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April A. Alongi

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Abstract

The Unborn Victims of Violence Act1 (UVVA) is a recent attempt by pro-life forces to take a slice out of the constitutional protections surrounding the right to choose.2 The UVVA is largely supported by pro-life Republicans, although the vote in the House of Representatives was not split entirely along party lines.3 Opponents argue that the statute is a

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* Juris Doctor, Washington and Lee University School of Law, May 2008; Bachelor of Arts in Political Science, State University of New York at Buffalo, 2005. I would like to thank Professor Ann Massie for all of her help and guidance in the writing process. I would also like to thank my friend and former roommate Stephanie Wilson for sharing her enthusiasm for women's rights with me.


2 See id. (creating an offense for perpetrators of crimes against a pregnant woman causing death or bodily injury to a child in utero for the death or injury to the child separately and additionally to the penalty for the crime against the woman).

stealthy attack upon Roe v. Wade,\(^4\) as the statute establishes a legal status for a fertilized egg, embryo, and fetus in the context of criminal punishment.\(^5\) Proponents, however, countered that the statute appropriately provides punishment to criminals who assault a pregnant woman, validates the families of prenatal assault victims, and prevents violence against women.\(^6\)

In the course of the debate over the UVVA, Representative Lofgren suggested a substitute bill that contained less aggressively pro-life language.\(^7\) The Lofgren substitute, a counterproposal offered by the Democrats, which was ultimately rejected, provided that injury to or termination of a pregnancy resulted in a second crime.\(^8\) That portion was the same as the UVVA; however, that second crime was an additional crime against the pregnant woman, rather than a crime against a second victim—i.e., the unborn entity—as in the UVVA.\(^9\)

of the bill compared to 149 who voted against the bill. \textit{Id.}

4. \textit{See} Roe v. Wade, 410 U.S. 113, 164–66 (1973) (holding that statutes criminalizing abortion are violative of the Due Process Clause of the Fourteenth Amendment if they create only an exception for the abortion procedures to save the life of the mother without regard to the pregnancy stage and without regard to other interests involved). In \textit{Roe}, the Supreme Court considered a facial challenge to the validity of Texas criminal abortion laws that proscribe abortion except when required to save the mother’s life. \textit{Id.} at 117–18. The \textit{Roe} Court found that the Fourteenth Amendment protects a woman’s right to abortion. \textit{Id.} at 153–54. In so finding, the Court concluded that women enjoyed a broad right to terminate a pregnancy at the time of the adoption of the Constitution and throughout most of the 19th century. \textit{Id.} at 140. The Court also noted that states have a legitimate interest in protecting fetal life. \textit{Id.} at 150. To determine the point at which the state’s interest becomes sufficiently compelling to overcome the mother’s privacy interest, the \textit{Roe} Court developed a trimester framework. \textit{Id.} at 162–64. Under this scheme the state had no compelling interest in the first trimester of pregnancy, but after fetal viability the state’s interests were so compelling as to allow it to proscribe abortion. \textit{Id.}


6. \textit{See} \textit{id.} at 639 (statement of Rep. Sensenbrenner) (stating that the purpose of the UVVA is to provide validation for unborn victims of violence by allowing perpetrators of such violence to be charged separately for the crime against the mother and that against the unborn victim).

7. \textit{See} \textit{id.} (statement of Rep. Lowey) (stating that the Lofgren substitute is an effective alternative to the proposed legislation, which achieves the same purpose without employing suspect means).


9. \textit{See} \textit{id.} (providing that injury to or termination of pregnancy resulted in a second
I. Introduction

... [W]e have never in our history recognized a fetus as a separate legal person. The Supreme Court in Roe v. Wade specifically says we have never recognized a fetus as a separate person.

If we were to do so, then we would get into the 14th amendment question that you cannot deprive a person of life, or liberty or process, without due process of law; and that is the purpose of this bill. That is the purpose of similar bills in the State legislatures, I suspect, to give underpinning to a future Supreme Court majority to say that we recognize a fetus as a person within the meaning of the 14th amendment and, therefore, abortion is murder and, therefore, Roe v. Wade is overruled and, therefore, States have no right to legalize murder and you would need a constitutional amendment to permit abortions in this country.¹⁰

Representative Jerrold Nadler made the above statement in voicing his opposition to a proposed federal law giving prenatal entities¹¹ certain legal rights.¹² The bill appears to contradict an important premise behind the constitutional right to seek an abortion: prenatal entities are not persons.¹³

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¹¹ From this point on, when I refer to a prenatal entity, I am speaking in a broad sense of all stages of a pregnancy prior to live birth. This includes all stages of pregnancy from a zygote, to an embryo, to a fetus.


¹³ See id. (arguing that the entire point of the bill is to undermine the rationale for Roe v. Wade).
The text of the bill, titled the "Unborn Victims of Violence Act of 2004," or "Laci and Conner's Law," was signed into law by the President slightly under a year later. The text of the act reads:

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.

14. See Carolyn Marshall, Jury Finds Scott Peterson Guilty of Wife's Murder, N.Y. TIMES, Nov. 13, 2004, at A10. The UVVA bill, which had been introduced in 1999, was reintroduced in Congress after the tragic murder of Laci Peterson and the subsequent death of her fetus, which was to be named Conner. Id. The murder of Laci consumed media attention for years after her disappearance in December 2002. Id. Laci was seven months pregnant, and her husband, Scott, became a suspect. Id. The story unfolded as America learned that Scott was living a double life: caring husband to Laci and boyfriend of massage therapist, Amber Frey. Id. Prior to Laci’s death, Scott had told Amber that he was a widower. Id. He even went so far as to call Amber from a candlelight vigil for Laci, to tell Amber that he was celebrating the New Year in Paris. Id. A few months later, Scott was arrested for Laci’s murder and was convicted in state court. Id. Note that even if the Unborn Victims of Violence Act had passed prior to Laci’s murder and the termination of her pregnancy, Scott would not have been charged under the federal statute, as the state of California had jurisdiction. Id.


(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 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. 17

Proponents argue that the Act is completely unrelated to a woman's right to an abortion because it excludes from the statute's punishment conduct involving a consensual abortion. 18 Opponents argue, however, that the UVVA is intended to undermine Roe v. Wade, 19 the seminal case providing that women have the right to seek an abortion. 20 They believe that the true purpose of the UVVA is to undercut the constitutional right to choose. 21 Representative Stephanie Jones believes that the UVVA:

... is the first step toward outlawing abortion. The real purpose of this legislation is not to deter and punish criminal conduct but to erode the reproductive rights of women. This bill is a thinly veiled attempt to undermine Roe v. Wade. 22

Opponents also believe that pro-life advocates are using a tragedy such as the Laci and Conner Peterson story to advance their agenda. 23

To bolster their arguments, opponents point to the debate surrounding the UVVA, which was introduced by Republicans. In the course of the

20. See supra note 4 and accompanying text (providing a summary of Roe).
21. See supra note 3 (providing results of UVVA vote).
23. See id. at 640 (statement of Rep. Nadler) (stating "the proponents of this bill are taking what should be a straightforward issue and unnecessarily turning it into a controversial one").
debate, a counterproposal was offered by Representative Lofgren.\(^\text{24}\) The Lofgren substitute was ultimately rejected, even though it served the same purposes that the UVVA purportedly was meant to achieve.\(^\text{25}\) The substitute did not, however, create any problems for the right to choose.\(^\text{26}\) The "Lofgren substitute," as it was commonly termed, named after the bill's sponsor from California, was officially titled the "Motherhood Protection Act of 2003."\(^\text{27}\) It read as follows:

SEC. 2. CRIMES AGAINST A WOMAN THAT AFFECT THE NORMAL COURSE OF HER PREGNANCY.

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

(b) The punishment for a violation of subsection (a) is—

(1) if the relevant provision of law set forth in subsection (c) is set forth in paragraph (1), (2), or (3) of that subsection, a fine under title 18, United States Code, or imprisonment for not more than 20 years, or both, but if the interruption terminates the pregnancy, a fine under title 18, United States Code, or imprisonment for any term of years or for life, or both; and

(2) if the relevant provision of law is set forth in subsection (c)(4), the punishment shall be such punishment (other than the death penalty) as the court martial may direct.\(^\text{28}\)

As the first federal statute to include a prenatal entity in its definition of "person," the UVVA raises many difficult questions regarding the future of the right to choose. This is because the right to choose is based upon the premise that a prenatal entity is not a person.\(^\text{29}\) Proponents argued in the


\(^{26}\) See id. (statement of Rep. Schakowsky) (stating that the Motherhood Protection Act protects women as effectively as the UVVA without complicating the right to choose).

\(^{27}\) See H.R. 2247 (stating that the official title of the "Lofgren Substitute" is the "Motherhood Protection Act of 2003").

\(^{28}\) Id.

\(^{29}\) See Roe v. Wade, 410 U.S. 113, 158 (stating that because the text of the
congressional debates that because prenatal entities are given personhood only in the context of a particular criminal statute, the statute does not suggest an undermining of Roe's guarantee of the right to seek an abortion. As Representative Sensenbrenner repeatedly noted during the congressional debates, "this bill . . . has nothing to do with abortion." Despite the Congressman's assurances, there are a number of reasons why opponents are suspicious that the statute's intent is actually about abortion.

For example, Senator Orrin Hatch admitted in a statement to CNN that "[opponents of the bill] say it undermines abortion rights. It does, but that's irrelevant." In addition, the executive director of the Christian Legal Society told the Los Angeles Times that:

[i]n 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.

In light of this factual background, it seems that the UVVA's true purpose is, in fact, to undermine the constitutional protections surrounding reproductive rights. Even if it were true, however, that the UVVA's proponents had no intention of overturning Roe, the statute still lays the foundation for establishing the notion that if a prenatal entity is a person, then it has the right to life that cannot be deprived without due process. In the eyes of the law, there would be two persons, both with equal rights. The woman who may wish to terminate the pregnancy by exercising her

Constitution contains no explicit case where "person" has a prenatal application, and because in the Nineteenth Century legal abortion practices were freer than today leads the Court to believe that "person" in the Fourteenth Amendment does not include the unborn).


31. Id. at 639.


34. See Roe, 410 U.S. at 156 (stating that if a fetus is afforded personhood, then its right to protection from abortion is guaranteed by the fourteenth amendment).

35. See 150 Cong. Rec. H637-05, 640 (statement of Rep. Nadler) (explaining that once the law recognizes a fetus as a legal person, the law must also recognize and protect the rights of that person).
right to liberty is the first, and the second is the prenatal entity, which presumably wants to exercise its right to life. How then does the law choose which person has the greater right?

To answer this question, imagine a hypothetical situation where two children exist: one is six, the other is three. If you were forced to choose, which one of these children should die? Which child has the lesser rights and thus would be sacrificed? How could one choose? Certainly, no one would be able to choose which of two living beings had greater rights and thus should be spared. Now imagine a situation where there are again two entities, the six-year-old and this time, a fetus (or perhaps an embryo or even a fertilized egg). Which one of these has greater rights and will be spared? Would anyone actually argue that the fetus has rights equal to the living child and thus, that the child should die? I believe that I would be hard-pressed to find a person who would sacrifice the six-year-old so that an unborn entity would have the potentiality of life. While this situation is unlikely ever to occur, it does strike a note of similarity to the example above where the woman wants to terminate her pregnancy and the prenatal entity presumably would like to live. The UVVA suggests a future where there is a necessity of choosing which entity has greater rights by including prenatal entities in its definition of "person."

II. Comparison of UVVA and the Lofgren Substitute

This note explores the impact that the recently enacted federal law and similar state laws may have on reproductive rights. For many years, proponents have attempted to chip away at the right to seek an abortion, and a federal fetal homicide statute like the UVVA is merely the latest attempt to overturn Roe. Fetal homicide statutes provide punishment for criminal interference with a pregnancy. Although the federal statute is a recent

36. See Ann MacLean Massie, Professor of Law at the Washington and Lee University School of Law, Reflections on Hadley Arkes' Natural Rights and the Right to Choose, Cumberland School of Law (Nov. 7, 2003) (stating a similar hypothetical with separate deductions from the author) (transcript available in the Journal of Civil Rights and Social Justice archives at Washington and Lee University School of Law).


enactment, states have used similar statutes for many years. Their forms differ from state to state with respect to the crime charged for interfering with a pregnancy, but all provide vindication to the devastated families who have suffered the unexpected loss of the potential child and perhaps also the pregnant woman. States enacting statutes similar to the UVVA have made arguments based on morality and emotion to gain support for their legislation. Many of these statutes endow a prenatal entity with rights equal to that of a woman, as victims of certain crimes of violence. As such, these laws are the latest steps of the pro-life movement’s effort to overturn the Supreme Court’s guarantee of the right to choose. Although there are states that refuse to enact these laws, the number dwindles with each passing day. Statutes like this value the right to choose, yet still provide comparable protection for women against violent attacks.

Comparing the UVVA to the Lofgren substitute, one can see that the Lofgren substitute, like the UVVA, recognizes that a woman suffering the non-consensual termination of her pregnancy endures a loss. Both bills also recognize that an assailant who causes a miscarriage or prenatal injury deserves punishment beyond that imposed for the underlying crime, i.e., the assault on the woman alone. In addition, the UVVA and the Lofgren substitute apply to the same original crimes: "The bill[s] identify 68 existing Federal laws dealing with acts of violence and expands them to include harm to... [a prenatal entity]." The UVVA, however, provides

41. See id. (listing state laws that give prenatal entity rights).
42. See 150 CONG. REC. H637-05, 644 (daily ed. Feb. 25, 2004) (statement of Rep. Stearns) (noting that the number of states that have passed laws recognizing two victims in crimes against pregnant women is increasing).
43. See Motherhood Protection Act of 2003, H.R. 2247, 108th Cong. (2003) (providing that those who attack a pregnant woman and affect her pregnancy will be punished).
that an assault upon a pregnant woman is a two-person crime if prenatal injury or termination results.\textsuperscript{47} The Lofgren substitute does not involve a two-victim crime, but it does provide that there are two crimes.\textsuperscript{48} Both crimes are against the woman: the first for the underlying crime, and the second for interfering with her constitutional right to choose: i.e., the right to carry a child to term without interruption.\textsuperscript{49} The most important difference is that the Lofgren substitute, unlike the UVVA, does not endow the fetus with any kind of personhood status.\textsuperscript{50} In fact, the Lofgren substitute does not mention any legal entity in addition to the pregnant woman.\textsuperscript{51}

Opponents of the UVVA are concerned that the statute, as pointed out by Representative Nadler, establishes "the foundation for laws that would criminalize abortion because, after all, if the fetus is a person, then abortion is murder."\textsuperscript{52} Such a foundation leads logically to the rejection of the central propositions in Roe—(i) that a fetus is not a person and (ii) that the pregnant woman has superior rights to life and liberty.\textsuperscript{53} The Roe propositions allow a woman to use her superior rights to choose to terminate her pregnancy, subject to the litany of limitations, which the case and its progeny impose.\textsuperscript{54}

During debates in the House of Representatives, proponents of the Unborn Victims of Violence Act argued that the bill serves several purposes.\textsuperscript{55} First, it punishes assailants who cause injury or death to a

\textsuperscript{47} See 18 U.S.C. § 1841 (2004) (establishing an unborn child as a legally protected entity where assault upon a pregnant woman which results in prenatal injury is classified as a two-person crime).


\textsuperscript{49} See id. (establishing two crimes without classification of the unborn child as a legally protected entity, thus providing that both crimes are committed against the woman).

\textsuperscript{50} See id. (providing that additional punishment would occur as result of crimes against the woman for causing injury to or termination of her pregnancy).

\textsuperscript{51} See id. (excluding the "child" as a legal entity).


\textsuperscript{53} See Roe v. Wade, 410 U.S. 113, 153 (stating that the right of privacy founded in the Fourteenth Amendment includes a woman's decision to terminate pregnancy).

\textsuperscript{54} See 150 CONG. REC. H637-05 (daily ed. Feb. 24, 2006) (noting that Roe did not recognize an unborn child as a separate legal entity, giving a woman superior legal rights and ability to terminate pregnancy).

\textsuperscript{55} See id. (describing multiple reasons for enacting the bill).
potential, desired child.\textsuperscript{56} Prior to the passage of the statute, one representative passionately argued that, "[u]nder current federal law, if a criminal assaults or kills a pregnant woman and causes death or injury to her unborn child, they face no consequences for taking or injuring that unborn life."\textsuperscript{57} Many Americans, especially after the tragic unfolding of the Laci and Conner Peterson story, felt that it was unfair for assailants to escape punishment for causing the termination of a woman’s pregnancy.\textsuperscript{58} Groups which had for years been advocating passage of the UVVA saw the change in public opinion as an opportunity.\textsuperscript{59} The UVVA had appeared twice before in the Congress, beginning in 1999, where it passed the House of Representatives twice, and twice stalled when the Senate failed to act.\textsuperscript{60} In the aftermath of the tragic murder of Laci Peterson, the legislation was reintroduced.\textsuperscript{61} Pro-life advocates—including victims (and their families) of violence who had miscarried as a result of the attacks—became involved in urging the passage of the UVVA.\textsuperscript{62}

Although public opinion in the country may have been changing, not all legislators were initially supportive of the bill.\textsuperscript{63} Sharon Rocha (Laci Peterson’s mother), Tracy Marciniak,\textsuperscript{64} and other victims and families of

\textsuperscript{56} See id. (establishing punishment under the proposed bill).
\textsuperscript{58} See 149 CONG. REC. H4018 (daily ed. May 14, 2003) (statement of Rep. Smith). ("[I]n a recent Fox News-Opinion Dynamics poll, 84 percent said that homicide charges are appropriate in the deaths of Laci Peterson and her unborn son Connor in the much-publicized Peterson murder case in California; only 7 percent said that a single homicide charge would be appropriate.").
\textsuperscript{60} See id. (statement of Rep. Lee) (noting the legislative history of the bill).
\textsuperscript{63} See supra note 3 and accompanying text.
\textsuperscript{64} Tracy Marciniak is a woman who was due to give birth in four days to a child which she and her husband intended to call Zachariah. That night, her husband flew into a rage, and decided that he would terminate her pregnancy and beat Tracy severely. Tracy was severely injured and nearly killed. During the attack, the fetus died. Because there was no law imposing additional punishment for causing a miscarriage, Tracy’s husband was convicted only of assault upon Tracy. See Unborn Victims of Violence Act of 2003 or Laci and Conner’s Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 108th Cong. 25–26 (July 8, 2003) [hereinafter House Hearings on UVVA]
those suffering a criminal interference with a pregnancy may have persuaded those reluctant legislators. It was even rumored that they threatened hesitant congresspersons with adverse publicity if they did not vote in support of the bill. In addition, many pro-life groups became involved in pressuring legislators to support the UVVA. Focus on the Family noted that the testimony of Laci Peterson’s mother was "compelling" and "deserve[d] much of the credit for" the bill’s passage. This accumulation of events led legislators to reintroduce the bill into Congress, feeling confident that they could finally pass the UVVA.

The Lofgren substitute also reflected a desire to punish assailants who interfered with a woman’s pregnancy. However, the text of the substitute consciously failed to mention a prenatal entity, an omission that UVVA proponents used to emphasize the substitute amendment’s inferiority. They argued that by failing to discuss the prenatal entity, the Lofgren substitute impliedly disregarded the loss of the potential child. UVVA

(testimony of Tracy Marciniak), available at http://commdocs.house.gov/committees/judiciary/hju88204.000/hju88204_0f.htm (describing the incident to Congress).
proponents lauded the supremacy of the UVVA because of its symbolic gesture to families who had suffered the loss of an undesired abortion.\footnote{See id. (stating that the families of victims seek recognition of the unborn child as a victim).}

Lofgren substitute proponents argued that even though the bill failed to mention a prenatal entity, it still provided enhanced punishment for an assailant who caused the termination of a pregnancy.\footnote{See id. at 666 (statement of Rep. Jackson) (noting that the substitute provided for a separate offense with greater punishment).} They maintained that they were just as dedicated as UVVA supporters were to providing additional punishment for assailants who caused interference with women’s pregnancies.\footnote{See id. at 641 (daily ed. Feb. 26, 2004) (statement of Rep. Nadler) (noting that opponents of UVVA recognize the heinous nature of the crime).} To demonstrate, the Lofgren substitute provided penalties equal to or harsher than the penalties provided by the UVVA.\footnote{Compare Motherhood Protection Act of 2003, H.R. 2247, 108th Cong. (2003) (providing a punishment of up to a life sentence for an attack resulting in termination of pregnancy), with Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841 (2004) (providing a punishment for causing injury or death of an unborn child equal to that of causing injury or death of the mother).} The crime for which the assailant was punished was the important distinction between the two bills. Although the UVVA treats the assault as against a second victim, \textit{i.e.}, the prenatal entity, the Lofgren substitute treated the second crime as against the woman, "because her interest in carrying that pregnancy to term and bearing a healthy baby is assaulted."\footnote{150 CONG. REC. H637-05, 641 (daily ed. Feb. 26, 2004) (statement of Rep. Nadler).} Because both bills punished assailants equally, it appeared that the UVVA actually represented a conscious plan to undermine or pave the way to overruling Roe.

The second purpose for enacting the UVVA was a congressional desire to provide recognition to the families of "unborn victims of violence."\footnote{See id. at 639 (statement of Rep. Sensenbrenner) (discussing the belief held by an attacked woman’s family that there were two victims).} Proponents wanted to acknowledge that the crime was a two-person, rather than a one-person, crime.\footnote{See id. at 641 (statement of Rep. Nadler) (describing grief felt by families of victims).} Families who felt that a person had died when the assailant caused the non-consensual termination of the pregnancy wanted validation for their feelings of loss.\footnote{Id.} Those families
were expecting the birth of a child.\textsuperscript{81} The pregnant women had eagerly anticipated a new baby.\textsuperscript{82} The assault ended that expectation and anticipation.\textsuperscript{83} The assailant injured the pregnant woman, perhaps causing her death, and caused injury to or termination of her pregnancy.\textsuperscript{84} When the woman miscarried, many of the families grieved as if a person had died.\textsuperscript{85} To them, the prenatal entity was as real as a living person.\textsuperscript{86} As Representative Sensenbrenner stated:

18-year-old Ashley Lyons and her unborn son, Landon, were murdered in Scott County, Kentucky. Current Kentucky law regards this crime as having only a single victim. But Carol Lyons, Ashley's mother and Landon's grandmother, said, "Nobody can tell me that there were not two victims. I placed Landon in his mother's arms, wrapped in a baby blanket that I had sewn for him, just before I kissed my daughter goodbye for the last time and closed the casket."\textsuperscript{87}

After hearing stories like this, many legislators wanted to recognize that a loss was sustained and that a person had died.\textsuperscript{88}

Although the Lofgren substitute addressed all of the other concerns dealt with by the UVVA, the substitute did not address this issue as adequately as the pregnant assault victims' families wanted.\textsuperscript{89} Because the substitute did not mention any prenatal entity, its additional punishment was not for ending the life of a second victim.\textsuperscript{90} Yet, the Lofgren substitute did discuss the assailant's impact on the pregnant woman, the true victim in

\begin{itemize}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.}
\item See \textit{id.} (noting that families of assaulted pregnant women considered there to be two victims).
\item \textsuperscript{86} \textit{Id.} at 639 (statement of Rep. Sensenbrenner).
\item \textsuperscript{87} \textit{Id.} (discussing the importance of recognizing family's feelings).
\item \textsuperscript{88} See \textit{id.} (discussing the importance of recognizing family's feelings).
\item \textsuperscript{89} See \textit{e.g., House Hearings on UVVA, supra note 64} (testimony of Tracy Marciniak) (explaining that her unborn son was also the victim of a crime). Marciniak testified:

I know that some lawmakers and some groups insist that there is no such thing as an unborn victim and that the crimes like this only have a single victim. But this is callous, and it is wrong. Please don't tell me that my son was not a real victim of a real crime. We were both victims, but only I survived.

\textit{Id.}
\item \textsuperscript{90} See \textit{147 CONG. REC. H1640} (daily ed. Apr. 21, 2006) (statement of Rep. Lofgren) ("This bill [the Lofgren substitute] focuses on the harm to the pregnant woman and provides, we hope, a deterrence of violence against women and provides very tough penalties when that violence results in injury to the fetus or a miscarriage.").
\end{itemize}
UNBORN VICTIMS OF VIOLENCE ACT

the assault. It is her expectation of childbearing that is victimized when the assailant causes injury to or termination of her pregnancy. Should she survive the attack, she will likely be the one suffering. Thus, it seems appropriate that because she suffered the criminal assault and then the non-consensual termination of her pregnancy, her injury should be the one that the statute symbolically recognizes. Rather than providing validation to grief-stricken families, perhaps the law should remain neutral and unsympathetic; after all, we do expect justice to be blind.

Finally, proponents believed that the UVVA would reduce violence against women, and particularly, pregnant women. Violence against pregnant women is a considerable problem, evidenced by statistics that show that the most common way for a pregnant woman to die is by homicide. Because the statute does not require intent to cause injury to anyone other than the woman, proponents reasoned that a would-be

91. See Motherhood Protection Act of 2003, H.R. 2247, 108th Cong. §2 (2003). Whoever engages in any violent or assaultive conduct against a pregnant woman resulting in the conviction of the person so engaging for a violation of any of the provisions of law set forth in subsection (c), and thereby causes an interruption to the normal course of the pregnancy resulting in prenatal injury (including termination of the pregnancy), shall, in addition to any penalty imposed for the violation, be punished as provided in subsection (b).

Id

92. See Jesse Allen, Comment, Blind Faith and Reasonable Doubts: Investigating Belief in the Rule of Law, 24 SEATTLE U.L. REV. 691, 709 ("The familiar image of blind Justice may provide a clue to the primacy of constraint in our legal system. Justice’s blindfold is generally interpreted as symbolizing the notion that the law’s application of objective reason produces results untainted by subjective sympathies, fears, likes, and dislikes.").

93. See 150 CONG. REC. H637-05, 645 (daily ed. Feb. 26, 2004) (statement of Rep. Garrett) ("This legislation is commonsense. Once passed, it will work to deter violence against women and their unborn children as well.").

94. See id. at 654 (statement of Rep. Watson) (noting that "[t]he statistics are shocking but true: The leading cause of death of pregnant women is murder"); see also Diana Cheng & Isabelle Horon, Enhanced Surveillance for Pregnancy-Associated Mortality—Maryland, 1993–1998, J. OF THE AM. MED. ASSOC., Mar. 21, 2001, Vol. 285, No. 11, 1455, 1457 (reporting the results of a study conducted in Maryland on deaths of pregnant women between 1993 and 1998, finding that "[t]he leading cause of pregnancy-associated death was homicide . . ."); Donna St. George, Many New or Expectant Mothers Die Violent Deaths, WASHINGTON POST, Dec. 19, 2004, at A01 (discussing the statistics from Maryland that point to homicide as the leading cause of pregnancy-associated death and highlighting that this may be a nationwide trend but that statistics are as yet unknown in other states that do not record reproductive status at time of death).

95. See 18 U.S.C. § 1841 (2004) ("An offense under this section does not require proof that . . . the defendant intended to cause the death of, or bodily injury to, the unborn child.").
assailant would be less likely to harm a woman for fear that he could be charged with two crimes.\(^\text{96}\) Because almost any woman (ranging in age presumably from 10 to 60) could be pregnant, a would-be assailant would be unable to guarantee that the woman was not pregnant.

Although all members of Congress supported the goal of reducing and preventing violence against pregnant women, opponents showed that it seemed that the proponents were not as concerned with preventing violence against women as they purported to be.\(^\text{97}\) Opponents argued that ulterior motives were behind the campaign for the UVVA.\(^\text{98}\) Many proponents of the UVVA had blemished records with respect to support for the federal Violence Against Women Act,\(^\text{99}\) a program clearly meant to prevent violence against women. Many who were now arguing that the UVVA must be passed to prevent violence against women had not made similar arguments for the Violence Against Women Act in the past.\(^\text{100}\) As Representative Nadler quipped, "it appears that many of the Members who have signed on to this bill [the UVVA] are the same ones who voted to divert funds from protecting women from violence to protecting stock dividends from taxation."\(^\text{101}\)

Opponents showed that they did not believe that the UVVA was the best way to achieve the goal of reducing violent attacks against women.\(^\text{102}\) Groups that work to stop violence against women also believed that the

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96. See 150 Cong. Rec. H637-05, 644 (daily ed. Feb. 26, 2004) (statement of Rep. Stearns) ("In terms of our criminal justice system, it's clear that this law will serve as a deterrent to future attacks on women of childbearing age.").

97. See id. at 655 (statement of Rep. Stark) ("Let's be clear, this bill will not help address the serious issue of violence against women, which affects nearly one in every three women during their adulthood.... In fact domestic violence organizations... oppose this legislation.").

98. See id. at 640 (statement of Rep. Nadler) (arguing that the real motive behind enacting the UVVA was to undermine existing abortion law and not to protect pregnant women).


101. Id.

102. See id. at 640 (statement of Rep. Nadler) (arguing that the Lofgren substitute could achieve the goal of protecting pregnant women without inserting abortion politics into the debate).
UVVA was not an effective solution, and thus, did not support the bill.\footnote{See id. at 655 (statement of Rep. Stark) (pointing to the fact that groups such as the National Coalition Against Domestic Violence, which does not take a position on abortion, oppose the Unborn Victims of Violence Act).} One group’s opposition, that of the National Coalition Against Domestic Violence, was even more significant when one notes that the group takes no position on abortion.\footnote{See generally National Coalition Against Domestic Violence Homepage, http://www.ncadv.org/ (last visited Dec. 18, 2008).} That showed that the statute’s impact on reproductive rights has no bearing on the group’s conclusion as to the UVVA’s effectiveness.\footnote{See id. at 655 (statement of Rep. Stark) ("In fact, domestic violence organizations, like the National Coalition Against Domestic Violence—that do not take positions on abortion—oppose the legislation [the UVVA].").} Judy Fulcher, the Public Policy Director of the Coalition, testifying before Congress, noted that "[t]he "UVVA" is not designed to protect women. The goal of the Act is to create a new cause of action on behalf of the unborn. The result is that the crime committed against a pregnant woman is no longer about the woman victimized by violence."\footnote{House Hearings on UVVA, supra note 64 (testimony of Juley Fulcher, Esq., Public Policy Dir. of the Nat’l Coalition Against Domestic Violence).}

Although the Lofgren substitute was not as strong a deterrent as the Violence Against Women Act, the substitute likely had some deterrence.\footnote{See 150 CONG. REC. H637-05, 655 (daily ed. Feb. 26, 2004) (statement of Rep. Farr) (arguing that the Lofgren substitute would have created a separate federal offense for violence against a pregnant woman that results in the termination or interruption of her pregnancy, and would thus prevent crimes against pregnant women).} Some legislators hoped that would-be assailants would think twice before harming a woman for fear that if she is pregnant, he could be charged with two crimes.\footnote{See id. at 644 (statement of Rep. Stearns) (stating "[i]n terms of our criminal justice system, it’s clear that this law will serve as a deterrent to future attacks on women of childbearing age").} If an assailant is willing to face the risk, however, that he will be punished for injuring one victim, the woman, then he will probably be just as undeterred at the risk of facing punishment for an additional victim. More importantly, the Lofgren substitute recognizes that an assault upon a pregnant woman is just that—an assault upon the woman.\footnote{See id. at 655 (statement of Rep. Farr) ("[T]his substitute [the Lofgren substitute] creates a new, separate federal offense for any violence or assault against a pregnant woman that interrupts or terminates her pregnancy.").} While the fetus is indirectly harmed, the woman experiences the direct assault. The UVVA’s disregard for the pregnant woman’s personal dignity is a
disservice to the woman who is injured in the assaultive conduct. The Lofgren substitute’s focus on the injured pregnant woman seems to be a more effective way to prevent violence against women. At the very least, it prevents no less violence than does the UVVA, without the controversial terminology.

During the congressional debates, one opponent mentioned several additional reasons why the UVVA creates problems for the federal government and why it should not be passed. Representative Ron Paul, a conservative Republican, opposed the bill on federalism grounds. He argued that the Congress has no constitutional authority to pass the bill, which intrudes into a realm of law that was traditionally governed solely by state mandates:

Of course, it is much easier to ride the current wave of federalizing every human misdeed in the name of saving the world from some evil than to uphold a constitutional oath which prescribes a procedural structure by which the Nation is protected from what is perhaps the worst evil, totalitarianism.

Representative Paul makes the valid point that as the federal government usurps additional rights that were formerly reserved for the States, an important aspect of our federalism-based system is lost. That is, voting with one’s feet; as morals become regulated by the federal government, a person dissatisfied has no choice but to leave the country or bear the regulation. It is a gradual change from the system that existed at the time of the Founding Fathers, where a person out of sync with his neighbors could move to another state where his views were better reflected in the legislature. Representative Paul notes that this virtue of federalism has been long disregarded by the federal government, and the UVVA is just the latest stab in the already-dying doctrine of federalism.

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111. Id.

112. Id.

113. See id. (discussing the Constitution as a method for limiting the Federal government and the ways in which the UVVA would erode that limit).

Lastly, there is a risk that pregnant women will suffer legal ramifications with the passage of the UVVA. Although proponents repeatedly point out that the legislation specifically excepts consensual abortion by the pregnant woman and her doctor, Juley Fulcher of the National Coalition Against Domestic Violence, believes the risk is there. She notes that in the states where fetal homicide statutes have been enacted, some have gone further and expanded the ways that a prenatal entity can be a victim: "In those states, women have been prosecuted and convicted for acts that infringe on state recognized legal rights of a fetus." Ms. Fulcher foresees a time when women may even be prosecuted for failing to protect the prenatal entity when a batterer causes injury to her and the entity. Yet even more importantly, there is the risk that a woman who is emotionally and/or financially reliant on the person who caused the injury to the pregnancy will not seek medical attention if the pregnancy miscarries. Such a woman, under the control of her batterer, will keep away from hospitals and doctors who may have a medical or legal obligation to contact the police, for fear that her domestic partner will suffer legal consequences, which in some states can be capital murder. "If Congress wishes to protect the pregnancy, the way to do that is by protecting the woman," and the National Coalition Against Domestic Violence did not believe that the UVVA protected either.

115. See House Hearings on UVVA, supra note 64 (testimony of Juley Fulcher, Esq.) (describing the possibility of a pregnant woman's liability to the fetus as a result of her actions during pregnancy).

116. Id. at 38 ("This bill would, for the first time, federally recognize that the unborn embryo or fetus could be the victim of a crime. It would not be a large intellectual leap to expand the notion of unborn fetus as victim to other realms.").

117. Id.

118. See id. ("While the Unborn Victims of Violence Act specifically exempts the mother from prosecution, it is easy to imagine subsequent legislation that would hold her responsible for injury to the fetus, even for violence perpetrated on her by her batterer under a failure to protect theory.").

119. See id. at 38–39 (considering the mother's possible liability under the UVVA).

120. Id.

121. See id. at 40–43 (explaining that it is the National Coalition Against Domestic Violence's position that the Unborn Victims of Violence Act does not protect pregnancy or women).
III. Roe v. Wade and its Progeny

The UVVA arises out of the controversy surrounding the right to choose, which has been debated for more than three decades. The case that sparked that debate, Roe v. Wade, held that the Constitution provides women with a qualified right to choose to have a pre-viability abortion. The controversial case determined that part of the liberty of the Due Process Clauses of the Fifth and Fourteenth Amendments endowed women with the right to choose. That right was premised upon the Supreme Court's conclusion that a prenatal entity is not a person, a finding that eliminated any conflict of interests between two beings equal before the law. Because a prenatal entity is not a person for purposes of the Due Process Clause, it therefore has no rights to which a born person is entitled.

After looking to the locations of the word "person" in the text of the Constitution, Justice Blackmun determined that the Framers did not intend the word to include prenatal entities. There are numerous instances:

Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause.


123. 410 U.S. 113 (1973).

124. See id. at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

125. See U.S. CONST. amend. V, § 1 (declaring that no person shall "be deprived of life, liberty or property, without due process of law ... "); see also U.S. CONST. amend. XIV, § 1 (declaring, "nor shall any State deprive any person of life, liberty or property, without due process of law ... ").

126. See Roe, 410 U.S. at 154 (holding that a woman has a right to an abortion subject to limited interests of the state).

127. See id. at 157–58 (finding that the Constitution did not include prenatal entities in the definition of "person").

128. Id.

129. See id. at 158 (examining various sources, Blackmun announced that authority, "persuades us [the Court] that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

130. Id. at 157.
Although those sections are the most important for purposes of the right to choose, they do not encompass an inclusive list. Justice Blackmun concluded that in each location, the word person is used in a way that only applies to an entity that has been born alive. As such, prenatal entities are not afforded the Fifth and Fourteenth Amendment Due Process protections of life, liberty, and process that the Constitution gives to persons.

The Court also decided that states, in furthering their compelling interest in protecting potential life of the prenatal entity, may limit a woman's ability to seek an abortion only after the fetus is viable; the interests of the state do not become compelling until the prenatal entity became viable, defined as having "the capability of meaningful life outside the mother's womb." At that point, states could prohibit abortion so long as there was an exception for the life and health of the woman. In addition, Roe carefully avoided the murky topic of when life begins.

Since 1973, opponents of the abortion right have attempted to chip away at the central holding of Roe with various state laws. At first with little success, opponents continued to try to cabin the Court's newfound constitutional protection, and in so doing, brought abortion rights into the limelight. Reproductive issues have practically become the litmus test

131. See id. (discussing the use of "person" in the Constitution). The Court found that the Constitution also referred to a "person":

in the listing of qualifications for Representatives and Senators... in the Apportionment Clause... in the Migration and Importation provision... in the Emolument Clause... in the Electors provisions... in the provision outlining qualifications for the office of President... in the Extradition provisions... and the superseded Fugitive Slave Clause... and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment.

Id

132. See id. at 157 (finding that no instance of the term "person" "indicates, with any assurance, that it has any possible pre-natal application").

133. See supra note 125 and accompanying text.

134. See Roe, 410 U.S. at 157–58 (holding that the Constitution makes numerous references to "person," and none could apply to a prenatal entity).

135. Id. at 163.

136. Id. at 163–64.

137. See id. at 159 (stating that the Court need not decide when life begins).


for Supreme Court nominees, and one can hardly remember a presidential campaign that did not feature the candidate's opinions supporting either the "right to choose" or the "right to life."

As the post-Roe years went by, the Supreme Court appeared to suggest that a change of course was coming; some justices seemed ready to modify Roe in City of Akron v. Akron Center for Reproductive Health. Justice O'Connor, in a dissenting opinion, took issue with Roe's holding that life is only potential at the point of viability. She believed that life is as potential at the point of viability as at any other time in the pregnancy.

140. See Linda Greenhouse, Taking a Stand on Confirmation: Senatorial Voices For and Against Bork, N.Y. TIMES, Oct. 6, 1987, at B6. Judge Bork was a federal judge serving on the United States Court of Appeals for the District of Columbia when he received his nomination to the Supreme Court. Id. His views on originality ignited a fierce backfire from civil rights and women's groups. Id. One of his beliefs was that the Constitution was never intended to include a right of privacy, and thus, Roe is not constitutional. Id.

141. See City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 422-25 (1983) (considering the validity of an Akron, Ohio, abortion ordinance that contained provisions dealing with performance of all second-trimester abortions in a hospital, parental consent, informed consent, a twenty-four-hour waiting period, and the disposal of fetal remains). According to the Akron Court, from approximately the end of the first trimester, the State "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Id at 430-31. The State's discretion to regulate, however, does not "permit it to adopt abortion regulations that depart from accepted medical practice." Id. at 431. The Akron Court held that the ordinance's hospital requirement of second-trimester abortions is unconstitutional because it imposes a "heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." Id. at 438. The Court finds the informed consent provision of the ordinance, specifying that a physician counsel the patient, unconstitutional because there is no valid state interest: "The State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." Id. at 448. The Court finds the parental consent provision of the ordinance unconstitutional because it lacks "a procedure by which a minor can avoid a parental veto of her abortion decision by demonstrating that her decision is, in fact, informed." Id. at 439. The Court finds the twenty-four-hour waiting period provision unconstitutional because "Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period." Id. at 450. Finally, the Court finds the disposal of fetal remains provision unconstitutional because it "fails to give a physician fair notice that his contemplated conduct is forbidden." Id. at 450-51.

142. See Akron, 462 U.S. at 460 (O'Connor, J., dissenting) (objecting to Roe's view that a state does not have an interest in potential human life until the point of viability). Akron itself dealt with another issue. An Akron ordinance imposed a requirement that all post-first trimester abortions be performed in a hospital; the Court found that such a constraint "unreasonably infringes upon a woman's constitutional right to obtain an abortion." Id. at 438 (majority opinion).

143. See id. at 461 (O'Connor, J., dissenting) ("The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than
Thus, a state has an interest in "protecting potential human life" for the pregnancy's duration.144

Justice O'Connor's argument has greater weight in the current age of advanced medical science. Today, doctors are able to provide for the separate existence of the fetus at a time in the pregnancy when the medical community used to believe that the prenatal entity was not viable.145 Just recently, a child was born at only 21 weeks after conception and, due to exceptional medical care, is now healthy and home with her parents.146

These continuing advances in neonatal care, as well as stories of the survival of extremely premature babies, are pushing back the gestation period traditionally assumed for viability. This could become a concern for women who may have relied on the fact that they could seek an abortion after the 21-week mark. If medical science advances to the point where doctors can deliver and keep alive a prenatal entity at only 15-weeks or perhaps even 10 weeks, will abortion be prohibited even at that early stage? Imagine how difficult it would be for a woman in the early stages of pregnancy, who may not even realize she is pregnant, to obtain an abortion. It certainly does not seem fair to forbid a woman from seeking an abortion merely because medicine has advanced so much.

Following Akron was Webster v. Reproductive Health Services,147 which involved a Missouri statute's possible interference with the right to choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

144. Id.

145. See Pat Wingert, The Baby's Who's Not Supposed to Be Alive, NEWSWEEK WEB EXCLUSIVE (Feb. 23, 2007), http://www.newsweek.com/id/36697 (last visited Dec. 18, 2008) ("In the 1960s, preemies born around 30 weeks and weighing over three pounds often died because their lungs were too immature to sustain them. Today, thanks to improved treatments, the line of viability hovers around 23 to 24 weeks (and 14 ounces) at hospitals with state-of-the-art intensive care nurseries.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

146. See id. (describing the circumstances of the exceptional birth of Amillia Taylor).

147. See Webster v. Reproductive Health Services, 492 U.S. 490, 490 (1989) (considering the validity of certain provisions of a Missouri statute regulating the performance of abortions). Specifically, the Court held that the Court need not pass on the constitutionality of the statute's preamble; statutory ban on use of public employees and facilities for performance or assistance of nontherapeutic abortions did not contravene the Constitution; and the issue of constitutionality of the statute's prohibition on use of public funds to encourage or counsel women to have nontherapeutic abortions was moot. Id. at 490–92. The Webster Court held that the Court need not pass on the constitutionality of the statute's preamble because the "preamble does not by its terms regulate abortions or any other aspect of appellees' medical practice." Id. at 491. The Webster Court additionally held that the statutory ban on use of public employees and facilities for performance or assistance of nontherapeutic did not contravene the Constitution because the "Due Process
seek an abortion.\textsuperscript{148} The statute's preamble was inconsistent with \textit{Roe}'s assertion that "persons" only include those born alive.\textsuperscript{149} The preamble "contain[ed] 'findings' by the state legislature that 'the life of each human being begins at conception,' and that unborn children have protectable interests in life, health, and well-being."\textsuperscript{150} It went on to say that unborn entities are entitled to the same rights as all other persons, subject to any limitations by the Constitution.\textsuperscript{151} Although these statements appeared to restrict the right to seek an abortion, the Court viewed the preamble as merely a "value judgment."\textsuperscript{152} The Court did not, therefore, invalidate such opinion of the state legislature, because it did not have a substantive effect.\textsuperscript{153} The preamble was merely encouraging childbirth over abortion.\textsuperscript{154} Thus, the Court refused to address the constitutionality of the Missouri statute's preamble.\textsuperscript{155}

\textit{Webster} also determined that the statute may require physicians to test for viability of any woman thought to be more than 20-weeks pregnant.\textsuperscript{156} This was significant because a fetus is not presumed to be viable at this stage of development.\textsuperscript{157} \textit{Roe} had held that a state could not interfere with a

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\textsuperscript{148} \textit{See id.} at 500–01 (stating that the Missouri statute involved five provisions which the Supreme Court discussed as being potentially unconstitutional as against the precedent of \textit{Roe}).

\textsuperscript{149} \textit{See Roe}, 410 U.S. at 158 ("All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

\textsuperscript{150} \textit{Webster}, 492 U.S. at 501.

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} at 506.

\textsuperscript{153} \textit{See id.} at 506–07 (asserting that "the extent to which the preamble’s language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide" and refusing to pass on the constitutional validity of the statute).

\textsuperscript{154} \textit{See id.} at 509 (expressing the view that the state's decision to encourage childbirth over abortion places no actual burden on a woman's right to choose).

\textsuperscript{155} \textit{See id.} at 507 ("We therefore need not pass on the constitutionality of the Act's preamble.").

\textsuperscript{156} \textit{See id.} at 492–93 (stating that the statute is reasonably designed to test viability at 20 weeks to determine whether or not the fetus is viable).

\textsuperscript{157} \textit{See id.} at 493 (alluding to the District Court's findings that medical evidence
woman's right to seek an abortion until after the fetus was presumed viable. The holding of *Roe* was losing its constitutional force.

The next cut into *Roe* arose in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. With the dissenting views of *Akron* now squarely in the majority, *Roe*’s protection of the right to seek an abortion was significantly re-shaped. Although *Casey* dealt with the same exact issue that the Supreme Court had struck down in earlier cases, the Court had changed its views since the early days after *Roe*. Here, the court discarded *Roe*’s trimester approach and adopted a new test for determining whether a regulation violated a woman’s right to seek an abortion. *Casey*’s new test was the "undue burden" standard. It provided that a statute would be

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158. *See Roe*, 410 U.S. at 163 ("With respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester.").


160. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (considering whether the provisions of the Pennsylvania Abortion Control Act of 1982 were constitutional). In holding that a few of the provisions were unconstitutional, the *Casey* Court abandons the trimester framework established in *Roe v. Wade* and adopts the undue burden standard. *Id.* The *Casey* Court ruled that a finding of an undue burden "is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. Although the *Casey* Court rejects *Roe*’s trimester framework, the *Casey* Court upholds the central holding of *Roe* that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879. The *Casey* Court also upholds the exception requirement of *Roe*; "Subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 879.

161. *See id.* at 876 ("Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman’s decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.").

162. *See id.* at 872 (describing the new test). The Court stated:

The trimester framework no doubt was erected to ensure that the woman’s right to choose not become so subordinate to the State’s interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State’s permissible exercise of its powers.

*Id.*

163. *See id.* at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").
constitutional so long as it did not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."  

Despite the changes, *Casey* ultimately affirmed *Roe*'s basic holdings that a woman has the right to seek an abortion and a prenatal entity is not a person. *Casey*'s holdings remain the most current dictates regarding the state of abortion rights. 

*Stenberg v. Carhart* was the next important case; it dealt with a state statute prohibiting partial-birth abortions. The Supreme Court struck down the statute because it included no exception to preserve the life or health of the pregnant woman. Considerable medical evidence showed that a complete ban on the late-term abortion procedures could result in detrimental harm to pregnant women. In the face of such evidence and the Court's prior decisions that late-term abortions must include a life and health exception, the Court struck

164. *Id.*

165. *See id.* at 879 ("Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding.").

166. *See Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000) (considering whether a Nebraska statute banning partial-birth abortion was constitutional). Dr. Leroy Carhart, a Nebraska physician who performs abortions in a clinical setting, brought a lawsuit seeking declaration that the Nebraska statute violates the Federal Constitution and asking for an injunction forbidding its enforcement. *Id.* at 922. The *Stenberg* Court held that the statute was unconstitutional for two independent reasons. First, the *Stenberg* Court said that the law lacked any exception "for the preservation of the health of the mother." *Id.* at 930. Second, the *Stenberg* Court said that the statute "imposes an undue burden on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself." *Id.* at 930. In reasoning that the statute should contain an exception for the health of the mother, the court presents evidence that the D&X method of abortion may at times be safer than the D&E procedure. *Id.* at 932. Using this evidence, the Court concludes that since the D&X procedure may at times be the safest and most appropriate, it is unconstitutional that the statute does not contain a health exception. *Id.* at 938. In reasoning that the statute is an undue burden for a woman trying to get an abortion, the Court concludes that the statute does not only cover the D&X procedure, but it also covers D&E. *Id.* at 939. Relying upon this conclusion, the Court rules that because the statute bans the more common D&E procedure, the statute imposes an undue burden on a woman trying to get an abortion. *Id.* at 945-46.

167. *See id.* at 921 (holding that a Nebraska partial-birth ban statute is unconstitutional).

168. *See id.* at 937-38 ("In sum, Nebraska has not convinced us that a health exception is 'never necessary to preserve the health of women.' Rather, a statute that altogether forbids D&X creates a significant health risk. The statute consequently must contain a health exception.").

169. *See id.* at 936 ("Especially for women with particular health conditions, there is medical evidence that D&X may be safer than available alternatives.").
down the statute. In 2007, the Court would revisit the issue and this time, uphold the statute.

To get around the Court's holding in *Stenberg*, Congress passed a federal statute finding that the medical procedure of this particular late-term abortion is never medically necessary. Upon constitutional challenge, three different district courts and courts of appeals found that Congress' findings were unreasonable and struck down the statute. On certiorari at the Supreme Court, the view was different, however, with two new justices appointed by the conservative and pro-life President George W. Bush. This time, in *Gonzales v. Carhart*, the Court upheld the abortion ban statute because the majority found that medical uncertainty persists regarding whether the procedure is medically necessary. Thus, where

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170. See id. at 932 ("The State fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure.").


172. Editorial, *A Shift on Abortions*, *WASH. POST*, Apr. 19, 2007, at A26 ("After the court overturned Nebraska's partial-birth abortion ban in 2000 in part because it lacked a health exception, Congress moved to get around that inconvenience by issuing a legislative finding that the procedure is never medically necessary.").

173. See id. ("Three separate district courts, upheld by three appeals courts, found that is was unreasonable and unsupported by medical evidence.").


175. See *Gonzales*, 127 S.Ct. at 1614 (considering the constitutional validity of the Partial-Birth Abortion Ban Act of 2003). *Id.* at 1614. The Partial-Birth Abortion Ban Act of 2003 proscribes a particular method of ending fetal life in the later stages of pregnancy. *Id.* at 1620. In upholding the Act, the *Gonzales* Court held that the Act is not void for vagueness, and that it does not impose an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. *Id.* at 1625–39. In finding that the Act is not void for vagueness, the *Gonzales* Court finds that the Act sets forth "relatively clear guidelines as to prohibited conduct" and provides "objective criteria" to evaluate whether a doctor has performed a prohibited procedure. *Id.* at 1628. In determining that the Act does not impose an undue burden by imposing overly broad restrictions on second-trimester abortions, the Court points out the differences between the Act and the Nebraska statute struck down in *Stenberg*. *Id.* at 1629–31. The Nebraska statute was struck down in *Stenberg* partially because it was seen by the *Stenberg* Court to prohibit the standard D&E abortion procedure, thereby imposing an undue burden on a woman seeking an abortion. *Id.* at 1631. The *Gonzales* Court differentiates the Act from the Nebraska statute struck down in *Stenberg* by holding that the Act does not prohibit the standard D&E procedure; "Here, by contrast, interpreting the Act so that it does not prohibit standard D&E is the most reasonable reading and understanding of its terms." *Id.* at 1631.

176. See *id.* at 1637 ("The medical uncertainty over whether the Act's prohibition
Congress has spoken on the issue and there is uncertainty, the Court will defer to the legislature.\textsuperscript{177}

Opponents of \textit{Roe} achieved some success in their attempts to chip away at the right to choose,\textsuperscript{178} though they still have not achieved their ultimate goal of overturning \textit{Roe}. Should that occur, the elimination of the constitutional right to choose would return to the states the ability to regulate and prohibit abortion.\textsuperscript{179} While the most recent late-term abortion ban is a considerable threat to the right to seek an abortion at any point in the pregnancy,\textsuperscript{180} it still does not do what the UVVA does, which is to provide rights (formerly reserved for born persons) to an unborn entity.\textsuperscript{181}

Opponents of the UVVA believed that the statute was enacted not for the purpose of protecting women and their pregnancies from violence but rather, for the purpose of ultimately overturning \textit{Roe}.\textsuperscript{182} Immediately after the legislation passed the House of Representatives, NARAL Pro-Choice America issued a press release denouncing the UVVA.\textsuperscript{183} The group opined that the statute's majority had determined "protecting families and punishing criminals is less important than taking advantage of tragedy to creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."). Note that \textit{Gonzales v. Planned Parenthood}, 435 F.3d 1163 (9th Cir. 2006) was consolidated with \textit{Gonzales v. Carhart}.

177. See id. at 1636 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

178. See Robert Barnes, \textit{High Court Upholds Curb on Abortion}, \textit{WASH. POST}, Apr. 19, 2007, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/18/AR2007041800710.html. The court's 5 to 4 decision upholding the Partial Birth Abortion Ban Act passed by Congress in 2003 marked the first time justices have agreed that a specific abortion procedure could be banned. It was also the first time since the landmark \textit{Roe v. Wade} decision of January 1973 that justices approved an abortion restriction that did not contain an exception for the health of the woman.

\textit{Id.}

179. See Center for Reproductive Rights, \textit{What if Roe Fell?}, 5 (Sept. 2004), http://www.reproductiverights.org/pdf/bo_whatifroefell.pdf ("A Supreme Court decision overturning \textit{Roe} would not by itself make abortion illegal in the United States. Instead, a reversal of \textit{Roe} would remove federal constitutional protection for a woman's right to choose and give the states the power to set abortion policy.").


181. See \textit{supra} note 2 and accompanying text.

182. See \textit{supra} note 5 and accompanying text.

promote the far-right agenda of trying to rob women of their right to choose." This view was reflected by various congresspersons who argued during the debates that the bill's language laid a dangerous foundation for undermining Roe's holding. Establishing rights for a prenatal entity and calling it a person is a dangerous precedent to set. No federal statutes in the past had given a prenatal entity the status of person.

The issue here is that the Supreme Court had previously held that a prenatal entity is not a person. In this statute, there is a drastic change—a fetus is now called a person and given rights of a person. That leads me to believe that a future Congress could pass a statute giving a prenatal entity even more rights, which then leads to the implication that this entity is now a person with full rights of a born person. If that is the case, and a person cannot be deprived of life, liberty, or property without due process of law, then a woman cannot choose to abort her fetus. She will be unable to exert any superior right over another person, and thus, Congress will have undermined the holding of Roe.

IV. Historical and Modern Limitations of Prenatal Rights

While there is the very real risk that a prenatal entity will in the near future gain full personhood status, such a shift has little basis in history. Legislators who rose in opposition to the UVVA found evidence, looking as far back as biblical times, indicating that both Judaism and Christianity regarded only those born alive as persons. Interpreting Exodus 21:22, Representative Nadler explained that the Bible did not mean to give "person" status to a prenatal entity. Only when the woman is killed as

184. Id.
185. See supra note 5 and accompanying text.
186. See supra note 149 and accompanying text.
189. See id. (reading Exodus). Nadler quoted: Exodus 21:22 reads as follows: 'If men strive and hurt a woman with child so that her fruit depart from her,' in other words, she has a miscarriage, they cause the destruction of the fetus, 'and yet no mischief follow, he shall be surely punished and he shall pay as the judges determine,' monetary compensation. 'And if any mischief follow, then they shall give life for life.' Id.
result of the assault is an act of murder involved.\textsuperscript{191} Moving into more recent times, the view of prenatal entities remained the same.\textsuperscript{192} Sir Edward Coke commented that:

\begin{quote}
[i]f a woman be quick with childe, and by a potion or other-wise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other caufe, this is murder \ldots \textsuperscript{193}
\end{quote}

The words of Sir Edward Coke show that at common law, the killing of a prenatal entity was not homicide. Rather, for causing the termination of a pregnancy, an assailant could be punished monetarily (or at least less severely than had he injured or killed a person).\textsuperscript{194} The government could, however, punish an assailant for homicide if it could prove that there was a live birth, where the child died soon after birth of injuries sustained prenatally.\textsuperscript{195}

In the context of history, which included only persons who were born alive, states began to enact feticide statutes that punished individuals for injuries to the prenatal entity even when the entity was not born alive.\textsuperscript{196} This change arose in an environment similar to the one we face today, one where medicine was advancing such that the law needed to change with it.\textsuperscript{197} In the early years of this country, the medical community had been unable to determine with any certainty when a stillborn baby had died or by what cause.\textsuperscript{198} In some cases, doctors even had difficulty verifying that a separate person for legal purposes, is a radical departure not only from Anglo-American legal traditions, but from all of Western legal traditions going way back to the Bible\textsuperscript{191}.\textsuperscript{192} See id. (discussing acts committed on the unborn and the historical treatment of such acts).

\textsuperscript{193} See supra note 172 and accompanying text.

\textsuperscript{194} See id. (stating the common law's treatment of the termination of the unborn was something less than murder).

\textsuperscript{195} See id. (providing that once outside the mother's womb, the child's rights were protected against murder).

\textsuperscript{196} See Major Michael J. Davidson, \textit{Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law}, ARMY LAW., July 1998, at 25 n.28 (providing feticide statute background material).

\textsuperscript{197} See Colleen Jolicocur-Wonnacott, Comment, \textit{The Unborn Victims of Violence Act: Friend or Foe to the Unborn?}, 17 T.M. COOLEY L. REV. 563, 569 (2000) (discussing medical advances and how these advances have interacted the law regarding treatment of the unborn).

\textsuperscript{198} See id. (discussing the early medical uncertainty surrounding the unborn).
woman had been pregnant at all. As science improved, states began to abandon the traditional born-alive rule, beginning with Massachusetts.

Historically, other areas of law have helped to shape views regarding the rights of prenatal entities. Representative Henry Hyde, a supporter of the UVVA, believed the statute was not such a departure from previous law because probate law provides a prenatal entity with interests similar to that of a born person: "The unborn has legal status in probate matters where a pregnant woman is an heir or beneficiary and is pregnant and the interests of the child may be different. So a guardian ad litem is appointed." I believe that Representative Hyde was suggesting that if a guardian ad litem need be appointed, that guardian must be acting in the interests of an entity endowed with rights. The Congressman's comments also strengthen the argument that this type of probate situation is not new in regard to the law; rather, this type of protection for a not yet born entity is commonplace where the prenatal entity stands to be a beneficiary.

In response, Representative Nadler noted that it is certainly true that as the prenatal entity develops, it is given greater interests. In particular, after viability, a state may prohibit abortion for the purpose of protecting the entity's potential life. However, the Congressman brings the argument back to the point that although an entity may have an interest, the true issue here is that "the definition of the fetus or the embryo as a human

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199. See Tara Kole & Laura Kadetsky, The Unborn Victims of Violence Act, 39 HARV. J. ON LEGIS. 215, 216 (2002) (stating that in the early years of medicine there was no certain way of determining a pregnancy).


202. See Blackstone, 1 BLACKSTONE'S COMMENTARIES 126 (1765) (stating that other areas of the law have recognized rights for the unborn).


204. See id. ("[I] do understand that as the fetus gets older, our law gives it more recognition . . . . What I am saying is that the definition of the fetus or the embryo as a human being, as a person, for purposes of law in all respects, which is what this bill would do, we have never done.").

205. See id. ("[T]he Supreme Court in Roe v. Wade said in the first trimester the interest of the woman and her choice completely prevails, you cannot regulate abortion. In the second trimester there is more of an interest, and, therefore you can regulate; and in the third trimester after viability, you can prohibit abortion.").
being, as a person, for purposes of law in all respects, which is what this bill would do, we have never done."206

In addition to the arguments made during debates, there are a few other interests that have been afforded prenatal entities in limited situations.207 In regard to gifts of inheritance prior to birth, prenatal entities have been able to receive them before they become a born alive person.208 As mentioned above, in this context, prenatal entities are also appointed guardians ad litem.209 This argument supports the conclusions of the UVVA supporters that if prenatal entities can receive property interests prior to birth, and property is unable to descend to a non-entity, then the prenatal entities must be persons.210 Yet, upon closer inspection, one realizes that although property may pass to a prenatal entity, it must be perfected; that means that the inheritance rights are conditioned upon the prenatal entity being born alive.211

A second area that provides certain limited rights to a prenatal entity is tort law. Traditionally, persons born alive were barred from bringing actions for injuries sustained prenatally; however, most courts today permit such lawsuits in tort.212 In addition, there are a few courts that even allow would-be parents to sue for wrongful death when a prenatal entity is stillborn.213 However, this right is not technically one given to a prenatal entity that is never born, and appears to be "consistent with the view that the fetus, at most, represents only the potentiality of life."214 Only the would-be parents benefit in an action to compensate them for the loss of their potential child.215

206. Id.
208. See supra note 193 (discussing that the common law recognized the right of the unborn to inherent estates).
209. See Roe, 410 U.S. at 161 ("[U]nborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem."").
210. Note that property cannot pass to an animal, inanimate object, or any other entity which is not considered alive. Note however, that property can pass to businesses and trusts, which are considered in some senses to be alive.
211. See Roe, 410 U.S. at 162 ("Perfection of the interests involved, again, has generally been contingent on live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.").
212. See id. at 161 (discussing tort remedies available for prenatal injuries sustained).
213. See id. (stating potential remedy in some courts for wrongful death involving a stillborn).
214. Id.
215. See id. (discussing the would-be parent's interests in prenatal life).
Today at least 34 states have begun to enact fetal protection statutes, although some are more closely analogous to the Lofgren substitute than the UVVA. The majority of the statutes are similar to the UVVA. These statutes provide that a prenatal entity, for purposes of the statute, is a person. Pennsylvania's Supreme Court had the opportunity to rule on the statute's constitutionality in Commonwealth v. Bullock, where a man was charged with the strangling murder of his girlfriend and his girlfriend's unborn child. Pennsylvania's statute provides that "it is unlawful to intentionally, knowingly, recklessly, or negligently cause the death of an unborn child, defined to include all stages of gestation from fertilization to live birth." The court, relying on interpretations by other state appellate courts, determined that the statute is constitutional because it "does not purport to define the concept of personhood or establish when life as a human being begins and ends, rather, it imposes criminal liability for the destruction of a human embryo or fetus that is biologically alive." Thus, the Pennsylvania prenatal protection statute contains some language similar


218. E.g., N.Y. PENAL LAW § 125.00 (McKinney 1998); KAN. STAT. ANN. § 21-3452 (2007).

219. See Commonwealth v. Bullock, 913 A.2d 207, 210 (Pa. 2006) (considering the constitutionality of Pennsylvania's fetal homicide statute, which defined certain deaths of unborn children as criminal homicide). The case involved the strangling death of a pregnant female and her unborn child by the woman's boyfriend. Id. Under Pennsylvania statute, the boyfriend was charged with murder and criminal homicide of the unborn child. Id. The Act classified the crime of criminal homicide "if he or she intentionally, knowingly, recklessly, or negligently causes the death of an unborn child ...." Id. The jury eventually convicted Bullock of voluntary manslaughter regarding the unborn child. Id. at 211. Bullock challenged the constitutionality of the statute. Id. The statute was upheld as constitutional because it "does not purport to define the concept of personhood or establish when life as a human being begins and ends; rather, it imposes criminal liability for the destruction of a human embryo or fetus that is biologically alive." Id. at 212. Accordingly, the statute and conviction were constitutionally upheld. Id. at 219.

220. See id. at 210 (upholding Pennsylvania's fetal homicide statute).

221. Id.

222. Id.
to the UVVA because the second crime the accused is charged with is for causing the death of whatever the thing was in the mother’s uterus. The statute carefully avoids determining that the prenatal entity is a person, yet still provides punishment to an assailant who causes the woman to involuntarily abort her pregnancy.\textsuperscript{223} This statute does not implicate problems for \textit{Roe v. Wade} as the UVVA does because it establishes no personhood status for a prenatal entity,\textsuperscript{224} yet Pennsylvania’s statute is still not as abortion-neutral as the Lofgren substitute.\textsuperscript{225} While the federal substitute provided that the second crime was against the woman for interfering with her right to choose, Pennsylvania’s legislation seems to provide the prenatal entity with some interest outside of the mother’s interest.\textsuperscript{226} Such language is dangerous because it leads one to believe that endowing a prenatal entity with a few rights now will lead to more and more rights culminating with an overturning of \textit{Roe}. As previously mentioned, there are a number of statutes that are more closely akin to the Lofgren substitute.\textsuperscript{227} \textit{People v. Davis}\textsuperscript{228} is one such California case where a defendant was charged with murder under a state statute after the assailant shot the woman causing her to lose so much blood that the fetus was stillborn. The California statute is not entirely like the Lofgren substitute.\textsuperscript{229} Here, the second crime is for causing the death of a fetus.\textsuperscript{230}

\begin{footnotes}
\item[	extsuperscript{223}] Id.
\item[	extsuperscript{224}] Id.
\item[	extsuperscript{227}] E.g., IND. CODE ANN. 35-42-1-6 (West 1998); KAN. STAT. ANN. 21-3440 (1994); R.I. GEN. LAWS § 11-23-5 (1994).
\item[	extsuperscript{228}] \textit{See} People v. Davis, 7 Cal. 4th 797, 802 (1994) (considering whether a murder under the California statute could have been committed on a fetus pre-viability). The defendant was charged under California statute with murder of a fetus, after the pregnant woman’s fetus died resulting from gunshots during a robbery. \textit{Id.} at 801. The defendant argued that he could not be held under the statute because the fetus did not have legal protection pre-viability, in accord with \textit{Roe v. Wade}. \textit{Id.} The court reasoned that when a mother’s privacy interest is not at issue, the legislature could determine when the fetus should be protected from homicide. \textit{Id.} at 810. The mother’s privacy interest was not at stake because the mother was not seeking an abortion. \textit{Id.} Rather, the defendant’s interest were at issue and those interests are not granted the right to choose when to abort the fetus. \textit{Id.} Accordingly, the legislature could pass a law protecting the life of the fetus. \textit{Id.} at 815. The court upheld the statute. \textit{Id.}
\item[	extsuperscript{230}] CAL. PENAL CODE § 187 (a) (1970).
\end{footnotes}
Thus, California's fetal protection statute falls somewhere between the UVVA, which punishes for causing death to a person and the Lofgren substitute which punishes for non-consensual termination of a woman's pregnancy.\textsuperscript{231}

The California statute provides, "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought."\textsuperscript{232} The defendant argued that the statute could not apply to any fetus that did not meet the definition of viability under the Roe standard.\textsuperscript{233} Because a fetus in California did not gain the status of protected by the state legislature until viability the defendant argued that the prenatal protection statute also could not apply to a prenatal entity not yet viable.\textsuperscript{234} Essentially, he did not think the law could charge him with murder of a non-viable fetus, which at the very same moment, could have been aborted by the woman. The court determined that there is no requirement of fetal viability to convict a defendant of murder with malice aforethought.\textsuperscript{235} California's state legislature did not specify a requirement of viability, and the court's only role was to determine if the statute violated the constitutional right to choose.\textsuperscript{236} The court held that, "when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide."\textsuperscript{237} Here, the mother's interests were not at stake because she was not attempting to abort the fetus.\textsuperscript{238} The interests at stake here were those of the defendant and he has no constitutional right to choose whether a woman aborts her pregnancy.\textsuperscript{239} As such, the California legislature was free to pass a law pursuant to its interest in protecting fetal life, and the court upheld the statute.\textsuperscript{240}

\begin{itemize}
\item \textsuperscript{231} See supra notes 8–9 and accompanying text.
\item \textsuperscript{232} Davis, 7 Cal. 4th at 800–01.
\item \textsuperscript{233} See id. at 806 (stating the defendant's argument regarding the constitutionality of the statute).
\item \textsuperscript{234} Id.
\item \textsuperscript{235} See id. at 810 (ruling that a defendant may be convicted of murder pre-viability).
\item \textsuperscript{236} See id. (discussing the court's role in interpreting the statute).
\item \textsuperscript{237} People v. Davis, 7 Cal. 4th 797, 810.
\item \textsuperscript{238} Id. at 800–01.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id.
\end{itemize}
V. Conclusion

Pro-choice advocates have been battling legislation that restricts the right to seek an abortion ever since the passage of Roe v. Wade. The UVVA appears to be the most effective statute yet passed by the pro-life side of the aisle involving a real threat to Roe.

... [T]his bill, H.R. 1997 [the Unborn Victims of Violence Act] ... is clearly focused at criminalizing the acts of women if they decide to choose to terminate a pregnancy. And why do I say that? Because what the bill does is to recognize a member of the species homo sapiens at all stages of development as a victim of crime from conception to birth. This attempts to afford a fetus, embryo, and even a fertilized egg rights and interests separate from and equal to those of the woman.241

Proponents of the UVVA insisted, however, that its purposes were only to punish criminals for causing injury to the pregnancy, validate the families’ feelings of loss, and prevent violence against pregnant women.242 Yet if that were the case, they should have had no problem accepting the Lofgren substitute, which served the same goals, but did not recognize a prenatal entity as a person.243 By charging the assailant with two crimes against the pregnant woman, the Lofgren substitute would accomplish the same purposes but would not take a step toward overturning Roe and the protections guaranteed thereunder. Punishing the assailant for two crimes against the woman also seems to be fitting because the woman has suffered so greatly—first, with an assault and, second, with injury to her fetus or termination of her pregnancy.

However, the pro-life advocates filled the debates with devastating stories of women who had their pregnancies terminated against their will.244 They further claimed that opponents did not care about the women and families who had suffered such a loss.245 But that was not the case; legislators on both sides of the aisle felt sympathy for the families of Laci Peterson and other women killed in similar circumstances. As Representative Jan Schakowsky argued during the debates, "[i]t is actually insulting and certainly annoying that there is some sort of accusation that

242. See supra notes 6, 47-50, 90 and accompanying text.
243. See supra note 18 and accompanying text.
244. See supra notes 78-88 and accompanying text.
245. See supra note 72 and accompanying text.
those of us who think the substitute is preferable do not care about women and do not care about the babies that they are carrying.° 246

Other opponents stood up to announce their desire to punish assailants who intrude on the private decision of a woman to carry a pregnancy to term, like Representative Stephanie Jones when she stated that:

We all agree that criminals who attack pregnant women—including especially heinous attacks aimed at ending the pregnancy—should be punished for their actions. But... [the UVVA] is not needed to allow the vigorous prosecution of anyone doing harm to a pregnant woman. 247

All of these statements show that there was an identical sentiment running through Congress—everyone wanted to punish an assailant who caused injury to a pregnant woman. That same feeling appears to be reflected in the general population, as was noted by various legislators during the debate. 248 Women like Karlene Robbins 249 deserve to have their attackers punished. Karlene's husband violently beat her after an argument; physically, she suffered only injuries to her nose, eye, and uterus, but she suffered more than a physical loss. She was stripped of her right to give birth to the potential child that she had eagerly waited for. Woman such as Karlene, without a law that punishes assailants for terminating a pregnancy against the woman's will, would not feel that justice has been served. However, justice can be served and Karlene's husband could be convicted under a statute that is not the death knell for abortion rights. A statute like that offered by Representative Lofgren vindicates the women who suffer such a tragedy yet also punishes those who unlawfully terminate a woman's pregnancy.

Yet since the Lofgren substitute was rejected, it seems clear that the important aspect was not the purposes as stated during the debate, but rather, that it was to establish a legal foundation in which a prenatal entity is given a right of a person. Unfortunately, the bill that passed was the UVVA, the one that spells trouble for the constitutional right to choose, and endows prenatal entities with a right formerly reserved to persons born alive. The UVVA can be used as a foundation to establish personhood for prenatal entities in other areas of law. That could allow a court to determine that the prenatal entities, as persons, cannot be deprived of life


249. See Tsao, supra note 200, at 458 (detailing the story of Karlene Robbins).
and liberty without due process of law, according to the dictates of the Fifth and Fourteenth Amendments. If that happens, Roe could be overturned.

While the UVVA appears to be on a collision course with the right to choose, it seems that the statute itself does not entirely run counter to Roe. The UVVA establishes only a single right for prenatal entities, i.e., the right that calls for punishment of the assailant who causes injury or death to the entity.250 Returning to the hypothetical situation given at the beginning of this note, in which one entity had to be sacrificed, the six-year-old, or the fetus, it seems that if most, if not all, people would choose the rights of the six-year-old, such choice represents a consensus that the two entities do not share the same rights. Thus, if two entities do not share the same rights and one of those entities is clearly a person (the born alive six-year-old), then that other entity (the fetus) cannot be a person.251

This argument stems from the American belief that all persons are equal before the law. The Declaration of Independence would remind us "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."252 If an entity only has one right, while entities born alive have the full array of rights, then a prenatal entity cannot be a person at all. Thus, while the UVVA lays a brick in the road to overturning Roe, the statute itself does not undermine Roe’s proposition that persons only include those born alive. If and when the Supreme Court does hear the case, the statute will probably be upheld if there is any similarity to state court cases dealing with the constitutionality of state prenatal protection statutes, which were discussed above.

A constitutional challenge would likely involve many different parties, with interest groups supporting both the right to choose and the right to life. Proponents of the statute will likely argue that the Court should look to the post-Roe cases and the Court’s willingness to restrict the right to choose so as to promote the state’s interest in protecting potential fetal life. They will argue that the UVVA is a logical extension. In response, opponents will probably bring their full arsenal with support from the National Organization for Women and NARAL Pro-Choice America, groups that vehemently opposed the UVVA. Their arguments will likely echo


251. But see Innocent Child Protection Act of 2000, H.R. 4888, 106th Cong. (1999) (defining unborn child as "a member of the species homo sapiens, at any stage of development, who is carried in the womb").

252. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)
statements made during congressional debates, i.e., that through the years, while the Supreme Court has restricted the right to choose, the main holding has remain unchanged. There is a right to an abortion, and that premise is based upon the notion that prenatal entities are not persons, and thus, the pregnant woman has the greater interest and may exercise that interest by choosing to terminate the pregnancy.

Justice Stevens commented on the Supreme Court's views on the status of a prenatal entity:

'No member of this Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.' This . . . remains a fundamental premise of our constitutional law governing reproductive autonomy.\(^{253}\)

Although the fundamental proposition has never before been questioned by the Court, the UVVA could cause a change of heart. With a majority of conservatives on the Court, for the first time in over thirty years, the right to choose appears to be in dire circumstances. The UVVA has chipped away yet another portion of the right to choose, and it may open the door to overturn Roe.

ARTICLES