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TIMOTHY STOLTZFUS JOST

Rights of Embryo and Foetus in Private Law

A. Embryo and Fetus: Concepts, In General

Neither the federal government of the United States nor any of its states have a specific law providing comprehensively for the protection of embryos and fetuses in all contexts. Rather the various states extend protection to embryos and fetuses to varying degrees and in various contexts. There is also no single legal definition of the terms embryo and fetus used throughout the United States, though the Supreme Court has recognized the embryo and fetus as sequential stages in the development of an unborn human.[1]

B. The Fetus as a "Person" and Beginning of "Personality"

In Roe v. Wade the Supreme Court expressly determined that: "the word 'person,' as used in the Fourteenth Amendment of the United States Constitution does not include the unborn."[2] The Court also, however, recognized—and has reaffirmed even more strongly in subsequent cases—the ability of the states to protect the interests of the unborn.

Perhaps because we are a common law jurisdiction, the states tend not to deal with the question of personhood or legal capacity of the unborn comprehensively, but rather address the issue on a case by case and issue by issue basis.[3] One provision of the civil code of Louisiana proclaims that "natural personality commences from the moment of live birth and terminates at death."[4] while another provision states: "An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb."[5] But few states make such clear statements in their law. Rather the issue of legal status or capacity must be examined in a

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1. Roe v. Wade, 410 U.S. 113 at 159 (1973).
2. 410 U.S. at 158.
3. See, exploring the understanding of fetuses and embryos that has emerged from this process, Kayhan Parsi, "Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos," 4 *DePaul J. Health Care L.* 703 (1999).
4. La. Civ. Code Ann. Tit. 1, § 25.
5. La. Rev. Stat. Ann., Tit. 9, § 123.

particular context. The only general statement one can make with some certainty with respect to all states is that legal personality exists from the point of birth, though full legal capacity may not attach until the date of majority (or even later if the person is incompetent). Every state, however, has common or statutory law protecting the interests of the unborn in some respects. Some states even protect the rights of fetuses born dead as against those who caused the death.

C. Fetus and Mother: Rights in Conflict; Termination of Pregnancy; and Legal Position of Father Toward Embryo and Fetus

The Supreme Court decided in Roe v. Wade[6] that a woman has a privacy right, protected by the United States Constitution, to decide whether or not to terminate her pregnancy. The Court also decided, however, that this right is not absolute, but is cabined by the state's interests in protecting the life and health of the mother and in protecting the potential life of the fetus.[7] The Court, attempting to balance these interests, divided the pregnancy into trimesters, holding that during the first trimester, a woman can decide to abort a fetus free from state interference; after the end of the first trimester, the state can regulate abortion to protect maternal health; and subsequent to the time when the fetus becomes viable (in 1973, at approximately the end of the second trimester), the state can regulate or proscribe abortion in the interest of preserving fetal life except where an abortion is necessary to preserve the life or health of the mother.[8] The basic principles of Roe v. Wade were reaffirmed by the Supreme Court more than a dozen times in the decade following the decision, but by the late 1980s the 7 to 2 majority that had decided the case dwindled.[9] *Roe's* underlying holding was preserved, nevertheless, in the Court's 1992 decision in Planned Parenthood of Southeastern Pennsylvania v. Casey.[10] Casey, however, abandoned *Roe's* trimester scheme, recognizing instead a continuing interest of the state in preserving life, beginning at conception and becoming compelling at viability (now pushed back by medical advances well before the end of the second trimester).[11] Under Casey, the states may regulate abortions prior to viability to promote their "profound interest in potential life" as long as they do not impose "an undue burden" on the woman's right to choose. After viability, the state may regulate or proscribe

6. 410 U.S. 113, 152-54 (1973).
7. Id. at 162-65.
8. Id.
9. See Webster v. Reproductive Health Services, 490 U.S. 490 (1989).
10. 505 U.S. 833 (1992).
11. Id. at 871-79.

abortion, as long as the life and health of the mother are protected.[12] Applying this formula, the Court upheld provisions in the challenged Pennsylvania law that specified the information that a physician had to give to a woman choosing an abortion, imposed a 24 hour waiting period on abortions, and required either parental or judicial consent for minors seeking an abortion. *Casey*, on the other hand, struck down a provision requiring spousal consent for married women, holding that this provision imposed an undue burden on the right of the woman to choose. As recently as 2000, a closely divided Supreme Court reaffirmed *Roe* and *Casey* in Stenberg v. Carhart,[13] holding that state prohibitions on the use of "partial birth abortions" prior to the point of viability imposed an undue burden on a woman's right to choose.

Every state in the United States continues to regulate, and in some circumstances prohibit, abortion. Seventeen states have kept on their books laws that are unconstitutional under *Roe* and *Casey* in the hopes that the Supreme Court will at some point reconsider these cases.[14] Forty-one states prohibit postviability abortions, several imposing bans more restrictive than those permitted by *Roe* and *Casey*.[15] Every state also imposes some restrictions on previability abortions, the most common being mandatory waiting periods, limitations on pubic abortion funding, provisions that allow medical providers and institutions to refuse to perform abortions as directed by their consciences, prohibitions against abortion counseling by public employees or publicly-funded agencies, husband consent or notification laws, statutes requiring insurance companies to charge higher premiums for abortion coverage or prohibiting insurers from covering abortions for public employees, informed consent laws, and parental consent or notification laws for minors.[16] Some of these provisions are unenforceable under *Roe* and *Casey*, and litigation continues as to the constitutionality of specific prohibitions.

In the end, the availability of abortions varies greatly throughout the United States, with the variation not wholly dependent upon the law of the particular jurisdiction. Anti-abortion groups and individuals have been very effective in harassing, and in some instances terrorizing, abortion clinics, and in some parts of the country virtually no doctors remain who will perform abortions (even though federal law prohibits intimidation of and interference with those choosing an

12. Id. at 878-79.

13. 530 U.S. 914 (2000).

14. Jean Reith Schroedel, *Is the Fetus a Person? A Comparison of Policies Across the Fifty States* 66 (2000).

15. Id. at 71-75.

16. Id. at 80-96.

abortion[17]). In other states, however, abortions are relatively freely available, even late in pregnancy.

D. Protection of the Embryo "in Vitro"

In vitro fertilization is widely available in the United States, but is not closely regulated. The 1992 federal Fertility Clinic Success Rate and Certification Act[18] requires the Secretary of Health and Human Services to develop a model program for inspection and certification of embryo labs, which is to be implemented by the states through regulatory or accreditation programs. This model act was released in July of 1999. The Fertility Clinic Act also requires reproductive technology programs to report their success rates to the Department of Health and Human Services, which in turn is to publish an annual consumer guide, first published in December of 1997 based on 1995 data.[19] The certification standards contained in the model act address issues such as quality assurance and control, qualifications of staff, and record maintenance.[20]

Few states, however, have adopted statutes regulating in vitro fertilization clinics or practices. Louisiana and New Hampshire go the furthest in regulating in vitro fertilization. While Louisiana law permits IVF, it recognizes an in vitro fertilized embryo as a juridical person[21] separate from the clinic in which it is held, and prohibits the destruction of in vitro fertilized embryos.[22] The New Hampshire law also addresses eligibility for embryo implantation, regulation of in vitro fertilization, and custody of the eggs.[23] In most states, however, IVF is only regulated to the extent that all medical facilities, professionals, and procedures are regulated, and informed consent to donation or transplantation of gametes or embryos is governed by the general common law of informed consent that covers all medical procedures.

E. Rights of Fathers and Mothers in Embryos in Vitro

Disputes have arisen in several instances with respect to the custody or disposition of embryos or gametes originally frozen for the purpose of subsequent conception when one party later wishes to proceed with implantation and the other has changed his or her mind and refuses to consent. In some of these cases, the parties had earlier entered into an agreement as to disposition of the embryos and the

17. 18 U.S.C. § 248(a).
18. 42 U.S.C. §§263a-1 et seq.
19. Andrews & Elster, "Regulating Reproductive Technologies," 21 *J. Leg. Med.* 35 (2000).
20. 42 U.S.C. § 263a-2(d).
21. La. Rev. Stat. Ann. Tit. 9, § 124.
22. Id. at § 129.
23. N.H. Rev. Stat. Ann. §§168-B:13 through 168-B:15.

court was asked to determine the enforceability of the agreement; in other cases the court was asked to decide the issue in the absence of an agreement.[24]

In the earliest of these cases, Davis v. Davis,[25] the wife in a divorce action asked the court for custody of embryos the couple had earlier frozen in an attempt to achieve pregnancy. The husband opposed the implantation and asked initially to leave the embryos frozen. The trial court found that the embryos were "human beings" and awarded their custody to the wife. The case was appealed, and by the time it reached the Tennessee Supreme Court both parties had remarried and the wife wished to donate the embryos to an infertile couple while the husband wanted them destroyed. The Tennessee Supreme Court rejected the lower court's holding that the embryos were persons, but also concluded that neither were they property. The court held instead held that the embryos were something in between, entitled to respect but not possessing rights in themselves. The court further held that the husband had a constitutional right to avoid unwanted parenthood, and that this right outweighed the wife's wish to donate the embryos.

The Court in Davis suggested that had the parties entered into a contract with respect to the disposition of the embryos, that agreement might govern subsequent disputes.[26] Later cases in fact involved agreements, usually between the couple and the fertility clinic. In Kass v. Kass,[27] the New York Court of Appeals enforced an agreement between a husband and wife and a fertility clinic that should they not be able to agree as to the disposition of their embryos at divorce, the embryos would be donated to research. The Court rejected the wife's arguments that her right of procreational privacy should permit her to change her mind and seek implantation of the embryos.[28]

In Litowitz v. Litowitz,[29] the Washington Supreme Court also enforced a cryopreservation contract, interpreting it to provide that the embryos were to be destroyed under the terms of the contract since five years had elapsed since the creation of the embryos.

In A.Z. v. B.Z.;[30] however, the Massachusetts court refused to enforce a contract regarding the disposition of frozen embryos because it violated the husband's right to refuse to procreate. And in J.B. v.

24. See Robertson, "Precommitment Strategies for Disposition of Frozen Embryos," 50 *Emory L. J.* 989 (2001) (discussing cases).
25. 842 S.W.2d 588 (Tenn. 1992), on reh'g in part, 1992 WL 341632 (Tenn. 1992).
26. 842 S.W.2d at 597.
27. 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998).
28. A Florida statute requires a contract with respect to the disposition of frozen embryos to cover the question of disposition upon divorce, among other circumstances. Fla. Stat. Ann. § 742.17.
29. 48 P.2d 261 (Wash. Sup. Ct. 2002).
30. 421 Mass. 150, 725 N.E.2d 1051 (2000).

M.B., the New Jersey Supreme Court held—in a situation where there was an in vitro fertilization contract but the contract did not clearly address the dispositional question—that the former wife of a divorced couple who did not wish to procreate had a constitutional right to block the wishes of the former husband to donate the eggs for implantation to others.[31] The court stated that as a general matter contracts involving in vitro fertilization are enforceable, but that either party has the right to change his or her mind about implantation up to the point where the embryos are used or destroyed, with the person objecting to procreation generally prevailing unless the party seeking implantation would otherwise be unable to conceive. Finally, in York v. Jones[32] the court permitted a couple to transfer a frozen embryo from a Virginia to a California clinic, rejecting the Virginia clinic's claim that the case was governed by the contract between the couple and the clinic, and holding rather that the embryo was the property of the couple and the clinic a bailee.[33]

F. Research on Embryos "in Vitro" and "in Vivo"

In the United States both federal and state law regulate research involving both embryos and fetuses. Federal law prohibits the use of federal funds for the creation of human embryos for research purposes, or for funding research in which embryos are "destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero."[34] This statute, however, has no effect on privately-funded research, which is not regulated by the federal government.

By one recent court, nine states ban research involving embryos (eight through general bans on research involving human conceptuses), while a tenth bans research after the fourteenth day following implantation.[35] The penalties available for violation of these prohibitions can be quite high, including imprisonment in some states. In other states, however, there is nothing to limit private research involving embryos. Several state laws limiting embryo research have

31. J.B. v. M. B., 170 N.J. 9, 783 A.2d 707 (2001).

32. 717 F.Supp. 421 (E.D.Va. 1989).

33. Similarly, in Hecht v. Superior Court, 16 Cal.App.4th 836, 20 Cal.Rptr.2d 275 (Cal.App. 1993), the probate court determined that the decedent's frozen sperm was property subject to the disposition of the court, and awarded it to his girl friend, whom he had intended to impregnate with it.

34. This prohibition is not found in codified legislation, but has rather since the late 1990s been regularly adopted as part of the bill that appropriates money for the Department of Health and Human Services.

35. Lori Andrews, State Regulation of Embryo Stem Cell Research in National Biotethics Advisory Commission, II Ethical Issues in Stem Cell Research, Commissioned Papers, A-1, at A-4 (2000).

been found to be unconstitutional on the grounds that they were too vague to inform researchers as to what was prohibited.[36]

Research involving fetuses is more closely regulated. Provisions of the Federal Common Rule governing federally funded research involving human subjects that protect pregnant women in research also apply to fetal research (as well as to research involving in vitro fertilization).[37] Under these rules, the risk to the fetus posed by research must be minimal unless the purpose of the activity is to meet the health needs of the mother or the particular fetus, and in any event, the risk must be the least possible consistent with achieving the objectives of the activity.[38] Researchers may play no role in any decisions affecting the timing, method or procedures used for an abortion; may not offer inducements for an abortion; and may not introduce procedural changes in an abortion that might cause greater than minimal risk to a pregnant woman or fetus.[39] No federally funded research can be done on a pregnant woman unless the purpose of the research is to benefit the health of the mother; the fetus is put only at minimal risk; the fetus is put at no greater risk than necessary; and both the mother, and in most instances the father, consent.[40]

Fetuses ex utero may not be used in federally funded research until it is determined whether the fetus is viable unless the research poses no added risk to the fetus and is necessary for developing important biomedical knowledge, or unless the activity is intended to increase the likelihood of the survival of the fetus.[41] Federally-funded research is forbidden on nonviable fetuses if the research would artificially maintain vital functions in the fetus or terminate fetal respiration or the fetal heartbeat.[42] Even if these requirements are met, the activity must also be intended to develop important biomedical knowledge not otherwise available and may only be carried out if the mother, and usually the father, consent.[43] Federally funded research involving dead fetuses, macerated fetal material or cells, or tissue or organs excised from a dead fetus must be conducted in accordance with state law.[44]

36. Forbes v. Napolitano, 236 F.3d 1009 (9th Cir. 2000); Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), revd. on other grds., 518 U.S. 137 (1996); Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986); Lifchez v. Hartigan, 735 F.Supp. 1361 (N.D. Ill. 1990), affd. Mem. 914 F.2d 260 (7th Cir. 1990)

37. These regulations define fetus to mean "the product of human conception from the time of implantation" until viability. 45 C.F.R. § 46.203(c).

38. 45 C.F.R. § 46.206.

39. 45 C.F.R. §§ 46.206(a)(4), 46.206 (b).

40. 45 C.F.R. § 46.207.

41. 45 C.F.R. § 46.209(a).

42. 45 C.F.R. § 45.209(b)(1) & (2).

43. 45 C.F.R. § 46.209(b)(3) & (d).

44. 45 C.F.R. § 46.211.

In addition to the Common Rule provisions, 42 U.S.C. § 289, prohibits federal funding of research involving nonviable fetuses or fetuses whose viability has not yet been determined unless the research will enhance the health, well-being or chances of survival of the fetus, or unless the research does not pose added risk of suffering, injury or death to the fetus and is intended to develop important biomedical knowledge not otherwise attainable.[45] The statute also requires that the level of research risk imposed on fetuses intended to be aborted must not be higher than the level of risk applied to fetuses carried to term.[46]

Twenty-six states impose some limits on fetal research.[47] Some ban research on dead fetuses, more on fetuses derived from abortions. Some state laws only apply to research on live fetuses. In some states women or couples who donate embryos or fetuses for research are subject to criminal sanctions. Many states also prohibit the sale of embryos or fetuses for research. It is generally agreed that consent should be obtained from the donor before conducting research on embryos or fetuses, but form consent is often obtained by fertility clinics for the use of left-over embryos for research without specifying the nature of the research.

G. Prenatal and Preimplantation Diagnostics

Prenatal and preimplantation diagnostic testing is generally unregulated in the United States. As noted above, about ten states ban embryological research.[48] But six of these ten exempt preimplantation screening, while the remaining four permit preimplantation screening if it is shown to be beneficial or without risk to the embryo.[49] Two further states prohibit research prior to an abortion or when the embryo is intended to be aborted.[50] Several of the federal court cases that have struck down state laws prohibiting research on embryos on constitutional grounds, however, have based their decisions on the argument that the statutes, which prohibited fetal experimentation while permitting diagnostic or therapeutic testing, were unconstitutionally vague. In sum, even where embryo or fetal research is limited, prenatal or preimplantation diagnostic testing is generally permitted.

Further, a right to terminate or refuse a pregnancy based on accurate genetic information is widely accepted in the United States. As discussed below, twenty-one states now recognize suits by parents

45. 42 U.S.C. § 289g.
46. 42 U.S.C. § 289g(b).
47. See supra n. 35.
48. See Coleman, "Playing God or Playing Scientist: A Constitutional Analysis of Laws Banning Embryological Procedures," 27 *Pac. L. J.* 1331, 1354 (1996).
49. Id.
50. Id. at 1354-55.

for "wrongful birth" based on negligent failure to diagnose genetic defects in offspring.[51] These cases generally assume, of course, that the parents would have aborted the fetus had they been accurately advised as to its genetic condition. As such, they implicitly reject any rights on the part of the fetus to not be aborted. Some in the United States argue that abortion or rejection of an embryo based on the prospect of disability is discriminatory—that it is based on a misunderstanding about the nature of disability and devalues persons with disabilities.[52] On the whole, however, Americans generally seem to believe that persons who choose to procreate should have the right to seek accurate genetic information about their prospective children, and to refuse to bear children who would be seriously disabled.

H. Protection of Fetus as an Organ Donor

A federal statute imposes criminal penalties for purchasing or selling fetal tissue, as well as for acquiring or transferring fetal tissue for transplantation where the fetus was obtained through an induced abortion and where the donation was made for a specified person or for a relative of the donor, or where the donor was paid the costs associated with the abortion.[53] The statue also imposes informed consent requirements on the donor, researcher, and donee, and limits research to therapeutic research.[54]

Every state in the United States has adopted the Uniform Anatomical Gifts Act in either its 1968 or 1987 version, both of which in their current form define "decedent" to include a "stillborn infant or fetus"[55] and permit donations of fetal organs by parents. Few state statutes expressly prohibit transplantation of fetal material.[56] Several states prohibit transplantation of fetal material for consideration,[57] or prohibit abortions for the purpose of obtaining transplantable material.[58] However, state prohibitions on fetal re-

51. Lori Andrews, "Liability Issues in Genetics: Recent Trends," presented at ASLME Health Law Teacher's Conference, June 9, 2000.

52. See Davis, "Genetic Dilemmas an the Child's Right to an Open Future," 28 *Rutgers L. J.* 549 (1997); Erik Parens & Adrienne Asch, "The Disability Rights Critique of Prenatal Genetic Testing, Special Supplement," *The Hastings Center Report*, Sept./Oct. 1999.

53. 42 U.S.C. § 289g-2.

54. 42 U.S.C. § 289g-1.

55. See Uniform Anatomical Gifts Act, 1968, § 1(b); 1987, § 1(2).

56. See N.D. Cent. Code § 14-02.2-01 and S.D. Code § 34-23A-17 (prohibiting fetal transplants following abortions).

57. Kan. Stat. Ann. 65-67a04 (also prohibits transplantation to relatives or specified donors or of material from aborted fetuses); Col. Rev. Stat. Ann. § 25-2-111.5; Purdon's Pa. Stat. Tit. 18 §3216.

58. Vernon's Ann. Mo. Stat. §188.031.

search, discussed above, may limit fetal tissue transplantation in many states.[59]

I. Remedies for the Protection of Embryo and Fetus

Historically, American common law courts did not permit wrongful death actions for injuries suffered in utero. This was true both because a fetus was considered a "single entity" with his or her mother, and because of a fear of fraudulent claims.[60] Beginning in the 1940s, American courts and state legislatures began to abandon this position. Currently, three major approaches can be found to this issue. First, it is clear in virtually all jurisdictions that have considered the issue that a personal injury action can be brought by a child born alive for fetal injuries, and wrongful death actions can be brought by the representatives of a child born alive for injuries suffered by the child before birth that resulted in death after birth, though in some jurisdictions it must be shown that the fetus was viable at the time of the injury.[61] About half the states also allow wrongful death actions for fetuses that die from an injury suffered in utero if the fetus was viable when the injury occurred.[62] Finally, a few jurisdictions allow wrongful death actions on the part of a fetus even if the fetus was not viable at the time of the injury.[63] Where wrongful death damages are recoverable, the extent of damages recoverable depends on the damages permitted under the state's wrongful death statute. Courts generally permit recovery of medical care and funeral and burial expenses, with some going further to permit recovery based on the parents' loss of a potential child's society or of the child's future earning capacity.[64] Finally, a few jurisdictions permit the mother to recover for her own sorrow, grieving and mental anguish for the loss of an unborn child.[65]

Though courts have been increasingly open to permitting civil recoveries for the death of unborn fetuses, courts have been less willing to approve criminal prosecutions for murder or vehicular homicide involving the death of a fetus, except where a state's statutory law clearly authorizes such actions.[66] When injury to a fetus caused the death of child born alive, however, homicide prosecutions are gener-

59. See Gonzalez, "The Legitimization of Fetal Tissue Transplantation Research Under Roe v. Wade," 34 *Creighton L. Rev.* 895, 904-06 (2001).

60. See Shah, "Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life," 29 *Hofstra L. Rev.* 931, 934-35 (2001). The leading case was Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

61. Chase, "Liability for Prenatal Injuries," 40 A.L.R.3d 1222, §2 (1971).

62. Shah, supra n. 60, at 942-49; Shapiro, "Annotation, Right to Maintain Action or to Recover Damages for Death of Unborn Child," 84 A.L.R.3d 411, § 4 (1978)

63. See Shah, supra n. 60, at 949-51; Shapiro, supra n. 62, at § 5.

64. Shapiro, supra n. 62, at §§ 2,6-8.

65. Id. at §§ 9, 10.

66. See Shah, supra n. 60, at 951-63;

ally allowed. About half the states, moreover, currently have statutes criminalizing actions against a fetus either as homicide or feticide.[67] These vary as to the point in fetal development after which causing death to a fetus becomes a crime, with some states criminalizing injuries causing the death of an unborn embryo or fetus from the date of conception, others only if the injury is caused after the point of "quickening" or viability.[68] Several states also penalize actions against pregnant women that result in miscarriage or injure the fetus.[69] Legislation is currently pending in Congress that would make causing the death of, or causing bodily injury to, a child in utero a separate offense if the death or injury was caused while the perpetrator was in the course of committing one of a number of designated federal offenses.[70]

The question of how to respond to women who expose their fetus to potential harm through drug abuse has proved particularly controversial in the United States. The problem has received a great deal of media coverage, and thirty-five states have adopted legislation addressing it.[71] Though a few states have adopted statutes recognizing prenatal drug abuse as prima facie evidence of child abuse or neglect, most states have taken a more public health-oriented approach, emphasizing education and counseling.[72] Despite the reluctance of state legislatures to adopt laws penalizing prenatal drug abuse, prosecutors in many states have brought criminal prosecutions against prenatal drug abusers under the general criminal laws.[73] The United States Supreme Court has recently held that the practice of a state hospital which routinely tested the urine of pregnant patients for drugs and referred women who tested positive to the police for criminal prosecutions violated the constitutional prohibition against unreasonable searches.[74]

American law distinguishes between wrongful birth cases (in which the parents of a child born with serious birth anomalies claim that they would not have chosen to conceive or would have aborted the child had they been given sufficient information about the child's probable condition); wrongful life cases (in which a child with serious anomalies presents the same claim); and wrongful conception cases (in which a healthy child's parents claim that the defendant's negli-

67. Smith, Note, "Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application," 41 *Wm. & Mary L. Rev.* 1845, 1851 (2000). See also, Wasserstrom, "Homicide Based on Killing of Unborn Child," 64 A.L.R.5th 671 (1998).

68. Smith, supra n. 67, at 1851-65.

69. Id. at 1865-69.

70. The Unborn Victims of Violence Act of 2001, H.R. 503.

71. Schroedel, supra n. 14, at 100-13.

72. Id.

73. See id. at 113-16.

74. Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001).

gence resulted in the unwanted conception of the child.)[75] Wrongful birth and conception cases have been widely accepted in the United States. Though seven states bar wrongful birth claims by statute, the courts of one of these states, North Carolina, have allowed a malpractice case based on defective genetic advising to proceed, noting that the parents could have chosen not to conceive had they been properly informed.[76] Only three states permit "wrongful life" cases, while nine states bar such claims by statute.[77]

Courts in wrongful birth actions generally allow damages for the costs of the pregnancy and the extraordinary health care and educational costs associated with the child, but commonly do not permit recovery for the costs that would be incurred in raising a "normal" child.[78] States are divided as to whether emotional costs associated with the birth of a seriously ill child are recoverable.[79] Where wrongful life actions are allowed, the damages allowed are similar to those permitted in wrongful birth cases.[80] Courts in wrongful conception cases award medical expenses and lost earnings from the pregnancy, but most courts have not awarded the costs of raising the unwanted child, though this may be changing.[81]

J. Developing Issues: Legal Issues Involving Stem Cell Research

One of the most contentious issues involving fetuses and embryos currently being debated in the United States is whether or not to permit stem cell research based on material derived from embryos or fetuses.[82] There is currently no federal statute specifically governing stem cell research, though proposed legislation is pending. Since stem cells can be derived, however, either from human embryos or fetal tissue, stem cell research is affected by the statutes and regulations governing embryo and fetal research in general, discussed above.

In January of 1999, the General Counsel of the Department of Health and Human Services (DHHS) under the former Clinton ad-

75. See Barry Furrow, et al., *Health Law*, § 17-1 (2d ed. 2000).
76. See Andrews, supra n. 51.
77. See id.
78. See Furrow, supra n. 75, at §17-5.
79. Id.
80. Id.
81. See Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990).
82. See National Bioethics Advisory Commission (NBAC), I *Ethical Issues in Human Stem Cell Research* 29-44 (1999); "Symposium on Manufactured Humanity: The Ethical and Legal Issues of Stem Cell Research, Bioengineering, and Human Cloning," 65 *Albany L. Rev.* 687ff. (2002); Andrews, supra n. 35; Flannery & Javitt, "Analysis of Federal Laws Pertaining to Funding of Human Pluripotent Stem Cell Research," in National Bioethics Advisory Commission, supra n. 35, at D-1; Feiler, "Human Embryo Experimentation: Regulation and Relative Rights," 66 *Fordham L. Rev.* 2435 (1998); Green, "Stopping Embryo Research," 9 *Health Matrix* 235 (1999).

ministration issued a legal opinion that federal prohibitions on funding research involving human embryos do not prohibit stem cell research since human pluripotent stem cells are not embryos.[83] The opinion also stated that stem cell research based on fetal tissue was permitted if it complied with the federal provisions dealing with fetal research, outlined above.[84] A report from the National Bioethics Advisory Commission basically concurred in these results.[85]

In August of 2000, the National Institute of Health issued guidelines for federally-funded research involving human pluripotent stem cells.[86] These guidelines permitted embryo-based research only where the embryos had been created for infertility treatment and were not needed for this purpose. The guidelines prohibited payments or other inducements for the embryos. They required that embryo donors give informed consent to the donation for research, with the information provided to the donors meeting detailed requirements. The guidelines also required that the researcher proposing to derive or use the stem cells be a different person than the physician responsible for the fertility treatment, so as to lessen conflicts of interest.

Under the August 2000 guidelines, research involving stem cells derived from fetal tissue had to comply with the provisions of the Common Rule and of the federal statutes governing fetal tissue research and fetal tissue transplantation.[87] The fetal tissue provisions of the guidelines dealing with informed consent and prohibition of purchase of fetal tissue are essentially identical to those pertaining to embryo research.

In August of 2001, President Bush suspended the guidelines with respect to embryonic stem cells and issued new guidelines on the topic.[88] Under President Bush's guidelines, federal funds may only be used to fund research on about sixty stem cell lines that had already been created from embryos with donor consent and without financial incentives prior to President Bush's statement. Federal funds cannot be used for research involving stem cells created from embryos destroyed after President Bush's announcement.

There currently exists also a prohibition on the use of federal funds for research involving cloning, which would affect potential stem cell research based on cloning. Federal legislation further banning cloning research has been proposed, but not yet adopted. The

83. Medical Research: NIH Says Federal Law No Bar to Financing Stem Cell Research, BNA's Health Care Daily Report, Jan. 27, 1999.

84. Id.

85. NBAC, supra n. 82.

86. 65 Fed. Reg. 51976 (2000).

87. 42 U.S.C. 289g-1, 42 U.S.C. 289g-2(a), and 45 CFR 46.210.

88. See, "Medical Research: President Bush Backs Federal Funding for Limited Embryonic Stem Cell Study," BNA's Health Care Daily Report, Aug. 13, 2001.

issue of cloning has, not surprisingly, provoked considerable academic commentary in the United States, and was the subject of an extended study by the National Bioethics Advisory Commission.[89]

K. Summary and Conclusions

In summary, the law of the United States with respect to embryos and fetuses is far from consistent, representing the deep division in the United States over the issue of abortion. There are some recognizable tendencies in the law, however. Most states prohibit the abortion of viable fetuses except under very limited circumstances, while also allowing wrongful death actions and permitting criminal homicide or feticide prosecutions when a third party causes the death of the fetus. Most states, on the other hand do not permit wrongful death recoveries or criminal homicide prosecutions against one who causes the death of an embryo, and the states are forbidden by the Constitution, as currently interpreted, from penalizing abortion of an embryo. No state grants an embryo or fetus full recognition as a juridical person while in vivo, but neither does our law treat the embryo or fetus simply as property.

I do not foresee the possibility of the United States achieving a sufficient consensus as to the nature of the embryo and fetus to permit universal and consistent answers to the questions raised by this report. One recent opinion poll found that 52% of Americans agreed, and 37% disagreed, with the result of Roe v. Wade, while 50% identified themselves as pro-choice and 42% as pro-life.[90] On the other hand, 50% believed that abortions were too easy to get in the United States (16% "too hard"), while 42% supported new laws restricting abortion (38% opposed).[91] With this level of division, and inconsistency, it is unlikely that we can hope for consistent laws the legitimacy of which will be widely accepted on these contentious topics in the near future.

89. See, NBAC, Cloning Human Beings, Vol. 1, Reports and Recommendations, Vol. 2, Commissioned Papers (1997); Greely, "Banning 'Human Cloning': A Study in the Difficulties of Defining Science," 8 *So. Cal. Interdisciplinary L. J.* 131 (1998); Robertson, "Liberty, Identity and Human Cloning," 76 *Tex. L. Rev.* 1371 (1998).

90. Portrait of America, Opinion Poll, January 18, 2001. http://www.portraitofamerica.com/html/poll-1604.html (visited July 17, 2001).

91. Id.