

Legal Personhood

Recently, the anti-choice movement has encouraged and supported 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 zygotes 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
- Reproductive justice advocates are concerned that, in granting the fetus legal status distinct from the pregnant woman, these laws create an adversarial relationship between a woman and her fetus.³ This opens the door to prosecution and punishment of pregnant women, including those who suffer miscarriages.⁴

State-Level Personhood Campaigns

- An unprecedented number of bills concerning reproductive healthcare were introduced in 2011, with 900 bills introduced in the first legislative session before the end of March. Only 175 similar bills were moving through the states at this time last year. In 2011, law makers introduced 22 “personhood” bills, which seek to legally define the status of being a “person” or “human” as beginning from the moment of conception, thus establishing legal personhood for fetuses. This is a direct attack against *Roe v. Wade*, and could ultimately have the effect of outlawing abortions altogether.⁵
 - In 2008, Colorado was the first state to have a personhood initiative on the ballot. This initiative failed to pass by a 3-to-1 margin. However, Personhood Colorado, the group behind this initiative, secured enough signatures so that the so-called “Human Life” Amendment to the state constitution will again be on the ballot in 2010.⁶
 - Personhood Nevada attempted to get a fetal personhood initiative on the ballot in 2010.⁷ The initiative was legally challenged, and the district judge ruled that the language was too vague and far-reaching for it to go on the ballot as written.⁸ While on appeal, the petition filing deadline to be included on the ballot passed; however, Personhood Nevada announced they will try the ballot initiative again in 2012.⁹
 - Anti-Choice advocates in Montana failed to get enough signatures to get on the ballot in 2008 but are collecting them again for the 2010 ballot.¹⁰
 - In 2010 Personhood Mississippi, an anti-choice, anti-contraception organization collected over 130,000 signatures calling for a 2011 ballot. Seeking a constitutional amendment, the group is asking voters to define life as beginning at “the moment of fertilization.”¹¹ In July of 2010 the ACLU and Planned Parenthood sought to remove

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the initiative, and in October of the same year the motion was denied.¹² Both groups have appealed before it makes its way to ballot in 2012.¹³

- Nineteen states have introduced legislation about fetal and pregnant woman assault.¹⁴ Within just the first few months of 2011, two states (NM and TN) have passed and one state (NC) has enacted assault legislation.¹⁵
- In June 2010, the Kentucky Supreme Court ruled that a fetus cannot be legally separated from the pregnant woman carrying it and thus cannot be treated as a separate legal person.¹⁶

Fetal Pain

Reliable medical evidence indicates that fetuses do not have the ability to feel pain, at least until 24 weeks (and even at 26 weeks).¹⁷ 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.”¹⁸ In June 2010, the BBC reported the results of a Royal College of Obstetricians and Gynaecologists’ review, which found that fetuses are undeveloped and sedated in a sleep-like unconscious state.¹⁹ The report states that the nerve connections in the cortex, the brain area which processes responses to pain, do not form properly before 24 weeks.²⁰ In addition, there are no safe and effective methods for administering anesthesia directly to the fetus in the abortion context.²¹

- Despite this lack of evidence, 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, legislation designed “[t]o ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child,” has been introduced during each of the last four years, each time failing to secure passage.²²
- Furthermore, ten states that mandate biased abortion counseling currently include provisions that require the pregnant woman to be given medically inaccurate information regarding fetal pain.²³
- Five states (TX, KS, IN, FL, AZ) require an ultrasound before an abortion.²⁴
- As of June 2011, legislation about fetal pain has been introduced in six states.²⁵
- In April and May 2010 the Senate and House in Missouri respectively approved legislation to require an abortion provider to 1) inform a woman seeking an abortion after 21 weeks of pregnancy of the purported ability of the fetus to feel pain and 2) offer anesthesia for the fetus.²⁶ This bill also requires the provider to include counseling materials that include the following: “The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being.”²⁷ The governor allowed the bill to pass without signature, and the new law took effect August 2010.²⁸
- Nebraska signed the Pain-Capable Unborn Protection Act into law in April 2010.²⁹ This bill makes abortion beyond 20 weeks of gestation illegal with felony charges for a doctor who performs an abortion beyond this point.³⁰ In its findings, the legislature relied on the scientifically-unsupported claim that fetuses must feel pain because they have the same reflex reactions to pain as children and adults.³¹ This law became enacted and formally operative Oct. 15, 2011.³²

Unborn Victims of Violence Act

The 2004 federal Unborn Victims of Violence Act (UVVA)³³ makes it a separate crime to engage in any of over 60 listed federal crimes of violence if the crime is committed against a pregnant woman and causes the death of or bodily injury to an “unborn child.”³⁴ Since 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



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independent victim of a crime with legal rights distinct from the woman who has been harmed by a violent criminal act.³⁵

- The act was originally drafted in part by the National Right to Life Committee³⁶ and was introduced by the anti-choice Rep. Melissa Hart (R-PA).³⁷
- Pro-choice advocates assert that violent crimes against pregnant women can be assigned tougher sentences without undermining the legal foundation of reproductive freedom. However, fetal protection legislation such as the UVVA can seriously undermine a woman's right to choose to have an abortion.³⁸

State Fetal Homicide Statutes

Currently, at least 38 states have fetal homicide laws—37 are statutory and one (MA) is case law.³⁹ At least 21 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.⁴⁰ These laws raise the same legal issues implicated by the UVVA.

- While South Carolina's legislature refused to pass a fetal homicide law, judges on the state Supreme Court rewrote state law in *Whitner v. South Carolina*⁴¹ to allow the arrest of any pregnant woman who even “risks” harm to her viable fetus. South Carolina continues to be first in the United States for the number of pregnant women arrested and last when it comes to funding for drug treatment.⁴²
- Between January and June 2010, four states (CO, NH, VT, and WY) introduced a total of seven bills in an attempt to criminalize fetal homicide.⁴³
- Some fetal homicide laws may be interpreted to apply to pregnant woman's behavior during her pregnancy, such as smoking, drinking, or ingesting drugs.⁴⁴
- In February 2010, the Utah Legislature passed a bill that allows the state to charge a woman with criminal homicide for inducing a miscarriage or obtaining an illegal abortion.⁴⁵ The bill criminalized any “reckless” actions taken by a pregnant woman to induce a miscarriage or cause an abortion outside of a physician's care with penalties up to life in prison.⁴⁶ The Governor vetoed this bill, but signed a similar bill into law on March 8, 2010, that changed the standard for criminal behavior from “reckless” behavior to “knowingly or intentionally” seeking to cause a miscarriage.⁴⁷
- In 2011, Georgia State Rep. Bobby Franklin introduced HB 1, which would criminalize miscarriages and make abortion completely illegal in Georgia. Under this bill, women who miscarry could be charged “prenatal murder” if they cannot prove that there was “no human involvement whatsoever in the causation” of their miscarriage. There has been no clarification as to what “human involvement” actually entails. Both miscarriages and abortions would be felonies, punishable by life in prison or death.⁴⁸

State Legislation Regarding Substance Abuse During Pregnancy

As of June 2011, 15 states introduced legislation regarding substance abuse during pregnancy. One state (AL) has passed and three states (AR, CO and KY) have enacted legislation.⁴⁹

- The Kentucky law relieves a health care professional of the responsibility to report a pregnant woman who is using alcohol or marijuana to the police if the professional is providing her with health services.⁵⁰
- The Minnesota law allocates \$1.8 million over a two year period for substance abuse prevention and treatment for pregnant women.⁵¹

State Children's Health Insurance Program (SCHIP)



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The State Children's Health Insurance Program (SCHIP) is a Department of 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).⁵²

- In 2002, HHS promulgated a rule expanding the definition of a "child" under SCHIP to include a fetus from conception to birth.⁵³ 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.⁵⁴
- In 2011, HHS amended the definition of "child" to "up to, but not including, age 19," omitting any language regarding conception.⁵⁵

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.⁵⁶

- However, at least five states have allowed recovery in wrongful death actions for non-viable, unborn fetuses.⁵⁷

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 State Rep. Stacey Campfield introduced legislation in Tennessee that would require the assignment of death certificates to terminated pregnancies.⁵⁸

- The legislation's stated rationale is to aid in tracking the number of abortions in the state;⁵⁹ however, abortions are already recorded by Tennessee's Office of Vital Records.⁶⁰
- As originally proposed, HB 0982 and SB 1094 would disclose confidential information about women, such as their social security numbers.⁶¹
- The bills were reintroduced in 2009 as HB 0819 and SB 1239.⁶² This version purportedly addresses the issue of medical privacy by including a section stating 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."⁶³
 - 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.

¹ 410 U.S. 113, 158 (1973).

² *What's Wrong With Fetal Rights: A Look at Fetal Protection Statutes and Wrongful Death Actions on Behalf of Fetuses* (July 31, 1996), ACLU, <http://www.aclu.org/reproductiverights/fetalrights/16530res19960731.html> [hereinafter ACLU, *What's Wrong With Fetal Rights*].

³ NATIONAL CONFERENCE OF STATE LEGISLATURES, *Fetal Homicide*, available at <http://www.ncsl.org/IssuesResearch/Health/FetalHomicideLaws/tabid/14386/Default.aspx> (last visited June 30, 2010).

⁴ *The War on Drugs Coming to a Womb Near You* (June 2010), NATIONAL ADVOCATES FOR PREGNANT WOMEN, http://advocatesforpregnantwomen.org/blog/2010/06/the_war_on_drugs_coming_to_a_w.php.

⁵ *State-Level Assaults on Abortion Rights* (June 17, 2011), HUFFINGTONPOST, http://www.huffingtonpost.com/2011/06/17/abortion-rights-states_n_879206.html#s294051&title=Mandatory_Ultrasounds.

⁶ Wendy Norris, *'Egg-as-Person' Efforts Notch Another Loss*, RH REALITY CHECK (June 28, 2010), <http://www.rhrealitycheck.org/blog/2010/06/28/person-efforts-notch-another-loss>.

⁷ American Civil Liberties Union of Nevada, *ACLU, Planned Parenthood File Challenge to Personhood Initiative*, 2009, <http://www.aclunv.org/aclu-planned-parenthood-file-challenge-personhood-initiative>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Deirdra Harris Glover, *Mississippi Personhood Initiative Introduced* (Feb. 21, 2010), PROCHOICEMISSISSIPPI.ORG, <http://prochoicemississippi.org/>.

¹² Ashley Lopez, *Legal Challenge to Mississippi 'Personhood' Amendment Maybe Headed to State Supreme Court* (April 22, 2011), <http://floridaindependent.com/27908/mississippi-personhood-aclu-planned-parenthood>.

¹³ *Id.*

¹⁴ *State Center Monthly State Update: Major Developments in 2010* (June 1, 2010), GUTTMACHER INSTITUTE, <http://www.guttmacher.org/statecenter/updates/index.html#assault>.

¹⁵ *Id.*

¹⁶ *Victory In Kentucky Supreme Court!* (June 2010), NATIONAL ADVOCATES FOR PREGNANT WOMEN, http://advocatesforpregnantwomen.org/blog/2010/06/victory_in_kentucky_supreme_co.php.

¹⁷ 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>.

¹⁸ 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>.

¹⁹ Branwen Jeffreys, *No Foetal Pain Before 24 Weeks*, BBC NEWS (June 24, 2010), available at <http://news.bbc.co.uk/2/hi/10403496.stm>.

²⁰ ROYAL COLLEGE OF OBSTETRICS AND GYNAECOLOGISTS, *FETAL AWARENESS- REVIEW OF RESEARCH AND RECOMMENDATIONS FOR PRACTICE* (June 2010), available at <http://www.rcog.org.uk/fetal-awareness-review-research-and-recommendations-practice>.

²¹ *Id.*

²² What's Wrong With Fetal Rights, *supra* note 2.

²³ GUTTMACHER INSTITUTE, *STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION* (July 1, 2011), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

²⁴ GUTTMACHER INST., *STATE LEGISLATION ENACTED IN 2011 RELATED TO REPRODUCTIVE HEALTH* (2011), available at <http://www.guttmacher.org/statecenter/updates/2011newlaws.pdf>.

²⁵ *State Center Monthly State Update: Major Developments in 2010 as of June 1, 2010*, GUTTMACHER INSTITUTE, <http://www.guttmacher.org/statecenter/updates/index.html#FetalPain>, (last visited June 28, 2011).

²⁶ *State Center Monthly State Update: Major Developments in 2010* (June 1, 2010), GUTTMACHER INSTITUTE, <http://www.guttmacher.org/statecenter/updates/index.html#FetalPain>.

²⁷ *Id.*

²⁸ David A. Lieb, *Missouri Governor Lets Abortion Law Take Effect*, CNSNEWS.COM, July 14, 2010, <http://www.cnsnews.com/node/69443>.

²⁹ Robin Marty, *Nebraska's Abortion Legislation Endstretch*, RH REALITY CHECK (Apr. 12, 2010), <http://www.rhrealitycheck.org/blog/2010/04/09/nebraskas-abortion-legislation-endstretch>.

³⁰ *Id.*

³¹ See Letter to Nebraska Legislature From Philip Darney, MD, MSc and Mark Rosen, MD, University of California, San Francisco (dated March 30, 2010), available at http://www.ansirh.org/_documents/research/late-abortion/UCSF.FetalPain.Nebraska.doc; Robin Marty, *Fetuses Before 24 Weeks Gestation Cannot Feel Pain, Experts in Nebraska Hearing Wrong*, RH REALITY CHECK (June 25, 2010), <http://www.rhrealitycheck.org/blog/2010/06/25/fetuses-weeks-gestation-cannot-feel-pain-experts-nebraska-hearing-wrong>.

³² Tom Venzoro, *See You in Court: An Analysis of Nebraska's Newest Abortion Legislation (LB 1103 Pain-Capable Unborn Child Protection Act)*, Mar. 15, 2011, NEB. L. REV., available at <http://lawreviewbulletin.unl.edu/?p=799>.

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

³⁴ 18 U.S.C. §1841.

³⁵ *Id.*; What's Wrong With Fetal Rights, *supra* note 2.

³⁶ WESTCHESTER COAL. FOR Legal Abortion, *Hijacking A Woman's Right to Choose*, Vol. 32 No. 2 (2003), available at <http://www.choicematters.org/newsletters/summer2003.pdf>.

³⁷ OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POL'Y (Feb. 2004), available at <http://whitehouse.gov/omb/legislative/sap/108-2/hr1997sap-h.pdf>.

³⁸ What's Wrong With Fetal Rights, *supra* note 2.

³⁹ NATIONAL CONFERENCE OF STATE LEGISLATURES, *Fetal Homicide Laws*, <http://www.ncsl.org/default.aspx?tabid=14386> (last visited June 28, 2011).

⁴⁰ *Id.*

⁴¹ 492 S.E.2d 777 (S.C. 1997).

⁴² *The War on Drugs Coming to a Womb Near You* (June 2010), NATIONAL ADVOCATES FOR PREGNANT WOMEN, http://advocatesforpregnantwomen.org/blog/2010/06/the_war_on_drugs_coming_to_a_w.php.

⁴³ Wendy Norris, *Analysis of Fetal Homicide Bills Suggests Ulterior Motives*, RH REALITY CHECK (Mar. 15, 2010), <http://www.rhrealitycheck.org/node/12971>.

⁴⁴ *Id.*

⁴⁵ Rachel Larris, *Utah Bill Criminalizes Miscarriage*, RH REALITY CHECK (Feb. 20, 2010), <http://www.rhrealitycheck.org/blog/2010/02/20/utah-bill-criminalizes-miscarriage>.

⁴⁶ *Id.*

⁴⁷ Rachel Larris, *Recap: WomensENews Story on Utah's 'Illegal Miscarriage'*, RH REALITY CHECK (Apr. 20, 2010), <http://www.rhrealitycheck.org/blog/2010/04/20/followup-story-utahs-bill-making-illegal-abortionsprosecutable-homicide>.

⁴⁸ Jen Quraishi, *Ga. Law Could Give Death Penalty for Miscarriages*, MOTHERJONES, Feb. 23, 2011, <http://motherjones.com/blue-marble/2011/02/miscarriage-death-penalty-georgia>; H.R. HB1, Reg. Sess. (Ga. 2011).

⁴⁹ *State Center Monthly State Update: Major Developments in 2010* (June 1, 2010), GUTTMACHER INSTITUTE, <http://www.guttmacher.org/statecenter/updates/index.html#substances>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Insure Kids Now*, CENTERS FOR MEDICARE & MEDICAID SERVICES, http://www.cms.hhs.gov/LowCostHealthInsFamChild/02_InsureKidsNow.asp#TopOfPage (last visited July 6, 2010).

⁵³ DEPT. OF HEALTH AND HUMAN SERVICES, STATE CHILD HEALTH: IMPLEMENTING REGULATIONS FOR THE STATE CHILDREN'S HEALTH INSURANCE PROGRAM, 67 FED. REG. 191, at 1 (Oct. 2, 2002), *available at* <http://www.cms.hhs.gov/quarterlyproviderupdates/downloads/CMS2127F.pdf>.

⁵⁴ *Id.* at 9.

⁵⁵ DEPT. OF HEALTH AND HUMAN SERVICES, STATE CHILD HEALTH: IMPLEMENTING REGULATIONS FOR THE STATE CHILDREN'S HEALTH INSURANCE PROGRAM, 66 FED. REG. 8 AT 188 (Jan. 11, 2011), *available at* <http://www.fns.usda.gov/cga/federal-register/2001/011101-a.pdf>.

⁵⁶ 19 Am. Jur. 3d *POF* §4 (2008).

⁵⁷ *Porter v. Lassiter*, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955); *Connor v. Monkem Co.*, 89 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).

⁵⁸ Tennessee General Assembly Website,

<http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HBO982&ga=105> (last visited June 28, 2011).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Tennessee General Assembly Website,

<http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HBO819> (last visited June 28, 2011).

⁶³ H.B. 0819 § 3(d), *available at* <http://www.capitol.tn.gov/Bills/106/Bill/HBO819.pdf>.