIBERALISM RECONSIDERED 2 (Douglas Maclean and Claudia Mills eds., 1983) ("[T]he liberal's emphasis on neutrality in moral personality is not the source but rather one consequence of a prior and general commitment to equality."). Because a commitment to neutrality flows from an antecedent commitment to equality, there is no need for a neutral justification of equality. *But cf.* Steven Wall, *Neutrality and Responsibility*, 98 J. PHIL 389 (2001) (arguing that neutrality of justification is incompatible with strong egalitarianism).

40. Pub. L. No. 108-212, § 1, 118 Stat. 568 (2004).

41. For a discussion of the history and rationale behind the "born alive" rule, see Michael Holfzapel, Comment, *The Right To Live, The Right To Choose, and The Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL'Y 431, 433-35 (2002); Tara Kole & Laura Kadetsky, *Recent Development: The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 216-18 (2002).

42. H.R. REP. NO. 106-332, at 4 (1999). In *United States v. Spencer*, the court recognized that the common law rule found its way into federal statutes. 839 F.2d 1341 (9th Cir. 1988), *cert. denied* 487 U.S. 1238 (1988). There, the court held that, "[i]n view of Congress's intent to reflect the state and common-law definition of murder when it passed the statute, and the state and common-law acceptance of infants who died subsequent to birth due to fetal injuries as human beings, it seems clear that

which “injuring or killing an unborn child during the commission of a violent crime ha[d] no legal consequence whatsoever,”⁴³ federal legislators banded together to sponsor the “Unborn Victims of Violence Act.”

The Act, which was first introduced in the House of Representatives on July 1, 1999, passed in the House on September 30, 1999,⁴⁴ but failed to pass in the Senate.⁴⁵ An identical bill was reintroduced and prevailed in the House in 2001.⁴⁶ In anticipation of a presidential veto, however, the bill again failed to gain the assent of the Senate.⁴⁷

Capitalizing on the prominence of the Scott Peterson trial, Congress named the 2004 version of the bill “Laci and Conner’s Law.”⁴⁸ The UVVA would henceforth carry the name of Peterson’s dead wife and fetus even though Peterson was not and could not have been prosecuted under federal law,⁴⁹ and even though the Act contains protections only for fetuses and not for the women who carry them. Whether it was because of a Republican majority in Congress,⁵⁰ the media’s undue focus on the trial of a good-looking white man

Congress intended fetal infanticide to be included within the statutory definition of ‘murder’ under 18 U.S.C. § 1111 [the federal murder statute].” *Id.* at 1343. *See also* United States v. Nelson, 53 M.J. 319 (C.A.A.F. 2000) (applying the common law born alive rule to a military prosecution for involuntary manslaughter of a newborn baby).

In contrast to the federal born alive rule, some states have recognized the crime of feticide even if the defendant could not reasonably have known that the woman he assailed was pregnant, and thus did not act with an intent to harm the fetus. *See, e.g.,* People v. Taylor, 86 P.3d 881 (Cal. 2004); Kentucky v. Morris, 142 S.W.3d 654 (Ky. 2004) (holding that Kentucky statute permits prosecuting as a homicide the felonious killing of a fetus, but declining to extend statute to defendant since it was adopted after the commission of his crime). *Cf.* 66 Fed. Credit Union v. Tucker, 853 So.2d 104 (Miss. 2003) (holding that Mississippi’s wrongful death statute creates a cause of action for death of a non-viable fetus); State v. Merrell, 450 N.W.2d 318 (Minn. 1990) (affirming defendant’s conviction for murder for the shooting death of the 28-day in utero embryo that he and his girlfriend had conceived).

In general, thirty-two states impose some form of criminal liability for harms to the fetus or its mother. For a thorough review of these laws, see Holzapfel, *supra* note 41, at 451-57; Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword To Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 461-70 (1998).

43. H.R. REP. NO. 106-332, at 3 (1999) (*italics added*). That an assailant could do no damage to the fetus without going through its mother’s body first, and that the battery committed against the mother could be prosecuted, apparently escaped the notice of these legislators.

44. H.R. 2436, 106th Cong. (1999). The Act was reintroduced in the house as The Unborn Victims of Violence Act of 2001, H.R. 503, 107th Cong. (2001).

45. *See* Kole and Kadetsky, *supra* note 41, at 215 n.2.

46. *Id.*

47. *Id.*

48. *See* Pub L. No. 108-212, § 1, 118 Stat. 568 (2004).

49. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §4.1-4.2 (2003); 150 CONG. REC. S3124-02, S3127 (daily ed. Mar. 25, 2004) (statement of Sen. Dianne Feinstein, noting that the UVVA would extend only to those offenses committed on federal property, which would exclude Peterson’s alleged crime).

50. In 2004, the House contained 227 Republicans and 205 Democrats, with one independent representative, and two vacant seats. *See* The Green Papers: General Election 2004, *The 108th Congress House Seats by State* at <http://www.thegreenpapers.com/G04/House.phtml> (last visited Oct.18, 2005) The Senate was comprised of fifty-one Republicans, forty-eight Democrats and one independent. *See* The Green Papers: Midterm Election, 2004 *Partisan Composition by State* at <http://www.thegreenpapers.com/G04/composition.phtml> (last visited Oct.18, 2005). The UVVA had been sponsored by Republicans in both houses, *see* H.R. REP. NO. 108-420, pt. 1 (2004), *reprinted in*

who killed his pretty, white wife in her eighth month of pregnancy,⁵¹ or a more general cultural consensus that individuals who injure the unborn ought to be punished for that act,⁵² Congress finally passed the bill that would do just that.⁵³

Signed into law on April 1, 2004,⁵⁴ the UVVA amends Title 18 of the United States Code, and the Uniform Code of Military Justice.⁵⁵ It protects the "unborn child," defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."⁵⁶ The Act criminalizes, and punishes as a separate offense, conduct that violates specified federal statutes or Military laws, and thereby causes death or bodily injury to an embryo or fetus.⁵⁷ The punishment attaching to the offense is the same as the punishment that federal law would provide had the offense been committed against the woman carrying the embryo or fetus.⁵⁸ Inasmuch as conviction under the UVVA "does not require proof that . . . the person engaging in the conduct 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 unborn child,"⁵⁹ the statute adopts a strict liability standard.⁶⁰ Where the defendant does intend death or bodily injury to the fetus, he will be punished as if his offense were the intentional killing or attempted

2004 U.S.C.A.N 533; 150 CONG. REC. S3124-02, and was overwhelmingly approved by them. *See id.*, *infra* note 53 (reporting voting results on the UVVA in the House and Senate).

51. *See* William Booth & Kimberly Edds, *Forget Bush-Kerry. What About Scott-Laci? A Trial Galvanizes, and Polarizes, the Media*, WASH. POST, Nov. 2, 2004 at A1 (citing a Fox News legal analyst who quipped, "You know, there could be dozens of dead, poor African American women and nobody's ever heard of them, and I can understand how this trial says if you're white and pretty, you get more attention.").

52. For example, a Newsweek poll cited in the House Report accompanying the UVVA, *see* H.R. REP. NO. 108-420, pt. 1, at 5 & n.5 (2004), found that 84% of respondents think that prosecutors should be permitted to charge those who kill fetuses with murder. Debra Rosenberg, *The War Over Fetal Rights*, NEWSWEEK, June 9, 2003, at 43. *See also* 150 CONG. REC. S3135 (reporting the House vote on the Innocent Child Protection Act, a bill banning the federal execution of pregnant women, which passed by a margin of 417 to 0).

53. The UVVA prevailed in the House by a vote of 254-163, *see* Associated Press, *House Passes Unborn Victims Bill* (Feb. 26, 2004), at <http://www.cbsnews.com/stories/2004/03/25/politics/main/608647.shtml> (last visited Oct. 18, 2005), and in the Senate by a vote of 61-38, 150 CONG. REC. S3124-02, S3167 (daily ed. Mar. 25, 2004).

54. *See supra* note 1.

55. *See* 18 U.S.C. 1841 (2000) and 10 U.S.C. 919(a) (2000).

56. 18 U.S.C. § 1841(d) (2000). *See also* 10 U.S.C. § 919(a)(d) (2000).

57. The Act contemplated, in particular, violations of specified provisions of the Federal criminal code, the Controlled Substances Act of 1970, the Atomic Energy Act of 1954, or specified articles of the Uniform Code of Military Justice.

58. 18 U.S.C. § 1841(a)(2)(A) (2000) ("[T]he punishment for that separate offense 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.").

59. 18 U.S.C. § 1841(a)(2)(B) (2000).

60. *See, e.g.*, BLACK'S LAW DICTIONARY 1422 (8th ed., 2004) (defining "strict liability crimes" as "[u]nlawful acts whose elements do not contain the need for criminal intent or *mens rea*.").

killing of a born human being.⁶¹ The Act exempts “(1) . . . conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law; (2) . . . medical treatment of the pregnant woman or her unborn child; or (3) [the conduct] of any woman with respect to her unborn child.”⁶²

Because of the exempting provisions, the Act does not appear to impinge on a woman’s constitutional right to an abortion, or interfere with her conduct during gestation. Indeed, given these provisions, we might see the Act as an attempt to further deter violence against women,⁶³ or to protect parents’ interests in those fetuses that they intend to carry to term.⁶⁴ A closer look at the Act reveals, however, that it has been promulgated for the fetus’s sake, and not for the sake of the women who harbor an interest in their own bodily integrity, or the parents who care about the fetus’s continued existence.

For example, punishment for the conduct that the Act criminalizes is keyed to the punishment that would befall an assailant had his act yielded its harmful consequences to the mother herself. The Act’s authors invoke the doctrine of transferred intent to explain this feature of the Act.⁶⁵ Under this common law doctrine, “a defendant who intends to kill one person but instead kills a bystander is deemed the author of whatever kind of homicide would have been committed had he killed the intended victim.”⁶⁶ But it is only where one presupposes that the intended and unintended victims are of equal moral worth that it makes sense to transfer intent from one to the other. To see this, consider that, if an assailant’s bullet missed his intended victim, and landed instead in a tree or a squirrel, the state would not prosecute the assailant for the death of the tree or the squirrel. The doctrine of transferred intent thus presumes that the unintended victim of the assailant’s act is the sort of being contemplated by a

61. 18 U.S.C. § 1841(a)(2)(C) (2000) (“If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.”).

62. 18 U.S.C. § 1841(c) (2000). The first exemption provision gave rise to the first, and so far only, legal challenge levied against the UVVA. In *Carlin v. United States*, 2004 U.S. Dist. LEXIS 14252 (E.D. Pa. 2004), a *pro se* plaintiff brought suit against the United States seeking to have this exemption provision repealed on the ground that it was allegedly “in direct contradiction with the Act itself.” *Id.* at *2. Carlin’s suit was dismissed after the court found he lacked standing to pursue his claim. *Id.* at *4.

63. Of course, the actual deterrent power of the UVVA has been subject to persuasive attacks. See, e.g., 150 CONG. REC. S3124-02, S3139 (daily ed. Mar. 25, 2004) (incorporating position paper from the Department of Justice on the UVVA, in which Jon P. Jennings, the Acting Assistant Attorney General, argues that the Bill’s deterrent function would be undercut by its use of a strict liability standard, since the attacker who does not know that his victim is pregnant obviously won’t be deterred by a law punishing harm to embryos or fetuses).

64. In a feat of rhetoric, some supporters of the UVVA have argued that the Act actually avenges, rather than impinges upon, a woman’s right to choose, since choice involves the opportunity to carry one’s pregnancy to term as it much does the opportunity to terminate that pregnancy. See Tsao, *supra* note 43, at 470.

65. H.R. REP. NO. 108-420, pt. 1, at 14-15 (2004), reprinted in 2004 U.S.C.C.A.N. 533.

66. *Id.* at 15 (citing 2 WHARTON’S CRIMINAL LAW 291-94 (Charles E. Torcia ed., 15th ed. 1994)).

criminal code as a victim. Accordingly, the Act's sentencing provisions suggest a moral parity between a mother and her embryo or fetus.⁶⁷

That the Act should bear such a suggestion reveals the way in which it escapes the bounds of what neutrality would permit. When the state expresses that women and their unborn children are of equal moral worth, as it does with the UVVA, it adopts a controversial metaphysical position, and thereby transgresses the commitment to neutrality dictated by those liberal theories that require the state to remain neutral not just between competing conceptions of the good but also between the metaphysical presuppositions undergirding citizens' comprehensive doctrines.⁶⁸

Yet the UVVA offends even the commitment to neutrality embodied in those liberal theories that do not mandate a general commitment to metaphysical neutrality,⁶⁹ for the UVVA is incompatible with the stance on abortion that liberalism should vindicate: The only neutral governmental position on abortion is no position at all. Thus, the liberal state should refrain from passing laws that condone or condemn the right to terminate a pregnancy.⁷⁰ Legislative or judicial abstention conforms better to the ideal of

67. Indeed, this suggestion is confirmed when, in defending the Act, its sponsors state that the Unborn Victims of Violence Act "serves vital national interests by extending the criminal law's protections for all human life." *Id.*

68. Rawls's political liberalism, *see supra* note 8, is one such theory.

69. *See supra* notes 29-30 and accompanying text.

70. Indeed, this is just the position that Canada has taken. On January 28, 1988, in *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30, the Canadian Supreme Court struck down a provision of the Criminal Code making it a criminal offense to "procure a miscarriage," R.S.C. 1985, pt. VIII, c. C-46, s. 287 (1985) (Can.). The Court ruled that that provision violated the rights to "life, liberty and security of the person" guaranteed by Canada's Charter of Rights and Freedoms. The Court spoke in striking liberal terms: "Forcing a woman," wrote the then-Chief Justice Brian Dickson, "by threat of criminal sanction to carry a foetus to term unless she meets certain criteria *unrelated to her own priorities and aspirations*, is a profound interference with a woman's body and thus a violation of her security of the person." *Morgentaler*, [1988] R.S.C. at 56 (emphasis added). The Canadian Parliament has neither rehabilitated Section 287, nor otherwise restricted abortion rights, since the *Morgentaler* decision was issued.

Of course, governmental abstention on the issue of abortion is not the position that many liberal theorists advocate. They correctly recognize that restrictions on abortion would impinge upon women's autonomy since such prohibitions would hinder the ability of women with unwanted pregnancies to pursue their conceptions of the good. Thus, John Rawls posits the issue of abortion as a "constitutional essential or a matter of basic justice," RAWLS, PL, *supra* note 8, at 244 n.32, and he argues that a prohibition on first-trimester abortions may be "cruel and oppressive," *id.* at 243-44 n. 32. Similarly, Ronald Dworkin contends that "any government that prohibits abortion commits itself to a controversial interpretation of the sanctity of life and therefore limits liberty by commanding one essentially religious position over others." RONALD DWORWIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 165 (1994). *See also* ACKERMAN, *supra* note 16, at 127-28. Nonetheless, some liberal theorists contravene their own commitments to neutrality by affirming a *right* to abortion. For example, in order to defend a right of abortion, Ronald Dworkin denies that pro-lifers really do believe that the fetus has the moral status of a person. DWORWIN, *supra*, at 32. Dworkin's defense of abortion thus rests on a controversial—and incongruously condescending—empirical assumption, *viz.*, that he knows the minds of abortion opponents better than they do. Cass Sunstein argues that abortion can be defended, on equal protection grounds, even by the state that recognizes fetal personhood, *see* Sunstein, *supra* note 29, at 30-44. Yet, here too, some controversial moral calculations will need to be made if a constitutional right to abortion is to survive in the face of the state's compelling interest in the continued existence of the class of persons (i.e., fetuses) who would be sacrificed by robust abortion rights.

neutrality than does either explicit authorization or criminalization because the government's silence need not express anything about the permissibility of abortion, while criminalizing that conduct expressly denounces it and exempting that conduct at least implicitly endorses it.⁷¹ But governmental abstention on the issue of the permissibility of abortion cannot be squared with governmental adoption of the position that embryos and fetuses possess the same moral worth as their mothers: If unborn children really do count as persons, then the government may not avoid legislating in the area of abortion any more than it may avoid legislating on the issue of parental obligations more generally.⁷² Yet it is not at all clear that unborn children do possess the moral

On the other hand, other liberals succeed in defending a right to abortion consistent with the conception of neutrality that they adopt. Ackerman, for example, eschews a conception of neutrality that would extend to questions regarding who can count as a rights-bearer within society, *see supra* note 16, at 74-75. Thus, his contention that a present capacity for dialogue is a prerequisite for personhood need not itself be neutral. And, since neither embryos nor fetuses can engage in dialogue, Ackerman can ground a right to abortion consistent with his commitment to neutrality.

71. Ought all instances of moral or metaphysical controversy to be met with a policy of government abstention? Michael Sandel thinks not. To illustrate his position that government should engage with deep moral and philosophical questions, Sandel raises “[p]erhaps the most famous case for bracketing a controversial moral question for the sake of political agreement”—Steven Douglas’ proposal, articulated in a set of famed debates with Abraham Lincoln, that government remain neutral on the question of slavery, given the deep moral disagreements about slavery’s morality. SANDEL, *DD*, *supra* note 34, at 21. Sandel sees no difference between Douglas’ position on slavery and the contemporary liberal’s position on abortion. *Id.* at 22-23. Moreover, in both cases, Sandel argues, neutrality can be sustained only if one already concludes that the practice is not wrong: “[I]f human life really does begin at conception, then bracketing the moral-theological question of when human life begins is far less reasonable than it would be on rival moral and political assumptions.” *Id.* at 20. Similarly, Sandel suggests, “it [is] reasonable to bracket the question of the morality of slavery only on the assumption that it [is] not the moral evil [Lincoln] regarded it to be.” *Id.* at 22. “[T]he political conception of justice defended by Douglas [and pro-choice liberals] depend[s] for its plausibility on a particular answer to the substantive moral question it [seeks] to bracket,” Sandel concludes. *Id.* at 23. In this sense, according to Sandel, liberalism is not neutral at all.

In response to Sandel, the first thing to note is that liberalism is not without the resources to meet Sandel’s critique on the issue of slavery. Sandel acknowledges that the “Kantian liberal can oppose slavery as a failure to treat persons as ends in themselves, worthy of respect.” *Id.* at 23. The critique is thus aimed at the political liberal, who may not avail himself of the metaphysical suppositions undergirding the Kantian conception of the self. But even Rawls’s political liberalism has a response, which can be found in its accounts of citizenship and social cooperation: “The idea of society as a fair system of cooperation and the political conception of the person which goes with this idea are sufficient to generate principles which bar slavery,” Andrew W. Siegel, *Moral Status and the Status of Morality in Political Liberalism*, in *DEBATING DEMOCRACY’S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW AND PUBLIC PHILOSOPHY* 149, 153 (Anita Allen and Milton C. Regan, Jr. eds., 1998), because Blacks no less than Whites meet the criteria for citizenship that Rawls posits, and because an institution that discriminates against one class of citizens would fail political liberalism’s “criterion of reciprocity,” RAWLS, *PL*, *supra* note 8, at xlvi; *see generally* Siegel, *supra*, at 152-53.

On the issue of abortion, Sandel is wrong to believe that one could defend abstention only if one presupposed that the embryo or fetus lacked moral status. Even if personhood did begin at conception, the rights of the embryo or fetus to continued existence would have to be weighed against the potential violation of basic liberties that would ensue from compelled gestation (note that no comparable liberty interest is at stake for would-be slaveholders). Of course, it is possible that the right to be free of an unwanted pregnancy does not rise to the level of a basic liberty, but it is also possible that the embryo and fetus enjoy a moral status inferior to that of born persons. And it is precisely these uncertainties that make abstention a genuinely neutral solution to the problem of abortion.

72. For the view that the state that recognizes fetal personhood can defend abortion on equal protection grounds, see Sunstein, *supra* note 29, at 30-44. It is worth noting, though, that the existence

worth of persons; instead this is, manifestly, an area of deep controversy. Given the ideological divide in this area, the unlikelihood that enlightenment or compromise is forthcoming,⁷³ and the implications of the issue for the basic liberties of women, the appropriate governmental response is to offer no response at all. Neutrality on the question of abortion requires neutrality on the issue of the moral worth of the unborn child.⁷⁴ The UVVA's implicit stance on the moral status of the fetus thus contravenes the aspirations of the liberal state.⁷⁵

Of course, the UVVA's congressional sponsors did little to conceal the Act's ideological underpinnings.⁷⁶ They refused to countenance an amendment that would have added language to the bill expressly stating that it should not be construed to limit a woman's abortion rights.⁷⁷ Indeed, Senator Orrin Hatch

of a right to abortion will need some form of legal codification if it is to survive in the face of the state's compelling interest in protecting the class of persons (i.e., fetuses) who would be sacrificed by robust abortion rights. Cf. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971) (providing a justification for abortion that concedes the personhood of the fetus but nonetheless recognizing that, given the fetus's personhood, the right to abortion might, in some instances, give way to the fetus's right to continued existence).

73. See, e.g., DWORKIN, *supra* note 70, at 15.

74. Is the converse true? That is, does neutrality on the issue of the moral status of the fetus require neutrality on the question of the morality of abortion? The Supreme Court appears not to think so since, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court refused to stake a position on the moral status of the fetus even as it secured a constitutional right to abortion. 410 U.S. at 159 ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). See *id.* at 162 ("In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."). Andrew Siegel argues that, despite the Court's pretensions to neutrality, no right to abortion would be permissible if the fetus really did have full moral standing. In this way, he argues, the Court's opinion begs the question with respect to the moral status of the fetus, and relies upon a contested position in order to do so. Siegel, *supra* note 71, at 156 ("[T]he political liberal cannot in good faith subsume abortion rights under the basic liberties which her political conception of justice supports. It seems the political liberal cannot promote a constitutional right to abortion without administering a fatal dose of metaphysics into her account.").

75. This impermissible departure from neutral principles was not lost on opponents of the UVVA. For example, the statement submitted by the dissenting representatives on the House Judiciary Committee argued that "H.R. 1997 marks a major departure from existing Federal law by elevating the legal status of a fetus at all stages of prenatal development . . ." H.R. REP. NO. 108-420, pt. 1, at 82 (2004); see also *id.* at 77 and 82; 150 CONG. REC. S3124-02, S3126 and S162-63 (daily ed. Mar. 25, 2004).

76. But cf. 150 CONG. REC. at S3135 (quoting a statement of Sen. Graham, one of the UVVA's initial authors, who defended his choice not to include the death penalty among the punishments imposed by the UVVA on grounds that represented an ostensible solicitude toward liberal neutrality).

77. H.R. REP. NO. 108-420, at 56. The proposed amendment, offered by Representative Tammy Baldwin (D-WI), would have stated that "[n]othing in [the UVVA] shall be construed as undermining a woman's right to choose an abortion as guaranteed by the United States Constitution or limiting in any way the rights and freedoms of pregnant women." *Id.* In defending this amendment, Rep. Baldwin stated that it would function "as a method of insurance, insurance that this bill not be used to erode a woman's right to choose an abortion." *Id.* at 57. Those who opposed the amendment claimed that it was redundant, given the UVVA's first exemption. See *id.* at 60. Yet the fact that the UVVA exempts from prosecution women who seek abortions does not yet entail that the UVVA robustly preserves women's right to abortion.

(R-UT), who fast-tracked the bill through the Senate,⁷⁸ has openly admitted that the UVVA would undermine abortion rights.⁷⁹ In rejecting an alternative that would have enhanced protections for pregnant women (rather than the fetuses they carried), another sponsor of the UVVA stated that its express purpose was to recognize the “dignity” of the unborn.⁸⁰

On the other hand, the Act reflects an ambivalence about the status of the unborn insofar as it exempts harm to the fetus caused by its mother’s conduct.⁸¹ This exemption, which effectively demotes embryos and fetuses to the status of less-than-persons, is no more neutral than are the Act’s sentencing provisions, which, again, treat the unborn child as the moral equal of (other) persons.⁸²

The Act thus creates a status paradox: If embryos and fetuses are persons for purposes of criminal protection, it is untenable that the UVVA should permit another class of persons – to wit, the women who carry fetuses – to engage in conduct that can greatly injure, or even kill embryos and fetuses.⁸³ Yet this disparate treatment of the unborn necessarily results from the Act’s categorical exemption of the conduct of women during the course of their

78. Kate Snow, *Laci Peterson Family Endorses 'Unborn Victims' Bill*, CNN, May 8, 2003, <http://www.cnn.com/2003/ALLPOLITICS/05/07/laci.bill/> (last visited Oct. 18, 2005).

79. See *id.* (“They say [the UVVA] undermines abortion rights. It does undermine it . . .”). In expressing her opposition to the UVVA, Senator Dianne Feinstein quoted from a letter written by the executive director and CEO of the Christian Legal Society in which he outlined the pro-life camp’s strategy:

“In as many areas as we can, we want to put on the books that the embryo is a person . . . That sets the stage for a jurist to acknowledge that human beings at any stage of development deserve protection—even protection that would trump a woman’s interest in terminating a pregnancy.”

150 CONG. REC. at S3128 (daily ed. Mar. 25, 2004).

For a recent example of this strategy, see Sheryl Gay Stolberg, *Bankruptcy Bill Is Arena for Abortion Fight*, N.Y. TIMES, Mar. 8, 2005, at A17 (describing a currently pending bill that would require physicians who perform abortions to administer pain medicine to the fetus). For the questionable scientific merit of that proposal, see Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS’N. 947 (2005) (finding that fetal perception of pain is unlikely before the third trimester).

80. H.R. REP. NO. 108-420, at 49 (Chabot’s testimony) (“The criminal law does not exist only to punish criminals, it exists to lend dignity to victims, including unborn victims.”)

81. 18 U.S.C. § 1841(c).

82. See *supra* text accompanying notes 65-67.

If the state betrays neutrality by failing to punish women whose conduct during pregnancy harms their fetuses, does neutrality then require that the state criminalize such conduct? The appropriate response to this kind of maternal-fetal conflict exceeds the scope of this Article. Nonetheless, I suggest that here, as in the case of abortion, legislative abstention is a more neutral alternative than is either criminalization or the explicit exemption from criminalization, see *supra* notes 70-71 and accompanying text.

For other ways in which the state confers upon the unborn some nebulous status between person and non-person, a status often referred to as “special,” see, for example, *Davis v. Davis*, 842 S.W.2d 588, 596 (Tenn. 1992) (referring to the “special respect” given to the embryo in deliberating about the appropriate disposition of a divorcing couple’s surplus IVF embryos); MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION AND EMBRYOLOGY 11.17, at 63 (1985).

83. States that criminalize drug use during pregnancy, see, e.g., *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), apparently adopt the view that fetuses warrant no less protection than (born) persons do. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), left this strategy unaffected, although it prohibited the suspicionless searches through which the city had obtained knowledge of drug use during pregnancy.

pregnancies.⁸⁴ This exemption provision thus controverts the status that the Act otherwise seems to confer on the unborn.⁸⁵

On the other side of the paradox, if embryos and fetuses do not possess the worth of persons,⁸⁶ then it is untenable that the Act should serve as a tool to chip away at abortion rights.⁸⁷ Without these rights, pregnant women would be required to lend their bodies during the gestation period to sustain beings that, *ex hypothesi*, are less than persons, and would thereby bear a duty unlike any imposed on other members of society.⁸⁸

Finally, whether the fetus is a person or not, the protection it receives should be no greater than the protection the law offers other persons. Yet the UVVA controverts this principle of equality since it does not require *conviction* of an offense against the mother as a predicate for prosecution.⁸⁹ In other words, the UVVA permits prosecution of an offense against the unborn child in

84. See 18 U.S.C. § 1841(c)(3).

85. The Act's abortion exemption, § 1841(c)(1), does not create this inconsistency, even on the hypothesis that embryos and fetuses are persons. Without this exemption, the state could charge women who aborted their fetuses with murder. Yet, for the reasons already stated, *see supra* notes 70-71 and accompanying text, the neutral state should refrain from regulating abortion, no matter the moral status of the unborn. See also Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (arguing that restrictions on abortion rights contravene the Fourteenth Amendment's Equal Protection clause). *A fortiori*, the state should not be permitted to criminalize abortion.

86. Some state analogs to the UVVA presuppose this status differential. See, e.g., *Vo v. Superior Court*, 836 P.2d 408 (Ariz. Ct. App. 1992) (holding that the intentional, premeditated killing of a fetus is not first-degree murder because fetuses are not included in the definition of "victim" in the state murder statute); *People v. Taylor*, 86 P.3d 881, 871 (Cal. 2004) (Kennard, J., dissenting) (stating that the legislature consciously intended to offer less protection to the fetus than to persons).

87. While taking for granted the status of fetuses as less-than-persons, most critiques of the UVVA focus on the threat it poses to abortion rights. See, e.g., Kole & Kadetsky, *supra* note 41; Aaron Wagner, *Texas Two-Step: Serving up Fetal Rights by Side-Stepping Roe v. Wade Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085, 1087 n.11 (2001); cf. 150 CONG. REC. S3124-02, S3129 (daily ed. Mar. 25, 2004) (quoting Sen. Lautenberg's statement that the UVVA elevates the status of the unborn even while its supporters reject measures that would increase health insurance coverage for poor and lower middle-class (born) children).

88. One might object that the combat exclusion, when combined with a male-only draft, presents an instance in which the state conscripts the bodies of men but not women in service of others. In this way, the objector might argue, men are subject to a duty similar to the duty of state-mandated gestation for women. Yet the combat exclusion, however offensive to the state's commitment to equality, is disanalogous because it has men sacrificing themselves for other persons while, on the hypothesis of the text accompanying this note, the state would be enlisting women's bodies for beings that had a status inferior to that of persons. To require that women, but not men, give over their bodies in the service of these less-than-persons would no doubt express that women were worth less than men – indeed, worth no more than the fetuses whom they served. *But cf.* Sunstein, *supra* note 29, at 35-36 (drawing a parallel between male-only conscription and compelled gestation insofar as both represent unacceptable instances of sex discrimination).

89. As one lawyer who testified before Congress on an earlier version of the UVVA noted:

To be convicted under 18 U.S.C. § 1841, the new criminal offense created by H.R. 2436, a defendant must have "engage[d] in conduct that violates" one of the existing federal crimes enumerated in § 1841(b). But must the defendant be convicted of one of those other offenses before he may be convicted of the separate offense under §1841? . . .

[T]he language is unclear.

Unborn Victims of Violence Act of 2001: Hearing on H.R. 2346 Before the Subcommittee of the Constitution of the House Judiciary Committee, 106th Cong. 89 (statement of Ronald H. Weich). See also H. R. REP. NO. 108-420, *Dissenting Views*, at 85. ("[T]he bill also fails to require a conviction on the underlying predicate offenses.")

lieu of prosecution for the harm against its mother. The Act thus provides another means for those who enforce the law to ignore the widespread harm of violence against women by shifting the focus from the women who necessarily experience an assault any time the fetuses they carry are injured or destroyed without their consent.⁹⁰ In this way, the Act treats the unborn child, relative to its mother, as a more worthy object of its protective resources.

In sum, no matter what the metaphysical or moral status of the unborn, the Act codifies inequality insofar as it either fails to extend to embryos and fetuses the protection that (other) persons deserve, or it does so at the expense of the women who carry them. Further, the Act fails to be neutral by adopting a controversial position on the moral status of abortion that impinges upon the scope of women's autonomy.

B. Congressional Alternatives to the UVVA

The UVVA was motivated, at least in part, by recent studies in a number of states that demonstrated that "homicide is the leading cause of death in pregnant women" in the geographic areas studied.⁹¹ While the UVVA tellingly betrays its true purpose by protecting the fetus alone, Democrats in Congress proposed an alternative that was more straightforward: they advocated increased protections for pregnant women themselves. Two such alternatives were advanced and debated.⁹²

90. Indeed, the doctrine of transferred intent, which undergirds the UVVA, compounds this neglect since that doctrine generally applies to situations in which a third-party is injured *instead* of the assailant's intended victim, while the injury to the fetus is *additional* to the one that its mother experiences and that the UVVA ignores. See *supra* text accompanying notes 65-66.

For other ways in which the state forsakes its female victims of violence, see, for example, Michelle J. Anderson, *New Voices on the New Federalism: Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 929 (2001) (arguing that, by "unfounding and downgrading crimes involving violence against women, police departments neglect to investigate hundreds, perhaps thousands, of legitimate rape complaints every year"); Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 410 (2003) (arguing that states are complicit in domestic violence insofar as they fail to prosecute wife batterers).

91. H. REP. NO. 108-420, pt. I at 4. See also *id.* at 4 n.2 (listing the published studies, which canvassed the causes of death of pregnant women in New York City, Maryland, North Carolina, and Illinois).

92. One other amendment was advanced in the House, but it would have merely added a *mens rea* component to the UVVA; this amendment did not contain an alternative proposal for addressing harm to pregnant women or fetuses. See *id.* at 68 (Amendment 2 to H.R. 1997 offered by Mr. Scott of Virginia). In the Senate, Patty Murray proposed an amendment that sought to supplement the UVVA with measures enhancing protections for victims of domestic violence; like the Scott amendment, that amendment did not address harm to the fetus or pregnant women specifically. See 150 CONG. REC. S3124-02, S3151-55 (daily ed. Mar. 25, 2004). Senator Murray's amendment was defeated on the ground that it had not received committee review before being brought to the Senate floor, and that it represented a significant expansion of existing federal programs (like the FMLA) with possible adverse consequences for businesses employing battered women.

First, the proposed Motherhood Protection Act of 2004 would have enhanced punishment for those individuals already convicted of assault against a pregnant woman who commit a separate offense where the assault "causes an interruption to the normal course of the pregnancy resulting in prenatal injury (including termination of the pregnancy)."⁹³ The purpose of this proposal was to "recognize that when [crimes of violence] hurt a pregnant woman and cause her to miscarry there is an additional and very serious harm to that woman."⁹⁴ Further, the amendment proposed in the Motherhood Act would:

allow [Congress] to avoid the fight over abortion . . . but to have the toughest law possible to protect women against violence and assault, and to punish those who would do the horrible wrong of denying a woman her chance to give birth to a healthy child and to enjoy raising that child throughout her life.⁹⁵

A separate proposal would have amended the United States Sentencing Guidelines, rather than add a separate crime for violence against pregnant women or the unborn.⁹⁶ This proposal, entitled the "Enhanced Sentencing for Crimes Against Pregnant Women Act of 2004," directed the U.S. Sentencing Commission to amend the Guidelines "to provide an appropriate sentencing enhancement when a crime is committed in violation of title 18 of the United States Code, causing bodily injury or death to a pregnant woman."⁹⁷

The only other proposal addressing harm to the fetus had been prepared by Rep. Sheila Jackson-Lee (D-TX). However that proposal was not debated because she was absent from the Committee meeting. See H.R. REP. NO. 108-420, pt. 1, at 72 (2004). Her alternative nonetheless appears in the House Report. See *id.* at 73-80. On her proposal, all instances of the words "unborn child" would have been replaced with "pregnant mother," and instances in which harm to the unborn is described would have been replaced with the phrase "terminates the pregnancy of the victim against her will or without her lawful consent." See *id.* In this way, her proposal, like the Motherhood Act, would have created a separate offense for violent acts leading to the destruction of the embryo or fetus without the pregnant woman's consent. Further, Rep. Jackson-Lee's proposal contained a provision stating that the new offense shall have effect only in those fiscal years when Congress fully funds the programs authorized in the Violence Against Women Act. See *id.* at 75.

Policy groups also advocated alternatives to the UVVA. For example, NARAL Pro-Choice America lobbied for a policy that would create a separate offense for crimes against pregnant women, enhance sentences of defendants who harmed fetuses, and provide greater funding and resources for prenatal and post-natal care. NARAL, *The "Unborn Victims of Violence Act" Is Not the Solution to Domestic Violence*, at <http://www.naral.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=7970> (last visited Mar. 7, 2005). The Center for Reproductive Rights advocated a similar policy. See *Fetal Personhood/Unborn Victims Legislation*, at http://www.reproductiverights.org/hill_pri_uvva.html (last visited October 18, 2005).

93. H.R. REP. NO. 108-420 at 44. (Lofgren amendment). Dianne Feinstein proposed a substantially similar bill in the Senate. See 150 CONG. REC. S3124, S3125 (2004).

94. H.R. REP. NO. 108-420 at 47 (Lofgren testifying). Senator Feinstein defended her version of the Motherhood Protection Act on similar grounds. See 150 CONG. REC. at S3126 ("our amendment contains the same law enforcement goals as [the UVVA] but without injecting a debate over a woman's right to choose into the equation.").

95. H.R. REP. NO. 108-420 at 48.

96. See *id.* at 65-66 (statement of Rep. Scott, author of this amendment).

97. *Id.*

Both of these amendments were defeated. Opponents of the Motherhood Act argued that its language was unclear,⁹⁸ and that it failed to express “society’s disapproval for the distinct loss that occurs when a mother’s unborn child is harmed or killed by a violent criminal.”⁹⁹ The Enhanced Sentencing Act was defeated on the ground that it too lacked the expressive force of the UVVA, and that it would permit the United States Sentencing Commission, an unelected body, to assign differential punishments based, for example, on the age of the fetus, while the UVVA valued all unborn life equally.¹⁰⁰

Importantly for purposes of a liberal critique, an appeal to neutrality figured on both sides of this debate. The Motherhood Act, Rep. John Conyers argued, would prevent violence against pregnant women without “slipping something in on anybody that may have strong views one way or the other about the import of *Roe v. Wade*.”¹⁰¹ But, as the UVVA’s supporters noted, neutrality cut against the Motherhood Act as well because it “would enshrine in law the offensive concept that such crimes have only a single victim, the pregnant woman.”¹⁰² Neutrality would thus be disserved by a policy that protected the unborn as well as one that protected pregnant women alone.

While both sides of the debate thus recognized that the state would have to abandon neutrality were it to adopt either the Republicans’ or Democrats’ proposals, neither side recognized that its proposal would also enlist the state in a significant departure from equality. This departure would result from each proposal’s implicit hierarchy between pregnant and non-pregnant women, which problematically presents the pregnant battered woman as a more legitimate and urgent object of the state’s protections.¹⁰³ While the Democrats’

98. See *id.* at 48; 150 CONG. REC. S3124-02, S3130 (daily ed. Mar. 25, 2004). In particular, the worry centered around the term “interruption to the normal course of pregnancy,” which, on the amendment’s phrasing, seemed to mean something other than termination of the pregnancy, see *supra* note 93 and accompanying text.

99. H.R. REP. 104-208 at 49 (statement of Rep. Steve Chabot); see also 150 CONG. REC. at S3130 (statement of Sen. Mike DeWine, voicing the same concern); *id.* at S3142 (statement of Sen. Sam Brownback, same). For a general account of the expressive considerations guiding the content of the criminal law, see Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUDIES 609 (1998).

Rep. Melissa Hart raised an additional objection, claiming that the UVVA had a greater power to deter crimes of violence than did the proposed Motherhood Act. It is difficult to ascertain from her testimony why she would have believed this to be so. See H.R. REP. 104-208 at 51.

100. *Id.* at 67 (Rep. Steve Chabot).

101. *Id.* at 53. See also 150 CONG. REC. at 3131 (statement of Sen. Feinstein, who argued that, in contradistinction with sponsors of the UVVA, sponsors of the Motherhood Act “do not create a child in utero. We try to avoid getting to the point where life is defined.”). Senator Feinstein also opposed the UVVA on the ground that it would undermine stem cell research. See *id.* at 3132.

102. *Id.* at 49. This statement, quoted by Rep. Steve Chabot, was actually offered by Sharon Rocha, Laci Peterson’s mother. *Id.* See also 150 CONG. REC. at 3136 (statement of Sen. Santorum) (“This is all about denying the humanity of the child. We just cannot contemplate that in our laws.”).

103. Cf. Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 902 (1996) (“[F]eminists . . . argue that the sexual exploitation of women is organized around the virgin/whore dichotomy. This dichotomy suggests that men act properly as long as they target the whore and respect the virgin.”). Cf. *id.* at 929-30 (criticizing rape laws on the ground that they derive from and reinforce

proposals clearly forsake non-pregnant women by addressing only harm to pregnant women, the UVVA reflects a hierarchy between pregnant and non-pregnant women more subtly: it reifies the self-abnegation traditionally associated with the "mother" figure as it shifts the focus of the assault from the pregnant woman to her unborn child. And, if virtue explains the pregnant woman's absence from this legislative picture, it must be vice that explains the absence of the non-pregnant woman.¹⁰⁴ So it is that the non-pregnant battered woman is cast in the role of whore, as the limited popular imagination decodes her decision to stay with her battering partner in terms of the financial support that she receives from him. Her abuse thus comes to be seen as the bargained-for price of the resources that her partner provides.¹⁰⁵ Viewed in this way, she is a much less sympathetic object of state intervention since that intervention would require the state to disrupt a private economic arrangement, a course of action in which the state has traditionally been loathe to engage.¹⁰⁶ In short, both parties' proposals fortify an insidious dichotomy between women by protecting those who are pregnant and neglecting those who are not.¹⁰⁷

the virgin/whore dichotomy); Susan E. Thompson, Note, *Prostitution – A Choice Ignored*, 21 WOMEN'S RIGHTS L. REP. 217, 243 ("The system of legalization [of prostitution] perpetuates the ideology of the whore/madonna dichotomy by emphasizing that whores are the source of diseases and licensing is the only way to control their behavior.").

104. The virtue/vice dichotomy follows from the law's tendency toward binary thinking, with subordinating effects for the women whose identities or allegedly defining traits fall on the devalued ends of these binary pairs. To see how this tendency operates in the context of battered woman's syndrome, see Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 132-33 (2004) ("[T]he 'battered woman syndrome,' both in its original conception and in the way it has been taken up in law, reflects a preoccupation with victimization at the expense of any recognition of agency. This is part of a larger social tendency to understand victimization and agency in dichotomous terms, as existing as binary opposites.").

105. In fact, the battered woman's economic situation can be attributed not to an economic exchange between equals but instead, at least in part, to a workplace that fails to make appropriate accommodations for the victims of domestic violence. Three national studies report that 25 percent of domestic violence victims have lost a job at least in part as a result of domestic violence. See 150 CONG. REC. S3124-02, S3153 (daily ed. Mar. 25, 2004) (statement of Sen. Murray). These women describe workplaces that are inhospitable to their plight, firing them when they need to take time off work to get a TRO or recover from a beating. *Id.*

106. Indeed, one senator opposed the Murray amendment (which would have provided greater support to all battered women, see *supra* note 92) on the ground that this support would "enable abuse" by making it easier for women to stay with their batterers. 150 CONG. REC., at 3158. This otherwise breathtakingly callous claim, which, if taken to its logical extreme, would imply that the best way for the government to address domestic violence is to make the lives of its victims as miserable as possible, enjoys some mitigation when viewed in light of the economic nature of the relationship between a batterer and his victim, preserving as it does a robust right of exit for both parties.

107. While it is true that domestic abuse often escalates when a woman is pregnant, see, e.g., *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 889 (1993) (citing studies reporting an increased incidence of domestic violence during pregnancy), it is difficult to justify the disparate treatment that pregnant and non-pregnant women receive when one considers that, for the majority of their adult days, women are not pregnant, so that the aggregate number of attacks experienced by non-pregnant women is significantly greater than that experienced by pregnant women. Cf. U.S. Department of Justice Office of Justice Programs Bureaus of Justice Statistics, *Crime Data Brief: Intimate Partner Violence, 1993-2001*, February 2003, NCJ 197838, available at <http://www.ojp.usdoj.gov/bjs/pub/>

Taken as a whole, then, neither party's attempt at fetal protection legislation would have honored the state's commitments to equality or neutrality. In the next Part, I consider the way in which the threat to liberalism posed by fetal protection statutes rises to the level of a full-fledged assault when pregnant battered women respond to the state's failure to protect them by taking the law into their own hands.

II. SELF-DEFENSE, NEUTRALITY, AND PROPORTIONALITY

Self-defense is a preeminent liberal right: It exists prior to the formation of the liberal state,¹⁰⁸ and its persistence within the liberal state functions as a condition of the state's legitimacy.¹⁰⁹ The right to self-defense, or to defense of a third-party, is preeminently liberal in another respect as well, for the contours of this right – especially its proportionality requirement – are defined by liberals' cherished aspiration to neutrality.¹¹⁰ As we have seen,¹¹¹ this commitment to neutrality requires that the state refrain from using moral values to guide state action.¹¹² Thus, when the citizen assumes the role of the state, as she does when defending against an imminent attack, she too must refrain from allowing moral assessments of her attacker's worth to condition her response. The proportionality requirement embodies this neutral constraint insofar as it requires that a defender's use of force be no greater than the force that she

ascii/ipv01.txt (Feb. 11, 2003) (reporting that twenty percent of the non-fatal violent crime committed against *all* women—some 600,000 cases annually—occurs at the hands of their partners).

Moreover, the fact that the Violence Against Women Act (VAWA), Pub. L. No. 103-322, Title IV, Subtitle A, §§ 40101 *et seq.*, 108 Stat. 1903 (1994), already provides an avenue for protecting non-pregnant women from violent crimes is not sufficient to quell concerns about the hierarchy at issue here. Funding for the provisions of VAWA is subject to Congressional review every fiscal year, a power which Congress has, sadly, sought to wield freely. For example, in 2004, funding for VAWA's supervised visitation centers, educational and training programs, rural and campus violence prevention initiatives, and grants to encourage arrests was less than the authorized amounts, and successive decreases are projected for fiscal years 2005 and 2006. See Family Violence Prevention Fund, Department of Justice Violence Against Women Funding, <http://endabuse.org/programs/display.php3?DocID=333>. In the wake of this under-funding, then, legislative proposals that single out pregnant women compellingly underscore the state's relative neglect of non-pregnant women.

Finally, Rep. Jackson-Lee's proposal, which permitted prosecutions under the UVVA only in those years when Congress had fully funded VAWA, *see supra* note 92, also does little to level the hierarchy between pregnant and non-pregnant women, for even she defends the part of her proposal requiring full funding for VAWA on the ground that doing so bolsters Congress's intent of protecting *pregnant* women, and not on the ground that Congress should dedicate itself to protecting *all* women. See H.R. REP. NO. 108-420, pt. 1, at 80 (2004) ("If it [sic] the intent of this legislation is to truly protect *pregnant women* from violence, adding a provision that ensures the effectiveness of an already-promulgated legislative remedy, i.e., the Violence Against Women Act (VAWA), would be a sound measure for the Committee.") (emphasis added).

108. *See infra* II.B.

109. *See infra* note 141 and accompanying text.

110. *See supra* notes 28-33 and accompanying text.

111. *See id.*

112. *See id.*; *see also* Siegel, *supra* note 71, at 150 ("The imposition of a comprehensive philosophical or religious doctrine on persons who reasonably reject it is, according to the political liberal, an oppressive use of state power.").

faced. In this way, the doctrine requires that a defender use mathematics, not morals, to determine the appropriate response.

In this Part, I explore the consequences of a confrontation between fetal protection statutes and this most pedigreed of liberal rights. The point of departure for this exploration is *People v. Kurr*,¹¹³ a Michigan case that held for the first time ever that fetal protection statutes entail that the “others” whom one has a right to defend include fetuses. I argue that, despite the court’s careful crafting of its opinion, *Kurr* assails a commitment to neutrality and reinforces inequality. The problem is not endemic to *Kurr*, however. The doctrines of self-defense and defense of others have themselves developed in ways that transgress their liberal roots. This Part thus wages a dual attack, condemning as liberal embarrassments both the generic doctrines and their extension to fetuses. To do so, this Part begins with a description of *Kurr* intended to highlight the fact that Michigan’s fetal protection statute did not compel the court to reach its illiberal decision. To fully appreciate *Kurr*’s transgressions of neutrality and equality, however, we will need to take a step back from the opinion in order to survey the liberal roots of self-defense and defense of others. This I do in Section II.B. I then expose, in Section II.C, the non-neutral and inegalitarian ways in which these doctrines have come to operate. Finally, I return to *Kurr* in Section II.D and argue that the extension of defense of others to the unborn gives rise to the same status dynamics that the UVVA produces.

A. A Novel, and Non-Neutral, Extension of Defense of Others

In 1999, Jaclyn Kurr stabbed her boyfriend during one of his habitual beatings,¹¹⁴ beatings so bad that they had caused her, on previous occasions, to seek treatment at a hospital and refuge in a domestic violence shelter.¹¹⁵ Her boyfriend died as a result of the knife wound, and, because the force she used to fend off the attack was greater than the force that she faced, her claim of self-defense was found unavailing.¹¹⁶ Stabbing and killing her boyfriend to protect her unborn babies,¹¹⁷ however, was recognized as a legitimate defense

113. 654 N.W.2d 651 (Mich. Ct. App. 2002), *reh’g denied*, 655 N.W.2d 552 (Mich. 2003).

114. *Id.* at 653.

115. *Id.*

116. Of course, there is no explicit evidence that the jury decided the case on proportionality grounds. Nonetheless, process of elimination leads to this result as it is hard to believe that a juror could have found that either of the other two requirements for self-defense were lacking. There is no question that the threat to her was imminent, as she responded in the course of the attack. Nor can there be any question that her response was necessary: retreat during the course of the attack was impossible, as she was in her own home, and previous experience with her boyfriend’s beatings had likely established that he could not be cajoled out of the attack. *See, e.g.*, *People v. Turner*, 194 N.W.2d 546, 548 (Mich. Ct. App. 1971) (outlining the requirements for self-defense under Michigan law); *People v. Emory*, No. 188803, 1997 Mich. App. LEXIS 563 at *2 (Mich. Ct. App. Feb. 7, 1997) (same).

117. “Defendant told a Kalamazoo police officer that she had been carrying quadruplets at the time of the stabbing.” *Kurr*, 654 N.W.2d at 651 n.1.

by the Michigan Court of Appeals, which extended a claim of defense of others to embryos and fetuses in its landmark opinion, *People v. Kurr*.¹¹⁸

The history of the case reveals that the proper resolution of the issue before the court was by no means clear-cut. At trial, the Kalamazoo Circuit Court refused to instruct the jury on the defense of others, stating that, for the defense to be available, “there had ‘to be a living human being existing independent of [defendant].’”¹¹⁹ Because the fetuses in question were under twenty-two weeks – the court’s recognized threshold for viability – the trial judge concluded that “‘there [were] no others.’”¹²⁰ The Michigan Court of Appeals, however, rejected the trial court’s finding, noting that Michigan’s Fetal Protection Act (the state analog to the UVVA) already criminalized death or harm caused to the fetus.¹²¹ The Court of Appeals concluded that extending defense of others

118. *Id.* at 654.

119. *Id.* at 653.

120. *Id.*

121. *Id.* (citing MICH. COMP. LAWS §§ 750.90a-c (2002)). Michigan’s Fetal Protection Act, enacted on July 3, 1998, is the functional equivalent of the UVVA. Its first provision dictates that where a person intentionally commits an aggravated felony or murder as defined in MICH. COMP. LAWS §§ 750.81-84, 750.86-88, and 750.90 (2002), either intending to “cause a miscarriage or stillbirth . . . or death or great bodily harm to the embryo or fetus” or acting “in wanton or willful disregard of the likelihood that the natural tendency of the person’s conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus,” and where “the person’s conduct result[s] in a miscarriage or stillbirth . . . or death to the embryo or fetus,” that person commits a felony punishable by up to life imprisonment. *Id.* § 750.90a. Its second provision dictates that, where a person intends to commit one of the same acts against the mother, and where that conduct injures or kills the fetus or embryo, that person commits a felony punishable by up to fifteen years in prison. *Id.* § 750.90b. To violate this second provision of the Fetal Protection Act, the assailant need not have a culpable mental state with respect to its conduct toward the fetus or embryo. A third provision makes grossly negligent conduct that causes a pregnant woman to have a miscarriage or stillbirth, or causes death or serious bodily harm to the fetus, also punishable as a felony. *Id.* § 750.90c(a). The same provision makes grossly negligent conduct that causes physical injury to the fetus, whether aggravated or not, punishable as a misdemeanor. *Id.* § 750.90c(d).

This Act, like the federal bill, contains exempting provisions that would prevent its application to:

“any . . . (a) act committed by the pregnant individual; (b) . . . medical procedure performed by a physician or other licensed medical professional within the scope of his or her practice and with the pregnant individual’s consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency; [or] (c) . . . lawful dispensation, administration, or prescription of medication.”

Id. §750.90f.

Despite these tempering provisions, however, the Michigan statute, like the federal bill, does not require that one act with a culpable mental state toward the fetus or embryo. “M.C.L. § 750.90b punishes an individual for harming or killing a fetus or embryo during an intentional assault against a pregnant woman *without regard to the individual’s intent or recklessness concerning the fetus or embryo*. M.C.L. § 750.90c punishes an individual for harming or killing a fetus or embryo during a grossly negligent act against a pregnant woman, *again without regard to the individual’s state of mind concerning the fetus or embryo*.” *Kurr*, 654 N.W.2d at 654 (emphasis added). This feature of the Act suggests that the doctrine of transferred intent is operating here as it does in the UVVA, *see supra* note 65 and accompanying text. Indeed, this suggestion is corroborated by the Act’s sentencing guidelines, which impose punishments for negligent or reckless harm to the fetus or embryo identical to those for harm caused to born individuals. *Compare id.* § 750.81a with *id.* § 750.90b(c), and *id.* § 750.81(1) with *id.* § 750.90b(d).

Moreover, just as the federal sponsors of the Unborn Victims of Violence Act were moved by a desire to protect “all human life,” H.R. REP. 108-420, at 21 (2004)”; *see also* H.R. 503, 107th Cong.

to fetuses was thus a logical corollary of the protection afforded to them by Michigan's criminal law.¹²²

The Michigan Supreme Court apparently approved of the appellate court's path-breaking extension of fetal protection in *Kurr* for it denied a rehearing of the case,¹²³ with one judge dissenting from the denial because there was "no supportive precedent" for the court of appeals' decision, and because "the issue is significant in our state and national jurisprudence."¹²⁴ As a result of *Kurr*, Michigan became the first and only state in the country to allow deadly force to be used in defense of embryos and fetuses, despite the fact that Michigan is one of twenty-eight states that criminalize conduct causing death or harm to the fetus.¹²⁵

Prior to *Kurr*, there had been only two other appellate cases where a woman raised fetal defense of others in order to justify killing her assailant.¹²⁶ In *Ogas v. Texas*, the Texas Court of Appeals rejected the defendant's assertion that she was entitled to use deadly force to protect her five month-old fetus.¹²⁷

(2001), Michigan's extension of the law's protective resources to nonviable fetuses and embryos evidences the same desire, see *Kurr*, 654 N.W.2d at 654 (citing Senate Fiscal Agency Legislative Analysis, SB 21 and HB 4524, Aug. 4, 1998). Finally, the Act actually mandates *harsher* punishments for assaults in which the attacker's intended victim is the fetus, and the harm to the mother is a necessary by-product of this assault, see § 750.90a (punishing the assailant with up to life in prison), than it does for instances in which the mother is the intended victim of the assault, and the harm to the fetus is merely incidental, see § 750.90b (punishing this sort of assault with no more than fifteen years imprisonment). In this way, the Act institutes a status hierarchy between women and their fetuses, with the state conferring more protection on the unborn than on the female citizenry of the state. If the state betrays its commitment to neutrality by treating fetuses as the moral equals of women, see *supra* text accompanying notes 67-75, then it does so *a fortiori* when it treats fetuses as the moral superiors of women.

122. "We conclude that in this state, the defense [of others] should also extend to the protection of a fetus, viable or nonviable, from an assault against the mother, and we base this conclusion primarily on the fetal protection act adopted by the Legislature in 1998." See MCL 750.90a *et. seq.*" *People v. Kurr*, 654 N.W.2d 651, 654 (Mich. Ct. App. 2002).

The Michigan Court of Appeals has since extended *Kurr*, holding in *People v. Greene* that the state can impose consecutive sentences for violations of Michigan's fetal protection statute and its aggravated assault statute (for harm to the mother) without contravening the double jeopardy clause of the United States Constitution. 2004 Mich. App. LEXIS 570 (2004).

123. See *People v. Kurr*, 655 N.W.2d 552 (Mich. 2003).

124. *Id.* at 553 (Kelly, J., dissenting).

125. H. R. REP. NO. 108-420, pt. 1, at 6 & n.13 (2004). Of these twenty-eight states, eighteen have made it a crime to kill an "unborn child": Arizona, Arkansas, Florida, Illinois, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, North Dakota, Pennsylvania, Oklahoma, Rhode Island, South Dakota, Utah, Washington, and Wisconsin. *Id.* at n.13. Two other states, Massachusetts and South Carolina, have concluded that the common law already affords protection to the fetus, and so dispensed with the need to incorporate this protection in their statutes. *Id.* For a discussion of state feticide laws, see Kadetsky and Kole, *supra* note 41, at 217-18.

126. *Ogas v. State*, 655 S.W.2d 322 (Tex. Ct. App. 1983); *People v. Gaines*, 292 N.E.2d 500 (Ill. App. Ct. 1973). In a third case, *Barnes v. Commonwealth*, 2002 Va. Ct. App. LEXIS 455, 14-15 (2002), the Virginia Court of Appeals had occasion to consider a fetal defense of others claim when a defendant alleged that she had stabbed and killed her attacker to protect both her child (who was with her), and her fetus. While the appellate court found that it was reversible error for the trial court to deny defendant a defense of others claim, it based its decision only on defendant's professed intention to defend her (born) child.

127. *Ogas*, 655 S.W.2d at 322.

The court reasoned that the fetus was not a “person” under the Texas Penal Code and so the defense of a third person statute did not cover acts undertaken to protect a fetus.¹²⁸ In *People v. Gaines*, a pregnant defendant raised defense of others, claiming that she had killed her husband to protect her fetus.¹²⁹ The court rejected the defense, arguing that she would not be entitled to raise it unless she could “establish that she had the right to kill in her own defense. This she [had] failed to do.”¹³⁰

Indeed, even where the protector of the fetus has engaged in non-violent action, courts have uniformly denied a defense of others claim. For example, abortion protesters charged with trespass at abortion clinics have routinely attempted to raise a defense of others claim, arguing that they acted to protect the fetuses.¹³¹ In no case has such a defense been accepted by the courts.¹³²

The near-uniform national policy against fetal defense of others no doubt arises because of a recognition that fetal rights to protection threatens to impinge upon women’s rights to abortion. After all, if fetuses may be protected against acts that will lead to their destruction, then they may, in particular, be protected against abortions. Yet, like the congressional supporters of the UVVA,¹³³ the court of appeals in *Kurr* feigned the incredible feat of protecting the fetus without impugning abortion rights.¹³⁴ Insisting that a defense of others claim could properly be invoked only where the threatened action was unlawful, and highlighting the constitutionality of a right to abortion, the court maintained that its holding would not encroach upon women’s reproductive rights.¹³⁵ In this way, the court attempted to distance itself from the controversial issue of when life begins,¹³⁶ while aligning itself with the naturally uncontroverted practice of a mother’s defending her young. On the court’s understanding of its opinion, then, a commitment to neutrality would

128. *Id.* at 325.

129. 292 N.E.2d 500 (Ill. App. Ct. 1973).

130. *Id.* at 503.

131. *See, e.g.,* Allison v. Birmingham, 580 So. 2d 1377 (Ala. Crim. App. 1991); State v. Clarke, 590 A.2d 468 (Conn. App. Ct. 1991); City of Missoula v. Asbury, 873 P.2d 936 (Mont. 1994); Bobo v. State, 757 S.W.2d 58 (Tex. Ct. App. 1988). *See generally* Shelby A.D. Moore, *Doing Another’s Bidding Under a Theory of Defense of Others: Shall We Protect the Unborn with Murder?*, 86 Ky. L.J. 257 (1997); James O. Pearson Jr., Annotation, “Choice of Evils,” *Necessity, Duress or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R. 521 (1992).

132. *See supra* note 131. *But cf.* People v. Archer, 537 N.Y.S.2d 726 (N.Y. Crim. Ct. 1988) (holding that defendants could raise a defense of necessity where they could prove that second- or third-term abortions were occurring at the clinic).

133. *See supra* note 64.

134. *But cf.* Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective To Extend Civil Rights to the Unborn from Creation to Natural Death*, 48 ST. LOUIS U. L.J. 425, 471 (2004) (heralding the *Kurr* opinion on the ground that it implicitly recognized that personhood begins at conception and placing the opinion in a line of cases that the author hopes will eventually lead to *Roe*’s demise).

135. People v. Kurr, 654 N.W.2d 651, 656 (Mich. Ct. App. 2002) (“Our holding today does not apply to what the United States Supreme Court has held to constitute lawful abortions.”).

136. In *Roe v. Wade*, for example, the Court noted the deep controversy around “the question of when life begins.” 410 U.S. 113, 159 (1973).

both drive and survive the court's recognition of Kurr's defense of others claim.¹³⁷ To see how far the court missed the mark, we will have to take a detour into the liberal roots of self-defense and defense of others, and the illiberal developments these doctrines have sustained.

B. Self-Defense and the Liberal State

The legal right to self-defense is a vestige of the right that individuals possessed in the state of nature to secure their preservation.¹³⁸ In this sense, "the right of self-defense is beyond the law. A legal system which failed to recognize the right . . . could have no valid claim on the allegiance or obedience of those it sought to bring within its sway."¹³⁹ Nonetheless, the right to defend oneself or others within civil society is nowhere near as robust as the right enjoyed in the state of nature, where "every Man[] [is] Judge in his own Case."¹⁴⁰ We can understand the restrictions on the right to self-defense and defense of others once we appreciate the role that this right played in the formation of the liberal state.

For Thomas Hobbes, for example, the right to defend oneself against deadly force was just a corollary of the right of Nature, which grants each person the liberty to do whatever her powers allow her to do.¹⁴¹ John Locke believed that a duty of self-preservation confers a right to use deadly force against "that which threatens [one] with Destruction."¹⁴² Both recognized that defense of others was a natural extension of the right to self-defense.¹⁴³

137. As the *Kurr* Court stated in defense of its holding:

We emphasize that our decision today is a narrow one. We are obviously aware of the raging debate occurring in this country regarding the point at which a fetus becomes a person entitled to all the protections of the state and federal constitutions. This issue, however, is not raised by the parties, is not pertinent to the resolution of the instant case, and does not drive our ruling today.

654 N.W.2d at 657.

138. See, e.g., Michael Thompson, *Aquinas, Locke and Self-Defense*, 57 U. PITT. L. REV. 677, 682-83 (1996).

139. David Gauthier, *Self-Defense and the Requirement of Imminence: Comments on George Fletcher's Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 615, 616 (1996). See also David A. J. Richards, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Introduction*, 57 U. PITT. L. REV. 461, 466 (1996).

George Fletcher offers a different argument for the claim that the right of self-defense legitimizes the state. Advancing a Kantian view of self-defense, Fletcher suggests that because aggression threatens the "principles of ordered liberty" implicit in the Right . . . those who are threatened should be able to use all necessary force to frustrate the attack." George Fletcher, *Punishment and Self-Defense*, 8 LAW & PHIL. 201, 210 (1989). In this way, "[a]n act of self-defense . . . vindicates the entire legal order." *Id.* at 208.

140. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 326 (Peter Laslett ed., 1988).

141. THOMAS HOBBS, LEVIATHAN 91 (Richard Tuck ed., 1992).

142. LOCKE, *supra* note 140, at 278.

143. For Hobbes, the right to defend a third-party followed from the total permissiveness of his state of nature, where "every man has a Right to every thing; even to one another's [*sic*] body." HOBBS, *supra* note 141, at 91. Locke addressed defense of others explicitly, arguing that everyone had a right to preserve mankind, which entailed a right to defend another against an impending attack. See LOCKE, *supra* note 140, at 272:

Classical liberal theorists held that these rights persisted in civil society and, indeed, their assurance was a condition of individuals' entry into a commonwealth with others.¹⁴⁴ Thus, both Hobbes and Locke conserved a right to self-defense in civil society because they recognized that the state may not always be able to arrive in time to protect its constituents. In such a circumstance, "one wants to say that the rug is drawn back . . . the agents are in a sort of temporary or provisional state of nature."¹⁴⁵ During these provisional moments, the rights that one held in the state of nature may justifiably be invoked.

Nonetheless, the right of self-defense differs from the forms of protection available in the state of nature because its invocation is subject to *a posteriori* state approval. There are two reasons for the state to constrain a citizen's right to self-defense. First, every invocation of self-defense overrides the state's role in protecting its citizens. To ensure that this invocation is not a usurpation of state power, the state requires that the attack be impending, and the force used be necessary.¹⁴⁵ Only when the imminence and necessity requirements are met can we be certain the defender did not improperly take matters into her own hands.¹⁴⁶

A second reason for the state to circumscribe a citizen's right to self-defense is to ensure that the protective right that the citizen invokes is consonant with the right that the state could invoke on her behalf. Since the latter right is constrained by the state's commitment to neutrality, the former right must be constrained in this way as well.¹⁴⁷ In other words, the constraints

In transgressing the Law of Nature, the Offender declares himself to live by another Rule Which being a trespass against the whole Species . . . every man upon this score, by the Right he hath to preserve Mankind in general, may restrain, or where it is necessary, destroy things noxious to them

144. See, e.g., HOBBS, *supra* note 141, at 206 ("[N]o man is supposed at the making of a Common-wealth, to have abandoned the defence of his life; or limbs, where the Law cannot arrive time enough to his assistance."); LOCKE, *supra* note 140, at 280-81 ("Thus a Thief . . . I may kill . . . because the Law, which was made for my preservation, where it cannot interpose to secure my Life from present force . . . permits me my own Defence, and the Right of War, a liberty to kill the aggressor . . .").

¹⁴⁵ Michael Thompson, *Aquinas, Locke and Self-Defense*, 57 U. PITT. L. REV. 677, 683 (1996). See also George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) [hereinafter Fletcher, *Domination*].

145. Thus, for example, at common law, for a defendant to be justified in using deadly force to repel an attack:

There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself there from. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances.

United States v. Peterson, 483 F.2d 1222, 1229-30 (D.C. Cir. 1973).

146. As George Fletcher has noted, the elements that justify self-defense are intended to exclude those who preemptively "take the law into their own hands" because such individuals "exceed their authority as citizens," and, in so doing, would subordinate others to their force. Fletcher, *Domination*, *supra* note 144, at 570.

147. *But see* Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477 (1998) (arguing that the state also has an obligation to treat its citizens fairly, which may entail that the state

on self-defense must reflect and "enforce requirements of political legitimacy."¹⁴⁸ As such, "they must be objective and public, disallowing, on these grounds, the relevance of a person's beliefs (reasonable or not)."¹⁴⁹ So it is that the contours of self-defense are defined, at least in part, by the state's commitment to neutrality.¹⁵⁰

Indeed, it is almost universally agreed among scholars that the right to self-defense may not be used to advance one's moral or personal agenda.¹⁵¹ For example, George Fletcher argues that even where an attacker is repugnant to our moral sensibilities we would violate "the premise of the criminal law that individuals ought to be judged by what they do, not by their social status or general moral worth," were we to allow our assessment of the attacker to influence our response.¹⁵² That the legal right to self-defense follows the state's right to protect its constituents "assures, or is intended to assure, the transgressor that his violation will receive the measured response of society, and not the arbitrary response of the victim."¹⁵³ The proportionality requirement comes into play, then, as a way of assuring that the defender's response is, in fact, "measured."¹⁵⁴ As we will see, however, what the proportionality requirement measures is hardly consistent with the neutral aspirations of the doctrine of self-defense.

acts in a non-neutral regard insofar as it individualizes the constraints on self-defense for each defendant).

148. Richards, *supra* note 139, at 466.

149. *Id.* at 466 (describing George Fletcher's position, Fletcher, *Domination*, *supra* note 145, at 555. *But see* Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?* 57 U. PITT. L. REV. 757 (1996) (arguing that there is a countervailing legitimacy condition for the state—namely, that it protects human rights—and that this condition is not always served by the state's commitment to neutrality).

150. David Gauthier has argued that the imminence requirement also serves the state's requirement of neutrality. Gauthier, *supra* note 139, at 619 ("One central role of the imminence requirement is to ensure that everyone may expect to benefit by maximizing the extent to which deterrence and punishment replace preemption and retaliation."). For a persuasive argument that the imminence requirement fails miserably in its aspirations to neutrality, see V. F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001).

151. See, e.g., George P. Fletcher, *Punishment and Self-Defense*, 8 L. & PHIL. 201, 208 (1989) ("The assumption is that only the state is entitled to carry out acts of justice relative to its citizens. No individual is authorized to make this judgment about the just deserts of his fellow citizen.").

152. George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette of Comparative Criminal Theory*, 8 ISR. L. REV. 367, 374 (1973). See also Larry Alexander, *Consent, Punishment, and Proportionality*, 15 PHIL. & PUB. AFF. 178, 178 (1986) ("The classical problem for liberals has been that while assessing moral desert looks to be obviously illiberal, jettisoning considerations of moral desert leads inexorably to unfair sacrifice of individuals, also illiberal."); Fletcher, *Domination*, *supra* note 144, at 556 (arguing that Judy Norman was not entitled to "put herself in the position of judge and executioner. . . . There may be justice in [her battering husband's] dying, but it is not a form of justice that the legal system can readily accommodate." (italics added)); Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 687 (1996); Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 285 (1991).

153. Gauthier, *supra* note 139, at 618.

154. It is not surprising that the quest for neutrality would rely upon a mathematical function. In describing the role that abstract conceptions play in a theory of political liberalism, John Rawls notes that "[w]e should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend. . . ." JOHN RAWLS, *POLITICAL LIBERALISM* 46 (1993).

C. Neutrality and Proportionality

1. Fuzzy Math

The requirement that a defender's force be proportionate admits of various construals. Most straightforwardly, this requirement entails that "only equal force may be used in response to a threat,"¹⁵⁵ or that the loss one inflicts must be "of equal magnitude" to the loss that one faced.¹⁵⁶ The problem with formulations like these is that they suggest that force is quantifiable, even while it is generally a normative inquiry, rather than a mathematical one, that is used to determine whether the proportionality requirement has been met.

In some states, the normative dimension of the inquiry is made explicit, as their statutes frame the proportionality requirement in terms of a reasonableness requirement. In Vermont, for example, the use of force must be "just";¹⁵⁷ in North Dakota, it must be "appropriate."¹⁵⁸ Yet normative judgments clearly inform standard proportionality determinations even where the language in which the requirement is framed does not explicitly acknowledge this. For instance, self-defense has been deemed justifiable even where there is more than one attacker, and the threatened individual kills them all.¹⁵⁹ If it is justifiable to prefer one innocent individual to several guilty individuals, though, this must be because the culpability of the guilty individuals permits us to discount the worth of their lives. In this way, moral judgments are weighed in measuring the response.

Relatedly, the use of deadly force has been permitted not just for threats of death or great bodily harm, but also for threats of rape, kidnapping, forcible sodomy, or other forcible felonies.¹⁶⁰ Yet we cannot make sense of laws that

155. Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 105 (2001).

156. Anthony J. Sebok, *Does an Objective Theory of Self-Defense Demand Too Much?* 57 U. PITT. L. REV. 725, 752 n.130 (1998) (citing John Q. La Fond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237, 249 (1983)).

157. VT. STAT. ANN. tit. 13, § 2305(1) (2001) ("If a person kills or wounds another under any of the circumstances enumerated below, he shall be guiltless . . . [i]n the just and necessary defense of his own life or the life of his or her husband, wife, parent, child, brother, sister, master, mistress, servant, guardian or ward. . .").

158. N.D. CENT. CODE § 12.1-05-07(1) (1976). See generally 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(d) at 81 (1984) ("Under the proportionality requirement, . . . force used by an actor must be *reasonable* in relation to the harm threatened.") (emphasis added).

159. ROBINSON, *supra* note 160, at 70.

160. New York, for example, allows for deadly force to be used when the defendant is faced with all of the above. N.Y. PENAL LAW § 35.15(2) (McKinney 1987). Illinois's statute appears to be equally permissive, allowing deadly force where the defendant faces "imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILL. COMP. STAT. 5/7-1 (1995). These statutes reflect the strategy adopted in the Model Penal Code, in which the standard proportionality requirement has been replaced by a list of threats that would justify self-defense. See Model Penal Code § 3.04(2)(b).

would strike the balance in this way if we understand proportionality as a mathematical concept that permits only force of a magnitude equal to that which one faced. George Fletcher's defense of a law that would permit a woman to kill a potential rapist makes clear that math is not, in fact, what the proportionality requirement tracks. He writes that, "[a]s the *innocent* party in the fray, the woman defending against rape *has interests that weigh more* than those of the aggressor."¹⁶¹ The connection between innocence and the weight of a person's interests, however, would be irrelevant if what we were weighing was the objective badness of rape versus the objective badness of death.¹⁶² What must be tipping the scale in favor of the woman, then, is a moral judgment that the man who would rape her deserves the objectively worse outcome.

That proportionality determinations are informed by our moral assessments is problematic not only because these run afoul of the liberal commitment to neutrality. Even apart from this commitment, we have great reason to be suspicious of these assessments, given that they are not always correct and that they do not always operate uniformly. To see this, we need only consider the disparate treatment that men and women receive under the proportionality requirement. While differences in size are often taken into account in cases where one man defends himself against another man, these differences are often discounted in cases where it is a woman who defends herself against a man.¹⁶³ As such, even while the weaker defender in each set of cases uses force greater than that which the defender faced, this use of force is often deemed

161. Fletcher, *supra* note 144, at 560 (emphasis added). Indeed, elsewhere, Fletcher admits that the attacker's culpability detracts from the value assigned to his life in choosing between the life of the attacker and that of the defender. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 855-64 (1978) ("The source of the right [to self-defense] is a comparison of the competing interests of the aggressor and the defender, as modified by the important fact that the aggressor is the one party responsible for the fight. This theory of the defense appears to be a straightforward application of the principle of lesser evils.").

162. Indeed, I suspect that, if faced with the nightmarish choice between rape and death, most individuals would choose the former, which suggests that rape, horrible as it is, is not as objectively bad as death.

163. *Compare* In the Interest of D.S., 694 So. 2d 565, 567 (La. Ct. App. 1997) (finding that defendant's use of a gun would not be disproportionate where "the victim, Eric Hunter, was a 21-year-old, 5'11" adult male weighing 165 lbs; DeJuan [the defendant] is a 13-year-old child who at the time of the incident was 5'4" tall and weighed 110-125 lbs. The two were only a few feet apart during their argument. The significant difference in their size, combined with the short distance between them makes it likely that even unarmed, the partially inebriated Hunter could have inflicted great bodily harm upon the adolescent DeJuan") with *Commonwealth v. Miller*, 634 A.2d 614 (Pa. Super. Ct. 1993) (holding that defendant's fatal stabbing was a disproportionate use of force because her victim was unarmed at the time of the killing, even though the knife that she used was the one with which he had threatened to kill her only moments before). See generally Beecher-Monas, *supra* note 157, at 106 & n.113; V. F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1248 & n.65 (2001).

permissible where the defender is male, but impermissible where the defender is female.¹⁶⁴

Moreover, it is not simply that when women and men use the same amount of force the law is more apt to find excessive force in the former instances and proportionate force in the latter ones. It is also that the law likely has more occasions upon which to conclude that a woman's use of force ran afoul of the proportionality requirement. Because women are generally not as strong as their batterers, the option of responding with like force is not readily available to them;¹⁶⁵ and it is easier to find that a response is disproportionate where it is different in kind (say, where a woman responds to fists with a knife or gun).¹⁶⁶ It is not clear that this difference renders the woman's force disproportionate, however, for different instruments may yet be wielded with the same amount of force, or may yet cause equal amounts of harm.

In short, then, the proportionality requirement, far from securing neutrality, instead seems particularly susceptible to being overtaken by partial, and often faulty, moral judgments. Thus, proportionality does not compel the law to find guilty the women who would defend themselves against repeated, brutal attacks. Instead, under the guise of measuring the magnitude of force, the law engages in a *de facto* assessment of the worth of lives. Apparently, it has often concluded that women should shut up and take it.

2. Choice of Evils and Evil Choices

We have just seen that we have reason to suspect the neutral operation of the proportionality requirement, as it is often unequally, and non-neutrally, applied. In this sub-section, I argue that the doctrine's indeterminacy renders

164. Beecher-Monas, *supra* note 157, at 106. Compounding this disparity is the fact that women who commit homicide "generally receive longer sentences than men who kill." ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 280-81 nn.114-15 (2000).

165. See, e.g., *State v. Wanrow*, 559 P.2d 548, 558 (Wash. 1977) ("In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons."); *Kress v. State*, 144 S.W.2d 735, 738 (Tenn. 1940).

166. See, e.g., *People v. Davis*, 337 N.E.2d 256, 260 (Ill. App. Ct. 1975) ("A belief that the decedent, unarmed, might kill or greatly injure the defendant, while she had a loaded gun, was wholly unreasonable."); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 126 (1985); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 587 (1988). *But cf.* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 418-19 (1991). Maguigan argues that, despite feminist protestations to the contrary, most jurisdictions do not require that the defender use a weapon only where the attacker is also armed. Instead, "[t]he majority rule, applicable to both male and female defendants, is that the reasonableness of a defendant's degree of force is decided on a case-by-case basis and that the use of a weapon against an unarmed attacker is not *per se* disproportionate." *Id.* at 418-19. It is precisely this case-by-case analysis that occasions the worry about the influence of norms on proportionality determinations, however.

inevitable an appeal to values, and that the suppression of this appeal in turn permits the differences in application.

The proportionality requirement is itself indeterminate. Even on the facially value-neutral construction of proportionality as equivalency,¹⁶⁷ it is still unclear what elements ought to figure in the proportionality determination. Perhaps we ought to compare the battered woman's response on a given occasion to the aggregate force used by the batterer during all of his previous beatings.¹⁶⁸ Or perhaps we should say that the woman's use of force was consistent with the criminal law's aim to protect everyone equally, so that her force was not disproportionate.¹⁶⁹ That these strategies are available, and yet neglected, reveals that the law is not unswervingly compelled to reach a single result by some mathematical function.

More generally, the doctrine as a whole is woefully ill-equipped to deal with the defining feature of self-defense and defense of others cases. These cases crucially, and necessarily, implicate the state in a choice between lives or sets of interests. The inevitable fact of choice helps to explain the problems in the proportionality requirement's application that we saw in the last subsection. These problems do not result from illicit departures from the doctrine, for where a doctrine does not point conclusively in one direction rather than another, judges or juries must supplement it with their own discretion. Of course, use of discretion does not necessarily entail its abuse—triers of fact might consistently arrive at the correct result through sound and principled judgment.¹⁷⁰ We do have special reason to worry about discretionary abuse, however, where discretionary judgments are occluded by a doctrine that professes to exclude these judgments in the first place.

The elements of the doctrine never address themselves to the reality of the choice involved in every self-defense and defense of others case. Again, these elements ask the fact-finder to inquire into whether the attack was imminent, and whether the defender's response was necessary and proportionate.¹⁷¹ What

167. Contrast this construction of "proportionality" with those found in Vermont and North Dakota law. See *supra* notes 157 and 158 and accompanying text.

168. Cf. *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (permitting defender to base her assessment of danger posed by attacker on her prior knowledge of him).

169. It is for this reason that Arthur Ripstein argues that we should allow battered women to use whatever force is necessary to resist their batterers' attacks, even if this force is greater than that which their batterers wield. Arthur Ripstein, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 705 (1996).

170. One could argue, for example, that neutrality could yet be preserved in the face of the necessary choice that self-defense (and defense of others) presents by, say, having the trier of fact flip a coin to determine whether the defender's or attacker's life/interests ought to be preferred by the court. Yet this proposal would fail to cohere with our conception of self-defense as a justification, for there would be no sense in which we could deem a defender's response justified (or unjustified) simply by virtue of her having won/lost a coin flip that occurred after the fact. Moreover, I submit (although decline to argue here) that if neutrality can be preserved only at the expense of rendering arbitrary the choice the state makes between individuals, then so much the worse for neutrality.

171. See *supra* Part II.B.

counts as proportionate, however, cannot be specified in advance, for this determination will turn on the nature of the interests at stake and the identities of the individuals who harbor these interests.¹⁷²

Proportionality judgments are thus *ad hoc*—when we ask, “was the defender’s force proportionate?”, we mean, “was the defender’s use of force appropriate in the circumstances in question?”, and we answer the latter question on the basis of evaluations about the specific parties under consideration, rather than through appeal to some predetermined set of criteria. Proportionality then becomes redundant—the defendant’s use of force is proportionate if it aligns with an *antecedent* judgment about how much force she should have used. In other words, the proportionality requirement does not tell us whether the defendant used force proportionate or equivalent to the force that she faced; it just tells us whether she used an amount of force warranted by her interests or the interests of the third-party whom she defended. The question of how much force those interests warranted is answered through a normative inquiry that the doctrine obscures.

D. Fetal Defense of Others and Equality

We have already seen that the transgressions of neutrality permitted by the proportionality requirement conduce to the subordination of women by men.¹⁷³ In this section, I argue that extension of defense of others to fetuses heightens the non-neutral and inegalitarian features of the doctrine. To this end, I return to the status dynamics instituted or perpetuated by the UVVA and argue that these are reproduced when the unborn are considered “others” for purposes of the doctrine of defense of others.

1. Status Paradoxes Revisited

In Part I, I argued that the protections conferred to the unborn by the UVVA exist in tension with other principles of law that treat fetuses and embryos as less than persons.¹⁷⁴ A similar status paradox emerges when the state permits persons to protect the unborn through the use of deadly force: If fetuses or embryos occupy a status lower than that which persons hold, then it is untenable that the state should permit third parties to kill individuals who threaten harm to the unborn. On the assumption of fetal non-personhood, then,

172. Others have waged a similar critique with respect to the necessity and imminence requirements. See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 428-35 (arguing that deterrence arguments against a duty to retreat—which obviates the necessity requirement—couch judgments about the appropriate response of the “true man”); V. F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001) (arguing that the imminence requirement occludes fact-finder’s subjective judgments).

173. See *supra* Parts II.B-C.

174. See *supra* text accompanying notes 83-90.

fetal defense of others allows the state to prefer the lives of non-persons to persons. On the other hand, if embryos and fetuses are persons, then it is untenable that the law should forbid use of defense of others by those who trespass in front of abortion clinics.¹⁷⁵ After all, if one may kill another in an effort to save the life of a fetus, surely one should be permitted to engage in the relatively harmless activity of trespassing in order to do so. In sum, fetuses cannot be treated as "others" for purposes of defense of others consistent with the law's treatment of fetuses for other purposes, and the law cannot countenance a mother's claim of defense of others consistent with its denial of the same claim by other defenders.¹⁷⁶

2. Status Hierarchies Reinforced

Like the legislative attempts to protect the unborn,¹⁷⁷ *Kurr* entrenches a hierarchy between pregnant and non-pregnant women. In general, the proportionality requirement works to the detriment of women more often than men since women will more often have to respond to fists with weapons, and since it is easier to find force disproportionate when it is different in kind.¹⁷⁸ Extending defense of others to embryos and fetuses, however, provides pregnant women with an opportunity to justify this disparate use of force, even though the threat to *their* bodies is no greater than the threat that a non-pregnant woman subject to the same attack would face. Pregnant women thus reap the benefit of the state's recognition that they have attached themselves to something of value.¹⁷⁹ But fetuses are not the only things that confer value on a woman's life. The products of her mind or the labors of her love might be no less valuable, and hence no less worthy of state-authorized protection. The state that recognizes the value-adding effect of the fetus but fails to recognize these other sources of value thus empowers pregnant women to safeguard their bodies while consigning non-pregnant women to their abusers.

175. See *supra* notes 131 and 132 and accompanying text.

176. Cf. Mario J. Rizzo & Douglas G. Whitman, *The Camel's Nose Is in the Tent: Rules, Theories and Slippery Slopes*, 51 U.C.L.A. L. Rev. 539, 565-67 (2003) (using the conflict between abortion and fetal protection cases—and citing *Kurr* as an example—to demonstrate that slippery slope arguments can be used by both sides of the abortion debate, with pro-lifers fearing that abortion rights will undermine fetal protection efforts, and pro-choicers fearing that feticide laws will undermine abortion rights).

177. See *supra* Part I.

178. See *supra* notes 166 and 167 and accompanying text.

179. Cf. Martha L. Fineman, *Images of Mothers in Poverty Discourse*, 1991 DUKE L.J. 274, 289-90 (1991) ("[M]otherhood has always been, and continues to be, a colonized concept—an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology.").

3. Fetal "Others" and Female "Others"¹⁸⁰

The *Kurr* strategy reflects not only an illicit preference for pregnant women, it also privileges harm to the fetus over harm to its mother. In denying *Kurr*'s claim to self-defense, a jury found that her response was unnecessary and/or excessive. The jury accordingly denied her authority to judge the magnitude of an attack that she faced. In sustaining her claim of defense of others, on the other hand, the jury affirmed her authority to judge the magnitude of force with which her fetuses were threatened.¹⁸¹ Yet, as an epistemic matter, a jury ought to place more confidence in a woman's assessment of the threat an attack poses to *her* than it places in her assessment of the threat posed to her fetus. After all, she comes to the former assessment by way of immediate sense-perceptions, the most reliable source of information,¹⁸² while she can arrive at the latter only through a process of conjecture that even science is without resources to support.¹⁸³ Indeed, given the dearth of scientific evidence on the subject of the consequences to the fetus of blows to its mother's stomach,¹⁸⁴ it is clear that a jury's rejection of self-

180. SIMONE DE BEAUVOIR, *THE SECOND SEX* xxix (H. M. Parshley ed. and trans., Alfred Knopf 1975) (1949) ("What peculiarly signalizes the situations of woman is that she—a free and autonomous being like all human creatures—nevertheless finds herself living in a world where men compel her to assume the status of the Other.").

181. Of course, the defense of others claim was submitted to the jury when the case was remanded to the trial court. As such, the jurors deliberating about the self-defense claim, which was submitted to the jury at the initial trial, were not the same as the jurors deliberating about the defense of others claim. Nonetheless, the composition of the jury should not affect the analysis I provide here since any jury is supposed to reflect the views of its community, and there is no reason to suppose that that was not the case in *Kurr*.

182. See, e.g., ARISTOTLE, *Metaphysics*, in ARISTOTLE 65, 68 (Philip Wheelwright trans., 1951) ("These states of knowledge are neither innate in a determinate form, nor developed from other higher states of knowledge, but from sense-perception. It is like a rout in battle stopped by first one man making a stand and then another, until the original formation has been restored.").

183. See, e.g., Lee et al., *supra* note 79. Cf. Brief of Amicus Curae The Lindsmith Center, *Whitner v. South Carolina*, 492 S.E. 2d 777, (arguing that the effects of maternal ingestion of certain legal and illegal drugs on the fetus has not yet been well established); Joni F. Katz, Comment, *Hazardous Working Conditions and Fetal Protection Policies: Women Are Going back to the Future*, 17 B.C. ENVTL. AFF. L. REV. 201, 223 (1989); Mary Ann Chirba-Martin and Carolyn M. Welshans, *An Uncertain Risk and an Uncertain Future: Assessing the Legal Implications of Mercury Amalgam Fillings*, 14 HEALTH MATRIX 293 (2004) (arguing that there is a dearth of scientific evidence regarding the effects on fetuses of mercury amalgam released from their mothers' fillings); ELIZABETH ARMSTRONG, *CONCEIVING RISK, BEARING RESPONSIBILITY: FETAL ALCOHOL SYNDROME & THE DIAGNOSIS OF MORAL DISORDER* 3-5 (2003) (arguing that the use of alcohol during pregnancy cannot account for fetal defects when only 5 percent of the babies born to women who drink heavily during pregnancy exhibit fetal alcohol syndrome, and that the entrenched prohibition on drinking while pregnant has more to do with "the power of medical knowledge to capture social anxieties" than it does with the existing scientific literature).

184. See, e.g., Alexander Butchart & Andres Villaveces, *Violence Against Women and the Risk of Infant and Child Mortality*, 81 BULL. OF WORLD HEALTH ORG. 17 (2003) (reviewing a study that, for the first time, attempted to measure the scale of the impact of abuse to the pregnant woman on infant mortality, and finding that the study suffered from significant limitations). Cf. 150 CONG. REC. S3124-02, S3139 (daily ed. Mar. 25, 2004) (incorporating letter from the DOJ arguing that it would be difficult to prosecute attackers under the UVVA since prosecutors would have to establish that the defendant caused a miscarriage or birth defect, and since these adverse events could just as easily be attributed to

defense and finding of justified defense of others cannot be based on any factual determination about the threat the fetus faced relative to that faced by its mother. Instead, such a jury’s verdict can only be read as a statement expressing a belief that fetuses deserve more protection than the women who carry them.

III. DETERRING, REDRESSING, AND DEFENDING AGAINST VIOLENCE TO ALL WOMEN (AND PROTECTING FETUSES ALONG THE WAY)

Thus far, we have considered a fetal protection statute that violates commitments to neutrality and a judicially approved fetal defense of others claim that portends even greater devastation to our cherished liberal commitments. Turning back the clock to the legal regime that existed prior to either the UVVA’s enactment or the *Kurr* decision, however, would not necessarily restore liberal order. A state that refuses to recognize the tragedy a woman may experience when she loses her fetus through an attack would honor neutrality no better than the state that punishes harm or death to the fetus. Similarly, a state that denies a woman the right to use deadly force to protect the life of her fetus makes a choice between lives that is no more neutral than the choice made by the state that would recognize a claim of fetal defense of others.

In this Part, I sketch the outlines for a statutory response to loss of fetal life and an expanded doctrine of self-defense to prevent threats to that life. The proposals I advance here are intended to be sufficiently robust and flexible to offer protections not just against harm to the fetus but also against harm to any project that a domestic violence victim would deem identity-defining. In this way, these proposals are intended to function as more effective and equitable means of fulfilling the ostensible goal behind the UVVA – that of preventing violence against women.¹⁸⁵

factors unrelated to an attack). Elizabeth Armstrong has noted that pregnant women are more likely to suffer domestic violence than to drink heavily during pregnancy, yet science has focused much more heavily on the latter “risk,” and public policy has aimed much more strenuously at curbing pregnant women’s drinking than at stemming their abuse. *See supra* note 185, at 2-3.

185. Deterring domestic violence was cited repeatedly in the congressional debates as a key goal of the UVVA. *See, e.g.*, 150 CONG. REC., at S3137 (statement of Orrin Hatch) (“The bill before us strengthens the right of women and provides those who fight domestic violence with another tool in their arsenal to go after abusers.”). Similarly, supporters of the Democrats’ alternatives routinely cited their efficacy at targeting violence against women. *See, e.g., id.* at S3149 (statement of Sen. Patrick Leahy in support of the Motherhood Protection Act and the Murray Amendment, which proposed additional measures to prevent domestic violence and treat its victims).

A. Retribution and Restitution

One need not hold that life begins at conception, or indeed believe that a human being is a legal or moral person at any time before birth,¹⁸⁶ in order to recognize the deep connection that many women feel toward their fetuses, and the correspondingly profound sense of loss that they would experience were their pregnancies to be terminated through an attack.¹⁸⁷ In this section, I argue that the state can respond to this loss without presupposing the fetus's personhood or privileging pregnant women in the criminal law. Indeed, the resources for this response are already present in existing criminal legislation, albeit amorphously.

As some congressional opponents of the UVVA recognized, its stated goal of preventing violence against women would be betrayed unless Congress authorized full funding for the Violence Against Women Act (VAWA).¹⁸⁸ These opponents focused in particular on VAWA's grant provisions,¹⁸⁹ which award states with funds to establish prevention programs and domestic abuse shelters.¹⁹⁰ The provisions in question have significantly reduced violence against women,¹⁹¹ and thus do indeed deserve full governmental support.¹⁹²

Notwithstanding the importance of VAWA's grant provisions, however, these cannot function as an adequate substitute for the UVVA because that statute offers retribution for individuals who lose their fetuses in a violent attack, while the granting provisions are aimed at preventing domestic violence

186. The term "human being" is often used to denote any member of the species homo sapiens, while the term "person" is restricted to those with the full panoply of moral and legal rights. *See, e.g.*, DEREK PARFIT, REASONS AND PERSONS 322 (1984); PETER SINGER, RETHINKING LIFE AND DEATH 180-83 (1994); Mary Anne Warren, *On the Moral and Legal Status of Abortion*, in ETHICAL ISSUES IN MODERN MEDICINE 276, 281 (John D. Arras & Nancy K. Rhoden eds., 1989).

187. *Cf.* Edith L. Pacillo, *Expanding the Feminist Imagination: An Analysis of Reproductive Rights*, 6 AM. U. J. GENDER & LAW 113, 116-119 (1997) (recognizing a right to abortion but nonetheless acknowledging the potentially devastating emotional consequences of exercising this right); Terry Nicole Steinberg, Note and Comment, *Abortion Counseling: To Benefit Maternal Health*, 15 AM. J. L. & MED. 483 (1989) (describing the psychological effects of abortion and noting that grief is the predominant emotion).

188. *See, e.g.*, H.R. REP. NO. 108-420, pt. 1, at 75 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, (proposal of Rep. Jackson-Lee, requiring full funding for VAWA as a condition of the UVVA's enactment); 150 CONG. REC. at S3129 (2004).

189. *See, e.g.*, 150 CONG. REC. at S3129, S3139, S3150 and S3151.

190. *See* 42 U.S.C. §§ 10401 *et seq.* (2003).

191. *See* 150 CONG. REC. S3124-02, S3163 (daily ed. Mar. 25, 2004) (statement of Sen. Ted Kennedy, reporting that, since VAWA's enactment in 1994, violence against women has been reduced by 21 percent).

192. Indeed, the need for full funding has grown in the wake of *United States v. Morrison*, 529 U.S. 1062 (2000), which struck down VAWA's civil remedy, and hence rid the statute of some of its deterrent power. Yet, despite VAWA's success, funding for VAWA has successively diminished over the last few years. *See, e.g.*, 150 CONG. REC., at S3141 (incorporation letter from Lynn Rosenthal, Executive Director of the National Network To End Domestic Violence, decrying the 2004 budget, which included \$16.1 million in cuts to VAWA's STOP grant program, which enhances law enforcement efforts aimed at preventing violence against women).

and supporting victims. The granting provisions thus do not address themselves to the violent offense itself.

Yet VAWA's criminal provisions,¹⁹³ which were never explicitly raised in the congressional debates,¹⁹⁴ offer a closer substitute to the UVVA. Not only do these provisions punish violence against women, they also require prosecutors to seek restitution for its victims.¹⁹⁵ Moreover, the goal of VAWA's restitution provisions is not just redress for the victims' injuries, but also enhanced retribution. Thus, VAWA requires that a court order restitution even where the "victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source."¹⁹⁶

VAWA frames its restitution provisions in broad terms, ordering the court to impose on the defendant restitution for "the full amount of the victim's losses."¹⁹⁷ These include any losses incurred by the victim for medical services;¹⁹⁸ rehabilitation;¹⁹⁹ necessary transportation, temporary housing, and child care expenses;²⁰⁰ lost income;²⁰¹ attorney's fees, plus any costs incurred in obtaining a civil protection order;²⁰² and "any other losses suffered by the victim as a proximate result of the offense."²⁰³ Moreover, courts have broadly construed these restitution provisions, compensating victims not just for the losses they incurred directly from the offense, but also for costs related to

193. 18 U.S.C. §§ 2247 *et seq.* (2003).

194. Again, those who invoked VAWA in the debates about the UVVA discussed the need to fully fund it, *see supra* note 189, or their general commitment to addressing violence against women, *see, e.g.*, 150 CONG. REC. at S3149 (statement of Sen. Leahy).

195. *See* 18 U.S.C. § 2248 (restitution for victims of sexual assault), § 2259 (restitution for victims of child sexual abuse) & § 2264 (restitution for victims of stalking and domestic violence). The language of § 2264 is exemplary: "[I]n addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter." § 2264(a) (emphasis added). VAWA's mandatory restitution provisions can be contrasted with the federal restitution provision of the Victim and Witness Protection Act, 18 U.S.C. § 3663 (2005), which makes restitution discretionary.

The restitution provisions in each of sections 2248, 2259 and 2264 are identical in all respects except that each references different offenses. *See supra*. Since section 2264, which provides restitution for stalking and domestic violence, is likely the one that best corresponds to the offense punished in both the UVVA and the Democrats' alternatives to it, I cite exclusively to this section in what follows.

196. 18 U.S.C. § 2264(b)(4)(B)(ii) (1996). *See also* § 2264(b)(5) (since deleted) (allowing the court to order, in instances where there is more than one offender, *each* to pay the *full* amount of the victim's losses).

197. 18 U.S.C. § 2264(b)(1) (1996); *see also* § 2264(b)(4)(B)(i) (mandating that the court impose a restitution order regardless of defendant's financial situation). Contrast the analogous provision in the generic federal restitution statute, 18 U.S.C. § 3663 (making restitution a substitute for any other penalty, and requiring the court to consider the defendant's finances in arriving at the restitution amount).

198. 18 U.S.C. § 2264(b)(3)(A).

199. 18 U.S.C. § 2264(b)(3)(B).

200. 18 U.S.C. § 2264(b)(3)(C).

201. 18 U.S.C. § 2264(b)(3)(D).

202. 18 U.S.C. § 2264(b)(3)(E).

203. 18 U.S.C. § 2264(b)(3)(F).

earlier acts of abuse,²⁰⁴ or protracted anticipated future expenses, like life-long therapy sessions necessitated by the abuse.²⁰⁵

While no court has yet done so,²⁰⁶ one could argue that the loss of the fetus through an attack falls within the catch-all clause mandating restitution for “any other losses suffered by the victim as a proximate result of the offense.”²⁰⁷ Construing VAWA in this way provides both the added deterrence and the expressive power that the UVVA affords.²⁰⁸ More specifically, if wrongful death awards for newborns are any guide,²⁰⁹ assailants who cause death to the fetus or embryo can expect to face restitution orders compelling payment in the hundreds of thousands of dollars, in addition to incurring any other punishments as a result of the assault. An established judicial response imposing such costs upon those who terminate pregnancies in the course of an attack would put would-be attackers on notice that the potential cost to them of the attack is likely not worth the satisfaction it would bring.²¹⁰ In addition,

204. See, e.g., *United States v. Hayes*, 135 F.3d 133 (2d Cir. 1998) (affirming a restitution order requiring defendant, who had been convicted of violating a protective order, to compensate the victim for costs arising not just out of his violation but also from the earlier acts of abuse that necessitated her relocation); *United States v. Popson*, 234 F.3d 1263 (2d Cir. 2000) (same).

205. See, e.g., *United States v. Danser*, 270 F.3d 451 (7th Cir. 2001) (requiring that defendant pay restitution to his nine-year old victim for seventy-five years of therapy); *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999) (affirming restitution order for future counseling for child sexual abuse victim); *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001) (holding that restitution order is appropriate if victim requires future counseling). *But cf.* *United States v. Follet*, 269 F.3d 996 (9th Cir. 2001) (requiring that the government establish a reasonable need for future therapy and supply an estimate of the costs as a condition of imposing these costs on defendant); *Hughey v. United States*, 495 U.S. 411, 416 (1990) (limiting restitution under what is now 18 U.S.C. § 3663—the generic federal restitution statute—to “losses caused by the conduct underlying the offense of conviction”).

206. Indeed, this strategy appears to have been overlooked even by domestic violence groups who advocated, as an alternative to the UVVA, sentencing enhancements for attacks against pregnant women rather than use of VAWA’s restitution provisions. See, e.g., 150 CONG. REC. S3124-02, S3141 (daily ed. Mar. 25, 2004) (incorporating letter from Lynn Rosenthal, Executive Director of the National Network To End Domestic Violence, who argued that “by supporting sentencing enhancements, Congress can advance both its goals of protecting victims of domestic violence and providing a legal sanction for loss of pregnancy as a result of battering”).

207. 18 U.S.C. § 2264(b)(3)(F).

208. The fact of the UVVA’s adoption does not render superfluous appeal to VAWA’s restitution provision because prosecutors could elect to indict the individual who beats a woman, and thereby destroys her fetus, under VAWA, rather than the UVVA. Indeed, prosecutors who appreciated the UVVA’s assault on liberalism could consciously refuse to use the UVVA in the eventual hope that its continued disuse would lead to its obsolescence. *Cf.* *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (“The undeviating policy of nullification by Connecticut of its anti-contraceptive laws . . . bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. ‘Deeply embedded traditional ways of carrying out state policy. . .’—or of not carrying it out—‘are often tougher and truer law than the dead words of the written text.’”), quoting *Nashville, C. & St. L.R. Co. v. Browning*, 310 U.S. 362, 369 (1940). See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 153-54 (1986) (meditating on the institutional dynamics underlying the doctrine of desuetude).

209. See, e.g., Tom Johnston, *Hospital Settles Suit for \$1.75 Million*, Pioneer Press Online, Sept. 2, 2004, http://www.yourlawyer.com/practice/news.htm?story_id=8479&topic=MedicalMalpractice (last visited Oct. 18, 2005) (reporting that a couple received a \$1.75 million award for the wrongful death of their newborn son); NJATTY.COM, \$500,000 Settlement for Death of Newborn, <http://www.njatty.com/articles/medmal/mzsp02.html> (last visited Oct. 18, 2005).

210. Indeed, because it is less politically charged than the UVVA, VAWA might prove to be a superior deterrent. See, e.g., 150 CONG. REC. at S3127 (incorporating letter from George Fisher, a

judicial recognition of the loss of the fetus as among the losses the victim faced would express the state's condemnation of fetal destruction, particularly in light of the retributive, rather than exclusively reparative, rationale undergirding VAWA's restitution provision.²¹¹ In this way, VAWA's restitution provision could be wielded to fulfill the UVVA's stated purpose of deterring and denouncing destruction of the unborn without waging its latent attack on abortion rights.²¹²

This use of VAWA's restitution provision furnishes a superior alternative not only to the UVVA; it also avoids the pitfalls of the Democrats' alternatives, which privileged pregnant women over non-pregnant women as objects of the

criminal law professor at Stanford, who argues that "[t]he Bill's apparent purpose of influencing the course of abortion politics will discourage prosecutions under any future Act").

211. See *supra* notes 196-197 and accompanying text. *But cf.* Marc Spindelman, *Are the Similarities Between a Woman's Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 U. MICH. J.L. REFORM 775, 834-35 (1996):

Though our society quantifies the value of life through, for example, wrongful death awards or life insurance policies, these are not generally considered to represent the value of actual life, or to constitute a substitute for the living person. The reduction of the value of life to a quantifiable figure raises concerns that in the process, life becomes merely another commodity to be bought, sold, or dispensed with as the marketplace—or worse, politics—demands.

It is crucial to note that providing a monetary award to women for the loss of their fetuses does not imply the non-personhood of the fetus any more than providing parents with a wrongful death award for the demise of their born child implies the non-personhood of that child. In short, the restitutionary proposal that I advance here is intended to be, and I believe is, neutral with respect to the status of the fetus.

212. VAWA might nonetheless appear to leave some of the UVVA's goals unfulfilled. After all, the UVVA addresses itself not only to *destruction* of the embryo or fetus but also to *any* harm that the embryo or fetus might suffer. Yet other existing legal remedies might be sufficient to fulfill the UVVA's remaining purposes. To see this, consider that, where the unborn child survives an attack, prosecution under the UVVA would take one of two forms. First, the government could seek to convict the attacker for the pain and suffering that the fetus suffered in utero. (Harm to an embryo, however, would likely not prompt prosecution because the embryo is too undeveloped to suffer pain at all. See Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049, 2055 (1994) ("An entity can only have a right to something if it has an *interest* in having it, and it can only have an interest in something if it is or has been sentient. . . . It is ludicrous to think that a fetus is sentient prior to a date near the end of the second trimester, when neurons in the brain's cortex spread and connect to nerve endings in the thalamus.")).

The prosecution's claim would be so speculative, however, that this is unlikely to be a successful—and thus chosen—strategy. See, e.g., 150 CONG. REC. S3124-02, S3129 (daily ed. Mar. 25, 2004) (incorporating letter from the DOJ describing the difficulties of proving that an attack caused a miscarriage or birth defect). The real effect of the UVVA's fetal harm provisions, then, is to provide the government with the means to prosecute those who, by attacking the pregnant woman, create lasting damage to her fetus—damage the full scope of which manifests itself only when the child has been born.

A second form of prosecution under the UVVA, then, would have the government wait until after the child is born to seek an indictment against the attacker. Yet the UVVA is not the sole means of punishing the individual who causes lasting damage to a child by engaging in a prenatal attack. See, e.g., *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987) (permitting an FTCA claim on behalf of a child who sustained prenatal injuries as a result of negligent medical care offered to a servicewoman at her military base); *Jorgensen v. Meade Johnson Lab., Inc.*, 483 F.2d 237 (10th Cir. 1973) (permitting tortious action for injuries to child caused by defendant's conduct prior to conception). *Cf.* *United States v. Spencer*, 839 F.2d 1341 (9th Cir. 1988) (affirming federal conviction, secured prior to enactment of the UVVA, for murder of child where it died very shortly after birth as a result of prenatal injuries); *Holfzapfel*, *supra* note 41, at 447 (noting that every jurisdiction provides recovery for prenatal injuries sustained by a child who is subsequently born alive). Along with VAWA, these remedies may be sufficient to fulfill all of the UVVA's deterrent and retributive functions.

law's protective resources.²¹³ The "any other losses" provision is sufficiently capacious to compensate a victim not just for the loss of her pregnancy but also for other losses that she suffers "as a proximate result of the offense."²¹⁴ For example, VAWA recognizes that many women will be compelled to relocate in order to elude their batterers. VAWA compensates these women for the move and consequent temporary loss of income.²¹⁵ Yet relocation imposes additional costs on the victim. The woman who is compelled to move may forfeit professional contacts, attachments to a community of friends that she had developed in the area, investments in projects that she would have to leave behind (for example, involvement with a community service or charitable group), connections to others with whom she engaged in group activities (a hiking club, knitting circle, poker buddies, etc.), and so on. At least some of these losses ought to be subject to compensation too. Moreover, many of these losses are not unique to the women who relocate; they may be borne, as well, by the women who stay, since battering itself might cause a woman to recede in shame or depression from her social network.²¹⁶ Compensation ought to be available for this woman's losses as well.²¹⁷

Of course, to estimate the cost of these losses, it would appear necessary for courts to thrust themselves into highly contested and contestable evaluative terrain. How could a court, consistent with the principle of neutrality, seek to put a price on the loss of a social or support network? And wouldn't the discretion afforded by the proposed compensatory scheme offer yet another repository for assessments of the worth of certain forms of life relative to others? It would exceed the scope of this Article to advance a detailed computation system that fits within neutrality's bounds. Nonetheless, a few general considerations present themselves.

First, regarding the *amount* of compensation: Some of the costs at issue are subject to unproblematic financial assessment. A licensed appraiser could determine the value of one's professional contacts, for example, in a systematic way that would apply across the board, and thus would not raise concerns about

213. See *supra* notes 103-106 and accompanying text.

214. 18 U.S.C. § 2264(b)(3)(F) (2000).

215. See 18 U.S.C. §§ 2264(b)(3)(C) and (D) (2005).

216. See, e.g., Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. POVERTY LAW & POL'Y 245, 251 (2000) (reporting studies finding that the most serious sequelae of battering arise in those women with depression and/or the weakest social ties).

217. It is worth noting that robust restitution for the victims of domestic violence has the added advantage of enabling them to leave their batterers. As the public policy director of the National Coalition Against Domestic Violence stated in support of the Murray amendment, see *supra* note 92, prosecution of batterers without attendant programs for their victims makes these victims less likely to report their abuse for fear that their partners, on whom they may be economically dependent, will be imprisoned as a result. *Id.* at S3165. If prosecutors routinely seek restitution for the victim in addition to conviction, however, they likely motivate more women to come forward.

non-neutrality.²¹⁸ Other costs, like the loss of one's established social activities or community of friends, are obviously far less susceptible to systematic computation. Two things should be noted about these costs, however. First, the problem posed by the need to compute these losses is not unique to the restitution program that I advocate here. Courts are constantly called upon to evaluate intangible losses, like loss of reputation,²¹⁹ loss of consortium,²²⁰ and so on. If such determinations can be made compatible with liberalism's commitments to neutrality and equality, then there is no reason to think that the same will not be true when it comes to computing the value of one's social network. Second, we are not powerless to limit the exercise of discretion here, for we need not insist upon a particularized calculation for each woman. Instead, we could stipulate in advance some sum available to any woman who can demonstrate that the abuse caused her to abandon her established social ties.²²¹ Of course, any figure that we stipulate is bound to be arbitrary, but this is only because money is such a poor substitute for the loss of one's social network.²²² And, however arbitrary the sum, its uniformity will at least prevent the casuistic evaluation of different forms of life that would transgress the commitments to neutrality and equality that we want to preserve. A predetermined, fixed sum for loss of social ties thus takes care of concerns about the amount of money each woman would receive for this loss.

A second consideration relates to the *scope* of the losses that should be compensable in the first place. To fix the possible spectrum in a somewhat extreme way, consider, at one end, the abandonment of a woman's life project and, at the other end, the pain of leaving behind, say, a favorite bagel shop that the woman found only after months of diligent searching. Ought any loss on the spectrum be compensable?

Liberalism obviously counsels caution before permitting the state to determine which losses should be in or out, but, in a world of scarce resources,

218. This type of appraisal is commonplace in the partnership dissolution context. *See, e.g.*, *Western Assurance Co. v. J. D. Connors*, 101 F. Supp. 2d 1111 (S.D. Ind. 1999) (assessing the going concern value of a dissolved partnership on the basis of an appraisal that included the value of the business's existing clients and contacts).

219. *See, e.g.*, *Poleski v. Polish American Publishing Co.*, 235 N.W. 841 (Mich. 1931).

220. *See, e.g.*, *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), *cert. den'd* 340 U.S. 852 (finding, for the first time, that a wife could bring a claim for loss of consortium with her husband).

221. This showing might be more easily made by the woman who removes herself from the home of her batterer than by the woman who simply retreats into herself. After all, the rupture that the first woman experiences is far more dramatic and decisive. Thus, it is possible that the proposal will have the disparate effect of more readily rewarding women who relocate than those who do not. I leave open the possibility that any resulting disparity will have the salutary consequence of encouraging women to leave their batterers.

222. *Cf.* Erin A. O'Hara, Note, *Hedonic Damages For Wrongful Death: Are Tortfeasors Getting Away With Murder?*, 78 GEO. L.J. 1687, 1708-1710 (1990) (describing opposition to damages awards for loss of life on the ground that such awards are arbitrary).

the theory is not completely disabled from drawing a line somewhere.²²³ I submit that the appropriate line is drawn between losses of ties that are constitutive of one's identity and losses of ties that are not. Recall that the motivating force behind liberalism is the aim of securing autonomy, or the freedom to engage in a project of self-authorship free from coercion by the state or one's fellow citizens.²²⁴ Battering erodes this freedom insofar as it constrains the victim's life choices by placing her under the thumb of her batterer. Further, battering undermines the victim's self-respect, which is a prerequisite for a person's autonomy. In this way, the most devastating effect of battering may be the damage it wages upon a woman's sense of self.²²⁵ As such, it is appropriate that restitution for violence against women should focus especially on the losses that particularly wrought this devastation. The scope of restitution under VAWA would thus be fixed such that losses bearing on the contents of a woman's life plan, or her capacity to form or enact it, would fall on the side of the line requiring compensation while losses that cannot be so described would not. To establish that the lost item was in fact constitutive of her identity, the battered woman could marshal witnesses who could testify to the central role the item played in the woman's sense of self. Thus loss of a favorite bagel shop *could* qualify for compensation if, for example, the woman could establish that she was a "regular," had developed a close-knit community of friends there, and adverted to her membership in that community in describing who she was.

More to the point, robust use of VAWA's restitution provision could compensate the woman who had, in virtue of being pregnant, come to incorporate a motherhood component in her sense of self and who then lost her fetus through an attack. Moreover, restitution for this loss would be available even if the attacker were ignorant of the pregnancy. Just as VAWA does not make restitution for childcare expenses contingent upon an attacker's knowledge that his victim had children who would need care,²²⁶ so too it ought not to make restitution for loss of an embryo or fetus contingent upon an attacker's knowledge of the unborn child's existence.

In sum, courts can wield VAWA's restitution provision to furnish an alternative to the UVVA that deters and denounces attacks leading to fetal destruction even as it preserves liberalism's commitments to neutrality and

223. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 31-68 (1980) (making scarce resources a necessary condition for rights, and especially distributive entitlements, in the liberal state).

224. See *supra* notes 20-26 and accompanying text.

225. See, e.g., Linda L. Ammons, *What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 *RUTGERS L. REV.* 1207 (1999); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 *U. CHI. LEGAL F.* 137, 146 (2002).

226. See 18 U.S.C. § 2264(b)(3)(C). Cf. § 2264(b)(3)(D) (providing restitution for a victim's lost income, the amount of which an attacker would, presumably, often be ignorant).

equality. Moreover, the deterrent, expressive and compensatory benefits that VAWA affords can and ought to be extended to address instances' of violence against non-pregnant women. This extension will, finally, make good on the UVVA's aspiration to prevent and punish violence against *all* women.

B. Defense of One's Self

Current self-defense doctrine, as we have seen,²²⁷ provides inadequate protection to women because the proportionality requirement limits their ability to defend themselves. As a result, a pregnant woman can justify the use of deadly force in response to a non-life-threatening attack only if the state recognizes her fetus as an "other" worthy of protection, as it did in *Kurr*. Non-pregnant women, who cannot advert to the presence of a fetus to justify their right to be free from attacks, are even more hindered by the proportionality requirement in their efforts at self-protection.²²⁸ The aim of this section is thus to propose an alternative that avoids the non-neutral and inegalitarian effects of the proportionality requirement in the context of domestic violence, and also permits women to defend their fetuses without producing the illiberal consequences of the doctrine of fetal defense of others.

Perhaps the most dramatic way to overcome the defects of the proportionality requirement would be to dispense with it altogether.²²⁹ On this strategy, imminence and necessity would be sufficient to justify self-defense. Indeed, one might argue that this strategy has particularly salutary effects for battered women since the would-be batterer would know both that his victim could respond with whatever force was necessary to repel the attack, and that she would likely have to resort to a more powerful weapon than fists in order to do so. The strategy can thus be seen as an alternative, and more just, allocation of the risks of engaging in a violent attack: The "cost" of the victim's relative weakness ought to be borne by the individual who would attack her, and not imposed on her by hampering her ability to defend herself, as it is in the current doctrine.²³⁰

Despite the apparent advantages of this strategy however, there is good reason to oppose the wholesale rejection of a proportionality requirement: The

227. See *supra* II.B & C.

228. See *supra* notes 164-67 and accompanying text.

229. Arthur Ripstein advocates such a strategy in the context of battered women. See *supra* note 152. For an implicit statement approving a policy that would allow a victimized woman to use whatever force was necessary to repel an attack, even if that force was disproportionate, see *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) ("that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense . . . violates the respondent's right to equal protection under the law.").

230. Cf. *State v. Woodward*, 74 P.2d 92, 96 (Idaho 1937) ("No man has a right to lay hostile, threatening hands on another, except when he is armed with legal authority to do so; and the man who does so acts at the risk of being met with sufficient superior force and violence to overcome such assault."); *Idaho v. Hansen*, 986 P.2d 346 (Idaho Ct. App. 1999) (following *Woodward*).

idea of proportionality tracks an intuition about the fairness of a response to an attack that we would do well to retain.²³¹ To see this, consider that the persistent attacker will not be deterred simply by getting hurt; he will desist from his assault only if he is incapacitated. But a relatively weaker victim will be unable to incapacitate her attacker without resorting to more force than she faced. If the attack is fairly innocuous – say, the attacker has embarked upon a persistent poking campaign – it would be unfair for the victim to bring this greater force to bear on her attacker, even if her response was necessary to avert the attacker’s poke.²³² In other words, the disparity between the force used in an attack and the force needed to forestall it can be so great that we might prefer to have the victim suffer the relatively harmless attack. This would especially be so where the attack was not likely to be repeated, and where it was not motivated by any kind of animus. There are at least some instances, then, when it would be unfair to allow the victim of an attack to respond with whatever force was necessary to repel it. A proportionality requirement can usefully bar just this sort of unfair response.

Yet an explicit proportionality requirement is not the only means of ensuring that a defender uses force appropriate in light of the attack that he faced. The Model Penal Code (MPC), for example, has replaced the proportionality requirement with an exclusive list of threats that would justify self-defense.²³³ According to the MPC, an individual is justified in using deadly force to forestall an attack only if he believes that force is “necessary to protect himself against death, serious bodily injury, kidnapping or [forcible] sexual intercourse.”²³⁴ By providing a list of specific circumstances under which self-defense is justified, the MPC formulation avoids ad hoc weighing of the force used on each side or, more perniciously, the value of the parties’ interests or lives. In this way, specifying *ex ante* the sorts of threats justifying self-defense can preempt the necessary, and frequently illiberal, use of discretion that infects more traditional formulations of the proportionality requirement,²³⁵ while also

231. Cf. Mordechai Kremnitzer and Khalid Ghanayim, *Twenty-five Years of George P. Fletcher's Re-Thinking the Criminal Law: Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875, 898 (2004) (positing a justification for proportionality on constitutional grounds, rather than intuitions about fairness).

232. Indeed, it is for this reason that the proportionality requirement is often submerged in formulations that require that the attack threaten great bodily harm or death to the defender. See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1229-30 (D.C. Cir. 1973) (“The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom.”) (emphasis added); *State v. Clay*, 256 S.E.2d 176, 182 (1979) (“[W]e hold that a defendant may employ deadly force in self-defense *only* if it reasonably appears necessary to protect against death or great bodily harm. . . . In so holding we expressly reject defendant’s contention . . . that a defendant would be justified by the principles of self-defense in employing deadly force to protect against bodily injury or offensive physical contact.”).

233. See Model Penal Code § 3.04(2)(b)(ii).

234. *Id.*

235. See *supra* notes 164-173 and accompanying text.

avoiding gross disparities in the relative force used by the attacker and defender.

The question for our purposes is whether such a formulation could, or should, include the threat to the fetus as a legitimate circumstance under which to use deadly force in self-defense. To begin, it is worth noting that some states have expanded the list of circumstances justifying deadly force beyond those included in the MPC formulation. New York, for example, adds the threat of robbery to the list of threats that would justify the use of deadly force in self-defense.²³⁶ Missouri includes not only robbery but also burglary and arson.²³⁷ Other states limit the right of self-defense to threats of death or severe bodily harm, but nonetheless relax constraints on self-defense when an attack occurs in the defender's home.²³⁸

The common thread between all of these expansions of the traditional doctrine, which limits self-defense to threats of death or severe bodily harm,²³⁹ is a threat to the integrity of the person of the victim. Thus, rape is included in many of these formulations not only because it is an instance of "serious bodily harm"²⁴⁰ but also because it poses a particularly devastating threat to the victim's sense of self.²⁴¹ Similarly, burglary is no more harmful than some

236. N.Y. PENAL LAW §35.15(2) (2004) ("A person may not use deadly physical force upon another person . . . unless (a) The actor reasonably believes that such other person is about to use deadly physical force . . . or (b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery.").

237. MO. REV. STAT. § 563.031 (2004). Cf. 720 ILL. COMP. STAT. 5/7-3 (2004) ("A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than a dwelling) or personal property However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.").

238. See, e.g., *People v. Tomlins*, 107 N.E. 496, 497 (1914) (Cardozo, J.) ("It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. . . . Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States. . . ."); *State v. Kennamore*, 604 S.W.2d 856 (Tenn. 1980) (duty to retreat does not apply if attack occurs in one's home). Among those states that decline to recognize a duty to retreat for attacks occurring in one's home, some make an exception where both the attacker and the victim are residents. See, e.g., *State v. Shaw*, 441 A.2d 561, 566 (Conn. 1981). It is easy to see how this exception disadvantages battered women. Indeed, in denying a woman's self-defense claim on the ground that she had a duty to retreat where her assailant—her battering husband—attacked her in her home, the New Jersey Supreme Court urged the legislature to reconsider application of the retreat rule in the case of domestic violence. *State v. Gartland*, 694 A.2d 564 (N.J. 1997).

239. See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1229-30 (D.C. Cir. 1973).

240. For example, the Sentencing Guidelines define "serious bodily injury" as "injury involving extreme physical pain or protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation," U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. 1(L) (2000)—a definition that would not characterize many instances of rape. Cf. *United States v. Yanez-Saucedo*, 295 F.3d 991, 996 (9th Cir. 2002) (citing the definition of "rape" in *Black's Law Dictionary* 1267 (7th ed. 1999) and underscoring the absence of a force element in that definition).

241. See, e.g., Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law To Comprehend the Injuries*, 46 AM. U.L. REV. 793,

other violent crimes that would not justify self-defense, but the threat it involves is lodged against the defender's home – a paradigmatic extension of the defender's identity.²⁴²

In short, we can distill from the lists of circumstances justifying self-defense a principle that distinguishes the sorts of threats that warrant the use of deadly force from those that do not. Self-defense is justified if and only if the defender reasonably believes that she faces an imminent, unlawful attack that can be averted only through the use of deadly force, and that attack poses a genuine threat to her person,²⁴³ where the definition of "person" encompasses not only the defender's body, but also those objects external to her that are nonetheless constitutive of her identity.²⁴⁴ This formulation of the principle owes much to Margaret Radin, who famously articulated a hierarchy between property that is constitutive of the self ("personal property"),²⁴⁵ and property whose value is "wholly interchangeable with money" ("fungible property"),²⁴⁶ with the former enjoying *prima facie* priority for the state's protective resources.²⁴⁷ This formulation also mirrors the principle for determining the

822 (1997) ("[R]ape seeks to degrade and destroy a woman based on her identity as a woman. [It is] grounded in total contempt for and dehumanization of the victim."); Andrea Giampetro-Meyer, M. Neil Browne, & Kathleen Maloy, *Recent Development: Raped at Work: Just Another Slip, Twist, and Fall Case?* 11 UCLA WOMEN'S L.J. 67, 87 & n.95 (2000) (arguing that rape is unique because it does damage to the victim's sense of self). Indeed, it is likely because of the intimate connection between sexual integrity and identity that the law seeks to protect the anonymity of rape victims.

242. See, e.g., Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 987 (1982) (positing home ownership as a paradigmatic instance of ownership of property with which a person may be "bound up"); *id.* at 991-96.

In a theory that groups threats warranting self-defense on the basis of their connection to one's sense of self, robbery would appear to be an outlier. Yet robbery can be construed as an identity-based threat so long as one adopts a sufficiently expansive conception of the threat to the self posed by the degradation of having to submit to a robbery. I take it that the "true man" doctrine embodies just such a broad conception. See, e.g., *Tennessee v. Renner*, 912 S.W.2d 701, 704 (Tenn. 1995) ("[A] true man who is without fault is not obligated to fly from an assailant . . . [W]hen a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable.") (quoting *Beard v. United States*, 158 U.S. 550, 561-62 (1895)); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 429-35 (1999) (arguing that deterrence-based arguments for the "true man" doctrine provide an expressively neutral basis for preserving a norm of honor that requires one to respond to an attack with force).

243. I add the "genuine" qualifier to indicate that the defender must reasonably believe that some feature of her identity is actually threatened, and she can do so only if she reasonably believes that she faces a threat of lasting or devastating harm to her person. A clearer picture of the sorts of threats that qualify should emerge from the discussion that follows.

244. The presence of an identity-based threat (or one of the other threats traditionally included on such lists, see *supra* notes 237-38 and accompanying text) is meant to serve as just one constraint on an invocation of self-defense; the proposal I advance here retains the doctrine's imminence and necessity requirements. I elaborate below on the relationship between identity-based threats and the remaining elements of the doctrine. See *infra* Part III.B.1-2.

245. Radin, *supra* note 244, at 960.

246. *Id.* at 987.

247. *Id.* at 991-1013. To be clear, the distinction that I borrow from Radin is one between objects that are constitutive of the self and those that are not. While Radin forges this distinction in the context of an exploration of private property, the distinction transcends that context. I go on to argue that the relationship of women to their fetuses may be constitutive of identity in the way that "personal property"

scope of restitution under VAWA that I articulated in the last section.²⁴⁸ Just as courts ought to construe VAWA's "any other losses" provision with special attention to losses constitutive of a woman's identity,²⁴⁹ the law ought to permit women to defend themselves against just these sorts of losses.²⁵⁰

To put the point in the terms of liberal theory, courts should treat threats to elements constitutive of one's self with special solicitude because of the premium that liberalism places on an individual's autonomy,²⁵¹ and because of the necessary connection between autonomy and self-authorship.²⁵² More specifically, elements of our lives have value because and to the extent they fit into our conceptions of the good. Threats aimed at our identities thus strike at the source of value for everything else in our lives. Given the foundational role of identity, a woman ought to be permitted to invoke a claim of self-defense where some identity-defining feature of her self is imperiled.²⁵³

Some women will experience their connections with their fetuses as paradigmatic of the sorts of relationships that are constitutive of the self.²⁵⁴ This may be so, first, because the fetus is housed in a woman's body, which is itself a prime example of a constitutive object.²⁵⁵ Second, the woman who has decided to carry the fetus to term has likely already embraced, and begun to incorporate, a conception of herself as a mother – a conception that depends, at least for the first-time mother, on her fetus's continued existence. Finally, it is not as if the fetus is just some generic hook onto which the pregnant woman can hang her "motherhood" identity; the pregnant woman likely infuses each

is, *see infra* III.B.3. Nonetheless, I do not mean to suggest that fetuses are or ought to be considered property; nor does the analogy that I draw to personal property depend on this suggestion. Thus, for example, though parents partially constitute the identities of their children by both lending children their genes and modeling behavior, this constitutive relationship does not entail that children own their parents.

248. *See supra* notes 225-27 and accompanying text.

249. 18 U.S.C. § 2264(b)(5)(F), *amended by* Pub. L. No. 104-132, § 205(d)(2)(D) (1996); *see supra* notes 225-27 and accompanying text.

250. Here, I limit the availability of the proposal that I advocate to women because this proposal is elaborated in light of the proportionality requirement's subordinating effects on women. The proposal is thus particularly responsive to the problems for women – especially, victims of domestic violence – that the traditional conception of self-defense poses. I leave open, but do not explore, the possibility that an identity-based claim to self-defense could be invoked by male and female defenders alike.

251. *See supra* notes 20-24 and accompanying text.

252. *See supra* notes 25-26 and accompanying text.

253. *Cf.* Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997 (2004) (arguing that the Americans with Disabilities Act should be construed broadly to protect all individuals' capacities to envision and obtain their conceptions of the good).

254. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1316 (1991) ("*From the standpoint of the pregnant woman, [the fetus] is both me and not me.*"); *cf.* Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 LOY. L.A. L. REV. 381, 428 (1999) (arguing that misappropriated eggs and embryos ought to be treated as personal property in the Radian sense, and their owners compensated accordingly). *But cf.* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B. U. L. REV. 359, 438 (2000) (arguing that disposition of sperm should be treated under the rubric of privacy, rather than that of personal property).

255. *See, e.g.*, Radin, *supra* note 244, at 965-66.

pregnancy with a unique set of hopes and projections about the course her life will take in raising the new child, which explains why the loss of a fetus can be devastating even for the woman who is already a mother.²⁵⁶ Thus, where there is an intimate connection between a woman and her fetus that contributes to her sense of self, the law should recognize her right to employ self-defense in the event that an attack threatens the fetus' well-being.²⁵⁷

Further, identities are robust, and there is no reason to think that motherhood will fully constitute a woman's identity, if she even elects it in the first place. We can imagine attacks that pose a threat to other core features of a woman's sense of self – the assault that threatens to disable the hand of an artist or voracious tennis player, the beating that aims not only to injure a woman but also to destroy her cherished work product, and so on. These attachments should also ground a legitimate claim of self-defense.

Of course, not every threat that implicates a feature of one's self will, in fact, threaten to imperil one's identity. To determine which identity-implicating threats would justify self-defense, we will have to distinguish between two species of threats – those that jeopardize the *contents* of an individual's identity, and those that jeopardize her *capacity* to forge her identity. I devote the remainder of this section to a consideration of the scope of each of these.

256. Cf. Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 160 (2000) (“[W]omen who suffer loss of pregnancy through miscarriage or elective termination of pregnancy for genetic reasons experience the grief of bereavement. Studies show that 71% to 75% of women who miscarry perceive the miscarriage as loss of a baby. Researchers have identified typical grief characteristics experienced by the mother after prenatal loss, including despair, anger, hostility, guilt, loss of control, rumination, depersonalization, somatic symptoms, and death anxiety. One can extrapolate from this evidence that pregnant women can, and many do, form bonds with their fetuses during pregnancy.”) (internal citations omitted); Margaret O. Little, *The Morality of Abortion*, in A COMPANION TO APPLIED ETHICS 313, 321 (R. G. Frey & Christopher Heath Wellman eds., 2003) (providing a defense of abortion on the ground that “we should acknowledge moral prerogatives over identity-constituting commitments and enterprises as profound as motherhood”).

Of course, as feminist scholars have noted, there can be an invidious aspect to the motherhood identity insofar as it is construed as a totalizing identity, leaving little or no room for women to adopt public or professional personas. See, e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (challenging first- and second-wave feminist theory for its unstinting acceptance of motherhood as a central part of women's lives); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993) (acknowledging the pleasure that motherhood can bring but arguing that it undermines women's individual identities and leaves women vulnerable to patriarchal power).

257. I phrase the right to use deadly force in defense of a fetus in conditional terms to reflect the possibility that some women will not harbor this kind of attachment to their fetuses. The availability of the right in question does not turn on any implicit assumptions about either the actual value of the fetus, or the necessary presence of a maternal-fetal bond, and so the account I propose here does not offer a *per se* right to defend fetuses. Instead, the value of the fetus—or any object that may be defended with deadly force—derives from the relationship that it has with the defender.

1. *Contents of an Individual's Identity*

It is worth noting initially that, just as property cannot be rigidly characterized as personal or fungible, but exists instead along a spectrum between these two extremes,²⁵⁸ the connection between a threat and one's identity is a matter of degree, with some attacks striking closer to one's core than others. At what point, then, is the connection between a threat and a person's identity too tenuous to justify self-defense?

The question goes to the nature of personal identity itself, a full account of which would exceed the scope of this Article.²⁵⁹ Nonetheless, a few general considerations provide rules of thumb for distinguishing threats to identity-defining features from those that cannot be so described. First, there are indicia of centrality, such as the length of time that the defender has been attached to the feature she sought to protect; the amount of time she devotes to nurturing or engaging that feature; the extent to which she has made her commitment to that feature public; and the degree to which she has organized other elements of her life around it. Friends and family could testify to the presence or absence of these indicia. Ultimately, however, authority over questions of the nature of one's self ought to rest with the author of that self, and, as such, there should be at least a strong presumption in favor of the validity of the defender's statements about the contents of her identity.

Of course, if each person is the authority on the components of her identity, then it follows that an attack may imperil a woman's identity without her attacker's knowing or intending his attack to be so grave. Should the identity-based claim to self-defense be available whether or not the attacker knows that his (non-lethal) assault threatens the identity of his victim?

One possibility would have the state permit self-defense where the defender sought to protect a common identity-defining feature, but forbid self-defense where the defender sought to protect an uncommon one. After all, the reasonable person would have familiarity with common identity-defining features and thus could be presumed to know whether an attack jeopardized one or more of these features. It would not be fair, however, to presume knowledge that a particular victim defined herself in an unconventional way, and that her sense of self was thus threatened by the attack.

There are two problems with this strategy, however. First, it would marginalize individuals who have chosen to define themselves in atypical ways since it would expose them to acts of aggression against which they would be

258. Radin, *supra* note 243, at 986-88.

259. For an example of the scope of disagreement regarding the predicates of personal identity, compare JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXVII, § 9 (A. Fraser ed. 1894) (identifying memory and self-consciousness as the sole constituents of personal identity) with Bernard Williams, *Bodily Continuity and Personal Identity*, in PROBLEMS OF THE SELF 19 (1973) (arguing that the body is an essential element of a person's identity).

forbidden to defend themselves. Second, it would undermine individuals' powers of self-authorship since it would deter people from exercising these powers in unconventional ways. Such a strategy would thus transgress liberalism's commitments to instantiating equality between all people and remaining neutral between individuals' chosen life plans.

A better strategy would be to impose a further constraint on anyone's invocation of the right to an identity-based claim of self-defense and require a showing that the defender acted with the reasonable belief that her attacker *intended* to assault the feature of her identity jeopardized by the attack. A defender who did not reasonably believe that her attacker bore such an intention would not be justified in responding to the attack with deadly force. To establish the attacker's intention, the would-be defender would be required, where time allowed, to warn her assailant that his attack posed the sort of threat that entitled her to respond with deadly force.²⁶⁰ If her assailant nonetheless failed to desist in the face of such a warning, she could reasonably infer an intent to harm the identity-defining feature at stake. Where there was not sufficient time to offer a warning, and where the defender had no other grounds upon which to form a reasonable belief about her attacker's intentions, her use of deadly force would not be justified. Nonetheless, that defender's response could be *excused* on the ground that any person may prefer herself to the person of another when the other's actions, whether intentionally or innocently, place her person in jeopardy.²⁶¹

2. Capacities

The second class of threats to consider are those that imperil a person's *capacity* to become a "fully developed person"²⁶² or that otherwise jeopardize one's ability to "form, to revise and rationally to pursue a conception of one's rational advantage or good."²⁶³ Obviously, significant threats to one's mental

260. The duty to warn here is in line with early American views of defense of one's dwelling, which were themselves based on the old English notion that the right to defend one's home was no less important than the right to defend one's life. See *State v. Patterson*, 45 Vt. 308 (1873). American cases adopting this notion permitted the householder to use deadly force so long as he first issued a warning to the intruder not to enter and to desist from the use of force. See, e.g., *State v. Conally*, 3 Or. 69 (1869); *Brown v. People*, 39 Ill. 407 (1866). See generally LAFAVE, *supra* note 49, at 167 & nn. 17-18 (2003).

261. See *United States v. Peterson*, 483 F.2d 1222, 1228 (D.C. Cir. 1973). In this instance, the defense would be something of a hybrid between duress and necessity. It would resemble duress insofar as the threatened harm derived from another person's willful actions, rather than the physical forces of nature. Unlike duress and like necessity, however, the defender's conduct would be aimed at the source of the threat, rather than at an innocent third-party. While duress has traditionally been construed as an excuse and necessity a justification, the "modern cases have tended to blur the distinction between duress and necessity." *United States v. Bailey*, 444 U.S. 394, 410 (1980). For our purposes, a defender's deadly response should be excused, but not justified, even if she later learns that her attacker did in fact intend the threat to her sense of self, since the justifiability of her act ought to be determined by the reasons she had for acting when she did, and not by some *post hoc* consideration.

262. Radin, *supra* note 242, at 1014.

263. RAWLS, PL., *supra* note 7, at 19.

faculties would qualify here. Yet these are likely already protected in virtue of the traditional doctrine's recognition of the right to use deadly force in response to a threat of "serious bodily harm."²⁶⁴ More interesting for our purposes are threats that jeopardize primary goods, or the all-purpose means to forming or acting on one's conception of the good.²⁶⁵ Some of these primary goods are fungible (e.g., "income and wealth"),²⁶⁶ or otherwise available in various forms (e.g., "free choice of occupation"),²⁶⁷ so that a threat to one of them would not genuinely impair one's capacity to develop or actualize her conception of the good.²⁶⁸ But other primary goods are far more vulnerable. Here, I focus on what Rawls calls "the social bases of self-respect," and what is more commonly referred to as "dignity,"²⁶⁹ because, of all the primary goods, it may be the one most susceptible to devastation through an attack.²⁷⁰

A corollary of the right to defend oneself against identity-based threats is the right to use deadly force to safeguard one's dignity, which is a necessary precondition for the autonomous exercise of one's powers of self-authorship. Of course, this is not to suggest that any dignitary assault warrants self-defense. Just as some threats may be too distantly related to the self to justify self-defense, so some attacks may pose too minor a threat to one's dignity to defend oneself. But where is the liberal to draw the line?

The classical liberal formulations of the right to self-defense contain the kernel of a response. Interestingly, there is an apparent discrepancy between the scope of self-defense that Hobbes and Locke would each permit to individuals within civil society. Hobbes explicitly denies a right to self-defense when the attack threatens one's dignity, rather than one's body: "[A] man receive words of disgrace, . . . and is afraid, unlesse he revenge it, he shall fall into contempt, and consequently be obnoxious to the like injuries from others; and to avoyd this breaks the Law, and protects himselfe for the future. . . . This is a Crime: For the hurt is not Corporeall, but Phantasticall."²⁷¹ Locke's account is more permissive as he argues that anyone who risks subordination may avail himself of the right to self-defense:

264. See *supra* note 145.

265. RAWLS, PL, *supra* note 8 at 3-5.

266. *Id.* at 3.

267. *Id.*

268. Two other primary goods on Rawls's list are freedom of movement, and access to the powers of public office. *Id.* One could invoke the traditional conception of self-defense to protect against serious threats to the former good; it is difficult to see how an attack could permanently impair the latter good.

269. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 277 (1977); Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 27 (Amy Gutmann ed., 1994). For the claim that dignity considerations underpin the Constitution, see, for example, Justice William J. Brennan, Jr., Address, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 8 (1985).

270. See RAWLS, TJ, *supra* note 21, at 155 and 386 (discussing the primacy of self-respect among the primary goods).

271. HOBBS, *supra* note 141, at 206-07.

I have reason to conclude, that he who would get me into his Power without my consent, would use me as he pleased, when he had got me there, and destroy me too when he had a fancy to it. . . . To be free from such force is the only security of my Preservation. . . . [I]t is Lawful for me to treat him, as one who has *put himself into a State of War* with me, *i.e.*, kill him if I can; for to that hazard does he justly expose himself. . . .²⁷²

Yet we can reconcile the apparent difference between the two theorists once we recognize that Hobbes aims his prohibition at the discrete dignitary assault – the one-time offense impugning the character of the victim—while the injury that Locke contemplates appears to be temporally extended. Time will likely rehabilitate the honor of Hobbes' victim, since he will be free to restore his reputation through future acts that neutralize the indignity heaped on him in the attack. Locke's victim, on the other hand, may be so defeated that she is unable to restore her sense of self while she remains under the thumb of her attacker. Hobbes' imagined encounter thus resembles the threats underlying the "true man" doctrine,²⁷³ while Locke's better comports with the experience of subordination that the battered woman suffers.²⁷⁴

Synthesizing the two accounts, then, we can say that dignitary assaults justify self-defense only when they threaten to subordinate (or perpetuate the subordination of) the victim to her assailant.²⁷⁵ Indeed, including a threat of subordination on the list of threats justifying self-defense has the additional benefit of redeeming the doctrine in a way that is directly responsive to its failings. For, if the proportionality requirement is rejected due to its tendency to subordinate women, then it is especially fitting that the doctrine should come to recognize subordination as a legitimate trigger for self-defense.

In sum, restricting the instances of self-defense to those threats that pose a genuine risk to one's identity or capacity for self-authorship goes a good distance toward avoiding the illiberal implications of both the proportionality requirement and the fetal defense of others. More specifically, this way of proceeding preserves neutrality insofar as it permits a woman to use deadly force in defense of her fetus without presupposing the personhood of the fetus, as a recognition of fetal defense of others does. In addition, the proposal does not implicate the state in a determination of the value of lives or ways of life since it permits a defender to vindicate the features of her life that are constitutive of her self, no matter the content of these features. Finally, the

272. LOCKE, *supra* note 140, at 279-80.

273. See, e.g., *People v. Toler*, 9 P.3d 341 (Colo. 2000) (affirming "true man" doctrine in a case of self-defense between two men unknown to each other before the incident leading to the deadly response).

274. See *supra* note 229 and accompanying text.

275. Cf. Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean for Morality and to the Criminal Law?* 57 U. PITT. L. REV. 757 (1996) (arguing that battered women ought to be permitted a claim of self-defense since they rightfully extract themselves from private tyrannies).

proposal avoids inequality, since the identity-based conception recognizes harms to pregnant and non-pregnant women alike.

CONCLUSION

Existing efforts at fetal protection privilege fetuses over their mothers, prefer pregnant women to non-pregnant women, and subordinate victims of domestic violence to their abusers. In so doing, these efforts transgress the liberal commitments to neutrality and equality that undergird our Constitution, and that continue to have relevance and vigor today. If the UVVA commits a sin of omission by neglecting the women who necessarily experience an assault when their fetuses are attacked, *Kurr* engages in a sin of commission by extending to fetuses protection that the self-defense doctrine disproportionately denies women. The law can do better. Violence against all women—including violence that implicates their fetuses—can more effectively be deterred and redressed by broadly construing VAWA’s restitution provisions. The scope of the threats that justify self-defense should undergo a similar expansion, thereby permitting a woman to use deadly force when an attack imperils her fetus or some other identity-defining element of her life. It is time for the law to recognize women as full-bodied subjects of the law, eligible for all of its protections. It is time for the law to stop treating women as defenseless Others.

