

# Bodies, Technology, and the Law: The Renegotiation of Fetal Visibility and Viability

Carolyn Kelly, Political Science, Class of 2021



#### **Abstract**

The last few years in the United States have seen a drastic increase in abortion restrictions. When I encountered this increase in abortion regulation, I was left wondering why medical evidence and the language of the fetal body was used to restrict abortion. This question led me to explore the intersections between the fetal visibility and viability in the public eye and before the legislature and the courts.

I will speak to a growing literature of fetal visibility and reproductive politics by adding legal theory to examine legislation.

My paper falls into three sections: I will begin by examining the meaning of the fetal body before ultrasound and how ultrasound changes this meaning and recognition. I will then look at antiabortion efforts to reinterpret medical images and the courts' initial reaction to abortion law. Finally, I will look at the courts and the legislatures recognition of the fetal body and its use to renegotiate viability. I will ultimately argue that the language of the fetal body brings the fetus to life in the public eye and in front of the legislature to redefine life, personhood and pregnancy.

#### **Literature Review**

Savell and Naffine show us that pregnant woman cannot be legal persons. The pregnant woman is not a bounded single individual and when the state takes on the interest of the fetus, is frequently placed in an antagonistic relationship with the fetus.

Law and Medicine cooperate to produce and regulate bodies and their boundaries. New modes of visuality like the ultrasound are used by law to isolate and visualize the fetus as a distinct individual while piercing the woman's body and rendering her invisible. These new modes of visuality, with legal doctrine like viability, considering the fetus in isolation. The fetus emerges visually through ultrasound and medically as it is treated as a patient by doctors. After ultrasound, treating pregnancy means treating the fetus, not the pregnant woman. The fetus emerges here as an isolated, personified individual. Authors before me have examined the connection between fetal visibility and reproductive politics. Petchansky in 1987 and Edgar in 2017 look at how the fetus is brought to life through the circulation of ultrasound images. My intervention is to bring in legal theory to look specifically at how fetal visibility is used to redefine fetal viability by anti-abortion activists.

#### **Background**

One of the fundamental principles of the anti-abortion movement is to take abortion, an abstract experience not familiar to most activists in the movement, and make it a concrete emotional reality. Anti-abortion activists work to make the fetus visible through graphic photos, fetal dolls, and symbolic funerals for its members. Fetal visibility is also essential for the anti-abortion movement because it works to separate the fetus from the woman. The fetus is constructed as the ultimate innocent being, but anti-abortion activists can only engage in this discourse if the fetus is isolated from the woman visually.



**Figure 1.** Dr. Robert Stewart Presents a Preserved Fetal Body to the legislature in 1967



**Figure 2.** The movie the Silent Scream, released in 1984, as the reinterpretation of medical imagery

**Figure 3.** Live ultrasound performed before the Ohio State legislature in 2011



## **Section I: Pre-Visibility**

In 1967, during a hearing for an abortion liberalization bill in Colorado, Robert Stewart, a gynecologist and anti-abortion activist, brought a preserved fetal body to the legislature to argue against abortion. Stewart was attempting to use the body to make a political argument about biological truths of abortion and pregnancy instead of a religious or moral argument against abortion. The state legislature rejected the fetal bodies as evidence and refused to enter them into the record of the hearing or even consider them.

Before Roe v. Wade and the social meaning of the fetal body did not suggest personhood but was instead used to discourage premarital sex for women by showing the biological origins of people.

Before ultrasound, treating pregnancy meant treating the pregnant woman, but after ultrasound, treating pregnancy meant treating the individual visualized fetus as a patient itself through things like fetal surgery. Even if the fetus is not a legal person, through changing technology, it becomes visible as an individual.

## Section II: The Fetal Body Before the Public

Roe v. Wade codified viability as the national standard for abortion regulation. Viability is a concept that has long defined law about pregnancy. Laws before Roe v. Wade protected fetuses who are capable of being born alive or are viable. Viability is largely a medical concept and one that governs birth management and the structures of personhood.

Roe v. Wade doesn't give women the right to abortion free of regulation on moral or philosophical grounds. The right to an abortion in the second trimester is explicitly given using medical data

After *Roe v. Wade* activists also pursued a strategy to visualize the fetus and rewrite public narratives about abortion. Antiabortion activists frequently traveled around the country armed with medical abortion films to visualize the fetus for audiences. Activists would re-record narration to retell the story of abortion with an emphasis on the individual fetus. In these films, the fetus is always shown as an individual, floating almost spaceman like, from the perspective of the camera. The fetus is not only constructed as an individual, but as alive as well through the circulation of images that emphasis its link to a baby.

Changes in technology and visualization also change the safety of abortion. There is a conflict between advancing medical technology and the Court's understanding of abortion rights and access, but the language of the fetal body has yet to be invoked by the law to effectively restrict abortion.

## Section III: Visibility and Viability Meet

In 2011, two pregnant women had live ultrasounds in front of the House Health Committee in Ohio. These ultrasounds were performed as evidence for a proposed heartbeat bill. The evidence in front of the legislature was not just the visual of fetuses in utero, it was a move to introduce the youngest witness ever to testify before the state's House Health Committee.

The post-*Planned Parenthood v. Casey* anti-abortion legislative strategy works off the separation between mother and fetus I described in the section above. It takes that separation and tries to renegotiate viability with the language of the body.

Through laws like fetal pain legislation, the language of the fetal body is used to renegotiate viability. In fetal pain legislation, the very existence of the fetal body and its reaction to stimuli is now used legally to construct it as "viable" or alive. Fetal pain uses the biological fact of the fetal body to renegotiate and push back viability. Heartbeat bills take this strategy to the logical extreme: the heartbeat is used to bring the fetus to life in front of the law through contrast, the opposite of alive is dead and thus the mere presence of the heartbeat itself brings the fetus to life. The use of the language of the fetal body before the law is not just to renegotiate viability, but also to recognized the heartbeat as a sound indicator of life and legal recognition. It is not just that the fetus is brought to life before the public and in the courts, it is brought to life through the power of the law. Heartbeat bills don't just restrict abortion, they create the fetus and its body as a biological and legal fact of life.

#### Conclusions

I have traced the changing meaning of the fetal body before the public, the legislature, and the courts. The fetal body is visualized through ultrasound and comes to life as personified and individual. The court originally protects abortion access through the Roe v. Wade framework, but changes in medical technology and Supreme Court make up lead to this framework's reversal in Planned Parenthood v. Casey which allows abortion, with restriction, up until viability. After Planned Parenthood v. Casey the language of the fetal body is used to develop loopholes for viability through laws like heartbeat bills. Although many of these laws have been overturned, they are laying the legal groundwork for the overturning of Roe v. Wade and in MKB Management Corp v. Stenehjem in 2010, the judges explicitly called for the Supreme Court to relitigate the viability standard. Heartbeat bills in particular present the most drastic challenge to abortion and pregnancy because they work to define the fetus and legally distinct and alive as early as six weeks.

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