

# Bill C-484 Endangers Abortion Rights and Women's Rights by Establishing Fetal Personhood

# A Rebuttal to Ken Epp

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#### Context

The following is a rebuttal to Conservative MP Ken Epp's statement of May 5: Claims that US "Fetal homicide / "unborn victims of violence" laws target pregnant women: A Smokescreen to attempt to discredit Bill C-484. His statement is posted here: <a href="http://www.kenepp.com/admin/assets/USCASESE1.pdf">http://www.kenepp.com/admin/assets/USCASESE1.pdf</a>.

Epp's article, in turn, is a rebuttal to a paper by Lynn Paltrow, Executive Director of the National Advocates for Pregnant Women (NAPW) in New York, titled: Lessons from the U.S. Experience with Unborn Victims of Violence Laws. Her article is posted here: http://www.arcc-cdac.ca/action/LessonsfromUS.pdf.

This rebuttal incorporates feedback and additional data from National Advocates for Pregnant Women, as well as from Canadian legal experts on reproductive health law and legal equality.

#### Introduction

Ken Epp claims that the U.S. experience where pregnant women have been arrested under "fetal homicide" laws does not apply to his Bill C-484. This bill, a proposed amendment to the Criminal Code of Canada, would make it a separate offence to injure or kill a fetus during a crime committed against a pregnant woman. Epp says that the claims made by Lynn Paltrow

Criminal law in Canada is a federal matter, and the Criminal Code is a federal act. A copy of the legislation can be viewed here: <a href="http://laws.justice.gc.ca/en/C-46/?noCookie">http://laws.justice.gc.ca/en/C-46/?noCookie</a>.

and relied on by myself and ARCC – that his bill can be used to police and punish pregnant women – are "alarmist" and "without foundation."

However, Epp does not seem to understand the possible ramifications of his bill. In particular, he seems oblivious to the fact that his bill can be used to establish precedent to police and punish pregnant women in other contexts and via other laws. Epp disputes that his bill turns fetuses into human beings or persons, but the language of his bill contradicts and negates the current definition of "human being" under Canadian law. It essentially establishes the fetus as a new legal entity – a person with the right not to be killed or injured. This can endanger abortion rights, since anti-abortion legislators and lobbyists could cite his bill as authority to introduce restrictions on abortion, in order to protect the fetus as a new legal person.

### U.S. laws and Bill C-484 – comparing apples to apples

Epp argues that comparing U.S. laws to his bill is to "compare apples and oranges," and that what has happened in the U.S. is irrelevant and misleading in regard to what would happen in Canada if C-484 became law. However, Epp failed to take into account that arrests and convictions of pregnant women in the U.S. under child endangerment or drug abuse laws generally rely on the *authority* of fetal homicide laws, regardless of how narrowly the latter are written or whether they exempt pregnant women from liability.

Epp states that only South Carolina has upheld convictions of pregnant women under child abuse and endangerment laws, using the state's judicially-enacted "fetal homicide" law as a precedent. This statement trivializes the plight of women whose convictions were overturned, many of whom spent years in jail before being exonerated. In Texas for example, at least three women were convicted and imprisoned for "delivering drugs to minors" because they continued their pregnancies to term in spite of a drug problem.

Epp is wrong when he claims that "in all cases, except in South Carolina, the charges were eventually dropped." In fact, the NAPW's research found that scores of women have pled guilty and are serving prison terms for a variety of crimes relating to their pregnancies. Women are often persuaded to plead guilty to avoid the risk of a long jail term, but that counts as a conviction even if the law should never have been applied against them in the first place. These cases are rarely reviewed or appealed unless the women can prove their counsel was inadequate.

At least two women in Tennessee were convicted of homicide under the state's fetal homicide law and sentenced to prison for trying to go to term despite drug problems, as Epp later admits in his statement. But he asserts that those cases don't count because Tennessee's law does not contain an explicit exemption for pregnant women. However, U.S. courts are supposed to apply laws in a way that takes into account the intentions of the legislature. The history of Tennessee's law and other state laws shows that, whether or not they have an explicit exception for the pregnant woman, the laws were only intended to target and punish third parties who injured pregnant women, causing harm to an "unborn child." Irrespective of the intentions of legislators, some feticide laws have been subverted from their original purpose to target pregnant women. The same risk is present with Epp's bill.

Epp completely ignored the fact that there actually have been convictions under state feticide laws with an exemption for pregnant women. For example, in 2007, a Missouri woman was charged with murder because she suffered a stillbirth after apparently struggling with alcoholism. She was charged even though Missouri's law recognizing fetal personhood

explicitly exempts pregnant women. Rather than face endless trials and court challenges, she pled guilty and was sentenced to seven years in prison for involuntary manslaughter. At least 22 other women have been arrested under Missouri's child abuse statutes, and although some cases have been dismissed, others are still pending.

The fetal homicide law in Texas also exempts pregnant women from criminal liability, but about 40 women have been prosecuted under drug abuse statutes, with many convicted. There is no documentation that their convictions were overturned except in the three cases mentioned earlier.

So exemptions for pregnant women in a fetal homicide law may be interpreted to pertain *only* to that law, with prosecutors citing the feticide law in other contexts, such as to justify interpreting the word "child" in another law to include fetuses. Epp seems completely unaware that his fetal homicide bill, regardless of any exemptions, could be cited to recognize fetal rights. He says: "The new offence created by C-484 is completely self-contained and has no impact on any other offences, either in the Criminal Code itself, or in any other statute." But Epp should know that in a common law regime governed by precedent, recognition of a legal entity in one context creates authority for its recognition in other contexts.

To give a hypothetical example, Section 215 of Canada's Criminal Code makes it an offence to fail to provide the "necessaries of life for a child under the age of sixteen years." The inaccurate use of the word "child" instead of fetus throughout Epp's bill, could encourage prosecutors or judges to cite his bill as authority to define fetuses as "children under 16" under Section 215, and thereby prosecute pregnant women for any unhealthy behaviour during pregnancy. Bill C-484 risks generating unforeseen impacts on many other provisions within the Criminal Code and in various spheres of Canadian law, such as health law, child welfare law, employment law, tort law, and constitutional law – wherever fetal rights advocates can construct an artificial opposition between a pregnant woman and her fetus. The bill can also provide encouragement to anti-abortionists to re-litigate previous court decisions that rejected legal rights for fetuses, and to lobby for new laws restricting abortion rights.

Epp characterizes the arrests, prosecutions, and convictions of pregnant women in other states besides South Carolina as "isolated incidents" that are "in no way representative of application of the legislation in the 37 states with these laws." He also says that just because it's possible for people to be falsely charged under a law, it does not mean the law should be struck down. However, as the NAPW makes clear, fetal homicide laws in the U.S. have often been used to *primarily* target pregnant women. For example, in South Carolina between 89 and 300 women have been arrested under the state's fetal homicide law, but only six third parties have ever been arrested (as far as the NAPW could ascertain), even though third parties were the intended target of the law. Arrests of third parties in other states are relatively rare as well, and overall, do not appear to be much more common than arrests of pregnant women. For example, in California, the NAPW found eleven cases where a third party was prosecuted for killing an unborn fetus since 1974, while eight pregnant women have been prosecuted<sup>2</sup> (not just the three discussed in Paltrow's paper). So, arrests of pregnant women are indeed representative of how these laws are used in the U.S.

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Memorandum from Kathrine Jack, National Advocates for Pregnant Women, May 13. 2008.

Epp dismisses most of these cases as "false arrests," which could happen randomly under any law. But in fact, these arrests are the predictable outcome of a deliberate anti-choice campaign to establish the legal rights of fetuses, without regard to the resulting harm done to the health and well-being of pregnant women and their families. When a particular vulnerable group of people is singled out for prosecution, it is discrimination and a serious cause for concern. Furthermore, Epp is using the term "false arrest" incorrectly. A false arrest occurs when there are no grounds or authority under which to arrest someone. These arrests and prosecutions of pregnant women in the U.S. are not false arrests, because they are based on plausible interpretations of the laws by prosecutors. And it is the fetal homicide laws that, too often, allow these interpretations to be successfully used against women. Although the prosecution's arguments have frequently failed, many convictions still stand, and in all cases, hundreds of individual women have suffered while waiting for the courts to decide the issue.

Epp makes much of the fact that his bill is narrow, applying only during the commission of an offence against a pregnant woman, so he says it cannot be compared with the U.S. fetal homicide laws because they are broader or differently-worded. The narrowness of his bill is not the issue, however. First, even with the best of intentions, laws can be used and manipulated to ends that can't be predicted in advance. This happened over and over again with the American fetal homicide laws, even though each state law is worded differently and the laws were intended to apply only to third party attacks on pregnant women. The second issue is the *de facto* granting of personhood to fetuses under Epp's bill, which as explained above, can establish the authority to extend fetal recognition to other laws or cases.

Epp's acknowledgment of the problems caused by the U.S. feticide laws means that he recognizes that such laws can be misapplied to punish women. This is why he says he added exemptions for pregnant women and abortion. The above analysis shows that he has missed the point, and that exemptions are insufficient protection, because his law could still be cited as authority in other contexts. We join Epp in his hope, that if his bill was adopted, it would *not* be used to police pregnant women. It's true that his law is not only narrowly written, but also better-worded than many of the U.S. laws. However, the differences between his bill and the U.S. laws may not be enough to save it from the risk of misapplication and misinterpretation. This is because the bill does not create an aggravated offence against the pregnant woman herself, but turns fetuses into a new legal entity with separate rights.

This leads us to another reason why Epp believes his bill will not be misapplied: "C-484 proposes to work with existing wording of the Criminal Code, preventing the possibility that the C-484 amendment could be open to misinterpretation or misapplication...." Let's turn now to the language of his bill to see why this claim also rests on a shaky foundation.

## Epp's bill establishes fetal personhood

Epp tries to distinguish between his bill and South Carolina's fetal homicide law by saying that the state law changed the definition of "person" to include fetuses for the purpose of homicide, while his bill "does NOT change the definition of human being." (The existing Criminal Code definition in Section 223 is: "A child becomes a human being ... when it has completely proceeded, in a living state, from the body of its mother.") He claims that the legal term "human being" would continue to have the same meaning if C-484 were enacted into law as it does now. This is very misleading, although it's possible that Epp himself does not realize the problems with the language in his own bill. In fact, the language is manipulative to the extent that it establishes fetal personhood on several different fronts.

First, Bill C-484 specifically *negates* the Criminal Code definition of human being. In an apparent attempt to get around the definition and ensure that charges under his bill will stick, Clause 5 of Epp's bill states: "*It is not a defence to a charge under this section that the child is not a human being.*" In other words, the fetus IS a human being under Epp's bill. Indeed, it must be, otherwise people could escape conviction using the "not a human being" defence, which would render the bill moot. The key problem once again is how the new uncertainty over the meaning of "human being" could affect other contexts and laws. As Liberal MP Marlene Jennings said during the March 3rd Parliamentary debate: "I can only imagine the legal confusion this would create around existing jurisprudence on human life and the relationship between a mother and her fetus."

The word "child" is used repeatedly throughout Epp's bill - 14 times to be exact - while the term "unborn child" appears five times. This language is unprecedented in the Criminal Code, which never refers to the "unborn" except in one very limited context: Section 238 of the Code makes it an offence to kill an "unborn child in [the] act of birth." This is a very far cry from calling an embryo an "unborn child", as does Bill C-484. A provision in Epp's bill states that a perpetrator must "know or ought to know" that the woman is pregnant, indicating that the term "unborn child" can refer to even very early pregnancies, when a woman first suspects she might be pregnant.

The word "child" also appears in subsection (2) of Section 223, in association with the definition of human being: "A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being." In another context, Epp has said that his use of the word "child" in Bill C-484 is consistent with Section 223(2).). This is incorrect. The meaning of "child" in subsection (2) is the same as that in the definition – a born-alive human being. Further, the term "before or during its birth" has only been interpreted to mean immediately before being born alive<sup>3</sup>, which also makes it consistent with the meaning of "unborn child" in Section 238. Under the common law "born alive" rule, rights can be vested in the potential that is the fetus, but the rights materialize only upon birth. The pregnant woman continues to be one legal entity until the live birth of her child. The "born alive" rule, as well as the unity of a pregnant woman and her fetus, are well-established legal principles in Canadian jurisprudence, and cannot be arbitrarily swept aside by an amendment to the Criminal Code.

Bill C-484 uses the term "mother" throughout to refer to a pregnant woman. Again, the use of this term in this context is unprecedented in the Criminal Code, used only in Section 238 again (as well as Section 223 in the definition of "human being"). Of course, many pregnant women are already mothers, and those without children may feel that the term applies to them, too. But this everyday use of language should not be transferred to a criminal law context. Legally speaking, a pregnant woman is not yet a mother in relationship to the fetus she is carrying, so the use of "mother" in Epp's bill is inaccurate and creates legal confusion. In fact, the terms "mother," "child," and "unborn child" are typical of language used by antiabortion activists. Such words clearly confer personhood onto the fetus.

The title of Epp's bill is the "Unborn Victims of Violence Act." Calling a fetus a victim makes no sense unless it's a separate entity and a person. In the Criminal Code, only human beings are referred to as victims of offences - never animals, property, or corporations. The word "victim" to denote fetuses therefore reflects the bill's creation of a new legal entity equivalent to persons.

<sup>&</sup>lt;sup>3</sup> R v. Sullivan and LeMay, 1991, 1 SCR 489.

The language in Epp's bill is misleading in yet another way. The media commonly refers to Bill C-484 as creating a separate charge of homicide for the fetus. Yet the bill never actually uses the word homicide. There are two offences in the bill, but both are unnamed and referred to only by description: "Causing the death of an unborn child while committing an offence" and "Injuring an unborn child while committing an offence." But the sentences for these offences are the same as, or similar to, those for homicide and attempted homicide. This strongly implies that these are the accurate but unspoken names for the offences. Further, the offences are included in the Criminal Code's Part VIII for "Offences Against the Person and Reputation." What is Epp's amendment doing there, if the fetus is not a person? - since Clause 6 of his bill specifies that the offences are not against the pregnant woman herself. By amending the Persons section of the Code to include an offence against fetuses, Epp's bill establishes legal personhood for the fetus.

Although Bill C-484 does not explicitly redefine the term "human being," it creates plenty of confusion over the definition by representing the fetus as a person in the ways described above. Not only does the bill conflict with the Criminal Code definition of human being, it disallows that definition as a defence against feticide, in effect making the fetus a human being.

#### Conclusion

Regardless of Ken Epp's stated intent for the bill – to protect pregnant women and wanted fetuses from violence – he should realize that once enacted, his bill can be used in ways he did *not* intend. Epp claims that his bill was vetted by lawyers who pronounced it constitutionally sound, but most other lawyers seem to disagree. His bill collides not only with the Criminal Code definition of "human being," it flies in the face of several Supreme Court of Canada rulings that said fetuses cannot be persons, that a pregnant woman and her fetus are "physically one" person, and that all rights must accrue to the pregnant woman because she already has established constitutional and equality rights.<sup>4</sup>

We all want to protect and value life, but it should be done in a way that values the women who bring that life into the world. By focusing on fetuses, not injured pregnant women, Bill C-484 is offensive to the full humanity of all women, not just pregnant women. It is a radical bill that positions the fetus as a woman's co-equal. By recognizing the "rights of the unborn," it creates the risk that pregnant women's behaviour could be regulated or punished, and abortion rights restricted. Therefore, Bill C-484 has profound and troubling implications for the health, rights, and independence of all women. It must not be allowed to become law.

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See for example: **Dobson v. Dobson** 1999 2 SCR 753; **Tremblay v. Daigle** 1989 2 SCR 530; and **Winnipeg Child and Family Services v. D.F.G.** 1997 3 SCR 925.