

Article 119a: Does It Protect Pregnant Women or Target Them?

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The “Unborn Victims of Violence Act” is a sham, designed . . . to promote an agenda by which women will in fact lose control of their bodies to the state.¹

I. Introduction

On 1 April 2004, President George W. Bush signed into law the Unborn Victims of Violence Act of 2004 (UVVA).² The UVVA amended the Uniform Code of Military Justice (UCMJ) by adding Article 119a, the offense of death or injury of an unborn child.³ Under this article, any person who, while engaging in certain predicate illegal behavior,⁴ either intentionally or unintentionally harms or kills an unborn child is criminally responsible for the unborn child’s death.⁵ Article 119a exempts three specific types of people from prosecution: anyone involved in a consensual abortion, anyone involved in medical treatment of the pregnant woman or unborn child, and the mother of the unborn child.⁶ The pronounced legislative intent behind this amendment is to protect pregnant women and their unborn children equally.⁷

However, opponents of the UVVA believe that its hidden agenda is to expand fetal rights so drastically that they begin to override the rights of a pregnant woman⁸ recognized by the U.S. Supreme Court in *Roe v. Wade*.⁹ In military criminal law, this amendment will cause the exact dramatic expansion of fetal rights feared by the UVVA’s opponents. In fact, Article 119a will eventually compel commanders to criminally charge pregnant Soldiers for legal prenatal conduct, will inappropriately propel the military into the nation’s abortion debate, and may inadvertently lead to increased harm and death of unborn children.

This article will begin by describing the evolution of fetal rights in military criminal law before the addition of Article 119a. Next, this article will detail the legislative history and intent behind the UVVA and its amendment to the UCMJ. This article will then demonstrate how the state of South Carolina, in order to be equitable and consistent, has used its feticide law¹⁰ to expand fetal rights and allow for the prosecution of pregnant women for their prenatal conduct. This article will then layout the dilemma military commanders will face when attempting to charge their servicemembers equitably and consistently under Article 119a. Next, it will argue that this dilemma will compel commanders to follow South Carolina’s

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¹ 150 CONG. REC. H650 (daily ed. Feb. 26, 2004) (letter from Carolyn Ratner, Senior Legislative Representative, Nat’l Council of Jewish Women).

² Unborn Victims of Violence Act of 2004, 18 U.S.C.S. § 1841 (LexisNexis 2008).

³ See *id.*; UCMJ art. 119a (2008).

⁴ See UCMJ art. 119a. The predicate crimes under this article are murder, manslaughter, rape, sexual assault, robbery, maiming, arson, and assault and can be found at UCMJ articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128, as well as, 10 U.S.C.S. §§ 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 (LexisNexis 2008).

⁵ See *id.*

⁶ See *id.*

⁷ See 150 CONG. REC. S3132 (daily ed. Mar. 25, 2004) (statement of Sen. Dewine, Ohio, sponsor of H.R. 1997, Unborn Victims of Violence Act of 2004).

⁸ See, e.g., 150 CONG. REC. S3131 (2004) (statement of Sen. Dianne Feinstein, Cal., sponsor of the Motherhood Protection Act, an alternative to the Unborn Victims of Violence Act, which rather than recognizing a fetus as a victim, proposed increased punishments for individuals who engage in certain conduct causing the early termination of a pregnancy).

⁹ 410 U.S. 113 (1973) (ruling that the right to privacy encompasses a woman’s decision to terminate her pregnancy and that an unborn child is not a person under the Constitution).

¹⁰ The terms “fetal homicide laws” and “feticide laws” are generic terms for state laws which essentially mirror the protections afforded unborn children in the UVVA. Nat’l Conf. of State Legislatures, *Fetal Homicide*, available at <http://www.ncsl.org/programs/health/fethom.htm> (last visited Mar. 12, 2008) [hereinafter *Fetal Homicide Laws*]; Thomas W. Strahan, *Legal Protection of the Unborn Child Outside the Context of Induced Abortion*, 11 A.I.R.V.S.C. 1 (Mar./Apr. 1997), available at http://www.lifeissues.net/writers/air/air_voll1no1_1997.html.

lead in expanding fetal rights and charging pregnant women for their prenatal conduct. Finally, this article will explore the problems that will stem from expanding fetal rights and prosecuting pregnant women for their prenatal conduct in the military.

A. Fetal Rights in Military Criminal Law: Before Article 119a

There were no codified protections for unborn children in the UCMJ prior to the UVVA. Only babies who were “born alive”¹¹ prior to an offense could be considered victims of a crime. Case law demonstrates, however, that even before the creation of Article 119a, military courts were amenable to acknowledging fetal rights. First, the courts showed a willingness to extend the born alive rule to include viable fetuses. Then, in 1999, a military court went a step further and assimilated a state feticide law to prosecute a servicemember for killing an unborn child.¹²

1. Born Alive Rule

The born alive rule is a common law rule that can be traced back to seventeenth century England. Sir Edward Coke, who was appointed Lord Chief Justice of the King’s bench in 1613, stated,

If a woman be quick with childe, and by a potion or otherwise *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 misprision, and not murder; but if the childe be *born alive* and dieth of the potion, battery, or other cause, this is murder.¹³

Under this rule, a person could be prosecuted for harm done to an unborn child only if that child was born alive prior to dying or exhibiting injury.

For example, in *Williams v. State*, a defendant was convicted of manslaughter for unintentionally shooting an arrow through the stomach of a woman who was nine months pregnant.¹⁴ This conviction was made possible under the born alive rule, only because the child lived for seventeen hours following an emergency cesarean section.¹⁵ In *Jones v. Commonwealth*, the defendant drove while intoxicated and his vehicle collided with a pregnant woman’s vehicle.¹⁶ Jones was convicted of second degree manslaughter when the woman’s child, delivered by Cesarean section, died fourteen hours later from injuries sustained during the collision.¹⁷ Finally, in *State v. Ashley*, a woman who was twenty-six weeks pregnant shot herself in the abdomen through a pillow.¹⁸ The bullet went through the fetus’ wrist and the baby was born by Cesarean section.¹⁹ The baby then died fifteen days later and the defendant was convicted of manslaughter and third-degree felony murder.²⁰ Like these state courts, military courts also applied the common law born alive rule.

2. Military Application of the Born Alive Rule

The born alive rule was first applied in a military courtroom in 1954. In *United States v. Gibson*,²¹ the U.S. Air Force Board of Review (AFBR) thoroughly analyzed and defined the born alive rule as it should be applied in the Air Force.²² In

¹¹ See *United States v. Gibson*, 17 C.M.R. 911 (A.F.B.R. 1954); *United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000).

¹² See *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999).

¹³ *Williams v. State*, 561 A.2d 216, 218 (Md. 1989) (quoting 3 COKE, INSTITUTES 50 (1648)).

¹⁴ *Id.* at 217.

¹⁵ See *id.*

¹⁶ 830 S.W.2d 877, 878 (Ky. 1992).

¹⁷ *Id.*

¹⁸ 670 So. 2d 1087, 1088–89 (Fla. Dist. Ct. App. 1996).

¹⁹ *Id.* at 1089.

²⁰ *Id.*

²¹ 17 C.M.R. 911 (A.F.B.R. 1954).

²² See *id.*

this case, First Lieutenant (1LT) Gibson, an Air Force nurse, kept her pregnancy a secret and then strangled her daughter with a pajama top immediately following her birth.²³ The AFBR determined that 1LT Gibson's daughter was born alive prior to being murdered and was therefore a proper victim under Article 118 of the UCMJ.²⁴

The AFBR examined two different state court interpretations of the born alive rule in search of the version to be applied in the Air Force.²⁵ First, they looked at the more liberal standard applied by a California appellate court in *People v. Chavez*.²⁶ The California appellate court's interpretation was that a baby begins its "independent existence after it has reached a state of development where it is capable of living and where it will, in the normal course of nature and with ordinary care, continue to live and grow as a separate being."²⁷ Then, the AFBR reviewed the interpretation of the New York Appeals Court in *People v. Hayner*.²⁸ The New York Appeals Court's view, more in line with early common law, was that a baby was born alive if it could carry "on its being without the help of the mother's circulation."²⁹ The AFBR in *Gibson* acknowledged that the more liberal approach could become applicable in military law.³⁰ However, they chose to adopt the New York court's conservative interpretation. Using this standard, the AFBR determined that 1LT Gibson's daughter was born alive before she was strangled.³¹

In making its determination, the AFBR considered two pieces of evidence that supported a conclusion that the baby took breaths on her own prior to dying. First, the doctor who performed the autopsy put the baby's lungs in water and discovered that they floated, signifying that they were filled with oxygen.³² Second, a witness testified that she heard a baby crying in 1LT Gibson's room.³³ Though the AFBR specifically recognized that there was no evidence showing that the umbilical cord was severed prior to the baby's death, it determined that the modern common law doctrine of born alive does not require that the umbilical cord be severed.³⁴

The born alive rule did not find its way back into a military courtroom again for another four decades. In *United States v. Nelson*,³⁵ Navy Hull Maintenance Technician Third Class (HT3) Nelson concealed her pregnancy while serving on a ship.³⁶ One evening, while her shipmates were ashore, she delivered a baby girl.³⁷ Without tending to her daughter, HT3 Nelson immediately wrapped her in the sheets used during labor and put her in a plastic bag with holes punched in it.³⁸ She then left the ship with her baby and twelve hours later carried her to a hospital.³⁹ Upon removing the baby from the plastic

²³ *Id.* at 917.

²⁴ *Id.* at 927. Article 118 of the UCMJ provides that murder is the unlawful killing of a "human being." UCMJ art. 118 (2008). The Air Force board in *Gibson* determined that because the child was born alive the baby was a "human being" under Article 118. *Gibson*, 17 C.M.R. at 927.

²⁵ *Gibson*, 17 C.M.R. at 924–27.

²⁶ 176 P.2d 92 (Cal. 1947).

²⁷ *Gibson*, 17 C.M.R. at 925 (quoting *Chavez*, 176 P.2d at 94).

²⁸ 90 N.E.2d 23 (N.Y. 1949).

²⁹ *Id.* at 24 (quoting 1 RUSSELL ON CRIME 349 (9th ed. n.d.)).

³⁰ The board stated that it did "not reject as unsound, or as inapplicable in military law, the more liberal and 'enlightened' version expressed in . . . *People v. Chavez* . . ." *Gibson*, 17 C.M.R. at 926.

³¹ *Id.* at 927.

³² *Id.*

³³ *Id.* at 917.

³⁴ The board cited Halsbury's Laws of England as the modern common law view:

A child is not considered in law to be completely born, so as to be the subject of a charge of murder or manslaughter until the whole body of the child is brought alive into the world having an **independent** circulation, and breathing or capable of breathing, from its own lungs, so that it possesses, or is capable of, an existence **independent** of connection with its mother. But the child may be completely born although the umbilical cord be not severed.

Id. at 924 (quoting 9 HALSBURY'S LAWS OF ENGLAND 427 (2d ed. 1937)).

³⁵ 53 M.J. 319 (C.A.A.F. 2000).

³⁶ *Id.* at 322.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

bag, the hospital personnel discovered that the baby was dead.⁴⁰ Nelson was convicted of involuntary manslaughter due to negligently delivering her baby without medical assistance and not providing assistance to the child following the delivery.⁴¹

Unlike in *Gibson*, there was no evidence that HT3 Nelson's baby cried prior to her death.⁴² Further, a doctor placed the baby's lungs in water and discovered that they did not float, therefore, they were not filled with oxygen.⁴³ However, HT3 Nelson testified that while her child did not cry, she did let out a small whimper following delivery.⁴⁴ Further, HT3 Nelson admitted that her newborn daughter was alive immediately before she arrived at the hospital.⁴⁵

To convict HT3 Nelson, the panel had to find that her newborn daughter fit the definition of a "human being" under Article 119(a) of the UCMJ, involuntary manslaughter.⁴⁶ While the defense did not argue that this child was not born alive, the judge gave an instruction to the panel which specifically cited *Gibson's* legal definition of born alive.⁴⁷

The Air Force Court of Criminal Appeals (AFCCA) affirmed the trial court, but replaced the *Gibson's* born alive test with a new "viability outside the womb" standard.⁴⁸ This new standard stated that when an infant is fully expelled from the mother and no longer needs her circulatory system to live, that infant will be considered born alive.⁴⁹ The AFCCA further explained that under this standard, "an infant need not be breathing at the time it is fully expelled from its mother so long as it 'shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles'"⁵⁰ Finally, the AFCCA found that "[i]n making this determination, as recognized by the *Gibson* court, it is also appropriate to consider current medical technology."⁵¹

When this case found its way to the Court of Appeals for the Armed Forces (CAAF), the court reverted back to the *Gibson* born alive standard. The CAAF reasoned that, "*Gibson* has been the sole authoritative voice in military jurisprudence on this issue for nearly a half century."⁵² The CAAF went on to state, "We agree, and note that *Gibson's* application of *Hayner* continues to offer flexibility to accommodate advancements in medicine and science that inevitably affect the reality of what it means to be 'born alive.'"⁵³

In 2003, the CAAF faced similar facts to those presented in both *Gibson* and *Nelson*. In *United States v. Riley (Riley II)*,⁵⁴ Airman (Amn) Riley ignored her pregnancy until she was full term and was experiencing cramps.⁵⁵ She went to a hospital and falsely complained that her back hurt from racquetball.⁵⁶ A doctor provided Amn Riley some pain medicine.⁵⁷ As she waited to be discharged, she doubled over in pain.⁵⁸ A doctor then drew blood to test for pregnancy.⁵⁹ While she

⁴⁰ *Id.*

⁴¹ *Id.* at 322–23, 325.

⁴² *Id.* at 322.

⁴³ *Id.* at 322–23.

⁴⁴ *Id.* at 322.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 324.

⁴⁸ *Id.*

⁴⁹ *Id.* at 323.

⁵⁰ *Id.* (quoting BLACK'S LAW DICTIONARY 184 (7th ed. 1999)).

⁵¹ *Id.* (quoting *United States v. Nelson*, 52 M.J. 516, 521 (N-M. Ct. Crim. App. 1999)).

⁵² *Id.* at 323.

⁵³ *Id.* at 324.

⁵⁴ 58 M.J. 305 (C.A.A.F. 2003).

⁵⁵ *Id.* at 306.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

waited for the results, Amn Riley went into the bathroom alone.⁶⁰ Hearing moaning from behind the bathroom door, emergency room technicians knocked on the door twice.⁶¹ Both times, Amn Riley dismissed the technicians stating that she would be out shortly.⁶² While in the bathroom, Amn Riley delivered the baby in a squat position so explosively that the baby hit the hard floor and fractured her skull.⁶³ The baby died instantly.⁶⁴ The baby's status in *Riley* seemed to present the greatest challenge under the born alive rule. However, the courts in this case chose to ignore the born alive rule stating that it was an undisputed fact that the baby was born alive.⁶⁵

The born alive line of cases demonstrates that even prior to the existence of Article 119a, military courts began eroding this rule, treating it as antiquated. In *Gibson*, while the AFBR cited witness testimony and medical evidence to prove that the baby took breaths prior to dying as support for their determination that the child was born alive, they held that the born alive doctrine does not require that the umbilical cord be severed.⁶⁶ Then, even without this witness testimony and medical evidence, the trial court in *Nelson* decided that the baby was born alive and the AFCCA attempted to redefine the born alive doctrine to include viable fetuses.⁶⁷ Finally, despite the lack of evidence supporting a determination that the baby was born alive prior to her death in *Riley*, the CAAF chose to accept this as an undisputed fact and conduct no analysis.⁶⁸ Prior to Article 119a, the born alive rule was never discarded. Over time, however, military courts applied the rule with more flexibility.

3. Assimilation of a State Feticide Law

In 1999, a military court went a step further and for the first time recognized an unborn child as an individual by assimilating a state feticide law.⁶⁹ Prior to the signing of the UVVA, approximately thirty-five states enacted their own feticide laws to protect unborn children.⁷⁰ This provided certain commanders⁷¹ the ability to use clause three of Article 134⁷² and the Assimilative Crimes Act (ACA)⁷³ to charge military offenders with a state feticide law. The case of *United States v. Robbins*⁷⁴ represents the first and only case to assimilate a state feticide law.

Air Force Amn Robbins assaulted his wife, who was thirty-four weeks pregnant.⁷⁵ Not only did Amn Robbins break his wife's nose and blacken her eye, but he hit her body so hard that her uterus ruptured and the placenta tore away from the uterine wall.⁷⁶ This caused the unborn child to die before birth.⁷⁷ The command, unable to charge Robbins with murder

⁶⁰ *Id.* at 307.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *United States v. Riley (Riley I)*, 47 M.J. 603, 607 (A.F. Ct. Crim. App. 1997).

⁶⁶ See *supra* notes 32–34 and accompanying text.

⁶⁷ See *supra* notes 42–51 and accompanying text.

⁶⁸ See *supra* note 65 and accompanying text.

⁶⁹ *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999) (convicting an Air Force Airman of violating Ohio's feticide law).

⁷⁰ The states that currently have feticide laws include: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. See *Fetal Homicide Laws*, *supra* note 10; Nat'l Right to Life Comm., *State Homicide Laws that Recognize Unborn Victims*, June 25, 2008, available at http://www.nrlc.org/Unborn_victims/Statehomicidelaws092302.html.

⁷¹ Only "certain commanders" could charge their Soldiers with these laws because only some states had these laws. Therefore, if no local state feticide law had been enacted or if the conduct did not occur within an area of exclusive federal or concurrent jurisdiction, the ACA would not permit such a charge. See 18 U.S.C. 13 (2000).

⁷² MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60 (2008) [hereinafter MCM].

⁷³ 18 U.S.C. 13.

⁷⁴ 52 M.J. 159.

⁷⁵ *Id.* at 160.

⁷⁶ *Id.*

⁷⁷ *Id.*

since the child was not born alive, assimilated the Ohio feticide law.⁷⁸ Airman Robbins pled guilty and was convicted of this offense.⁷⁹

On appeal, Amn Robbins argued that the preemption doctrine⁸⁰ prohibited this prosecution.⁸¹ Airman Robbins pointed to the fact that the Ohio feticide law was a part of Ohio's involuntary manslaughter statute.⁸² He then argued that Articles 118 and 119 of the UCMJ, murder and manslaughter, comprehensively covered this class of offenses and served to preempt the assimilated Ohio involuntary manslaughter statute.⁸³ The CAAF affirmed the conviction, stating, "The Ohio statute does not conflict with congressional intent to preempt the field. To the contrary, legislation regarding termination of pregnancy is an area traditionally left to the states."⁸⁴ The CAAF further stated that this assimilated offense was distinct from homicide because a homicide victim must be born alive.⁸⁵ Therefore, the CAAF reasoned that the Ohio feticide law filled a gap in criminal law and was properly assimilated.⁸⁶

Robbins represents the first time, prior to the addition of Article 119a, that a military court recognized an unborn child as an individual victim. While the military courts in *Nelson* and *Riley* indicated a willingness to accept a liberal definition of born alive, they never went as far as to acknowledge fetal rights. Through *Robbins*, military courts announced, for the first time, their readiness to grant fetal rights.

B. Fetal Rights in Military Criminal Law: After Article 119a

The UVVA and Article 119a define an unborn child as "a child in utero."⁸⁷ They further define a child in utero as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."⁸⁸ This marks the first time that the federal government has recognized the rights of an unborn child in criminal law.⁸⁹ Although Article 119a has been in existence for almost three years, a military court has yet to convict an individual of violating Article 119a.⁹⁰

II. The Unborn Victims of Violence Act and Its Amendment to the UCMJ

A. Legislative History

Congress enacted the UVVA, also called the Laci and Connor's Law,⁹¹ five years after its origination. Congressman Lindsey Graham from South Carolina, currently a Senator and a colonel in the Air Force Reserve Judge Advocate General's

⁷⁸ *Id.*

⁷⁹ *Id.* at 159.

⁸⁰ The preemption doctrine precludes the use of Article 134 to charge an offense already specifically covered in Articles 80 to 132, UCMJ. MCM, *supra* note 72, pt. IV, ¶ 60c(5)(a).

⁸¹ *Robbins*, 52 M.J. at 160.

⁸² *Id.*

⁸³ *Id.* at 162–63.

⁸⁴ *Id.* at 163.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Unborn Victims of Violence Act of 2004, 18 U.S.C.S. § 1841 (LexisNexis 2008); UCMJ art. 119a (2008).

⁸⁸ 18 U.S.C.S. § 1841; UCMJ art. 119a.

⁸⁹ 145 CONG. REC. 23,362 (1999) (statement from Congresswoman Jackson-Lee, Tex.).

⁹⁰ At least one commander has charged a Soldier with a violation of Article 119a. In 2006, at Fort Hood, Texas, a commander charged an officer named Major (MAJ) Marcel Thompson with a violation of Article 119a. E-mail from Major Deirdre Brou, Trial Counsel, Judge Advocate General's Corps, to Major Kirsten M. Dowdy (13 Mar. 2008, 22:32 EST) (on file with author). The commander accused MAJ Thompson of killing an unborn child by placing aspirin powder, Cytotec or some other unknown substance in the vagina of his pregnant girlfriend, causing her to miscarry. *Id.* In addition to the Article 119a charge, the commander charged MAJ Thompson with violating Article 128, Assault and Article 134, Adultery and Obstruction of Justice. *Id.* The trial judge sitting on this case was COL Theodore Dixon. *Id.* A military panel convicted MAJ Thompson of violating Article 134, Adultery and Obstruction of Justice. *Id.* However, the panel found MAJ Thompson not guilty of violating Article 119a and Article 128, Assault. *Id.*

⁹¹ This federal act was named after Laci and Connor Peterson. Laci and her unborn child, Connor were both killed by their husband and father, Scott Peterson. Press Release, President Bush Signs Unborn Victims of Violence Act of 2004 (Apr. 1, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/04/20040401-3.html>. When signing the Act, President Bush stated,

Corps,⁹² first introduced⁹³ this controversial bill in the House of Representatives as the Unborn Victims of Violence Act of 1999 (1999 UVVA).⁹⁴ The House of Representatives then referred the bill to the Judiciary Committee's Subcommittee on the Constitution.⁹⁵ As one of several opponents of the bill, Congresswoman Jackson-Lee from Texas stated,

[T]his particular legislation, Mr. Speaker, finds many of us at odds with the intent of the proponents. And it is not because we are not empathetic and sympathetic to the crisis and the tragedy that occurs when a pregnant woman is attacked, and not because we do not want to find relief, but because this bill, unfortunately, wants to be a side bar or a back-door response to some of our colleagues' opposition to Roe versus Wade.

This bill undermines a woman's right to choose by recognizing for the first time under Federal law that an embryo or fetus is a person, with rights separate and equal to that of a woman and worthy of legal protection. And the bill does not establish the time frame. The Supreme Court has held that fetuses are not persons within the meaning of the 14th Amendment. If enacted, H.R. 2436 will improperly inject debates about abortion into Federal and military criminal prosecutions across the country.⁹⁶

Despite the opposition, the House of Representatives passed the UVVA 1999.⁹⁷ The Senate then failed to act on the 1999 UVVA.⁹⁸

In 2001, Congressman F. James Sensenbrenner, Jr. from Wisconsin, reintroduced the bill⁹⁹ as the Unborn Victims of Violence Act of 2001.¹⁰⁰ Once again, the House of Representatives passed the bill.¹⁰¹ However, as in 1999, the Senate failed to act on the bill.¹⁰² The reasons behind the opposition to this Act were the same as they were in 1999. A Congresswoman opposed to the Act stated,

[Connor's] little soul never saw light, but he was loved, and he is remembered. And his name is forever joined with that of his mom in this statute, which is also known as Laci and Connor's Law. All who knew Laci Peterson have mourned two deaths, and the law cannot look away and pretend there was just one.

Id.

⁹² See United States Senator Lindsey Graham, South Carolina, *Biography*, <http://lgraham.senate.gov/public/index.cfm?FuseAction=AboutSenatorGraham.Biography> (last visited Sept. 14, 2008).

⁹³ See generally 145 CONG. REC. 23,361 (1999) (naming Congressman Graham as the bill's sponsor).

⁹⁴ H.R. 2436, 106th Cong. (1999).

⁹⁵ The referral of this Act to the Subcommittee on the Constitution of the Committee on the Judiciary instead of the Subcommittee on Crime was extremely controversial. In 1999, Congresswoman Slaughter from New York, argued,

The supporters of the bill insist that H.R. 2436 has nothing to do with the abortion debate and was crafted to protect women against violence. Why then, one is left to wonder, was this bill referred not to the Subcommittee on Crime but, instead, to the Subcommittee on the Constitution of the Committee on the Judiciary.

145 CONG. REC. 23,361 (statement Congresswoman Slaughter, N.Y.). Similarly, in 2001, Congressman Conyers asked, "if this bill does not deal with abortion, . . . why is it coming out of the Subcommittee on the Constitution instead of the Subcommittee on Crime?" 147 CONG. REC. 6305-06 (2001). Congressman Conyers then answers his own question by stating, "You think we thought that it was tossed there by accident. But it was tossed there because it is changing the fundamental constitutional law in the most controlling case on abortion in current Federal judicial practice, *Roe v. Wade*. That is why it went there." *Id.* at 6306.

⁹⁶ 145 CONG. REC. 23,362 (1999).

⁹⁷ See 145 CONG. REC. 23,395. It passed by a vote of 254 to 172 in the House of Representatives. See *id.*

⁹⁸ See Joseph L. Falvey, Jr., *Kill an Unborn Child—Go to Jail: The Unborn Victims of Violence Act of 2004 and Military Justice*, 53 NAVAL L. REV. 1, 11 n.1 (2006) (citing 'Unborn Victims' Bill Passed By House, ASSOC. PRESS, Feb. 26, 2004, available at <http://www.msnbc.msn.com/id/4387085>). Lieutenant Colonel Michael J. Davidson, U.S. Army Judge Advocate General's Corps submitted written comments to the Senate Judiciary Committee concerning S.1673. He supported the bill stating that he "believe[s] this legislation would have a positive impact on military law by providing a uniform feticide law and by eliminating reliance on the out-dated born alive rule." Written Testimony of Michael J. Davidson, Lieutenant Colonel, Concerning S.1673, The Unborn Victims of Violence Act of 1999, available at <http://www.senate.gov/comm/judiciary/general/oldsite/223200md.htm>. Lieutenant Colonel Davidson went on to opine that "the Act does not interfere with a woman's right to choose, but instead reinforces both that right and the government's interest in protecting the potentiality of life." *Id.*

⁹⁹ See generally 147 CONG. REC. 6339 (2001) (naming Congressman Sensenbrenner as the bill's sponsor).

¹⁰⁰ H.R. 503, 107th Cong. (2001).

¹⁰¹ See 147 CONG. REC. 6339-40. It passed by a vote of 252 to 172 in the House of Representatives. See *id.*

¹⁰² See Falvey, *supra* note 98, at 11 n.1.

The Unborn Victims of Violence Act is the first volley this term by the anti-choice legislators to restrict a woman's right to choose. This bill would add to the Federal criminal code a separate new offense to punish individuals who injure or cause the death of a child which is in utero, regardless of the stage of development. It sounds innocuous enough, but in essence it is a sham.¹⁰³

In the third attempt to enact this legislation, the House of Representatives and the Senate both passed the Unborn Victims of Violence Act of 2004.¹⁰⁴ President George W. Bush subsequently signed the Act into law.¹⁰⁵ Prior to its enactment, opponents in 2004 expressed the same concerns as the opposition in 1999 and 2001. For example, Congressman Nadler argued,

If a fetus is recognized as a legal person, then this bill would open the door to barring abortions, to prosecuting women or to restraining them physically for the sake of the fetus. Some courts and State governments have already experimented with this approach. . . . Once we recognize even a zygote, two cells, as having the same legal status as the pregnant woman, it would logically flow that her liberty could be restricted to protect its interests. The whole purpose of Roe is to say that her liberty interests trump the interests of the fetus. This bill says exactly the opposite.¹⁰⁶

Members of Congress countered the UVVA all three times by introducing substitute amendments.¹⁰⁷ The substitute amendments recommended the addition of an almost identical punitive article to the UCMJ. These substitutes, instead of pronouncing the unborn child in utero as the victim, allowed for the prosecution of a person who, while engaged in a predicate offense, "cause[d] the termination of a pregnancy or the interruption of the normal course of pregnancy."¹⁰⁸ As pointed out by Senator Feinstein in 2004, the substitute amendments "include[d] the same structure, the same crimes, and the exact same penalties as the [UVVA]. The only real difference between [the] amendment[s] and the [UVVA] was that [they did] not attempt to place into law language defining life as beginning at conception beginning with an embryo."¹⁰⁹ The substitute amendments failed to pass in either house each time they were considered.¹¹⁰

B. Legislative Intent

The UVVA's sponsors and proponents consistently promoted the bill stating that unlike the substitute amendments, the UVVA recognizes two victims instead of just one when a mother and her unborn child are killed or harmed by a third party.¹¹¹ Proponents specifically cited *United States v. Robbins*¹¹² as a primary example of the need for a federal UVVA. For instance, in 1999, Congressman Buyer, the chairman of the Subcommittee on Military Personnel supported amending the UCMJ stating,

Once this bill was reported, it is fitting that the Uniform Code of Justice be compatible with the Federal statute, and that is why we procedurally waived jurisdiction.

¹⁰³ 147 CONG. REC. 6337 (statement of Congresswoman Slaughter).

¹⁰⁴ The House Bill, H.R. 1997 was sponsored by Congresswoman Melissa Hart, Pa. The House Bill was passed by a vote of 254 to 163. 150 CONG. REC. H667-68 (daily ed. Feb. 26, 2004). The companion Senate Bill, S.R. 1019 was sponsored by Senator Mike DeWine, Ohio. The Senate Bill was passed by a vote of 61 to 38. 150 CONG. REC. S3167 (daily ed. Mar. 25, 2004).

¹⁰⁵ See NAT'L RIGHT TO LIFE COMM., KEY FACTS ON THE UNBORN VICTIMS OF VIOLENCE ACT (2004), available at http://www.nrlc.org/unborn_victims/keypointsuvva.html.

¹⁰⁶ 150 CONG. REC. H640 (daily ed. Feb. 26, 2004) (statement of Congressman Nadler), available at <http://thomas.loc.gov/cgi-bin/query/F?r108:2:/temp/~r108JCCBHC:e24014>.

¹⁰⁷ In the House of Representatives, the substitute amendment, the Lofgren Amendment, introduced in 1999, 2001 and 2004 was named after its primary sponsor, Congresswoman Lofgren, Cal. 145 CONG. REC. 23,361 (1999); 147 CONG. REC. 6337-38 (2001); 150 CONG. REC. H646 (daily ed. Feb. 26, 2004). In the Senate, the substitute amendment, entitled the Feinstein Amendment or the Motherhood Protection Act, was introduced by among others, Sen. Feinstein, Cal. See 150 CONG. REC. S3125 (daily ed. Mar. 25, 2004).

¹⁰⁸ 150 CONG. REC. H637-39 (daily ed. Feb. 26, 2004).

¹⁰⁹ 150 CONG. REC. S3126 (daily ed. Mar. 25, 2004).

¹¹⁰ See 145 CONG. REC. 23,394-95 (1999); 147 CONG. REC. 6339 (2001); 150 CONG. REC. H667 (daily ed. Feb. 26, 2004); 150 CONG. REC. S3151 (daily ed. Mar. 25, 2004).

¹¹¹ See 145 CONG. REC. 23,364 (1999); 147 CONG. REC. 6307 (2001); 150 CONG. REC. S3125 (daily ed. Mar. 25, 2004).

¹¹² 52 M.J. 159 (C.A.A.F. 1999).

The need for the manager's amendment and the request for support by this body is illustrated by the case of *United States versus Robbins*.¹¹³

In 2001, Congressman Sensenbrenner pointed out that,

Military prosecutors were able to charge Robbins for death of the unborn child by assimilating Ohio's fetal homicide law through the Uniform Code of Military Justice. Had Mr. Robbins beaten his wife just across the river in Kentucky, a State which has no fetal homicide law, he would have received no additional punishment for killing the unborn child.¹¹⁴

Finally, in 2004, Senator Dewine, the Senate bill's sponsor, introduced the bill by asking his colleagues to "[i]magine a pregnant woman in a national park or a pregnant woman on an Air Force base and she is violently assaulted. As a result . . . she loses her child."¹¹⁵ Senator Dewine then announced that "[t]oday, unless that Federal park or Air Force base is located in a State that has a similar law, a Federal prosecutor would search the Federal statute books in vain to find anything to charge that assailant [with]."¹¹⁶

The UVVA's sponsors never directly addressed the intent behind exempting the mother from prosecution for any harm she may do to her unborn child. In 1999, Senator Dewine simply explained that the drafters,

purposely drafted this legislation very narrowly. For example, it would not permit the prosecution for any abortion to which a woman consented. It would not permit the prosecution of a woman for any action—legal or illegal—in regard to her unborn child. That is not what the intent of this legislation is all about. This legislation, further, would not permit the prosecution for harm caused to the mother or unborn child in the case of medical treatment.¹¹⁷

Likewise, Senator Graham, the original drafter of the 1999 bill, did not specifically explain the intent behind exempting mothers in the UVVA. However, he implied that the UVVA was only intended to cover a third party's criminal activity toward an unborn child.¹¹⁸ Despite this implied intent, in 2004, Senator Graham from South Carolina,¹¹⁹ admitted that in his own state, feticide law was being used to convict mothers for their prenatal behavior.¹²⁰

III. South Carolina's Feticide Law Used to Convict Mothers: An Example of What UVVA Opponents' Feared

A. History of South Carolina's Feticide Law

Initially, the South Carolina Supreme Court established the existence of its state's feticide law through interpretation. More specifically, in 1984, the South Carolina Supreme Court in *State v. Horne*¹²¹ held that South Carolina's murder statute¹²² must be interpreted to include viable fetuses as individual victims.¹²³ The defendant in this case stabbed his wife, who was nine months pregnant.¹²⁴ After arriving at the hospital, doctors attempted to deliver the child through caesarean

¹¹³ 145 CONG. REC. 23,385 (1999).

¹¹⁴ 147 CONG. REC. 6303 (2001) (statement of Congresswoman Sensenbrenner).

¹¹⁵ 150 CONG. REC. S3125 (daily ed. Mar. 25, 2004).

¹¹⁶ *Id.*

¹¹⁷ 145 CONG. REC. 23,555 (1999).

¹¹⁸ *Id.* As the original drafter of the 1999 bill, Senator Graham clarified that, "[w]hat [he] wanted to do was to focus on what [he] thought [they] all could agree on, to a large extent. The law in abortion and the politics of abortion really do not play well here because we are talking about criminal activity of a third party." *Id.*

¹¹⁹ See *supra* note 92 and accompanying text.

¹²⁰ See 150 CONG. REC. S3134 (daily ed. Mar. 25, 2004). More specifically, Senator Graham admitted, "There are cases out there where mothers are being prosecuted who abuse drugs or alcohol and do damage to their children." *Id.*

¹²¹ 319 S.E.2d 703 (S.C. 1984).

¹²² S.C. CODE ANN. § 16-3-10 (2006).

¹²³ *Horne*, 319 S.E.2d at 704.

¹²⁴ *Id.*

section; however, the child died in the womb.¹²⁵ The mother survived.¹²⁶ The defendant was convicted of assault and battery with intent to kill and voluntary manslaughter for killing the unborn child.¹²⁷ Mr. Horne appealed to the South Carolina Supreme Court on the ground that the crime of feticide had not yet been recognized in South Carolina.¹²⁸ The South Carolina Supreme Court granted the appeal and reversed the voluntary manslaughter conviction.¹²⁹ However, the court also unanimously declared feticide to be a crime in South Carolina from that day forward.¹³⁰ The court's rationale was that it would be "grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context."¹³¹

Then, in *State v. Ard*, the South Carolina Supreme Court held that a defendant was eligible to receive the death penalty for murdering a viable fetus.¹³² The court stated that the term "person" in the South Carolina Code's statutory aggravating circumstances for murder was intended to include viable fetuses.¹³³ As support for its holding, this court noted that the legislature amended portions of the murder statutes after the holding in *Horne*¹³⁴ and chose not to specifically exclude viable fetuses as potential victims.¹³⁵ The South Carolina Supreme Court concluded that by not amending the statutes to exclude viable fetuses as potential victims, the legislature demonstrated their intent to include viable fetuses in the murder statutes.¹³⁶

South Carolina actually codified its feticide law in 2006. The South Carolina UVVA¹³⁷ provides that a person who commits a violent crime that causes the death of, or injury to, a child in utero is guilty of a separate offense and that the person must be punished as if the death or injury occurred to the unborn child's mother.¹³⁸ Additionally, the South Carolina Act states that if a person intentionally kills or attempts to kill an unborn child, they must be punished for murder or attempted murder.¹³⁹ Finally, the South Carolina Act, like the federal UVVA, specifically exempts from prosecution the mother of the unborn child.¹⁴⁰

B. Despite Exemption, Court Turns Feticide Law Against Mothers

Despite the specific exemption of mothers from prosecution, the South Carolina Supreme Court in *Whitner v. State* used the fetal rights acknowledged in the feticide law to convict a mother for harming her unborn child under a separate South Carolina child neglect statute.¹⁴¹ More specifically, the court in *Whitner* used its recognition of feticide in *Horne*,¹⁴² to expand the definition of a "child" under the South Carolina criminal child abuse and endangerment statute, to include viable fetuses.¹⁴³

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 703.

¹²⁸ *Id.* at 704.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (citing the decision in *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964), where the South Carolina Supreme Court held that a wrongful death action could be maintained for a viable, unborn fetus).

¹³² 505 S.E.2d 328, 375 (S.C. 1998).

¹³³ S.C. CODE ANN. § 16-3-20 (C)(a) (2006).

¹³⁴ 319 S.E.2d 703.

¹³⁵ *See Ard*, 505 S.E.2d at 375.

¹³⁶ *Id.*

¹³⁷ S.C. CODE ANN. § 16-3-1083.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 492 S.E.2d 777 (S.C. 1997). Cornelia Whitner was convicted of child neglect in violation of S.C. CODE ANN. § 20-7-50 (1985). *Id.*

¹⁴² 319 S.E.2d 703 (S.C. 1984).

¹⁴³ *Whitner*, 492 S.E.2d at 780.

Cornelia Whitner pled guilty to criminal child neglect for ingesting cocaine during her third trimester of pregnancy.¹⁴⁴ The South Carolina criminal child neglect statute provided that,

any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.¹⁴⁵

The court held that the word “child” in the child neglect law included a viable fetus. The court, relying on its rulings in *Horne*¹⁴⁶ and *Fowler v. Woodward*¹⁴⁷ determined that it “would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.”¹⁴⁸

The South Carolina Supreme Court then used its holding in *Whitner* to uphold the conviction of Regina McKnight of homicide by child abuse, for killing her unborn child through cocaine use.¹⁴⁹ McKnight gave birth to a nearly full-term stillborn child in 1999.¹⁵⁰ An autopsy showed that the child had cocaine in her body.¹⁵¹ Subsequently, McKnight was convicted of homicide by child abuse.¹⁵² Under this statute a person is guilty of homicide by child abuse if he or she “causes the death of a child under the age of eleven while committing child abuse or neglect.”¹⁵³ The court, as they did in *Whitner*, held that the term “child” included a viable fetus.¹⁵⁴ The court relied on the fact that the legislature amending this statute in 2000 “was well aware of this court’s opinion in *Whitner*, yet failed to omit ‘viable fetus’ from the statute’s applicability.”¹⁵⁵ The court saw this as “persuasive evidence that the legislature did not intend to exempt fetuses from the statute’s operation.”¹⁵⁶

These court rulings demonstrate at a state level how a feticide law’s novel grant of fetal rights can quickly spread to other statutes.¹⁵⁷ The expansion of fetal rights in South Carolina is the exact infestation that was feared by opponents of the

¹⁴⁴ *Id.* at 778.

¹⁴⁵ S.C. CODE ANN. § 20-7-50 (1985).

¹⁴⁶ 319 S.E.2d 703.

¹⁴⁷ 138 S.E.2d 42 (S.C. 1964) (holding that a wrongful death action could be maintained for a viable, unborn fetus).

¹⁴⁸ *Whitner*, 492 S.E.2d at 780.

¹⁴⁹ *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003).

¹⁵⁰ *Id.* at 171.

¹⁵¹ *Id.*

¹⁵² *Id.* Regina McKnight was convicted of homicide by child abuse in violation of S.C. CODE ANN. § 16-3-85(A) (2001). *Id.*

¹⁵³ S.C. CODE ANN. § 16-3-85(A) (2006).

¹⁵⁴ *McKnight*, 576 S.E.2d at 174.

¹⁵⁵ *Id.* at 175.

¹⁵⁶ *Id.*

¹⁵⁷ Not all states have allowed such a spread to occur. The South Carolina Supreme Court in their holding in *Whitner* recognized that many states have not allowed for mothers to be prosecuted for drug use during their pregnancy. As examples, the court listed *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (1977); *State v. Carter*, 602 So. 2d 995 (Fla. Ct. App. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Ct. App. 1991); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992, *cert. denied* (Ga. 1992); *Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App.), *app. denied*, 437 Mich. 1046 (Mich. 1991) and *Commonwealth v. Kemp*, 643 A.2d 705 (Pa. Super. Ct. 1994). See *Whitner v. State*, 492 S.E.2d 777, 782 (S.C. 1997). The South Carolina Supreme Court distinguished their decision from these. First, the court pointed out that most of the decisions are inapplicable because they were decided under drug delivery or distribution statutes instead of child neglect or child endangerment statutes. *Id.* The court conceded that the California case and Kentucky case involved homicide, murder and manslaughter statutes instead of drug statutes, but set itself apart from these decisions stating that California and Kentucky “have entirely different bodies of case law from South Carolina.” *Id.* The South Carolina Supreme Court then specifically rejected the decision made by the Massachusetts Superior Court in *Pellegrini* even after noting that Massachusetts, unlike California and Kentucky, has a “body of case law similar to South Carolina’s.” *Id.* The South Carolina Supreme Court examined the Massachusetts decision in *Pellegrini* and determined that the ruling was based on a theory that a viable fetus should be given the rights of a person only as a vindication of a parent’s interest and that “the viable fetus lacks rights of its own that deserve vindication.” *Id.* at 783. The South Carolina Supreme Court then concluded that, “[b]ecause the rationale underlying our body of law—protection of the viable fetus—is radically different from that underlying the law of Massachusetts, we decline to follow the decision of the Massachusetts Superior Court in *Pellegrini*.” *Id.*

federal UVVA.¹⁵⁸ Proponents of the UVVA seemed mystified over the fears of their opponents, arguing that the exemptions are so clear there is no conceivable way the Act could be used to undermine a mother's reproductive rights.¹⁵⁹ South Carolina demonstrates that these fears can easily come to fruition. The South Carolina Supreme Court ruled that it would be "absurd" to recognize fetal rights in feticide, but not in child abuse or neglect laws.¹⁶⁰ In other words, the South Carolina Supreme Court allowed fetal rights to creep over to other statutes, based on a desire to be consistent and equitable. Military commanders, based on the same desire, will likewise be compelled to apply the fetal rights recognized in Article 119a to other UCMJ Articles.

IV. Military Commanders and Military Courts Will Also Expand Fetal Rights to Be Consistent and Equitable

A. Military Commanders' Disposition Decisions under Article 119a

Imagine that an Army commander faces two separate situations where Soldiers under his command allegedly kill an unborn child. In the first instance, an investigation reveals that a male Soldier had a minor altercation with a female Soldier in the unit. The female Soldier happened to be five weeks pregnant. The pregnant Soldier lost her baby because the quarrel became physical. The male Soldier, who committed a simple assault on the expectant mother, is further charged with violating Article 119a, despite the fact that he was completely unaware that she was pregnant.

In the second instance, this same commander discovers that a different female Soldier is accused of killing her own unborn child in a separate incident. This Soldier was eight months pregnant. An investigation reveals that she ingested a large amount of cocaine intending to kill or harm her unborn child. Despite the commander's desire to be consistent and equitable, the commander cannot charge the second Soldier with a violation of Article 119a because she is exempt from prosecution as the mother of the unborn child.

Under Article 119a, this second Soldier who killed her own unborn child intentionally will not face any consequences for her actions. However, the unknowing, less culpable male Soldier, who had a minor altercation with a Soldier who was five weeks pregnant, may face full prosecution. These circumstances present a unique dilemma for the commander as he makes his disposition decisions.

A commander's decision regarding how to dispose of criminal offenses is "one of the most important and difficult decisions facing a commander."¹⁶¹ Rule for Courts-Martial (RCM) 306 states that in making a disposition decision, a commander must consider and balance many factors.¹⁶² Among these factors are the "interest of justice" and the "effect of the decision on the accused and the command."¹⁶³ Additionally, RCM 306 projects that the goal of the commander "should be a disposition that is warranted, appropriate, and fair."¹⁶⁴ Aspiring to be fair certainly does not mean that commanders should try to dispose of all like offenses in the same way. In fact, commanders are encouraged to treat each case

¹⁵⁸ The Executive Director of the National Network to End Domestic Violence, Lynn Rosenthal, specifically summarized this fear in her letter to Congress opposing the UVVA in 2004.

[W]hile the UVVA on its face seems to protect women from prosecution of the violence causes her to lose the pregnancy, it may lead to a slippery slope that erodes women's rights and holds them responsible for this loss. This slippery slope has already formed in South Carolina For example, in *Whitner v. State*, the court found that South Carolina's child endangerment statute could be used to punish a pregnant woman who engaged in any behavior that might endanger her fetus. Legislation regarding violence against women must be carefully considered in order to prevent unintended effects from hurting the very women it is supposed to help.

150 CONG. REC. S3141 (daily ed. Mar. 25, 2004).

¹⁵⁹ For example, in 2004, Senator Hatch stated:

I cannot imagine why anyone would oppose this bill I do not believe this bill in any way undermines abortion rights The bill explicitly says that the Federal Government cannot prosecute a pregnant woman for having an abortion. In fact, the bill goes even further. The bill does not permit prosecution against any woman with respect to her unborn child regardless of whether the mother acted legally or illegally.

150 CONG. REC. S3136.

¹⁶⁰ *Whitmer*, 492 S.E.2d at 780.

¹⁶¹ MCM, *supra* note 72, R.C.M. 306.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

individually.¹⁶⁵ However, a commander must carefully balance this concept with the inherent disruption he may cause within the command with drastically disparate dispositions for like offenses. The *Manual for Courts Martial (MCM)* specifically explains that,

The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.¹⁶⁶

If a commander is grossly inconsistent in his disposition decisions for like offenses, he may negatively influence the good order and discipline of his unit and its effectiveness. This would directly defeat the codified purposes of military law. Therefore, there is a “fundamental tension . . . between the UCMJ dictate that we treat each case individually, and the need for some form of consistency.”¹⁶⁷

In order to be consistent, a commander who faces the dilemma described above, may search for a way to ensure that the more culpable Soldier faces consequences for her intentional killing. Even if the less culpable male Soldier was eliminated from the above scenario, a commander may still feel that the malicious intentional act of his Soldier warrants prosecution. Despite Article 119a’s specific exemption of the mother from prosecution, its recognition of the fetus as an individual victim may provide this commander with the ability to charge the pregnant Soldier with the death of her unborn child, as seen in South Carolina.

South Carolina demonstrates how fetal rights created through feticide laws can easily be adopted into other crimes out of a desire to be consistent and equitable.¹⁶⁸ These identical goals may lead to the same unintended expansion of fetal rights in the military. As seen in South Carolina, the grant of fetal rights in Article 119a may eventually be used to allow the prosecution of mothers for their prenatal conduct. A commander may charge a Soldier with a violation of the UCMJ by simply applying Article 119a’s definition of the word “child” to Article 134, Child Endangerment.¹⁶⁹ If a military court is amenable to this application, a federal conviction will follow.

B. Will Military Courts Convict Mothers for Prenatal Conduct?

Even prior to the fetal rights granted by the addition of Article 119a, an Air Force Airman was charged and convicted of child neglect under Article 134’s general article for cocaine use during her pregnancy in *United States v. Foreman*.¹⁷⁰ The Air Force Court of Military Review overturned this conviction. The court found:

As to prenatal drug use, there is no legal basis, absent specific statutory authority, to suggest that an unborn fetus is intended as a potential victim of criminal neglect under Article 134, nor do we choose to create such a basis at this time, particularly where the fetus, once born, shows no discernible injury from the alleged neglect.¹⁷¹

Through this holding, the court in *Foreman* implied that given the statutory authority, it would allow for an Article 134 child neglect charge to extend to unborn children as victims.¹⁷² In other words, the court in *Foreman* seemed amenable to a

¹⁶⁵ See *id.* R.C.M. 306.

¹⁶⁶ *Id.* pt. I, ¶ 3.

¹⁶⁷ E-mail from Lieutenant Colonel Mark L. Johnson, Chair, Criminal Law Dep’t, TJAGLCS, U.S. Army, Charlottesville, Va., to Major Kirsten M. Dowdy (18 Dec. 2007, 17:12 EST) (on file with author).

¹⁶⁸ See *supra* sec. III, subsec. B.

¹⁶⁹ Commanders will have a few different charging options for this conduct under Article 134, UCMJ. Commanders could charge this as child endangerment, reckless endangerment or they could craft a different child neglect charge using the general article as seen in *United States v. Foreman*, No. 28008, 1990 C.M.R. LEXIS 622 (A.F.C.M.R. May 25, 1990). Child endangerment is a new offense under Article 134. President George W. Bush amended the UCMJ to include this new offense through Executive Order 13,447, which took effect on 1 October 2007. See Exec. Order No. 13,447, 72 Fed. Reg. 56,233–37 (Oct. 2, 2007). This amendment presents the perfect opportunity for commanders to begin to charge mothers for their prenatal conduct as it fails to specifically define the word “child” in the offense.

¹⁷⁰ No. 28008, 1990 C.M.R. LEXIS 622.

¹⁷¹ *Id.* at 3.

¹⁷² *Id.*

future extension of a child neglect charge to include unborn children as victims. The court leaves the door open by stating that it did not want to “create such a [legal] basis at [that] time.”¹⁷³

If the facts presented in *Foreman* were before a military court today, the outcome may have been different. Article 119a provides the statutory authority that the *Foreman* court determined was absent, by allowing unborn children to be the victims of a crime. A military court faced with these facts today may walk through the door left open in *Foreman* and allow the fetal rights created in Article 119a to leak over to a child endangerment charge under Article 134.

Military courts, in the past, have allowed for such a leak. The courts have found it appropriate to apply an expanded definition designed for one punitive article to another punitive article. For example, in *United State v. Adams*,¹⁷⁴ the CAAF based its decision to broaden the actual knowledge element in Article 86, failure to go to one’s appointed place of duty, primarily on the fact that this expansion had already been made with respect to Article 112a, wrongful use of a controlled substance. More specifically, the CAAF expanded the element of actual knowledge within Article 86 to encompass the concept of “deliberate ignorance.”¹⁷⁵

This concept was originally applied by the CAAF to Article 112a in *United States v. Newman*¹⁷⁶ and then again in *United States v. Brown*.¹⁷⁷ In *Newman*, the CAAF held that “in cases where knowledge is an essential element, specific knowledge is not always necessary; rather, purposeful ignorance may suffice.”¹⁷⁸ The CAAF later clarified in *Brown* that, “[s]ome evidence must [be] admitted which permits an inference of deliberate avoidance, *i.e.*, that ‘the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and . . . the defendant purposely contrived to avoid learning of the illegal conduct.’”¹⁷⁹

In *Adams*, the CAAF considered the case of Private (Pvt) Adams who deliberately avoided his responsibility to determine where his place of duty was.¹⁸⁰ While he was not at his appointed place of duty, in order to be in violation of Article 86, UCMJ, Pvt Adams had to have actual knowledge of where that place was at the moment he was avoiding it.¹⁸¹ The CAAF determined that the Pvt Adams’s deliberate avoidance of the requisite knowledge under Article 86, UCMJ, should not excuse his failure to go to his appointed place of duty.¹⁸²

In *Adams*, the CAAF recognized that the “deliberate avoidance” theory as applied to Article 112a was specifically supported in the *MCM*, whereas the expansion of this principle for use under Article 86 was unsupported.¹⁸³ The CAAF acknowledged its unprecedented decision stating,

unlike the explanation contained in the *MCM* for Article 86(1), UCMJ, the *MCM* provision for Article 112a, UCMJ, at issue in *Brown* expressly allowed for such an inference where the accused “avoids knowledge of the presence of a controlled substance.” To date, this Court has not considered the deliberate avoidance theory outside the context of drug offenses. Thus, we have not considered whether the deliberate avoidance theory permits an inference of knowledge where the punitive article at issue expressly requires that the accused have actual knowledge of his illegal conduct.¹⁸⁴

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ 63 M.J. 223 (C.A.A.F. 2006).

¹⁷⁵ *Id.* (holding that deliberately ignoring one’s duty to know where his or her appointed place of duty will not serve as an excuse or defense to a violation of Article 86, failure to be at one’s appointed place of duty).

¹⁷⁶ 14 M.J. 474, 478 (C.M.A. 1983).

¹⁷⁷ 50 M.J. 262 (C.A.A.F. 1999).

¹⁷⁸ *Newman*, 14 M.J. at 478.

¹⁷⁹ *Brown*, 50 M.J. at 266 (quoting *United States v. Lara-Velasquez*, 919 F.2d 946, 952 (5th Cir. 1990)).

¹⁸⁰ *See Adams*, 63 M.J. at 223.

¹⁸¹ UCMJ art. 86 (2008).

¹⁸² *See Adams*, 63 M.J. at 226–27.

¹⁸³ *See id.* at 226.

¹⁸⁴ *Id.* at 225 (citation omitted).

The CAAF then concluded that “a literal application of actual knowledge to Article 86, UCMJ, offenses would result in absurd results in a military context.”¹⁸⁵ The CAAF recognized that this would allow servicemembers to avoid committing this offense by simply shirking their duty to learn where they are required to be.¹⁸⁶ The CAAF went on to conclude that “in the absence of evidence that the President sought to limit the application of the deliberate avoidance theory to Article 112a, UCMJ, . . . we hold that deliberate avoidance can create the same criminal liability as actual knowledge for all Article 86, UCMJ, offenses.”¹⁸⁷

The CAAF used this same reasoning in *United States v. Zachary*, when it held that mistake of fact should not only be a defense to carnal knowledge under Article 120, UCMJ, but also to the offense of indecent acts with a child under Article 134, UCMJ.¹⁸⁸ The CAAF acknowledged that in 1996 Congress amended Article 120(b), Carnal Knowledge of the UCMJ to specifically recognize mistake of fact as a defense to each crime.¹⁸⁹ The CAAF then stated “that it is illogical and unjust to recognize mistake of fact as to the alleged victim’s age as a complete defense to a carnal knowledge offense under Article 120(d), UCMJ, but not to recognize the same defense to the lesser included offense of indecent acts with a child.”¹⁹⁰

These cases demonstrate that military courts, with no legislative support, will apply theories designed for one punitive article to another punitive article. The similarities between the holding in *Adams*, *Zachary*, and the South Carolina Supreme Court holding in *Whitner*, are remarkable. The courts rationalize the extensions of the “deliberate avoidance” theory, the “mistake of fact defense” and “unborn child as a victim” principle to other crimes opining that it would be “absurd” or “illogical” not to make such an extension.¹⁹¹ From the CAAF’s holdings in *Adams* and *Zachary*, it is easy to see how military courts will expand the “unborn child as a victim” principle for use in Article 134 to prosecute mothers for prenatal neglect or abuse. Military courts, like the South Carolina Supreme Court, will find it absurd or illogical for this principle to apply to Article 119a and not Article 134. As seen in *Adams* and *Zachary*, military courts will apply the principle to Article 134, because there is no direct evidence that the President sought to limit this principle’s application when he signed the UVVA. Further, the existence of Article 119a will not prevent this Article 134 charge under the preemption doctrine.

C. Preemption Doctrine Will Not Be an Obstacle to Article 134 Charge

Assuming a military court does apply the “unborn child as a victim” principle and a mother is convicted under Article 134 for her prenatal conduct towards her unborn child, she may argue that the preemption doctrine will not allow her conviction to be upheld. However, her argument will most likely be unsuccessful. The preemption doctrine states that Article 134 may not be used to charge an offense that is already specifically covered by Articles 80 through 132.¹⁹² In other words, if Congress intended to cover a certain class of offenses completely through a specific punitive article and an individual’s conduct does not amount to a violation of that article, a separate offense may not be created under Article 134.¹⁹³

In order for the preemption doctrine to prohibit charging mothers for their prenatal conduct, Congress must have intended to cover this conduct completely through Article 119a. Military courts use a two-pronged test to determine whether the preemption doctrine applies.¹⁹⁴ The first prong of this test asks “whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific areas of the Code.”¹⁹⁵ The second prong

¹⁸⁵ *Id.* at 226.

¹⁸⁶ *See id.*

¹⁸⁷ *Id.*

¹⁸⁸ 63 M.J. 438, 442–43 (C.A.A.F. 2006).

¹⁸⁹ *Id.* at 442.

¹⁹⁰ *Id.* at 443.

¹⁹¹ Compare *Adams*, 63 M.J. at 226 (holding “a literal application of actual knowledge to Article 86, UCMJ, offenses would result in *absurd* results in a military context.”) (emphasis added), and *Zachary*, 63 M.J. at 443 (holding “that it is *illogical* and unjust to recognize mistake of fact as to the alleged victim’s age as a complete defense to a carnal knowledge offense under Article 120(d), UCMJ, but not to recognize the same defense to the lesser included offense of indecent acts with a child”) (emphasis added), with *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997) (holding it “would be *absurd* to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statute proscribing child abuse.”) (emphasis added).

¹⁹² MCM, *supra* note 72, pt. IV, ¶ 60c(5)(a).

¹⁹³ *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979).

¹⁹⁴ *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978).

¹⁹⁵ *Id.* at 110–11.

asks “whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of . . . [one of] the general articles.”¹⁹⁶ In this case, charging mothers for prenatal abuse or neglect does not pass this two-pronged test and therefore is not prohibited by the preemption doctrine.

The first prong of this test requires an examination of Congress’ intent in drafting Article 119a. Senator Graham, one of the original UVVA’s drafters, made it clear during the 2004 congressional debates that the focus of the UVVA was not on the prenatal conduct of mothers, but instead on the conduct of third parties.¹⁹⁷ Therefore, Senator Graham inferred that Article 119a, UCMJ was intended only to cover misconduct of third persons toward unborn children. Further, regarding the second prong, a charge of child endangerment under Article 134 of the UCMJ would not be composed of “a residuum of elements” of Article 119a. An Article 119a charge requires that certain predicate offenses be committed causing the harm or death of an unborn child. A child endangerment charge under Article 134 would not have an element requiring such a predicate offense.¹⁹⁸ Therefore, these charges are separate and distinct. Based on this two-prong test, Article 119a would not serve to preempt an Article 134 charge against a mother for her prenatal conduct.

V. Why Not Prosecute Mothers for Prenatal Conduct?

Prosecuting mothers for prenatal conduct is problematic for at least three reasons. First, these prosecutions may lead the military down a slippery slope of charging and convicting mothers for legal prenatal conduct. Second, the military may be inappropriately propelled into the nation’s abortion debate. Finally, the ultimate result of these prosecutions may be that mothers harm or abort their unborn children to avoid criminal charges.

A. Slippery Slope

Prosecuting mothers for certain prenatal conduct is not necessarily inappropriate. For example, Cornelia Whitner and Regina McKnight, from South Carolina, used cocaine while they were pregnant and harmed their unborn children.¹⁹⁹ This offense may be worthy of a criminal conviction and criminal punishment. If U.S. Air Force Staff Sergeant Gussie Foreman had harmed her unborn child through her prenatal cocaine use,²⁰⁰ she too may have deserved criminal prosecution. However, a significant problem with prosecuting mothers for their use of controlled substances while pregnant is that these prosecutions will not be limited to illegal conduct. In the military, these prosecutions may lead commanders and military courts down a slippery slope. These commanders and military courts may begin to charge and convict mothers for legal conduct which negatively affects their unborn child.

The South Carolina Supreme Court in *State v. McKnight* references author Nova D. Janssen, from Drake University, as a supporter of the prosecution of mothers for drug abuse that harms their unborn child.²⁰¹ Janssen argues that “[o]ne of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child.”²⁰² In support of this position, the author points out that,

¹⁹⁶ *Id.* at 111.

¹⁹⁷ 150 CONG. REC. S3134 (daily ed. Mar. 25, 2004).

¹⁹⁸ The elements of child endangerment are,

- (1) That the accused had a duty for the care of a certain child;
- (2) That the child was under the age of 16 years;
- (3) That the accused endangered the child’s mental or physical health, safety or welfare through design or culpable negligence; and
- (4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Exec. Order No. 13,447, 72 Fed. Reg. 56,179, 56,233–34 (Oct. 2, 2007).

¹⁹⁹ *See supra* notes 141, 149 and accompanying text.

²⁰⁰ *See supra* note 170 and accompanying text.

²⁰¹ *State v. McKnight*, 576 S.E.2d 168, 175 n.5 (S.C. 2003).

²⁰² Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 762 (2000).

Studies show that cocaine, as well as other illegal drugs, has been linked to strokes while still in the womb or shortly after birth, difficulties in bonding and habituation, attention deficit disorder, impaired growth, and a variety of physical deformities that may result when constriction of blood vessels decreases the transmission of nutrients from mother to unborn child. Heroin, a drug that has made a significant resurgence in recent years, has been linked to congenital abnormalities, jaundice, respiratory distress syndrome, low birth weight, low Apgar scores, impaired cognitive and behavioral development, and a high likelihood of complications resulting from withdrawal. Studies have even shown that ingestion of marijuana—a drug long thought to be harmless to unborn children—during pregnancy may result in “increased behavioral problems and decreased performance on visual perceptual tasks, language comprehension[,] sustained attention[,] and memory.”²⁰³

To strengthen the article, Janssen specifically mentions and rejects the slippery slope argument against criminalizing drug use by pregnant women.²⁰⁴ Janssen acknowledges that “[t]his is a valid question, particularly considering that alcohol—a legal substance—can be even more detrimental to an unborn child than many illegal substances.”²⁰⁵ Janssen then rejects this concern by stating that “there is no slippery slope because there is no constitutional right to take illegal drugs.”²⁰⁶ Janssen further acknowledges that mothers who harm their children by drinking alcohol during their pregnancy deserve punishment equal to those pregnant women who abuse drugs.²⁰⁷ However, Janssen argues that “[t]he mere fact that some bad behaviors are beyond the reach of the legal system, . . . does not mean that society should leave unpunished bad behaviors which are within the reach of the legal system.”²⁰⁸ Janssen then simply concludes, “[a]s with any legal issue, a line must be drawn somewhere, and here it can easily be drawn between legal and illegal behaviors.”²⁰⁹

Janssen’s rejection of the slippery slope argument is inherently flawed. Janssen argues that a line between illegal behaviors and legal behaviors is easily drawn since legal behaviors are “beyond the reach of the legal system.”²¹⁰ Janssen’s statement would be accurate if pregnant women were only facing prosecution for their underlying illegal behavior of drug use. However, the South Carolina Supreme Court, for example, convicted Cornelia Whitner and Regina McKnight of child neglect, and did nothing to limit their ruling to cases in which the underlying conduct itself is illegal.²¹¹ In other words, based on the South Carolina Supreme Court’s reasoning in these cases, it could have just as easily convicted these women of child neglect due to alcohol use, a legal behavior. Therefore, legal behaviors are certainly not “beyond the reach of the legal system.”²¹²

Similarly, military commanders may charge Soldier mothers for prenatal drug use under Article 134 instead of Article 112a, Use of a Controlled Substance. Article 134 declares certain acts illegal that, in a civilian context, would be legal. For instance, Article 134 prohibits conduct such as indecent language, straggling, and adultery.²¹³ This demonstrates that the military legal system is not limited to punishing only prenatal behaviors that involve otherwise illegal conduct. Article 134 could certainly be used to punish prenatal behaviors that would otherwise be legal, such as, alcohol use or failing to follow recommendations from medical personnel. Therefore, Janssen’s bright line that guards against a slippery slope problem does not exist.

In some states, mothers have already faced prosecution for prenatal conduct that would otherwise be legal. For example, in Wisconsin, Deborah Zimmerman was charged with attempted murder for consuming alcohol while pregnant.²¹⁴ Zimmerman was nine months pregnant and drank so much alcohol that her baby was born with a blood alcohol level of

²⁰³ *Id.* at 746–47 (citations omitted).

²⁰⁴ *See id.* at 763–64.

²⁰⁵ *Id.* at 763.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *Id.* at 763–64.

²⁰⁹ *Id.* at 764.

²¹⁰ *See id.*

²¹¹ *See supra* notes 141, 149 and accompanying text.

²¹² Janssen, *supra* note 202, at 763.

²¹³ UCMJ art. 134 (2008).

²¹⁴ *State v. Deborah*, 596 N.W.2d 490 (Wis. 1999).

.199% and suffered from symptoms associated with fetal alcohol syndrome.²¹⁵ She was charged with attempted murder based on the fact that she admitted to her nurse that she was going to “keep drinking and drink [herself] to death and [she was] going to kill this thing because [she didn’t] want it anyways.”²¹⁶

Unlike Whitner and McKnight, who were charged with child neglect,²¹⁷ Zimmerman was charged with attempted first-degree homicide and first-degree reckless injury.²¹⁸ Zimmerman filed a motion to dismiss and the circuit court denied it.²¹⁹ Zimmerman appealed the order denying her motion to the Wisconsin Court of Appeals.²²⁰ The Wisconsin Court of Appeals reversed the circuit court decision that there was probable cause to charge Zimmerman with these crimes based on the fact that the legislature specifically limited the definition of a “human being” in these statutes to include only “one who has been born alive.”²²¹ The Court of Appeals ruled that “it would be absurd to conclude that a ‘human being’ can be an unborn child if the perpetrator is the mother, where the definition of ‘human being’ includes only persons who have been born alive.”²²²

The court found further support that the legislature did not intend for unborn children to be victims of those crimes, by looking at several other statutes where the legislature had specifically included protections for unborn children. The court therefore reasoned that,

When the legislature in one subsection of a statute specifically criminalizes death or injury to unborn child victims, but in another subsection uses the general designation of “human being” victims, we conclude that the legislative intent is manifest—an unborn child is not to be included in the definition of “human being.”²²³

While the outcome was favorable to her, Deborah Zimmerman was nevertheless the first in this country to face prosecution for prenatal alcohol abuse, an otherwise legal activity. The Wisconsin Court of Appeals acknowledged its fear of the slippery slope stating,

Even though Deborah’s actions were egregious, we decline the State’s overture to give the statute such a broad construction. Under such a construction, a woman could risk criminal charges for any perceived self-destructive behavior during her pregnancy that may result in injuries to her unborn child. Any reckless or dangerous conduct, such as smoking heavily or abusing legal medications, could become criminal behavior because the actions were taken while the woman was pregnant. “Taken to its extreme, prohibitions during pregnancy could also include the failure to act, such as the failure to secure adequate prenatal medical care, and overzealous behavior, such as excessive exercising or dieting.”²²⁴

Wisconsin is not the only state to charge pregnant women for legal prenatal conduct. In Wyoming, a prosecutor charged a pregnant woman for her use of alcohol during her pregnancy.²²⁵ However, the charges in this case were dismissed due to a lack of evidence that the fetus was harmed by alcohol.²²⁶ In Missouri, Lisa Pindar was similarly charged with second-degree assault and child endangerment when her newborn son exhibited signs of Fetal Alcohol Syndrome.²²⁷ Finally, in California,

²¹⁵ *Id.* at 492.

²¹⁶ *Id.* at 491.

²¹⁷ *See supra* notes 141, 149 and accompanying text.

²¹⁸ *Deborah*, 596 N.W.2d at 491.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 492–93 (quoting WIS. STAT. § 939.22(16) (2006)).

²²² *Id.* at 494.

²²³ *Id.*

²²⁴ *Id.* at 494–95 (quoting *Hillman v. Georgia*, 503 S.E.2d 610, 613 (Ga. Ct. App. 1998)).

²²⁵ *See* LYNN M. PALTROW ET AL., CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN 2 (Apr. 1992), available at <http://www.advocatesforpregnantwomen.org/articles/1992stat.htm> (citing *State v. Pfannestiel*, No. 1-90-8CR (Co. Ct. of Laramie, Wyo., Feb. 1, 1990) as dismissed for lack of probable cause); CTR. FOR REPRODUCTIVE RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN’S HEALTH AND CHILDREN’S INTERESTS I, 17 n.10 (Sept. 2000) (BRIEFING PAPER), available at http://www.reproductiverights.org/pdf/pub_bp_punishingwomen.pdf [hereinafter PUNISHING WOMEN].

²²⁶ *See* PALTROW, *supra* note 225, at 2.

²²⁷ *See id.*

police and prosecutors arrested and criminally charged Pamela Rae Stewart because she ignored her doctor's advice to stay in bed, stop having sexual intercourse and take labor suppressing medication.²²⁸ While none of the charges in these cases resulted in convictions, they demonstrate that the fear of a slippery slope in the prosecution of mothers is real.

Like the prosecutors in *Zimmerman*, *Pfannestiel*, *Pindar*, and *Stewart*, military commanders may decide to prosecute pregnant Soldiers for their alcohol consumption or other legal conduct under Article 134. Pregnant Soldiers in the military are provided with written limitations from their doctors as soon as their pregnancy is detected. These limitations advise that pregnant Soldiers not deploy, not conduct airborne operations and not submit to the standard physical fitness requirements of their service.²²⁹ If a pregnant Soldier were to ignore these limitations and jump out of an airplane, for instance, harm to her unborn child is probable. It is easy to imagine a commander unreasonably charging this Soldier with child endangerment under Article 134.

The list of possible prosecutions is endless. Author Carolyn Coffey demonstrates this limitless slope, when she raises questions such as,

If a woman can be prosecuted for drinking while pregnant—which, by the way, is not illegal—could another be prosecuted for smoking cigarettes and birthing an underweight baby? For endangering her unborn child by failing to heed a doctor's bed rest orders? For becoming pregnant while obese, thus doubling, or in the case of the extremely obese even quadrupling, the chance of neural tube defects?²³⁰

In summary, the largest negative consequence of prosecuting mothers for their harmful prenatal conduct is the slippery slope that will inevitably develop. As predicted by the dissent in *Whitner*, “the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize. To ignore this ‘down-the-road’ consequence in a case of this import is unrealistic.”²³¹

B. The Military Will Be Propelled into the Nation's Abortion Debate

In 1999, Congresswoman Jackson-Lee from Texas warned that the UVVA would “improperly inject debates about abortion into Federal and military criminal prosecutions across the country.”²³² Conversely, proponents of the UVVA argued that the UVVA had nothing to do with abortion.²³³ A fact that is indisputable is that the UVVA recognizes the unborn child as an individual victim and therefore recognizes that a fetus has rights. This article has shown how this recognition of fetal rights has been expanded and used in other criminal statutes against mothers in South Carolina.²³⁴ Further, this article has demonstrated how this recognition of fetal rights will most likely lead to a similar expansion in military prosecutions and convictions.²³⁵

This expansion of fetal rights may be perceived as the military's declaration that the rights of an unborn child surpass the rights of the pregnant Soldier carrying the child. This declaration may create the appearance that the military or a specific commander, is taking a political stance in the nation's abortion debate. The Department of Defense has made it clear that military personnel should remain non-partisan.²³⁶ The grant of fetal rights in Article 119a may, however, inappropriately push the military and its commanders into a political debate.

²²⁸ See *id.* (citing *People v. Pamela Rae Stewart*, Declaration in Support of Arrest Warrant Case No. M508 197 (Aug. 28, 1986); PUNISHING WOMEN, *supra* note 229, at 17 n.11 (citing No. M508197, Reporter's Transcript, at 4 (Cal. Mun. Ct. San Diego Cty. Feb. 26, 1987)).

²²⁹ See *id.*

²³⁰ Carolyn Coffey, *Whitner v. State: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. CONTEMP. HEALTH L. & POL'Y 211, 211 (Fall 1997) (citing Robin Abcarian, *A New Strategy for Pregnancy Police?*, L.A. TIMES, Sept. 18, 1996, at E2).

²³¹ *Whitner v. State*, 492 S.E.2d 777, 788 (S.C. 1997) (quoting Moore, A.J., dissenting).

²³² 145 CONG. REC. 23,362 (statement of Congresswoman Jackson-Lee).

²³³ See, e.g., 150 CONG. REC. S3134 (daily ed. Mar. 25, 2004) (statement of Sen. Graham).

²³⁴ See *supra* sec. III, subsec. B.

²³⁵ See *supra* sec. IV.

²³⁶ See U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION 6-300 (Aug. 1993) (C6, 29 Nov. 2007); U.S. DEP'T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES reference (e) (19 Feb. 2008).

In addition to improperly propelling military commanders into the abortion debates through their disposition decisions, the military court decisions that may result from the addition of Article 119a may later be used as ammunition to overturn *Roe v. Wade*.²³⁷ In *Roe*, the Supreme Court clearly ruled that an unborn child is not a person under the Constitution.²³⁸ Conversely, the UVVA and Article 119a specifically designate an unborn child as a person. In 2004, the National Organization for Women spoke out against the UVVA stating that its new definition of a person to include “even zygotes, blastocysts or embryos . . . would give rights to fertilized eggs, embryos and fetuses—ultimately, setting the stage to legally reverse *Roe*.”²³⁹ Similarly, following President Bush’s signing of the UVVA, author Kate Randall comments that the Act, “[b]y covering crimes in which an embryo is protected from the ‘time of conception,’ anti-abortion advocates are seeking to establish a precedent in federal law that could be used to push through new anti-abortion legislation.”²⁴⁰

As noted above, Senator Graham stated that “[n]othing in the language of this bill is intended in any way to undermine the legal basis for abortion rights, as expressed by the Supreme Court in *Roe v. Wade*, and subsequent decisions.”²⁴¹ While the *intent* of the UVVA’s language may not be to erode abortion rights, that will be the *result*. Each time a military court allows fetal rights to expand within the punitive articles, a federal court opinion that inadvertently contradicts the Supreme Court’s ruling will be created. Over time, these military opinions may be used as support to institute a new precedent that establishes individual rights for the unborn and eliminates abortion rights. In 2004, Senator Feinstein, quoting Professor Charo from the University of Wisconsin stated,

[i]f you can . . . draw enough examples from different parts of life and law where embryos are treated as babies, then how can the Supreme Court say they are not? This is, without question, a conscious strategy. . . the erosion against *Roe* is being waged, piece by piece, bit by bit, law by law, action by action . . .²⁴²

Military courts’ rulings will become one of the “piece[s]” or “bit[s]” of this strategy to overturn *Roe v. Wade*. This interjection of the political debate over abortion into the military arena is highly problematic.²⁴³

C. The Ultimate Result Could Be More Harm and Deaths of Unborn Children

The pronounced intent of the UVVA was to protect pregnant women and their unborn children from violence and death.²⁴⁴ However, the ultimate result may be the direct opposite. In order to avoid prosecution for their prenatal conduct, pregnant Soldiers may abort their unborn children. For instance, a servicemember like SSG Gussie Foreman, who despite her prenatal drug use carried a healthy child to term, might have aborted her baby simply to avoid the possibility of prosecution. Therefore, the number of abortions may increase in the military because of Article 119a and the expansion of fetal rights. A Massachusetts Superior Court noted this quandary stating that the, “[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.”²⁴⁵

Article 119a specifically excludes the act of abortion from prosecution.²⁴⁶ If a pregnant Soldier believes that her commander may charge her with a violation of Article 134 for her prenatal conduct, she may simply choose to consent to an abortion. If the abortion is legal, she could not be prosecuted for eliminating her unborn child. Any attempt to prosecute this

²³⁷ 410 U.S. 113 (1973).

²³⁸ *Id.*

²³⁹ Press Release, Nat’l Org. for Women, NOW Urges Immediate Action to Prevent Devastating “Unborn Victims of Violence Act” from Passing in Senate (Feb. 26, 2004), available at <http://www.now.org/press/02-04/02-26.html>.

²⁴⁰ Kate Randall, *Bush Signs “Unborn Victims of Violence Act”: Legislation Targets Abortion Rights*, WORLD SOCIALIST WEB SITE, Apr. 9, 2004, <http://www.wsws.org/articles/2004/apr2004/vict-a09.shtml>.

²⁴¹ 150 CONG. REC. S3164 (daily ed. Mar. 25, 2004) (statement of Sen. Graham).

²⁴² 150 CONG. REC. S3150 (daily ed. Mar. 25, 2004) (statement of Sen. Feinstein).

²⁴³ See *supra* note 236 and accompanying text.

²⁴⁴ See 150 CONG. REC. S3132 (daily ed. Mar. 25, 2004) (statement of Sen. Dewine, Ohio, sponsor of H.R. 1997, Unborn Victims of Violence Act of 2004).

²⁴⁵ *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992) (citations omitted); see also *Commonwealth v. Pellegrini*, No.87-970, slip op. (Mass. Super. Ct., Oct. 15, 1990) (holding that a pregnant woman is not criminally liable for the transmission of cocaine to her unborn child).

²⁴⁶ UCMJ art. 119a (2008).

as a crime under Article 134 would most likely be blocked by the preemption doctrine since consensual abortion is specifically addressed and exempted in Article 119a.²⁴⁷

Just as concerning is the idea that pregnant Soldiers, fearing prosecution, may also avoid proper prenatal care and harm their unborn children. In *State v. Zimmerman*, the Wisconsin Court of Appeals acknowledged that “the imposition of criminal sanctions on pregnant women for prenatal conduct may hinder many women from seeking prenatal care and needed medical treatment because any act or omission on their part may render them criminally liable to the subsequently born child.”²⁴⁸ A Florida court similarly recognized that, “[r]ather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected.”²⁴⁹

One could argue that in a military society, due to its paternalistic nature, pregnant servicemembers will not be inclined to forego prenatal care simply to avoid prosecution for their prenatal conduct. Military leaders closely supervise their subordinates, to include those who are pregnant. For this reason, it might be difficult to be pregnant, avoid prenatal care, and go unnoticed. This argument is further supported by the idea that all servicemembers, to include pregnant Soldiers, are subject to random urinalysis tests and therefore, drug use would most likely not be first detected through prenatal care.

However, despite this paternalistic society, pregnant servicemembers may still forgo prenatal care to avoid prosecution. As demonstrated by the pregnant Soldiers in the “born alive” line of cases, *Gibson*, *Nelson*, and *Riley*, concealing a pregnancy and avoiding prenatal care can be done.²⁵⁰ In fact, the women in these cases managed to conceal their pregnancies while surrounded by other servicemembers in a barracks and on a ship.²⁵¹ This possible result of increased death and harm of unborn children is the exact opposite of what the UVVA’s drafters intended.²⁵² However, in the military, just as in the states, this result is more than just conceivable.

VI. Conclusion

The UVVA’s addition of Article 119a to the UCMJ is purported to protect pregnant women and their unborn children equally.²⁵³ The UVVA and Article 119a recognize an unborn child as an individual victim.²⁵⁴ Therefore, the UVVA grants a fetus rights for the first time in federal law.²⁵⁵ Based on this novel grant of fetal rights, opponents of the UVVA are adamant that its hidden agenda is to erode women’s reproductive rights²⁵⁶ and eventually overturn the Supreme Court’s decision in *Roe v. Wade*.²⁵⁷

The UVVA’s sponsors firmly deny that it has anything to do with mothers’ rights, abortion or *Roe v. Wade*.²⁵⁸ In support of this denial, they point to the fact that the UVVA and Article 119a expressly exempt from prosecution anyone involved in a consensual abortion, medical treatment or the mother of the unborn child.²⁵⁹ Drafters stated that the intent was merely to cause third party criminals to not only face criminal consequences for harm they may do to a pregnant women, but also for harm done to a second victim, the unborn child.²⁶⁰

²⁴⁷ See *supra* notes 192–196 and accompanying text.

²⁴⁸ *State v. Deborah*, 596 N.W.2d 490, 495 (1999).

²⁴⁹ *Johnson*, 602 So. 2d, at 1295–96.

²⁵⁰ See *supra* pp. 2–5.

²⁵¹ See *id.*

²⁵² See 150 CONG. REC. S3132 (daily ed. Mar. 25, 2004) (statement of Sen. Dewine, Ohio, sponsor of H.R. 1997, Unborn Victims of Violence Act of 2004).

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See *supra* note 89 and accompanying text.

²⁵⁶ See *supra* note 8 and accompanying text.

²⁵⁷ See *supra* note 9 and accompanying text.

²⁵⁸ See *supra* note 233 and accompanying text.

²⁵⁹ See *supra* note 117 and accompanying text.

²⁶⁰ See *supra* note 111 and accompanying text.

Regardless of its intent, however, in the military, the UVVA represents a dramatic expansion of fetal rights in criminal law. This expansion will allow commanders to charge pregnant Soldiers for their illegal and legal prenatal conduct under Article 134, the exact prosecution intentionally exempted from Article 119a and the UVVA. Military courts, like the South Carolina Supreme Court, will convict these Soldiers holding that it would be “absurd” and inconsistent to acknowledge fetal rights in Article 119a and not apply those fetal rights to a child endangerment charge under Article 134. These convictions will improperly place military commanders in the nation’s abortion debate and may also cause more pregnant women to abort or harm their unborn children because of their desperate desires to avoid prosecution.

The UVVA and Article 119a, in practice, will not protect unborn children and mothers equally. In the military, as demonstrated by South Carolina, this novel grant of fetal rights will eventually cause an unborn child’s interests to outweigh a mother’s rights. As opponents of the UVVA alleged, this elimination of a woman’s right to control her body may be part of the hidden agenda its proponents wished to accomplish.