

# MICHIGAN'S PROPOSED PRENATAL PROTECTION ACT: UNDERMINING A WOMAN'S RIGHT TO AN ABORTION

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## INTRODUCTION

During the last few years, many states have passed laws criminalizing conduct that injures or causes the death of a fetus.<sup>1</sup> In the 1995 session of the Michigan legislature, a conservative Republican State Senator, William Van Regenmorter, proposed "The Prenatal Protection Act."<sup>2</sup> This bill would criminalize virtually any injury to a fetus, with little regard for the wrongdoer's intent. Senate Bill 515 has a "medical exemption" which is intended to preserve a woman's constitutional right to have an abortion.<sup>3</sup> However, despite this exemption, Senate Bill 515 has two constitutional defects.

First, Senate Bill 515 violates the Supremacy Clause of the Constitution because U.S. Supreme Court decisions do not permit the Michigan legislature to legally characterize a fetus as a child or a person.<sup>4</sup> Section 3 of Senate Bill 515, for example, refers to the great bodily harm or death caused the "unborn child, the unborn child's

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1. IOWA CODE § 707.7 (1995); NEV. REV. STAT. § 200.210 (1991); OKLA. STAT. tit. 21, § 713 (1991); *see generally* *People v. Davis*, 872 P.2d 591, 620-23 (Cal. 1994) (Mosk, J., dissenting).

2. S.B. 515, 88th Leg. (1995). The text of the bill appears in Appendix A of this article.

3. S.B. 515 § 19(b).

4. *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a state lacks a compelling interest in protecting the fetus and in prohibiting abortion until viability); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (determining that a woman has the right to choose to have an abortion before viability of the fetus without an undue burden by the state).

mother, or *another person*."<sup>5</sup> The statute then describes the "unborn child" as the "live unborn offspring of a human being at any time or stage of development from conception until birth."<sup>6</sup> These characterizations of the fetus as a person from the moment of conception violate the U.S. Supreme Court's holdings in *Roe v. Wade*<sup>7</sup> and *Planned Parenthood v. Casey*.<sup>8</sup>

Second, Senate Bill 515 is unconstitutionally vague and overbroad because it will often be unclear whether a fetal miscarriage early in the pregnancy is caused by an act of a third party or by the frequent spontaneous abortions that can occur at an early stage of pregnancy.<sup>9</sup> The problem with determining causation is compounded by the absence of a clear intent standard in several parts of the statute. The U.S. Supreme Court has ruled that an unclear criminal law regulating abortions is void for vagueness when the statute also lacks a meaningful intent requirement.<sup>10</sup> This reasoning applies to Senate Bill 515. Moreover, Senate Bill 515 is overbroad because its vagueness means that it inevitably will be used by prosecutors against people who did not actually cause the injury or death of a fetus.

Senate Bill 515 is also bad public policy. It imposes excessive criminal penalties on individuals who may accidentally cause injury to a fetus even if the mother is virtually unharmed, and even if neither the wrongdoer nor the woman knows that the woman is pregnant. Senate Bill 515 therefore provides little protection to pregnant women. By contrast, an alternative bill, House Bill 5531,<sup>11</sup> proposed by Michigan Democratic Representative Laura Baird, avoids these constitutional and practical problems and would protect pregnant women.

This article has six parts. Part I describes Senate Bill 515's provisions in more detail, as well as the provisions of the Baird alternative. Part II reviews the legal rules established by the Supreme Court's two most famous abortion decisions. Part III explains why Senate Bill 515 violates the Supremacy Clause. Part IV shows how Senate Bill

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5. S.B. 515 § 3(2) (emphasis added).

6. S.B. 515 § 2.

7. 410 U.S. 113 (1973).

8. 505 U.S. 833 (1992).

9. D. Keith Edmonds, *Early Embryonic Mortality in Women*, 38 FERTILITY & STERILITY 447, 451 (1982) (explaining that "...total embryonic loss is very high, sixty-two percent of all detected pregnancies terminating prior to twelve weeks.").

10. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979).

11. H.B. 5531, 88th Leg. (1995) (providing protection from assault to pregnant women without considering the fetus a person). The text of this proposed bill appears in Appendix B of this article.

515 is vague and overbroad. Part V demonstrates that passage of Senate Bill 515 would be bad public policy. Finally, Part VI clarifies how the Baird alternative avoids these problems. The goal of this article is to show states how they can protect pregnant women without infringing on a woman's abortion rights.

## I. EXAMINING THE PROPOSED STATUTES

Senate Bill 515 would criminalize virtually all injuries caused to a woman's "unborn child." The bill has received great support from "Right to Life" groups.<sup>12</sup> By contrast, Representative Baird's alternative bill is designed to protect women from injuries during pregnancy. House Bill 5531, therefore, avoids the constitutional issues raised by Senate Bill 515. Representative Baird's bill has received support from groups such as Planned Parenthood and the ACLU.<sup>13</sup> Each bill will be discussed separately.

### A. *Senate Bill 515*

Senate Bill 515 is designed to protect the "unborn child," which is defined as "the live unborn offspring of a human being at any time or stage of development from conception until birth."<sup>14</sup> Thus, it does not matter whether the fetus is three weeks old or six months old. Senate Bill 515 penalizes maliciously-caused injuries to the unborn child more than negligently-caused injuries. "Maliciously" is defined in Section 3 as, "[w]ith the intent to cause the death of the unborn child, the unborn child's mother, or another person."<sup>15</sup> In short, Senate Bill 515 defines the fetus as a person.

The penalties in Senate Bill 515 are quite severe. For example, Section 4 provides that a person who intentionally causes the death of an unborn child shall receive twenty-five years to life in prison.<sup>16</sup> Section 5 is a variation on state felony murder laws. It maintains that a person who commits a crime such as attempted arson, criminal sexual conduct, or robbery which, in turn, results in the death of an

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12. *Pregnant Woman Protection Act: Hearings on S.B. 515 Before the Senate Comm. on the Judiciary*, 88th Leg. (1995) (testimony of Edward Rivet, Legislative Director, Right to Life of Michigan, on file with the clerk of the Senate Comm. on the Judiciary).

13. *House Considers Bill to Create Crimes Against Unborn Children*, ARGUS PRESS, Mar. 21, 1996, at 8; Jennifer Loven, *State House Considers Bills to Create Crimes Against Unborn Children*, MACOMB DAILY, Mar. 21, 1996, at A1.

14. S.B. 515 § 2.

15. S.B. 515 § 3(2)(a). Several other parts of the statute have similar characterizations of the unborn child as a person. See, e.g., S.B. 515 § 3(c); S.B. 515 § 4.

16. S.B. 515 § 4.

unborn child shall be imprisoned for twenty-five years to life.<sup>17</sup> Moreover, the penalties are serious even for conduct that is not malicious.

Section 6, for example, provides that a person who causes the death of an unborn child by any assault may be imprisoned for up to fifteen years and fined \$7500.<sup>18</sup> An assault may occur with any unwanted contact that one person has with another.<sup>19</sup> This grave punishment may be applied regardless of the fetus' stage of development.

Section 11 states: "A person who drives any vehicle...without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property and thereby causing great bodily harm to an unborn child...is guilty of a felony...."<sup>20</sup> This provision therefore criminalizes simple negligence in driving. The punishment can be up to two years in prison.<sup>21</sup> Section 12 states that a person who operates a vehicle "at an immoderate rate of speed," or "negligently," and who causes the death of an unborn child can be imprisoned for up to two years as well.<sup>22</sup>

Senate Bill 515 also has a rather extraordinary provision which places the burden of proof on the criminal defendant regarding the status of the fetus at the time of injury.<sup>23</sup> Section 18 maintains that the pregnant woman's fetus will be presumed to have been alive at the time of the alleged violation.<sup>24</sup> This presumption against the defendant exemplifies the severity of Senate Bill 515.

### *B. The Baird Alternative*

Representative Baird's bill provides an alternative to Senate Bill 515 that would protect the legitimate interests of pregnant women from injury without labeling the fetus as a person.

The operative part of House Bill 5531 specifies:

If a person knows or has reason to know that a woman is

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17. S.B. 515 § 5.

18. S.B. 515 § 6.

19. See, e.g., *Stowers v. Ardmore Acres Hosp.*, 172 N.W.2d 497, 503 (Mich. Ct. App. 1969), *aff'd sub nom.*, *Stowers v. Wolodzko*, 191 N.W.2d 355 (Mich. 1971) (holding that the absence of pain and suffering in non-consensual touching does not mean no assault occurred); *People v. Zuniga*, 223 N.W.2d 652, 654 (Mich. Ct. App. 1974) (remarking that assault simply requires purposeful, non-consensual touching).

20. S.B. 515 § 11.

21. *Id.*

22. S.B. 515 § 12.

23. S.B. 515 § 18.

24. *Id.*

pregnant and physically injures that woman by committing or attempting to commit a crime and that injury results in a miscarriage or serious physical injury to the fetus, the person is guilty of a felony and shall be imprisoned for not more than 10 years.<sup>25</sup>

House Bill 5531 also has an express abortion exemption.<sup>26</sup> The bill defines "serious physical injury" as meaning "...substantial bodily disfigurement..." to the fetus, or impairment of "...the function of a body organ or limb of the child that develops from the fetus."<sup>27</sup>

## II. THE SUPREME COURT'S DECISIONS IN ROE AND CASEY

The two leading U.S. Supreme Court cases discussing whether a fetus can be considered a person are *Roe*<sup>28</sup> and *Casey*.<sup>29</sup> In *Roe* the Court struck down a Texas statute that criminalized abortions.<sup>30</sup> The Court ruled that the statute violated a woman's liberty interests under the Due Process Clause.<sup>31</sup> The Court said that "...the word 'person' as used in the Fourteenth Amendment, does not include the unborn."<sup>32</sup> The Court also rejected Texas' argument that life begins at conception,<sup>33</sup> and that the states have a compelling interest in protecting this potential life from and after conception.<sup>34</sup>

Justice Blackmun, writing for the majority, established a trimester framework for analyzing the states' interests in abortion regulations.<sup>35</sup> States have a compelling interest in the mother's health after the first trimester.<sup>36</sup> But the states lack a compelling interest in the "potential life" until viability, namely between six to seven months into the pregnancy.<sup>37</sup>

In *Casey*, the Court reaffirmed a woman's constitutional right to an abortion and upheld *Roe*'s determination that a fetus is not a per-

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25. H.B. 5531 § 90A(1).

26. H.B. 5531 § 90A(5).

27. H.B. 5531 § 90A(6)(B).

28. *Roe v. Wade*, 410 U.S. 113 (1973).

29. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

30. *Roe*, 410 U.S. at 153.

31. *Id.*

32. *Id.* at 158.

33. *Id.* at 159.

34. *Id.* at 163.

35. *Roe*, 410 U.S. at 162-63.

36. *Id.* at 163.

37. *Id.* at 163. "The 'compelling' point is at viability... because the fetus then...has the capability of meaningful life outside the mother's womb." *Id.*

son.<sup>38</sup> Justices Souter, Kennedy, and O'Connor also gave an eloquent and extended discussion of *stare decisis*.<sup>39</sup> *Stare decisis* is the doctrine that courts should generally honor their precedents rather than reverse positions suddenly. In *Casey*, the Court noted that *stare decisis* is especially important on fundamental matters of personal liberty such as a woman's right to an abortion.<sup>40</sup> The Justices explained that the public's confidence in the good faith of an unelected judiciary would be shaken if such vital legal precedents were not honored.<sup>41</sup>

The Court, however, repealed Justice Blackmun's trimester approach<sup>42</sup> and ruled instead that, before viability, state abortion regulations would be allowed that did not "unduly burden" the woman's right to an abortion.<sup>43</sup> The Court, however, still fixed viability as the point where the "...[s]tate's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."<sup>44</sup> In other words, *Casey* reaffirmed *Roe*'s central holding that the state lacks a compelling interest in preserving the potential life of the fetus until viability.

To sum up, the Supreme Court in *Casey* and *Roe* ruled: (1) that a fetus does not constitute a person under the federal constitution; and (2) that states lack a compelling interest in protecting that potential life until it reaches viability. *Casey*'s eloquent defense of *stare decisis* also demonstrates the Court's adherence to its precedents on fundamental matters of personal liberty.

### III. THE SUPREMACY CLAUSE ISSUES RAISED BY DEFINING A FETUS AS A PERSON

The Court's decisions in *Roe* and *Casey*, and the Constitution's Supremacy Clause, do not allow the Michigan legislature to define a fetus as a person. Article VI, Section 2 of the United States Constitution contains the Supremacy Clause which states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the *supreme law* of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

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38. *Casey*, 505 U.S. at 845 (explaining the state's interest in "the fetus that may become a child"); *Id.* at 876 (discussing the state's interest in "potential life").

39. *Id.* at 854-69.

40. *Casey*, 505 U.S. at 856-57.

41. *Id.* at 868-69.

42. *Id.* at 873.

43. *Id.* at 874-78.

44. *Id.* at 860.

*laws of any state to the contrary notwithstanding.*"<sup>45</sup> Thus, any conflicts between state and federal law must be resolved in favor of the supreme federal law.<sup>46</sup>

In *Marbury v. Madison*,<sup>47</sup> the Court made clear that the Court is the final arbiter of whether legislation complies with the U.S. Constitution by declaring: "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>48</sup> This is the doctrine of judicial review. Taken together, the Supremacy Clause and *Marbury* mean that state laws will be struck down by courts when they conflict with the Supreme Court's interpretation of the federal constitution.<sup>49</sup>

Senate Bill 515's definition of the fetus as a person runs afoul of the Supremacy Clause because the U.S. Supreme Court rejected that definition in *Roe* and *Casey* when it defined a "person" under the Fourteenth Amendment as not including a fetus.<sup>50</sup> The Michigan legislature cannot legislate around these rulings.

Law Professor Ronald Dworkin of NYU Law School and Oxford University discusses the definition of a fetus in his 1993 book, *Life's Dominion*, which analyzes the Supreme Court's abortion decisions in *Roe* and *Casey*.<sup>51</sup> He writes that one effect of these cases is that:

States have no power to overrule the *national* constitutional arrangement and if a fetus is not part of the constitutional population under that arrangement, states cannot make it one. The Supremacy Clause of the Constitution declares that the Constitution is the highest law of the land. If that means anything, it means that the rights the national Constitution guarantees individual American citizens cannot be repealed by the legislatures of the several states, either directly, by flat repealing legislation, or indirectly, by packing [adding to] the constitutional population....*An American state, then, has no constitutional power to declare a fetus a person or to protect fetal interests at the expense of its citizens' constitutional rights.*<sup>52</sup>

In 1981, during Congressional debate on a proposed "Human Life Bill," a dozen constitutional law scholars and six former United

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45. U.S. CONST. art. VI, § 2 (emphasis added).

46. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

47. 5 U.S. 137 (1803).

48. *Id.* at 177.

49. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

50. *Roe*, 410 U.S. at 153; see *Casey*, 505 U.S. at 845 (discussing the state's interest in "the fetus that may become a child").

51. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

52. *Id.* at 114-15 (emphasis added).

States Attorneys General, with diverse views on abortion, all agreed that Congress lacked the power to define a fetus as a person.<sup>53</sup> Their reasoning indicated that the states also lacked this power.<sup>54</sup>

Professor Laurence Tribe of Harvard Law School, another constitutional law scholar, testified that "the Supreme Court in *Roe* held a state powerless..." to enshrine a theory of life.<sup>55</sup> Professor Tribe explained that the Supreme Court in *Roe* "had no doubt whatever about the meaning of 'person' under the Constitution. They left no opening there... *What the Court was holding was that the State cannot impose its answer.*"<sup>56</sup> He further explained:

If one disagrees with that view, one is not disagreeing on a question of fact—What is the fetus? What is a human being?—but on a basic proposition of constitutional law. The only way to undo a proposition of constitutional law announced by the Court is by constitutional amendment, not by legislative redefinition of constitutional language.<sup>57</sup>

He cited *Marbury* to support his position.<sup>58</sup>

Professor William Van Alstyne of Duke University Law School said at these same hearings that:

The decision in *Roe v. Wade* is equally emphatic with regard to the meaning of the word "person" as it appears in the Fourteenth Amendment. The Reconstruction Congress did not have in mind and did not intend to include among the beneficiaries of section 1, zygotes, blastulas, embryos or fetuses.<sup>59</sup>

Professor Van Alstyne likewise referred to *Marbury* to show that this kind of legislation could not stand.<sup>60</sup>

The U.S. Supreme Court has indicated this interpretation of *Roe* is correct. In *Rosen v. Louisiana State Board of Medical Examiners*,<sup>61</sup> the Supreme Court affirmed by memorandum a U.S. District Court rul-

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53. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 248 (1981) [hereinafter *Hearings*] (Statement of Laurence H. Tribe). Among the constitutional law professors who signed the letter were Paul Brest, John Hart Ely, Paul A. Freund, Erwin N. Griswold, Louis Henkin, Philip B. Kurland, Louis B. Schwartz, Telford Taylor, Laurence H. Tribe, William Van Alstyne, Harry H. Wellington, and Charles Alan Wright. The U.S. Attorney General signees, who came from both parties, were Herbert Brownell, Jr., Nicholas Katzenbach, Ramsey Clark, Elliot L. Richardson, William B. Saxbe, and Benjamin R. Civiletti.

54. *Id.* at 249.

55. *Id.*

56. *Id.* at 299 (emphasis added).

57. *Id.* at 243.

58. *Hearings*, *supra* note 53, at 250.

59. *Hearings*, *supra* note 53 at 277 (statement of William Van Alstyne).

60. *Hearings*, *supra* note 53 at 280-81 (letter from William Van Alstyne).

61. 380 F. Supp. 875, 877 (E.D. La. 1974), *aff'd mem.*, 419 U.S. 1098 (1975).



ing stating:

State legislatures have...attempted to accord a purely statutory right to fetal life at the expense of abridging a woman's constitutionally protected right. Such legislation has been ruled unconstitutional. *A State cannot by legislative fiat, infringe upon an area which has been foreclosed by the United States Supreme Court from State interference.*<sup>62</sup>

Several other post-*Roe* U.S. Supreme Court decisions have rejected efforts to treat the fetus as a person. The Supreme Court in *Colautti v. Franklin*<sup>63</sup> found unconstitutional a Pennsylvania law which said that if the aborted fetus appeared to be viable, the doctor had to take the same actions necessary to preserve its life that would be required in the case of a fetus intended to be born alive. The Court said:

[N]either the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus.<sup>64</sup>

In *City of Akron v. Akron Center for Reproductive Health, Inc.*,<sup>65</sup> the Supreme Court rejected the constitutionality of an Akron, Ohio law which made physicians performing abortions criminally liable unless they “insure that the remains of the *unborn child* are disposed of in a *humane* and sanitary manner.”<sup>66</sup> The municipality required the fetus to be treated like a person, namely, to be buried in a “humane” manner. The Supreme Court found this “decent” and “humane” burial requirement, which existed even at the earliest stage of embryo formation, to be unacceptable under *Roe*, particularly since physicians who violated the provision could be held criminally liable.<sup>67</sup>

The Court in *Akron* also found unconstitutional Ohio's requirement that the doctor tell the woman “the unborn child is a human life from the moment of conception,” saying the requirement violated the *Roe* holding that “a State may not adopt one theory of when life begins to justify its regulation of abortions.”<sup>68</sup> The *Akron* Court

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62. *Rosen*, 380 F. Supp. at 877 (emphasis added).

63. 439 U.S. 379 (1979).

64. *Id.* at 388-89 (emphasis added).

65. 462 U.S. 416 (1983), *overruled on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

66. *Akron*, 462 U.S. 416, 424 (emphasis added).

67. *Id.* at 452 n.44 (distinguishing *Akron* from *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 573 (E.D. Pa. 1975), where the state characterized the legislative purpose of an Ohio law as simply “to preclude the needless dumping of aborted fetuses onto garbage piles”).

68. *Akron*, 462 U.S. 416, 444 (citing *Roe*, 410 U.S. at 159-62).

majority opinion said that the dissent "would uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential life....This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*."<sup>69</sup> Other lower federal courts have decided the Fourteenth Amendment does not permit states to enact legislation defining a fetus as a person.<sup>70</sup>

It is true that, unlike the cases discussed above, Senate Bill 515 has a medical procedure exemption, a self-defense exemption, and an exemption for the mother's actions.<sup>71</sup> The medical procedure exemption apparently is designed to avoid having the statute conflict with a woman's right to an abortion. According to this exemption, the medical procedure must be performed by a physician or other licensed medical professional at the mother's request or the request of her legal guardian.<sup>72</sup> It also applies to the lawful dispensation or administration of lawfully prescribed medication.<sup>73</sup> The self-defense exemption applies to any act committed in lawful self-defense or defense of another.<sup>74</sup>

These exemptions, however, do not avert the direct conflict between the federal definition of a person and the definition in Senate Bill 515. Moreover, these exemptions simply reflect a more subtle effort to gradually undermine *Roe* and *Casey* by developing a new body of law affording the fetus the same rights as a person. The gradual erosion of the *Roe* and *Casey* holdings that this statute would cause would just as certainly violate the Supremacy Clause as the

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69. *Id.* at 419 n.1. See also *Katzenbach v. Morgan*, 384 U.S. 641 n.10 (1966) (stating that Bill of Rights provisions such as the Equal Protection Clause of the Fourteenth Amendment by their "own force" prohibit certain state laws).

70. See, e.g., *Doe v. Israel*, 482 F.2d 156, 159 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (holding that the Rhode Island legislature lacks the power after *Roe* to "defin[e] some creature as an unborn child, to be a human being and a person from the moment of its conception"); *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975) (stating that "[s]ince the fetus is not a person....neither is it a 'child'"). But see *Webster v. Reproductive Health Services*, 492 U.S. 490, 491 (1989) (holding a statement in an anti-abortion statute's preamble that life begins at conception was constitutional because it simply "express[ed]....[a] value judgment" in the abstract). Senate Bill 515, however, would enact this value judgment as legislation and would therefore be unconstitutional.

71. S.B. 515 § 19(a)-(c).

72. S.B. 515 § 19(b).

73. *Id.*

74. S.B. 515 § 19(c).

statutes in the above cases.<sup>75</sup> The statement in *Casey* on the importance of *stare decisis* in the abortion area does not permit such efforts to undermine *Roe* and *Casey*.

#### IV. THE VAGUENESS AND OVERBREADTH CONCERNS WITH SENATE BILL 515

In *Kolendar v. Lawson*,<sup>76</sup> the U.S. Supreme Court ruled that a criminal law must provide adequate notice to the defendant and to the law enforcement authorities of the prohibited conduct.<sup>77</sup> The Fourteenth Amendment's Due Process Clause requires such notice to prevent arbitrary enforcement of the criminal laws.<sup>78</sup> In *Colautti*, the Court applied these principles to strike down a statute as vague that criminalized certain conduct connected to abortions.<sup>79</sup> Senate Bill 515 is unconstitutionally vague because its causation standard is indeterminate and because it has several sections which lack a meaningful intent requirement, similar to *Colautti*. This vagueness also makes it overbroad because it will likely be used to prosecute innocent people.

Senate Bill 515 permits the prosecution of individuals who injure or kill a fetus even if the fetus is only a few weeks old. Criminal convictions under virtually all sections of the statute are contingent on a determination as to whether a third party has "caused" an injury to the fetus or its death.<sup>80</sup> Yet, determining causation is difficult because, as one study on embryo mortality has reported: "[m]ore than sixty percent of all pregnancies end spontaneously, often before the woman is aware that she is pregnant."<sup>81</sup> Indeed, this figure covers the first twelve weeks of pregnancy according to reliable medical stud-

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75. See DWORKIN, *supra* note 51 at 113-16 (stating that defining a fetus as a person adds to the constitutionally protected populace and thus dilutes the woman's right to an abortion); cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (describing how the gradual recognition of new rights closely related to, and originating in, certain more fundamental rights can dilute those fundamental rights); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 486, 488 (1985) (arguing that creating new free speech rights will "undercut" society's commitment to the noble value of free speech). Similarly, affording a fetus the same rights as a person diminishes the value of that person's rights with regard to their right to abort a fetus.

76. 461 U.S. 352 (1983).

77. *Id.* at 357-58.

78. *Id.*

79. *Colautti*, 439 U.S. at 379 (1979).

80. S.B. 515 § 3.

81. Edmonds, *supra* note 9, at 451.

ies.<sup>82</sup> These spontaneous abortions can occur due to the woman's genetic makeup, environmental factors, developmental matters, and the effect of earlier abortions.<sup>83</sup>

The causation issue will, therefore, be highly debatable and hence vague in many cases because of the natural fragility of the fetus. The issue will be particularly difficult in instances where the miscarriage does not occur until several hours or days after the mother has contact with the defendant, since natural complications could have intervened.<sup>84</sup> Another problem is that some provisions, such as Section 11 of Senate Bill 515, criminalize conduct that causes "great bodily harm" to the fetus.<sup>85</sup> It is not clear, however, what it means to cause "great bodily harm" to a one-month-old embryo.

The vagueness of this bill is compounded by the lack of any clear intent requirement in several sections. In *Colautti*, the Supreme Court dealt with a vague criminal statute that required doctors who perform abortions to determine whether the fetus is or may be viable. The Court found the statute unconstitutional and stated:

This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*....Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than a "trap for those who act in good faith."<sup>86</sup>

Several recent federal court cases have relied on the lack of any meaningful *mens rea* (intent) requirement to strike down other abor-

82. Bicka A. Barlow, Comment, *Severe Penalties for the Destruction of "Potential Life"—Cruel and Unusual Punishment*, 29 U.S.F. L. REV. 463, 494 (1995). Examples of studies discussed by Barlow include D. Keith Edmonds, *Early Embryonic Mortality*, in HUMAN EMBRYONIC AND FETAL DEATH 1, 2 (Ian H. Porter & Ernest B. Hook eds., 1980); Sam Shapiro & Dean Bross, *Risk Factors for Fetal Death in Studies of Vital Statistics Data: Inference and Limitations*, in SPONTANEOUS AND RECURRENT ABORTION 89, 91 (Michael J. Bennett & D. Keith Edmonds eds., 1987).

83. *Id.* at 495. According to the author,

[a] serious question arises as to whether the defendant *actually causes* the death of such a young fetus, unless the mother dies at the same time.

Those states that criminalize the killing of a fetus from conception on, or from seven to eight weeks of age, are punishing a defendant for the death of a fetus during the window of time when the fetus has the highest probability of being spontaneously aborted. The application of *proximate cause* to fetal homicide in these jurisdictions is troublesome, especially in light of the scientific evidence that sixty-two percent of pregnancies will be aborted within the first twelve weeks of gestation.

*Id.* at 499-500 (emphasis added).

84. See *Connally v. General Constr.*, 269 U.S. 385, 391 (1926) (defining a law as vague where persons of "common intelligence must necessarily guess at its meaning and differ as to its application.") (emphasis added).

85. S.B. 515 § 11.

86. *Colautti*, 439 U.S. at 395 n.12.

tion-related regulations which contain criminal penalties.<sup>87</sup> The U.S. Supreme Court has emphasized the disfavored nature of strict liability criminal offenses outside the abortion context as well.<sup>88</sup>

Senate Bill 515, however, is virtually a strict liability criminal statute because it does not matter whether the wrongdoer knows a woman is pregnant. Virtually any injury to a fetus caused by a third party is prosecutable, including those resulting from ordinary vehicular accidents. Section 7 permits a person to be convicted of a felony and jailed for up to fifteen years for engaging in grossly negligent acts which result in the death of the fetus, even if the wrongdoer did not know a fetus existed. In Section 6, a person who assaults a pregnant woman (e.g., places her in reasonable fear of harm through threat of force or violence), but does not physically injure her in any way or know she is pregnant, may be subjected to a fifteen year felony jail sentence if the person's actions somehow cause the "unborn child" to die.<sup>89</sup>

Senate Bill 515, therefore, violates the constitutional presumption that a criminal statute should at least require the prosecution to prove the defendant acted with knowledge the woman was pregnant.<sup>90</sup> The vagueness of the causation requirement, the lack of any meaningful intent requirement in several sections, and the excessive penalties in this statute make it unconstitutionally vague.

A criminal law is overbroad if it permits the conviction of a substantial number of people who have not engaged in any criminal activity.<sup>91</sup> Because of its vagueness concerning causation, Senate Bill 515 allows prosecutors to prosecute defendants who did not proximately cause any injury to the fetus.

Senate Bill 515's overbreadth problem is illustrated in Section 18 which states: "In a prosecution for an alleged violation of this act, evidence proving that the mother of the unborn child was pregnant prior to the time of the alleged violation shall give rise to a *rebuttable*

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87. See, e.g., *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1463-67 (8th Cir. 1995) (holding that a strict criminal liability statute would have a chilling effect on willingness of physicians to perform abortions); *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051, 1081-87 (S.D. Ohio 1995) (holding that the lack of *mens rea* requirement in a statute which imposes criminal liability may indicate the statute is unconstitutionally vague).

88. See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 437-38 (1978) (holding that intent is an element of a criminal antitrust offense).

89. S.B. 515 § 6.

90. See generally *Gypsum*, 438 U.S. at 444.

91. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding that a statute that makes it illegal for people to gather at a street corner and engage in conduct that is "annoying" to passersby is overbroad because its vagueness gives law enforcement authorities unfettered discretion to apply it to people who have done nothing illegal).

*presumption* that the unborn child was alive at the time of the alleged violation.<sup>92</sup> This section allows a prosecutor to obtain a guilty verdict in cases without proving the defendant's acts proximately caused the fetus' death. Instead, it requires the defendant to prove the fetus died as a natural complication of the pregnancy. Section 18, therefore, converts the constitutional presumption of innocence into an unconstitutional presumption of guilt.<sup>93</sup> Innocent people will be jailed if this bill becomes law, and it will not survive constitutional scrutiny.

## V. THE PUBLIC POLICY CONSIDERATIONS.

An example can best illustrate why Senate Bill 515 is bad public policy. Imagine a twenty-one-year-old Michigan State University student who has a lot of alcohol to drink at a private party. He is legally entitled to drink alcohol. Afterwards, he decides to sober up by walking to the 7-Eleven for coffee. He pushes open the door, and it accidentally strikes a woman, standing by the cash register, in the abdomen. She is a few weeks pregnant, but does not know it. She is a bit shaken up but otherwise feels fine. A few hours later, however, she has a miscarriage, which doctors conclude may have been caused by the door striking her abdomen. The twenty-one-year-old could be prosecuted for violating Section 7 of Senate Bill 515 because that provision only requires gross negligence. If convicted, he would be guilty of a felony punishable by up to fifteen years in prison. This punishment scheme is cruel and arbitrary.

This example highlights several problems. If the law's goal is to protect a fetus or to protect a woman's right to carry her pregnancy to term, that goal cannot be fulfilled if it permits the prosecution of individuals who accidentally injure a woman without any knowledge that she is pregnant.

Moreover, a seven-week-old fetus is undeveloped, and roughly the size and weight of a peanut. Severe criminal penalties, such as life imprisonment or fifteen to twenty-five years in jail, are cruel and cannot be justified simply because a person accidentally causes an injury to, or the death of, such an undeveloped and fragile entity. Such penalties for abortions were certainly not in existence when the

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92. S.B. 515 § 18 (emphasis added).

93. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 697 (1975) (finding that the state cannot make the defendant prove the absence of an element of the crime); *Morrisette v. United States*, 342 U.S. 246, 275 (1951) (holding criminal intent is an essential element of a crime).

Fourteenth Amendment was adopted.<sup>94</sup>

Adoption of Senate Bill 515 will also waste Michigan taxpayers' monies because of the need to defend the statute from the inevitable constitutional challenges that it will face in court. Senate Bill 515 is especially wasteful because any real interests the State has can be satisfied by adopting the Baird alternative, which will likely not face a court challenge. These problems with Senate Bill 515 show why legislators motivated by religious or political goals cannot make a non-partisan determination of when life begins.

It is perhaps for these reasons that most states do not have laws that define the fetus as a person from the moment of conception, and do not criminalize such a wide range of conduct directed at the fetus.<sup>95</sup> Two states that have similar statutes are Minnesota and Illinois. Neither statute, however, is as broad as the one proposed here.<sup>96</sup> The Illinois criminal statute, for example, has an intent requirement.<sup>97</sup> Although courts in those states have upheld their narrower statutes from constitutional attacks, they have not addressed the specific constitutional arguments raised here. It simply does not make sense for a state to have a strict liability criminal statute for accidentally injuring a pre-viable fetus.

## VI. THE ABSENCE OF CONSTITUTIONAL PROBLEMS WITH THE BAIRD BILL

The Baird alternative avoids these constitutional problems. It requires that the pregnant woman, and not just the fetus, be physically injured. The State certainly has a compelling interest in criminalizing such conduct. The Baird Alternative avoids Supremacy Clause problems by not defining the fetus as a person, and it does not impose any presumption of guilt on defendants. The Baird Bill is also not vague or overbroad since its intent requirement states that the

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94. *See, e.g., Roe*, 410 U.S. at 138 (noting that after the Civil War, the states began to outlaw abortion but the criminal sanctions were "lenient" before quickening, referring to the point when a woman is "quick with child.").

95. The dissenting opinion in *People v. Davis*, 872 P.2d 591, 620-23 (Cal. 1994), contains a detailed survey of which states have criminal laws prohibiting the injury or killing of a fetus, and describes the scope of these laws. It shows that few states have criminal laws as broad as Senate Bill 515.

96. *See, e.g., MINN. STAT. ANN.* § 609.21 (West 1996) (making it a crime to cause death or injury to an unborn child as a result of operating a motor vehicle "in a grossly negligent manner; in a negligent manner while under the influence of alcohol, a controlled substance, or any combination of those elements; while having an alcohol concentration of 0.10 or more, as measured within two hours of the time of driving").

97. *ILL. ANN. STAT.* ch. 720 § 5, para. 9-1.2 (Smith Hurd 1996) (defining intentional homicide of an unborn child as the infliction of death or great bodily harm to a pregnant woman or her unborn child and exempting consensual abortion as such).

defendant must know of the pregnancy beforehand.

### CONCLUSION

At first glance, Senate Bill 515 may look like a reasonable attempt to protect a woman's interest in seeing her pregnancy go to term. A closer examination, however, reveals that it is a transparent attempt to treat the fetus as a legal person. Such a law violates the Constitution's Supremacy Clause. Its vagueness and overbreadth ultimately undermines a woman's right to an abortion. Thus, Senate Bill 515 should be rejected and the Baird alternative embraced. The Baird alternative protects the legitimate interests of the woman and the fetus in avoiding injury, without unnecessarily pretending that the fetus is a person.



## APPENDIX A

*Senate Bill 515*

A bill to define certain crimes against prenatal children; to define and allow certain practices; and to prescribe certain penalties.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as "The Prenatal Protection Act."

Sec. 2. As used in this act, "unborn child" means the live unborn offspring of a human being at any time or stage of development from conception until birth.

Sec. 3. (1) Except as otherwise provided in this act, a person who maliciously causes the death of an unborn child by any assault, infliction of injury, or any other means or action upon the mother, is guilty of a felony punishable by imprisonment for life or any term of years.

(2) As used in this section, "maliciously" means any of the following:

(a) With the intent to cause the death of the unborn child, the unborn child's mother, or another person.

(b) With the intent to cause great bodily harm to the unborn child, the unborn child's mother, or another person.

(c) In willful or reckless disregard of the likelihood that the natural tendency of the assault, infliction of injury, or other action taken will be to cause the death of, or great bodily harm to, the unborn child, the unborn child's mother, or another person.

Sec. 4. A person who causes the death of an unborn child in violation of section 3 is guilty of a felony and shall be punished by imprisonment for life or any term of years but not less than 25 years if the assault, infliction of injury, or other action causing the death of the unborn child is committed with a premeditated intent to cause the death of the unborn child, the unborn child's mother, or another person.

Sec. 5. (1) A person who causes the death of an unborn child in violation of section 3 is guilty of a felony and shall be punished by imprisonment for life or any term of years but not less than 25 years if the assault, infliction of injury, or other action causing the death of the unborn child is committed in the perpetration or attempted perpetration of a criminal offense involving arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first

degree, a major controlled substance offense, robbery, home invasion, larceny of any kind, extortion, or kidnapping.

(2) As used in this section:

(a) "Arson" means any felony violation of Chapter X of the penal code, Act No. 328 of the Public Acts of 1931.

(b) "Major controlled substance offense" means any of the following:

(i) a violation of section 7401(2)(a)(i) to (iii) of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7403 of the Michigan Compiled Laws.

(ii) a violation of section 7403(2)(a)(i) to (iii) of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7403 of the Michigan Compiled Laws.

(iii) a conspiracy to commit an offense listed in subdivision (i) or (ii).

Sec. 6. Except as otherwise provided in this act, a person who causes the death of an unborn child by any assault or intentional infliction of injury upon the mother of the unborn child is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$7,500, or both.

Sec. 7. Except as otherwise provided in this act, a person who commits a grossly negligent act that is a direct and substantial cause of the death of an unborn child is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$7,500, or both.

Sec. 8. A person who assaults or inflicts an injury upon a woman, known by that person to be pregnant, with the intent to cause the death of the woman's unborn child is guilty of a felony punishable by imprisonment for life or any term of years.

Sec. 9. A person who assaults or inflicts an injury upon a woman, known by that person to be pregnant, with the intent to cause great bodily harm to the woman's unborn child is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$5,000, or both.

Sec. 10. Except as otherwise provided in this act, a person who causes an aggravated injury to an unborn child by any assault or intentional infliction of injury upon the mother of the unborn child is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000, or both.

Sec. 11. A person who drives any vehicle upon a highway carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed

or in a manner so as to endanger or be likely to endanger any person or property and thereby causing great bodily harm to an unborn child, but not causing death, is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000, or both.

Sec. 12. A person who, by the operation of any vehicle upon any highway or upon any other property, public or private, at an immoderate rate of speed or in a careless, reckless or negligent manner, but not willfully or wantonly, shall cause the death of an unborn child is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000, or both.

Sec. 13. A person who operates a vehicle in violation of section 625(1) or (3) of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625 of the Michigan Compiled Laws, and causes the death of an an unborn child is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500 or more than \$10,000, or both.

Sec. 14. A person who operates a vehicle in violation of section 625(1) or (3) of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625 of the Michigan Compiled Laws, and causes great bodily harm to an unborn child is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than \$1,000 or more than \$5,000, or both.

Sec. 15. A person who operates a vessel on the waters of this state in violation of section 80176 of Part 801 (marine safety) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.80176 of the Michigan Compiled Laws, and causes the death of an unborn child is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500 or not more than \$10,000, or both.

Sec. 16. A person who operates a vessel on the waters of this state in violation of section 80176 of Part 801 (marine safety) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.80176 of the Michigan Compiled Laws, and causes great bodily harm to an unborn child is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than \$1,000 or not more than \$5,000, or both.

Sec. 17. In a prosecution of a violation of this act committed during the first trimester of pregnancy, the prosecutor shall be required to prove the existence of the unborn child by admissible evidence of a laboratory analysis or by testimony of a physician or other licensed medical professional.

Sec. 18. In a prosecution for an alleged violation of this act, evidence providing that the mother of the unborn child was pregnant prior to the time of the alleged violation shall give rise to a rebuttable presumption that the unborn child was alive at the time of the alleged violation.

Sec. 19. This act does not apply to any of the following:

(a) An act committed by the mother of an unborn child.

(b) A medical procedure performed by a physician or other licensed medical professional at the request of a mother of an unborn child or the mother's legal guardian or the lawful dispensation or administration of lawfully prescribed medication.

(c) An act committed in lawful self-defense or defense of another, or which is otherwise legally justified or excused.

Sec. 20. The imposition of a criminal penalty for a violation of this act does not preclude the prosecution and sentencing of a person for any other applicable criminal violations.

Sec. 21. This act shall take effect May 1, 1996.

## APPENDIX B

### *The Baird Alternative*

Substitute for House Bill No. 5531

A bill to amend act No. 328 of the Public Acts of 1931, entitled as amended "The Michigan Penal Code," as amended, being sections 750.1 to 750.568 of the Michigan Compiled Laws, by adding section 90(a).

#### THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 328 of the Public Acts of 1931, as amended, being sections 750.1 to 750.568 of the Michigan Compiled Laws, is amended by adding section 90(a) to read as follows:

SEC. 90A.(1) If a person knows or has reason to know that a woman is pregnant and physically injures that woman by committing or attempting to commit a crime and that injury results in a miscarriage or serious physical injury to the fetus, the person is guilty of a felony and shall be imprisoned for not more than 10 years.

(2) The mandatory term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the underlying crime or attempt to commit the crime. The court

may impose the term of imprisonment prescribed by this section to be served consecutively with and preceding any term of imprisonment imposed for the conviction of the underlying crime or attempt to commit the crime.

(3) In a prosecution for a violation of this section committed during the first trimester of pregnancy, the prosecuting attorney shall prove the existence of the pregnancy by evidence of a laboratory analysis and by testimony of a physician or other licensed medical professional.

(4) This section does not apply to an act committed by the pregnant woman.

(5) This section does not apply to performing a lawful abortion.

(6) As used in this section:

(a) "Person" means an individual, partnership, association, limited liability company, corporation, or other entity. Person does not include a governmental entity.

(b) "Serious physical injury to the fetus" means an injury to the fetus' physical condition that results in or is likely to result in substantial bodily disfigurement to or seriously impairs the function of a body organ or limb of the child that develops from the fetus.

