

# CHILDREN OF A LESSER LAW: THE FAILURE OF THE BORN-ALIVE INFANTS PROTECTION ACT AND A PLAN FOR ITS REDEMPTION

## I. INTRODUCTION

The twentieth century saw significant progress made in the protection of children, and with good reason. Consider the following, all of which occurred in the United States within recent years:

- Weak and unable to fend for himself, a child was thrown into a dumpster and abandoned.<sup>1</sup>
- In obvious need of medical attention, which was immediately available, a child was merely wrapped in a blanket and died 2.5 hours later.<sup>2</sup>
- In desperate need of medical care, a child was laid on a table, abandoned in a closet and died.<sup>3</sup>
- Alive and moving, a child was sealed in a plastic bag and dumped in the trash, where he died.<sup>4</sup>
- Unknown whether he was alive or dead, a child was submerged into a toilet until his death became a certainty.<sup>5</sup>
- A child was plunged into a water-filled bucket and held there until he drowned.<sup>6</sup>
- While in a weakened state, a child was taken in hand and his neck was broken.<sup>7</sup>

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<sup>1</sup> Kathleen M. Casagrande, *Children Not Meant to Be: Protecting the Interests of the Child When Abortion Results in Live Birth*, 6 QUINNIPIAC HEALTH L.J. 19, 36 (2002).

<sup>2</sup> *Id.* at 46; Jill Stanek, *The Invisible Born-Alive Infants Protection Act*, DECLARATION FOUND., Aug. 24, 2004, <http://www.declaration.net/news.asp> (follow “2004” hyperlink under “Top News”; then follow “Stanek: The invisible . . .” hyperlink) (reporting two additional deaths that occurred in similar circumstances).

<sup>3</sup> Casagrande, *supra* note 1, at 36; Jill Stanek, *DOJ: Betraying Aborted-Alive Babies?*, WORLDNETDAILY, Sept. 20, 2006, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=52059](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=52059) (reporting at least two additional deaths that occurred under similar circumstances).

<sup>4</sup> Jill Stanek, *Biohazard Bags & Buckets*, WORLDNETDAILY, Sept. 8, 2004, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=40346](http://www.wnd.com/news/article.asp?ARTICLE_ID=40346); “Aborted” *Baby Born Alive, Authorities Say*, WORLDNETDAILY, Aug. 16, 2006, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=51549](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=51549) (reporting an additional death that occurred under similar circumstances).

<sup>5</sup> Lynn Vincent, *Death by Drowning*, WORLD, June 18, 2005, at 39, available at <http://www.worldmag.com/displayarticle.cfm?id=10740>. “When I was in training to do second trimester abortions, I was told that we would have [women] deliver into the toilet so that if the baby happens to be alive, that it drowns.” Lynn Vincent, *Labor and Delivery*, WORLD, May 28, 2005, at 27, available at <http://www.worldmag.com/displayarticle.cfm?id=10673> (statement of a former abortion-clinic worker).

<sup>6</sup> Stanek, *supra* note 4.

- A child in a similarly weakened state was beaten with a dull instrument until he died.<sup>8</sup>
- Abandoned and struggling to breathe, twins were taken to a human body-parts wholesaler. When the wholesaler protested that live children were unacceptable, the supplier flooded the twins' transport container with water and drowned them. Afterwards, the sale was completed.<sup>9</sup>

While these children are dead and gone, some comfort might be taken in knowing that those responsible for their deaths were brought to justice. Except that they were not brought to justice. In fact, they were never prosecuted. And there is no indication that many of the deaths were even investigated.

How is this possible? It is simply that each of these children was marked for death.<sup>10</sup> Once marked for death, they had no rights.<sup>11</sup> Theirs was to die by hook or by crook. Each of these children was born alive through an abortion attempt. And then they were killed or left to die.

The Born-Alive Infants Protection Act of 2002 (BAIPA)<sup>12</sup> was enacted to end this obscenity and prevent legalized abortion from expanding to unhindered infanticide. It has failed.<sup>13</sup> In fact, BAIPA, an Act of Congress duly signed into law by the President of the United

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<sup>7</sup> See Celeste McGovern, *Unholy Harvest*, TODAY'S FAMILY NEWS, [http://www.fotf.ca/tfn/life/articles/Unholy\\_Harvest.htm](http://www.fotf.ca/tfn/life/articles/Unholy_Harvest.htm) (last visited Nov. 9, 2006) (originally published in the March 2000 issue of *Canadian Citizen*).

<sup>8</sup> See *id.*

<sup>9</sup> Charlene Quint Kalebic, *Children, the Unprotected Minority: A Call for the Reexamination of Children's Rights in Light of Stenberg v. Carhart*, 15 REGENT U. L. REV. 223, 224 n.9 (2002-2003).

<sup>10</sup> H.R. REP. NO. 107-186, at 2 (2001).

<sup>11</sup> *Id.*; see also Casagrande, *supra* note 1, at 37-38. But see Hilary White, *Baby Girl Born Alive and Killed After Surviving Late-Term Abortion*, LIFESITE, Nov. 2, 2006, <http://www.lifesite.net/ldn/2006/nov/06110205.html> (reporting the investigation and potential criminal prosecution for the death of a child reportedly killed after being born alive through an abortion attempt).

<sup>12</sup> Born-Alive Infants Protection Act (BAIPA) of 2002, 1 U.S.C. § 8 (Supp. III 2003). BAIPA extends the full protection of the U.S. Code to any infant who completely exits the womb and subsequently exhibits one of four signs of life: breathing, a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. *Id.* For the full text of BAIPA, see *infra* Part III.B.

<sup>13</sup> The executive and legislative approaches to BAIPA, analyzed in Parts II, V and VI.A, *infra*, have from before its enactment ensured its failure. As empirical evidence of this failure, a number of the deaths recorded in the opening paragraph of this section occurred well after BAIPA was enacted. See *supra* notes 4 & 6 and accompanying text; Stanek, *supra* note 2 and accompanying text; Stanek, *supra* note 3 and accompanying text. For reports of additional deaths following the enactment of BAIPA, see Stanek, *supra* note 3; Stanek, *supra* note 4; Jill Stanek, *Catholic Hospitals Commit—And U.S. Bishops Condone—Live-Birth Abortion*, WORLDNETDAILY, Sept. 15, 2004, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=40465](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=40465).

States, amending 15,000 provisions of the *United States Code* and 57,000 provisions of the *Code of Federal Regulations*<sup>14</sup>—the first federal law in history to place any type of limit on the “right” to abortion<sup>15</sup>—effectively does not exist.<sup>16</sup>

This note considers how and why BAIPA has failed and what may be done about it. Part II is an inside look at the history and making of BAIPA and how it was destined from its inception to become a non-factor as a limit to the “right” to abortion. Part III covers the need for and purpose of BAIPA and analyzes its effect on current abortion law. Part IV discusses the current approach to enforcing BAIPA. Part V analyzes the primary reason the current approach to enforcing BAIPA has failed and proffers a foundational solution for this failure. Part VI suggests some preliminary actions to lay the groundwork for the successful enforcement of BAIPA and examines measures implemented in the state of Michigan as a potential framework for the federal protection of children born alive through abortion attempts. Part VII, in culmination, outlines a conceptually simple, comprehensive plan for ensuring the enforcement of BAIPA, and Part VIII concludes this note.

## II. AN INSIDER’S LOOK AT THE HISTORY OF BAIPA<sup>17</sup>

In June 2000, the Supreme Court handed down *Stenberg v. Carhart*<sup>18</sup> and effectively struck down the partial-birth abortion laws of thirty-one states.<sup>19</sup> *Carhart*’s analysis marked a radical change in the

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<sup>14</sup> H.R. REP. NO. 107-186, at 37.

<sup>15</sup> See Hadley Arkes, *Unheralded Good*, NAT’L REV. ONLINE, July 31, 2002, <http://www.nationalreview.com/comment/comment-arkes073102.asp>.

<sup>16</sup> See *infra* Part V and *supra* note 13. But see Hadley Arkes, *Bush’s Second Chance*, FIRST THINGS, Apr. 2005, at 13, available at <http://www.firstthings.com/ftissues/ft0504/articles/arkes.html> (discussing a BAIPA-related complaint filed by the DOJ in spring 2005).

<sup>17</sup> Most of the material for this section was taken from various publications of Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College. Professor Arkes was intimately involved in both the drafting and passage of BAIPA and testified before Congress on its behalf in both 2000 and 2001.

<sup>18</sup> 530 U.S. 914 (2000). In *Carhart*, the Court “struck down a Nebraska law banning partial-birth abortion, a procedure in which an abortionist delivers an unborn child’s body until only the head remains inside of the womb, punctures the back of the child’s skull with scissors, and sucks the child’s brains out before completing the delivery.” H.R. REP. NO. 107-186, at 2.

<sup>19</sup> HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 237 (2002).

As [Justice] Kennedy made plain . . . in tones of injury and disbelief, [Justice] O’Connor had [via *Carhart*] staged a defection from a deflection: In order to align herself with the liberal bloc in this case, she had to repudiate that carefully crafted middle course that Kennedy thought he had signed onto in *Casey*.

. . . [H]e was [shocked] that O’Connor would be willing to walk away from her own holdings in *Casey* and other cases.

Court's approach to abortion in the United States,<sup>20</sup> causing concern among members of both Congress and anti-abortion groups.<sup>21</sup> In response to the Court's findings and analysis in *Carhart*,<sup>22</sup> Representative Charles Canady (R-FL), Chairman of the Subcommittee on the Constitution,<sup>23</sup> began work on a modest bill "to establish at least a limit to that sweeping 'right' to abortion."<sup>24</sup>

Using earlier bill drafts by Hadley Arkes<sup>25</sup> and Clark Forsythe,<sup>26</sup> Canady utilized Congress's authority to define the terms of the *United*

*Id.* at 239.

<sup>20</sup> H.R. REP. NO. 107-186, at 4.

[W]hat was described in *Roe v. Wade* as a right to abort "unborn children" ha[d] now been extended by the Court to include the brutal killing of partially-born children just inches from birth . . . [This] conclusion [was based] on claims by abortionists that partially delivering an infant before killing [him] is safer for the mother because it requires less "instrumentation" in the birth canal and reduces the risk of complications from "retained fetal body parts." . . . [T]hese same claims would support an abortionist's argument that fully delivering an infant before killing [him] is safer for the mother and is, therefore, constitutionally protected.

*Id.*

<sup>21</sup> ARKES, *supra* note 19, at 243–44. Concerned parties included Representative Charles Canady (R-FL), Chairman of the Subcommittee on the Constitution; Douglas Johnson, National Right to Life Committee; and Hadley Arkes. *Id.*

[T]he political class had to put the question of whether [the] right to abortion would find a limit anywhere. If there was no barrier in infanticide—in the destruction of children at the point of birth—there might be no barrier anywhere in that vast field encompassing 'homicide' in all its varieties.

*Id.* at 234.

<sup>22</sup> *Id.* at 243–44.

<sup>23</sup> *Id.* at 244.

[Canady was] not disposed to waste a moment, for he had put himself under term limits and he would be leaving the Congress at the end of the term . . . He was determined, however, to get something done [in response to *Carhart*] before his time ran out in the chairmanship, and he quickly saw that the bill to preserve the child born alive offered the best practicable measure at this moment.

*Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 245. Forsythe was then president of, and former counsel for, Americans United for Life. *Id.* In Forsythe's draft,

a child "born alive" was taken to mean "the complete expulsion or extraction from its mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, caesarean section, or induced abortion."

*Id.* at 245 n.12.

*States Code* as the basis for the bill.<sup>27</sup> Its purpose was to “simply establish that the condition of being marked for an abortion did not remove the child from the class of rights-bearing persons.”<sup>28</sup> After being introduced by Representative Canady, the bill was designated H.R. 4292, and hearings were scheduled for July.<sup>29</sup>

Representative Canady chose six individuals to give testimony at the hearings on behalf of H.R. 4292:<sup>30</sup> Robert George,<sup>31</sup> McCormick Professor of Jurisprudence at Princeton; Gerard Bradley,<sup>32</sup> Professor of Law at Notre Dame; Hadley Arkes,<sup>33</sup> Ney Professor of Jurisprudence and American Institutions at Amherst College; Jill Stanek,<sup>34</sup> R.N.; Allison Baker,<sup>35</sup> R.N.; and Gianna Jesson.<sup>36</sup>

Both Stanek and Baker testified to their experiences with “live birth abortions”<sup>37</sup> while employed as nurses at Christ Hospital in Oak Lawn,

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<sup>27</sup> *Id.* at 245.

To pronounce in that way on the meaning of terms in federal law was not to enlarge the federal jurisdiction. The law would simply take that jurisdiction as it stood, and it would make the simple point that children who survive abortions were indeed persons who came within the protection of the law.

*Id.*

<sup>28</sup> *Id.* at 246.

<sup>29</sup> *Id.* at 247.

<sup>30</sup> *Id.* at 247–48.

<sup>31</sup> *Born-Alive Infants Protection Act: Hearing on H.R. 4292 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 60 (2000) [hereinafter *BAIPA Hearings*] (testimony of Robert George).

<sup>32</sup> *Id.* at 52 (testimony of Gerard Bradley).

<sup>33</sup> *Id.* at 6 (testimony of Hadley Arkes).

<sup>34</sup> *Id.* at 14 (testimony of Jill Stanek).

<sup>35</sup> *Id.* at 17 (testimony of Allison Baker).

<sup>36</sup> *Id.* at 23 (testimony of Gianna Jesson). Ms. Jesson is a survivor of a saline abortion attempt that left her afflicted with cerebral palsy. ARKES, *supra* note 19, at 248.

<sup>37</sup> “Live-birth abortions,” also known as “induced-labor abortions,” are composed of a three-step procedure:

First, the physician opens the cervix . . . using either prostaglandin E2 gel, Cytotec3 or laminaria (little match-like sticks composed of seaweed) . . . . He inserts one . . . or two . . . pills in or near the cervix, irritating it and causing it to open. Second, after the cervix opens, the small baby . . . literally drops out of the womb. Sometimes, the baby dies in the process. However, many are born alive—thus the name, “live-birth” abortion. In this case, the third step is letting the baby die.

Stacy A. Scaldo, *The Born-Alive Infants Protection Act: Baby Steps Toward the Recognition of Life After Birth*, 26 NOVA L. REV. 485, 492–93 (2002) (quoting Catherina Hurlburt, *Live-Birth Abortions: The Next Step After Partial-Birth Abortion*, CONCERNED WOMEN FOR AM., July 1, 2000, <http://www.cwfa.org/main.asp> (follow “Core Issues – Sanctity of Life” hyperlink; then follow “Live Birth Abortions . . .” hyperlink).

The third step is not always to let the baby die, but to kill him by drowning or bludgeoning. See Kalebic, *supra* note 9, at 224 n.9; McGovern, *supra* note 7.

Illinois.<sup>38</sup> They each recounted witnessing instances of children born alive through this procedure who, though living for prolonged periods after birth (sometimes hours), were not given the available medical attention needed for continued survival.<sup>39</sup> Among the more notable instances was Ms. Baker's account of finding a vigorously moving infant laid naked on a table in a soiled utility room.<sup>40</sup>

H.R. 4292 faced opposition in the House.<sup>41</sup> Some claimed that there was a "dishonest purpose behind it."<sup>42</sup> Others claimed that "the bill did not supply any right that is not already guaranteed under the laws of the nation."<sup>43</sup> An ironic counter to the latter objection, however, came directly, albeit unintentionally, from the Illinois Attorney General's (AG) Office. An investigation into the eyewitness accounts of Jill Stanek and Allison Baker had been launched.<sup>44</sup> The Illinois AG, however, found "no violations of the law in regards to the practices at Christ Hospital, specifically [with respect to] the [live-birth] abortion procedure and the lack of medical treatment given to children born alive."<sup>45</sup> In a letter regarding the investigation, the Illinois AG stated, "[w]hile we are deeply respectful of your serious concerns about the practices and methods of abortions at this hospital, we have concluded that there is no

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<sup>38</sup> ARKES, *supra* note 19, at 248.

<sup>39</sup> See *BAIPA Hearings*, *supra* note 31, at 14–17 (testimony of Jill Stanek); *id.* at 17–18 (testimony of Allison Baker).

<sup>40</sup> *Id.* at 18 (testimony of Allison Baker).

<sup>41</sup> The National Abortion Rights Action League (NARAL) also opposed the bill. In a statement released the same day the hearings were held, NARAL stated:

The basic tenets of *Roe v. Wade* were the subject of yet another anti-choice assault today, as the House Judiciary Subcommittee on the Constitution held a hearing on H.R. 4292, the so-called "Born-Alive Infants Protection Act." The Act would effectively grant legal personhood to a pre-viable fetus—in direct conflict with *Roe* . . . .

. . . In proposing this bill, anti-choice lawmakers are seeking to ascribe rights to fetuses "at any stage of development," thereby directly contradicting one of *Roe's* basic tenets.

Press Release, National Abortion Rights Action League, *Roe v. Wade* Faces Renewed Assault in House (July 20, 2000), [http://www.nrlc.org/Federal/Born\\_Alive\\_Infants/NARALonlive-born.pdf](http://www.nrlc.org/Federal/Born_Alive_Infants/NARALonlive-born.pdf).

<sup>42</sup> ARKES, *supra* note 19, at 268. Rep. Jerrold Nadler (D-NY) stated:

The purpose of this bill is only to get the pro-choice members to vote against it so they can then slander us and say that we are in favor of infanticide . . . .

. . . Mr. Speaker, I believe the only real purpose of this bill is to trap the pro-choice members into voting against it so that they can slander us . . . . [T]hat is why I voted in the committee in favor of the bill[,] so that we do not step into this trap.

*Id.*

<sup>43</sup> Casagrande, *supra* note 1, at 37.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

basis for legal action by this office against the Hospital or its employees, agents or staff.”<sup>46</sup>

Ultimately, H.R. 4292 passed through the House in September 2000<sup>47</sup> with a final vote of 380-15.<sup>48</sup> The bill was then referred to the Senate. The Senate, however, would be H.R. 4292’s final stop. The 2000 presidential election campaign was underway, and to the “deep astonishment” of its supporters, the bill never came to the Senate floor for a vote, apparently overshadowed by presidential politics.<sup>49</sup>

In 2001, the bill that would become H.R. 2175<sup>50</sup> was reintroduced in the House by Representative Steve Chabot (R-OH),<sup>51</sup> who had taken the outgoing Representative Canady’s place as the Chairman of the Subcommittee on the Constitution.<sup>52</sup> A preamble was added to the bill,<sup>53</sup> made up of findings<sup>54</sup> and a list of purposes,<sup>55</sup> meant to provide clear

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<sup>46</sup> *Id.* at 37–38 (quoting Catherina Hurlburt, *Illinois Attorney General Finds No Wrongdoing at Christ Hospital*, CONCERNED WOMEN FOR AM., Aug. 24, 2000, <http://www.cwfa.org/main.asp> (follow “Core Issues – Sanctity of Life” hyperlink; then follow “Illinois Attorney General . . .” hyperlink)).

<sup>47</sup> *Id.* at 35.

<sup>48</sup> ARKES, *supra* note 19, at 268.

<sup>49</sup> *Id.* at 270.

The word went around Capitol Hill that the bill never made it to the floor because Trent Lott, the leader of the Republican majority, had no particular interest in bringing it to a vote . . . . The further word circulating in Washington was that, of course, Lott would have brought the bill to the floor if he had received any directing word from the Bush campaign that it suited the interests of the campaign to draw attention to that issue and bring it to the point of judgment.

*Id.*

<sup>50</sup> See H.R. REP. NO. 107-186, at 1 (2001).

<sup>51</sup> ARKES, *supra* note 19, at 278.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 275.

<sup>54</sup> *Id.*

The findings presented then a bill of charges against the law shaped in the decisions of federal judges. By drawing out the premises behind those decisions, the findings formed a moral critique that supplied, in turn, a justification for this new act of legislation. The findings would put in place new premises for the law.

For those who had worked, over the years, for this bill, the findings offered the most gratifying confirmation [of the] rationale and logic behind the bill.

*Id.* at 277–78.

<sup>55</sup> *Id.* at 278. The full text of the “purposes” is as follows:

- (1) to repudiate the flawed notion that a child’s entitlement to the protections of the law is dependent upon whether that child’s mother or others want him or her;
- (2) to repudiate the flawed notion that the right to an abortion means the right to a dead baby, regardless of where the killing takes place;

meaning and context for the bill: “infants who are born alive, at any stage of development, are persons who are entitled to the protections of the law.”<sup>56</sup> These findings were “bolstered by a notable addition,”<sup>57</sup> namely, the legal analysis handed down by the Third Circuit Court of Appeals in *Planned Parenthood v. Farmer*.<sup>58</sup>

Because party control of the Senate had shifted since H.R. 4292 had been introduced the previous year,<sup>59</sup> supporters of H.R. 2175 were concerned that the findings, which had been left out of H.R. 4292,<sup>60</sup> might not make it through the Senate.<sup>61</sup> This concern would prove of little consequence, however, as the findings were deleted before the bill ever reached the floor of the House. Without explanation, Representative James Sensenbrenner (R-WI), Chairman of the Judiciary Committee, removed the findings from the bill.<sup>62</sup> H.R. 2175 “would go to hearings, to markup, and to the floor in the same, spare version that had gone to the floor in September.”<sup>63</sup>

While the supporters in the House were considering what effect this would have on the bill, Senator Rick Santorum (R-PA) introduced H.R. 2175 in the Senate.<sup>64</sup> It was offered as a rider to the Patients’ Bill of

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(3) to affirm that every child who is born alive—whether as a result of induced abortion, natural labor, or caesarean section—bears an intrinsic dignity as a human being which is not dependent upon the desires, interests, or convenience of any other person, and is entitled to receive the full protections of the law; and

(4) to establish firmly that, for purposes of Federal law, the term “person” includes an infant who is completely expelled or extracted from his or her mother and who is alive, regardless of whether or not the baby’s development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

H.R. REP. NO. 107-186, at 3 (2001).

<sup>56</sup> H.R. REP. NO. 107-186, at 1–2.

<sup>57</sup> ARKES, *supra* note 19, at 275.

<sup>58</sup> 220 F.3d 127 (3d Cir. 2000). “According to the Third Circuit, under *Roe* and *Carhart*, it is ‘nonsensical’ and ‘based on semantic machinations’ and ‘irrational line-drawing’ for a legislature to conclude that an infant’s location in relation to his or her mother’s body has any relevance in determining whether that infant may be killed.” H.R. REP. NO. 107-186, at 5. *Farmer* had been decided the previous July, just six days after the hearings for H.R. 4292. ARKES, *supra* note 19, at 275.

<sup>59</sup> ARKES, *supra* note 19, at 279.

<sup>60</sup> *Id.* at 266–67.

<sup>61</sup> *Id.* at 279.

<sup>62</sup> *Id.* To at least some supporters of H.R. 2175, this “gut[ted] the section that accomplished the purpose of the bill—the section that would dramatize to the public the premises that were being challenged now in the bill.” *Id.* at 266. H.R. 2175, with its stated findings and purposes, was “a notable convergence of sentiment, years in the making, and it seemed unbelievable that it should all be waved aside now, as a matter of little consequence, by one man . . .” *Id.* at 280.

<sup>63</sup> *Id.* at 279.

<sup>64</sup> *Id.* at 281.

Rights.<sup>65</sup> Initially, some spoke out against the bill.<sup>66</sup> Those opposed to H.R. 2175 “knew that they could not concede the human standing of the child marked for abortion without generating some unsettling questions about the child still in the womb.”<sup>67</sup> To simply vote against the bill, however, would suggest that they in fact approved of infanticide. Instead, any objection to the bill was soon waived<sup>68</sup> with the hope and goal to “deprive of it any significance.”<sup>69</sup> A wise move, for this hope would soon be realized.

Due to the terrorist attacks of September 11, 2001, further work on H.R. 2175 was delayed. Finally, in March 2002, H.R. 2175 passed the House by a voice vote.<sup>70</sup> The following July, it was passed in the Senate with unanimous consent.<sup>71</sup>

On August 5, 2002, flanked by Representative Chabot and Senator Santorum, President Bush signed the Born-Alive Infants Protection Act of 2002 into law.<sup>72</sup> At the signing, President Bush proclaimed:

The Born-Alive Infants Protection Act is a step toward the day when every child is welcomed in life and protected in law. It is a step toward the day when the promises of the Declaration of Independence will apply to everyone, not just those with the voice and power to defend their rights.<sup>73</sup>

And then the Born-Alive Infants Protection Act, the first federal legislation in history to successfully place any type of limit on the judicially created “right” to abortion,<sup>74</sup> faded away into obscurity. Little,

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 282. “Deborah Stabenow, the new senator from Michigan, reacted instantly: She couldn’t vote for that bill, she said; it sought to establish that the unborn child was a ‘person’ in the law even before birth.” *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *President Bush Signs Born Alive Infants Protection Act*, NAT’L RIGHT TO LIFE, Aug. 5, 2002, [http://www.nrlc.org/Federal/Born\\_Alive\\_Infants/BAIPAsigned.html](http://www.nrlc.org/Federal/Born_Alive_Infants/BAIPAsigned.html) [hereinafter *Pres. Signs*].

<sup>71</sup> *Id.*

The price of passing the bill in the Senate was essentially to give the [opposition] what they wanted. The bill was introduced for its formal “readings” without explanation or fuss . . . . [T]he bill was “passed” late on a Thursday night, at the end of a cluttered legislative day . . . . There would be no roll call, and so no [one] would be compelled to record a vote, either for or against . . . . Santorum would not be allowed to frame the bill, to point to its meaning, and no voice would be sounded to explain the significance of what was done.

Arkes, *supra* note 15.

<sup>72</sup> *Pres. Signs, supra* note 70.

<sup>73</sup> *Id.* Before signing BAIPA into law, President Bush confirmed, “This important legislation ensures that every infant born alive—including an infant who survives an abortion procedure—is considered a person under federal law.” *Id.*

<sup>74</sup> *See* Arkes, *supra* note 15.

if anything, was ever said about it again. The White House was silent on the matter. Virtually no further word came from the House or the Senate. It is mentioned by name in only one published legal case, state or federal.<sup>75</sup> A total of six law review articles cover BAIPA in any detail.<sup>76</sup> And a year after its passage, Christ Hospital in Oak Lawn, Illinois—the very hospital whose practices were a catalyst to the creation and passage of BAIPA—was unaware that BAIPA even existed.<sup>77</sup>

Like the children it was meant to protect, BAIPA was birthed, laid aside, and allowed to die by those who should have cared for it most.<sup>78</sup>

### III. BAIPA: ITS PURPOSE AND EFFECT

#### A. *The Need for BAIPA*

BAIPA was in large measure intended as a quasi-preemptive check on a federal judiciary that had demonstrated a clear inclination, most recently in *Stenberg v. Carhart*<sup>79</sup> and *Planned Parenthood v. Farmer*,<sup>80</sup> to expand the “right” to abortion to include the “right” to infanticide.<sup>81</sup> In

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<sup>75</sup> See *Warnock v. Servicemembers’ Group Life Ins.*, No. 1:03-CV-1329-DFH, 2004 U.S. Dist. LEXIS 8533 (S.D. Ind. Apr. 28, 2004).

<sup>76</sup> See Kathleen M. Casagrande, *Children Not Meant to Be: Protecting the Interests of the Child When Abortion Results in Live Birth*, 6 QUINNIPIAC HEALTH L.J. 19 (2002); Michele Kurs Frishman, *Wisconsin Act 110: When an Infant Survives an Abortion*, 20 WIS. WOMEN’S L.J. 101 (2005); Scott A. Hodges, *Beyond the Bounds of Roe: Does Stenberg v. Carhart Invalidate the Partial-Birth Abortion Ban Act of 2003?*, 57 OKLA. L. REV. 601 (2004); Charlene Quint Kalebic, *Children, the Unprotected Minority: A Call for the Reexamination of Children’s Rights in Light of Stenberg v. Carhart*, 15 REGENT U. L. REV. 223 (2002-2003); Stacy A. Scaldo, *The Born-Alive Infants Protection Act: Baby Steps Toward the Recognition of Life After Birth*, 26 NOVA L. REV. 485 (2002); Richard Stith, *Location and Life: How Stenberg v. Carhart Undercut Roe v. Wade*, 9 WM. & MARY J. WOMEN & L. 255 (2003).

<sup>77</sup> Stanek, *supra* note 2.

<sup>78</sup> “For who would attach any meaning to a law, when those who enacted it did not proclaim it, or even ma[k]e some noticeable effort to impart its meaning to the public. In the absence of anything said officially, the meaning of the bill can be marked only in commentaries . . .” *Id.*

<sup>79</sup> 530 U.S. 914 (2000).

<sup>80</sup> 220 F.3d 127 (3d Cir. 2000).

<sup>81</sup> H.R. REP. NO. 107-186, at 2 (2001). “The right to abortion created in *Roe* thus appears to encompass, at least in the Supreme Court’s view, the right to infanticide.” *Id.* at 6. This idea was first expressed by the federal judiciary in *Floyd v. Anders*, 440 F. Supp. 535, 539 (D.S.C. 1977).

A child had survived an abortion for 20 days, and when the question was put as to whether there had been an obligation to preserve [his] life, the answer tendered by [Judge] Haynsworth was no. As he “explained,” that was not a child but a fetus, and [referencing *Roe*] “the fetus in this case was not a person whose life state law could protect.” In other words, the right to an abortion was the right to an “effective abortion,” or a dead child.

Arkes, *supra* note 15 (quoting *Floyd*, 440 F. Supp. at 539).

*Carhart*, the Court implied that a child's right to protection under the law is not endowed by (virtual) birth,<sup>82</sup> but by some subjective notion of whether he is wanted by his mother.<sup>83</sup> In short order, *Farmer* built upon this concept by "conclud[ing] that a child's status under the law, regardless of the child's location [with respect to the womb], is dependent upon whether the mother intends to abort the child or to give birth."<sup>84</sup>

Under the logic of these decisions, once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law . . . . And if a child who survives an abortion and is born alive would have no claim to the protections of the law, there would, then, be no basis upon which the government may prohibit an abortionist from completely delivering an infant before killing [him] or allowing [him] to die. The "right to abortion," under this logic, means nothing more than the right to a dead baby, no matter where the killing takes place.<sup>85</sup>

BAIPA—the sole federal statutory limit to the judicially created "right" to abortion—stands as the only affirmative legislative counter to this logic. Thus, it is the only federal obstacle to subsequent judicial findings that could potentially incorporate unrestricted infanticide into

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<sup>82</sup> *But see* U.S. CONST. amend. XIV, § 1 ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . .").

<sup>83</sup> *See* H.R. REP. NO. 107-186, at 2. "Nebraska's statute, making criminal the performance of a 'partial birth abortion,' violates the Federal Constitution . . . by 'impos[ing] an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself." *Carhart*, 530 U.S. at 929–30.

During the 2000 Congressional hearings for BAIPA, Professor Hadley Arkes testified:

[t]he Court [via *Carhart*] has brought us to the very threshold of infanticide, and we are asked now to take a deep breath, avert our eyes, and simply get used to the notion that the right to abortion will be spilling past the child in the womb, to order the deaths of children outside the womb. It has become more critical than ever, at this moment, that a line be drawn.

*BAIPA Hearings*, *supra* note 31, at 14 (testimony of Hadley Arkes).

<sup>84</sup> H.R. REP. NO. 107-186, at 2. "[T]he [New Jersey] Legislature would have us accept, and the public believe, that during a 'partial-birth abortion' the fetus is in the process of being 'born' at the time of its demise. It is not. A woman seeking an abortion is plainly not seeking to give birth." *Farmer*, 220 F.3d at 143. *But see, e.g.*, BLACK'S LAW DICTIONARY 179 (8th ed. 2004) (defining *birth* as "[t]he complete extrusion of a newborn baby from the mother's body," and conspicuously lacking any reference to intent).

The *Farmer* court continued:

In what can only be described as a desperate attempt to circumvent over twenty-five years of abortion jurisprudence, the [New Jersey] Legislature would draw a line [between abortion and infanticide] based upon the location in the woman's body where the fetus expires. Establishing the cervix as the demarcation line between abortion and infanticide is nonsensical on its face . . . .

*Farmer*, 220 F.3d at 143–44.

<sup>85</sup> H.R. REP. NO. 107-186, at 2.

this “right.”<sup>86</sup> BAIPA is, in effect, the first and last federal statutory line of defense against judicially legalized infanticide.

*B. The Effect of BAIPA on Current Abortion Law*

BAIPA “is exclusively a definitional provision,”<sup>87</sup> and so does not “articulate any new substantive rule of law.”<sup>88</sup> It does little more than enshrine into federal statute what is instinctively obvious to most, and what is codified to some extent in thirty states and the District of Columbia.<sup>89</sup> In its entirety, BAIPA reads:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Born-Alive Infants Protection Act of 2002”.

SEC. 2. DEFINITION OF BORN-ALIVE INFANT.

(a) In General.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

“§ 8. ‘Person’, ‘human being’, ‘child’, and ‘individual’ as including born-alive infant

“(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words ‘person’, ‘human being’, ‘child’, and ‘individual’, shall include every infant member of the species *homo sapiens* who is born alive at any stage of development.

“(b) As used in this section, the term ‘born alive’, with respect to a member of the species *homo sapiens*, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

“(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species *homo sapiens* at any point prior to being ‘born alive’ as defined in this section.”

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<sup>86</sup> “Any right must have its limit, including the right to abortion, and if that limit is not found in outright infanticide, we must ask: where could it possibly be?” *BAIPA Hearings*, *supra* note 31, at 14 (testimony of Hadley Arkes).

<sup>87</sup> H.R. REP. NO. 107-186, at 14.

<sup>88</sup> *Id.* “[The Act] does not call for an as-yet-unarticulated constitutional basis for lawmaking.” *Id.* (quoting *BAIPA Hearings*, *supra* note 31, at 54 (testimony of Gerard Bradley)).

<sup>89</sup> H.R. REP. NO. 107-186, at 7. For an exhaustive list of relevant state code sections, see *id.* at 7 n.24.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by adding at the end the following new item:

“8. ‘Person’, ‘human being’, ‘child’, and ‘individual’ as including born-alive infant.”<sup>90</sup>

The practical effect of BAIPA is simply this: from the time of birth and beyond, “all concerned have the normal, legal duties of care that they would have for any other infant.”<sup>91</sup> It changes nothing in currently accepted abortion law—no constraint triggered by BAIPA is an issue until abortion is rendered a physical impossibility by the birth of the child.<sup>92</sup> “Nothing in [BAIPA] impairs any right to abortion or any right to end the pregnancy because the abortion and the pregnancy have ended”<sup>93</sup> before BAIPA is even a concern.<sup>94</sup>

There is, then, no less of a “right” to abortion in the wake of BAIPA than existed previously. There is only an implied federal statutory prohibition of infanticide.

#### IV. THE CURRENT APPROACH TO ENFORCEMENT

The enforcement of BAIPA has fallen to the Department of Health and Human Services (HHS).<sup>95</sup> To date, the sole enforcement actions taken by HHS are notification and education measures directed at “relevant entities,” “state officials, health care providers, hospitals and child protective agencies.”<sup>96</sup> The most pointed of these educational measures are HHS’s internally promulgated instructions on how BAIPA interacts with the Emergency Medical Treatment and Labor Act

<sup>90</sup> BAIPA, 1 U.S.C. § 8 (Supp. III 2003).

<sup>91</sup> *BAIPA Hearings*, *supra* note 31, at 53 (testimony of Gerard Bradley). BAIPA also amends 15,000 provisions of the U.S. Code and 57,000 provisions of the Code of Federal Regulations. H.R. REP. NO. 107-186, at 37.

<sup>92</sup> Having given “birth” by completely expelling the child from the womb, the Act assures equal protection of the law to the person just born. The woman is not then prohibited, by this or any other act, from securing or completing an “abortion.” From the moment of birth on, “abortion” is, according to standard medical usage, impossible. No “pregnancy” remains to be terminated. *BAIPA Hearings*, *supra* note 31, at 56 (testimony of Gerard Bradley).

<sup>93</sup> *Id.* at 6 (testimony of Hadley Arkes).

<sup>94</sup> In the end, BAIPA merely establishes the womb as a statutory “no man’s land”: a child can now *earn* his unalienable rights and citizenship by either 1) somehow, while *in utero*, endearing himself to his mother so that he is “wanted” and she chooses not to kill him, or 2) escaping from the womb with enough development and little enough bodily damage to exhibit one of the four BAIPA signs of life.

<sup>95</sup> *HHS Pledges Thorough Enforcement of Born-Alive Act*, NEWSMAX.COM, Apr. 27, 2005, <http://www.newsmax.com/archives/articles/2005/4/26/212935.shtml>.

<sup>96</sup> Culture & Cosmos, *Health and Human Services Pledges Thorough Enforcement of Born-Alive Act*, CULTURE OF LIFE FOUND., Apr. 26, 2005, <http://www.culture-of-life.org/?Control=ArticleMaster&aid=1314>.

(EMTALA)<sup>97</sup> and the Child Abuse Prevention and Treatment Act (CAPTA).<sup>98</sup> Each of these measures is presented in some detail in Parts IV.A and IV.B, *infra*.

#### A. BAIPA and EMTALA

EMTALA was “enacted to ensure public access to emergency services.”<sup>99</sup> It places Medicare-participating hospitals that offer emergency services under three obligations with respect to medical emergency situations: a screening requirement,<sup>100</sup> a stabilization requirement, and a transfer requirement.<sup>101</sup> A hospital can be fined up to \$50,000 per EMTALA violation, and a violating hospital places its Medicare-provider agreement at risk.<sup>102</sup> An individual physician faces fines up to \$50,000 per violation and potential “exclusion from the Medicare and Medicaid programs.”<sup>103</sup> EMTALA also authorizes private rights of action to redress violations.<sup>104</sup>

For EMTALA to apply to an emergency situation, and thus the requirement for a medical screening to exist, an individual must first “come to the emergency department” of a Medicare-participating

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<sup>97</sup> 42 U.S.C. § 1395dd (2000 & Supp. III 2003); *see* Memorandum from the Ctrs. for Medicare & Medicaid Servs. of the Dep’t of Health & Human Servs. to State Survey Agency Dirs. (Apr. 22, 2005) (Ref. No. S&C-05-26) [hereinafter CMS Memo] (on file with author). This memorandum was sent with the stated purpose of providing guidance to state and regional personnel “regarding the enforcement of [EMTALA] during investigations of hospitals where the Born-Alive Infants Protection Act could be potentially implicated.” *Id.*

<sup>98</sup> 42 U.S.C. §§ 5101–5107, 5111–5119c (2000 & Supp. III 2003); *see* Memorandum from the Admin. on Children, Youth & Families of the Dep’t of Health & Human Servs. to State & Territorial Agencies Administering or Supervising the Admin. of the [CAPTA] Program (Apr. 19, 2005) (Log No. ACYF-CB-PI-05-01) [hereinafter ACF Memo] (on file with author).

<sup>99</sup> CMS Memo, *supra* note 97.

<sup>100</sup> In its entirety, the “screening” subsection of EMTALA reads:

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

42 U.S.C. § 1395dd(a).

<sup>101</sup> CMS Memo, *supra* note 97.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; *see* Preston v. Meriter Hosp., 700 N.W.2d 158 (Wis. 2005).

hospital.<sup>105</sup> This can be accomplished in several different ways.<sup>106</sup> A person can arrive at a dedicated emergency area of a hospital and request help for any medical condition.<sup>107</sup> A person can also arrive at any part of the hospital's property and request help for a possible *emergency* medical condition.<sup>108</sup> In either situation, the statutorily-required request for help can be made on behalf of the person needing assistance.<sup>109</sup> And, perhaps most significantly with respect to BAIPA, the request on behalf of the person needing assistance "will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior," that help is needed.<sup>110</sup> Should the required screening lead to the determination that the individual does have a requisite medical or emergency medical condition, EMTALA requires the hospital either to stabilize the individual or to transfer the individual if the applicable transfer requirements are met.<sup>111</sup>

*Preston v. Meriter Hospital* involved a child born "on an emergency basis" at a premature twenty-three weeks gestation in the birthing center of Meriter Hospital.<sup>112</sup> The hospital staff knew "that without at a minimum resuscitation and the administration of oxygen and fluids, [the] infant had virtually no medical chance to survive."<sup>113</sup> Regardless,

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<sup>105</sup> 42 U.S.C. § 1395dd(a); *EMTALA Requirements Extend to Born-Alive Infants Protection Act of 2002*, HEALTH L. NEWS, Spring 2005, [http://www.pswslaw.com/news/Images/healthlaw\\_sum05.pdf](http://www.pswslaw.com/news/Images/healthlaw_sum05.pdf) [hereinafter *Health*].

<sup>106</sup> "Comes to the emergency department" has been defined by the Code of Federal Regulations as follows:

With respect to an individual who is not a patient (as defined in this section), the individual—

(1) Has presented at a hospital's dedicated emergency department, as defined in this section, and requests examination or treatment for a medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs examination or treatment for a medical condition;

(2) Has presented on hospital property, as defined in this section, other than the dedicated emergency department, and requests examination or treatment for what may be an emergency medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs emergency examination or treatment.

42 C.F.R. § 489.24(b) (2005).

<sup>107</sup> *Id.* § 489.24(b)(1).

<sup>108</sup> *Id.* § 489.24(b)(2).

<sup>109</sup> *Id.* § 489.24(b).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* § 489.24(d).

<sup>112</sup> 700 N.W.2d 158, 162–63 (Wis. 2005).

<sup>113</sup> *Id.* at 163.

the hospital refused treatment to the infant.<sup>114</sup> He died two-and-a-half hours later.<sup>115</sup>

In bringing a suit for damages, the child's parents argued that under EMTALA the hospital has the duty to screen anyone who arrives at any place in the hospital that can respond to the requested emergency medical care.<sup>116</sup> Meriter countered that EMTALA only applies in those areas of the hospital designated by the hospital as emergency departments.<sup>117</sup> The court found that EMTALA "requires a hospital to provide an emergency medical screening examination to an individual requesting emergency care, regardless of where he or she presents in the hospital."<sup>118</sup> Further, the court concluded that EMTALA "imposes a duty upon a hospital to provide a medical screening examination to a newborn who (1) presents to any part of the hospital<sup>119</sup> or (2) is born in the birthing center of the hospital and otherwise meets the conditions set forth in [EMTALA]."<sup>120</sup>

HHS has similarly indicated that, under BAIPA, EMTALA could apply to an infant born alive in a hospital's delivery department with a medical condition<sup>121</sup> and to an infant born alive elsewhere on the hospital grounds with an emergency medical condition, including an infant born alive from an abortion attempt.<sup>122</sup> In either instance, should the hospital not comply with EMTALA's medical screening requirement and the ensuing stabilizing or transfer requirements, the hospital may be found in violation of EMTALA and subject to the monetary and Medicare-related penalties listed in the beginning of this section.<sup>123</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 165.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 167. "[I]t is a ridiculous distinction, one that places form over substance, to state that the care a patient receives depends on the door through which the patient walks." *Id.* (quoting *McIntyre v. Schick*, 795 F. Supp. 777, 781 (E.D. Va. 1992)).

<sup>119</sup> *Id.* at 167–70. The court's use of the term "emergency room" in its concluding analysis is misleading. *See id.* at 170. It is clear from the immediately preceding analysis that the court defines a hospital's emergency department to include the entire hospital property, in accordance with 42 C.F.R. 489.24(b). *See id.*

<sup>120</sup> *Id.* at 170. "When a baby is born in a hospital birthing center, the newborn has come to the emergency department for purposes of the EMTALA duty to provide a medical screening examination." *Id.* at 162.

<sup>121</sup> CMS Memo, *supra* note 97. This is assuming that the hospital's delivery department is found to be a "dedicated emergency department" per 42 C.F.R. § 489.24(b). *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> EMTALA and its requirements do not apply to in-patients (i.e., once a person is admitted as a patient, the screening, stabilizing, and transfer requirements are no longer in effect). But "[w]ere an infant born alive and then admitted to the hospital, the [Medicare Conditions of Participation (CoPs)] would clearly apply to the infant . . ." *Id.* If a hospital

### B. BAIPA and CAPTA

CAPTA was created to provide the states with federal funding to help prevent child abuse. There are four CAPTA requirements that HHS regards as particularly relevant to ensuring compliance with BAIPA.<sup>124</sup> For born-alive infants, the state must provide:

- [1.] Coordination and consultation with individuals designated by and within health-care facilities with regard to responding to medical neglect;
- [2.] Prompt notification by the individuals designated within health-care facilities of cases of suspected medical neglect (including withholding of medically indicated treatment from disabled infants with life-threatening conditions) to child protective services;
- [3.] At a minimum, *the authority* for State child protective services to pursue any legal remedies as may be necessary to provide medical care or treatment for a child when such care or treatment is necessary to prevent or remedy serious harm to the child; and,
- [4.] The authority for State Child Protective Services to pursue, and the *actual pursuit* of, any legal remedies that may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions.<sup>125</sup>

HHS has further directed that “[a]ll references to a ‘child’ or ‘children’ in the definitions, provisions and assurances of [CAPTA], as amended, are to be read to include infants who are ‘born-alive’ as that term is [now] defined [under BAIPA].”<sup>126</sup> HHS has specifically required that the states ensure that their “laws, procedures and practices with respect to child abuse and neglect conform to the requirements of CAPTA as its terms are interpreted” by the addition of BAIPA to the *United States Code*.<sup>127</sup> Otherwise, the implication is that the state may be found noncompliant with the eligibility requirements of CAPTA and so lose the applicable CAPTA funding.

## V. THE CENTRAL PROBLEM OF CURRENT BAIPA ENFORCEMENT MEASURES

### A. *The Failure of the Current Approach to Enforcing BAIPA*

At the same time HHS released its instructions on how BAIPA affects EMTALA<sup>128</sup> and CAPTA,<sup>129</sup> HHS pledged (appropriately, if not

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were to violate those CoPs, it would put at risk its Medicare-provider agreement. Admitting an infant born alive as an in-patient must be done in good faith. *Health, supra* note 105.

<sup>124</sup> ACF Memo, *supra* note 98.

<sup>125</sup> *Id.* (citations omitted).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> CMS Memo, *supra* note 97; *see supra* Part IV.A.

<sup>129</sup> ACF Memo, *supra* note 98; *see supra* Part IV.B.

timely<sup>130</sup>) to “investigate all circumstances where individuals and entities are reported to be withholding medical care from an infant born alive in potential violation of federal statutes.”<sup>131</sup> Therein, however, lies the problem—at least for children born alive through an abortion attempt.

Both EMTALA<sup>132</sup> and CAPTA<sup>133</sup> are report-oriented statutes—they are not triggered until someone reports a violation. This proves no real problem to infants born alive, in general. In the course of a “normal” birth, all involved have a vested interest in preserving the life of the child. The goal is to remove a *living* child from the womb and *preserve* that life by whatever means necessary and available. A violation of EMTALA or CAPTA is unlikely, at best, and would most assuredly be reported by either the child’s parents or medical providers, respectively.

For an infant born alive through an abortion attempt,<sup>134</sup> however, this reporting requirement poses a significant problem. The goal of an abortion, as opposed to the goal of a “normal” birth, is to remove a *dead* child from the womb by *killing* the child through whatever means necessary and available. No one involved in an abortion attempt, save the child, gets what he wants unless the child is killed.<sup>135</sup> And once an

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<sup>130</sup> BAIPA was signed into law in August 2002. *Pres. Signs, supra* note 70. The referenced EMTALA and CAPTA instructions were not published until April 2005. CMS Memo, *supra* note 97; ACF Memo, *supra* note 98.

<sup>131</sup> Press Release, U.S. Dep’t of Health & Human Servs., Statement by Sec’y Regarding Born-Alive Infant Prot. (Apr. 22, 2005) (on file with author).

<sup>132</sup> CMS Memo, *supra* note 97.

<sup>133</sup> ACF Memo, *supra* note 98.

<sup>134</sup> The protection of children born alive through abortion attempts was a central purpose for the enactment of BAIPA. *See* H.R. REP. NO. 107-186, at 3 (2001).

<sup>135</sup> At the risk of stating the obvious: the mother wants him dead; the attendant(s) wants him dead; the abortionist wants him dead. It is the abortionist’s sole purpose to kill the child. That is his business, and any failure to do so endangers that business and thus the abortionist’s livelihood.

There is also a far more sinister and lucrative incentive for the abortionist to ensure the child is killed: namely, the international fetal-tissue-trafficking market, where the corpse of a healthy, intact child brings the highest price. Kalebic, *supra* note 9, at 226.

Fetal tissue trafficking is a large international business with an estimated global market of \$1 billion in 2002, up from \$428 million in 1996. According to the 1999 price list for one national broker, the going rate for a baby’s eyes is \$50; \$150 for limbs; \$150 for lungs and heart; \$325 for a spinal cord; and \$999 for an eight-week brain. The vast majority of “work orders” specify that the specimen must be “fresh,” “normal,” free of abnormalities and shipped on wet ice by Federal Express within hours of the abortion procedure. Therefore, in order to be fresh, normal and intact, [abortion procedures that damage the child’s tissue] cannot be used; moreover, because the body parts must be free of abnormalities, brokers will only accept babies who were healthy before they were aborted.

abortion procedure begins, the entire life experience of the child from that point on is under the sole observation and direct control of those who want him dead.

This presents an exceptional conflict of interests:<sup>136</sup> the only people in a position to enforce the rights of a child born alive through an abortion attempt—a legal person due the full protection of the law—are the same people who want him dead and have acted to kill him. Moreover, under the normal circumstances of a child born alive through an abortion attempt, the only witnesses to the birth—and thus the only people in a position to report a BAIPA-related violation of EMTALA or CAPTA—are the potential violators themselves.<sup>137</sup>

HHS's approach to enforcing BAIPA has, then, rendered the enforcement of the most fundamental right of an entire class of persons now protected under law solely reliant upon the likelihood that a potential violator of a federal statute, with a vested interest in consummating the violation, either to independently abstain from the violation or report himself for the violation. HHS has, in sum, rendered BAIPA—the sole federal statutory limit to the “right” to abortion—effectively unenforceable. This, for a law, translates into practical nonexistence.

*B. A Foundational Solution to the Conflict of Interests Inherent in HHS's Approach to Enforcing BAIPA*

The simplest and most effective solution to any situation that involves a conflict of interests is the withdrawal of the conflicted party (or parties). If withdrawal is not an option, the second best solution is to neutralize any conflict of interests by the intervention of a disinterested third party.<sup>138</sup> Wholly removed from direct interest in the outcome of the situation in question, a disinterested third party is in the best possible position to ensure good faith and legal compliance on the part of all

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*Id.* at 225–26 (footnotes omitted). “The financial incentives afforded by the sale of fetal tissue actually encourage” abortion procedures that cause the least damage to the child’s tissue, such as live-birth abortions. *Id.* at 226.

<sup>136</sup> See also Casagrande, *supra* note 1, at 46–54 (discussing the conflict of interests that arises when a child is born alive through an abortion attempt).

<sup>137</sup> Though, no doubt, the only witnesses to many offenses are the offenders, enforcing accountability for mortal offenses committed against children born alive through an abortion attempt offers unique challenges. One of the more obvious of these is that any evidence of an abortion attempt—including one that involved wrongdoing—is easily and routinely destroyed with no significant third-party involvement. The corpse (or “fetal tissue”) is simply discarded and incinerated, with no investigation, no one the wiser, and no one to miss the victim.

<sup>138</sup> See also Casagrande, *supra* note 1, at 52–54 (discussing, *inter alia*, the need to involve an independent party when a child is born alive through an abortion attempt in order to dispel the resulting conflict of interests).

parties involved. In the event of noncompliance, and depending on the level of authority bestowed, the disinterested party can either penalize a violator or report him to an appropriate authority for adjudication.

The two criteria that trigger BAIPA—the complete expulsion or extraction of the infant from the mother and the infant’s subsequent exhibition of one of four signs of life—require a reliable, credible, and competent observer to determine whether the criteria have been met and thus whether BAIPA is applicable to the situation at hand. While the usual observers of an abortion may be competent, the conflict of interests prevents them from being reliable, if not credible as well.<sup>139</sup> As the withdrawal of the conflicted parties in any abortion scenario is as unrealistic<sup>140</sup> as the reliability of the participants, a legitimate effort to enforce BAIPA would seem to require the presence of a disinterested third party at any abortion procedure that has the potential to result in a live-birth as defined by BAIPA.<sup>141</sup>

There is certainly precedent for such a requirement. In the same way that an authoritative escort was needed to enforce the law and ensure the safety and rights of black students attending “white only” schools during integration,<sup>142</sup> a disinterested third party is required at a qualifying abortion procedure to ensure that the safety and rights of an infant born alive are upheld. Children born alive through an abortion

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<sup>139</sup> See *supra* Part V.A.

<sup>140</sup> Over forty-seven million abortions have been performed in the United States since 1973, based on studies by the Allan Guttmacher Institute and the Center for Disease Control. Nat’l Right to Life, *Abortion in the United States: Statistics and Trends*, <http://www.nrlc.org/abortion/facts/abortionstats.html> (last visited Nov. 4, 2006).

<sup>141</sup> In addition to live-birth or induced-birth abortions, both D&E abortion attempts and saline abortion attempts have resulted in children born alive. “Mere dismemberment of a limb [during a D&E abortion] does not always cause death because [Dr. Carhart] knows of a physician who removed the arm of [a] fetus only to have the fetus go on to be born ‘as a child living with one arm.’” Casagrande, *supra* note 1, at 30 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 959 (2000)). And Gianna Jessen, who testified in support of BAIPA, is a survivor of a saline abortion attempt that left her afflicted with cerebral palsy. ARKES, *supra* note 19, at 248.

<sup>142</sup> See *The Dwight D. Eisenhower Library, Little Rock School Integration Crisis*, <http://www.eisenhower.archives.gov/dl/LittleRock/littlerockdocuments.html> (last visited Oct. 31, 2006) (discussing President Eisenhower’s use of federal troops to enforce the findings of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

Whenever normal agencies prove inadequate to the task and it becomes necessary for the Executive Branch of the Federal Government to use its powers and authority to uphold Federal [law], the President’s responsibility is inescapable. In accordance with that responsibility, I have today issued an Executive Order directing the use of troops under Federal authority to aid in the execution of Federal law at Little Rock, Arkansas. This became necessary when my Proclamation of yesterday was not observed, and the obstruction of justice still continues.

Dwight D. Eisenhower, U.S. President, Radio Address Announcing His Executive Order Directing the Use of Federal Troops in Little Rock, Arkansas (Sept. 24, 1957), *available at* <http://www.eisenhower.archives.gov/dl/LittleRock/PressRelease924571.pdf>.

attempt are at least as oppressed, powerless, and voiceless as the beneficiaries of integration, and their very lives are at stake.<sup>143</sup>

If education and racial equality were worth the trouble of using a disinterested third party to ensure compliance with the law—is life itself worth any less?

## VI. PRELIMINARY ACTIONS AND A PARTIAL MODEL

### *A. Recommended Preliminary Actions to Lay the Groundwork for the Enforcement of BAIPA*

HHS's educational and notification efforts are a start for the enforcement of BAIPA, but barely. BAIPA amends 15,000 provisions of the *United States Code* and 57,000 provisions of the *Code of Federal Regulations*<sup>144</sup>—is it possible that EMTALA and CAPTA are the only two laws that BAIPA alters in any significant way? Potential age discrimination<sup>145</sup> comes immediately to mind. Or perhaps BAIPA creates a new subcategory of discrimination: e.g., gestational discrimination. Any effects of BAIPA on the Americans with Disabilities Act<sup>146</sup> must be addressed. It would also be surprising if existing civil rights legislation does not apply.<sup>147</sup> And surely, as a violation of BAIPA is a violation of federal law, an institution found to have violated BAIPA risks losing any tax exemption it may have.<sup>148</sup>

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<sup>143</sup> Considering the illustrations provided in Part I, many of which occurred well after BAIPA was enacted, *see supra* notes 1–9 and accompanying text, there is every reason to expect any abortion that lacks such an observer and results in a live birth to also result in a BAIPA violation. And a BAIPA violation almost certainly translates into a denial of the fundamental right to life of a person protected under the law.

<sup>144</sup> H.R. REP. NO. 107-186, at 37 (2001).

<sup>145</sup> *See* 42 U.S.C. §§ 6101–6107 (2000 & Supp. III 2003).

<sup>146</sup> 42 U.S.C. §§ 12101–12213 (2000 & Supp. III 2003). Children prenatally diagnosed with disabilities account for a significant number of abortion attempts. *See* George Neumayr, *The Abortion Debate that Wasn't Under the Radar*, AM. ASS'N OF PEOPLE WITH DISABILITIES NEWS, July 17, 2005, [www.aapd-dc.org/News/disability/abortdebate.html](http://www.aapd-dc.org/News/disability/abortdebate.html).

<sup>147</sup> Arkes, *supra* note 16.

If a student at a private college receives a loan from the federal government, the whole college is now considered a recipient of federal aid, and all relevant regulations of the federal government bear on all parts of the college. The President might simply put this question to the committees of Congress: If any patient, in a clinic or hospital, is covered by Medicare—or receives a loan from the Veterans' Administration or a check from Social Security—does the whole facility become a recipient of federal aid?

*Id.*

<sup>148</sup> *Id.* “The brute fact is that every hospital receives some kind of federal aid, and virtually all of them depend in one way or another on tax exemptions.” *Id.* In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the university was denied federal tax exemption because its internal rules were found to violate federal public policy. *Id.* BAIPA,

Similarly, most everyone is at least passingly familiar with the judicially created “right” to abortion. Can it seriously be asserted that *anyone* is familiar with BAIPA? Surely an effort is in order to make the only federally legislated limit to this “right” as familiar as the “right” itself. “For who would attach any meaning to a law, when those who enacted it [do] not proclaim it, or even ma[k]e some noticeable effort to impart its meaning to the public.”<sup>149</sup> Those that brought us BAIPA—the President and the supporting members of Congress—should at least endeavor to give some greater public accounting and explanation of BAIPA, to include why it was enacted and what effect it has and will have on the law.<sup>150</sup> “In the absence of anything said officially, the meaning of the bill can be marked only in commentaries . . . .”<sup>151</sup>

And, in the same way the public accounting of BAIPA’s effect on the law is incomplete, the coverage of HHS’s notification and education efforts is incomplete as well. To date, the only enforcement instructions provided by HHS with respect to BAIPA are directed solely at hospitals. Nothing has been said about how BAIPA affects the operation of abortion clinics. While “live-birth abortions” do occur in hospitals, this is not the only place they occur: if BAIPA is to be enforced, then such a major source of potential violations as an abortion clinic<sup>152</sup> cannot be ignored.

### *B. A Model in Michigan*

In December 2002, following the enactment of BAIPA, Michigan approved a number of measures to protect children born alive through abortion attempts.<sup>153</sup> Among these was Michigan’s own “born alive infant protection act.”<sup>154</sup> Michigan’s “baipa” closely resembles the federal BAIPA, but it comes much closer to establishing a legal environment where the rights of an infant born alive through an abortion attempt may be enforced. Four of these measures are worth a brief examination and provide insight into solving the enforcement problem of the federal BAIPA.

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by comparison of degrees, is a duly enacted statute of the United States, not a mere public policy. *Id.*

<sup>149</sup> Arkes, *supra* note 15.

<sup>150</sup> “[T]he simplest words spoken by the president [carry] the authority of his office and they have behind them the weight of the Executive branch.” *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> For examples of abortion clinic actions that were (or would be) BAIPA violations, see sources cited, *supra* notes 2, 4–5.

<sup>153</sup> See, e.g., 2002 Mich. Pub. Acts 311, 313, 334–36 (codified at MICH. COMP. LAWS § 333.1071 (2002)); see also Telephone Interview with Jill Stanek, R.N. (Nov. 18, 2005) [hereinafter Stanek Interview] (referencing the relevant Michigan legislative acts).

<sup>154</sup> MICH. COMP. LAWS § 333.1071.

First, instead of merely *implying* a limit to the “right” to abortion, Michigan’s “baipa” explicitly states that limit: “A woman’s right to terminate her pregnancy ends when the pregnancy is terminated. It is not an infringement on a woman’s right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion.”<sup>155</sup> There is no gray area here—no “wobble room”—for differing interpretations. Michigan’s “baipa” is an express limit on the “right” to abortion and an affirmative legislative declaration of intent and authority to protect the rights and lives of the state’s most vulnerable citizens. Michigan did what BAIPA should have done.

Second, in the event a newborn’s mother “refus[es] to authorize all necessary life sustaining medical treatment for the newborn or releas[es] the newborn for adoption,”<sup>156</sup> the child immediately falls under the guardianship of the state via Michigan’s “safe delivery of newborns law.”<sup>157</sup> If, then, a child is born alive through an abortion attempt, and the mother persists in her desire that the child die, she loses all parental authority over the child and immediately surrenders him to the state.

Third, in conjunction with its “safe delivery of newborns law,” Michigan’s “baipa” imposes express duties on the abortionist. In the event a child is born alive through an abortion attempt “in a hospital setting,” the abortionist is required to “provide immediate medical care to the newborn” and transfer him “to a resident, on-duty, or emergency room physician who shall provide medical care to the newborn.”<sup>158</sup> If the abortion occurs “in other than a hospital setting,” e.g., in an abortion clinic, the abortionist is required to “provide immediate medical care to the newborn and call 9-1-1 for an emergency transfer of the newborn to a hospital that shall provide medical care to the newborn.”<sup>159</sup>

Finally, Michigan gave its “baipa” some teeth. In Michigan, it is a “felony, punishable by imprisonment for not more than 10 years,” for an abortionist to act “with intent to injure or wholly to abandon” a child born alive through an abortion attempt.<sup>160</sup> Thus, an abortionist found to have drowned or bludgeoned a child born alive through an abortion attempt,<sup>161</sup> or to have simply let the child born alive die without rendering the aid required by Michigan’s “baipa,” faces the threat of a felony conviction.

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<sup>155</sup> *Id.* § 333.1072.

<sup>156</sup> *Id.* § 333.1073(1).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* § 333.1073(2).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* § 750.135(1)-(3).

<sup>161</sup> *See* Kalebic, *supra* note 9, at 224 n.9; McGovern, *supra* note 7.

### C. Michigan's Model and BAIPA

The measures implemented in Michigan<sup>162</sup> provide a good foundational model for establishing the framework needed to enforce BAIPA: an express (as opposed to implied) limit to the “right” to abortion, a transfer of custody procedure, mandatory immediate medical care for the newborn, and penalties for noncompliance. But at least two additional measures are required to ensure effective enforcement: an express, though not exhaustive, definition of the “immediate medical care” an abortionist is required to provide an infant born alive, and the appointment of a disinterested third party to neutralize the conflict of interests inherent in an abortion that results in a live birth.<sup>163</sup>

#### 1. Defining Immediate Medical Care

The purpose of any abortion procedure is termination of a pregnancy by killing the child in the womb. Due to the fragility of the human infant, one who survives such an attempt on one's life will almost certainly be in immediate need of basic resuscitation and stabilization measures.<sup>164</sup> No child born alive through an abortion attempt will likely survive without this most basic of care.<sup>165</sup>

It is therefore essential to define expressly the “immediate medical care” any abortion provider is required to render an infant born alive to include 1) on-site, basic neonatal resuscitation and stabilization procedures, 2) performed by independent, competent medical professionals, with the necessary equipment, 3) standing by in the immediate vicinity of the abortion.<sup>166</sup>

Unless those who are permitted to kill the child in the womb are required to provide the necessary resuscitation and stabilization measures should the child escape the womb alive, any attempt to protect the child under law is, at best, futile, because without it the child will never survive the event that first brings him under this protection. In effect, without this requirement, every infant born alive through an abortion attempt will be denied the fundamental right to life BAIPA is meant to secure.

#### 2. Identifying the Disinterested Third Party

Part V, *supra*, covered the need for the presence of a disinterested third party at any abortion attempt that may result in a child born alive

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<sup>162</sup> See *supra* Part VI.B.

<sup>163</sup> See *supra* Part V (discussing the need for the intervention of a disinterested party at abortions that could result in a live birth).

<sup>164</sup> Stanek Interview, *supra* note 153.

<sup>165</sup> See, e.g., *supra* notes 1–9 and accompanying text.

<sup>166</sup> See Stanek Interview, *supra* note 153.

to ensure compliance with BAIPA. All that remains is to identify this independent party. No one answer exists. There is, perhaps, no good answer. HHS, however, has unintentionally provided a workable candidate.

In its program instruction on how BAIPA affects CAPTA, HHS stated that for a state to remain eligible for CAPTA funds, the state's Child Protective Services (CPS) is to have the "authority" to ensure that "medical care [is provided] for a child when such care or treatment is necessary to prevent or remedy serious harm to the child," including a child born alive through an abortion attempt.<sup>167</sup> This is precisely the purpose for a disinterested party at an abortion attempt: the prevention and remedy of serious harm to the child born alive. HHS could not have expressed it better had they intended.

CPS exists to protect children, often children born into hostile, abusive families. A mother who has hired someone to kill her child is certainly approaching the outer bounds of hostility and abuse. CPS agents are already trained to recognize signs of physical abuse, and so likely are more readily trainable to competently recognize a "live birth" and the four BAIPA signs of life. CPS is also well funded, receiving both state and federal monies. In sum, CPS may be in a better position than any government entity to intervene as a disinterested party on behalf of a child born alive through an abortion attempt to ensure compliance with BAIPA. CPS was created to uphold the rights of children—let them be used to uphold the rights of *all* children, including those most recently recognized under the law.

The federal government, of course, cannot order CPS to serve in this capacity.<sup>168</sup> That direction would have to come from the states themselves. Due to the nature of CAPTA, however, this need does not present a problem. A fuller explanation is provided in Part VII, *infra*.

#### VII. A PLAN FOR BAIPA'S REDEMPTION

While there are any number of measures that could be taken to enforce BAIPA, some of which are listed in Part VI.A, *supra*, there is a fairly simple solution that would likely see the purposes of BAIPA accomplished almost immediately: The Born-Alive Infants Protection Act of 200X (BAIPA 200X).

As simple in form and content as its predecessor, but exceedingly more effective, BAIPA 200X utilizes existing federal law to establish the legal framework by which the purposes of the original BAIPA may be realized. The Act has two main parts. The first is a simple amendment to the *United States Code* to define expressly the term "abortion" as it

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<sup>167</sup> ACF Memo, *supra* note 98.

<sup>168</sup> *See* *Printz v. United States*, 521 U.S. 898 (1997).

applies to the killing of an unborn child. This is currently missing from the *Code*, despite the fact that “abortion” appears in relevant context in many of its sections. The definition comes from a neutral source, such as *Black’s Law Dictionary*<sup>169</sup> or a recognized medical authority. And, though implicit in the original BAIPA and the accepted definitions of “abortion” itself, the amendment follows Michigan’s example<sup>170</sup> and includes in the definition an express declaration of the sole limit BAIPA placed on the “right” to abortion: that is, the “right” to abortion ends when the child is born alive. This simple declaration, without credible question, undeniably affirms the logical conclusion of BAIPA and expressly establishes the statutory bright line between abortion and un-legalized infanticide originally intended by BAIPA.

The second part of BAIPA 200X amends CAPTA, specifically 42 U.S.C. § 5106(a)(b) and (c)(b). These subsections list the eligibility requirements states must meet to receive federal grants for child abuse and neglect prevention and treatment programs and programs for the investigation and prosecution of child abuse and neglect. The amendment asserts that in order for a state to qualify for assistance under 42 U.S.C. § 5106(a) and (c), the state shall have and implement a plan to prevent the abuse and neglect of all infants born alive, as defined under BAIPA. The plan must, at a minimum, include the following: an immediate transfer of parental custody procedure;<sup>171</sup> an express requirement that all abortionists provide immediate onsite neonatal resuscitation and stabilization procedures for any child born alive, including immediate patient transfer to a qualified, independent medical professional for treatment;<sup>172</sup> specific penalties for violations;<sup>173</sup> and appointment of a disinterested third party to neutralize the inherent conflict of interests present when an infant is born alive through an abortion attempt.<sup>174</sup>

BAIPA 200X also 1) includes a preamble, made up of a discussion of the purposes and policies behind its specific measures,<sup>175</sup> 2) addresses funding issues, and 3) provides a sample plan that meets its

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<sup>169</sup> According to *Black’s*, *abortion* is the “artificially induced termination of a pregnancy for the purpose of destroying an embryo or a fetus.” BLACK’S LAW DICTIONARY 6 (8th ed. 2004). In reference to human abortion, both *embryo* and *fetus* refer to a “developing but *unborn*” human in the earlier and latter stages of development, respectively. *Id.* at 561, 654 (emphasis added).

<sup>170</sup> See *supra* Part VI.B.

<sup>171</sup> See, e.g., *supra* Part VI.B.

<sup>172</sup> See *supra* Parts VI.B–C.

<sup>173</sup> See, e.g., *supra* Part VI.B.

<sup>174</sup> See *supra* Part VI.C; see also *supra* Part V (discussing the need for a disinterested third party at any abortion attempt that may result in a live birth).

<sup>175</sup> See *supra* notes 52–58 and accompanying text; see also *supra* Part VI.B.

requirements.<sup>176</sup> Where relevant, BAIPA 200X references Michigan's respective legislative measures as examples.<sup>177</sup>

There ultimately could be little justifiable resistance to BAIPA 200X, absent a desire to legalize *ex utero* infanticide. The federal legislature certainly has the authority to define the terms in the *United States Code*.<sup>178</sup> It has, as well, the authority to establish eligibility requirements for federal grants.<sup>179</sup> And the federal executive, for its part, has the responsibility to see that existing federal law is enforced. The two branches equally share the responsibility to ensure that the laws enacted are enforceable. The states, in turn, would without question be hesitant to disqualify themselves from the funding CAPTA provides, particularly when the effort to meet the requirements of BAIPA 200X is funded by the very grants for which the effort is made.

There is, in sum, every reason for the passage of BAIPA 200X, or a measure very much like it, and little reason for it to fail. Both the legislative and the executive authority and responsibility are obvious. The cooperation of the states is comfortably assured. It lays the groundwork for the effective enforcement of the only federal legislative barrier to abortion as unhindered infanticide.<sup>180</sup> It removes the absurdity of a law adopted into the *United States Code* replete with conflicting interests to the point of unenforceability. And, most importantly, BAIPA 200X protects and upholds the fundamental right to life due the most vulnerable legally recognized among us.

Who could fail to support, if not sponsor, such a measure? All that is required is the appropriate action on the part of those that enacted BAIPA in the first place.

## VIII. CONCLUSION

Currently, the Born-Alive Infants Protection Act of 2002 is the only federal legislation in history to place a limit on the "right" to abortion,<sup>181</sup> a right created by a judiciary that seems bent on expanding this "right" to include outright infanticide.<sup>182</sup> BAIPA's only significant effect is to

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<sup>176</sup> An adequate example could easily be drawn from the measures discussed in Part VI.B–C, *supra*.

<sup>177</sup> *See supra* Part VI.B.

<sup>178</sup> U.S. CONST. art. I, § 8; *see also* H.R. REP. NO. 107-186, at 14 (discussing the Congressional authority to enact the relevant portions of the original BAIPA).

<sup>179</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>180</sup> *See Arkes, supra* note 15.

<sup>181</sup> *Id.*

<sup>182</sup> *See Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood v. Farmer*, 220 F.3d 127, 143–44 (3d Cir. 2000).

imply a statutory bright line separating abortion from unimpeded infanticide.<sup>183</sup> Due to the near-complete inaction of the legislative and executive branches of the federal government following BAIPA's enactment,<sup>184</sup> including the so-called "enforcement" measures of the HHS,<sup>185</sup> however, BAIPA is effectively nonexistent.<sup>186</sup> The direct result is that an entire class of legally recognized individuals are rendered human chattel and utterly denied the most basic protections of the law. An act as simple as The Born-Alive Infants Protection Act of 200X<sup>187</sup> would ensure that the purposes of the original BAIPA are accomplished and so uphold the fundamental right to life denied the most oppressed, voiceless, and powerless persons recognized under law.

"Any right must have its limit, including the right to abortion, and if that limit is not found in outright infanticide, we must ask: where could it possibly be?"<sup>188</sup>

*Roger Byron*

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<sup>183</sup> *See supra* Part III.

<sup>184</sup> *See supra* Part II.

<sup>185</sup> *See supra* Part IV.

<sup>186</sup> *See supra* Part V.

<sup>187</sup> *See supra* Part VII.

<sup>188</sup> *BAIPA Hearings, supra* note 31, at 14 (testimony of Hadley Arkes).