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Recommended Citation

Robert Steinbuch, The Butterfly Effect of Politics over Principle: The Debate over the Unborn Victims of Violence Act and the Motherhood Protection Act, 12 *Quinnipiac Health L.J.* 223 (2009).

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The Butterfly Effect of Politics over Principle: The Debate over the Unborn Victims of Violence Act and the Motherhood Protection Act

Robert Steinbuch*

I. Introduction

In 2003, the Unborn Victims of Violence Act¹ (UVVA) was reintroduced in the Senate.² Examining the debate led me to the perhaps obvious realization that politics over principle too often directed the discourse on this complex and nuanced issue. Both sides were pursuing a largely common goal, but they could not find common language for the legislation. I believe that agreement eluded the parties because of the respective agendas that accompanied their legislative proposals.

II. Analysis

The UVVA became known as “Laci and Conner’s Law,” in memory of the Laci Peterson case. Laci Peterson was a pregnant, twenty-seven year old substitute teacher from Modesto, California, who was murdered by her husband, Scott Peterson.³ Scott Peterson claimed that he returned from a fishing trip and found the family dog wandering and his wife missing.⁴

The New York Times described some of the subsequent salient facts of the case when it noted that:

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¹ Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C.A. § 1841); *see also infra* Appendix A.

² *See* NAT’L ORG. FOR WOMEN <http://www.now.org/issues/legislat/200305.html#unborn>.

³ *See id.*

⁴ Carolyn Marshall, *Jury Finds Scott Peterson Guilty of Wife’s Murder*, N.Y. TIMES, Nov. 13, 2004, *available at* <http://www.nytimes.com/2004/11/13/national/13peterson.html>.

- “The remains of Ms. Peterson and *her unborn son*, whom the couple had planned to name Conner, washed ashore in April 2003.”⁵
- “The jury found Mr. Peterson, [thirty-two], guilty of first-degree murder for the death of his wife, Laci, who was eight months pregnant, and of second-degree murder for the *death of the fetus*.”⁶
- “Scott Peterson, the Modesto fertilizer salesman whose murder trial stoked the nation’s appetite for real-life courtroom drama, was found guilty on Friday of killing his wife and *unborn child* in 2002.”⁷

The vernacular used by the New York Times, often described as the nation’s “paper of record,”⁸ and typically considered modestly “liberal,”⁹ illustrates the underlying controversy with the legislation. In some instances, the Times characterized Connor as Laci’s “unborn son” and “unborn child.”¹⁰ In others, the Times portrayed Connor as a “fetus.”¹¹ Was Connor an “unborn child” or a “fetus”? Was Connor something else? Is there a difference? Does it matter?

In the milieu of the continuing debate on abortion, language matters. The “Right to Life” movement calls its opponents “abortionists” or “pro-abortion.”¹² The “Pro-Choice” movement denominates its opponents as “anti-choice.”¹³ By controlling language, the advocates hope to shape opinion and, ultimately, political outcomes.¹⁴ Pro-life advocates argue that

⁵ See *id.* (emphasis added).

⁶ See *id.* (emphasis added).

⁷ See *id.* (emphasis added).

⁸ Daniel Okrent, *THE PUBLIC EDITOR; Paper of Record? No Way, No Reason, No Thanks*, N.Y. TIMES, Apr. 25, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9D02E1D8123AF936A15757C0A9629C8B63>.

⁹ Daniel Okrent, *THE PUBLIC EDITOR; Is The New York Times a Liberal Newspaper?*, N.Y. TIMES, July 25, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9D01E7D8173DF936A15754C0A9629C8B63>.

¹⁰ Marshall, *supra* note 4.

¹¹ *Id.*

¹² NAT’L RIGHT TO LIFE, <http://www.nrlc.org/FOCA/LawmakersProposeFOCA.html>.

¹³ See NARAL, PRO-CHOICE AMERICA, BUSH NOMINEE RICHARD HONAKER’S WITHDRAWAL MARKS PRO-CHOICE GRASSROOTS VICTORY, http://www.prochoiceamerica.org/news/press-releases/2008/pr11142008_honaker.html.

¹⁴ Throughout this paper, I will be discussing issues and concepts defined differently by the various groups involved. I will endeavor to use the language acceptable to all—well, likely most, at best. This will often require at least two formulations of rele-

the mother's interests¹⁵ cannot trump those of the unborn child. Pro-choice advocates argue that the mother's interests generally control the outcome of her pregnancy. To bolster their positions, pro-life advocates argue that the unborn child is a full person, while pro-choice advocates argue along a spectrum that the fetus is not life or is not a full person.

Given this political landscape, it was not, therefore, greatly surprising that the National Organization for Women (NOW), and other groups with similar philosophies, characterized the UVVA as an issue of "reproductive rights" and bemoaned the fact that "George W. Bush has made it clear that he is anxious to sign just such an anti-reproductive rights bill into law, should both the House and the Senate pass it."¹⁶ NOW was concerned that the UVVA "would elevate fetal rights and establish the legal personhood of a fetus,"¹⁷ and that by statutorily protecting the "unborn child" and assigning criminal liability to its unwanted destruction, the federal government would "accord[] statutory legal status to fetuses at all stages of prenatal development, [and] undermine[] the foundation of the *Roe v. Wade* decision."¹⁸

However, the stated purpose behind the UVVA was not to dramatically shift the legal landscape. Thirty-five states currently

vant terms, and will undoubtedly be somewhat labored. In certain instances, out of convenience and in an effort to minimize verbosity, I will use the term(s) favored by the group that I am discussing. This should not be construed as an endorsement of one view over another. Moreover, in this piece, I have not endorsed any position on the issue of abortion, which divided the left and right on what otherwise was a generally accepted principle—that the destruction/killing, against the will of an expectant mother, of what the expectant mother is carrying is deserving of serious sanction. I intentionally do not state a position, or whether I have a position, because I believe that doing otherwise will shut off open discussion. Indeed, a corollary of the thesis of this paper—that language is overtaking policy because of political agendas—is that the parties to this debate have difficulty seeing past the meta-views of their opposites and focusing on the specific issue at hand. I have tried to adopt this "agnostic" approach elsewhere when discussing controversial issues. See, e.g., Robert Steinbuch, *Reforming Federal Death Penalty Procedures: Four Modest Proposals to Improve the Administration of the Ultimate Penalty*, 40 IND. L. REV. 97 (2007).

¹⁵ It is difficult to choose the right word for this point. In this context, "interest" embodies many concepts, including medical, social, and religious views; concepts of autonomy and life; and preferences and desires, among others.

¹⁶ See NAT'L ORG. FOR WOMEN, REPRODUCTIVE RIGHTS, "UNBORN VICTIMS" ACT DOES NOTHING TO DETER VIOLENCE AGAINST WOMEN (2003), <http://www.now.org/issues/legislat/200305.html#unborn>.

¹⁷ See *id.*

¹⁸ See *id.*

have some legislation that punishes the “killing of an unborn child” or “involuntary termination of a wanted pregnancy,” — depending on how one chooses to characterize it, as homicide in at least some circumstances.¹⁹ Nearly as many states (twenty-nine) had such laws at the time that the UVVA was under consideration.²⁰ Moreover, the problem being addressed by the UVVA was not disputed. The bill’s sponsor in the Senate—Mike DeWine, a strongly Pro-Life, politically moderate, Republican from Ohio—described several cases that were addressed by state analogs of the UVVA.²¹

NOW’s political characterization that the UVVA was “part of the anti-reproductive rights forces’ agenda to dismantle *Roe v. Wade*,”²² however, was not necessarily wrong for *all* on the right. Some of those who supported the UVVA were decidedly “Pro-Life” or “anti-choice”—depending on who does the naming—and these supporters may have seen the UVVA as a means to advance their political agenda. In response to this accusation, though, proponents of the UVVA pointed to the following language in the bill:

- (c) Nothing in this section shall be construed to permit the prosecution—
 - (1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;
 - (2) of any person for any medical treatment of the pregnant woman or her unborn child; or
 - (3) of any woman with respect to her unborn child.

¹⁹ NAT’L RIGHT TO LIFE, http://www.nrlc.org/Unborn_victims/Statehomicidelaws092302.html.

²⁰ 150 Cong. Rec. S3124-02, at S3126 (2004).

²¹ See *id.* at S3130. Senator DeWine gave several such examples. He described how Airman Gregory beat his eight-month pregnant wife, ending the pregnancy. Air Force prosecutors could not prosecute under the Uniform Code of Military Justice or federal law. The only federal crime was for the assault on the mother. So prosecutors bootstrapped Ohio’s unborn victims law to prosecute Airman Robbins. This was far from a certain approach, but was ultimately upheld. *U.S. v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998). Similarly, Shiwona Pace of Little Rock, Arkansas, was days away from giving birth. Her boyfriend, Eric Bullock, hired three thugs to beat her and kill her unborn baby. *Bullock v. State*, 111 S.W.3d 380 (Ark. 2003). Bullock was convicted under the “Fetal Protection Act,” which Arkansas passed just a few weeks before the assault. ARK. CODE ANN. §5-1-102 (2005).

²² See NAT’L ORG. FOR WOMEN, *supra* note 2.

But the opponents of the bill were not convinced. Senator Feinstein said that

[a]lthough the text of the amendment itself technically provides an exception for abortion, experts on both sides of this issue agree the language in the bill will clearly place into Federal law a definition of life that will chip away at the right to choose as outlined in *Roe v. Wade*.²³

While Senator Feinstein and organizations such as NOW, the National Abortion and Reproductive Rights Action League (NARAL), and the Religious Coalition for Reproductive Choice (RCRC) agreed that lawmakers should take steps to prevent assaults on pregnant women and severely punish those who commit such assaults, they did not believe that the UVVA was the appropriate way to achieve that important goal. Besides their objection to the legal protection of a wanted fetus, the bill's opponents were also concerned that the legislation would divert the attention of the justice system away from violence against women.²⁴

These opponents favored another bill, the Motherhood Protection Act²⁵ (MPA), which Representative Zoe Lofgren and Senator Diane Feinstein, both Democrats from California, introduced as an alternative to the UVVA.²⁶ While the UVVA penalized harming an "unborn child," defined as "any member of the species homo sapiens, at any stage of development, who is carried in the womb,"²⁷ the MPA created a separate criminal offense for harming a pregnant woman without establishing any

²³ See NAT'L RIGHT TO LIFE, http://www.nrlc.org/Unborn_Victims/index.html (follow "Read the historic Senate Debate on the Unborn Victims of Violence Act" hyperlink); see also 18 U.S.C.A. § 1841 (2008).

²⁴ For NARAL's perspective of the UVVA, see Julie Foster, *Congress Debates Protecting Unborn*, WORLDNET DAILY EXCLUSIVE, Apr. 26, 2001, available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=22577. For RCRC's view of the UVVA, see <http://aclu.procon.org/viewanswers.asp?questionID=678>.

²⁵ H.R. 2247, 108th Cong. (2003). The full text of the version of this bill that was offered as an alternative by Senator Diane Feinstein during the Senate debate is attached as Appendix B. See *infra* Appendix B. The competing bill was actually somewhat different. Senator Feinstein amended the MPA and tried to offer the new version during the floor debate, but Senator DeWine objected. Senate Floor Debate, *supra* note 21. The version discussed in this paper is the one that Senator Feinstein hoped to introduce.

²⁶ See NAT'L ORG. FOR WOMEN, *supra* note 2.

²⁷ See *id.*

crime against the fetus/unborn child.²⁸ In order to fit into the rubric that opponents of the UVVA described, proponents of the MPA characterized the wrong being punished as “[t]he termination of a wanted pregnancy”²⁹ Through this bill, opponents of the UVVA asserted that they could address the same concern as the UVVA without implicating the issues of abortion and life.

So, was NOW right? Did the MPA create the same outcome but without the controversy? Indeed, Senator Feinstein argued this very point in the floor debate over the UVVA:

Our amendment, the Motherhood Protection Act, will accomplish the same goal as the Unborn Victims of Violence Act, but will do so in a way that does not involve us in the debate about abortion or when life begins. In my view, there is no reason to vote against this substitute unless the intention is to establish legally that human life, for the purposes of Federal criminal law, begins at the moment of conception because, ladies and gentlemen, that is exactly what this bill does.³⁰

But in supporting the particular formulation in the MPA, some on the left were pursuing their own political agenda—much like they claimed of the right. The agenda was to avoid conceding that at least some issues of potential life are implicated in any attempt to protect women from the unwanted termination of a pregnancy. This goal resulted in tortured language in the MPA.

The MPA provided the following penalty structure: “the punishment for that separate offense [of causing the termination of a pregnancy or the interruption of the normal course of pregnancy] is the same as the punishment provided [for that conduct] under Federal law [] *had that injury or death* occurred to the [pregnant woman].”³¹ While the italicized language refers to the injury or death of the fetus/unborn child, the definition of “injury or death” of a fetus was never explicitly provided

²⁸ See *id.*

²⁹ See *id.*

³⁰ Senate Floor Debate, *supra* note 20. Senator Feinstein submitted a letter from Law Professor George Fisher—an outstanding jurist and academic—making this point. The letter is perhaps the best articulation of this position, and is transcribed as Appendix C. See *infra* Appendix C.

³¹ See Appendix A (emphasis added).

in the bill. Additionally, under the MPA, “termination of a pregnancy” is equated to murder, although the MPA never recognized any killing or death of the fetus. Indeed, in an effort to support the confusing language of the MPA, which made no reference to a baby/child/fetus at all, Senator Feinstein stated that “[i]f a fetus who dies during a crime is a murder victim, then isn’t abortion murder?”³² In order to address the political interests of her constituency, Senator Feinstein did not want to include any reference to a separate victim whatsoever.

While those on the right and the left proposed bills whose language elevated, at the expense of clarity and consensus, their respective ideological goals, there was a middle ground. During the debate over the UVVA, Senator Feinstein admitted—perhaps unwittingly—to supporting the California law under which Scott Peterson was prosecuted.³³ Thirty-four years before the debate over the UVVA, California enacted a statute that defined murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”³⁴ During the part of the debate in which she discussed the California statute, Senator Feinstein, somewhat surprisingly, stated that “the use of the words ‘or fetus’ makes a distinction between a human being and a fetus for purposes of the application of the homicide statute. That is important. And that is the law under which Laci Peterson’s alleged murderer is going to be prosecuted.”³⁵ In praising the use of the term “fetus” over “unborn child” in the California statute—notwithstanding her aforementioned objection to the use of the term “fetus”—Senator Feinstein accepted the notion underlying the California statute; that a separate crime exists for the homicide or destruction of a fetus.

While a middle ground, in the form of the California statute, was available, neither side offered a bill with similar language during the debate. Why? Perhaps from the perspective of the UVVA supporters, they believed that there was no need. After all, they succeeded with the language of “unborn child” over “fetus.” But at the time of the vote, success in the Senate was not

³² See Senate Floor Debate, *supra* note 20.

³³ See *id.*

³⁴ CAL. PENAL CODE § 187 (2008).

³⁵ Senate Floor Debate, *supra* note 20; see also 150 CONG. REC. § 3124 (2004).

certain at all. Indeed, Feinstein's amendment failed by only *one* vote,³⁶ and thus, nobody knew what the outcome would be. So, if the right had offered the California version, they would have guaranteed the enactment of a statute that "works" over the significant possibility of the enactment of the structurally flawed MPA. Furthermore, adopting the California formulation would have certainly garnered more votes than either the MPA or UVVA given that Democrats and Republicans each expressed support for either the California law itself or the ideas behind it. So, the right would have given up the perceived political benefits of their bill for a version that (1) ensured passage of legally enforceable language—unlike the MPA, and (2) enjoyed greater support than either version actually offered.

While the right's political gamble paid off, why then didn't the left offer a federal version of the California bill? They were less likely to win with the MPA in the political climate at the time. So, if they were concerned about having a positive effect on the law, they should have tried to shape the outcome in some fashion. Perhaps they simply thought that they would succeed. After all, the Feinstein amendment failed by only one vote. And while Senator Feinstein acknowledged supporting California's version of the UVVA/MPA at one point, she also stated that "[i]f a fetus who dies during a crime is a murder victim, then isn't abortion murder?"³⁷ She was pursuing this hard-line position of the left, notwithstanding the absence of such a development in California law. By offering the California statute, the left—just as the right—would have guaranteed that a coherently written statute passed with greater support than either offered version.

Moreover, the California statute would have allowed for other laws, such as wrongful-death actions on behalf of involun-

³⁶ Carl Hulse, "Senate Outlaws Injury to Fetus During Crime," N.Y. TIMES, Mar. 26, 2004, available at <http://www.lexis.com>. The Feinstein amendment was in actuality essentially the vote on the bill, because many on the left were not going to oppose the final version of the bill regardless of the exact text. This was so for two reasons. First, many on the left supported the ultimate purpose of either version of the bill—punishing those who destroy/kill a fetus against the will of the mother—and they were not going to let the language of the right interfere with their final vote. *See id.* Second, some on the left felt that failing to support the bill, which had wide popular support, would be politically unwise. As a consequence, after the Feinstein amendment failed, the vote on the final version of the bill was not particularly close (61-38). *Id.*

³⁷ *See* Senate Floor Debate, *supra* note 20.

tarily terminated, viable fetuses that the MPA may have undermined.

For example, as of 2001,

[t]hirty-[three] jurisdictions permit a wrongful-death action on behalf of a viable fetus. (Of those thirty-[three] jurisdictions, four permit an action for an unviable fetus (Connecticut, Missouri, South Dakota, and West Virginia)). Four jurisdictions permit an action, even for unviable fetuses, but have a live birth or stillbirth requirement (Louisiana, Maryland, Oklahoma, and Pennsylvania). One jurisdiction permits an alternative remedy by allowing an action for damages resulting in stillbirth caused by negligence (Florida). One jurisdiction noted in dicta that a wrongful-death action might be permitted but declined to reach the merits on procedural grounds (Utah). Three jurisdictions prohibit an action for an unborn nonviable fetus but have not reached the issue of whether a viable fetus may maintain an action (Alaska, Oregon, and Rhode Island). Four jurisdictions have no case law on the issue (Colorado, Guam, Puerto Rico, and Wyoming). Only [eight] jurisdictions . . . reject a wrongful-death action for a viable fetus.³⁸

In fact, my home state of Arkansas was the thirty-third state to recognize a wrongful-death action on behalf of a viable fetus, and Arkansas did so as an explicit consequence of its version of the law punishing fetal homicide.³⁹ The court that recognized that cause of action reasoned aptly that if the state could prosecute a miscreant for attacking a woman and killing, against her will, that which she carries, a mother should be able to recover for the same harm to the fetus or unborn child caused by negligence of, say, a medical professional. By failing to acknowledge

³⁸ Phillip AKA v. Jefferson Hosp. Ass'n, 42 S.W.3d 508, 515 n. 2 (Ark. 2001).

³⁹ *Id.* at 516-17; see ARK. CODE ANN. § 5-1-102 (2009):

[(13)(B)(i)(a) For the purposes of §§ 5-10-101-5-10-105], "person" also includes an unborn child in utero at any stage of development.

(b) "Unborn child" means a living fetus of twelve (12) weeks or greater gestation.

(ii) This subdivision 13(b) does not apply to:

(a) An act that causes the death of an unborn child in utero if the act was committed during a legal abortion to which the woman consented;

(b) An act that is committed pursuant to a usual and customary standard of medical practice during diagnostic testing or therapeutic treatment; or

(c) An act that is committed in the course of medical research, experimental medicine, or an act deemed necessary to save the life or preserve the health of the woman.

the unique status of the fetus, the MPA may not have permitted this outcome.

III. Conclusion

A federal version of the California bill would have been more enforceable than the MPA and less polarizing than both the MPA and the UVVA. Neither side offered such a proposal. Both sides in the debate over the UVVA were pursuing and protecting their interests and agendas in offering their versions of legislation, which sought to accomplish similar goals. As a consequence, support for both proposals suffered. Both sides could have been closer to each other if stripped of their accompanying political baggage. But this is how we often produce legislation in America. We have one eye on the current issue and the other on politics. This metaphorical lack of focus often results in murky lawmaking. This, in turn, leads to disputes in the judiciary—as well as to disputes about the role of the judiciary.

Presidents George Washington and John Adams warned against the development of political parties.⁴⁰ Parties were viewed as selfish and factional.⁴¹ They worked against national unity.⁴² Washington's and Adam's critique foresaw the phenomenon of politics over principle. And while a solution does not portend nor demand the destruction of parties, it does require that we think differently about the function of parties. If we are able to do so, we will give meaning to the words of these founders' genius.

⁴⁰ DAVID EDWIN HARRELL, JR., ET. AL, *UNTO A GOOD LAND: A HISTORY OF THE AMERICAN PEOPLE* 234 (Wm. B. Eerdmans Publishing Co. 2005).

⁴¹ *Id.*

⁴² *Id.*

APPENDIX A

**Laci and Conner's Law (Enrolled as Agreed to or
Passed by Both House and Senate)**

H.R.1997

*One Hundred Eighth Congress
of the
United States of America
AT THE SECOND SESSION*

Begun and held at the City of Washington on Tuesday, the twentieth day of January, two thousand and four

An Act

To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Unborn Victims of Violence Act of 2004' or 'Laci and Conner's Law'.

SEC. 2. PROTECTION OF UNBORN CHILDREN.

(a) IN GENERAL- Title 18, United States Code, is amended by inserting after chapter 90 the following:

'CHAPTER 90A—PROTECTION OF UNBORN CHILDREN

'Sec.

'1841. Protection of unborn children.

'Sec. 1841. Protection of unborn children

'(a) (1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

'(2) (A) Except as otherwise provided in this paragraph, the 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.

'(B) An offense under this section does not require proof that—

'(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

'(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

'(C) 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.

'(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

'(b) The provisions referred to in subsection (a) are the following:

'(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f), (h)(1),

and (i), 924(j), 930, 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1951, 1952 (a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

'(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e)).

'(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

'(c) Nothing in this section shall be construed to permit the prosecution—

'(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

'(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

'(3) of any woman with respect to her unborn child.

‘(d) As used in this section, the term ‘unborn child’ means a child in utero, and the term ‘child in utero’ or ‘child, who is in utero’ means a member of the species homo sapiens, at any stage of development, who is carried in the womb.’.

(b) CLERICAL AMENDMENT- The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 90 the following new item:
1841’.

SEC. 3. MILITARY JUSTICE SYSTEM.

(a) PROTECTION OF UNBORN CHILDREN- Subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 919 (article 119) the following new section:

‘Sec. 919a. Art. 119a. Death or injury of an unborn child

‘(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section and shall, upon conviction, be punished by such punishment, other than death, as a court-martial may direct, which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child’s mother.

‘(2) An offense under this section does not require proof that—
‘(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

‘(ii) the accused intended to cause the death of, or bodily injury to, the unborn child.

‘(3) 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 paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

‘(4) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

'(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

'(c) Nothing in this section shall be construed to permit the prosecution—

'(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

'(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

'(3) of any woman with respect to her unborn child.

'(d) In this section, the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.'

(b) CLERICAL AMENDMENT- The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 919 the following new item:

'919a. 119a. Death or injury of an unborn child.'

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

APPENDIX B**The Motherhood Protection Act**

Strike all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Motherhood Protection Act”.

SEC. 2. PROTECTION OF PREGNANT WOMEN.

(a) **IN GENERAL.**—Title 18, United States Code, is amended by inserting after chapter 90 the following:

“CHAPTER 90A—PROTECTION OF PREGNANT WOMEN**“CHAPTER 90A—PROTECTION OF PREGNANT WOMEN**

“Sec. 1841. Causing termination of pregnancy or interruption of the normal course of pregnancy.”

§1841. Causing termination of pregnancy or interruption of the normal course of pregnancy

“(a)(1) Any person who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the termination of a pregnancy or the interruption of the normal course of pregnancy, including termination of the pregnancy other than by live birth is guilty of a separate offense under this section.

“(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided for that conduct under Federal law had that injury or death occurred to the pregnant woman.

“(B) An offense under this section does not require proof that—

“(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

“(ii) the defendant intended to cause the termination or interruption of the normal course of pregnancy.

“(C) If the person engaging in the conduct thereby intentionally causes or attempts to cause the termination of or the interruption of the pregnancy, that person shall be punished as provided under section 1111, 1112, or 1113, as applicable, for intentionally terminating or interrupting the pregnancy or attempting to

do so, instead of the penalties that would otherwise apply under subparagraph (A).

“(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

“(b) The provisions referred to in subsection (a) are the following:

“(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229, 242, 245, 247, 248, 351, 831, 844(d), 844(f), 844(h)(1), 844(i), 924(j), 930, 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1951, 1952(a)(1)(B), 1952(a)(2)(B), 1952(a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

“(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e)).

“(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

“(c) Subsection (a) does not permit prosecution—

“(1) for 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 in a medical emergency;

“(2) for conduct relating to any medical treatment of the pregnant woman, or matters related to the pregnancy; or

“(3) of any woman with respect to her pregnancy.”.

(b) CLERICAL AMENDMENT.—The table of chapters for part 1 of title 18, United States Code, is amended by inserting after the item relating to chapter 90 the following:

“90A. Protection of pregnant women 1841”.

SEC. 3. MILITARY JUSTICE SYSTEM.

(a) PROTECTION OF PREGNANT WOMEN.—Subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 919 (article 119) the following: “§919a. Art. 119a. Causing termination of pregnancy or interruption of normal course of pregnancy

“(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the termination of a pregnancy or the interruption of the normal course of pregnancy, including ter-

mination of the pregnancy other than by live birth, is guilty of a separate offense under this section.

“(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment for that conduct under this chapter had that injury or death occurred to the pregnant woman.

“(B) An offense under this section does not require proof that—

“(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

“(ii) the defendant intended to cause the termination or interruption of the normal course of pregnancy.

“(C) If the person engaging in the conduct thereby intentionally causes or attempts to cause the termination of or the interruption of the pregnancy, that persons shall be punished as provided under section 918, 919, or 880 of this title (article 118, 119, or 80), as applicable, for intentionally causing the termination of or interruption of the pregnancy or attempting to do so, instead of the penalties that would otherwise apply under subparagraph (A).

“(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

“(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 111, 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

“(c) Subsection (a) does not permit prosecution—

“(1) for 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 in a medical emergency;

“(2) for conduct relating to any medical treatment of the pregnant woman or matters relating to her pregnancy; or

“(3) of any woman with respect to her pregnancy.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after the item relating to section 919 the following:

“919a. Causing termination of pregnancy and termination of normal course of pregnancy.”.

APPENDIX C

STANFORD LAW SCHOOL
Stanford, CA, July 10, 2003

Senator Dianne Feinstein
U.S. Senate
Senate Hart Office Building
Washington, DC

Dear Senator Feinstein:

I wish to express my concern about the current formulation of S. 1019, the Unborn Victims of Violence Act of 2003. Although I fully endorse the Bill's ultimate aim of protecting pregnant women from the physical and psychological trauma of an endangered or lost pregnancy, I believe that the Bill's current formulation will frustrate rather than forward this goal.

I write both as a former prosecutor and as a law professor specializing in criminal law and criminal prosecution. At the outset of my career, I served as an assistant district attorney in Middlesex County, Mass., and as an assistant attorney general in the Massachusetts Attorney General's office. I then went to Boston College Law School, where I administered and taught in the criminal prosecution clinic. I have been at Stanford since 1995 and a tenured professor of law since 1999; during the next academic year, I will serve as Academic Associate Dean. In 1996 I founded Stanford's criminal prosecution clinic and have administered and taught in the clinic ever since. I have also created a course in prosecutorial ethics, which I taught at Boston College Law School and, as a visitor, at Harvard Law School.

My background and interest in criminal prosecution prompt me to raise three objections to this Bill. All of them focus on the Bill's use of the expressions "child in utero" and "child, who is in utero," and on its definition of these terms as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."

First: The Bill's apparent purpose of influencing the course of abortion politics will discourage prosecutions under any future Act.

I do not know what motives gave rise to the Bill's use of the expressions "child in utero" and "child, who is in utero," but I do know that any vaguely savvy reader will conclude that these terms and the Bill's definition of them were intended by the Bill's authors to influence the course of abortion politics. It is a fair prediction that when a pro-life President is in office, prosecutions under this Bill will be more frequent than when a pro-choice President is in office. That is because the public will interpret this Bill as suggesting that abortion is a potentially criminal act and will interpret prosecutions under the Bill as endorsing this sentiment.

If the authors of the Bill truly seek to protect unborn life from criminal violence, they will better accomplish this purpose by avoiding such expressions as "child in utero." Better alternatives would refer to injury or death to a fetus or damage to or termination of a pregnancy.

Second: The Bill's apparent purpose of influencing the course of abortion politics will motivate prosecutors to exclude those prospective jurors who otherwise would be most sympathetic to the prosecution's case.

If I were prosecuting a case under this Bill, I would hope to have a jury that includes persons deeply sensitive to the rights and interests of pregnant women. Such jurors would regard an attack on a pregnant woman as being a twofold crime, comprising both the injury directly inflicted on the mother and the stark emotional and physical trauma resulting from injury to or loss of her pregnancy.

But such jurors also will be more likely than others to believe that pregnant women have the right to exercise autonomy over their bodies and to choose whether to abort a pregnancy. I predict that many or most judges will bar prosecutors and defense counsel from questioning prospective jurors about their views on abortion or about related matters such as their religion,

religious practices, or political affiliations. Forced to act largely on instinct, prosecutors may be inclined to exercise peremptory challenges against those prospective jurors who appear to be most sympathetic to the rights of pregnant women. This result clearly would frustrate the Bill's stated purpose of protecting unborn life from criminal violence.

Third: The Bill's apparent purpose of influencing the course of abortion politics offends the integrity of the criminal law.

To anyone who cares deeply about the integrity of the criminal law, this Bill's apparent attempt to insert an abortion broadside into the criminal code is greatly offensive. The power to inflict criminal penalties is, second only to the power to wage war, the highest trust invested in our institutions of government. Because the power to make and enforce criminal laws inherently carries enormous potential for abuse, those who exercise that power must always do so with a spirit free of any ulterior political motive. The American Bar Association's Standards Relating to the Administration of Criminal Justice provide that "[i]n making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved" (Standard 3-3.9(d).) Not all prosecutors conduct themselves with fidelity to this principle, but we may readily condemn those who do not. We may likewise condemn other public actors who abuse the sacred public trust of the criminal sanction for political ends.

For these reasons, I object to the current formulation of the Unborn Victims of Violence Bill. As I am confident that an alternative version of the Bill can fully accomplish its stated purpose of protecting unborn life from criminal violence while avoiding each of the difficulties I have outlined above, I strongly encourage the Senate to modify the Bill in the ways I have suggested above or in some other manner that avoids the freighted and frankly politicized terms, "child in utero" and "child, who is in utero."

My thanks to you for your consideration of my views.

Sincerely,

George Fisher,
Professor of Law