

# FETAL PAIN LEGISLATION: SUBORDINATING SOUND MEDICAL FINDINGS TO MORAL AND POLITICAL AGENDAS

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The medical community has quietly debated the controversial issue of fetal pain for over 20 years. Failure to articulate exactly what “feeling pain” means, as well as a lack of consensus over the accuracy of different testing methods utilized within the medical community to detect and measure pain, further complicates this debate. While many physicians require an element of self-awareness or conscious appreciation as a predicate to defining the experience of pain, others have argued that experiencing pain does not require a mindful awareness, but rather can be measured by behavioral responses to environmental stimuli. Only lately has the debate over fetal pain come to garner widespread attention within the legal, political, and public arenas. During recent legislative sessions, pro-life advocates have latched onto the concept of fetal pain as a new legislative tactical avenue through which to further their anti-choice agenda.

Across the nation, pro-life advocates have been pushing for informed consent abortion restrictions requiring physicians to inform women who seek an abortion beyond 20 weeks gestation about the existence of fetal pain and the option of seeking fetal anesthesia. Legislatures at both the state and federal levels have routinely defended such fetal pain statutes as constitutionally permissible by relying on legitimate state interest arguments similar to those made in *Planned Parenthood of Southern Pennsylvania v. Casey*. In August of 2005, the American Medical Association (AMA) issued a report, after undertaking a multi-disciplinary review of fetal pain studies, that concluded a fetus cannot consciously perceive pain until it reaches the gestational age of 29 to 30 weeks. The AMA’s report necessarily calls into question the rationale and motive behind recent efforts to enact fetal pain legislation, as well as the authority and credibility of the scientific findings and expert testimony upon which such legislation purportedly has been buttressed. This article addresses the manner in which the AMA 2005 Fetal Pain Report works to substantially undermine the factual basis and state interest arguments federal and state legislatures have cited to fetal pain legislation.

Part I discusses how adherence to the “substantial obstacle” undue burden analysis articulated in *Casey* has resulted in legislatures and pro-life advocates defending increasingly expanded versions of informed consent abortion regulations. Such legislative provisions include fetal pain statutes, which pro-life advocates and legislatures routinely have justified as constitutionally permissible requirements that serve the states’ purported interests in protecting the health of the mother and the potential life of the fetus. Part II evaluates the credibility that ought to be assigned to the AMA report’s conclusion repudiating the existence of fetal pain any time prior to 29 to 30 weeks gestation. Recognizing that the AMA’s factual conclusions regarding fetal pain stand in stark contrast to the factual findings, state interest arguments, and policy rationale that advocates and supportive politicians have routinely relied upon to endorse and justify the enactment of fetal pain statutes, parts III and IV argue that the persuasive value and credible authority of the AMA report render fetal pain legislation unconstitutional.

If you are interested in reading the full text of this article, it is published in the *J. LEGAL MEDICINE*, 27: 459-76 (2006), and is available for purchase from the Taylor and Francis Publishing website at: [www.informaworld.com](http://www.informaworld.com).