



**Testimony for the House Judiciary Committee
February 20, 2018**

HB 748 - Criminal Law – Homicide – Unborn Child (Laura and Reid’s Law)

JOANNA DIAMOND
ADVOCACY CONSULTANT

OPPOSE

The American Civil Liberties Union of Maryland (ACLU) opposes HB 748, which would repeal references to the terms “viable” and “viable fetus” in the statutory provisions concerning the offense of murder or manslaughter of a fetus. Additionally, it removes the word “fetus” and replaces it with “unborn child,” defined as “a fetus at any stage of development that is carried in the womb.”

The ACLU recognizes that a woman may suffer a serious physical and emotional injury if her pregnancy is ended by an assault, a drunk driving accident, or other criminal or negligent acts. The ACLU fully supports a woman's right to obtain redress under civil law for an injury to her fetus, and we support society's right to punish criminal conduct.

Maryland law already criminalizes the killing of a viable fetus. HB 748 would amend that law to include a fetus at any state of development, giving even an embryo in the earliest stages of a pregnancy the status of an independent victim of a criminal act.

We urge legislators and advocates of choice to take a careful look at bills designed to protect fetuses. They must be alert to the pitfalls in such bills and refrain from supporting statutes that endanger civil liberties.

HB 748 Violates the Supremacy Clause

In changing the language of the current statute from “fetus” to “unborn child,” HB 748 proposes to further treat the fetus as an independent victim, with legal rights distinct from the woman harmed or killed by the criminal conduct. A pregnant woman and her fetus should never be regarded as separate, independent, and even adversarial, entities. Yet that is precisely what this legislation and some anti-choice organizations have attempted to do in the past decade.

Anti-choice organizations have long promoted fetal protection legislation as one prong of their campaign to eliminate the right to choose. It is no accident that anti-choice groups like Americans United for Life have drafted and circulated such legislation all over the country. Passage of fetal protection laws gives anti-choice forces a propaganda coup and a launching pad for arguments to restrict abortion.

The equation of fertilized eggs, embryos, and fetuses with individuals (“child”) violates the Supremacy Clause of the U.S. Constitution. In *Roe v. Wade*,¹ the

¹ 410 U.S. 113 (1973).

AMERICAN CIVIL
LIBERTIES UNION
OF MARYLAND

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

WWW.ACLU-MD.ORG

COLEMAN BAZELON
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

Supreme Court roundly rejected that claim.² There is no authority to pass laws directly at odds with Supreme Court’s constitutional ruling in *Roe* that a fetus is not a person (or “child,” as the case may be with HB 748).³

HB 748 Violates Due Process Rights

HB 748 disregards the Constitution's promise that citizens are entitled to due process of law. It violates due process guarantees because it is unacceptably vague with regard to the provision on “wanton[] or reckless[] disregard[]” for harm to a fetus.

The Supreme Court has made clear that statutes may be vague in violation of the Due Process Clause due to concerns of “lack of notice,” and can only be overcome “in any specific case where reasonable persons would know that their conduct is at risk.”⁴ Under this bill, taking away the requirement of “viability” and replacing it with “any stage of development that is carried in the womb” substantially increases the likelihood that the accused, or the woman for that matter, would not know that the woman was pregnant, therefore subjecting an individual to a potential manslaughter charge on the basis of wanton and reckless disregard to someone who could not have known that the fetus was being harmed.

Under Maryland law, “viable” refers to the stage at which “there is a reasonable likelihood of the fetus's sustained survival outside the womb,” pursuant to the attending physician’s judgment.⁵ At this later stage of pregnancy, it is easier for a physician to determine whether a woman’s pregnancy is healthy or not and to judge the stage of development of the fetus. However, prior to viability and particularly in the earliest stages of a pregnancy, physicians cannot necessarily determine whether a fetus will become viable. Many women may not even realize that they are in the early stages of pregnancy. If a woman does not know she is pregnant, she would likely engage in her routine behavior that could be seen as risky to the health of her pregnancy. Without the knowledge of her pregnancy, the woman could continue to drink alcohol, smoke cigarettes, do extreme sports, and the list goes on.⁶ As it relates to this statute, other people could engage or aid in

² *Id.* at 156-67.

³ Allowing criminal punishment for the “killing” of a non-implanted fertilized egg that medical authorities agree is not “human life,” impermissibly reflects the concerns of a handful of religions, instead of a legitimate state interest. *Oyler v. Boles*, 368 U.S. 448, 453 (1962) (forbidding prosecution based on religion).

⁴ See *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988); Additionally, whether an accused “caused” the “death” of an embryo or non-viable fetus that may or may not have matured to a living person is a matter of philosophy and personal opinion, and proves far too vague to satisfy the rigorous demands of the Eighth Amendment. See, e.g., *Evans v. People*, 49 N.Y. 86 (1872) (“death cannot be caused when there is no life”).

⁵ Md. Code Ann., Crim. Law, § 2-103(a).

⁶ *Grodin v. Grodin*, 102 Mich. App. 396 (1980) (The Court held that a child could sue his mother for having taken tetracycline during pregnancy, allegedly resulting in discoloration of the child's teeth. The facts of the case were such that after a doctor assured the woman/defendant that it was

such activities with the woman who is pregnant. Under this bill, a friend who gives a woman alcohol or cigarettes or takes her skateboarding could be prosecuted as “wantonly and recklessly disregard[ing] the likelihood that the person’s actions would cause the death of or serious physical injury to the [fetus].” As such, this bill is unconstitutionally vague in its lack of defining “wanton[] or reckless[] disregard[].”

Further, if an individual does not know a woman is pregnant, he or she would have no way to know that their actions could be “wanton[] or reckless[]” under the bill. As such, this lack of notice violates due process. This bill opens the floodgates to murder or manslaughter without proper notice to the accused.

Additionally, miscarriages and other problems can occur that will prevent a fetus from ever developing. Accordingly, there would be many legal problems associated with determining whether there was murder or manslaughter of a fetus that was not yet viable.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

The purpose of this legislation is not to protect women from violence. The leading cause of death for pregnant women is murder. To protect women from abuse and violence, lawmakers must increase support for domestic violence prevention programs. Fetal homicide legislation is a deceptive attempt to separate the woman from her fetus. It will not stop violence against pregnant women; instead, it will chip away at the legal foundation of a woman's right to choose abortion. People who commit heinous crimes against pregnant and non-pregnant women can and should be punished. However, the current law sufficiently addresses this. This bill is dangerous, impractical, and unnecessary.

HB 748 seriously jeopardizes civil liberties, and we urge an unfavorable report.

impossible for her to become pregnant, she continued to take the medication tetracycline. Only after consulting a different doctor who told her she was seven or eight months pregnant did she stop taking the medication. The plaintiff claimed that as a result of his mother's taking the drug, he developed teeth that were brown and discolored).