



SB0561 Criminal Law - Homicide - Fetus

Presented to the Hon. Bobby Zirkin and Members of the Senate Judicial Proceedings Committee

February 22, 2018, 12:00 p.m.

POSITION: OPPOSE

NARAL Pro-Choice Maryland urges the Senate Judicial Proceedings Committee **an unfavorable report on SB0561**, Criminal Law - Homicide – Fetus, sponsored by Senator Justin Ready.

Our organization is an advocate for reproductive health, rights, and justice. As part of our efforts to protect reproductive freedom for all Marylanders, we work to ensure every child-bearing individual has the right to decide if, when, and how many children to have, as well as to parent in good health, in safety, and with dignity. We honor pregnancy in all its complexity. We also recognize that in some relationships, pregnancy can be a trigger for domestic violence. **The work towards advancing reproductive justice and the work to eliminate violence against women are intricately interconnected.**

In 2005, the Maryland General Assembly signed into law HB398, Murder and Manslaughter - Viable Fetus, which amended Section 2-103 of the Article - Criminal Law in the Annotated Code of Maryland. The bill established that a prosecution could be instituted for murder or manslaughter of a viable fetus if there was: intention to cause death of, or serious physical injury to, the viable fetus; or wanton or reckless disregard of the likelihood of causing death of, or serious injury to, the viable fetus. It defined “viable” as the stage during which, in the medical judgment of the attending physician, there is a “reasonable likelihood of the fetus’ sustained survival outside the womb.”ⁱ

SB0561 expands HB398 by replacing “viable fetus” with “fetus,” which it defines as “MEANS AN UNBORN OFFSPRING OF THE SPECIES HOMO SAPIENS FROM THE END OF THE EIGHTH WEEK AFTER FERTILIZATION UNTIL BIRTH.” While sponsors of this new bill claim that it will create a law that helps deter crimes against pregnant domestic violence victims, there is no known evidence that laws of this sort minimize violence against pregnant individuals. Additionally, the bill fails entirely to address the woman, and establishes the fetus as the victim. As advocates for reproductive rights, we are deeply concerned about passing legislation that *inherently* establishes personhood for a nonviable fetus. This is a direct assault on the fundamental holding of *Roe v. Wade*, and endowing such personhood inescapably diminishes the personhood of the woman, including her rights to liberty, bodily autonomy, and medical decision-making. The word “homicide” is applied to a criminal act committed against a person; an 8-week fetus is not a person. A measure like this could be construed as granting legal authority to criminally investigate any pregnancy loss and falsely accuse anyone, including the individual who was pregnant, with a felony crime.

Although SB0561 includes subsection (f), which exempts “an act of failure to act of pregnant woman” from being prosecuted, empirical data suggests that the bill’s expansion of the current law will result in more pregnant women unlawfully accused of criminal acts. A 2013 study by the legal nonprofit National Advocates for Pregnant Women reveals that since *Roe v. Wade*, there have been more than 400 cases in the U.S. in which, with pregnancy as a necessary element, women have faced arrest, incarceration, increases in prison or jail sentences; detention in hospitals, mental institutions, or drug treatment programs; or forced medical interventions, including surgery.ⁱⁱ Since this study, there have been more than an additional 250 cases identified. Such cases have taken place in the majority of states with a feticide law, even where there are

explicit provisions to protect pregnant women from punishment. Fetal homicide laws have been politically abused to arrest, investigate, and prosecute pregnant women under terms of child endangerment, reckless driving, and drug delivery laws, among others, a practice that disproportionately targets low-income women and women of color. In almost every case for which an underlying theory could be recognized, the authors of the 2013 study found that the legal theory used was that the fertilized egg, embryo, or fetus should be treated as if it were a separate legal entity from the pregnant individual. **Prosecutors, judges, and hospital counsel argued that the legal authority came directly or indirectly from their states' feticide statutes that treat the unborn as legally separate.** Further, in a 2017 report, Amnesty International documented cases in which pregnant women were arrested for otherwise legal activities and experiences including attempting suicide, falling down stairs, and refusing medical treatment.ⁱⁱⁱ We have to ask the question, do we want Maryland to become a state in which each pregnancy loss is investigated by the local authorities? Women in the United States have been wrongfully locked up for having a miscarriage, or giving birth to a stillborn.

The December 2018 *New York Times* special editorial board report brought attention to the increasing troubling trend of arresting, investigating, and/or prosecuting women for pregnancy loss. "You might be surprised to learn that in the United States a woman coping with the heartbreak of losing her pregnancy might also find herself facing jail time. Say she got in [a car accident in New York](#) or [gave birth to a stillborn in Indiana](#): In such cases, women have been charged with manslaughter. In fact, a fetus need not die for the state to charge a pregnant woman with a crime. Women [who fell down the stairs](#), [who ate a poppy seed bagel and failed a drug test](#) or who took legal drugs during pregnancy — [drugs prescribed by their doctors](#) — all have been accused of endangering their children. Such cases are rare. There have been several hundred of them since the Supreme Court issued its decision ratifying abortion rights in *Roe v. Wade*, in 1973. But they illuminate a deep shift in American society, away from a centuries-long tradition in Western law and toward the embrace of a relatively new concept: that a fetus in the womb has the same rights as a fully formed person. This idea has now worked its way into federal and state regulations and the thinking of police officers and prosecutors. As it has done so, it's begun not only to extend rights to clusters of cells that have not yet developed into viable human beings, but also to erode the existing rights of a particular class of people — women. Women who are pregnant have found themselves stripped of the right to consent to surgery, the right to receive treatment for a medical condition and even something as basic as the freedom to hold a baby in the moments after birth."^{iv}

We support pregnant women who are victims of crime and holding criminals accountable under law, but SB0561 is not the avenue to do so. Under the guise of establishing that a charge of fetal homicide may occur as early as 8 weeks of pregnancy, this bill establishes fetal personhood, threatening the personhood of any living individual capable of child-bearing, and potentially triggering politically motivated arrests and investigations of pregnant individuals for fetal loss. Politically motivated legislators should not exploit tragedy to work fetal personhood into Maryland law. Abuse of power can occur in local legal communities when engaging in the arrest, investigation, and/or prosecution of pregnant people to further the agendas of those seeking to elevate the status of a fetus as a person. SB0561 is not anti-domestic violence bill. Therefore, NARAL Pro-Choice Maryland **urges an unfavorable report on SB0561.** Thank you for your time and consideration.

ⁱ (2005). *Maryland Health - General Section 20-209*. Retrieved from <https://law.justia.com/codes/maryland/2005/ghg/20-209.html>

ⁱⁱ Paltrow, L. and Flavin, J. (2013, January 25). "Arrests of and forced interventions on pregnant women in the United States (1973-2005): The implications for women's legal status and public health," *Journal of Health Politics, Policy and Law*. Retrieved from

http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/executive_summary_paltrow_flavin_jhpl_article.php

ⁱⁱⁱ Amnesty International (2017, May 23). *USA: Criminalizing Pregnancy: Policing Pregnant Women Who use Drugs In The USA*. Retrieved from <https://www.amnesty.org/en/documents/amr51/6203/2017/en/>

^{iv} New York Times editorial Board, "A Woman's Rights" <https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html> December 28, 2018