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By Juan A. Ortiz Salazar

THE UNBORN VICTIMS OF VIOLENCE ACT:
EXPANDING A NEOLIBERAL, CARCERAL STATE
Dominic Scialabba

Abstract

Fetal-protection laws, such as the Unborn Victims of Violence Act, are a contemporary means of upholding and spreading the neoliberal administrative state and mass incarceration within the United States. This act creates a political culture in which laws similar to the Unborn Victims of Violence Act can be applied to restrict mothers' access to proper health services, and to even imprison expecting mothers. I argue these laws do not work to prevent domestic violence, but rather participate in the larger prison industrial complex. A second key finding is that fetal-protection laws stand as obstacles to achieving reproductive justice in policing the bodies of mothers and redefining the relationship between mother and fetus. Political, queer, and critical race theories combine to create a critical framework for analyzing fetal-protection laws present in the United States, alluding to the need for larger political and institutional changes within the United States that render prisons obsolete.

Introduction

Mothers in the United States must navigate a state that has institutionalized their reproduction to such a point where mothers are detached from their fetus in the eyes of the law, and some mothers are painted and jailed as abusers against their own unborn children. In 2004, the Bush Administration passed the Unborn Victims of Violence Act (UVVA), an act which establishes the fetus as a separate entity in domestic violence cases. The Unborn Victims of Violence Act allows for the possibility of a separate offense for one who “causes the death of, or bodily injury ... to, a child, who is in utero at the time the conduct takes place.”¹ Under this act, a person who abuses a pregnant mother would receive a heavier jail sentence. Seeing itself as a way to combat domestic violence against pregnant mothers, the Unborn Victims of Violence Act employs a woman-protectionist narrative, whereas the state’s efforts are legitimate in protecting mothers from irrational abusers through placing abusers in prison.

This woman-protectionist narrative is also employed to justify the mass incarceration it invokes. President Bush argues in his “Statement on House of Representatives Passage of Legislation to Protect Unborn Victims of Violence,” “pregnant women who have been harmed by violence, and their families, know that there are two victims – the mother and the unborn child – and both victims should be protected by Federal law.”² The act reframes the relationship between the state and a mother’s body because of a newly legitimized investment in mothers’ reproductive lives. This act, and those like it, destroy the bodily autonomy of pregnant mothers and place the state’s interests in fetuses as more important than those of the individual mother.³ I

¹ *Unborn Victims of Violence Act*, 18 U.S.C. §1841 (2004).

² George W. Bush, “Statement on House of Representatives Passage of Legislation to Protect Unborn Victims of Violence,” (February 26, 2004).

³ Jeanne Flavin, “Innocent Preborn Victims,” in *Our Bodies, Our Crimes: The Policing of Women’s Reproduction in America* (New York; London: NYU Press, 2009): 95-119.

argue fetal-protection laws are a means of upholding the prison industrial complex and the neoliberal administrative system of the United States, and a means of stifling true reproductive justice, defined as “the human right to maintain personal bodily autonomy, have children, not have children, and parent the children... in safe and sustainable communities.”⁴ Through a critical analysis of the Unborn Victims of Violence Act of 2004, this paper seeks to demonstrate the influences of neoliberalism and the prison industrial complex on fetal-protection laws.

The Prison Industrial Complex and Neoliberalism

The Unborn Victims of Violence Act expands practices of mass incarceration in the United States through its participation in the prison industrial complex. The concept of “prison industrial complex” is used “to point out that the proliferation of prisons and prisoners is more clearly linked to larger economic and political structures and ideologies than to individual criminal conduct and efforts to curb ‘crime’.”⁵ A rise in crime narrative has been employed by the government, starting with the Reagan Administration, to justify the expansion of the prison system.⁶ The term “prison industrial complex” challenges this preconceived narrative to call to attention how incarceration is used as a way for the state to control marginalized communities, which can be seen through race being a driving factor in the push for increasing and sustaining high levels of incarceration.⁷ One in nine Black men between the ages of twenty and thirty-four are

⁴ Sister Song: Women of Color Reproductive Justice Collective, “Reproductive Justice.”

⁵ Angela Y. Davis and Cassandra Shaylor, “Race, Gender, and the Prison Industrial Complex California and Beyond,” *Meridians: Feminism, Race, and Transnationalism*, Vol. 2, no. 1, (2001): 2.

⁶ Michael C. Campbell and Heather Schoenfeld, “The Transformation of America’s Penal Order: A Historicized Political Sociology of Punishment,” *American Journal of Sociology*, Vol. 118, no. 5 (2013): 1375-1423.

⁷ Michael C. Campbell, Matt Vogel, & Joshua Williams, “Historical Contingences and the Evolving Importance of Race, Violent Crime, and Region in Explaining Mass Incarceration in the United States,” *Criminology*, Vol. 53, no. 2 (May 2015): 180-203.

imprisoned.⁸ The prison industrial complex is an intersectional issue that affects multiple identities, as a majority portion of the prison population comes from marginalized racial communities and women are the fastest growing prison population.⁹ Mass incarceration has become the answer to solving social issues that should be addressed by other institutions.¹⁰ The establishment of the concept “prison industrial complex” works to call out a society in which an overreliance on incarceration has become natural. The prison industrial complex relies heavily upon global neoliberalism. Neoliberalism can be defined by four main policy trends: extended privatization, deregulation, increase in corporate power, and defunding of social services.¹¹

The belief in personal responsibility over a collective responsibility drives neoliberalism, which justifies the privatization and deregulation occurring under the current system. Neoliberalism influences social and political institutions as those in power see marginalized communities’ oppressed status in society resulting from individuals making bad choices rather than systemic oppressive forces. The trend of mass incarceration in the United States is linked to neoliberalism with regards to capitalistic exploitation: “Multinational globalization in search of cheaper and cheaper labor and profit maximization is part and parcel of the growth of the prison industrial complex. The ideological underpinnings of racialization and the political economy of inequality are at the core of this discussion.”¹² Prisons are a site of cheap, industrial labor which can be exploited by the global marketplace, especially when the prison

⁸ Roy Walmsley, “World Prison Population List 1,” International Centre for Prison Studies, 6th ed., (2005).

⁹ *op. cit.*, fn. 5

¹⁰ *Ibid.*

¹¹ Johanna Bockman, “Neoliberalism,” *Contexts*, Vol. 12, no. 3 (Summer 2013): 14-15.

¹² Rose M. Brewer and Nancy A. Heitzeg, “The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex,” *American Behavioral Scientist*, Vol. 51, no. 5 (January 2008): 625.

population in the United States has quadrupled since 1980, rising from 400,000 to just under 1.6 million.¹³ Incarceration and the criminal justice system are not accidental to, but rather embedded in, a state that exploits prisoners for profitable, cheap labor in a space where there can be no strikes and no organized opposition.¹⁴ With a lack of social services to support those struggling to survive in a capital market that relies on post-industrial jobs, the state turns to mass incarceration. Rather than work toward long-term systemic solutions to solve social issues, such as working in a post-industrial society, the state is able to turn toward incarceration as a short-term solution where those unfit to society’s standards are locked up.¹⁵ This trend is no stranger to fetal-protection laws that imprison both domestic violence abusers and pregnant mothers addicted to drugs.

The Unborn Victims of Violence Act

A critical analysis of the Unborn Victims of Violence Act demonstrates that fetal-centered laws have roots in neoliberalism and the prison industrial complex, whereas these laws work toward controlling pregnant mothers and reproduction. The Unborn Victims of Violence Act was introduced in 2001 by the Bush Administration and passed in 2004 to protect fetal life from harm and possible death resulting from domestic violence.¹⁶ Specifically, an abuser who injures or kills a fetus is punished for the act against the mother, and is also punished for the harm committed against the fetus as if the fetus had been a person.¹⁷ The main components of this act include the second criminal charge against a domestic violence offender, and the establishment

¹³ The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections* (June 2017).

¹⁴ Angela Y. Davis, “Masked Racism: Reflections on the Prison Industrial Complex in the USA,” *Lola Press: International Feminist Magazine*, no. 12 (April 30, 2000): 52.

¹⁵ *Ibid.*

¹⁶ *op. cit.*, fn. 2

¹⁷ Tara Kole and Laura Kadetsky, “The Unborn Victims of Violence Act,” *Harvard Journal on Legislation*, Vol. 39, no. 215 (Winter 2002): 215-521.

of personhood for an unborn fetus affected by the violence.

This act creates an obstacle to achieving reproductive justice through defining the fetus as an individual person separate from the mother. This act comes in a post-*Roe* society in which the fetus was specifically established as not a person to guarantee abortion rights for women.¹⁸ Placing the UVVA in the context of *Roe v. Wade*, the act is seen as a means of undermining abortion rights: “Roe held that the unborn fetus is not a ‘person’...Nevertheless, by treating a fetus as a person for the purposes of federal criminal law, the UVV [UVVA] may lead some to question Roe’s assessment of fetal life. Coupled with improvements in prenatal medicine and technology, the Act may in fact serve ultimately to undermine abortion rights.”¹⁹ Abortion rights are fundamental when working toward reproductive justice because access to abortion allows for control over one’s reproductive activities and allows one to make decisions about whether to bear a child. Access to abortion has become institutionalized within the United States, as intersecting systems, such as class and race, determine one’s ability to access abortion services.²⁰ The UVVA itself protects abortion rights for mothers who have access to a certified physician.²¹ Often times, middle to upper-class white women. Under neoliberal values, though, mothers who do not have access to these certified abortion clinics are seen as lacking this access due to their own personal choices in life. The UVVA challenges a woman’s right to privacy which is secured under the Fourteenth Amendment in the act’s establishment of the mother as separate from the fetus. In creating this dualism between mother and

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ *op. cit.*, fn. 17, 215-216.

²⁰ Christine Dehlendorf and Tracy Weitz, “Access to Abortion Services: A Neglected Health Disparity,” *Journal of Health Care for the Poor and Underserved*, Vol. 22, no. 2 (May 2011): 415-21

²¹ *op. cit.*, fn. 1

fetus, the state works to protect the fetus over the mother.

In addition to the Unborn Victims of Violence Act harming pregnant mothers’ reproductive autonomy through defining the fetus as an individual person, the act also harms these mothers through its surface-level dedication to preventing domestic violence. “Surface-level dedication,” I argue, refers to the notion that the state only seeks to prevent domestic violence through the practice of incarceration, but is not taking larger steps to address a culture that creates domestic abusers. In the Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, Judge Steve Chabot argues:

*The Unborn Victims of Violence Act was designed to address this current inadequacy in Federal law by providing that an individual who injures or kills an unborn child during the commission of certain predefined violent Federal crimes may be punished for a separate offense. This legislation is vitally important to expectant mothers and their families, serving as a deterrent to anyone who thinks that they can injure or kill an unborn child with minimal consequences.*²²

The language of the act and arguments in support of the act, such as those put forth by Judge Steve Chabot demonstrate the perceived motivation behind these laws: preventing further domestic violence against pregnant mothers. The law itself uses language focusing primarily on the fetus rather than the mother, though, which challenges the notion that this law is designed to protect mothers.²³ In fact, the UVVA and other fetus-centered homicide laws define harm in relation to the fetus: Fetus-centered homicide laws contribute to the perception that the

²² Unborn Victims of Violence Act of 2003 or Laci and Conner’s Law, *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives* (108th Congress., 1st Sess., 2003): 88.

²³ *op. cit.*, fn. 3

harm is defined by the harm to the fetus rather than to the woman. In doing so, they contribute to the devaluation of women that makes violence against women a problem in the first place... Claims of fetal rights relegate ‘the women are being hit, demeaned, and violated to the status of baby carriers’ rather than human beings.²⁴

Through defining the fetus as a person, pregnant mothers revert to a status of “baby carrier.” Devaluing mothers to this status questions who these laws are meant to protect, and who they actually protect. Increasing criminal charges seems to be a solution to solving the domestic violence issue, assuming that a rational individual would not want to put themselves in jail for a longer amount of time. This assumption has roots in neoliberal personal responsibility and does not address the systemic roots of domestic violence.

This act individualizes oppression by painting domestic violence as a few people in society making bad decisions rather than acknowledging a system of oppression and injustice that needs to be addressed. The individualization of domestic violence cases occurs at the intersection of the prison industrial complex and neoliberalism, “where the struggles of oppressed people come to be used to prop up the very arrangements that are harming those people.”²⁵ This practice fails to address domestic violence as a social and cultural issue. Neoliberalism is a self-justification for the state’s mass use of the prison system, creating a system of punishment instead of a system of prevention. Instead of facing a culture of domestic violence, the UVVA justifies the spread of other fetal-protection laws that further a culture of criminalization, both of abusers and of mothers.

Broader Implications of the UVVA

While the UVVA does not directly punish pregnant mothers, the

²⁴ *Ibid*, 101.

²⁵ Dean Spade, “Keynote Address: Trans Law and Politics on a Neoliberal Landscape,” *Temple Political and Civil Rights Law Review*, Vol. 18 (2009): 359.

UVVA validates and substantiates other fetal-protection laws that put mothers into prisons. A recent example of the incarceration of a woman under these fetal-protection laws is the case of Purvi Patel from April 2015. Purvi Patel, a 33-year-old woman from Indiana, was given 20 years in prison for illegally inducing an abortion and for neglecting her “dependent.”²⁶ Patel’s case “demonstrates how unsparing the criminal-justice system can be to women whose pregnancies end in (or otherwise involve) suspicious circumstances. If one lesson of the case is about the legal risk of inducing your own late-term abortion, another is about the peril of trying to get medical help when you are bleeding and in pain.”²⁷ Purvi Patel’s case is part of a trend to imprison mothers who have a current or past drug addiction, and those mothers who lose their babies under “suspicious” circumstances. The UVVA validates these state laws because it establishes a federal interest in protecting the life of fetuses over the livelihood of the mothers.

Mothers who become addicted to drugs while pregnant become characterized as malicious beings and may be prosecuted under the same laws that are seemingly designed to protect the mother and the fetus. Fetal-homicide laws can have consequences for a mother’s reproductive health: “A desire to avoid prosecution or confinement under these laws encourages women with addictions to forego medical treatment throughout their pregnancy, avoid giving birth in a hospital, or, in even more extreme cases, seek out abortions to terminate the fetus that could be responsible for their loss of liberty.”²⁸ The UVVA and similar state laws only value mothers when they perform the role

²⁶ Emily Bazelon, “Purvi Patel Could Be Just the Beginning,” *The New York Times Magazine* (April 1, 2015).

²⁷ *Ibid*.

²⁸ Jennifer Henricks, “What to Expect When You’re Expecting: Fetal Protection Laws that Strip Away the Constitutional Rights of Pregnant Women,” *Boston College Journal of Law & Social Justice*, Vol. 35, no. 1 (2015): 139.

of fetal carrier in the societally and medically correct fashion, defining what a mother “should be” through those in power. The state is quick to put a woman in prison for endangering her fetus, but does not address what happens to a woman once she is in prison. Putting a mother in prison may protect her from the dangers of drug use or self-inducing abortion, but a lack of proper reproductive health care in prisons present another form of danger:

Women prisoners wait months, and sometimes years, to receive routine gynecological examinations that protect against the development of serious health conditions. For some women, these delays, combined with a consistent failure of prison medical staff to address treatable conditions early, result in the development of serious reproductive health problems.²⁹ When women in prison are neglected proper reproductive healthcare, the state’s reasoning for placing pregnant mothers in prison collapses. The state argues that through punishing these women, they are promoting both the fetus and the mother’s health and well-being, yet prisoners do not receive proper healthcare. This gap between the state’s justification and the reality of prisoners demonstrates that the state is placing mothers in prison for the sole purpose of putting more people in prison, erasing the experiences of mothers who do not fit in with society’s definition of what a mother should be and should act like.

Conclusion

The Unborn Victims of Violence Act and its validation of other fetal-protection laws work to recreate a neoliberal landscape in the United States that sees mass incarceration as a primary solution to social issues. A running theme of the Unborn Victims of Violence Act and other fetal-protection laws is the lack of proactive, self-reflective work in society to acknowledge and prevent societal factors that influence domestic violence, drug and alcohol

²⁹ *op. cit.*, fn. 5, 12.

addiction, and self-induced abortions. Through combining critical theories surrounding the prison industrial complex and the neoliberal administrative system, I have produced a framework to analyze the broader implications of fetal-protection laws. Not only do these laws work to harm the very mothers supposedly protected under these acts, but rather they also participate actively in a rising incarceration rate. While these acts remain, the theoretical framework put forth provides critical tools to inform future political and socio-cultural work, as well as tools to resist the passage of future legislation that relies primarily on incarceration as a solution.

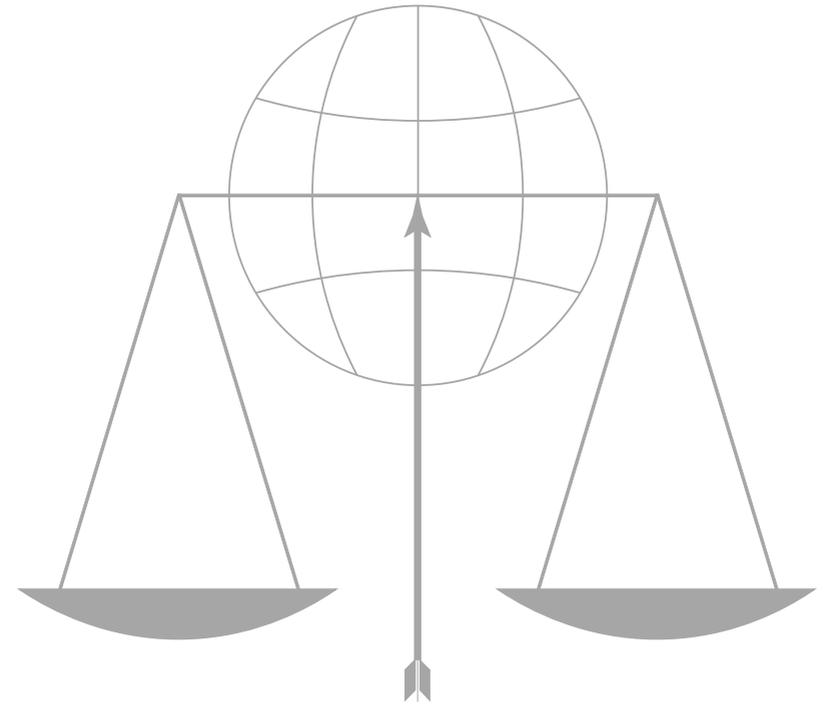
To rearticulate, reproductive justice has three main components: full bodily autonomy over one’s self; the free choice to decide whether to have a child; and the ability to raise one’s child in a safe environment.³⁰ Mothers who cannot access healthcare services and drug rehabilitation services do not have full control over their bodies. Mothers who revert to the status of “baby carrier” under these laws lose their bodily autonomy when society now sees them in relationship to another being, their fetus. Mothers in abusive relationships lack the ability to make reproductive decisions free from coercion. Until radical structural, social, and cultural changes come about to preemptively challenge the issue of domestic violence in the United States, mothers will not be able to raise their children in safe environments. Fetal-protection laws exist at the intersection of institutions that denies women reproductive justice.

The prison industrial complex and neoliberalism work together to create an empty solution to social problems: imprisoning the few bad individuals in society to give the appearance of fixing society. To truly achieve reproductive justice, there needs to be a challenging of the United States administrative system which currently works to categorize

³⁰ *op. cit.*, fn. 4

marginalized communities in an effort to determine their life chances, deciding the lifespan, the opportunities, and the ability to move freely for these people.³¹ A far-reaching goal of connecting trends of incarceration within fetal-protection laws to theories discussing the neoliberal carceral state is to create a society in which prisons are obsolete. To achieve this goal, work must be done to create preemptive programs that decriminalize drug addiction. A creation of drug rehabilitation programs that are affordable and accessible give those with drug issues the ability to get help without the need for forced state intervention.³²

Continuing, prisons that are currently seen as economic bases, by both the majority white rural population staffing them and private corporations, must cease to hold this fundamental position in society.³³ These recommendations point to a larger, radical shift that must occur, in which the prison system's embedded relationship with the state needs to be removed. Decarceration strategies, such as free drug rehabilitation programs, act as a first step in working towards this radical shift because they will decrease the number of women in prison.³⁴ Ultimately, the neoliberal administrative system in the United States must be challenged through social welfare programs that deem prisons obsolete.



³¹ *op. cit.*, fn. 25

³² *op. cit.*, fn. 3

³³ Sarah Childress, "Michelle Alexander: 'A System of Racial and Social Control,'" *Frontline* (April 29, 2014).

³⁴ *op. cit.*, fn. 5