

## Can the Defendant Even Rise? – A Brief Analysis of the Laws Governing Abortion and Fetal Rights in the State of Florida

by Renzo Broggi

### Introduction

The legal quandaries surrounding abortion and fetal rights represents contentious topics in contemporary American political discourse, a topic which is vehemently argued between conservatives and liberals to this very day. The issue was brought into the national spotlight when the Supreme Court delivered its landmark decision in the 1973 case of *Roe v. Wade*.<sup>1</sup> The case was originally decided by the United States District Court of the Northern District of Texas, which ruled that the criminality status of abortion laws in Texas were unconstitutional. The Supreme Court's decision affirmed in part the District Court's decision and ruled that abortion was legal under certain circumstances determined by the trimester phase and the impact the childbirth would have on the health of the mother. The ruling was specific in regards to allowing women to choose if they want to undergo the abortion procedure during the first trimester and implemented a nearly universal standard for all states to follow. However, it remained vague on the authority given to states in circumstances involving post first trimester.

While advancements have been made regarding a woman's right to choose whether she wants to undergo an abortion post *Roe v. Wade*, this consequently has also lead to a rise in fetal rights advocacy. In the State of Florida and at least 37 other states, there are "fetal homicide" laws in place which govern how to deal with the homicide or manslaughter of a fetus.<sup>2</sup> It is interesting to note this dichotomy, some regard the termination of the fetus as legal and the other side regards it as illegal. As the late President Ronald Reagan stated in a 1984 presidential debate against his Democratic challenger Walter Mondale, "Now, isn't it strange that that same woman could have taken the life of her

---

<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> *Fetal Homicide State Laws*, NCSL.org , 2017, <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>, (last visited March 25, 2017).

unborn child, and it was abortion and not murder, but if somebody else does it, that's murder?"<sup>3</sup>

## Evolution of Laws Governing Abortion on the Federal Level

Contrary to popular belief, *Roe v. Wade* neither fully legalized abortion nor was abortion fully illegal prior to the ruling. The issue of abortion was primarily handled on a state by state basis before the *Roe v. Wade* ruling, which meant that there were no federal standards in regards to how procedures were performed or regulated. There were also states where abortion was completely illegal unless the life of the mother was threatened.<sup>4</sup> One of the states which had the most stringent regulations regarding abortion was New York. Until 1970 a woman in New York and the person performing the abortion could be imprisoned for their actions.<sup>5</sup> While abortion largely remained a state legislative issue during the period, this was changed by the national attention given to the issue of abortion. *Roe v. Wade* may have been the primary case regarding federal implementation of abortion regulations, however the issue was discussed on a federal level prior to the ruling.

In the 1971 case of *United States v. Vuitch*,<sup>6</sup> the person who performed abortions was required to be a certified physician. Specifically, the court stated that, "The Supreme Court . . . held that under such law, which prohibits abortion unless 'necessary for the preservation of the mother's life or health,' the burden is on the prosecution to plead and prove that abortion was not necessary for the preservation of the mother's life or health, and abortion is permitted for mental health reasons whether or not patient has previous history

---

<sup>3</sup> *Ronald Reagan: Debate Between the President and Former Vice President Walter F. Mondale in Louisville, Kentucky*, The American Presidency Project, Presidency.ucsb.edu, <http://www.presidency.ucsb.edu/ws/?pid=39199>, (last visited April 5, 2017).

<sup>4</sup> Linda Greenhouse & Reva B Siegel, *Before Roe v. Wade*, 120 Yale L.J. 2028 (2011), <http://www.yalelawjournal.org/feature/before-and-after-roe-v-wade-new-questions-about-backlash>, (last visited April 5, 2017).

<sup>5</sup> *Id.*

<sup>6</sup> *United States v. Vuitch*, 402 U.S. 62 (1971).

of mental defects; and that, as thus construed, the abortion law is not unconstitutionally vague.<sup>7</sup> The crucial aspect which led to the Court's decision in *Vuitch* was based on the 14<sup>th</sup> amendment and their interpretation of what constitutes a human being. Accordingly, a human fetus that had not reached the point of viability, essentially a medical determination on whether the fetus will have the capability of being brought to term, was not considered as a human being in regards to the 14<sup>th</sup> amendment by the court.

This case primarily concerned the Washington D.C. region, but it was a crucial step which provided the precedent necessary for the ruling of *Roe v. Wade*. This is evident in the opinion of the case, as it is noted that, “. . . perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.”<sup>8</sup> The ruling in *Roe v. Wade* provided precedent for countless abortion cases which followed, refocusing the issue of abortion from one which used to be primarily handled within the state's legislature all the way up to the federal level.

The shift in the balance of federal power regarding abortion regulation was again exemplified in the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>9</sup> where the Supreme Court struck down some of Pennsylvania's abortion regulations from the 1980s, citing *Roe v. Wade* as its authority for precedent. One of the crucial aspects of this decision was regarding the change in the framework of abortion protocols, noting that, “. . . the undue burden test, rather than the trimester framework previously imposed, should be used in evaluating abortion restrictions before viability.”<sup>10</sup> This change in regulation from the trimester framework to the undue burden standard entirely changed the standards for abortion, as the undue burden standard states that laws may not be implemented which impede upon one's constitutional rights.<sup>11</sup>

---

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>10</sup> Id.

<sup>11</sup> “Undue burden,” Legal Information Institute, [https://www.law.cornell.edu/wex/undue\\_burden](https://www.law.cornell.edu/wex/undue_burden), (last visited April 5, 2017).

With this change, the burden of determining the viability of the unborn shifts from the doctor to the mother. However, this shift in the balance of power presents the mother of the unborn with a comprehensive reevaluation of the current standards and allows for more applicable justifications in regards to abortions. While the ruling on the *Planned Parenthood of Southeastern Pennsylvania v. Casey* case was a victory case for advocates of abortion, it also unnerves those concerned with the erosion of states' rights when merged with federal law, since the laws put in place by the State of Pennsylvania were voided by the Supreme Court's ruling. Regardless, the Supreme Court of the United States remains the ultimate judicial authority of the land and it is interesting to note how abortion over time has transitioned from a state issue over to the federal stage. This lessening of restrictions in the laws regarding accessibility to abortion has subsequently given rise to the issue of fetal rights, and consequently has given rise to state legislated stipulations to the existing federal regulations on abortion.

### **Laws Governing Fetal Rights in the State of Florida and their Application**

Although the decisions implemented by Supreme Court rulings such as *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* produced laws which are legally binding in all 50 states, the federal-state balance of power has allowed states to enhance their regulations regarding the legality of abortions. Specifically, there has been an increase in fetal rights advocacy across states, which in turn has placed added emphasis on the value of the unborn fetus while simultaneously providing states freedom to regulate abortion within their own borders. In the state of Florida, from the year 2000 to 2008, there was a decline in the total numbers of abortions from 103,050 down to 94,360. This decrease was consistent with the national trend which went from 1,312,990 down to 1,212,350 during the same period.<sup>12</sup>

---

<sup>12</sup> Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services In the United States*, 2008, Perspectives on Sexual and Reproductive Health , Volume 43, Number 1, March 2011, <https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/4304111.pdf>, (last visited April 5, 2017).

With the present declining trend, we can see that the implementation of fetal rights laws have had an impact on the number of abortions being performed throughout the United States. In the state of Florida there are extensive fetal rights laws in place which specifically define what an “unborn human” is and the protections available to them under the law. For instance, under the Florida Statute Chapter 775, section 021, paragraph 5, it states, “Whoever commits an act that violates a provision of this code or commits a criminal offense defined by another statute and thereby causes the death of, or bodily injury to, an unborn child commits a separate offense if the provision or statute does not otherwise specifically provide a separate offense for such death or injury to an unborn child.”<sup>13</sup> While the definition of the unborn is clearly defined in paragraph 5 subsection e, stating that “As used in this subsection, the term “unborn child” means a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb.”<sup>14</sup> Damages caused to the unborn fetus are also covered in Florida Statute Chapter 782, section 09, the laws regulating “killing of unborn child by injury to mother” are laid out.<sup>15</sup>

Specifically, the law states that if the death of a mother results in the death of the child, that the perpetrator would receive a punishment of a similar degree as they would because of the mother’s death. So, for instance, if the mother’s death resulted from murder in the second degree, the perpetrator would be charged with second degree murder for the mother and again separately for the murder of the fetus.<sup>16</sup> While these laws regulate the behavior of another person against a fetus which results in reprehensible damage or death, they do not mention any regulations against actions taken by the mother. The statute includes an exception on fetal terminations for abortions voluntarily secured by the mother.

Because abortions remain legal on the federal level, this stipulation in the law is necessary to protect those women who decide to undergo the procedure. The protection to fetuses is also extended in Florida Statute Chapter 316, section 193, paragraph 3, subsection 3, C(3)(a)(b), which deals with driving under the

---

<sup>13</sup> *Fla. Stat.* § 775.021(5).

<sup>14</sup> *Id.*

<sup>15</sup> *Fla. Stat.* § 782.009.

<sup>16</sup> *Id.*

influence. That section states that the death of any unborn child that occurs as a result of a driving under the influence fact pattern can be penalized in the following manner:

a. A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

b. A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if:

(I)At the time of the crash, the person knew, or should have known, that the crash occurred; and (II)The person failed to give information and render aid as required by s. 316.062.<sup>17</sup>

For purposes of this subsection, the term “unborn child” has the same meaning as provided in s. 775.021(5). A person who is convicted of DUI manslaughter shall be sentenced to a mandatory minimum term of imprisonment of 4 years<sup>18</sup>.

Noting the stipulations presented by the states which protect the mother and her fetus, it is interesting to note the historical application of the law from Florida’s Supreme Court. In the 1977 Florida Supreme Court case of *Stern v. Miller*,<sup>19</sup> an automobile accident involving a 7-month pregnant woman resulted in the stillborn delivery of her unborn child due to the negligence of the other party involved. The issue before the court was to determine whether the fetus would have been viable had it not been for the accident and only because of the accident. The court ultimately determined that the fetus did not meet the definition of a “person” under the Wrongful Death Act.<sup>20</sup> This discrepancy in the classification of the status of the fetus was due to statutory interpretation of what constitutes a person, specifically a “minor child.” A precedent was established which defined a “minor child” in the 1968 Florida Supreme Court case of *Stokes v. Liberty Mutual Insurance Company*,<sup>21</sup> where a stillborn fetus was considered a “minor child” under the Wrongful Death

---

<sup>17</sup> Fla. Stat. § 316.193(3)(C)(3)(a)(b).

<sup>18</sup> Id.

<sup>19</sup> *Stern v. Miller*, 348 So. 2d 303 (1977).

<sup>20</sup> Fla. Stat. § 768.16.

<sup>21</sup> *Stokes v. Liberty Mutual Insurance Company*, 202 So. 2d 794 (1967).

Act. However, the issue regarding the interpretation of what constituted a “minor child”, was replaced by the time *Stern v. Miller* was decided.<sup>22</sup>

While the issue of determining the legal remedies available for harmful actions towards an unborn fetus caused by another person were enumerated, there remained the issue of determining whether it is a criminal offense if the mother terminates her own fetus through means other than an abortion procedure. This very issue was brought before the Florida Supreme Court in the 1997 case of *State of Florida v. Ashley*, where a young woman was charged with a third-degree felony murder and manslaughter for having shot herself through the abdomen, which ultimately resulted in the death of the fetus.<sup>23</sup> The Circuit Court, Pinellas County, dismissed the third-degree felony charges. However, they did not dismiss any manslaughter charges. The Florida Supreme Court’s opinion by Justice Overton ultimately decided that “. . .criminalizing such actions by a pregnant woman raises a number of policy, social, moral, and legal implications. However, under our form of government, the appropriate place for those issues to be resolved is in the legislature. Accordingly, I concur with the majority opinion and defer to the legislature for consideration of this issue.”<sup>24</sup>

Essentially, the Supreme Court held that common law immunity of pregnant woman for causing injury or death to their fetus was not abrogated by felony murder, manslaughter, and termination of pregnancy statutes.<sup>25</sup> This case demonstrates the effect of the expanded abortion accessibility, and the effect it has had on the laws regulating the rights of the fetus, as well as the rights of the mother. Considering the case law and statutory modifications in Florida, we can note that the state has imposed its own regulations over a federal standard concerning abortion by creating a distinction in the law where the early termination of a fetus can be punishable by law under certain circumstances.

---

<sup>22</sup> Id.

<sup>23</sup> *State of Florida v. Ashley*, 670 So.2d 1087 (1996).

<sup>24</sup> Id.

<sup>25</sup> Id.

## Conclusion

Overall, we can see that the double standard present in the law governing abortions and fetal rights can be attributed to the divide between federal and state legislatures in regards to regulating abortions. Ever since the Supreme Court's ruling on *Roe v. Wade*, the door was opened for the federal government to allow early term abortions universally across all states, while allowing states to retain some of their power by allowing local stipulations to the federal regulations in the form of fetal rights laws. Ultimately, states need to find a balance with the current federal laws in place and need to maintain their ability to govern abortion and fetal rights as their constituencies see fit.