The truth about Bill C-484: A compassionate and constitutionally valid remedy to current injustice in Canadian criminal law

A response to the Abortion Rights Coalition of Canada's claims that Bill C-484 would "endanger abortion rights and women's rights be establishing fetal personhood"

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This report responds to the claims made in an article by Joyce Arthur, Coordinator of the Abortion Rights Coalition of Canada, entitled *"Bill C-484 Endangers Abortion Rights and Women's Rights by Establishing Fetal Personhood,"* May 16, 2008. [1]

Ms. Arthur's article was a response to my paper entitled: *"Claims that 'fetal homicide' / 'unborn victims of violence' laws target pregnant women: A smoke-screen to attempt to discredit Bill C-484."* [2]

That paper, in turn, was a response to a report by Lynn M. Paltrow, executive director of the US-based National Advocates for Pregnant Women entitled, *"Lesson from the US Experience with Unborn Victims of Violence Laws."* [3]

[1] http://www.arcc-cdac.ca/presentations/rebuttal-to-ken-epp.pdf
[2] http://www.kenepp.com/admin/assets/USCASESE1.pdf
[3] http://www.arcc-cdac.ca/action/LessonsfromUS.pdf

Overview

1 Executive Summary

Joyce Arthur, Coordinator of the Abortion Rights Coalition of Canada, argues that Bill C-484 endangers "abortion rights" and women's rights by establishing fetal personhood.[4]

On the surface, Ms. Arthur's arguments may seem compelling, but a thorough analysis of her statements demonstrates that too many of her assertions are simply inaccurate or incorrect.

The laws in the US she argues are similar to C-484 are in fact substantially different from C-484; and even were such laws to be enacted in Canada (which is highly unlikely), they would not have the same impact in the Canadian legal context. Moreover, the wording of Bill C-484 is explicit, so that there is no danger this bill can be used in any way other than for what it is intended – to give legal recourse to lay charges against a *third-party* in the *very specific, very narrow circumstance* when a pregnant woman is the victim of a crime, the attacker knows she is pregnant, and, in the process, the attacker intentionally or recklessly harms or causes the death of her baby/fetus.

Importantly, Bill C-484 does not make the fetus a "person" or give it legal status as such. It does recognize the *existence* of the fetus, as a number of presently existing laws already do, including the Criminal Code and tort law.

As the issue has been raised repeatedly by opponents of the Bill, it is important to make clear that Bill C-484, if it were to become law, would in fact not affect the law on abortion nor would it criminalize pregnant women for any harm they may cause to their own fetuses/unborn children.

The most deeply worrying aspect of what Ms. Arthur and her co-advocates against Bill C-484 are doing in flooding the public square with articles such as the one mentioned above, is that the public and Members of Parliament, who have an especially important role to play in this debate, might not realize the serious errors of law in Ms. Arthur's arguments and as a result act on the basis of false information about the specific laws and the law, in general, she refers to, and about the assumed legal impact of Bill C-484.

We all recognize that Canada is a democracy and the "rule of law" is the cornerstone of democracy. Consequently, respect for the law, in terms of not intentionally misrepresenting it, is one of the most fundamental values on which we establish Canadian society. It would be profoundly worrying if the law were to become a puppet of a particular ideology and used with reckless abandon with respect to the accuracy of its content. It is even more disturbing if elected Members of Parliament unwittingly promote these inaccuracies and cast their vote based on them.

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[4] *"Bill C-484 Endangers Abortion Rights and Women's Rights by Establishing Fetal Personhood*," by Joyce Arthur, Abortion Rights Coalition of Canada, May 16, 2008.

2 US laws and Bill C-484 – comparing what is simply not comparable

2.1 Focus on US situation is a distraction to hide the real reason Joyce Arthur opposes C-484

As I have already discussed at length in my report, "*Claims that US 'fetal homicide/ 'unborn victims of violence laws' target pregnant women: A smoke-screen to attempt to discredit Bill C-484,"* the laws in the U.S. that Ms. Arthur argues are similar to C-484 are actually substantially different from C-484. The wording of Bill C-484 is explicit, so that there is no danger this bill can be used in any way other than for what it is intended – to give legal recourse to lay charges against a *third-party* in the *very specific, very narrow circumstance* when a pregnant woman is the victim of a crime, the attacker knows she is pregnant, and, in the process, the attacker intentionally or recklessly harms or causes the death of her baby/fetus.

Importantly, Ms. Arthur, herself, admits that C-484 is quite different from the US laws: "It's true that [C-484] is not only narrowly written, but also better worded than many of the U.S. laws," she writes on page 4 of her report.

Yet she still says it "may not be enough to save it from the risk of misapplication and misinterpretation" even though she provides no evidence that this could happen in Canada. All her so-called "evidence" deals with American cases in the American legal context, which is quite different from the Canadian legal context.

It is clear, no amount of assurance that C-484 will not be used to "police" and "punish" pregnant women will satisfy Ms. Arthur, because it seems her objection to C-484 is not really about what could happen to pregnant women who engage in behaviours that are dangerous to their unborn children/fetuses if C-484 were to become law.

Ms. Arthur clearly admitted why she fears C-484 when she told a reporter at the National Post:

"*If the fetuses are recognized in this bill, it could bleed into people's consciousness and make people change their minds about abortion*."[5]

Thus the comparison to US laws is largely if not totally a distraction, a strategy designed to provide a convenient excuse to oppose C-484, when the real reason Ms. Arthur opposes C-484 seems to be that it recognizes some value in the fetus (in that it can be the victim of a crime) which Ms. Arthur says might lead to some Canadians changing their minds about abortion (which also deals with the fetus).

[5] "Fetal rights stir debate on abortion," by Charles Lewis, National Post, March 1, 2008

But how is that a justifiable reason to oppose this Bill? Is it right in a free and democratic society to try to control how and what people think by ensuring there is no debate on sensitive issues? If people of their own free will decide to rethink their position on an important issue, why should that be suppressed?

It is particularly upsetting that the above-cited fear is so clearly a driving force behind the opposition to Bill C-484. If we support the kind of narrow thinking displayed above, then what we are saying is that we are willing to sacrifice the justice that would result from C-484 becoming law for the sole purpose of trying to prevent the possibility that some Canadians might rethink their views about abortion.

It is worth noting that everyday Canadians don't have this problem. Three successive national polls have revealed that the majority of Canadians, including Canadian women, across all regions and party lines, support this legislation. They know it is not about abortion, but rather about justice for defenseless victims.

And even if Canadians do start questioning abortion, it does not necessarily follow that they will change their minds about whether a woman should have the freedom to choose that option. What it could mean is that so-called pro-choice advocates will be in a position of having to justify abortion without relying on the illusion that the fetus is absolutely worthless. They will just need to defend the view that, in spite of the unborn child being recognized as something of value, the woman's interests are paramount.

In fact, Chief Justice Dickson, in the1988 Supreme Court Morgentaler case dealing with consensual abortion, talked about the necessity of "balancing" the "interests" of the child and the mother: "Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective."

In fact all seven Supreme Court Justices in the 1988 Morgentaler decision were unanimous in finding that the state has an interest in the protection of the fetus!

If the Supreme Court has ruled that the interests of the unborn child need to be taken into consideration in the context of consensual abortion, how much more so when the woman has ***not*** chosen abortion?

In the case of Unborn Victims of Crime, there is no balancing act necessary because there is no "conflict of interests." The killing of the woman's unborn child is being forced upon her. Her "interests" and her child's "interests" are the same. In the case of consensual abortion, their "interests" are in conflict. That difference distinguishes the issues raised by abortion from the issues raised with Bill C-484.

Abortion advocates haven't had to defend their position in terms of a "conflict of interests" of two entities, each with value. But it is the only intellectually honest way of framing the abortion debate. The argument that the fetus is nothing more than an appendage of the woman or a "blob

of tissue" or a "parasite," according to Ms. Arthur,[6] is scientifically and medically untenable. As far as the mother who wants her baby is concerned, it is callous and offensive. And as far as society is concerned, it sends a disturbing message about the value of human life, regardless of the fact that Canadian law does not afford that human life legal personhood status.

The irony is that for years pro-lifers have been accused of trying to impose their views on others. The opponents of C-484 are now attempting to impose on women who want to be pregnant and want to love and protect their babies the view that the child in her womb is unworthy of any respect or protection at all in criminal law. As it stands today, a criminal can brutally attack a pregnant woman with a fist or a boot or a gun or a knife or a sword and face no consequences for killing what is so dear to her.

C-484 remedies this current injustice in such a way that fully maintains the choice of the woman who chooses to end her pregnancy of her own free will. To oppose this bill, is to stand in defense of only certain women – those pregnant women who choose abortion.

To the woman who wants to have a child, the fetus is of great importance and worth. Why should Ms Arthur impose her views on a woman with a different view?

In Joyce Arthur's own words

The following quote is taken directly from an article written by Joyce Arthur, entitled "The Fetus Focus Fallacy." It would appear from her very own words that Ms. Arthur supports a woman's right to *all* reproductive choices, no matter what that choice is, because according to Ms. Arthur, the woman's feelings about her fetus is what counts. She says:

> We all have our own opinions about what the moral status of the fetus might be. Some people believe a fertilized egg is a full human being with an absolute right to life that supercedes any right of the woman. Others believe that a fetus attains moral value only after it becomes viable, or upon birth. But that's all these beliefs are - opinions. There's no way to decide between them, because they're entirely subjective and emotional. Therefore, the only opinion that counts is that of the pregnant woman. The status of her fetus and any moral value accorded to it is entirely her call. ***A fetus becomes a human being when the woman carrying it decides it does.*** *[emphasis added]*
>
> Pro-choice leaders and activists are wrong to encourage debate on the status of the fetus. They are wrong to publicly speculate on its moral value. Their opinion about the fetus is just as irrelevant and just as dangerous as the opinion of the most fanatical anti-choicer. Because when we inject our opinions about the fetus into the public square, it just shows our lack of respect and trust for the moral authority of pregnant women. We insult their dignity, invade their privacy, and trample on their personal relationship with their fetus. [7]

[6] "The Fetus Focus Fallacy," by Joyce Arthur, Pro-Choice Press, Spring, 2005, http://www.prochoiceactionnetwork-canada.org/articles/fetus-focus-fallacy.shtml

[7] The Pro-Choice Press, Spring, 2005 (http://www.prochoiceactionnetwork-canada.org/articles/fetus-focus-fallacy.shtml).

Yet, in her vociferous opposition to C-484, Ms. Arthur is now doing precisely what she says pro-choice leaders should *not* be doing, that is, voicing their "irrelevant" opinions on the status of the fetus because she says it shows a "lack of respect and trust for the moral authority of the pregnant woman." *She is discounting the views of those women who view their fetuses already as human beings. She is discounting the views of those women who want their unborn children protected in law from third-party attacks.* Ms. Arthur is doing precisely what she has condemned pro-lifers for doing – imposing their views on others. Ms. Arthur is imposing her view that the fetus is unworthy of any protection in criminal law onto everyone else, including the woman who *wants* protection for her unborn baby.

I would not doubt that Olivia Talbot who was murdered in Edmonton in 2005 believed her 27-week unborn baby boy, Lane Jr., was a *human being*…I would not doubt that Aysun Sesen who was almost eight months pregnant when she was murdered in Toronto in October 2007 believed her unborn baby girl, Gul, was a *human being*. Any woman who has chosen life for her baby, who is anxiously awaiting her beloved child's birth, who has already named her baby, presumably believes her yet-to-be born baby is a *human being*, or at the very least, that it should be a crime for a third-party to kill her baby against her will. It is these very children which C-484 protects, and so, if Ms. Arthur stands by her own words, out of philosophical consistency, she would ***necessarily*** support C-484.

Otherwise what she is really saying is, *"A fetus becomes a human being when the woman carrying it decides it does,* ***as long as she decides it does only after it has been born and not before, or as long as those of us who don't believe it is a child or has any value says it does."*** This is so clearly not an authentic "pro-choice" position from anyone claiming to support a woman's "freedom of choice."

Let me be clear. It is not so-called pro-lifers who have argued that the moral status of the fetus is dependent on the value afforded it by the pregnant woman – it is those who claim to be "pro-choice" and in this case, Ms. Arthur herself. Now Ms. Arthur's supposedly "pro-choice" beliefs are being put to the test with C-484 and her strident opposition to this Bill reveals what appears to be quite a hypocritical and duplicitous stance on the issue of women's "reproductive freedom."

C-484 addresses the injustice of harming or killing a woman's unborn child without her consent. It recognizes the great pain and anguish she and other family members experience when the child she wants and loves, the child *she deems is already a human being, the child she believes has a moral status such that it should be protected in criminal law*, is violently taken from her by a third-party against her will. It is a bill which upholds a woman's right to choose life for her baby.

Intelligent, compassionate women – including those who are truly 'pro-choice' on the abortion issue – will recognize that such a wronged woman has had her choice ripped away, and she deserves justice. Only the most strident, uncaring individual with a particular ideology to protect at all costs would play politics with such a tragedy.

Ironically, such strident, ideological opposition to C-484 could in reality undermine the pro-choice cause as a result, according to at least one prominent American pro-choice lawyer (*see following section*).

2.2 Not all pro-choice American lawyers agree with Lynn M. Paltrow and National Advocates for Pregnant Women (NAPW)

Carolyn B. Ramsey, Associate Professor of Law, University of Colorado School of Law, supports a woman's right to abortion, as is clearly evident from her article, *"Restructuring the debate over fetal homicide laws."* Ramsay, however, holds a different view about the 'fetal homicide' laws in the US than does Lynn M. Paltrow, executive director of the US-based National Advocates for Pregnant Women. Ms. Ramsey says *(note: in the quotes below, the square-bracketed footnote references exist in the original text, but the footnotes are not reproduced here):*

> Fetal homicide statutes, which usually make exceptions for abortion and other types of maternal liability, [FN7] do not sound the death knell for reproductive rights. Although "pro-life" [FN8] groups support these statutes as part of their agenda of overturning Roe, [FN9] the laws themselves are not uniformly **…** hostile to that landmark decision. Indeed, the position embodied in many criminal codes that feticide is murder in some circumstances and legal abortion in others [FN10] balances a pregnant woman's right to make a choice that affects her body and life in profound ways with the need to punish a third-party killer who has no legitimate interest in causing the death of the fetus. [8]

2.2.1 Absolutist position could damage image of pro-choicers in the public mind

Tellingly, Ms. Ramsey says that the extreme position some pro-choice advocates hold could reinforce the notion in the public mind that "pro-choicers espouse an extreme, anti-life position":

> However, an absolutist reaction that denies everything the statutes assert – that a fetus constitutes a human life; that killing it is, in some contexts, criminally wrong; and that the murder of a pregnant woman and the resultant death of her fetus amount to two losses, rather than one – risks corroborating, in the public mind, the allegation that pro-choicers espouse an extreme, anti-life position. Moreover, this approach impedes holding wrongdoers, such as abusive spouses, accountable for their actions. [FN30]
>
> ….Fetal homicide laws enjoy widespread popular support. Opinion polls indicate that the vast majority of American adults believe that someone who attacks a pregnant woman should face additional charges for harming the "unborn child." [FN31] If the attack causes the death of the "unborn child," almost **…** eighty percent of those questioned in one poll answered that the perpetrator should face separate murder charges. [FN32][9]

[8] Carolyn B. Ramsey, "Restructuring the debate over fetal homicide laws," *Ohio State Law Journal* 721, 2006, p. 1
[9] Ramsey, p. 3.

2.2.2. Trend away from prosecuting pregnant women in the US

Contrary to Ms. Paltrow's claims that 'fetal homicide' laws are used to "police" and "punish" pregnant women, Ms. Ramsey says efforts to criminalize pregnant women have met with little success and there is a trend away from prosecuting pregnant women. She says that fears that the Whitner case (referred to by Ms. Paltrow as the prime example in South Carolina where a woman was prosecuted for harming her own unborn child) was the start of a trend towards criminalizing pregnant women has not become a reality:

> Indeed, despite ordinary Americans' disapproval of crack-addicted mothers, [FN67] the appellate bench is not alone in its resistance to convictions based on maternal liability for fetal harm. Efforts to criminalize prenatal substance abuse by passing new statutes have met little success in state legislatures. [FN68] Uncertainty about whether the fetus could be considered either a "child" or a "person" led many judges to reverse convictions in the 1990s, [FN69] but subsequently-enacted fetal homicide laws continued the trend against prosecuting pregnant women by expressly including exceptions for maternal liability. [FN70] Many states have exempted expectant mothers from prosecution, even after clarifying that their criminal codes cover fetal injury or death….
>
> In short, the fear that Whitner signaled a sea change toward the punitive treatment of pregnant women [FN71] has not become a reality. If the abortion and maternal liability exceptions to fetal homicide laws provide a valid indication, commentators overstate the danger that these statutes will be used directly to control women's bodies and behavior. [FN72] [10]

What is interesting here is that Ms. Ramsey, in footnote 71 (FN71), credits Ms. Paltrow for her "tireless work for the ACLU and other organizations that submitted amicus briefs" which "helped defeat the prosecutorial approach."[11] Ms. Paltrow's tireless efforts now seem to be directed at encouraging Canadians to oppose C-484 even though she cannot produce any evidence that this "prosecutorial approach" would ever be attempted, let alone succeed, in Canada.

2.2.3 Context is important

I have repeatedly argued there is clearly a difference between:

a) the woman who is pregnant and presents to a doctor, clinic or hospital, saying "I'm pregnant and I don't want to be. Please help me."

and

[10] Ibid, p. 5.
[11] Ibid. p. 27.

(b) the woman who is lying on the floor while being attacked with a fist, boot, knife, sword or gun, who is crying, screaming, and pleading for her life and the life of her wanted, unborn child.

Echoing this idea, Ms. Ramsey says,

> …a contextual approach to life-taking allows us to reconcile the position of a voluntary mother whose fetus is killed with that of a woman who wants an abortion. The first woman and her family experience the **…** killing of the fetus at the hands of a third party not only as a death, but also as a criminal wrong. For the latter woman, on the other hand, the termination of fetal life constitutes a difficult but justifiable decision. The moral choice to bear and raise a child… belongs to the woman. Such a decision can never legitimately rest with her attacker.[12]

2.2.4 "Single victim" alternative is not the answer (e.g. Bill C-543)

Many pro-choice activists in both Canada and the US have argued in favour of creating stiffer penalties for attacks on pregnant women (as Liberal MP Brent St. Denis' recently introduced Bill C-543 would purportedly do) rather than creating a separate offence to recognize the death of the unborn child. But Ms. Ramsey says such an approach could result in "overly lenient penalties for pregnancy violence, compared to the fetal homicide approach. For example, simply creating a special category of assault crimes fails to make a meaningful distinction between an attack on an expectant mother that causes her to lose her fetus and one that does not."[13]

One argument that has been used against C-484 is that in Canada, unlike in the US, we have a system where sentences are served concurrently, so an additional offence and corresponding penalty for the injury/death to the child will make no difference.

It will make a difference. First of all, if the mother survives and the child dies, then C-484 certainly will allow for the criminal to be given a longer sentence because the maximum sentence under C-484 is life imprisonment and the minimum sentence is 10 years; whereas the maximum penalty allowed for an assault on the woman is only 15 years, and there is no minimum.

Secondly, the Criminal Code is used not just to punish criminals, but also, importantly, as a means to recognize our strongly-held social values. In the case of convicted serial killer Robert Pickton, justice demands he be convicted of as many murders as he committed, despite him not serving any more prison time for them. Recognizing all these individual crimes is important because it sends a strong social message about the wrongness of each act of violence and about the value of each life lost. C-484 is no different in that it too denounces the intentional or reckless killing of the fetus/unborn child by the woman's attacker and recognizes the value of

[12] Ibid. p. 7.
[13] Ibid., p. 9.

each victim in the crime, regardless of the fact that the unborn child is not considered a "human being" in Canadian criminal law.

Ms. Ramsey says that the view that the unborn child is seen as a murder victim by the surviving family members is no less legitimate than the opposite view that "a murder could not occur until the baby was born alive." She says pro-choicers "stray from the essential meaning of reproductive rights" when they put so much emphasis on trivializing the fetus:

> The unwanted destruction of the fetus by a third party thus may be perceived as a wrongful killing. Describing the loss of her daughter Laci's late-term fetus at the hands of her son-in-law, Scott Peterson, Sharon Rocha wrote to U.S. Senators: "When a criminal attacks a woman who carries a child, he claims two victims. I lost a daughter, but I also lost a grandson . . . ." [FN153] Rocha further explained her opposition to a proposed **…** amendment to the UVVA which would have recognized an attack on a pregnant victim as a more serious crime than an attack on a non-pregnant victim…:
>
> > I hope that every legislator will clearly understand that such a single victim amendment … would be a painful blow to those, like me, who are left alive after a two victim crime, because Congress would be saying that Conner [i.e. the late-term fetus] and other innocent unborn victims like him are not really victims-indeed, that they never really existed at all. But our grandson did live. He had a name, he was loved, and his life was violently taken from him before he ever saw the sun. [FN154]
>
> Such sentiments do not mandate fetal homicide laws or speak with authority as to their desirability or constitutionality. To some, Rocha's view may seem irrational and sentimental… Nevertheless, one cannot say that Rocha's sense that Peterson murdered her grandson is any more culturally constructed than the older, common-law view that a murder could not occur until the baby was born alive. Moreover, pragmatically, there is no need for pro-choice advocates to oppose Rocha and the many Americans who agree with her.....
>
> ***The pro-choice camp strays from the essential meaning of reproductive rights if it devotes as much energy to trivializing fetal life as it does to promoting the autonomy and equality of women in our society.*** Surely no reasonable person could argue that a man who kicks his pregnant girlfriend in the stomach, [FN155] …or an ex-boyfriend who shoots his estranged lover to death after she leaves him [FN157] had a legitimate interest in causing the death of the unborn. These criminal actors stripped their victims of the choice to become mothers…. ***Distinguishing consensual abortion from a violent actor's anti-social destruction of a fetus is thus fundamental to women's rights.*** [emphasis added] [14]

[14] Ibid., p. 10 – 11.

2.2.5 Opposition to 'fetal homicide' law could be a costly political mistake for pro-choicers

In a direct reference to an article by Ms. Paltrow in the *Albany Law Review,* 1999, "Pregnant Drug Users, fetal persons, and the threat to Roe v. Wade," in which Ms. Paltrow says, "[R]egardless of intent, these [state laws] create an environment in which prosecutions of pregnant women seem reasonable and the right to abortion does not," Ms. Ramsey says, pro-choicers who hold such a position (i.e. who oppose fetal homicide laws) could be making "a costly political mistake":

> To summarize: While critics of fetal homicide laws often depict them as a monolithic threat to reproductive freedom, [FN110] this broad-brush approach is more polemical than informative. In their diversity, American states have approached fetal homicide in ways that track available poll data, with the majority making it clear that their laws do not directly impinge on a woman's right to terminate her pregnancy or punish her lifestyle if she chooses to carry her fetus to term…..[F]ailing to perceive key differences between implacable anti-abortionists and the "grays," who support Roe but still accord the fetus some degree of humanity, could be a costly political mistake for the pro-choice camp to make.[15]

2.3 Detailed analysis of Joyce Arthur's claims about US laws

2.3.1 NAPW acknowledges only South Carolina has upheld prosecutions of pregnant women

(page 2)

On page 2 of her article, *"Bill C-484 Endangers Abortion Rights and Women's Rights by Establishing Fetal Personhood,"* Ms. Arthur writes:

> Epp states that only South Carolina has upheld convictions of pregnant women under child abuse and endangerment laws, using the state's judicially-enacted 'fetal homicide' law as a precedent. This statement ***trivializes*** the plight of women whose convictions were overturned, many of whom spent years in jail before being exonerated. [emphasis added]

It is difficult to see why she thinks I "trivialize the plight of women…" given that I was referring to Lynn Paltrow's own comments:

> The only U.S. state that has explicitly upheld prosecutions of women because they risked or allegedly caused harm to their fetuses, is South Carolina.[16]

[15] Ibid., p. 7.
[16] "Lesson from the US experience with unborn victims of violence laws," National Advocates for Pregnant Women, p. 2.

Ms. Arthur continues, "Epp is wrong when he claims that "in all cases, except in South Carolina, the charges were eventually dropped." She is referring to a statement I made about cases referred to by NAPW that deal with child abuse/endangerment laws. Again, see quote above from Lynn Paltrow who admits that only South Carolina has upheld prosecutions of pregnant women.

I reviewed only the specific cases referenced by NAPW to begin with. But even more generally, Ms. Ramsey says that "with the exception of Whitner v. State and its progeny in South Carolina, courts generally have reversed pregnant drug users' convictions."[17]

2.3.2 C-484 is unlike the Tennessee law
(page 2)

Yet again, Ms. Arthur refers to two cases where women were convicted of homicide for harm they caused to their own fetuses. She completely discounts the important difference between C-484 and the Tennessee homicide law which applies to fetuses and has no exception for the mother. She argues that the history of Tennessee's law shows that the intent of the legislators was that it should not apply to the pregnant woman, regardless of there being no explicit exception. But if there is no explicit exception in the statute, then the statute can become open to interpretation, regardless of the original intent of the legislators. *C-484 cannot be open to interpretation because the wording is explicit*.

2.3.3 C-484 has safeguards, Texas law does not which leaves it open to misinterpretation
(page 3)

Ms. Arthur brings up the Texas fetal homicide law and the fact that about 40 women were then prosecuted for harm to their own unborn children, even though the fetal homicide law has an explicit exception for women. She ignores my analysis explaining how the Texas *Controlled Substances Act* (the law under which the women were prosecuted) was misinterpreted by the prosecutor. As I pointed out in my analysis:

> So this was a problem of misinterpretation of a law by a prosecutor who misapplied a definition contained solely within one statute to an entirely different statute…. ***This type of misinterpretation by a prosecutor has been addressed in C-484 because C-484 does not redefine any words currently used in the Criminal Code*** (unlike the term "individual" in the *Texas Penal Code* which was expanded to include "unborn child"). ***This eliminates the possibility that a prosecutor could misapply an expanded definition to any other offence.*** [18]

As an aside, Ms. Arthur says that "there is no documentation that their convictions were overturned" except in three cases, yet in the NAPW document I was responding to, Ms.

[17] "Restructuring the debate over fetal homicide laws," Carolyn B. Ramsey, Ohio State Law Journal, 2006, p. 5.

[18] "Claims that 'fetal homicide' / 'unborn victims of violence' laws target pregnant women: A smoke-screen to attempt to discredit Bill C-484" Ken Epp, p. 5.

Paltrow says, "…we were eventually able to overturn the convictions." There is no indication Ms. Paltrow is referring to only three out of 40.

2.3.4 C-484 is unlike South Carolina's judge-made fetal homicide law which set a precedent for future cases involving child abuse/endangerment laws
(page 3)

Firstly, Ms. Arthur misrepresents what Lynn Paltrow herself says in the NAPW document. Ms. Arthur says: "For example, in South Carolina between 89 and 300 women have been arrested under the state's *fetal homicide law*…" [italics added]. That's not what Ms. Paltrow said. Rather, Ms. Paltrow said, "Our research found that at least 89 women and possibly as many as 300 women have been arrested in South Carolina based on the *legal precedent established by South Carolina's judicially created fetal homicide law*." The cases cited by Ms. Paltrow involved *child abuse/endangerment laws*, not the *state's fetal homicide law* as Ms. Arthur claims.

Secondly, I explained in detail in my report how it was possible for women to be charged under South Carolina's *child abuse/endangerment* laws given the legal precedent set in the 1984 judge-made fetal homicide law. I went on to explain in detail how that could *not* happen in Canada with C-484 because C-484 is very different from the laws in South Carolina. For example, there are no explicit exceptions for the pregnant women in SC nor do the SC laws apply only in the commission of an offence against the woman, as is the case with C-484.

2.3.5 Missouri's statutory scheme recognizes unborn children as "persons," Canada's does not
(page 2)

The law with respect to unborn children in Missouri is completely different from the law in Canada. As Ms. Ramsey points out, "Missouri's statutory scheme defines an "unborn child" as a "person" for the purposes of homicide, imposes severe penalties, including death, and does not contain an explicit exception for abortion. (Mo. Ann. Stat. Section 1.205; Section 565.020)"[19] (*See the appendix for the exact wording of the statute*.)

The Missouri statute has only a very narrow exception for acts by the mother which would not appear to exempt pregnant women who cause harm to their unborn children through substance abuse:

> Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

It also states that the definition of "person" in this section applies to other statutes as well:

[19] Ramsey, p. 7.

> Definition of "person" in this section, which includes unborn children is applicable to other statutes and court concludes that it applies at least to the involuntary manslaughter statute, section 565.024, RSMo.

This is completely unlike the situation in Canada in which unborn children are not recognized as "human beings" or "persons" in the Criminal Code, with or without the C-484 amendment. Furthermore, the C-484 amendment explicitly excludes any acts or omissions by the woman which clearly exempts the woman whose alcoholism causes death to her unborn child, unlike the Missouri law whose exception for the mother is ambiguous. Further guarantee that C-484 could not apply to actions of the mother is that C-484 applies only during the commission of an offence against the pregnant woman. Clearly, when a mother's own alcoholism is the cause of harm or death to her fetus, she is not the victim of a crime and so, clearly, C-484 does not apply.

3 C-484 does not establish fetal personhood

3.1 Detailed analysis of Ms. Arthur's claims about Canadian criminal law

Ms. Arthur's analysis of C-484 and the existing criminal law is replete with inaccuracies. This section attempts to address the major misrepresentations of the law made by Ms. Arthur.

3.1.1 C-484 does not negate the Criminal Code definition of "human being" (page 5)

C-484 contains a clause that states, "It is not a defence to a charge under this section that the child is not a human being." In reference to this clause, Ms. Arthur says, "In other words, the fetus IS a human being under Epp's bill."

Ms. Arthur has just concluded the exact opposite of what this clause, in fact, says. The fact that a defendant cannot use the defence that the child is not a human being, means that the bill recognizes that the child is indeed *not* a "human being" according to the Criminal Code definition of that term. *Nevertheless*, C-484 creates a criminal offence for intentionally killing the fetus/unborn child during the commission of an offence against the pregnant woman.

The wording in C-484 is very precise and it does not alter the definition of "human being." That term remains as defined in section 223 of the Criminal Code. Therefore contrary to what Ms. Arthur claims, C-484 does not introduce any "uncertainty over the meaning of 'human being.'"

3.1.2 "Mother" and "child" are terms already used in Criminal Code (Page 5)

Ms. Arthur contradicts herself when she discusses the usage of the terms "child" and "mother" in C-484. In two places, she says these terms are "unprecedented" only to complete her sentences by giving examples of where these terms are, in fact, already used in the Criminal Code. The Criminal Code currently uses no term *other than* "child" to refer to the unborn child (Sections 223 (1) , 223 (2), 238 (1) and 238 (2)). The term "fetus" is never used in the Criminal Code. And when referring to the unborn child's mother, the Criminal Code already uses the term "mother" (Section 238 (2)). In reality, is there any other term that better describes the relationship of the pregnant woman to her unborn child? If not "mother," then what?

Ms. Arthur says that the terms "mother," "child,'" and "unborn child…. clearly confer personhood onto the fetus," but does not explain how this is so.

As far as the phrase "unborn child" is concerned, it is not, in fact, used in the C-484 amendment, nor is it used in the existing Criminal Code, except in titles and headings.[20] The term used in C-

[20] The phrase "unborn child" is only used in the titles/headings in the Criminal Code. So for example, the heading/title of the existing section 238 of the Criminal Code is "Killing unborn child in the act of birth"; and in the

484 as well as the existing Code is "child" and it is distinguished from a born child in various ways. For example, the existing section 238 refers to the "child that has not become a human being"; section 223 states that the "child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother"; and the C-484 amendment refers to the "child during birth or at any stage of development before birth."

Ms. Arthur is also incorrect in her understanding of section 223 (2). She says, "The meaning of child in subsection (2) is the same as that in the definition – a born-alive human being." The exact wording of this section is:

> 223 (2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

In section 223 (2), the term "child" is used to refer to *both* the unborn child and the born child.

Thus, contrary to what Ms. Arthur claims, C-484 is entirely consistent with existing Criminal Code usage of the terms "child," "unborn child," (which is not used in the Code itself, but just in the headings/titles) and "mother." And yet Ms. Arthur disingenuously says the following: "In fact, the terms 'mother,' 'child' and 'unborn child' are typical of language used by anti-abortion activists."

Either Ms. Arthur is aware that the Criminal Code already uses what she calls "anti-abortion activist" language, in which case she should be directing her criticism at the existing Criminal Code, not the C-484 amendment, if she does not like that language; OR she is actually unaware of how the Criminal Code currently deals with the unborn child/fetus, in which case she is not properly qualified to comment on the impact the C-484 amendment would have on the Code.

Given that the term "child" is already used in the Criminal Code to refer to the fetus/unborn child/human offspring before birth, one is left to wonder why Ms. Arthur displays such an adverse, extreme, reaction to the use of this term in C-484.

It is worth noting that what Ms. Arthur refers to as "anti-abortion activist" language was actually used by none other than staunch pro-choice advocate and former Cabinet Minister Barbara McDougall twenty years ago in the House of Commons:

> Society and religion, over the centuries, have had differing views on the mores of abortion, *of killing an unborn child. Let us not be afraid of the vocabulary*.[21] [italics added]

Be that as it may, if the term "child" in C-484 were replaced with the term "fetus," would Ms. Arthur support C-484? I suspect not, in which case her criticism in this regard is yet another red herring meant to distract the public and voting Members of Parliament from the real reasons she opposes C-484, which were discussed in section 2.1.

C-484 amendment, the title/heading is "Injuring or causing the death of an unborn child while committing an offence." The Short Title of C-484 is called the "Unborn Victims of Crime Act."

[21] Hon. Barbara McDougall, Hansard, P. 1 8080, July 27, 1988

3.1.3 C-484 does NOT set a precedent for reinterpreting the word "child" in other sections of the Criminal Code
(page 3)

Given the above discussion, it is easy to see why Ms. Arthur is incorrect when she says that C-484 could allow judges to reinterpret other sections of the Criminal Code. She states:

> But Epp should know that in a common law regime governed by precedent, recognition of a legal entity in one context creates authority for its recognition in other contexts.
>
> To give a hypothetical example, Section 215 of Canada's Criminal Code makes it an offence to fail to provide the "necessaries of life for a child under the age of sixteen years." The inaccurate use of the word "child" instead of fetus throughout Epp's bill, could encourage prosecutors or judges to cite his bill as authority to define fetuses as "children under 16" under Section 215, and thereby prosecute pregnant women for any unhealthy behaviour during pregnancy.

As discussed at length in the previous section, "child" is *already* used in the Criminal Code to refer to the fetus. This means that if the Courts choose to interpret section 215 of the Criminal Code about the "necessaries of life for a child under the age of sixteen years" as applying to fetuses, *they can do so today without Bill C-484!*

3.1.4 The term "victim" used in the Short Title of C-484 does not create a "new legal entity equivalent to persons"
(page 5)

Firstly, for the sake of accuracy, the Short Title of C-484 is the "Unborn Victims of Crime Act," not the "Unborn Victims of Violence Act" as Ms. Arthur states.

Ms. Arthur says that "only human beings are referred to as victims of offences – never animals, property, or corporations. The word 'victim' to denote fetuses therefore reflects the bill's creation of a new legal entity equivalent to persons."

Ms. Arthur offers no explanation as to what she means by "only human beings are referred to as victims of offences." The term "victim" is not defined in the Criminal Code.

As far as C-484 is concerned, the term "victim" is only used in the Short Title, "Unborn Victims of Crime Act." It is not used in the text that describes the new offences created by C-484. And because it was not actually used, there was no need to define it. So how can it create a "new legal entity equivalent to persons?" Ms. Arthur does not even attempt to offer an explanation.

Certainly, the creation of an offence for killing the fetus without the pregnant woman's consent allows us to think about the fetus as a "victim" just as we think of the pregnant woman as a "victim" or anybody else who is the object of a criminal offence. We have criminal laws against cruelty to animals, and one could view animals as "victims" as well. But whether the term

"victim" was in the Short Title or not, is beside the point. One must look at the actual wording of the Criminal Code amendment that creates the new offences– at the wording of Bill C-484 – and in that amendment, as has been said repeatedly, *no new terminology is introduced.*

Besides, as the Law Reform Commission of Canada stated in its working paper, *Crimes Against the Foetus*: "….to decide whether to give the foetus criminal law protection we don't need to decide if it is a person….There is nothing which limits criminal law protection to persons." (p. 34)

3.1.5 New offence created in C-484 is not "homicide"

(page 6)

It is not clear what point Ms. Arthur is trying to make when she says that because the sentences imposed by the new offence in C-484 are similar to penalties for existing offences of homicide and attempted homicide, the implication is that "these are the accurate but unspoken names for the offences." It is ***not*** accurate to use these terms to describe the new offences (regardless of the fact the media does so) because "homicide" by definition applies only to "human beings" as defined in the Criminal Code. C-484 had to create new offences because it is dealing with an entity (the child before birth) that is not defined as a "human being."

3.1.6 Inclusion of C-484 amendment in chapter dealing with "Persons" does not confer personhood status on fetus

(page 6)

Ms. Arthur objects to the fact that the new offences created by C-484 are included in Part VIII of the Criminal Code, entitled "Offences Against the Person and Reputation." She says, "By amending the Persons section of the Code to include an offence against fetuses, Epp's bill establishes legal personhood for the fetus." She offers no legal argument to back up this claim.

As already noted, there is currently limited protection for the fetus/unborn child already in Part VIII of the Criminal Code.

- Section 238: "Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life."
- Section 223 (2): "A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being."

In other words, the Criminal Code today *does* recognize in a very limited way, the existence of the fetus/unborn child and has very specific, narrowly defined laws that offer some protection to the fetus/unborn child. And these laws are in the "Persons" section of the Criminal Code. Do these sections confer "personhood" status simply because they are in Part VIII? Of course not.

The new offences created by C-484 are only applicable during the commission of an offence against the unborn child's mother, who is a "person." This is another reason why it makes sense to put this amendment into Part VIII of the Criminal Code. But regardless of what Part of the Criminal Code C-484 would amend, *what matters is the wording of the amendment itself*, and as has been said repeatedly, ***there is nothing in the C-484 amendment that confers personhood status on the fetus. And this is because the definition of "human being"- which is used to interpret all laws relating to "persons" – has not been changed.***

3.2 C-484 is in line with all Supreme Court rulings cited by Ms. Arthur

(page 6)

Ms. Arthur says that C-484:

> … flies in the face of several Supreme Court of Canada rulings that said fetuses cannot be persons, that a pregnant woman and her fetus are 'physically one' person, and that all rights must accrue to the pregnant woman because she already has established constitutional and equality rights. [4]
>
> [4] See for example: Dobson v. Dobson 1999 2 SCR 753; Tremblay v. Daigle 1989 2 SCR 530; and Winnipeg Child and Family Services v. D.F.G. 1997 3 SCR 925.

The courts have said that the fetus is not a "person" in Canadian law, and this is because our existing law does not recognize the fetus as a person. So the Courts have simply acknowledged the law as it stands today. But the Supreme Court has also said on numerous occasions that Parliament has a legitimate interest in the protection of the fetus and that it is not up to the courts to decide how to provide this protection – in spite of the fetus not being a "person" according to existing law – it is up to the legislature, that is, Parliament, to decide.

Contrary to Ms. Arthur's claim that C-484 "flies in the face of several Supreme Court of Canada rulings," C-484, in fact, is *reinforced* by Supreme Court of Canada rulings, including the very three cases Ms. Arthur cites, namely, *Dobson v. Dobson, Tremblay v. Daigle,* and *Winnipeg and Child Family Services v. D.F.G.*

3.2.1 Dobson v. Dobson [1999] 2 SCR 753

At issue in this case was "whether a mother should be liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured her foetus."[22] Cynthia Dobson was 27 weeks pregnant when she was involved in a motor vehicle collision which resulted in injuries to her not-yet-born child, Ryan Dobson. Ryan was born the next day and the prenatal injuries caused permanent mental and physical impairment. Ryan sued his mother for damages alleging that the collision was caused by her negligent driving.

[22] Dobson v. Dobson [1999] 2 SCR 753

Two important points were affirmed by the Supreme Court in this case that I believe are relevant to Bill C-484.

First, the majority found that the *courts* could not impose a duty of care on a pregnant woman towards her fetus, and so the born child could not sue his mother for damages. However, the Court said the *legislature could* impose such a duty of care. Speaking for the majority, Justice Cory said:

> The public policy concerns raised in this case are of such a nature and magnitude that they clearly indicate that a legal duty of care cannot, and should not, be imposed **by the courts** upon a pregnant woman towards her foetus or subsequently born child. However, **unlike the courts, the legislature may, as did the Parliament of the United Kingdom, enact legislation in this field**, subject to the limits imposed by the *Canadian Charter of Rights and Freedoms.* [emphasis added][23]

In other words, the majority said that while a *court* may not be able to create a new law which would offer some protection to the fetus (in this case, the ability for a born child to sue its mother for damages sustained before it was born), the *legislature* may. The only stipulation is that it must be in line with the *Canadian Charter*, as all laws must be. In fact, as the court noted, such a law was passed in the UK. The very narrowly defined law actually benefits the mother as well as the child and so would not be considered an intrusion on the "rights of bodily integrity, privacy and autonomous decision-making of pregnant women":

> The resolution of such fundamental policy issues is a matter best left to the legislature. In the United Kingdom, it was Parliament that provided a carefully tailored and minimally intrusive legislative scheme of motor vehicle insurance coverage. It was designed to provide a measure of compensation for a child who sustains prenatal injuries as a result of the negligent driving of his or her mother. Yet, it provides protection for mothers by prohibiting claims against them beyond the limits of their insurance policies.[24]
>
> …..
>
> The legislative record in the United Kingdom clearly demonstrates that the motor vehicle exception to maternal tort immunity for prenatal negligence was designed as a measure to decrease the anxiety of women who continue to drive during their pregnancies. It does so by providing recourse to insurance if there is a motor vehicle accident. The distinction in the Act between driving negligence and all other types of negligence stems from pragmatic and logistical considerations. It reduces the driving-associated worries of pregnant women with the mandatory requirement of motor vehicle insurance. These are precisely the types of "common-sense" criteria that legislators may consider in the course of their studies. [25]

In fact just last year, a similar law was passed in the Alberta Legislature. It is a very narrowly defined law that would allow a child to sue its mother for negligent driving as long as the mother

[23] Ibid. at para. 76
[24] Ibid. at para. 36
[25] Ibid. at para. 68

has insurance coverage. Both the mother and child will benefit in such cases because the money helps the family as a whole.

C-484, too, is a "common-sense" piece of legislation that in no way "collides" with anything the Supreme Court said in *Dobson v. Dobson*. In fact, the Court was clear that the legislature *could* enact measures that offer some protection to the fetus as long as such measures do not infringe on the rights of women. C-484 enhances the rights of women by protecting their right to bring their children to term in safety, by hopefully acting as a deterrent to violence against pregnant women, and by acknowledging and honouring the real loss she and her family suffer when both her choice to bear a child and her wanted child are brutally taken from her. C-484 does this *without in any way infringing on her freedom to choose abortion or to engage in any act that might pose a danger to her fetus.*

The second important point that needs to be made about the Dobson case is that the Court distinguished between *the negligent actions of a third-party and the child's pregnant mother.* The Court said, "The inseparable unity between an expectant woman and her foetus distinguishes the situation of the mother-to-be from that of a negligent third-party."[26]

In the case of a third-party, a legal precedent was set in *Montreal Tramways Co. v. Leveille, [1933] SCR 456* when the court ruled that a child could sue a third-party for prenatal injuries. Referring to that case, Justice Cory said:

> In *Montreal Tramways*, *supra*, a child born with club feet two months after an incident of alleged negligence by the tramcar company brought an action for the prenatal injuries which caused the damages. Lamont J., for the majority, held that the child did indeed have the right to sue. He based his conclusion on the following rationale (at p. 464):
>
> > If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.[27]

This is relevant to C-484 because C-484, like *Montreal Tramways*, involves actions of a third-party, *not* the pregnant mother. C-484 criminalizes *only third-party attacks* that cause the injury or death of a pregnant woman's unborn child. Any and all actions or omissions by the pregnant woman are explicitly excluded. This is perfectly in line with the *Dobson* ruling because in *Dobson*, the court ruled *only* that a child could not sue its mother for prenatal injuries (unless, as already discussed, there was explicit legislation allowing for this.) The court had previously ruled in *Montreal Tramways*, that a child *could* sue a third-party.

[26] Ibid. at para. 25
[27] Ibid. at para. 13

There is another interesting parallel between C-484 and what the Court said in *Dobson:* "It is sufficient to observe that when a child sues some third party for prenatal negligence, *the interests of the newborn and the mother are perfectly aligned*."[28] [italics added]. So too in the case of C-484 are the mother and child's interests "perfectly aligned." Unborn victims of crime legislation deals specifically and only with the case where the woman is attacked, against her will, and has *not* consented to an abortion. Her interest in bringing her child safely to term is "perfectly aligned" with the child's interest in being born alive. So again, not only does C-484 not "collide" with *Dobson*, if anything, C-484 is affirmed by Dobson.

There is another observation made by the Court in *Dobson* which I think is also relevant to C-484. Speaking for the majority, Justice Cory said:

> Pregnancy represents not only the hope of future generations but also the continuation of the species. It is difficult to imagine a human condition that is more important to society. From the dawn of history, the pregnant woman has represented fertility and hope. Biology decrees that it is only women who can bear children. Usually, a pregnant woman does all that is possible to protect the health and well-being of her foetus. On occasion, she may sacrifice her own health and well-being for the benefit of the foetus she carries.[29]

In my opinion, such a sentiment provides further justification for a law that gives additional protection to pregnant women and their unborn children which is what C-484 would do by its deterrent effect. And in the case where a criminal is not deterred, C-484 would send a strong social message about the wrongness of violating a pregnant woman's choice to give birth to her child in safety and the wrongness of killing her child against her will.

So to summarize *Dobson*'s relevance to C-484, the Supreme Court found that while the *court* may not create a law to allow legal action against a pregnant woman by her born child, the *legislature* could, as long as it was narrowly defined and did not infringe on a woman's Charter rights. The Court also distinguished between third-party actions and actions by the pregnant woman herself. So although the court refused to allow a born child to take action against its *mother* for prenatal injuries, a born child could take legal action against a *third-party* (*Montreal Tramways*.) So *Dobson* acknowledges the ability for Parliament to enact legislation to protect the unborn children (as long as it does not offend the Charter) AND the court views actions by third-parties differently than actions by the mother. And if the court can create a law to protect fetuses from actions by third-parties as it did in *Montreal Tramways*, surely Parliament can.

Thus there is nothing at all in *Dobson* that would prevent Parliament from passing C-484 into law.

[28] Ibid. at para. 17
[29] Ibid. at para. 24

3.2.2 Tremblay v. Daigle [1989] 2 SCR 530

In *Tremblay v. Daigle*, the issue at hand was whether an injunction granted to Guy Tremblay, the boyfriend of Chantale Daigle who was 20 weeks pregnant, to restrain her from obtaining an abortion, was justified. The Supreme Court ruled it was not, because in the opinion of the Court, neither the Quebec Civil Code nor the Quebec Charter recognized fetal personhood.

The Supreme Court made that ruling based on the existing law, and, similar to *Dobson*, the Court said it was up to Parliament to determine what level of protection to give the unborn child; it was not up to the court to decide on such a law. The Court stated:

> "The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood…..**Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature."** [30]*(emphasis added)*

The following passage is further evidence that the court was in no way saying that the legislature could not recognize fetal personhood or some form of fetal rights or protection if it chose to do so. What the court was grappling with was whether or not the Quebec legislature had in fact recognized the fetus as a person, not whether the legislature had the prerogative to do so:

> In our view the Quebec *Charter*, considered as a whole, does not display any clear intention on the part of its framers to consider the status of a foetus. This is most evident in the fact that the *Charter* lacks any definition of "human being" or "person". For her part, the appellant argues that this lack of an intention to deal with a foetus' status is, in itself, a strong reason for not finding foetal rights under the *Charter*. There is force in this argument. One can ask why the Quebec legislature, if it had intended to accord a foetus the right to life, would have left the protection of this right in such an uncertain state. As this case demonstrates, even if the respondent's arguments are accepted it will only be at the discretionary request of third parties, such as Mr. Tremblay, that a foetus' alleged right to life will be protected under the Quebec *Charter*. If the legislature had wished to grant foetuses the right to life, then it seems unlikely that it would have left the protection of this right to such happenstance.[31]

This passage makes it clear that the court was basing its decision on what it believed was the intention of the Quebec legislature. This implies that if the legislature chose to recognize fetal personhood, it would have the right to do so. There would have been no point for the court to go through the extensive analysis it did in order to determine the intent of the legislature if the court was of the opinion that the fetuses *cannot* be persons. It would have just made its ruling irrespective of the wishes of the legislature. But it did not do this.

So the court in *Tremblay v. Daigle* said that the fetus was not a person because it was of the opinion that the Quebec *legislature* had never clearly recognized it as such, implying that the

[30] *Tremblay v. Daigle [1989] 2 SCR 530*
[31] Ibid.

legislature *could* recognize personhood, or at least grant some sort of legal protection for the fetus if it wanted to, keeping in mind that any such law would have to respect the Charter.

Yet C-484 does not even recognize fetal personhood at all….it does much less than that. It recognizes only that, in the context of a pregnant woman being the victim of a crime, any intentional injury or death to her unborn child would also be a crime. Such a law does not grant any independent legal rights to the unborn child.

Thus nothing about C-484 "flies in the face" of anything the Supreme Court said in *Tremblay v. Daigle.*

3.2.3 Winnipeg Child and Family Services v. D.F.G. [1997] 3 SCR 925

The respondent in this case was five months pregnant and addicted to glue sniffing, which could damage the nervous system of the developing fetus. Two of her previous children were born permanently disabled as a result of her addiction and were made permanent wards of the state. At issue in this case was whether the woman could be ordered into protective custody in order to protect her unborn child.

Recognizing that the current law did not recognize the fetus as a person the court ruled that the woman could not be forced into custody:

> The law of Canada does not recognize the unborn child as a legal person possessing rights…. It follows that, under the law, the fetus on whose behalf the appellant purported to act in seeking the detention order was not a legal person and possessed no legal rights. … Putting the matter in terms of tort, there was no right to sue, whether for an injunction or damages, until the child was born alive and viable. Since the action at issue was commenced and the injunctive relief sought before the child's birth, ***under the law as it presently stands,*** it must fail.[32] [emphasis added]

Like the previous cases already discussed, the Supreme Court was simply applying the existing law which did not recognize fetal personhood. The court was clear, however, that Parliament *could* enact legislation to protect the unborn child. Speaking for the majority, Chief Justice McLachlin said:

> First, we are concerned with the common law, not statute. ***If Parliament or the legislatures wish to legislate legal rights for unborn children or other protective measures, that is open to them***, subject to any limitations imposed by the Constitution of Canada.[33] [emphasis added]
>
> …..
>
> Finally, and perhaps most importantly, ***there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.*** [emphasis added][34]

[32] Winnipeg Child and Family Services v. DFG [1997] SCR 925
[33] Ibid. at para. 12.
[34] Ibid at para. 18

….

> Balcombe L.J. also emphasized the incompatibility between wardship of the unborn and the pregnant woman's freedom. He pointed out that (as in Canada) the *Mental Health Acts* regulate and limit when a person may be confined against her will. If a pregnant woman was to be subject to controls for the benefit of her unborn child, ***Parliament should so legislate,*** as it had in the case of mentally incompetent persons. At pp. 200-201, he stated:
>
> > … If the law is to be extended in this manner, so as to impose control over the mother of an unborn child, where such control may be necessary for the benefit of that child, ***then under our system of parliamentary democracy it is for Parliament to decide whether such controls can be imposed and, if so, subject to what limitations or conditions.***[35] [emphasis added]

Finally, Chief Justice McLachlin concludes:

> I conclude that the common law does not clothe the courts with power to order the detention of a pregnant woman for the purpose of preventing harm to her unborn child. Nor, given the magnitude of the changes and their potential ramifications, would it be appropriate for the courts to extend their power to make such an order. ***The changes to the law sought on this appeal are best left to the wisdom of the elected legislature***.[36] [emphasis added]

Thus it is clear the Supreme Court based its ruling on the existing law and left it squarely in the hands of Parliament to legislate protection for the unborn child.

It is important to note that, just as in *Dobson v Dobson* and *Tremblay v. Daigle*, *Winnipeg Family Services v. DFG* deals with the issue of conflicting "interests" between the pregnant mother and the unborn child. This is completely unlike bill C-484 where the interests of the pregnant woman and her fetus are completely aligned.

Given the Supreme Court has said repeatedly that the legislature may create laws to protect the unborn child - *even when the interests of the pregnant woman and her unborn child are in conflict* as in these three cases under discussion (subject of course to the provisions of the Charter, as all laws must be), then *it is even more certain that the courts would allow the legislature to create a law that protects the interests of both the pregnant woman and her wanted unborn child as unborn victims of crime legislation would do*. In fact, it might even be argued that a *lack* of such a law could be an infringement on a woman's Charter right to security – the security to carry a wanted child into the world without the threat of violence.

As the above analysis makes clear, there is nothing at all in *Dobson*, *Tremblay* or *Winnipeg Child and Family Services* that would prevent Parliament from passing C-484 into law. It is noteworthy that Ms. Arthur did not even attempt to show how C-484 "collides" with *any of these*

[35] Ibid. at para. 53.
[36] Ibid. at para. 59.

three cases, except in a passing comment about how the court said "a pregnant woman and her fetus are 'physically one.'" This statement by the court is addressed in the following section.

3.2.4 The Court's finding that "A pregnant woman and her fetus are 'physically one'" does NOT "collide" with C-484

Finally, I feel it is important to address Ms. Arthur's comment that the Supreme Court has said that "a pregnant woman and her fetus are "physically one" because this statement is used over and over again by the critics of C-484 as supposed 'proof' that C-484 "collides" with Supreme Court rulings.

In ***Dobson v. Dobson,*** the court did make this observation, but here is the full quote: "A pregnant woman and her foetus are physically one, in the sense that she carries her foetus within herself."[37] Of course the pregnant woman carries her fetus within herself, and *in that sense,* one could say they are "physically one." But even going beyond this one phrase, if we look at the full context of the quote, the Court is making the point that giving a born child the right to sue its mother for prenatal injuries could be an infringement on the woman's freedom, and the court was not prepared to make such a ruling (again, I must point out, the courts have *repeatedly* said that the *legislature* may in fact create such a law as long as it does not contravene the Charter.) This is the full quote:

> A pregnant woman and her foetus are physically one, in the sense that she carries her foetus within herself. Virtually every aspect of her behaviour could foreseeably affect her foetus. Thus the vindication of a born alive child's right to sue his mother in tort would severely constrain a pregnant woman's freedom of action. The physical unity of pregnant woman and foetus means that the imposition of a duty of care would amount to a profound compromise of her privacy and autonomy. Therefore, even if a duty of care could be said to arise in the instant case, there are determinative policy considerations, formulated by this Court in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925, negativing the finding of a duty of care.[38]

This is precisely **NOT** analogous to C-484 because C-484 *explicitly excludes acts or omissions by the pregnant woman and is intended only to criminalize actions by third-parties.* As I have said repeatedly, C-484 applies only to the actions of third-parties, and the court was very clear in *Dobson* that actions by third-parties and actions by the pregnant woman are *not* analogous.

It is more than a little misleading to take a quote from a court ruling out of context, as Ms. Arthur and her co-campaigners against C-484 have done, and apply it to a situation that is not even like the one the court was discussing at the time.

Whether or not one views the fetus and its mother as "physically one" because the fetus is inside the mother is beside the point when deciding whether or not it should be a crime for a third-party to harm or kill that fetus without the woman's consent. Again, neither this statement singled out by Ms. Arthur, nor anything else said by the court in *Dobson*, conflicts in any way with C-484. It

[37] *Dobson et. al.* at para. 95
[38] Ibid. at para. 96

is telling that Ms. Arthur did not include an analysis of the *Dobson* case in her criticism of C-484, only a single statement, which, when understood in context, has absolutely no relevance to what we are dealing with in C-484.

To be clear, the court also made a similar comment in ***Winnipeg Child and Family Services v. D.F.G.:***

> Before birth the mother and unborn child are one in the sense that "[t]he 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman": *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408 (Comm.), at p. 415, applied in *Re F (in utero), supra*. [39]

No one is denying that the lives of the fetus and pregnant women are intimately connected. In fact, it is precisely because they are intimately connected that one cannot destroy the woman's unborn child against her will without committing an offence against her. And so by criminalizing third-party attacks on women in which the intention is to harm or kill the child, it is hoped that violence against both woman and child will be deterred. Such a law sends a strong message about respecting a woman's choice to protect the life of her baby and about the value of this developing life she has chosen to bring into the world. In those cases where the violence is not deterred, such a law would validate the horrible loss she and surviving family members suffer because it recognizes that something of value was brutally taken from her against her will; and anyone who violates her in that fashion will face the consequences.

3.3 C-484 helps to remedy existing inconsistency in criminal law

The lack of criminal penalties for third party attacks on the *in utero* fetus is inconsistent with our existing criminal law which offers some protection to *in vitro* embryos, as per the Assisted Human Reproduction Act which was passed in 2004.

Section 10(3) of the AHR Act creates the following criminal offence:

> (3) No person shall, except in accordance with the regulations and a licence…. destroy… an *in vitro* embryo, for any purpose.

The regulations for Section 10 have not yet been defined, but undoubtedly one requirement will be that the embryo "donors" will have to give consent before the embryo can be destroyed, otherwise criminal charges could be laid. Given this legal reality in current Canadian law, it is at best ironic that a person can attack and kill a woman's child in her womb, without her consent, at any stage at all during her pregnancy, and will be charged with only the assault on her, with no charge for killing her baby against her will.

[39] *Winnipeg Family Services et. al*. at para. 27.

It is reasonable to ask: *How can it be a crime to destroy a woman's days-old human embryo, without her consent, when it is in a petri dish, but not a crime to destroy a woman's wanted unborn child at any stage of development, without her consent, when it is in her womb*?

The Assisted Human Reproduction Act recognizes that human life, no matter how young or early in its development, has some value. And this is why certain activities on embryos are outright banned, and other activities are strictly controlled. In other words, our federal criminal law offers some level of protection to human embryos in the lab. Yet as soon as that embryo is implanted in a woman, it loses any protection from the law it once had. It is fair to ask if this makes logical or ethical sense.

In her article "A Place for Criminal Law in the Regulation of Reproductive Technologies," University of Ottawa assistant professor Angela Campbell believes there are two fundamental bases for using criminal law in the area of assisted human reproduction: "**the importance of the values and interests at stake, and the goal of conveying a powerful social message."** [40]

> ***(a) Importance of the Interests and Values at Stake***
>
> As discussed earlier, science and research related to assisted human reproduction have the potential to alter our perception of human dignity and integrity. Whether we are dealing with the use of embryos in research, the donation of ova or semen, or surrogacy arrangements, human life and the value we attribute to it lie at the root of the ethical debate in this area. These concepts are so important that any activity that threatens to alter the way we perceive, treat and value human life deserves to be met with a weighty and meaningful legislative response. [41]
>
> ….
>
> ***(b) Conveying a Powerful Social Message***
>
> Marshall and Duff write that the criminal law "is a way of indicating a serious condemnation of an activity or action." [*S.E. Marshall & R.A. Duff, "Criminalization and Sharing Wrongs" (1998) 11:1 Can. J.L. & Juris. 7 at 21-22*]. Somerville states, "we use criminal law not only to punish people, but also to state our most important social values." *[M. Somerville, "A Clone by any Other Name" The Globe and Mail (15 May 2002) A19*]. These comments reflect on the way that legislators use criminal law to send a clear message expressing society's rejection of, and intolerance for a specific act. [42]

I would argue that for the same two reasons – the importance of the interests and the values at stake (i.e., the value we attribute to human life), and the importance of sending a strong social message (i.e., that it is wrong to destroy that unborn human life against the mother's will in an attack on her) – we need the criminal law protection afforded by the Unborn Victims of Crime Act. How can we justify protecting embryos in the lab, but not a pregnant woman's wanted baby in her womb?

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[40] Angela Campbell, "A Place for Criminal Law in the Regulation of Reproductive Technologies," *Health Law Journal*, Vol. 10, 2002, p. 96. (http://www.law.ualberta.ca/centres/hli/pdfs/hlj/v10/campbe.pdf)
[41] Ibid, p. 96.
[42] Ibid. p. 98.

4 Conclusion

As the forgoing analysis has shown, C-484 cannot be used against pregnant women in any way, it cannot be used to restrict a woman's freedom to choose an abortion, it does not recognize fetal personhood, and it is completely in line with Supreme Court of Canada rulings.

In spreading inaccurate information about the law in their campaign against C-484, Ms. Arthur and ARCC have turned their backs on pregnant women who want to be mothers and dishonour the pain and suffering these mothers feel when their cherished not-yet-born child is slain. Ms. Arthur and ARCC claim to be the great defenders of women's rights, and yet by opposing Bill C-484 they are robbing women of the added protection, in criminal law, of bringing their children safely into the world. They are denying justice to the woman who has been victimized by a brutal crime, one which has violently taken her yet-to-be-born but very much wanted child from her womb.

How can Ms. Arthur and ARCC claim to speak for women when they work so hard to rob such a violated woman of basic human compassion and justice?

Unborn victims of crime legislation is NOT about abortion. It's only about abortion for those abortion-rights advocates who are so extreme in their views that they cannot get past their strident ideology to feel any compassion for a woman who is such a tragic victim.

My message to Ms. Arthur and ARCC and others who are so strenuously fighting against Bill C-484 is this: if you don't support this Bill, deny your support because of what it actually is, not because you want it to sound like it is something that it is not. Be honest about why you don't support the Bill. Don't frighten Canadians into thinking this Bill is something that it is not. So again, please be honest about it and tell Canadians the real reason why you oppose it: admit that you are so concerned about how it might affect people's thinking on abortion, that even the most vulnerable of women who has made a choice – a pregnant woman who wants her baby – will not have your support because your fear about protecting your ideology is more important than her loss; admit that it is more important for you to try to prevent Canadians from even thinking about the moral status of the fetus than it is to try to prevent violence against pregnant women; admit that you won't respect and support choices that are not in line with your own.

As has been the case too often in history, the right or truly just thing has not been done to help protect the weak or innocent simply because large, powerful, ideological groups band together to fear-monger and predict outcomes that will never – and could never – occur. Sadly, this approach is often enough to frighten people into supporting the status quo.

I truly hope that Canadians, through their MP's, will set aside any possible ideological constraints or pressures that sometimes get in the way of doing what we really believe is right and just, and look in their hearts and recognize what they instinctively must believe: that it is simply wrong for anyone to attack a woman, and further to attack a woman with the purpose of violating her pregnancy and destroying her not-yet-born baby against her will. If we can rectify this wrong in law, we will have taken one more step toward a more just and compassionate Canadian society.

APPENDIX

Missouri Revised Statutes

Missouri Revised Statutes, Chapter 1, section 1.205 reads:

1.205 Life begins at conception--unborn child, defined--failure to provide prenatal care, no cause of action for.
1.205. 1. The general assembly of this state finds that:
(1) The life of each human being begins at conception;
(2) Unborn children have protectable interests in life, health, and well-being;
(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

(L. 1986 H.B. 1596)

CROSS REFERENCE:

Abortion regulations, Chap. 188, RSMo
(1989) Where section by its terms does not regulate abortions or any other aspect of appellees' medical practice, it can be read simply to express a value judgment. The extent to which the statute might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitely decide. U. S. Supreme Court declined to rule on the constitutionality of the section unless the meaning of the section is applied to restrict the activities of a claimant in some concrete way. Webster v. Reproductive Health Services, 109 S.Ct. 3040.

(1992) Definition of "person" in this section, which includes unborn children is applicable to other statutes and court concludes that it applies at least to the involuntary manslaughter statute, section 565.024, RSMo. State v. Knapp, 843 S.W.2d 345 (Mo. en banc).

(1995) Statute sets out a canon of interpretation enacted by general assembly directing that time of conception and not viability is the determinative point at which legally protectable rights, privileges and immunities of an unborn child should be deemed to begin. Statute further sets out the intention of the general assembly that courts should read all Missouri statutes in pari materia with this section. Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo. en banc).

Missouri Revised Statutes, Chapter 5, Offenses Against the Person:

Note in the Cross Reference below that for the purposes of the following section on second degree murder, “the unborn child is a person”:

565.021. 1. A person commits the crime of murder in the second degree if he:

(1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or
(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.
2. Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.
3. Notwithstanding section 556.046, RSMo, and section 565.025, in any charge of murder in the second degree, the jury shall be instructed on, or, in a jury-waived trial, the judge shall consider, any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84
*No continuity with § 565.021 as repealed by L. 1983 S.B. 276.
CROSS REFERENCE:
No bail, certain defendants, certain offenses, RSMo 544.671
(1990) Reduction in sentence was available to defendant when statute which limited maximum term of imprisonment became effective before state brought charges but after crime was committed. (Mo.App.) Searcy v. State, 784 S.W.2d 911.
(1998) Defendant may be charged under the felony murder statute instead of involuntary manslaughter at the prosecutor's discretion when both apply. State v. Pembleton, 978 S.W.2d 352 (E.D.Mo.).
(2004) Unborn child is a person for purposes of section. State v. Rollen, 133 S.W.3d 57 (Mo.App. E.D.).