

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 the fetus, embryo, or zygote, abortion opponents are seeking to establish precedent for fetal personhood.

- Granting a fetus, embryo, or fertilized eggs independent legal rights undermines one of the central tenets of Roe – 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. The extent to which such a bill may endanger reproductive rights depends on its specific language. States may:
 - amend existing homicide statutes to include the fetus as a possible victim;
 - pass statutes defining the fetus as a person or human being;
 - enact freestanding statutes to define a new crime for injury to a fetus;
 - extend wrongful death statutes to permit civil suits against individuals who cause the death of a fetus; or
 - enact new statutes to penalize injury to a pregnant woman that causes harm to her pregnancy or results in a miscarriage.¹

Unborn Victims of Violence Act

The federal Unborn Victims of Violence Act (UVVA), 18 U.S.C.A § 919(a) (2004) & 18 U.S.C.A § 1841 (2004), makes it a separate crime to engage in violent behavior against a pregnant woman and cause the death of or bodily injury to an “unborn child.”² Because 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 as an independent victim of a crime with legal rights distinct from the woman who has been harmed by a violent criminal act.

- The act was originally drafted in part by the National Right to Life Committee and introduced by the anti-choice Rep. Melissa Hart (R-PA).³
- Pro-choice advocates contend that violent crimes against pregnant women can be assigned tougher sentences without undermining the legal foundation of reproductive freedom.

State Fetal Homicide Statutes

Currently, at least 36 states have fetal homicide laws – 31 are statutory and 3 are case law.⁴

- At least 15 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. These laws raise the same legal issues brought about by UVVA.⁵

¹ 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 July 14, 2008).

² Find Law, One Hundred Eighth Congress of the United States of America at the Second Session, <http://news.findlaw.com/hdocs/docs/abortion/unbornbill32504.html> (last visited July 14, 2008).

³ American Civil Liberties Union, Interested Persons Memo on the Unborn Victims of Violence Act (S. 480/H.R. 503), <http://www.aclu.org/reproductiverights/gen/16557leg20020327.html> (last visited July 14, 2008).

⁴ National Conference of State Legislatures, Fetal Homicide, <http://www.ncsl.org/programs/health/fethom.htm> (last visited July 14, 2008).

⁵ Id.



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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 \$36,200 a year.⁶

- In 2002, HHS promulgated a rule expanding the definition of a “child” under SCHIP to include a fetus from conception to birth.⁷ 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.⁸

Fetal Pain

There is no medical evidence to support the notion that fetuses have the ability to feel pain, even after 26 weeks.⁹ Neither withdrawal reflexes nor hormonal stress responses to invasive procedures prove the existence of fetal pain, because they can be elicited by non-painful stimuli and occur without conscious cortical processing¹⁰ In addition, there are no safe and effective methods for administering anesthesia directly to the fetus.¹¹

- Many state laws mandating biased abortion counseling also include provisions regarding fetal pain, despite the lack of conclusive medical evidence that fetuses have the ability to feel pain.¹²
- The Unborn Child Pain Awareness Act of 2005 would force abortion providers to tell women seeking termination of pregnancies at least “20 weeks from fertilization” about fetal pain. It failed to pass in the House in December 2006 but was reintroduced in the House and the Senate in 2007.
 - H.R.3442: To ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child. Last major action: referred to the House Subcommittee on Health (8/3/07).
 - S.356: A bill to ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child. Last major action: referred to Senate Subcommittee on Health, Education, Labor, and Pensions (1/22/07).

Wrongful Death Statutes

A majority of jurisdictions in the U.S. permit wrongful death causes of action on behalf of a viable fetus that dies from injuries resulting from torts. The expansion of wrongful death codes

⁶ Centers for Medicare & Medicaid Services, Insure Kids Now, http://www.cms.hhs.gov/LowCostHealthInsFamChild/02_InsureKidsNow.asp#TopOfPage (last visited July 14, 2008).

⁷ State Children's Health Insurance Program, Eligibility for Prenatal care and Other Health Services for Unborn Children, 67 Federal Register 191, Oct. 2, 2002, available at <http://www.cms.hhs.gov/quarterlyproviderupdates/downloads/CMS2127F.pdf> (last visited July 14, 2008).

⁸ Id.

⁹ Stuart W.G. Derbyshire, PhD, Fetal “Pain” – A Look at the Evidence, 13 American Pain Society 4 (2003), available at <http://www.ampainsoc.org/pub/bulletin/jul03/article1.htm> (last visited July 14, 2008).

¹⁰ Susan J. Lee, JD, Henry J. Peter Ralston, MD, Eleanor A. Drey, MD, EdM, John Colin Partridge, MD, MPH, Mark A. Rosen, MD, Fetal Pain: A Systematic Multidisciplinary Review of the Evidence, 294 The Journal of the American Medical Association 8, Aug. 24/31, 2005, available at <http://jama.ama-assn.org/cgi/content/abstract/294/8/947> (last visited Aug. 17, 2008).

¹¹ Id.

¹² Joerg Dreweke, Rebecca Wind, State Mandated Abortion Counseling Materials Often Medically Inaccurate, Biased, Guttmacher Institute News Release, Oct. 26, 2006, <http://www.guttmacher.org/media/nr/2006/10/26/index.html> (last visited July 14, 2008).



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to include embryos or zygotes is part of an effort to establish precedent for fetal personhood and ultimately limit women's right to choose abortion.¹³

- However, courts in Missouri and West Virginia have allowed wrongful death causes of action for the death of non-viable fetuses as well.
- In 2005, a judge in Chicago allowed a couple to bring a wrongful death statute against a fertility clinic for unintentionally disposing of their fertilized egg (*Miller v. American Infertility Group* (218 Ill. 2d 542; 844 N.E.2d 424)).¹⁴

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.¹⁵

- The legislation's stated rationale is to aid in tracking the number of abortions in the state,¹⁶ but abortions are already recorded by Tennessee's Office of Vital Records.¹⁷
- The death certificates would disclose confidential information about women, such as social security numbers.¹⁸ The bill is currently pending.
 - HB 0982 and SB 1094 are both currently pending. The last major action was taken in February 2007, when each bill was referred to the respective health committees.

¹³ National Conference of State Legislatures, Fetal Homicide, <http://www.ncsl.org/programs/health/fethom.htm> (last visited July 14, 2008).

¹⁴ Dee McAree, Wrongful Death Suit Allowed Over Embryo, Action over discarded fertilized egg could have broader ramifications, *THE NATIONAL LAW JOURNAL*, Feb. 18, 2005, available at <http://www.law.com/jsp/article.jsp?id=1108389933276> (last visited July 14, 2008).

¹⁵ Erik Schelzig, Death certificates on abortions proposed, *www.boston.com*, Feb. 14, 2007, available at www.breitbart.com (search death certificates on abortion proposed) (last visited July 14, 2008).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*