



Fetal Rights

Legal Personhood

Recently, the anti-choice movement has stimulated legislation—purportedly aimed at protecting pregnant women—to create new legal protections for fetuses. By moving toward an independent legal status for fetuses, embryos, or zygotes, abortion opponents hope to establish precedent for fetal personhood.

- Granting fetuses, embryos, or fertilized eggs independent legal rights undermines one of the central tenets of *Roe v. Wade*¹—that a fetus is not a legal “person” for the purposes of constitutional protection.
- Legislation to protect fetuses, embryos, and zygotes can take many different forms, and thus the degree to which such legislation endangers reproductive rights varies. Such legislation may:
 - Define the fetus, embryo, or zygote as a person or a human being;
 - Amend existing homicide statutes to include the fetus, embryo, or zygote as a possible victim;
 - Extend wrongful death statutes to permit civil suits against individuals who cause the death of a fetus, embryo, or zygote;
 - Create statutes that define an independent crime for injury to a fetus, embryo, or zygote; or
 - Enact new statutes that penalize injury to a pregnant woman that causes harm to her pregnancy or results in a miscarriage.²

Fetal Pain

There is no medical evidence to support the notion that fetuses have the ability to feel pain, even at 26 weeks.³ According to an article in the *Journal of the American Medical Association (JAMA)*, “[n]either withdrawal reflexes nor hormonal stress responses to invasive procedures prove the existence of fetal pain, because they can be elicited by nonpainful stimuli and occur without conscious cortical processing.”⁴ In addition, there are no safe and effective methods for administering anesthesia directly to the fetus in the abortion context.⁵

- Despite the above, there have been repeated federal efforts to force abortion providers to tell women seeking abortions about fetal pain. For example, the Unborn Child Pain Awareness Act of 2007, which was also unsuccessfully introduced in each of the previous four years, was designed “[t]o ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child.”⁶
- Furthermore, many state laws that mandate biased abortion counseling also include provisions that require the pregnant woman to be given medically inaccurate information regarding fetal pain.⁷

Unborn Victims of Violence Act

The federal Unborn Victims of Violence Act (UVVA)⁸ makes it a separate crime to engage in violent behavior against a pregnant woman that causes the death of or bodily injury to an “unborn child.”⁹ Because the UVVA applies to all stages of prenatal development, it is the first federal law to recognize a zygote (fertilized egg), an embryo (through week eight of a pregnancy), or a fetus (after week eight) as an independent victim of a crime with legal rights distinct from the woman who has been harmed by a violent criminal act.¹⁰

- The act was originally drafted in part by the National Right to Life Committee¹¹ and was introduced by the anti-choice Rep. Melissa Hart (R-PA).¹²
- Pro-choice advocates assert that violent crimes against pregnant women can be assigned tougher sentences without undermining the legal foundation of reproductive freedom.



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However, fetal protection legislation such as the UVVA can seriously undermine a woman's right to choose to have an abortion.¹³

State Fetal Homicide Statutes

Currently, at least 36 states have fetal homicide laws—31 are statutory and three are case law.¹⁴ At least 19 states have fetal homicide laws that apply to the earliest stages of pregnancy (“any state of gestation,” “conception,” “fertilization,” or “post-fertilization”), indicating an expansion of fetal and embryonic rights.¹⁵ These laws raise the same legal issues implicated by the UVVA.

State Children's Health Insurance Program (SCHIP)

The State Children's Health Insurance Program (SCHIP) is a Health & Human Services (HHS) program that provides health insurance coverage to uninsured children in families with incomes above Medicaid eligibility but at or below \$44,100 a year (though the eligibility rules differ slightly between states).¹⁶

- In 2002, HHS promulgated a rule expanding the definition of a “child” under SCHIP to include a fetus from conception to birth.¹⁷ This rule expands health insurance coverage for the “unborn child” but does not expand coverage for the pregnant woman for post-partum care, including ordinary post-delivery hospital care or complications.¹⁸

Wrongful Death Statutes

A majority of U.S. jurisdictions permit wrongful death causes of action on behalf of a viable fetus that dies from injuries resulting from torts.¹⁹

- However, at least five states have allowed recovery in wrongful death actions for non-viable, unborn fetuses.²⁰
- The expansion of wrongful death codes to include non-viable fetuses is yet another part of the effort to establish precedent for fetal personhood and ultimately limit women's right to choose abortion.

Death Certificates for Terminated Pregnancies

The most recent development in the push for fetal personhood is mandatory death certificates for aborted fetuses. For example, in February 2007 Rep. Stacey Campfield (R-Tenn) introduced legislation in Tennessee that would require the assignment of death certificates to terminated pregnancies.²¹

- The legislation's stated rationale is to aid in tracking the number of abortions in the state;²² however, abortions are already recorded by Tennessee's Office of Vital Records.²³
- As originally proposed, HB 0982 and SB 1094 would disclose confidential information about women, such as social security numbers.²⁴
- The bills were reintroduced in 2009 as HB 0819 and SB 1239.²⁵ This version purportedly addresses the issue of medical privacy by including a section that states that the personal information contained in the death certificate will not be disclosed to any person, except for use in “research activities [and for] producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.”²⁶
 - However, it is unclear what the term “research activities” actually encompasses.
 - Furthermore, no explanation is given for what information could be gleaned from such death certificates that is not already available under the current reporting system. It is unclear what purpose such redundant legislation can serve beyond intimidating women into forgoing their legal right to abortion for fear of having their private information disseminated.



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¹ 410 U.S. 113, 158 (1973).

² American Civil Liberties Union, What's Wrong With Fetal Rights: A Look at Fetal Protection Statutes and Wrongful Death Actions on Behalf of Fetuses, <http://www.aclu.org/reproductiverights/fetalrights/16530res19960731.html> (last visited June 4, 2009) [hereinafter ACLU Website].

³ Stuart W.G. Derbyshire, Fetal "Pain" – A Look at the Evidence, 13 AM. PAIN SOC'Y 4 (2003), available at <http://www.ampainsoc.org/pub/bulletin/julo3/article1.htm>.

⁴ Susan J. Lee et al., Fetal Pain: A Systematic Multidisciplinary Review of the Evidence, 294 JAMA 8 (2005), available at <http://jama.ama-assn.org/cgi/content/abstract/294/8/947>.

⁵ Id.

⁶ H.R. 3442, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.03442;> S. 356, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.00356>.

⁷ Joerg Dreweke & Rebecca Wind, State Mandated Abortion Counseling Materials Often Medically Inaccurate, Biased, Guttmacher Institute, <http://www.guttmacher.org/media/nr/2006/10/26/index.html> (last visited June 10, 2009).

⁸ 10 U.S.C. § 919(a) (2006); 18 U.S.C. § 1841 (2006).

⁹ 18 U.S.C. § 1841.

¹⁰ Id.; ACLU Website, *supra* note 2.

¹¹ Westchester Coal. for Legal Abortion, Hijacking A Woman's Right to Choose (2003), available at <http://www.choicematters.org/newsletters/summer2003.pdf>.

¹² OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY (Feb. 2004), available at <http://www.whitehouse.gov/omb/legislative/sap/108-2/hr1997sap-h.pdf>.

¹³ ACLU Website, *supra* note 2.

¹⁴ National Conference of State Legislatures, Fetal Homicide, <http://www.ncsl.org/programs/health/fethom.htm> (last visited June 8, 2009).

¹⁵ Id.

¹⁶ Centers for Medicare & Medicaid Services, Insure Kids Now, http://www.cms.hhs.gov/LowCostHealthInsFamChild/o2_InsureKidsNow.asp#TopOfPage (last visited June 8, 2009).

¹⁷ Eligibility for Prenatal care and Other Health Services for Unborn Children, 67 Fed. Reg. 191 (Oct. 2, 2002), at 1, available at <http://www.cms.hhs.gov/quarterlyproviderupdates/downloads/CMS2127F.pdf>.

¹⁸ Id. at 9.

¹⁹ 19 Am. Jur. 3d POF §4 (2008).

²⁰ Porter v. Lassiter, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955); Connor v. Monkem Co., 898 S.W.2d 89, 93 (Mo. 1995); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790-91 (S.D. 1996); Farley v. Sartin, 466 S.E.2d 522, 533 (W. Va. 1995); 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 106 (Miss. 2003). See also Richard Everett Collins, 66 Federal Credit Union v. Tucker: The Mississippi Supreme Court Invites More Fetal Wrongful Death Actions – The State Legislature is Quick to Approve, 35 U. MEM. L. REV. 345, 353-54, 356-57 (2005).

²¹ Tennessee General Assembly Website,

<http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0982&ga=105> (last visited June 9, 2009).

²² Id.

²³ Id.

²⁴ Id.

²⁵ Tennessee General Assembly Website,

<http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB0819> (last visited June 9, 2009).

²⁶ H.B. 0819 § 3(d), available at <http://www.capitol.tn.gov/Bills/106/Bill/HB0819.pdf>.