

# Law, Religion, and Fetal Personhood

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**T**he question of when it can be said that a fetus is endowed with “personhood” is fundamentally religious and theological. This question raises a complex and multi-faceted issue that itself encompasses a host of deeper questions. Fundamentally, what is the meaning of ‘personhood’? Personhood implies self-awareness, the knowledge of oneself as a being separate and apart from the rest of the world. What is it that makes someone a person, what is it that makes each of us a

distinct, unique being? Does it come from the mind or the heart or that elusive, ill-defined, unseen quantity known as the soul? At what point in human development does the soul enter the body, and is that the same thing as saying that the fetus has become a unique and self-aware human being?

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These are questions of religious belief, not of science, law or public policy. There are a wide variety of teachings and beliefs about personhood among the multiplicity of religious groups in the United States, and there is no consensus. Often there is no consensus even within a particular faith tradition. Judaism teaches that the fetus is not a person until the head has emerged from the birth canal and the first breath has been taken. The Roman Catholic Church has held a variety of teachings over the last 2,000 years, ranging from belief in personhood occurring at 40 days after conception for a boy and 80 days for a girl, to belief in personhood occurring at conception.

In Islam, personhood is seen as occurring at 120 days gestation. For Hindus, life is without beginning or end, neither beginning with conception nor ending with death.

People of faith, philosophers, ethicists, and theologians have debated this question for centuries without coming to a consensus. Nevertheless, some state and federal legislators are trying to enshrine one particular religious belief into law, declaring the fetus, at all stages of conception and pregnancy, to be fully human, with full rights and protections under the law that are equal to those of a woman. Opponents of legal abortion have been using these efforts as part of their strategy to limit and ultimately eliminate women's reproductive rights.

The Supreme Court's 1973 *Roe v. Wade* decision galvanized opponents

been paid to the activities of socially conservative lawyers who try to undermine abortion rights by devising legal rationales for defining the human organism in all stages of development as a person.<sup>2</sup> Legal advocacy groups associated with socially conservative Christian groups have followed a two-pronged strategy: 1) crafting model fetal rights legislation and 2) developing legal arguments about why existing laws should be re-interpreted in ways that result in embryos and fetuses being legally defined as persons.

Prior to the 1970s, legal debates about fetal personhood were limited to the effect of fetal status on other parties rather than the actual humanity of the fetus.<sup>3</sup> After *Roe*, fetal rights advocates argued that a "compelling interest" justifies state intervention to protect fetal life in a broad range of settings. Within criminal law, this argument most often is made with respect to laws dealing with abortion, prenatal drug exposure, and third-party acts of violence that can harm fetuses. Fetal rights proponents have sought to change civil statutes and case laws dealing with wrongful death, wrongful life and wrongful birth. In all of these situations, enhanced fetal rights have resulted in a diminution of the legal rights accorded women.

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of legal abortion and led socially conservative Protestants and Catholics to begin cooperating, albeit in limited ways, during the late 1970s and early 1980s. In the mid-1990s the alliance was formalized in a document entitled *Evangelicals and Catholics Together: The Christian Mission in the Third Millennium* that committed the two groups to working together on social and cultural issues, most notably abortion (Masci, 2004: 14-15).<sup>1</sup>

Although efforts to overturn *Roe* have been studied from many different perspectives, little attention has

## Restricting Abortion

Every year hundreds of bills designed to limit access to legal abortion are introduced in state legislatures.<sup>4</sup> Popular measures include those designed to restrict a minor's access to reproductive health services,<sup>5</sup> biased counseling and informed consent provisions, mandatory waiting periods, conscience-based exemptions that allow hospitals, medical practitioners

and pharmacists to refuse to provide family planning services to women, and extremely stringent regulation of abortion providers.<sup>6</sup> More recent efforts have included attempts to pass laws requiring that pregnant women seeking abortions be given the option of providing anesthesia to their fetus during the procedure. As explained by Chief Justice Rehnquist in his opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), “*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere façade to give the illusion of reality.”

If *Roe* is overturned, the regulation of abortion would be governed primarily by state law (NARAL, 2004). At least 18 states have abortion bans that would come into effect. Three states (Alabama, Delaware, and Massachusetts) still have in place pre-*Roe* abortion bans that have never been overruled by their courts.<sup>7</sup> Wisconsin has a pre-*Roe* ban that was only partially invalidated by the courts.<sup>8</sup> Eleven more states (Arizona, Arkansas, Colorado, Michigan, Mississippi, New Mexico, North Carolina, Oklahoma, Rhode Island, Vermont and West Virginia) never repealed their pre-*Roe* bans, which were judicially blocked.<sup>9</sup> In 1991 Louisiana and Utah adopted new abortion bans, and Michigan did the same in 2004.

Six additional states (Arkansas, Illinois, Kentucky, Louisiana, Missouri and Montana) have adopted laws that indicate an abortion ban will be immediately triggered if *Roe* is repealed. The exact meaning of these laws is unclear, given that several of these states do not have abortion bans on the books (i.e., there is no ban to be triggered). These six states, as well as Nebraska, North Dakota, Pennsylvania and Utah,

also have adopted laws stating that it is the policy of the state to protect fetal life. While not actual bans, these enactments are indicative of the climate within the 10 states.<sup>10</sup>

The federal government also has considered a number of bills that are based on Americans United for Life (AUL) and the National Right to Life Committee (NRLC) model laws that

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have been passed at the state level. The passage of the Partial-Birth Abortion Ban Act of 2003 represented a major success for the NRLC, which had made the legislation a top priority since 1993. The law, which criminalizes dilation and extraction abortions,<sup>11</sup> was the first federal ban since *Roe*. In 2004 the Federal Refusal Clause, a provision that allows health care companies to prohibit medical practitioners from performing or informing women about abortion services, became law.

### Fetal Abuse Prosecutions

Aside from abortion, no fetal policy issue has generated as much attention as criminal prosecutions for what is referred to as “fetal abuse.” Although many preventable social and environmental hazards—poverty, malnutrition, and inadequate medical care—have been associated with adverse birth outcomes, the term fetal abuse has been applied almost exclusively to threats to fetal well-being that are caused by prenatal drug exposure.<sup>12</sup> Since 1985, women have been prosecuted in at least 36 states for

“fetal abuse”—a crime that does not exist in any state’s criminal statutes.

District attorneys, who have substantial discretion over whether a person is formally charged with a crime, have used a wide range of existing criminal statutes to prosecute pregnant addicts for exposing their fetuses to drugs in utero,<sup>13</sup> including child abuse, child neglect, contributing to the delinquency of a minor, delivering drugs to a minor, assault with a deadly weapon, manslaughter, and homicide. None of these statutes included language making them applicable to fetuses when

where the urine of the woman rather than the newborn was tested, the U.S. Supreme Court ruled that involuntary drug testing of a pregnant woman violated the Fourth Amendment’s prohibition on unreasonable searches and seizures. The ruling, however, left open the possibility of screening newborns while entirely avoiding the issue of whether fetuses (viable or unviable) are legally persons.<sup>16</sup>

Fetal rights proponents also have supported the use of civil detention of pregnant women. In 1988 Minnesota passed a law that provided for the civil commitment of pregnant women who abused hard drugs. South Dakota and Wisconsin subsequently passed far more draconian civil commitment statutes. South Dakota now allows the involuntary commitment until delivery of pregnant women who use drugs or alcohol. Wisconsin authorized the state to take custody from conception onwards of any fetus exposed to illegal drugs or alcohol. Because the state cannot obviously take separate physical custody of the fetus, the woman is civilly committed (Schroedel, 2000: 178-179).<sup>17</sup>

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they were first applied to pregnant addicts. To be successful, prosecutors have had to argue that fetuses legally are persons (i.e., fetal life is entitled to the same legal protections as born human beings). For example, district attorneys have argued that pregnant women deliver drugs to minor children (e.g., fetuses) via the umbilical cord<sup>14</sup> and that a positive drug screen is evidence that the woman committed assault with a deadly weapon (i.e., cocaine).<sup>15</sup>

Although higher courts have reversed charges in most of the cases that have been appealed, in 1996 the Supreme Court of South Carolina in *Whitner v. South Carolina* upheld the child abuse conviction of a woman whose son tested positive for cocaine shortly after birth. The court held that South Carolina’s child endangerment statute applied to a viable fetus.

In another South Carolina case, *Ferguson v. City of Charleston* (2002),

### **Third Party Fetal Killing**

The vast majority of third party fetal killings occur when husbands and boyfriends assault their pregnant partners. Traditionally, these acts have been treated quite leniently by the judicial system (Schroedel and Peretz, 1994). However, in the past ten years, there has been a tremendous upsurge in state legislatures adopting statutes criminalizing third party fetal killing, most of which are at the instigation of conservative legal groups.

In the absence of statutory law, legal responses to fetal killing are governed

by the “born alive” rule, which holds that there can be no prosecution for acts that may have caused a fetal injury unless there is a live birth. Because of limited medical knowledge, it was thought to be impossible to determine what caused a miscarriage or stillbirth or to eliminate possible causes such as a difficult delivery.

Currently only eight states (Alabama, Colorado, Hawaii, Montana, New Jersey, Oregon, South Carolina, and Vermont) do not have some type of criminal statute explicitly making it a crime to kill a fetus.<sup>18</sup> In South Carolina, the “born alive” rule was judicially modified in *State v. Horne* (1984) so that someone who killed a viable fetus could be charged with murder. Although states vary in their response to fetal killing, the statutes can be divided into two broad categories: 1) laws that provide enhanced penalties for assaults that result in harm or death to a fetus but do not treat it as equivalent to killing a born human being and 2) laws that treat fetal killing as equivalent to killing a born human being.

Ten states (Alaska, Connecticut, Delaware, Kansas, Maine, Massachusetts,<sup>19</sup> New Hampshire, New Mexico, North Carolina, and Wyoming) have criminal statutes that treat an assault on a pregnant woman more harshly than an assault on a non-pregnant person, but do not have murder, manslaughter or feticide statutes. None use language that equates embryos and fetuses with born human beings. For example, New Mexico treats criminal assaults on pregnant women that result in miscarriage or stillbirth more harshly than assaults on other people.

Five additional states (Arkansas, California, Idaho, Mississippi, and

Texas) have laws that punish assaults on pregnant women as well as murder statutes that apply to fetuses. The Arkansas statute requires the fetus to have reached a gestational age of 12 weeks. The Texas statute explicitly defines an unborn child as a human being from fertilization onwards. Seven states (Arizona, Florida, Michigan, Nevada, Oklahoma, Rhode Island, and Washington)<sup>20</sup> include fetuses in their manslaughter statutes but not in their murder statutes. Four states (Georgia, Indiana, Iowa, and Louisiana,) define fetal killing as feticide, which is the nineteenth century offense.

The remaining 21 states treat fetal killing as murder or its functional equivalent.<sup>21</sup> Some of the states have provisions in their laws that specify that the fetus must have reached a specific gestational age to be covered by the criminal statute.<sup>22</sup> Although a handful of states had murder statutes that applied to fetuses in the late nineteenth and early twentieth century, all of these states subsequently dropped fetal killing from their murder statutes.

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After a high profile fetal killing case, California revised its murder statute in 1970 to include fetal killing. The remaining states revised their criminal statutes after *Roe*.

The AUL has been at the forefront of these efforts. Its Legal Defense Fund helps train lawyers and judges through its legal seminars and quarterly newsletter. The AUL crafted model fetal homicide legislation that has been introduced into state legislatures across

the country.<sup>23</sup> In 1996 Ohio used the AUL model as the basis of revisions to its murder statute. Two years later the Pennsylvania Pro-Life Federation and the Catholic Family Institute worked closely with state legislators in developing a law that closely resembled the AUL model. The statute defines the killing of an “unborn child” at any state of prenatal development as murder or manslaughter. In floor debates the primary sponsor of the legislation was asked if a person who intentionally knocked over a Petri dish of fertilized eggs could be charged with “multiple homicides.” He responded, “If you knew, and it was your intent, then yes” (*Lancaster New Era*, 1997: A1).

The 2004 “Unborn Victims of Violence Act” defines an “unborn child” as a member of the species *homo sapiens*, at any stage of development, which is carried in the womb.<sup>24</sup> Legislation supported by NRLC and

American Coalition for Life Activists has called for prosecuting women who have an abortion for murder. They even favor using murder statutes to charge victims of rape and incest who have abortions (Schroedel, 2000: 127).

### Civil Actions That Extend Fetal Personhood

For most of our country’s history, fetal rights was not an issue in tort claims.<sup>25</sup> The development of a separate medical field—embryology—that treats embryos and fetuses as patients, independent of the women, has contributed to the view of the fetus as an independent person. Fetal rights advocates have used these medical advances in civil court actions. They have promoted laws that extend legal personhood to fetuses with respect to wrongful death claims, while opposing efforts to allow a disabled child or parents to get tort recovery as occurs in cases involving wrongful life and wrongful birth claims.

Wrongful death claims involve tort actions for damages when a fetus is stillborn or dies shortly after birth due to injuries or negligent actions. In wrongful life cases, the child or person acting on his behalf files a tort action against a health care provider, claiming that the person was negligent about informing the parents that the child would be born with severe disabilities, thereby preventing the parents from obtaining an abortion. The argument is that the disability imposes such burdens on the child that he would have been better off not being born. Wrongful birth claims are similar, but the parents are the aggrieved party. The facts in a wrongful birth case are the same as in a wrongful life case, the only difference being the party seeking damages.

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AUL was first introduced in Congress in 1999, with proponents bringing onto the floor of the House of Representatives enlarged photographs of a Wisconsin woman holding the body of her dead child. She had been only four days away from giving birth when her husband brutally beat her, killing the fetus. After the killing in California of Laci Peterson and her 8-month-old fetus generated considerable media attention, proponents invoked their deaths as a reason to pass what is now called “Laci and Connor’s Bill.”

Although state and federal laws that treat fetal killing as equivalent to the murder of a born human being exclude the loss of fetal life due to abortion, the

The Minnesota Supreme Court in *Verkennes v. Corniea* (1949) broke legal ground by ruling that a viable fetus had an independent existence and that tort recovery was allowed under the state's wrongful death civil statute. In 1980 Georgia in *Shirley v. Bacon* became the first state to assign independent recovery rights in wrongful death cases to a nonviable fetus. With support from anti-choice organizations, courts have accepted the legitimacy of wrongful death actions. Courts have ruled in favor of plaintiffs in wrongful death cases in 40 states and against such actions in seven states.<sup>26</sup>

With respect to wrongful life actions, initially the trend was toward accepting such actions. In the first major wrongful life case, *Gleitman v. Cosgrove* (1967), the New Jersey Supreme Court concluded that it was impossible to know whether a life with defects was superior to no life at all. Thirteen years later, in *Curlender v. Bio-Science Laboratories*, the plaintiff was allowed to recover damages for pain and suffering caused by her "wrongful life." In *Turpin v. Sortini* (1982), the California Supreme Court held that damages can be recovered even if being born is superior to non-existence, thereby getting around the argument made in *Gleitman* that courts cannot determine whether death is superior to life with disabilities.

Groups opposed to legal abortion argued that these rulings devalue human life and the Catholic Church launched a campaign against both wrongful life and wrongful birth tort actions, arguing that God does not make mistakes (Schroedel, 2000: 176).<sup>27</sup> AUL developed and disseminated model legislation barring wrongful life and wrongful birth tort actions. In 1984 Pennsylvania passed a ban on wrongful

life and wrongful birth tort actions that closely resembled the AUL's model legislation.

At this time, ten states have statutes banning wrongful life civil actions.<sup>28</sup> The statutes in Idaho, Indiana, and Utah include language precluding claims that a "person would not have been permitted to have been born alive but would have been aborted." Maine, North Dakota and South Dakota only ban wrongful life claims, while the remaining states explicitly ban both wrongful life and wrongful birth claims (Hensel, 2005). No state has statutes explicitly allowing such actions.

Over the next two decades, courts overwhelmingly rejected wrongful life

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tort actions, primarily because these cases require a decision about whether non-existence is preferable to life with disabilities. The purported harm is the child's life—and most people are squeamish about declaring a person's life to be an injury. Courts in 19 states have rejected wrongful life cases.<sup>29</sup> The only states where courts have accepted such claims are California, New Jersey and Washington (Hensel, 2005).

Courts have been more receptive to wrongful birth tort actions because this generally does not require a weighing of life versus non-existence. Instead the harm is the parents' denial of choice about whether to continue a pregnancy. Only Georgia and North Carolina have rejected such actions, while 17 states have endorsed wrongful birth tort actions when a child is born with disabilities (Hensel, 2005).<sup>30</sup>

## Implications for Women

Although *Roe* struck down state laws restricting a woman's right to a first trimester abortion, it also for the first time accorded the fetus legal status separate from the woman. Socially conservative legal groups have used the Court's assertion that states may have a "compelling interest" in the potentiality of human life to construct an ever increasing web of case and statutory law according personhood rights to fetal life. While not all of these laws and judicial rulings directly undermine women's legal rights, many of them do.

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In the areas that most directly pit the woman's interest against that of the fetus—abortion, forced medical interventions, and prenatal drug and alcohol abuse—courts have adopted a far less stringent standard for determining whether infringements of the pregnant woman's rights are permissible than is applied when the aggrieved party is a non-pregnant person (Schroedel, Fiber and Snyder, 2000). One of the ironies is that although there is no consensus about whether the fetus is a person, a

pregnant woman can have her privacy rights curtailed and her bodily integrity violated and be civilly detained in order to protect the interests of fetal life, but these same actions are not permissible to further the interests of a born human being.

Moreover, rulings that accord personhood status to fetal life in one arena can be used as precedents in other areas. As the AUL notes on its web site (2005), "Clearly fetal protection laws establish much needed legal protection for unborn children. While such laws do not directly impact abortion, they do cultivate an awareness of the value and rights of unborn children. The potential impact of these laws is significant."

In fact, the issue is much broader than the "value of fetal life," and it is misleading and incorrect to suggest that those who have concerns about fetal rights laws do not respect fetal life. All of these efforts regarding fetal personhood have at their core the goal of turning fundamentalist religious doctrine into the law of the land. However, there is a diversity of opinion about whether and when fetal life can be considered equivalent to the actual life of the woman. Because it is essentially a religious and theological issue on which there is no consensus, the question of fetal personhood should remain in the private sphere of religious dialogue and left out of public policy and legislation.

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## Endnotes

<sup>1</sup> Opposition to abortion is based on Biblical texts, such as *Jeremiah*, Chapter 1, Verse 5 where the prophet speaking for God states, "Before I formed you in the belly I knew you; and before you came forth out of the womb, I sanctified and I ordained you a prophet unto the nations," which are taken to mean that God considers life to begin with fertilization. Other Biblical scholars cite other verses, such as *Genesis*, Chapter 2, Verse 7, where God "breathed into his nostrils the breath of life and man became a living being" as indicating life begins when the human organism breathes, something which is not possible prior to the 23<sup>rd</sup> or 24<sup>th</sup> week of gestational age due to poor lung development. They view the verse from *Jeremiah* as applicable only to the prophet rather than to all humanity.

<sup>2</sup> The two Christian legal groups that have been in the forefront in crafting model fetal rights statutes and developing novel legal rationales for stretching existing statutory law to encompass fetal life are Americans United for Life (AUL) and the National Right to Life Committee (NRLC). For an in-depth examination of more than a dozen socially conservative Christian legal groups that advocate fetal personhood or oppose abortion, see The Center for Reproductive Law & Policy (1998).

<sup>3</sup> For example, inheritance laws, which were the first to accord personhood status to the fetus, did so in order to ensure that the wishes of the testator were followed (Nelson, Buggy and Wiel, 1986; Parness, 1985).

<sup>4</sup> For example in 2004, there were 714 anti-choice measures considered by state legislatures. Maine was the only state to not consider such legislation (NARAL, 2005: 2)

<sup>5</sup> In 2006, the Supreme Court ruled on one of the laws restricting minors' access to abortion in *Ayotte v. Planned Parenthood of Northern New England*, where the constitutionality of a New Hampshire parental notification law was challenged.. There were two primary issues in the case: 1. must parental notification laws include an exception allowing women whose health is threatened to obtain abortions without notification and 2. what standard of review is applicable (i.e., is the "undue burden" standard articulated in *Casey* still definitive in determining the constitutionality of restrictions).

<sup>6</sup> AUL wrote the earliest post-*Roe* model law restricting abortion, which in 1982 was adopted in Pennsylvania. The Abortion Control Act, which included a mandatory 24-hour waiting period, mandatory lectures by physicians, parental consent provisions for women under 21 years of age, and the requirement that all second trimester abortions be performed in hospitals, was overturned by the Supreme Court in *Thornburgh v. American College of Obstetricians & Gynecologists* (1986). Six years later a very similar AUL written law was upheld by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). The composition of the Court, however, had changed during the intervening years. During the same period the NRLC also began promulgating model laws restricting abortion.

<sup>7</sup> If *Roe* were overturned, it is unlikely that the abortion ban in Massachusetts would be enforceable because the state's constitution has been interpreted as providing protection to a woman's right to have an abortion.

- <sup>8</sup> The Wisconsin statute was only ruled as unconstitutional with respect to abortions performed prior to “quickening.” “Quickening” refers to the point in a pregnancy when the woman first feels fetal movement, which usually occurs around the fourth month of a pregnancy. The quasi-legal doctrine of using “quickening” to demarcate the point in a pregnancy when it was no longer permissible to have an abortion was part of British common law that was carried over to colonial America.
- <sup>9</sup> The high courts in New Mexico and West Virginia have ruled that their state constitutions have broader protections of individual rights including a woman’s right to an abortion than does the federal Constitution. As such, it is unlikely that a repeal of *Roe* would result in an immediate reinstatement of their abortion bans.
- <sup>10</sup> For a discussion of trigger laws and related statutory enactments, see Center for Reproductive Rights. September 2004. *What if Roe Fell? The State-by-State Consequences of Overturning Roe v. Wade*. New York: Center for Reproductive Rights.
- <sup>11</sup> The Partial-Birth Abortion Ban is not being enforced, pending judicial review by the Supreme Court in November 2006. At least two-thirds of the states already had passed similar NRLC-modeled legislation. The Supreme Court in *Carhart v. Stenberg* (2000) ruled that such laws were unconstitutional because they did not include exceptions to protect the health of the woman.
- <sup>12</sup> See Schroedel, Jean Reith and Paul Peretz (1994) for a history of how the term fetal abuse came to be applied to physical and developmental harms traceable to prenatal drug exposure as opposed to the many other preventable threats to fetal well-being.
- <sup>13</sup> Probably the most egregious example of a district attorney exercising discretion in terms of prosecuting a woman for “fetal abuse” occurred in Utah, where Melissa Rowland, a 28 year old homeless, mentally ill woman was charged with first degree felony homicide. Rowland’s “crime” was that she delayed acting upon physician’s advice to have a caesarean section and ended up losing one of her twins.
- <sup>14</sup> See *Johnson v. State* (1992).
- <sup>15</sup> See *State v. Inzar* (1991).
- <sup>16</sup> In 2003 the Supreme Court refused to review a murder conviction of another South Carolina woman, whose drug use was found to have caused the death of her fetus.
- <sup>17</sup> Courts have long been open to arguments that involuntary medical interventions on pregnant women are justified in the interest of fetal health. For more than 40 years, courts have forced pregnant women to undergo a range of medical procedures, including but not limited to blood transfusions, cerclages, and caesarean sections (Schroedel, 2000: 78-79). The involuntary civil commitment of pregnant women, again in the interest of fetal health, is just the next step in the “slippery slope” of sacrificing women’s rights in favor of fetal rights.
- <sup>18</sup> There has been a sharp drop in the number of states following the “born alive” rule. In 1998 more than half of the states followed the common law rule in dealing with suspicious fetal deaths (Schroedel, 2000).
- <sup>19</sup> The Massachusetts Supreme Court, however, has upheld fetal killing convictions. In *Commonwealth v. Cass* (1984), the Court ruled that killing a fetus with a gestational age of eight and a half months was covered by its vehicular homicide statute. In *Commonwealth v. Lawrence* (1989), the Court upheld the involuntary manslaughter conviction of a man whose actions resulted in the death of a 27-week gestational age fetus.
- <sup>20</sup> The Arizona manslaughter statute explicitly applies to an embryo or fetus at any stage of development, while the others apply after quickening.
- <sup>21</sup> The following states treat fetal killing as murder or its functional equivalent: Arkansas, California, Idaho, Illinois, Kentucky, Maryland, Minnesota, Missouri, Mississippi, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.
- <sup>22</sup> For example, in Arkansas the fetus must have reached a gestational age of 12 weeks. In California the human organism must be post-embryonic (e.g., 7-8 weeks gestational age). In New York the statute specifies a gestational age of 24 weeks must have been reached, while in Maryland and Tennessee the fetus must be viable.
- <sup>23</sup> On its website the AUL claims credit for crafting the recently adopted fetal homicide laws in Idaho and Nebraska (AUL, October 4, 2005).
- <sup>24</sup> The “Unborn Victims of Violence Act” only applies to federal crimes (i.e., fetal killings that occur during the commission of a federal offense or on federal lands). The overwhelming majority of fetal killings are acts of domestic violence, most of which occur within the home. These would not be covered by the federal statute.
- <sup>25</sup> In *Dietrich v. Inhabitants of Northampton* (1884), a woman who fell on a defective railway line was denied damages for the loss of her fetus. The Massachusetts Supreme Court held that the fetus was a “non-person” and thereby not entitled to damages. This ruling became the benchmark for denying tort recovery claims for the next six decades. Fetal status as a “non-person” in *Dietrich* was cited as a rationale for changing nineteenth century criminal statutes that made fetal killing a crime (Yates and Yates, 1992: 294).
- <sup>26</sup> Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin have allowed wrongful death civil actions on behalf of fetal life. Courts have ruled against such actions in California, Florida, Nebraska, New Jersey, New York, Texas, and Virginia (National Conference of State Legislatures, 2002; National Right to Life Committee, 2005).

<sup>27</sup> Disability rights proponents also are strongly opposed to wrongful life and wrongful birth actions, arguing that they undermine the ability of persons with disabilities to develop a positive self image and social well being of the entire community. The legal basis for the recovery of damages in these tort cases is that both the individual with disabilities and society would be better off if she or he were not born (Hensel, 2005).

<sup>28</sup> The ten states that statutorily ban wrongful life civil actions are Idaho, Indiana, Maine, Michigan, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota and Utah.

<sup>29</sup> The 19 states where courts have rejected wrongful life cases are Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Maryland, Michigan, Missouri, Nevada, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, Texas, West Virginia, and Wisconsin.

<sup>30</sup> The 17 states that have allowed wrongful birth tort actions are Alabama, Florida, Idaho, Illinois, Kansas, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, South Carolina, Texas, Virginia, Washington, and West Virginia.

## About the Author

Jean Reith Schroedel earned a B.A. in political science from the University of Washington in 1981 and a Ph.D. in political science from the Massachusetts Institute of Technology in 1990. Schroedel spent two years as an assistant professor at Yale University prior to accepting an appointment at Claremont Graduate University in 1991. In 2001 she was promoted to full professor in the Department of Politics and Policy. Her research and teaching interests encompass a wide range of topics, most of which are linked together by a common thread—to what extent are the concerns of traditionally under-represented groups addressed by the political system within the United States. Schroedel is the author of three books: *Alone in a Crowd* (1985); *Congress, the President, and Policymaking: A Historical Analysis* (1994); and *Is the Fetus a Person: A Comparison of Policies Across the Fifty States* (2000), an analysis of the three major fetal policy issues (abortion, drug use by pregnant women, and third party fetal killings). In 2001 the American Political Science Association awarded her the prestigious Victoria Schuck Prize for her research on policies regarding the fetus.

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