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THE LEGAL STATUS OF THE UNBORN CHILD UNDER STATE LAW

PAUL BENJAMIN LINTON

INTRODUCTION

In Roe v. Wade, the United States Supreme Court held that a pregnant woman has a fundamental privacy right, derived from the liberty language of section one of the Fourteenth Amendment, to obtain an abortion. That right, however, must be balanced against the State’s interests in the health of the pregnant woman and the “potential life” of her unborn child, which interests become compelling at different stages of pregnancy. The State’s interest in the health of the woman does not become “compelling,” and, therefore, strong enough to support regulation of the abortion procedure, until the end of the first trimester of pregnancy, at which point the risks associated with undergoing an abortion are approximately equal to the risks associated with carrying the child to term. And the State’s interest in the “potential life” of the unborn
child does not become "compelling," and strong enough to support a prohibition of abortion, until the child is viable (i.e., capable of sustained survival outside the mother with or without medical assistance).\(^6\) Even after the child’s viability, however, the States may not prohibit an abortion if the procedure is necessary to preserve the pregnant woman’s life or health.\(^7\) In the companion case of *Doe v. Bolton*,\(^8\) the Court held that the medical judgment as to whether an abortion is necessary “may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well being of the patient. All these factors may relate to health.”\(^9\) The Court, however, has not yet reviewed a post-viability abortion ban, and it remains unclear whether the expansive definition of “health” in *Doe v. Bolton* represents a limitation on the States’ authority to prohibit post-viability abortions.\(^10\)

In *Planned Parenthood v. Casey*,\(^11\) a plurality of the Court abandoned the “trimester scheme” set forth in *Roe v. Wade*, tacitly downgraded the nature of the right recognized in *Roe*, and adopted a new standard for evaluating abortion regulations.\(^12\) A regulation of abortion is constitutional unless it imposes an “undue burden” on the woman’s choice to obtain an abortion.\(^13\) An “undue burden” exists if the regulation in question “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”\(^14\) In *Casey*, the Court reaffirmed the “viability” rule in *Roe* that “[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”\(^15\) The upshot of *Casey* is that the States have broader authority to regulate abortion throughout pregnancy but no authority

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6. Id. at 163–64. The Court stated that a “fetus becomes ‘viable,’” when it is “potentially able to live outside the mother’s womb, albeit with artificial aid.” Id. at 160.

7. Id.


9. Id. at 192.


12. Id. at 869–79.

13. Id. at 873–79.

14. Id. at 877.

15. Id. at 879.
to prohibit abortion before viability (and their authority to prohibit abortion after viability remains unclear).

*Roe* and *Casey*, of course, were limited to laws prohibiting and regulating abortion. Although, in *Roe*, the Court held that the unborn child is not a “person” within the meaning of section one of the Fourteenth Amendment, 16 neither *Roe* nor *Casey* purported to address the States’ authority to define the legal status of the unborn child outside the context of abortion or to confer legal rights upon the unborn child that do not interfere with the exercise of the “abortion liberty” recognized in *Roe*. Indeed, the Court has held that, apart from the regulation of abortion, nothing in *Roe* precludes the States from extending the protection of the law to unborn children. 17 This article explores the multi-faceted ways in which state law protects unborn children outside the context of abortion—in criminal law, tort law, health care law, property law and guardianship law.

I. CRIMINAL LAW

FETAL HOMICIDE STATUTES

More than two-thirds of the States have enacted statutes that define the killing of an unborn child (outside the scope of abortion) as a form of homicide. Some States have included gestational requirements, such as viability, 18 “quickening,” 19 or some other stage

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of pregnancy.20 But the most common approach, the one that has been adopted in more than one-half of the States, has been to make the killing of an unborn child a crime without regard to any arbitrary gestational age.21 Although fetal homicide statutes have been

20. Arkansas draws the line at twelve weeks gestation. See ARK. CODE ANN. § 5-1-102(13)(B)(f)(a), (b) (West Supp. 2011) (cross-referencing homicide offenses); id. §§ 5-10-101 to -105. Under California law, the offense of murder has been defined to include the unlawful killing of a “fetus,” see CAL. PENAL CODE § 187(a) (West 2008), which the California Supreme Court has interpreted to mean “post-embryonic” (i.e., seven to eight weeks gestation). People v. Davis, 872 P.2d 591, 599 (Cal. 1994). Virginia also has enacted a statute prohibiting the “[k]illing of a fetus,” VA. CODE ANN. § 18.2-32.2 (West 2009), but the term “fetus” is not defined in the criminal code and has not yet been interpreted by the state supreme court.

repeatedly challenged on a variety of federal (and, in a few cases, state) constitutional grounds, no fetal homicide statute has ever been struck down. The courts considering these challenges have uniformly held that nothing in Roe v. Wade prevents the States from treating the killing of an unborn child (outside the scope of abortion) as a form of homicide, that fetal homicide statutes are not unconstitutionally vague in defining the elements of the offense in violation of the Due Process Clause of the Fourteenth Amendment; that such statutes, in determining when life before birth shall be protected, do not constitute an “establishment of religion” within the meaning of the Establishment Clause of the First Amendment; that in distinguishing between the conduct of a pregnant woman in consenting to an abortion and the violent acts of third parties, fetal homicide statutes do not deny the equal protection of the law in violation of the Equal Protection Clause of the Fourteenth Amendment.


23. Brinkley, 322 S.E.2d at 51–53; Smith, 815 F.2d at 1387–88; Ford, 581 N.E.2d at 1198–1202; Merrill, 450 N.W.2d at 322–24; Knapp, 843 S.W.2d at 349; Alfieri, 724 N.E.2d at 482–83; Moore, 1998 WL 754603, at *2–3; Bullock, 913 A.2d at 212–13; Lawrence, 240 S.W.3d at 915–16; State v. MacGuire, 84 P.3d 1171, 1174–77 (Utah 2004).

Amendment; and that they do not constitute “cruel and unusual punishment” in contravention of the Eighth Amendment.

IMPOSITION OF THE DEATH PENALTY

Of the thirty-three States that have retained the death penalty for certain criminal offenses, at least twenty-three of them, by statute, prohibit the execution of a woman while she is pregnant. The sentence of death is suspended until the woman is no longer pregnant.

PENALTY ENHANCEMENT

Of the thirty-three States that have retained the death penalty for certain criminal offenses, at least six of them provide that the killing of a pregnant woman is an aggravating factor that may justify imposition of a death sentence.

II. TORT LAW

PREGNATAL INJURIES

A majority of jurisdictions (thirty) have expressly or impliedly rejected viability as an appropriate cutoff point for determining liability for nonfatal prenatal injuries and allow actions to be brought for such injuries without regard to the stage of pregnancy.

25. Smith, 815 F.2d at 1388; People v. Campos, 592 N.E.2d 85, 97 (Ill. App. Ct. 1992); Ford, 581 N.E.2d at 1198–1201; Merrill, 450 N.W.2d at 321–22; Holcomb, 956 S.W.2d at 290–93; Alfieri, 724 N.E.2d at 482; Bullock, 913 A.2d at 215–16; Flores, 245 S.W.3d at 436–37; MacGuire, 84 P.3d at 1177–78.


28. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(q) (West 2004); DEL. CODE ANN. tit. 11, § 4209(e)(1)(p) (West 2007); IND. CODE ANN. § 35-50-2-9(b)(16); 42 PA. CONS. STAT. ANN. § 9711(d)(17) (West 2012); TENN. CODE ANN. § 39-13-204(i)(16) (Supp. 2011); VA. CODE ANN. § 18.2-31(11) (West Supp. 2010); see also OR. REV. STAT. § 163.155 (2011) (pregnancy of victim may be considered an aggravating factor for purposes other than imposition of the death penalty).
pregnancy when they were inflicted. A minority of jurisdictions (seventeen States and the District of Columbia) recognize a cause of action for prenatal injuries sustained after viability but have not yet

decided whether the action will lie for injuries suffered before viability.30 There are no reported cases recognizing or denying a cause of action for prenatal injuries from Alaska, Maine, and Wyoming. No state court has rejected a cause of action for prenatal injuries since 1969.31

**WRONGFUL DEATH**

The overwhelming majority of jurisdictions (forty States and the District of Columbia) now allow recovery under wrongful death statutes for prenatal injuries resulting in stillbirth where the injury causing death (or the death itself) occurs after viability.32 Two of


these States also allow recovery where the death (or injury causing death) occurs after quickening,\textsuperscript{33} and eleven States allow recovery regardless of the stage of pregnancy when the injury and death occur.\textsuperscript{34} And where prenatal injuries result in death after live birth, the weight of modern authority rejects any requirement of viability as a condition of recovery under wrongful death statutes.\textsuperscript{35}

\begin{footnotesize}

33. Porter, 87 S.E.2d at 100; Rainey, 72 So.2d at 434; MISS. CODE ANN. § 11-7-13 (West 2004) (amending wrongful death statute to include an “unborn quick child”).

34. Mack v. Carmack, 79 So.3d 597 (Ala. 2012); 740 ILL. COMP. STAT. ANN. 180/2.2 (West 2010) (amending wrongful death statute to apply to an unborn child regardless of the stage of gestation or development). But see Miller v. Infertility Grp. of, Inc., 897 N.E.2d 837 (Ill. App. Ct. 2008) (statute does not apply to pre-implanted fertilized ova); Danos, 402 So.2d at 638–39 (rejecting viability requirement) (codified at LA. CIV. CODE ANN. art. 26 (1999) (“An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.”)); Wartelle v. Women’s and Children’s Hosp., Inc., 704 So.2d 778, 781 (La. 1998) (citing LA. CIV. CODE ANN. art. 26); Conner, 889 S.W.2d at 89 (interpreting statute setting forth rule of construction); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996) (interpreting wrongful death statute); Carranza, 267 P.3d at 913–15; Farley, 466 S.E.2d at 522 (interpreting wrongful death statute); MICH. COMP. LAWS ANN. § 600.2922a (West 2010); NEB. REV. STAT. ANN. § 30-809(1) (West 2010) (amending wrongful death statute to include an “unborn child in utero at any stage of gestation”); OKLA. STAT. ANN. tit. 12, § 1053(F) (West Supp. 2012); OKLA STAT. ANN. tit. 63, § 1-730; S.D. CODIFIED LAWS § 21-5-1 (1987) (amending wrongful death statute to include an “unborn child”); TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (West 2008) (defining “individual” in wrongful death statute to include an “unborn child at every stage of gestation from fertilization until birth”).

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Fourteen of the forty jurisdictions that have allowed a cause of action for the wrongful death of unborn child after viability, however, have denied recovery (for stillbirth) where both the injury and the death occur before viability. A minority of States (eight) still deny wrongful death actions for prenatal injuries unless the death follows a live birth. And two States have not yet decided whether a wrongful death action will lie for prenatal injuries resulting in stillbirth.

WRONGFUL LIFE AND WRONGFUL BIRTH CAUSES OF ACTION

A “wrongful life” cause of action is a claim brought on behalf of a child who is born with a physical or mental disability or disease that could have been discovered before the child’s birth (or, in some cases, before the child was conceived) by genetic testing, amniocentesis, or other medical screening. The gravamen of the action is that, as a result of a physician’s failure to inform the child’s parents of the child’s disability or disease (or at least of the availability of tests to determine the presence of the disability or disease) or of the possibility that any child they would conceive might suffer from such a condition, they were deprived of the opportunity to abort the child (or of preventing the child’s conception in the first place), thus resulting in the conception and birth of a child experiencing permanent physical or mental impairment. A “wrongful birth” cause of action, on the other hand, is a claim based on the same


facts brought by the parents of the impaired child on their own behalf. Although most state courts that have considered the issue recognize wrongful birth actions, the overwhelming majority of such courts refuse to recognize wrongful life actions because of the impossibility of determining damages based upon a comparison between life in the child’s impaired condition and non-existence and because of the strong public policy protecting and preserving human life.\(^{39}\) In addition, ten States, by statute, have banned both wrongful life and wrongful birth causes of action.\(^{40}\) Constitutional challenges brought against these statutes, including the argument that they interfere with the “abortion liberty” recognized in Roe v. Wade, have been rejected.\(^{41}\)

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40. IDAHO CODE ANN. § 5-334 (West 2010); IND. CODE ANN. § 34-12-1-1 (West 2011); MINN. STAT. ANN. § 145.424 (West 2011); MO. ANN. STAT. § 188.130 (West 2011); N.D. CENT. CODE § 32-03-43 (2010); OHIO REV. CODE ANN. § 2305.11.6 (West 2010); OKLA. STAT. ANN. tit. 3, § 1-741.12 (West Supp. 2012); 42 PA. CONS. STAT. ANN. § 8305(a) (West 2007); S.D. CODIFIED LAWS § 21-55-1 to -4 (2004); UTAH CODE ANN. § 78B-3-109(2) (West 2008). At least four States, in the absence of legislation, have refused to recognize wrongful birth, as well as wrongful life, causes of action. See Atlanta Obstetrics & Gynecology Grp., 398 S.E.2d at 558–63; Grubbs, 120 S.W.3d at 687–91; Taylor, 600 N.W.2d at 685–92 (overruling contrary holdings); Azzolino, 337 S.E.2d at 533–37.

III. HEALTH CARE LAW

All of the States have enacted statutes authorizing competent adults to execute advance directives (living wills and durable powers of attorney for health care) setting forth what health care they wish to receive in the event that they are no longer able to make those decisions for themselves. Subject to limited exceptions, most of these statutes prohibit the withdrawal or withholding of life-sustaining treatment from a pregnant woman patient under the authority of an advance directive. Similarly, these statutes prohibit an agent acting under a health care power of attorney from authorizing an abortion.

requires the State to recognize a cause of action for wrongful life); Taylor, 600 N.W.2d at 687 (explaining that the State “has no obligation [under Roe v. Wade] to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective, and eugenic, abortion”).

42. ALA. CODE § 22-8A-4(h) (2006) (“Advance Directive for Health Care,” § 3); ALASKA STAT. § 13.52.055 (2008); ARK. CODE ANN. § 20-17-206(c) (West 2005); CONN. GEN. STAT. ANN. § 19a-574 (West 2011); DEL. CODE ANN. tit. 16, § 2503(j) (West 2003); FLA. STAT. ANN. § 765.113(2) (West 2010); GA. CODE ANN. § 31-32-4 (2009) (Form, Part Two, ¶ (9)); GA. CODE ANN. § 31-32-9(1); IDAHO CODE ANN. § 39-4504 (West 2002) (A Living Will, ¶ 4); IDAHO CODE ANN. § 39-4505 (2002) (A Durable Power of Attorney for Health Care, ¶ 4); 755 ILL. COMP. STAT. ANN. 35/3(c) (West Supp. 2011); IND. CODE ANN. § 16-36-4-8(d) (West 2007); IOWA CODE ANN. § 144A.6(2) (West 2005); KAN. STAT. ANN. § 65-28,103(a) (West 2008) (last sentence); KY. REV. STAT. ANN. §§ 311.625(1) (form), 311.629(4) (West 2007 & Supp. 2010); MICH. COMP. LAWS ANN. §§ 700.5509(1)(d), 700.5512(1) (West Supp. 2011); MO. ANN. STAT. § 459.025 (West 2007); MONT. CODE ANN. §§ 50-9-106(7), 50-9-202(3) (2011); NEB. REV. STAT. ANN. § 20-408(3) (West 2008); NEB. REV. STAT. ANN. § 30-3417(1)(b) (West 2010); NEV. REV. STAT. ANN. § 449.624(4) (West 2009); N.H. REV. STAT. ANN. § 137-J:5(V)(c) (Supp. 2011); N.D. CENT. CODE § 23-06.5-09(5) (Supp. 2009); OHIO REV. CODE ANN. §§ 1337.15(3), 2133.06(B) (West 2007); OKLA. STAT. ANN. tit. 63, § 3101.4(C) (West Supp. 2012) (Advance Directive for Health Care Form, ¶ IV(c)); OKLA. STAT. ANN. tit. 63, § 3101.8(C) (2010); 20 PA. CONS. STAT. ANN. § 5429(a), (b) (West Supp. 2008); R.I. GEN. LAWS §§ 23-4-10.5(c), 23-4-11.6(c) (2008); S.C. CODE ANN. §§ 44-77-70, 62-5-504(G) (2002 & Supp. 2009); S.D. CODIFIED LAWS §§ 34-12D-10, 59-7-2.8 (2009); TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2010); UTAH CODE ANN. § 75-2a-123(1) (West Supp. 2010); WASH. REV. CODE ANN. § 70.122.030(1)(d) (West 2011); WIS. STAT. ANN. § 154.03 (West 2006) (Directive to Attending Physician, ¶ 4); WIS. STAT. ANN. § 154.19(1)(e) (DNR orders); see also 20 PA. CONS. STAT. ANN. § 5429(b) (DNR orders); TEX. HEALTH & SAFETY CODE ANN. § 166.098 (same).

43. ALA. CODE § 26-1-2(g)(1) (Supp. 2011); ALASKA STAT. § 13.26.150(e)(2) (2008) (restriction on guardian authorizing an abortion); CAL. PROB. CODE § 4652(e) (West 2009); FLA. STAT. ANN. § 765.113(1) (West 2010); GA. CODE ANN. § 31-32-14(b) (2009); NEV. REV. STAT. ANN. § 162A.850(1)(e) (West 2009); N.D. CENT. CODE § 23-06-5.03(6) (Supp. 2009); OKLA. STAT. ANN. tit. 30, § 3-119(3) (West 2009) (restriction on guardian authorizing an abortion); OR. REV. STAT. § 127.540(5) (2009); TEX. HEALTH & SAFETY CODE § 166.152(f)(4) (West 2010); VA. CODE ANN. § 54.1-2983.3(B) (West Supp. 2010); see also TEX. HEALTH & SAFETY CODE § 166.163 (form of disclosure statement).
IV. PROPERTY LAW

The rights of unborn children are also protected by property law. A posthumous child—a child conceived before the death of a parent (and, in some States, certain other close relatives) who dies intestate (without a will) but born thereafter—inherits as if he or she had been born during the lifetime of the decedent. And, subject to certain exceptions, if a person fails to provide in his or her will for a child born after the will is executed, the omitted child receives a share in the estate equal in value to what he or she would have received if the testator had died intestate or a share that is equal to that given to children named in the will. A similar rule applies to


future interests.46

V. GUARDIANSHIP LAW

Finally, all States—by statute, court rule or case law—permit a guardian ad litem to be appointed to represent the interests of an unborn child in various matters including estates and trusts.47
CONCLUSION

Notwithstanding the Supreme Court’s decision in Roe v. Wade, the States remain free to extend the protection of the law to unborn children so long as that protection does not interfere with the “abortion liberty” recognized in Roe. And, as the foregoing survey indicates, all of the States have chosen to do so in one or (more commonly) multiple areas of the law—criminal law, tort law, health care law, property law and guardianship law. The legal protections States have accorded unborn children outside the scope of abortion have withstood repeated constitutional challenges. It is surely an anomaly that, in every area of law but one—abortion—the States may define the legal status of the unborn child and confer legal rights upon the unborn child. But that anomaly is one that is entirely of the Supreme Court’s making and one which, at some point, the Court will need to confront and resolve.

48. See, e.g., cases cited supra notes 22–26, 41.