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Canada's only national political pro-choice advocacy group

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Position Paper #57

The Case against a “Fetal Homicide” Law

Homicide is not a rare occurrence in Canada, but when a pregnant woman is murdered, the result is that people often urge that the perpetrator be charged with two homicides – of both the woman and her fetus.

The victims and families of these horrific tragedies deserve our deepest sympathy, and they deserve justice. However, the issues of creating a “fetal homicide” law so that murder charges can be laid for the “death” of the fetus is complex and problematic. This paper explains why creating such a law would be an unconstitutional infringement on women’s rights, and would likely result in harms against pregnant women.

Private Member Bills to Recognize Fetuses as Victims of Crime

In May 2006, as the result of a string of (unrelated) cases involving pregnant women being murdered, Conservative MP Leon Benoit introduced Bill C-291 to amend the *Criminal Code* to recognize “Unborn Victims of Violence”. The bill was to make it a separate offence to kill or injure a fetus while committing a violent crime against a pregnant woman. The bill was deemed non-votable and unconstitutional.

Another attempt to resurrect this concept came in 2007, when Conservative MP Ken Epp introduced Bill C-484, “The Unborn Victims of Crime Act” as a private members bill. This bill passed second reading but died on the order paper when an election was called in September 2008.¹ Prior to that, a strong pro-choice campaign against the bill forced the Conservative leader to withdraw its support.

Then in 2016, Conservative MP Cathy Wagantall introduced another private member’s bill C-225 “Protection of Pregnant Women and Their Preborn Children Act (Cassie and Molly’s Law),” in response to the murder of 8-months pregnant Cassandra Kaake of Windsor. The campaign for the bill was led by the partner and family of the murdered woman, apparently in a bid to make it more difficult to argue against the bill. However, it was almost exactly the same as the previous Bill C-

¹ <https://openparliament.ca/bills/39-2/C-484/>. Also: <http://www.arcc-cdac.ca/c484.htm>

484, and was defeated at second reading on Oct 19, 2016², with MPs instead calling on a national action plan to end violence against women.³

Since this bill was defeated, other pregnant women have been the victims of violence, including Candice Rochelle Bobb of Montreal⁴, Raja Ghazi⁵, of Toronto, and Arianna Goberdhan of Toronto⁶. All three women were killed, but in the cases of Bobb and Ghazi, their babies survived for a short time after birth. This means they became human beings with rights under the law; therefore, separate charges were laid in the deaths of the infants. In the Goberdhan case however, the fetus died in utero, so police could not lay separate charges for its death.

An Issue of Domestic Violence

Pregnant women being assaulted or killed is usually a domestic violence issue, and the rights of fetuses should not take precedence over the rights of the woman. When media coverage focuses on the victim's fetus, and whether it should have rights or not, the pregnant woman is overlooked and so is the problem that killed her – domestic violence.

Homicide is a leading killer of pregnant women, and it's well-known that violence against women increases during pregnancy⁷. What we need to address are better measures to protect women in general, and pregnant women in particular, from domestic violence. For example, in Canada, women are usually asked by their healthcare provider as part of a first trimester assessment whether they have experienced domestic violence, and some midwifery clinics request a psychological assessment in the first trimester that queries how the woman or transgender person perceives their partner is reacting emotionally to the pregnancy.⁸

Yet, while these questions can be indicators of potential violence, they do not address why pregnant woman experience an increase in domestic violence. Perhaps some men feel threatened by the impending birth of a child, or perhaps they feel a loss of control over the woman and the relationship. During pregnancy, a woman has more control over what's happening with her body, plus she often becomes the center of attention from others. Do some men perceive that as a threat to their dominance? Domestic violence in general often reflects a man's need for power and control, with pregnancy often seen as an excuse to control women even more. Also, a man may resort to abuse as a way to pressure his partner into having an abortion OR a baby, or just to express his resentment either way at her choice. For these reasons, the level of a woman's emotional and physical attachment to the fetus should have nothing to do with the rationale for a "fetal homicide" law, as some have claimed. In other words, if a pregnant woman loses her fetus in an attack, the injury to her is equally as serious when the pregnancy is unwanted as when it's wanted. A "fetal homicide" law would completely sidestep the issue of domestic abuse and do nothing to protect pregnant women from violence before it happens. It would also do nothing to protect women who are abused shortly after

² <https://openparliament.ca/bills/42-1/C-225/>. Also: <http://www.arcc-cdac.ca/c225.html>

³ An in-depth explanation of the bill can be found here: http://www.huffingtonpost.ca/2016/10/04/preborn-children-bill-c225-cassie-mollys-law-jeff-durham_n_12331126.html

⁴ <http://www.cbc.ca/news/canada/toronto/bobb-shooting-update-1.4002360>

⁵ <http://montrealgazette.com/news/local-news/suspect-in-pregnant-womans-stabbing-faces-murder-charge-for-death-of-baby>

⁶ <http://nationalpost.com/news/canada/toronto-killing-reignites-emotional-debate-can-an-unborn-fetus-be-a-murder-victim>

⁷ https://www.beststart.org/resources/anti-violence/pdf/bs_abuse_lr_f.pdf

⁸ <https://www.slideshare.net/CrimePreventionCouncil/the-role-of-family-medicine-in-screening-for-domestic-violence>

giving birth or having an abortion. Before we start talking about laws to protect fetuses, let's make sure women's rights are protected first, by addressing the systemic problem of domestic violence.

Legal Rights Conflict

In Canada, women have guaranteed rights and equality under our *Charter of Rights and Freedoms*. Fetuses do not. Persons do not gain legal status and rights in our society until they have completely exited from the birth canal, alive (as per the *Criminal Code*, Section 223(1)). Also, the Supreme Court has ruled that a woman and her fetus are considered “physically one” person under the law (*Dobson vs. Dobson*)⁹. If we give any legal rights to a fetus, we must automatically remove some rights from women, because it's impossible for two beings occupying the same body to enjoy full rights. If we try to “balance” rights, it means the rights of one or both parties must be compromised, resulting in a loss of rights. Legally speaking, it would be very difficult to justify compromising women's established rights in favour of the theoretical rights of fetuses.

Separating a woman from her fetus under the law creates a harmful, adversarial relationship between a woman and her fetus. For example, if pregnant women are threatened with arrest for abusing drugs, they are less likely to seek pre-natal care. In reality, the best way to protect fetuses is to protect pregnant women – by giving them the supports and resources they need for a good pregnancy outcome, and by protecting their safety during pregnancy by reducing domestic violence in general.

Although a law that would make it a separate crime to injure or kill a fetus during an attack on a pregnant woman sounds reasonable on the surface, most people don't realize there's a hidden agenda against abortion behind the promotion of these laws. Those calling for a “fetal homicide” law (besides the victims' families) are mostly anti-choice groups and anti-choice MPs, who intend such bills to pave a route to restricting or criminalizing abortion. In the United States, anti-choice groups and legislators have stated they want to use these laws to restrict abortion. Also, when the federal law *Unborn Victims of Violence Act* passed in 2004 in the U.S., its anti-abortion sponsors rejected proposals to protect the woman herself under the law.

U.S. Evidence on the Harms of Fetal Homicide Laws

The public would probably be much less willing to support a “fetal homicide” law if they understood its real effects. We can look to the United States for evidence, where about 35 states have enacted so-called “fetal homicide” laws that make it a crime to cause harm to a fetus.¹⁰ Twenty-four of these state laws define a fetus as a person and a separate homicide victim. This gives the fetus legal rights distinct from the woman who was attacked. Although the laws were supposedly meant to target third parties who harm pregnant women, they have been largely used against pregnant women, including those with wanted pregnancies¹¹. Between 1973 and 2005, over 400 pregnant women experienced interventions or arrests under these laws, including an additional 250 women between 2005 and 2013. They are being punished for behaviours and conditions that are not criminalized for other people, such as drug or alcohol abuse and mental illness. Some states have proposed punishing pregnant women in abusive relationships who are unable to leave their batterers.

⁹ <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1716/index.do>

¹⁰ <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>

¹¹ <https://www.guttmacher.org/gpr/2015/09/prosecuting-women-self-inducing-abortion-counterproductive-and-lacking-compassion>

Women have also been charged or jailed for murder for experiencing a stillbirth after refusing a caesarean section, or just from suffering a stillbirth. In 2011, Bei Bei Shuai¹² was charged by Indiana authorities with murder and feticide after her failed suicide attempt resulted in the death of her fetus.

Arrests of pregnant women have occurred even under state fetal protection laws that make exemptions for the pregnant woman herself. Courts have so far struck down these latter prosecutions, but arrests continue based on a growing body of law declaring that fetuses have rights separate from those of pregnant women. The worst offender is South Carolina, which declared by judicial fiat that viable fetuses are legal persons and that pregnant women who use illegal drugs or engage in any other behavior that jeopardizes the fetus can be prosecuted as a child abuser or murderer.¹³ Dozens of pregnant women with drug abuse problems have been arrested as a result, even though they had virtually no access to drug treatment programs.

Even where pregnant women themselves are not prosecuted under “fetal homicide” laws, others may suffer grave injustice. When a law recognizes fetal rights, it creates a legal contradiction. Because if a fetus has the right not to be “murdered” in the womb by a third party, why doesn’t it have the right not to be “murdered” by its own mother? This is why fetal homicide laws are being used in the U.S. to target pregnant women, including those who have sought illegal self-induced abortions. At least 17 women have been prosecuted for self-inducing their own abortion. In two of the worst cases, an Indiana judge in 2015 sentenced Purvi Patel to 20 years for feticide and neglect because she took abortion-inducing drugs to end her 25-week pregnancy and then failed to provide medical care to the baby when it was born¹⁴. In 2016 in Tennessee, Anna Yocca was indicted on felony charges of aggravated assault and attempted abortion, after trying to abort herself with a wire coat hanger.

Fetal homicide or fetal personhood laws create contradiction and confusion, resulting in a real and dangerous slippery slope towards criminalizing pregnant women for their behaviours while pregnant. In Texas in 2016, a motion was raised to force women who undergo abortions to hold funerals for the fetus¹⁵, and in 2017 another bill threatened to make it a felony to help transport a woman to have an abortion.¹⁶ Once the fetus is treated as a homicide victim, the woman’s rights become essentially moot.

How can we achieve justice in these cases?

In Canada, the judicial system routinely takes aggravating circumstances into account. In the case of an assault or murder of a pregnant woman, even though a third party cannot be charged separately with harm to the fetus, prosecutors may recommend more serious charges (such as first degree murder or aggravated assault), judges may impose harsher penalties, and parole boards may deny parole to convicted perpetrators. Perhaps we need a new law that codifies such practices. About a dozen U.S. states have laws that simply apply stiffer punishments for murdering a pregnant woman, but do not make the death of the fetus a separate crime, such as Colorado¹⁷. Such a solution would avoid the controversy about giving rights to fetuses or interfering with abortion rights, and would ensure that women do not lose their rights while they are pregnant.

¹² <https://www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/>

¹³ http://www.advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/

¹⁴ <http://www.motherjones.com/politics/2016/09/woman-convicted-death-her-fetus-walks-free/>

¹⁵ <http://www.cnn.com/2016/12/01/health/texas-abortion-fetal-burial-cremation-trnd/index.html>

¹⁶ <https://www.texasobserver.org/texas-bill-could-send-people-to-jail-for-driving-a-woman-to-an-abortion/>

¹⁷ <https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/20/horrific-attack-on-pregnant-woman-prompts-debate-over-colorados-fetal-homicide-laws/>