

Fetal Personhood Creep

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I. INTRODUCTION

Legal fetal personhood is an extreme concept. As we explain below, it gives a fetus, embryo, blastocyte or zygote all the rights of a born, living person, and it confers those rights whether those cells are residing in a test tube or inside the uterus of a pregnant person.¹ Under a legal fetal personhood regime, every test tube must be treated as if it contains a living child.² Under a legal fetal personhood regime, no pregnant person is in charge of any aspect of their pregnancy or their lives.³

This concept is too extreme for most people. Knowing this, proponents of legal fetal personhood have learned not to directly argue for it.⁴ For over fifty years they have instead engaged in “fetal personhood creep”—an incrementalist strategy designed to achieve by surreptitious methods what they cannot achieve with candor.⁵ In this article, we explain legal fetal personhood creep, the achievements it has secured, and the very real dangers it presents.

First, we explain what legal fetal personhood is and what it is not.⁶ We explain how legal fetal personhood undermines the health and autonomy of pregnant people and threatens the availability of assisted reproductive technologies.⁷ Legal fetal personhood also dehumanizes the pregnant person, by controlling their behavior and encouraging surveillance of their actions.⁸ We then provide an overview of national attempts to establish legal fetal personhood, both in Congress and the courts.⁹ After explaining the national

¹ See *infra* Part II.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See *infra* Part V.

⁶ See *infra* Part II.

⁷ *Id.*

⁸ *Id.*

⁹ See *infra* Part III.

efforts, we then present a summary of how the states, overall, have grappled with and allowed legal fetal personhood creep, via laws, litigation, constitutional amendments and citizen initiatives.¹⁰

After providing an understanding of what legal fetal personhood would mean and the advancements the movement has made both nationally and at the state level, we then provide two specific state examples to illustrate how legal fetal personhood creep is spreading in Idaho and in Texas.¹¹ For each, we explain how proponents laid a foundation via integrating fetal personhood language into their official deliberations and by incorporating fetal personhood language into anti-abortion health care laws.¹² We next explain the four-step process of fetal personhood creep that occurs after that foundation is laid.¹³ First, legislators pass laws that ostensibly protect the pregnant person, but in reality serve only to lay the groundwork for legal fetal personhood.¹⁴ Second, legislators pass laws that hold certain categories of pregnant people, such as those with substance abuse disorders, legally liable for real or feared fetal ailments.¹⁵ Third, legislators pass laws equating pregnancy loss with the loss of a child, a tactic that exploits the genuine pain pregnancy loss causes to forward the legal fetal personhood agenda.¹⁶ Fourth, legislators enact a series of increasingly severe laws to curtail the reproductive rights of minors.¹⁷ These laws play on parental fears in an effort to undermine advocates of reproductive justice and normalize the language of controlling pregnant people.¹⁸ After these foundational steps, the states are primed for bolder efforts that overtly establish legal fetal personhood, to the detriment of both the pregnant person and society overall.¹⁹

We conclude by arguing that fetal personhood creep is a real and present danger, not just in the two states we highlight, but to the nation overall.²⁰

II. WHAT IS LEGAL FETAL PERSONHOOD

Legal fetal personhood is often conflated and confused with the value of a pregnancy, even though these are two very different things. It should go

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part V.

¹² *Id.*

¹³ *Id.*

¹⁴ See *infra* Section V.A.1, V.B.1.

¹⁵ See *infra* Section V.A.2, V.B.2.

¹⁶ See *infra* Section V.A.3, V.B.3.

¹⁷ See *infra* Section V.A.4, V.B.4.

¹⁸ *Id.*

¹⁹ See *infra* Section V.A.5, V.B.5.

²⁰ See *infra* Part VI.

without saying that a pregnancy can, and often does, have tremendous value for the person who is pregnant. When acknowledging that a fetus has value, we are referring to relational, moral, religious, community and personal values.²¹ Arguing against legal fetal personhood is not equivalent to arguing against the value of a pregnancy, because legal personhood is a rights driven agenda, not a values driven conversation. Ascribing legal personhood to those not actually born does not give that fetus, embryo, zygote or collection of cells any more value than they already possess. It is something different—it exists solely to give a fetus the legal rights of an actually born person.²² To confer legal personhood on an entity signifies that that entity is a rights bearer. This means that the fetus, while not yet an actually born human, has the full panoply of rights of any other human. Bestowing this legal status on a fetus (or a test tube), means that they have separate legal rights and protections from the pregnant person.²³ Under this structure, there is a separate legal human being, with the rights of any other human being, within the body of the pregnant person from the moment of conception.²⁴ In fact, under a fetal personhood regime, there is effectually an actual legal human being, with the full rights of any other human being, in an IVF test tube.²⁵ It is this separation that causes trouble—it puts the pregnant person

²¹ See generally Byron J. Styles, *The Value of Pregnancy and the Meaning of Pregnancy Loss*, 46 J. SOC. PHIL. 91 (2015) (discussing the relational value of pregnancy, where Styles builds on the work of bioethicist Hilde Lindemann); see generally Mary Ruth Ziegler, *The Contested Future of Patient Autonomy and Fetal Personhood*, 24 AM. J. BIOETHICS 23 (2024) (discussing the biological claim of pregnancy).

²² Throughout this article specific terms for pregnancy stages are utilized when appropriate, and we use the word “fetus” to generally represent all stages of pregnancy development, including blastocyst, zygote, embryo, fetus, and cell collections not yet within a pregnant person’s body.

²³ Internationally, legal personhood is recognized as starting at birth. For example, the Universal Declaration of Human Rights (UDHR), the 1948 foundational fundamental human rights agreement, premises human rights on birth. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). Other treaties, agreements, and national structures agree. See, e.g., VISA A. J. KURKI, LEGAL PERSONHOOD 1 (George Pavlakos et al. eds., Cambridge Univ. Press 2023); Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPROD. HEALTH MATTERS 120, 120 (2005).

²⁴ While many proposed and in effect laws declare that fetal personhood begins “at conception,” the medical community position is that pregnancy does not begin until implantation. Rachel Benson Gold, *The Implications of Defining When a Woman is Pregnant*, 8 GUTTMACHER POL’Y REV. 7, 7 (2005) (“Pregnancy is established when a fertilized egg has been implanted in the wall of a woman’s uterus.”).

²⁵ See *infra* Section II.B. IVF, or in vitro fertilization, is a multi-step process used by people seeking pregnancy. In the process, medicines are taken to spur the growth of eggs, and the resulting mature eggs are harvested from ovaries and fertilized, in a laboratory, by sperm. Eventually one or more of these fertilized eggs are inserted into a uterus.

at odds with the fetus, it necessarily diminishes the rights of the pregnant person, and it is legally unworkable.²⁶

Proponents of legal fetal personhood may or may not know the repercussions of granting separate legal personhood status to pregnancies. If they do, they are willing to subvert the rights of pregnant people to the rights of their pregnancies.²⁷ And they are willing to forego the parental aspirations of those pursuing assistive reproductive technologies (A.R.T.) in favor of legal rights bearing ‘people’ in test tubes.²⁸ If they do not understand the implications of legal fetal personhood, they are unwittingly conflating the value of a potential life with the rights bearing legal definition of personhood. In either case, the results of legal fetal personhood are excessive and far-reaching. And, contrary to what its proponents allege, legal fetal personhood not only harms pregnant people; it also harms the well-being of a fetus.²⁹ In short, it serves no good ends. Below, we list and explain some of the dangers created when legal fetal personhood becomes law.

A. Legal Fetal Personhood Undermines the Health and Medical Decision-Making of Pregnant People

When the law recognizes one rights bearing legal person in a pregnancy—the pregnant person—that person holds decision-making power for all their medical needs. Bestowing legal rights on a fetus, however, means that there are two equal human beings in one body during a traditional

²⁶ There have been multiple efforts to craft a theory that recognizes the value of a pregnancy while avoiding the many pitfalls of legal fetal personhood. While an in-depth discussion of these various theories are outside the scope of this article, we note that these include using tort law to recognize both the subjective and relational value of a pregnancy. *See generally* Greer Donley and Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 Vand. L. Rev. 1669 (Nov. 22, 2022). It also includes ‘Fetal Maternal Identity Theory,’ which posits that a fetus has a legal identity, but that identity is “subsumed within the legal identity of the mother.” Amanda Gvozden, *Fetal Protection Laws and the “Personhood” Problem: Toward a Relational Theory of Fetal Life and Reproductive Responsibility*, 112 J. Crim. L. & Criminology 409, 421 (2022). A third approach is to use intent to determine not just parental obligations, but all fetal rights. Laura Hermer, *Intentional Parenthood, Contingent Fetal Personhood, and the Right to Reproductive Self-Determination*, Mitchell Hamline School of Law vol. 57 (2024). *See also* F.M. Kamm, *Abortion Bans and Cruelty*, *Journal of Practical Ethics*, vol. 11, iss. 1 (2023) (using a Doctrine of Double Effect analysis and concluding that abortion bans are morally unjustifiable even if the fetus is awarded personhood).

²⁷ Jia Tolentino, *We’re Not Going Back to the Time Before Roe. We’re Going Somewhere Worse*, THE NEW YORKER (June 24, 2022), <https://www.newyorker.com/magazine/2022/07/04/we-are-not-going-back-to-the-time-before-roe-we-are-going-somewhere-worse> [https://perma.cc/9GHG-AKY4].

²⁸ *Infertility: Frequently Asked Questions*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductive-health/infertility-faq/index.html> [https://perma.cc/RW8-AZBR].

²⁹ *See, e.g.*, Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 500 (2021).

pregnancy.³⁰ When there are two rights bearing individuals occupying the same physical space and dependent on the same life sustaining processes, how can medical decisions be made?³¹

Legal fetal personhood takes the medical decision-making power out of the hands of the pregnant person and gives it to the state.³² That means that even in cases of rape, incest, or the presence of a fatal fetal anomaly, the pregnant person no longer has the right to make the decision that is best for them or for their family, whether that be treatment for an autoimmune disorder or inducing delivery.³³ History shows us that when the state is the decisionmaker, those decisions will generally prioritize the interests of potential life (the pregnancy) over the interests, health and well-being of actual life: that of the living, already born, pregnant person and over the choices they wish to make for their pregnancy.³⁴

The idea that the state might prioritize the interests of the fetus above those of the pregnant person has been articulated in the abortion context since the *Roe v. Wade* case.³⁵ But those seeking to subsume the rights of pregnant people to “legal fetal personhood” have since gone beyond challenging the autonomy of pregnant people in the context of abortion

³⁰ See *infra* Section II.B. While both this section and the next one focus on the problems with legal fetal personhood when there is a pregnant person physically carrying the fetus, we also address the problems fetal personhood poses for those pursuing A.R.T.

³¹ While this section looks at how legal fetal personhood could impact the individual medical choices of pregnant people, declaring fetuses to be legal persons also threatens many other aspects of medicine, including, for example, stem cell research. See Jeannie Baumann, *State ‘Personhood’ Laws Threaten Embryonic Stem Cell Research*, BLOOMBERG L. (Aug. 4, 2022, 11:25 AM), <https://news.bloomberglaw.com/health-law-and-business/state-personhood-laws-threaten-embryonic-stem-cell-research> (on file with authors).

³² See generally Pamala Harris, Note, *Compelled Medical Treatment of Pregnant Women: The Balancing of Maternal and Fetal Rights*, 49 CLEV. ST. L. REV. 133 (2001) (making the case that a pregnant person should be allowed to make decisions).

³³ Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES (June 21, 2023), <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> (on file with author); Dabney P. Evans et al., “A Daily Reminder of an Ugly Incident . . .”: *Analysis of Debate on Rape and Incest Exceptions in Early Abortion Ban Legislation in Six States in the Southern US*, 31 SEXUAL & REPROD. HEALTH MATTERS, May 3, 2023, at 1, 2–3.

³⁴ See KATHERINE FLEMING & EMMA ROTH, PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 22 (2022), <https://www.pregnancyjusticeus.org/resources/when-fetuses-gain-personhood-understanding-the-impact-on-ivf-contraception-medical-treatment-criminal-law-child-support-and-beyond> [https://perma.cc/K96Z-NLX9].

³⁵ In the first oral argument in *Roe*, counsel for the state of Texas said that Jane Roe lost the right to challenge the anti-abortion law at issue by becoming pregnant. In other words, her rights as a human being either disappeared or were subordinated to the fetus once conception occurred. In asserting that Roe did not have standing, counsel stated, “I think [Roe] makes her choice prior to the time she becomes pregnant.” Oral Argument at 41:55, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), <http://www.oyez.org/cases/1971/70-18> [https://perma.cc/3X75-GENA].

health care. Now they are trying to subvert the rights of pregnant people to access or refuse other health care medications and procedures.³⁶ This results in pregnant people losing their rights and autonomy and being subjected to government decision makers regarding their health care.³⁷

As an example, if a fetus is a separate legal person, and the pregnant person receives a cancer diagnosis while pregnant, or becomes pregnant while battling cancer, could they take the medications necessary to save their life if those same medications will end or impact their pregnancy? When the pregnant person is the only legal rights-bearing person in the equation that decision will be made by them. But if the fetus is a legal person, that decision could be made by a legislature or a court, leaving oncologists unsure of how to proceed, allowing them to make arbitrary choices, and delaying decision making and life-saving interventions.³⁸

Seeing the fetus as a rights bearing legal entity has already led medical staff to deny pregnant people—and women of childbearing age—medications that they sought.³⁹ Reports of doctors and pharmacists refusing to allow pregnant—or even potentially pregnant—women the medications they need has been growing exponentially in the last two years.⁴⁰ These instances include: denial of medication for Ehlers-Danlos syndrome because

³⁶ Incidents where pregnant people lose their autonomy to make medical decisions are often referred to as “obstetric violence,” a term first coined in Venezuela in 2007. Dr. Rogelio Pérez D’Gregorio, *Obstetric Violence: A New Legal Term Introduced in Venezuela*, 111 INT’L J. GYNECOLOGY & OBSTETRICS 201, 201 (2010).

³⁷ See Debra DeBruin & Mary Faith Marshall, *Coercive Interventions in Pregnancy: Law and Ethics*, 23 J. HEALTH CARE L. & POL’Y 187, 187–88 (2021).

³⁸ Elizabeth Gourd, *Overturing Roe vs Wade Undermines US Cancer Care*, 23 THE LANCET ONCOLOGY 987, 987 (2022); Charlotte Huff, *New Abortion Laws Jeopardize Cancer Treatment for Pregnant Patients*, KAISER HEALTH NEWS (Sept. 16, 2022), <https://kffhealthnews.org/news/article/abortion-laws-jeopardize-cancer-treatment-pregnant-patients> [https://perma.cc/J4XN-D99T]; Nicole T. Christian & Virginia F. Borges, *What Dobbs Means for Patients with Breast Cancer*, 387 NEW ENG. J. MED. 765, 765 (2022).

³⁹ In addition to the medical care situations that occur when the pregnant person is able to make their own care decisions, as described herein, legal fetal personhood also impacts medical decision making that occurs when the pregnant person is no longer able to communicate. For example, when a person correctly authorizes a legal end-of-life advance directive and the state has, or reads, a “pregnancy exception” into the document. Arkansas provides a stark illustration of this, as in that state medical professionals must follow end-of-life directives unless “it is possible that the fetus could develop to the point of live birth with continued application of life-sustaining treatment.” ARK. CODE ANN. § 20-17-206(c) (2024) (emphasis added). There is, of course, no medical guidance offered, or feasible, as to what this practically means. See *infra* Sections V.A–B for how this issue has played out in the two states we highlight.

⁴⁰ Sheryl Gay Stolberg, *U.S. Tells Pharmacists Not to Withhold Pills That Can Cause Abortion*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/health/abortion-pills-pharmacists.html> (on file with authors).

the woman seeking the medication was of “childbearing age,”⁴¹ denial of methotrexate for arthritis,⁴² and denial of medication to treat ulcers,⁴³ among many others.⁴⁴ These denials presume a conflict between the pregnant person (and the pregnant-capable person) and their pregnancy. This gives the state an excuse to step in to resolve a conflict that never existed.⁴⁵ These instances are reflective of not only the dehumanization of all pregnant capable people, but they also represent the compounded impact legal fetal personhood has on the disability community around medication access.⁴⁶

This elevation of the fetus over the actual, present pregnant person has already extended beyond medication denials into forced invasive medical

⁴¹ The woman, Tara Rule, recorded audio of the medication denial and the doctors reasoning. See Kylie Cheung, *Woman With Severe Chronic Pain Was Denied Medication for Being “Childbearing Age,”* JEZEBEL (Sept. 22, 2022, 6:35 PM), <https://www.jezebel.com/woman-with-severe-chronic-pain-was-denied-medication-fo-1849569187?rev=1663871377030> (last accessed July 10, 2024) (on file with authors). She later filed a lawsuit that is pending as of this writing. Rule v. Braiman, No. 23-CV-01218, 2024 WL 4042135, at *1 (N.D.N.Y. Sept. 4, 2024).

⁴² In one case, a 14-year-old Arizona girl who had relied on methotrexate to combat juvenile idiopathic arthritis was denied a refill of her medication. Katie Kindelan, *Mom Speaks Out After 14-Year-Old Daughter Was Denied Arthritis Medication Due to Abortion Law*, GOOD MORNING AM. (Oct. 6, 2022, 2:03 PM), <https://www.goodmorningamerica.com/wellness/story/mom-speaks-14-year-daughter-denied-arthritis-medication-91107896> [https://perma.cc/6J87-QDCV]; see also Rob Volansky, *Denial of Methotrexate Prescriptions Post-Roe Yields ‘Condemnation,’* HEALIO (July 29, 2022), <https://www.healio.com/news/rheumatology/20220728/denial-of-methotrexate-prescriptions-postroe-yields-condemnation> [https://perma.cc/N9BQ-C5CZ] (discussing reports of patients being denied methotrexate prescriptions following *Dobbs*). In addition to being used as a treatment for several arthritic conditions, methotrexate can also be used to treat miscarriages or induce an abortion. Because inappropriate denials of methotrexate are proliferating, the American College of Rheumatology, the Arthritis Foundation and the Creaky Joints organization are seeking patient access stories and have issued action alerts to help patients negotiate access issues. See, e.g., *Methotrexate Access Disruptions: What Rheumatology Patients Need to Know*, AM. COLL. OF RHEUMATOLOGY (Apr. 20, 2023), <https://rheumatology.org/patient-blog/methotrexate-access-disruptions-what-rheumatology-patients-need-to-know> [https://perma.cc/R3QA-4FQ2].

⁴³ Katie Shepherd & Frances Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, WASH. POST (Aug. 8, 2022), <https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/> (on file with authors); Brittini Frederiksen et al., *Abortion Bans May Limit Essential Medications for Women with Chronic Conditions*, KFF (Nov. 17, 2022), <https://www.kff.org/womens-health-policy/issue-brief/abortion-bans-may-limit-essential-medications-for-women-with-chronic-conditions> [https://perma.cc/R2FN-DER6].

⁴⁴ Because of the potential impact on a developing pregnancy, pregnant people could also be denied x-rays, anesthesia and drug treatment. Nadia N. Sawicki & Elizabeth Kukura, *From Constitutional Protections to Medical Ethics: The Future of Pregnant Patients’ Medical Self-Determination Rights After Dobbs*, 51 J.L., MED. & ETHICS 528, 529 (2023).

⁴⁵ See Michelle Oberman, *Mothers and Doctors’ Orders: Unmasking the Doctor’s Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 454 (2000).

⁴⁶ See Allison M. Whelan, *Chronic Conditions and Reproduction in a Post-Dobbs World*, 77 OKLA. L. REV. 93, 120 (2024).

procedures.⁴⁷ Although whether or not to undergo a medical procedure is often presented to the pregnant person as a choice, that choice is respected only as long as the decision is one the medical facility agrees with.⁴⁸ Otherwise, pregnant people are threatened with either child protective services or court intervention; in other words, pregnant people have the right to agree to medical care that prioritizes their pregnancy over themselves, but not the right to refuse that treatment.⁴⁹ This has, unfortunately, occurred repeatedly,⁵⁰ despite the stances of leading medical associations, ethicists, and human rights organizations that oppose the coercion of pregnant people.⁵¹

Cesarian sections (“C-sections”) provide far too many examples of this coercion.⁵² Taking place later in pregnancy, these procedures have long been a place where pregnant peoples’ bodily autonomy has been overridden in favor of perceived and opposing fetal legal rights.⁵³ This occurs in a variety

⁴⁷ THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NUMBER 664: REFUSAL OF MEDICALLY RECOMMENDED TREATMENT DURING PREGNANCY 4 (2016), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/06/refusal-of-medically-recommended-treatment-during-pregnancy> [https://perma.cc/QC4A-VSF2] (recognizing that C-sections and blood transfusions as the most notable, although not the only, examples of procedures forced on pregnant people).

⁴⁸ Devin Dwyer & Patty See, ‘*Nobody Cared: Women Who Have Reported Mistreatment While Giving Birth Say CDC Report Validates Their Trauma*’, ABC NEWS (Nov. 28, 2023, 4:10 AM), <https://abcnews.go.com/Politics/cared-women-reported-mistreatment-giving-birth-cdc-report/story?id=105077279> [https://perma.cc/HQB2-W5LJ].

⁴⁹ See, e.g., Johanna Eichinger et al., *Women’s and Provider’s Moral Reasoning About the Permissibility of Coercion in Birth: A Descriptive Ethics Study*, 32 HEALTH CARE ANALYSIS 184, 186 (2024); Theresa Morris & Joan H. Robinson, *Forced and Coerced Cesarean Sections in the United States*, 16 CONTEXTS 24, 25 (2017).

⁵⁰ See, e.g., Christine H. Morton et al., *Bearing Witness: United States and Canadian Maternity Support Workers’ Observations of Disrespectful Care in Childbirth*, 45 BIRTH 263, 263 (2018) (finding that one-fifth of respondents had witnessed providers engaging in procedures against a patient’s explicit wishes).

⁵¹ See, e.g., AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NUMBER 501: MATERNAL-FETAL INTERVENTION AND FETAL CARE CENTERS 1 (2017) (“Any fetal intervention, however, has implications for the pregnant woman’s health and necessarily her bodily integrity and, therefore, *cannot be performed without her explicit informed consent.*”); AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 47, at 2 (“The College opposes the use of coerced medical interventions for pregnant women, including the use of the courts to mandate medical interventions for unwilling patients.”).

⁵² Note that many of the same issues occur with other invasive procedures, such as blood transfusions. In one example, a mass was discovered in a woman who was around 34.5 weeks pregnant. She underwent surgery and, conscious during the procedure, refused a blood transfusion. Although the surgeon initially respected her wishes, he later asked for, and received, court approval for the procedure. The transfusion, later held to be in error when the woman sued, had to be done while restraining and sedating her over her violent objections. *In re Brown*, 689 N.E.2d 397, 399–400, 406 (Ill. App. Ct. 1997).

⁵³ See generally Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299 (2013) (documenting cases proving that pregnant people were

of scenarios,⁵⁴ and while women have long resisted and fought the imposition of these procedures, it took until 1990 for a U.S. appellate court to weigh in on the practice.⁵⁵ Not only have individual doctors in particular situations forced C-sections on unwilling patients, there is evidence that entire hospitals have adopted official policies for performing procedures, like C-sections, without a pregnant woman's consent if they can't "persuade" her to give her permission.⁵⁶ This "persuasion" takes many forms, and hospitals are even willing to put these threats in writing, to make sure the pregnant woman knows that if she does not "agree," the hospital will proceed to operate on her without her consent.⁵⁷ In situations where the pregnant person has not agreed, medical practitioners have gone so far as to have laboring women physically brought to a facility against their will to undergo a forced C-

repeatedly suffering forced medical interventions, in addition to arrests and detention, and that these instances happened more frequently to Black women, low-income women and those alleged to be using illegal drugs).

⁵⁴ The examples herein are given to illustrate some of the ways that C-sections are forced on pregnant patients; note that in addition to coercing a patient to consent, getting court authorization to override a patient's choices, and simply going ahead with the procedure regardless of consent, there are two additional ways that medical staff can proceed without patient consent: on an incapacitated patient with court or surrogate authorization or on a vegetative patient when legally permitted. Thaddeus Mason Pope, *Legal Briefing: Unwanted Cesareans and Obstetric Violence*, 28 J. CLINICAL ETHICS 163, 163 (2017).

⁵⁵ The first legal appellate ruling on a case of forced C-section was the well-known case of Angela Carter, a woman dying of cancer who chose, with her family, not to have the procedure. The hospital went to court and got an order forcing her to undergo the procedure and both she and her baby died. See David Remnick, *Whose Life is it, Anyway? Angie Carter Lived a Very Simple Life . . . and Died a Very Complicated Death*, WASH. POST (Feb. 21, 1988), <https://www.washingtonpost.com/archive/lifestyle/magazine/1988/02/21/whose-life-is-it-anyway-angie-carter-lived-a-very-simple-life-and-died-a-very-complicated-death/875f515e-64ab-4f93-af37-f6a4147e5189> (on file with authors). Despite the fact that the appellate court in the Carter case vacated the judgment (after her death), the problem continues. *In re A.C.*, 573 A.2d 1235, 1264 (D.C. 1990) (en banc); see, e.g., Alex Ronan, *Why More American Women Could Be Forced to Get C-Sections*, ELLE (Feb. 1, 2024, 8:00 AM), <https://www.elle.com/culture/career-politics/a46411148/american-women-forced-c-section-interview-2024> [<https://perma.cc/U5Z2-F488>].

⁵⁶ Molly Redden, *New York Hospital's Secret Policy Led to Woman Being Given C-Section Against Her Will*, THE GUARDIAN (Oct. 5, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/oct/05/new-york-staten-island-university-hospital-c-section-ethics-medicine> [<https://perma.cc/5WF2-NGV9>] (explaining how a Staten Island N.Y. hospital's policy enabled doctors to force a C-section on Rinat Dray, a Brooklyn resident who refused the procedure).

⁵⁷ Dominique Mosbergen, *Pregnant Mom Says Hospital Threatened to Call Child Services Unless She Has C-Section (UPDATE)*, HUFFPOST (July 29, 2014), https://www.huffpost.com/entry/forced-c-section-jennifer-goodall_n_5627933 [<https://perma.cc/Y826-JMEN>] (noting the letter written to Jennifer Goodall by the hospital's Chief Financial Officer). Goodall later filed a lawsuit, which was dismissed without prejudice. *Goodall v. Comprehensive Woman's Health Ctr.*, No. 14-399, 2014 WL 3587290, at *3 (M.D. Fla. July 18, 2014).

section.⁵⁸ Additionally, even though it is often medical practitioners and hospitals seeking to override the rights of the pregnant person, state actors have also stepped in, seeking to hold someone liable for refusing a C-section.⁵⁹

These examples demonstrate how extensively pregnant people have been subjected to having their autonomy undermined when a fetus is given or presumed to have legal standing.⁶⁰ More recently, proponents of giving legal status to fetuses are trying a new tactic—passing extremist state laws that restrict abortion health care in almost all circumstances and then challenging looser federal laws on the theory that if the fetus is a legal person, the state can prioritize their interests over the pregnant person regardless of the federal law at issue.⁶¹ And in all of these cases, the characteristics of the patient

⁵⁸ In 1996, a Florida woman in labor, Laura Pemberton, was picked up at her home, against her will, and brought to Tallahassee Memorial Regional Medical Center where doctors performed the procedure without her consent. She later sued, but the lawsuit was dismissed. *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1248–49 (N.D. Fla. 1999). Note that this same hospital was sued again for a related issue when they attempted to force a pregnant woman to remain in the hospital so that they could ensure that she received adequate bed rest. *Burton v. Florida*, 49 So. 3d 263, 264 (Fla. Dist. Ct. App. 2010).

⁵⁹ For example, in 2004 the state of Utah charged a woman with murder for having had a stillborn fetus after refusing to have a C-section. See Howard Minkoff & Lynn M. Paltrow, *Melissa Rowland and the Rights of Pregnant Women*, 104 OBSTETRICS & GYNECOLOGY 1234, 1234–36 (2004). She later pled guilty to two counts of child endangerment. See Linda Thomson, *Rowland Accepts Plea Bargain in Twin's Death*, DESERET NEWS (Apr. 8, 2004, 4:46 PM), <https://www.deseret.com/2004/4/8/19821876/rowland-accepts-plea-bargain-in-twin-s-death> [<https://perma.cc/ZHF3-8QA8>].

⁶⁰ It bears notice that proponents of legal fetal personhood have given scant attention to access to health care generally and to health care for pregnant people specifically. For a discussion of having improved lifelong health care, as opposed to hyper-focusing on pregnant women and subverting their decisions, see Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537, 541–42 (2006).

⁶¹ This is what is happening in the two EMTALA Emergency Medical Treatment and Labor Act (EMTALA) cases currently being litigated. Under EMTALA, any person presenting at a covered emergency room is entitled to be screened; if that screening reveals an emergency medical condition, that person must be appropriately stabilized, admitted or transferred. 42 U.S.C. § 1395dd. Litigation commenced in Idaho and Texas over what medical treatments were permitted if the screening revealed a condition for which abortion was the standard of care. In Idaho, the federal district court viewed EMTALA as a statute designed to medically stabilize the patient—the pregnant person—and found that EMTALA preempted state law so that emergency room doctors in the state could continue to provide abortions when medically necessary. *United States v. Idaho*, 623 F. Supp. 3d 1096, 1102 (D. Idaho 2022). In Texas, the Court read EMTALA as a statute designed to protect the pregnant person and the fetus equally and had no problem with a legislative decision to balance the two, or even to prefer the life of the fetus. *Texas v. Becerra*, 623 F. Supp. 3d 696, 728 (N.D. Tex. 2022), *aff'd*, 89 F.4th 529 (5th Cir. 2024). For a full discussion of how the issue of legal fetal personhood was the determinative factor in the two EMTALA cases, see Wendy Heipt, *EMTALA in a Post-Dobbs World: The March Towards Fetal Personhood Continues*, 59 IDAHO L. REV. 369, 399–410 (2023). Note that these cases are ongoing.

determine outcome as much as anything,⁶² with lower income and BIPOC pregnant persons disproportionately targeted.⁶³

B. Legal Fetal Personhood Negatively Impacts Growing a Family

Under a true fetal personhood regime, a state could hold that abortion health care would always be illegal.⁶⁴ This prospect was recognized by the Supreme Court in the *Roe v. Wade* case, in arguments made by counsel for both sides⁶⁵ and by the court itself.⁶⁶ This could apply to all abortions,

⁶² Terri-Ann Samuels et al., *Obstetricians, Health Attorneys, and Court-Ordered Cesarean Sections*, 17 WOMEN'S HEALTH ISSUES 107, 110–11 (2007).

⁶³ See, e.g., Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1203–04 (1990).

⁶⁴ This is likely the case under the most recent Republican Party platform. Although the party has made their anti-abortion stance less explicit, it also clearly alludes to a recognition of legal fetal personhood. While the platform professes support of IVF, that is logically unfeasible in a legal fetal personhood regime. Julianne McShane, *The GOP's "Softened" Abortion Platform Is a Ruse*, MOTHER JONES (July 9, 2024), <https://www.motherjones.com/politics/2024/07/gop-republican-platform-fetal-personhood-abortion-ban> [<https://perma.cc/L7K8-WQU7>].

⁶⁵ When counsel for Jane Roe was questioned as to how a determination that the fetus was a legal person for purposes of the 14th Amendment would impact her case, she replied, "I would have a *very* difficult case." Oral Argument at 24:13, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (emphasis added), <https://www.oyez.org/cases/1971/70-18> [<https://perma.cc/3X75-GENA>]. When counsel for the state of Texas was asked a similar question, he agreed that his case was "lost," if the fetus was not a person. Oral Argument at 36:38, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) <https://www.oyez.org/cases/1971/70-18> [<https://perma.cc/3X75-GENA>]. The *Roe* Court specifically noted both counsels' concessions that the determination of fetal personhood was critical to their arguments. *Roe*, 410 U.S. at 156–57. Note that the assumption that legal fetal personhood automatically defeats abortion rights has been questioned. Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 350 (2010).

⁶⁶ The *Roe* court recognized that:

Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception . . . for the purpose of saving the life of the mother, is typical. But if the fetus is a person . . . does not the Texas exception appear to be out of line with the Amendment's command? There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion . . . is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

Roe, 410 U.S. at 157 n.54 (citation omitted). In the end the *Roe* court agreed determined that, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158. Assessing the law in a variety of disciplines, the Court found that this was in keeping with legal tradition—while various religious denominations held divergent views, the court recognized that, "the unborn have never been recognized in the law as persons in the whole sense." *Id.* at 162.

whether they are performed because of the pregnant person's mental health or physical health, or those abortions that happen during A.R.T. procedures, in particular IVF.⁶⁷

IVF often involves the implantation of multiple embryos in the hopes that at least one will develop into a healthy pregnancy.⁶⁸ The procedure has been used to help people become parents for forty-five years and currently accounts for 2% of all births.⁶⁹ When too many embryos develop, patients can undergo “selective reduction” to eliminate one or more fetuses. Selective reduction is a term that means what it doesn't say. It is a euphemism for abortion; but in an effort to avoid that word, clinics, A.R.T. literature, and fertility professionals use the term “selective reduction” for pregnancy terminations in the pursuit of A.R.T.⁷⁰ The hope was this would distinguish abortions done in A.R.T. as procedures employed to allow another pregnancy to go forward, as opposed to “bad” or “elective” abortions done just to terminate a pregnancy.⁷¹ It has worked, an A.R.T. has often been given a “carve out” by those opposed to abortion health care.⁷² But it is illogical.⁷³ Abortions (or “selective reductions”) in the IVF context make little sense if

⁶⁷ Note that A.R.T. has evolved within a society that views legal questions through long-established family law structures built on assumptions about what a family looks like. *See generally* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) (examining the historical construction of the family, the impact of A.R.T., and the need for a recognition of the social dimensions of parenting that are grounded in equality); *see also* Courtney G. Joslin, *Nurturing Parenthood Through the UP A* (2017), 127 YALE L.J.F. 589, 589–93 (2018) (responding to the NeJaime article).

⁶⁸ Not every attempt results in a pregnancy and in A.R.T. a fetus “may never exist.” Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567, 590 (2011).

⁶⁹ Trevor Hughes, *Alabama Court Rules Frozen Embryos Are Children, Chilling IVF Advocates*, USA TODAY (Feb. 27, 2024, 1:54 PM), <https://www.usatoday.com/story/news/nation/2024/02/20/alabama-supreme-court-frozen-embryos-ruling-ivf/72662533007> [<https://perma.cc/XL5Q-RHDX>].

⁷⁰ From the birth of the first IVF baby in 1979, proponents of A.R.T. saw that opponents of abortion health care would be a problem they would have to address. John D. Biggers, *IVF and Embryo Transfer: Historical Origin and Development*, 25 REPROD. BIOMEDICINE ONLINE 118, 125 (2012).

⁷¹ R.C. Wimalasundera, *Selective Reduction and Termination of Multiple Pregnancies*, 15 SEMINARS FETAL & NEONATAL MED. 327, 331–34 (2010); Mark I. Evans et al., *Update on Selective Reduction*, 25 PRENATAL DIAGNOSIS 807, 811 (2005).

⁷² A few organizations and religions, most notably the Roman Catholic Church, have consistently opposed not only IVF, but all A.R.T. practices. *See, e.g.*, Jason Horowitz, *Francis Urges Ban on Surrogacy, Calling It 'Despicable'*, N.Y. TIMES (Jan. 8, 2024), <https://www.nytimes.com/2024/01/08/world/europe/pope-francis-surrogacy-ban.html> (on file with authors).

⁷³ Jessica Winter, *The Fight Over I.V.F. Is Only Beginning*, THE NEW YORKER (Mar. 3, 2024), <https://www.newyorker.com/science/annals-of-medicine/the-fight-over-ivf-is-only-beginning> (on file with authors).

one truly believes embryos should have full legal rights,⁷⁴ and proponents of A.R.T. have been unable to carry this exceptionalism over to IVF, which threatens the future of the procedure.⁷⁵

No case illustrates the incompatibility of legal fetal personhood and A.R.T. techniques such as IVF more than a 2024 Alabama court decision, *LePage v. Center for Reproductive Medicine*.⁷⁶ In this case, after going to an Alabama fertility clinic and undergoing IVF treatments, three couples were each able to conceive, carry a pregnancy, and give birth.⁷⁷ All three had remaining embryos which they elected to preserve at a hospital, the Mobile Infirmary Medical Center.⁷⁸ In 2020, a hospital patient entered the unlocked portion of the facility where the frozen embryos were kept.⁷⁹ The patient attempted to remove the embryos, was burned by the subzero temperatures, and dropped the embryos, destroying them.⁸⁰ The couples sued the hospital under Alabama's Wrongful Death of a Minor Act, claiming that their test tube embryos were minor children.⁸¹ In February 2024, the Alabama state supreme court issued a 131-page opinion that can be summarized in one sentence: *Because legal personhood exists for the unborn, frozen embryos are actually "extrauterine children" and must be treated as actual, living kids*.⁸²

That decision, almost immediately, had effects far outside that one courtroom.⁸³ In the state of Alabama, IVF ground to a halt, with the state's

⁷⁴ Note that "abortion abolitionists" do not believe in any exceptions to abortion. While this group is willing to force pregnancy and birth on women regardless of the state of their health or the circumstances they are in, they at least shed the hypocrisy of those who decry abortion as murder but allow exceptions nevertheless. See, e.g., *On Abolishing Abortion*, S. BAPTIST CONVENTION (June 21, 2021), <https://www.sbc.net/resource-library/resolutions/on-abolishing-abortion> [<https://perma.cc/9QLE-92YB>] ("[R]eject[ing] any position that allows for any exceptions.").

⁷⁵ Press Release, Off. of U.S. Sen. Tammy Duckworth, Fact Sheet: Duckworth and Murray Outline How Republican Attacks on IVF Are Serious, Real and on the Rise Across America (June 12, 2024), <https://www.duckworth.senate.gov/news/press-releases/fact-sheet-duckworth-and-murray-outline-how-republican-attacks-on-ivf-are-serious-real-and-on-the-rise-across-america> [<https://perma.cc/266Z-WPU4>].

⁷⁶ *LePage v. Ctr. for Reprod. Med., P.C.*, No. 22-515, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024), *reh'g denied*, 2024 WL 1947312 (Ala. May 3, 2024).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *LePage*, 2024 WL 656591, at *1–2.

⁸³ Joanna L. Grossman & Sarah F. Corning, "Extrauterine Children" and Other Nonsense Wrought by the Fetal Personhood Movement, JUSTIA (Feb. 21, 2024), <https://verdict.justia.com/2024/02/21/extrauterine-children-and-other-nonsense-wrought-by-the-fetal-personhood-movement> [<https://perma.cc/M7EQ-5DBM>] (analyzing the *LePage* decision and noting the irony of IVF patients bringing a lawsuit that could end IVF).

largest IVF provider and two additional clinics stopping treatment.⁸⁴ Across the country, everyone involved in the IVF process, from lab workers to transport agencies, from doctors to patients, worried that other states would follow suit, and that IVF storage facilities, currently housing well over one million embryos,⁸⁵ would become de facto frozen nurseries, responsible for the well-being of thousands of “extrauterine children.”⁸⁶ Employers with health plans that covered some or all IVF expenses considered whether they would face accomplice liability when procedures that they paid for destroyed “extrauterine children.”⁸⁷ This would all make the practice of IVF rarer and more expensive, if it even survived.⁸⁸ The realization that legal fetal personhood was tied to IVF left many people who had advocated for legal

⁸⁴ Aria Bendix, *Three Alabama Clinics Pause IVF Services After Court Rules That Embryos Are Children*, NBC NEWS (Feb. 22, 2024, 6:20 PM), <https://www.nbcnews.com/health/health-news/university-alabama-pauses-ivf-services-court-rules-embryos-are-children-rcna139846> [https://perma.cc/XW5T-9LYV].

⁸⁵ Pub. Health on Call, *The Alabama Supreme Court's Ruling on Frozen Embryos* (Feb. 27, 2024), <https://publichealth.jhu.edu/2024/the-alabama-supreme-courts-ruling-on-frozen-embryos> [https://perma.cc/Q5GW-LX6J].

⁸⁶ Since 2002, HHS has run an adoption program for frozen embryos. See *Embryo Adoption Awareness and Services Program*, U.S. DEPT OF HEALTH & HUM. SERVS.: OFF. OF POPULATION AFFS., [https://opa.hhs.gov/grant-programs/embryo-adoption-awareness#:~:text=The%20Embryo%20Adoption%20Awareness%20and%20Services%20\(EAA\)%20program%20supports%20grants,awareness%20of%20embryo%20donation%2Fadoption](https://opa.hhs.gov/grant-programs/embryo-adoption-awareness#:~:text=The%20Embryo%20Adoption%20Awareness%20and%20Services%20(EAA)%20program%20supports%20grants,awareness%20of%20embryo%20donation%2Fadoption) (on file with authors). Almost every grant recipient from this program is a Christian and/or anti-abortion organization. Caroline Lester, *Embryo 'Adoption' Is Growing, but It's Getting Tangled in the Abortion Debate*, N.Y. TIMES (Feb. 17, 2019), <https://www.nytimes.com/2019/02/17/health/embryo-adoption-donated-snowflake.html#:~:text=53-,Embryo%20Adoption%20Is%20Growing%2C%20but%20It's%20Getting,Tangled%20in%20the%20Abortion%20Debate&text=As%20evangelical%20Christians%2C%20Paul%20and,process%20often%20yields%20extra%20embryos> (on file with the authors). Religious organizations involved in the embryonic adoption process have promoted the idea that unused embryos are ‘snowflake children,’ who need to be brought into traditional family structures. “*Snowflake*” *Embryo Adoption: A Warning to LGBT and Single Parents*, AM. SURROGACY (May 24, 2019), <https://www.americansurrogacy.com/blog/snowflake-embryo-adoption-a-warning-to-lgbt-and-single-parents> [https://perma.cc/2AQM-3ZRB].

⁸⁷ Katie Johnson et al., *Fetal Personhood Trend Amplifies Employer Health Plan Liability*, BLOOMBERG L. (Apr. 8, 2024, 3:30 AM), <https://news.bloomberglaw.com/us-law-week/fetal-personhood-trend-amplifies-employer-health-plan-liability> (on file with authors).

⁸⁸ Soon after the decision was published, the Alabama legislature passed a law in response. While this law does not address the central holding of the *LePage* case, it provided in-state facilities with some legal protection. See S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024), <https://legiscan.com/AL/text/SB159/id/2952994> [https://perma.cc/WHP3-ACW6]. Despite this effort, at least one IVF facility in the state has since decided to permanently close by 2025 because of liability concerns. Sara Moniuszko, *Alabama Hospital to Stop IVF Services at End of the Year Due to “Litigation Concerns,”* CBS NEWS (Apr. 4, 2024, 12:26 PM), <https://www.cbsnews.com/news/alabama-hospital-to-stop-ivf-embryos-mobile-infirmary> (on file with authors). Of the remaining clinics, most are continuing to move embryos out of the state, and one is destroying the embryos they have in storage. Azeen Ghorayshi & Sarah Kliff, *IVF Threats in Alabama Drive Clinics to Ship Out Embryos*, N.Y. TIMES (Aug. 12, 2024), <https://www.nytimes.com/2024/08/12/health/ivf-embryos-alabama.html> (on file with the authors).

fetal personhood and also for IVF in a pickle.⁸⁹ It also brought home the realization that without further protections, IVF was truly in danger.⁹⁰ And while a number of organizations and individuals supported the idea of “extrauterine” children, and the resultant end to IVF,⁹¹ others tried to continue the idea of A.R.T. exceptionalism, stating that they believed in legal fetal personhood, but that IVF should be exempted from that belief.⁹²

As the *LePage* case so aptly demonstrated, legal fetal personhood does not just apply to fetuses in utero—it also covers microscopic cells in test

⁸⁹ In Congress, dozens of lawmakers signed onto the Access to Family Building Act, national legislation that, if passed, would have protected the right to dispose of unused eggs and gametes, a common practice following IVF treatments. See Access to Family Building Act, H.R. 7056, 118th Cong. (2024); see also Caroline Light & Marya T. Mtshali, *Women, Your Privacy Rights Are Ephemeral When Fetal Personhood Becomes Law*, TAMPA BAY TIMES (MAR. 5, 2024), <https://www.tampabay.com/opinion/2024/03/05/women-your-privacy-rights-are-ephemeral-when-fetal-personhood-becomes-law> [<https://perma.cc/8YZY-BWUQ>] (noting the “rude awakening” that *Dobbs* opened the door to challenging the reproductive rights of the well-off).

⁹⁰ See Myrisha S. Lewis, *Personhood, Politics, Assisted Reproduction, and the Law Post-Dobbs*, 45 PACE L. REV. 83, 84 (2024).

⁹¹ Stephanie Kirchgaessner, *IVF Treatment Faces ‘Clear and Present Danger’ from US Anti-Abortion Effort*, THE GUARDIAN (May 12, 2022, 2:30 PM), <https://www.theguardian.com/us-news/2022/may/12/ivf-treatment-us-anti-abortion-laws-bills> [<https://perma.cc/3DUN-SSDN>] (reporting on an interview with the chief legal officer for Americans United for Life likening IVF to eugenics); Emma Waters, *Why the IVF Industry Must Be Regulated*, THE HERITAGE FOUND. (Mar. 19, 2024), <https://www.heritage.org/life/report/why-the-ivf-industry-must-be-regulated> [<https://perma.cc/42KP-TSJC>] (suggesting policy recommendations for the protection of “embryonic human beings”); Katarina Sostaric, *Iowa House Votes to Increase Penalties for Killing ‘Unborn Person’ as Democrats Raise IVF Concerns*, IOWA PUB. RADIO (Mar. 8, 2024, 7:13 AM), <https://www.iowapublicradio.org/state-government-news/2024-03-08/iowa-house-criminal-penalties-killing-unborn-person-ivf-concerns-alabama> [<https://perma.cc/7KAU-UUMN>].

⁹² In addition to the legal gymnastics required in carving out IVF exceptions to abortion health care bans and fetal personhood statutes, the practice presents other problems. First, exceptions for IVF promote the idea that there are “good” and “bad” ways to go about reproduction and “good” and “bad” abortions. Selective reduction is as much an abortion as any other. Second, carving out an exception for IVF is fundamentally inequitable. IVF is generally used by higher income individuals—not only is IVF not always covered by insurance, but Medicaid coverage of fertility treatment is optional, and coverage varies between the states. In contrast, abortion seekers are generally younger, Blacker, and report lower income levels. And Black women are more likely to do more IVF cycles to have a live birth than other women. Rolonda Donelson & Rebecca Reingold, *Creeping Personhood: Analyzing the Impact of Alabama Supreme Court’s Decision on IVF*, O’NEILL INST. FOR NAT’L & GLOB. HEALTH L.: GEO. UNIV. L. CTR. (Mar. 19, 2024), <https://oneill.law.georgetown.edu/creeping-personhood-analyzing-the-impact-of-alabama-supreme-courts-decision-on-ivf> [<https://perma.cc/4NS4-DB3N>]; Deborah J. Leffell, *How ART Exceptionalism Exposes the Pretense of Fetal Personhood*, 99 N.Y.U. L. REV. 366, 370 (2024); see also Melissa Quinn, *Pence Says Fertility Treatments ‘Deserve the Protection of the Law’*, CBS NEWS (Nov. 20, 2022, 11:49 AM), <https://www.cbsnews.com/news/mike-pence-fertility-treatments-ivf-supreme-court-face-the-nation> [<https://perma.cc/D87A-587L>] (noting V.P. Pence’s support for IVF coexisting with his belief that fetuses should have legal personhood).

tubes.⁹³ This broad definition of legal personhood directly threatens IVF, particularly in the states we focus on below.⁹⁴

C. *Legal Fetal Personhood Dehumanizes the Pregnant Person*

In addition to negatively impacting a pregnant person's ability to make medical decisions and access medical care, and negatively impacting the future of A.R.T., legal fetal personhood also threatens the autonomy of both pregnant and pregnant capable people. If a fetus, from conception onward, is a full rights bearing legal entity, that means that any person, no matter their age or health, who becomes pregnant by any method, criminal or not, must remain pregnant, take care of that pregnancy in a manner as approved by the state, and then deliver—regardless of the impact on that person's physical health, their mental health, their family, their finances, their job or their aspirations. In essence, that person will, regardless of circumstances, be forced to carry a pregnancy to term. As offensive as forced pregnancy may be, legal fetal personhood carries still greater harms—because if a fetus is a rights bearing legal person the state can also exercise control over the pregnant person in the name of the fetus from conception until birth. This has already begun. In this section we explain how legal fetal personhood subjects pregnant people to both surveillance and to control.

1. Surveilling the Pregnant Person

Increasingly, pregnant people are being surveilled through social media – installed apps, online messages and internet searches have all been used as evidence to prosecute people for “pregnancy crimes.”⁹⁵ Below we provide a few examples of how medical personnel, prosecutors and individuals have all used internet data to criminalize pregnant people for their real, or suspected,

⁹³ Edward R. Grant, *The Short-Lived Verdict in Le Page v. Center for Reproductive Medicine: Why ‘Personhood’ Matters in the Regulation of Assisted Reproductive Technologies*, 32 MED. L. REV. 399, 401–04 (2024).

⁹⁴ Monika Jordan, *The Post-Dobbs World: How the Implementation of Fetal Personhood Laws Will Affect In Vitro Fertilization*, 57 UIC L. REV. 249, 251 (2024); Giulia Carbonaro, *Roe v. Wade Being Overturned Could See IVF Banned in at Least 30 States*, NEWSWEEK (June 24, 2022, 5:56 PM), <https://www.newsweek.com/roe-v-wade-being-overturned-ivf-banned-30-states-1715576> [<https://perma.cc/Z6F8-QX49>] (referring to research showing that in multiple states, including Idaho and Texas, IVF is at risk in the post-Roe era).

⁹⁵ Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, 19 DUKE J. CONST. L. & PUB. POL'Y 1, 42 (forthcoming 2024); Olivia M. Bridges, *Lawmakers Look at Data Privacy in Post-Dobbs World*, ROLL CALL (Sept. 28, 2023, 6:00 AM), <https://rollcall.com/2023/09/28/lawmakers-look-at-data-privacy-in-post-dobbs-world> [<https://perma.cc/9XBY-K7U6>].

pregnancy crimes.⁹⁶ With the increase of legal fetal personhood regimes, these examples will only proliferate.⁹⁷

Our first example involves the case of Lattice Fisher, a mom of three who had an unplanned pregnancy in 2017.⁹⁸ After experiencing a stillbirth in her home bathroom 36 weeks into her pregnancy, she called 911 and was brought to a local hospital, examined and questioned, and the fetus was brought to the Medical Examiner (ME) for an autopsy.⁹⁹ Using an undependable test, the ME determined that asphyxia had caused the fetal death.¹⁰⁰ Based on the MEs finding and statements made to hospital staff, in early 2018 Fisher was indicted on second-degree murder charges.¹⁰¹ To meet the “intent” requirement of the crime, the prosecutor relied on her internet search history, which investigators had mined when they confiscated her phone, and where

⁹⁶ Data privacy is a growing area of concern overall as increasing aspects of reproductive justice are criminalized. As just a few examples, this includes concerns around period tracking mobile apps, *see generally* Jiaxun Cao et al., *Federal Trade Commission, “I Deleted it After the Overturn of Roe v. Wade”: Understanding Women’s Privacy Concerns Toward Period-Tracking Apps in the Post Roe v. Wade Era*, in CHI ‘24: PROCEEDINGS OF THE 2024 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS (Florian Floyd Mueller et al. eds., 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/10-Laabadli-Understanding-Womens-Privacy-Concerns-Toward-Period-Tracking-Apps-in-the-Post-Roe-v-Wade-Era.pdf [<https://perma.cc/JU75-CSLB>] (conducting an online 183-participant vignette survey, with participants expressing significant concern about privacy regarding period tracking apps); the use of data by unregulated pregnancy centers, *see* Press Release, Legal Voice, Complaints Filed Against CPCs (Apr. 26, 2024), https://legalvoice.org/cpc_complaints_42624 [<https://perma.cc/H243-6F43>]; and the harvesting of digital data near abortion clinics, *see* Andrea Vittorio & Skye Witley, *Abortion-Rights States Begin Shielding Digital Data Near Clinics*, BLOOMBERG L. (July 24, 2023, 4:05 AM), <https://news.bloomberglaw.com/privacy-and-data-security/abortion-rights-states-begin-shielding-digital-data-near-clinics> (on file with authors).

⁹⁷ The 2025 Presidential Transition Project, known as Project 2025, calls for an increase in the CDC’s “abortion surveillance” system, mandating reporting of, *inter alia*, miscarriages, treatments incidentally resulting in the end of a pregnancy (such as chemotherapy), and stillbirths. THE HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 455 (Paul Dans & Steven Groves eds., 2023).

⁹⁸ Elizabeth Kukura, *Punishing Maternal Ambivalence*, 90 FORDHAM L. REV. 2909, 2912–13 (2022).

⁹⁹ Teddy Wilson, *Prosecution in Search of a Theory: Court Documents Raise Questions About Case Against Lattice Fisher*, REWIRE NEWS GRP. (Feb. 21, 2018, 12:16 PM), <https://rewirenewsgroup.com/2018/02/21/prosecution-search-theory-court-documents-raise-questions-case-lattice-fisher> [<https://perma.cc/9L8S-PEDK>].

¹⁰⁰ The test used to determine culpability in this case was the infamous “lung float” which purports to determine if there was a live birth. Duaa Eldeib, *A Lab Test That Experts Liken to a Witch Trial Is Helping Send Women to Prison for Murder*, PROPUBLICA (Oct. 7, 2023, 5:00 AM), <https://www.propublica.org/article/is-lung-float-test-reliable-stillbirth-medical-examiners-murder> [<https://perma.cc/Y5HW-D243>] (finding that this unreliable test has been used to imprison at least nine women).

¹⁰¹ Teddy Wilson, *Mississippi Woman Criminally Charged for Pregnancy Outcome After Home Birth (Updated)*, REWIRE NEWS GRP. (Feb. 6, 2018, 3:22 PM), <https://rewirenewsgroup.com/2018/02/06/mississippi-woman-criminally-charged-pregnancy-outcome-home-birth> [<https://perma.cc/Y5R9-CYJM>].

they found searches on inducing a miscarriage and obtaining misoprostol.¹⁰² Although this initial charge was dismissed, prosecutors unsuccessfully sought to reindict her, leaving her fighting criminal charges for almost three years.¹⁰³ It should not need stating that having medical facilities participate in criminalizing patients serves only to dissuade people from seeking the medical help they need.¹⁰⁴

Of course, a state that accords full legal rights to a fetus cannot solely rely on medical facilities to monitor pregnant people: it also needs the compliance of citizens willing to turn in their neighbors for behaviors they find suspicious. This is already happening. Surveilling pregnant people is a conversation that is already, in some circles, normalized, and people have already begun reporting “suspicious” pregnancy behaviors.¹⁰⁵ The recent case of Celeste Burgess is illustrative.

Burgess was approximately twenty-nine weeks pregnant when she took medication abortion pills that she ordered online.¹⁰⁶ After the abortion, Burgess and her mother burned and buried the fetus.¹⁰⁷ Burgess never went to a medical facility—she was turned in by a friend, who reported to authorities that Burgess had taken medication to end her pregnancy and that she had ordered the medication via her family’s computer.¹⁰⁸ Burgess was

¹⁰² Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. BALT. L. REV. 1, 5–6 (2020).

¹⁰³ Cat Zakrzewski et al., *Texts, Web Searches About Abortion Have Been Used to Prosecute Women*, THE WASH. POST (July 3, 2022), <https://www.washingtonpost.com/technology/2022/07/03/abortion-data-privacy-prosecution> (on file with the authors).

¹⁰⁴ *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period*, AM. COLL. OF OBSTETRICS & GYNECOLOGISTS (July 2024), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period> [<https://perma.cc/PW55-A6S7>] (concluding that threatening pregnant patients with criminal prosecution makes people less likely to seek help when they need it); see generally Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646 (2021) (arguing that police in ERs should not surveil); Rebecca Stone, *Pregnant Women and Substance Abuse: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUST., no. 2, Feb. 12, 2015, at 1, 13.

¹⁰⁵ Nicole Karlis, *Republicans Want a Database of Pregnant People. In Many Ways, Abortion Surveillance Is Already Here*, SALON (May 17, 2024, 5:30 AM), <https://www.salon.com/2024/05/17/want-a-database-of-pregnant-people-in-many-ways-abortion-surveillance-is-already-here> [<https://perma.cc/XU43-EXBF>].

¹⁰⁶ Paul Hammel, *Mother Who Helped Teen Daughter Abort Fetus Is Sentenced to Two Years in Prison*, NEB. EXAM’R (Sept. 22, 2023, 4:54 PM), <https://nebraskaexaminer.com/2023/09/22/mother-who-helped-teen-daughter-abort-fetus-is-sentenced-to-two-years-in-prison> [<https://perma.cc/HZ6B-2BR9>].

¹⁰⁷ Michael Levenson, *Nebraska Teen Who Used Pills to End Pregnancy Gets 90 Days in Jail*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2023/07/20/us/celeste-burgess-abortion-pill-nebraska.html> (on file with the authors).

¹⁰⁸ Morgan Carmen, *Abortion Snitching Is Already Sending People to Jail*, MS. MAG. (Aug. 19, 2023), <https://msmagazine.com/2023/08/19/celeste-burgess-abortion-snitching-privacy-police-illegal> [<https://perma.cc/B7FB-F66W>].

sentenced to ninety days in jail for “illegally concealing human remains.”¹⁰⁹ This example is not singular—a willingness to turn in pregnant people has proliferated since the *Dobbs* decision.¹¹⁰

These examples show that legal fetal personhood can only lead to increased surveillance of the bodies of not only pregnant people, but pregnant-capable people.¹¹¹ It also impacts privacy concerns widely,¹¹² concerns that will likely proliferate with the increased use of AI.¹¹³ While this intrusiveness is a danger to us all, it will disproportionately impact low-income and BIPOC communities.¹¹⁴

¹⁰⁹ *Nebraska Mother Who Pleaded Guilty in Abortion Case to Be Sentenced Next Week*, KTVI (Sept. 13, 2023, 4:55 PM), <https://www.ktiv.com/2023/09/13/nebraska-mother-who-pleaded-guilty-abortion-case-be-sentenced-next-week> [<https://perma.cc/6DUN-RNHS>]. Burgess ended up serving 53 days. See Sanya Mansoor, *What Nebraska’s Sentencing of a Teen Who Used Abortion Pills Might Mean in Post-Roe America*, TIME (July 26, 2023, 4:57 PM), <https://time.com/6298166/nebraska-abortion-pill-case-legal-experts> [<https://perma.cc/9RBS-ETGX>]. Her mother was sentenced to two years for improper removal of remains and false reporting. Jesus Jiménez, *Mother Who Gave Abortion Pills to Teen Daughter Gets 2 Years in Prison*, N.Y. TIMES (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/us/jessica-burgess-abortion-pill-nebraska.html> (on file with the authors).

¹¹⁰ For an additional example from the state of Texas, see *infra* Section V.B.

¹¹¹ Valena E. Beety & Jennifer D. Oliva, *Policing Pregnancy “Crimes,”* 98 N.Y.U. L. REV. ONLINE 29, 32 (2023) (anticipating an increase in the surveillance of pregnant people post *Dobbs*).

¹¹² This is most recently illustrated by the concerns over the American Privacy Rights Act (APRA). APRA is a bipartisan bill to protect online privacy. At the last minute, a June 2024 hearing to mark up in the bill in the House Energy and Commerce Committee was canceled. While others also raised concerns, the bill was particularly targeted by pro legal fetal personhood lawmakers, who forcefully opposed the bill because it threatened “unborn children.” See, e.g., Memorandum from Reprod. Health & Freedom Watch on June 27 APRA Mark-Up Canceled Amid Pro-Life Opposition to Interested Parties (June 27, 2024), <http://reproductivehealthfreedom.us/memo-house-conservatives-circulating-memo-claiming-privacy-law-would-cause-pro-life-organizations-to-shut-down> [<https://perma.cc/V5A3-3KZK>]; *Analysis: New Internet Privacy Bill Would Undermine Pro-Life Movement*, CATHOLICVOTE (June 11, 2024), <https://catholicvote.org/analysis-new-internet-privacy-group-would-undermine-pro-life-movement> [<https://perma.cc/2Y9A-EUZJ>].

¹¹³ Abeer Malik, *When AI Turns Miscarriage Into Murder: The Alarming Criminalization of Pregnancy in the Digital Age*, BILL OF HEALTH: THE PETRIE-FLOM CTR.: HEALTH L. POL’Y, BIOTECHNOLOGY, & BIOETHICS AT HARV. L. SCH. (2025), <https://blog.petrieflom.law.harvard.edu/2024/11/01/when-ai-turns-miscarriage-into-murder-the-alarming-criminalization-of-pregnancy-in-the-digital-age> [<https://perma.cc/859N-W862>].

¹¹⁴ Currently, BIPOC patients are more than three times more likely to die during childbirth than white patients, and perinatal communication with BIPOC patients remains an area of concern. See generally Maren S.G. Henderson et al., *America’s Racial Reckoning Within Perinatal Communication: A Rapid Review Using Sociotechnical Systems Theory to Compare Publications Before and After 2020*, 14 J. PRIMARY CARE & CMTY. HEALTH, Apr. 20, 2023, at 1, 1–15 (looking at literature changes around the communication driving racial disparities in infant and maternal outcomes); see Katie Gentile, *Exploring the Troubling Temporalities Produced by Fetal Personhood*, 19 PSYCHONALYSIS, CULTURE, & SOC’Y 279, 288 (2014).

2. Controlling the Pregnant Person's Behavior

The push for legal fetal personhood means that these invasions of privacy and attempts to criminalize pregnant people will increase.¹¹⁵ The examples, *infra*, around abortion health care prove this—and abortions are generally simple procedures that take place within hours or days.¹¹⁶ Legal fetal personhood extends the control a state can have over the body of a pregnant person to nine months, and that regulation can be extensive.¹¹⁷ By establishing the fetus as a legal person, that fetus is entitled to all the privileges and rights of any person and the pregnant person is legally responsible for the welfare of that fetus and subject to the imposition of society's archetypes of motherhood.¹¹⁸ This means that everything about her lifestyle—from her diet to the job she has to the alcohol she drinks to the hobbies she engages in to the living situation she finds herself in—are all subjected to state regulation.¹¹⁹ This is justified on the theory that once someone is pregnant, their body no longer belongs to them but to the fetus, for which they are merely the vessel.¹²⁰ Any deviation from state proscribed norms is viewed as aberrant, illegal or a sign of mental decline.¹²¹ In fact, it has been suggested that pregnant people who choose abortion health care are by definition so

¹¹⁵ Sarah Varney & Layla Quran, *After Roe, Pregnant Women Face Increased Risk of Criminal Prosecution*, PBS (Nov. 14, 2024, 6:30 PM), <https://www.pbs.org/newshour/show/after-overturn-of-roe-more-women-face-prosecution-for-what-they-do-while-pregnant> [<https://perma.cc/366Z-RG3H>]; Mansoor, *supra* note 109; Patricia Hurtado & Francesca Maglione, *In a Post-Roe World, More Miscarriage and Stillbirth Prosecutions Await Women*, FORTUNE (July 5, 2022, 2:45 PM), <https://fortune.com/2022/07/05/roe-v-wade-miscarriage-abortion-prosecution-charge> (on file with authors).

¹¹⁶ As the anti-abortion health care movement has demonstrated, those opposing reproductive justice are increasingly looking to criminalize those who disagree. Note, *Impediments to Reproductive Justice: The Criminal Legal System and American Carceral State*, 137 HARV. L. REV. 2320, 2336 (2024).

¹¹⁷ Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights*, TIME (June 28, 2022, 4:40 PM), <https://time.com/6191886/fetal-personhood-laws-ro-abortion> [<https://perma.cc/ND3M-AFX5>].

¹¹⁸ Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 687 (2006) (making the observation that “[l]egal recognition of fetal rights can best be understood as a powerful mechanism for enforcing societal notions of maternity and womanhood”).

¹¹⁹ Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 478 (1998).

¹²⁰ Katie Glueck, *Kansas Abortion Vote Tests Political Energy in Post-Roe America*, N.Y. TIMES (July 31, 2022), <https://www.nytimes.com/2022/07/31/us/politics/kansas-abortion-vote.html> (on file with the authors).

¹²¹ Although the roots of criminalizing pregnancy go deep, modern efforts to hold pregnant people liable for their own behaviors while pregnant have increased exponentially since the *Roe v. Wade* decision was published. See generally LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH* (N.Y. Univ. Press 2017) (discussing moral and legal norms around pregnancy).

unhinged that they should be subject to mandatory psychiatric in-patient stays.¹²²

Some courts have already recognized this danger. In his opinion enjoining a Georgia law that would have redefined “child” to include any embryo or fetus in utero, Judge Steve C. Jones observed that if the law were allowed to stand it would be lawful to find a pregnant woman with an eating disorder guilty of child cruelty, or to hold health care providers liable for failing to report an abusive living situation.¹²³ This is not rhetoric. If a fetus is a legal person, then pregnant people are subject to the control of the state in how they manage their pregnancy, for the good of another “citizen.” Such control of the pregnant person will not be possible without severe penalties in place for disobedience.¹²⁴ Recognizing this truth, prosecutors in states getting ever closer to full fetal legal personhood are already taking stands. As one example, a group of Georgia prosecutors issued a public statement expressing their reluctance to prosecute people who get, provide, or assist in abortion health care, recognizing that while “[p]rosecutors are entrusted with immense discretion,” they also have a “responsibility to refrain from using limited criminal legal system resources to criminalize personal medical decisions.”¹²⁵ The problem is that prosecutors change, and if a fetus is a rights bearing person under the law, a pregnant person who does not properly care for their fetus in the eyes of the state is vulnerable to prosecution.¹²⁶

All this means that properly caring for a fetus under a legal fetal personhood regime means not only refraining from abortion, but also providing for them as one would an already born child or be faced with charges of negligence or worse. If you wouldn’t take an already born child skydiving, could you not engage in that activity while pregnant?¹²⁷ Would

¹²² Jason Jones & John Zmirak, *Once the Law Protects Unborn Kids, Should We Seek Legal Penalties for Women Who Abort Them?*, THE STREAM (May 11, 2022), <https://stream.org/once-the-law-protects-unborn-kids-should-we-seek-legal-penalties-for-women-who-abort-them> [<https://perma.cc/RN99-BQCU>].

¹²³ *Sistersong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1316 (N.D. Ga. 2020).

¹²⁴ Melissa Gira Grant, *Listen Closely to the Men Crafting the GOP’s Anti-Abortion Policy*, THE NEW REPUBLIC (July 3, 2024), <https://newrepublic.com/article/183444/republican-anti-abortion-policy-rnc-platform> [<https://perma.cc/72BF-HMQQ>].

¹²⁵ FAIR & JUST PROSECUTION, JOINT STATEMENT FROM ELECTED PROSECUTORS 1 (Mitchell Atwell et al. eds., 2023), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [<https://perma.cc/6TQX-ZPVD>].

¹²⁶ Rachel Garbus, *Georgia’s “Fetal Personhood” Statute Is Uncharted Territory*, ATLANTA MAG. (Aug. 23, 2022), <https://www.atlantamagazine.com/news-culture-articles/georgias-fetal-personhood-statute-is-uncharted-territory> (on file with authors).

¹²⁷ Dolon Chakravartty, *Attending to Differential Environmental Exposures Among Racialized Newcomer Women in Canada: Why So Difficult?* 52–53 (2019) (Ph.D. dissertation, University of Toronto) (ProQuest) (looking at chemical exposure and noting how the concept of fetal personhood leads to policing pregnant women’s behaviors).

having a high-risk or undesirable job be criminally endangering that “child”?¹²⁸ Must you avoid foods that are thought to heighten the risk of miscarriage¹²⁹ and only consume foods that lower the risk of miscarriage?¹³⁰ Do you need to be extra careful while pregnant and walking, in case you are struck by a car and later sued for negligence?¹³¹ Will states lower the legal blood alcohol limit for pregnant people and then charge them with endangering a second person?¹³² Would your liability rest on whether you later had a miscarriage, a stillbirth, or a healthy delivery?¹³³ How can this practically function for all the facets of everyday life designed to work for already born people? Can a fetus qualify your car for the HOV lane? Can you claim a fetus as a dependent for tax purposes?¹³⁴ As discussed in Section V,

¹²⁸ As one example, a pregnant Canadian woman received an unusually harsh sentence for prostitution, as the judge found that given her choice of employment, incarceration was “the only way to protect this child [pregnancy].” Nathalie Levman, *Fostering Relationships: The State and Pregnancy*, 14 J.L. & SOC. POL’Y 217, 228–29 (1999).

¹²⁹ *Food That Can Cause Miscarriage*, TIMES OF INDIA (Apr. 8, 2021, 6:25 AM), <https://timesofindia.indiatimes.com/life-style/health-fitness/photo-stories/foods-that-can-cause-miscarriage/photostory/57146524.cms> [<https://perma.cc/6HXX-VMVD>].

¹³⁰ *Diet High in Fruit and Vegetables Linked to Lower Miscarriage Risk*, UNIV. OF BIRMINGHAM (Apr. 19, 2023), <https://www.birmingham.ac.uk/news/2023/diet-high-in-fruit-and-vegetables-linked-to-lower-miscarriage-risk> [<https://perma.cc/K8B7-GSCW>].

¹³¹ This was, literally, the case in New Hampshire, where the father of a child born disabled sued the child’s mother for her negligence in crossing the street while pregnant. *Bonte v. Bonte*, 616 A.2d 464, 464 (N.H. 1992).

¹³² This was, literally, the case in Tennessee, where a woman whose blood alcohol limit was half the legal limit was arrested. The arresting officer charged her after learning she was pregnant. Kontji Anthony, *Police: Woman Earns DUI for Endangering Fetus*, ACTION NEWS 5 (Jan. 8, 2013, 12:07 AM), <https://www.actionnews5.com/story/20525700/police-pregnant-woman-earns-dui-for-endangering-fetus> [<https://perma.cc/TF2X-AJNL>].

¹³³ It is not straight-forward to prosecute pregnant people after the fact for abortions, whether or not self-managed, because miscarriages and abortions present identically after the fact and the medical interventions to treat both are the same. *Pregnancy Loss Within Black and Black Mixed Heritage Communities*, MISCARRIAGE ASS’N (2025), <https://www.miscarriageassociation.org.uk/information/pregnancy-loss-within-black-and-black-mixed-heritage-communities/#:~:text=It%20has%20been%20identified%20that,and%20to%20close%20that%20gap> [<https://perma.cc/LX7F-P34X>]. This means that the establishment of legal fetal personhood would not only criminalize SMAs, but it would also subject every person seeking medical attention post-miscarriage to interrogation. Carlisle, *supra* note 117 (explaining that, pre-*Roe*, patients seeking medical attention post miscarriage “were all suspects.”). Further, Black, Native Hawaiian and Pacific Islander women experience miscarriage and stillbirth at rates far exceeding their White counterparts, which means they present for these conditions at medical facilities more often and are more at risk for state intervention. Usha Ranji et al., *Dobbs-era Abortion Bans and Restrictions: Early Insights About Implications for Pregnancy Loss*, KFF (May 2, 2024), <https://www.kff.org/womens-health-policy/issue-brief/dobbs-era-abortion-bans-and-restrictions-early-insights-about-implications-for-pregnancy-loss> [<https://perma.cc/LUM5-UM58>] (noting that in the U.S. medical community miscarriages are called spontaneous abortions).

¹³⁴ *Texas Woman Says Unborn Baby Counts as Passenger in HOV Lane*, AP NEWS (July 11, 2022, 4:11 PM), <https://apnews.com/article/abortion-us-supreme-court-health-texas-dallas-ef8f2c>

supra, these are absurdities already working their way into law. And even if you are later found “innocent,” for one of these “crimes,” these accusations punish, traumatize and sully. This has already happened to women who ate the wrong kind of bagel¹³⁵ or tripped down the stairs,¹³⁶ or suffered a miscarriage.¹³⁷

We also acknowledge the very real danger that legal fetal personhood would lead to an increase in forced sterilizations, both temporary and permanent. Control of a pregnant person means not only regulating what they can or cannot do during the course of their pregnancy, it also means there will be consequences for those who do not follow the rules. Efforts in this area have already begun. A 1993 Washington state proposed law would have compelled involuntary birth control insertion if a court found “that the mother has given birth to a baby with fetal alcohol syndrome or addicted to drugs by clear, cogent, and convincing proof.”¹³⁸ Efforts to control the reproductive capability of certain populations has gone beyond issues of drugs or alcohol.¹³⁹ Proposals have included mandatory contraceptive implantation for people who have received publicly funded abortions,¹⁴⁰ and for people seeking benefits they are eligible to receive.¹⁴¹

35dc09f31fc77ee891a185e47b (on file with the authors); see *infra* Section V.B.5 for a longer discussion on this issue.

¹³⁵ Antonia Noori Farzan, *Yes, You Can Fail a Drug Test by Eating a Poppy Seed Bagel, as a Maryland Mother Learned*, WASH. POST (Aug. 8, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/08/yes-you-can-fail-a-drug-test-by-eating-a-poppy-seed-bagel-as-a-maryland-mother-learned> (on file with the authors).

¹³⁶ Dan Savage, *Woman in Iowa Arrested for Falling Down the Stairs While Pregnant*, THE STRANGER (Mar. 1, 2010, 4:06 PM), <https://www.thestranger.com/news/2010/03/01/3529867/woman-in-iowa-arrested-for-falling-down-the-stairs-while-pregnant> [<https://perma.cc/Y7ZN-LK7V>].

¹³⁷ *When Prosecutors Jail a Mother for a Miscarriage*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html> [<https://perma.cc/PM65-WCSH>].

¹³⁸ S. 5249, 53rd Legis., Reg. Sess. (Wash. 1993); had the law passed, the birth control could not have been removed “until six months after the court finds [the mother] is clean and sober.”

¹³⁹ Many of these efforts target and/or disproportionately impact pregnant people of color, those identifying as low-income and those with disabilities. See Elizabeth Jekanowski, *Fall 2018 Journal: Voluntarily, for the Good of Society: Norplant, Coercive Policy, and Reproductive Justice*, BERKELEY PUB. POL’Y J. (Aug. 23, 2018), <https://bppj.studentorg.berkeley.edu/2018/08/23/norplant-coercive-policy-and-reproductive-justice> [<https://perma.cc/282M-WKP9>].

¹⁴⁰ Lisa Levenstein & Justina Licata, *Reading the Fine Print in North Carolina’s New Abortion Law*, NC NEWSLINE (Sept. 18, 2023, 12:05 PM), <https://ncnewslines.com/2023/09/18/reading-the-fine-print-in-north-carolinas-new-abortion-law> [<https://perma.cc/49NR-ZPXM>].

¹⁴¹ Rachel Benson Gold, *Guarding Against Coercion While Ensuring Access: A Delicate Balance*, 17 GUTTMACHER POL’Y REV. 8, 10 (2014), https://www.guttmacher.org/sites/default/files/article_files/gpr170308.pdf [<https://perma.cc/U7MX-KX5P>].

Finally, giving a fetus the legal power to override the pregnant person dehumanizes the pregnant person.¹⁴² Prioritizing the perceived or real needs of a fetus at the expense of the pregnant person's wishes or needs takes away the autonomy and the rights of the pregnant person.¹⁴³ This is not only problematic, but also a unique extension of American jurisprudence at odds with other areas of law. Under U.S. law, a human being can generally protect themselves, even by use of deadly force, when their lives or bodily integrity are at risk from another human being.¹⁴⁴ But pregnant people are not equal under a legal fetal personhood regime—they are lesser.¹⁴⁵ All of these issues, and more, stem from the same problem: that the law is not equipped to properly account for the legal value of potential humans.¹⁴⁶ Nevertheless, as detailed below, such efforts continue.¹⁴⁷

¹⁴² All of this illustrates the problem of hinging abortion rights or legal fetal personhood on the evolving frontiers of science. The rights of a pregnant person should be dependent on their autonomy as a human being and not on theories about viability. This has been a problem since the *Roe* court indicated that their decision could rest on a future answer to that question:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer.

Roe v. Wade, 410 U.S. 113, 159 (1973) (emphasis added).

¹⁴³ See generally Howard Minkoff et al., *The Two Front War on Reproductive Rights—When the Right to Abortion is Banned, Can the Right to Refuse Obstetrical Interventions Be Far Behind?*, 24 AM. J. BIOETHICS 11 (2023) (looking at post-*Dobbs* rights of refusal for pregnant patients); but see Francis J. Beckwith & Jason T. Eberl, *Clarifying the Philosophical and Legal Foundations of Dobbs*, 24 AM. J. BIOETHICS 25, 25–26 (2024) (providing another interpretation of the rationale of the *Dobbs* case, while sharing the concerns around a pregnant patient's right to refuse medical treatment).

¹⁴⁴ David French, *The Supreme Court Puts the Pro-Life Movement to the Test*, N.Y. TIMES (June 30, 2024), <https://www.nytimes.com/2024/06/30/opinion/moyle-idaho-abortion-emptala.html> (on file with authors) (noting the hypocrisy when, under “Stand-Your-Ground” laws, a person may legally use deadly force when there is a threat of bodily harm vs. how under abortion restrictions a pregnant woman must be on the verge of death before receiving an abortion).

¹⁴⁵ Fresh Air, *Personhood in the Womb: A Constitutional Question*, NPR (Nov. 21, 2013), <https://www.npr.org/transcripts/246534132> [https://perma.cc/5M7B-JUEA].

¹⁴⁶ Lisette Ten Haaf, *Future Persons and Legal Persons: The Problematic Representation of the Future Child in the Regulation of Reproduction*, 5 LAWS, no. 10, Feb. 26, 2016, at 13, 14 (unpacking how the law lacks both the terminology and the conceptual framework to adequately address issues with ‘future children’).

¹⁴⁷ This article focuses on how states are incrementally and sneakily adopting legal fetal personhood and the impact that does, and will, have on pregnant people. But we note that the adoption of legal fetal personhood would resonate far outside the boundaries of our article, negatively impacting numerous areas, including, *inter alia*, fetal tissue research (see THE HERITAGE FOUND., *supra* note 97 (declaring a policy against fetal tissue research)); divorce (see generally Paige Mackey Murray, *Disposition of Pre-Embryos Upon Dissolution of Marriage in Colorado*, 50 COLO. LAW. 40 (2021) (analyzing Colorado court treatment of pre-embryos based on their current status as non-legal persons)); and inheritance law (Grace E. Howard, *The Harsh Legal*

III. NATIONAL ATTEMPTS TO ESTABLISH FETAL PERSONHOOD

The idea of pre-birth personhood is an idea that has been debated in theological, philosophical, societal and religious circles for eons, reflecting the varied ideas about when personhood begins.¹⁴⁸ As interesting as those discussions are, as noted *infra*, they are separate from the question of when legal personhood begins.¹⁴⁹ In this section we provide a brief overview of the attempts to codify legal fetal personhood in the United States at the national level.¹⁵⁰

The effort to establish legal fetal personhood for the entire country is a movement that gained its traction in the wake of the U.S. Supreme Court's 1973 decision in *Roe v. Wade*.¹⁵¹ In that case, relying on a right to privacy in the Due Process Clause of the Fourteenth Amendment, a 7–2 Court held that a person may choose to have an abortion until a fetus becomes viable.¹⁵² As explained *infra* the question of whether the fetus had any claim to legal personhood, and if so when that right began, was very much a part of the case—in the oral arguments¹⁵³ and in the briefings by both counsel for the

Reality of 'Fetal Personhood,' THE PROGRESSIVE MAG. (Jan. 5, 2024, 1:39 PM), <https://progressive.org/op-eds/the-harsh-legal-reality-of-fetal-personhood-howard-20240105> [<https://perma.cc/ZVL2-ZMWZ>] (noting a recent North Carolina case relying on inheritance law to establish legal fetal personhood)).

¹⁴⁸ Life Examined, *Defining Life and Personhood: What Science, Philosophy, and Religion Have to Say*, KCRW (Mar. 11, 2023), <https://www.kcrw.com/culture/shows/life-examined/human-life-personhood-science-religion-philosophy-ethics-society> [<https://perma.cc/KP47-522M>].

¹⁴⁹ *Center for Health Ethics*, UNIV. OF MO. SCH. OF MED. (2025), <https://medicine.missouri.edu/centers-institutes-labs/health-ethics> [<https://perma.cc/WJH2-E2SN>] (distinguishing between moral, metaphysical, physical and legal personhood).

¹⁵⁰ This section focuses on national legislative attempts to establish legal personhood prior to birth; therefore, we do not provide details on legislation such as the Born-Alive Infants Protection Act of 2002. *See* Born-Alive Abortions Survivors Protection Act, S. 123, 117th Cong. (2021). Although that law is also a piece of anti-abortion health care legislation, it applies only to actual born human beings and so is outside the scope of this article.

¹⁵¹ While the modern legal fetal personhood movement began in 1973, there were certainly proponents of the idea pre-dating the *Roe v. Wade* case. *See generally* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE ROE V. WADE (Oxford Univ. Press 2016) (looking at the anti-abortion health care movement, including legal fetal personhood, before *Roe v. Wade*).

¹⁵² Although this article focuses on the indirect ascension of fetal personhood in the states, we note that the *Roe* decision was not only criticized by those seeking to limit the availability of abortion health care; it was also a target of advocates in favor of abortion health care. *Roe v. Wade*, 410 U.S. Criticisms from the latter group focused primarily on the trimester framework, the majority's reliance on privacy and the 14th Amendment, and the civil rights structure that the Court employed. *See, e.g.*, ANITA L. ALLEN, WHAT ROE V. WADE SHOULD HAVE SAID 116–33 (Jack M. Balkin ed., N.Y. Univ. Press 2023).

¹⁵³ *Roe v. Wade* was argued twice before the U.S. Supreme Court—first on December 13, 1971, and then again on October 11, 1972. While unusual, re-arguments do occur. Other high-profile cases that have been reargued before SCOTUS include *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (argued first on March 24, 2009, and then reargued on

parties and by *amicus*.¹⁵⁴ As we noted earlier, the *Roe* opinion specifically stated that the word “person” was not defined as a fetus, and, if it were, the case would have to be differently decided.¹⁵⁵ This set off a firestorm of backlash that intensified over the years.¹⁵⁶ Although initially advanced by religious groups,¹⁵⁷ promotion of the fetus as a legal human became a partisan argument and is currently a pillar of political platforms and a politically sponsored social issue.¹⁵⁸

A. The Human Life Amendments

The reaction to the *Roe* decision was immediate.¹⁵⁹ Two days after the decision was published the National Conference of Catholic Bishops

September 9, 2009); *Baker v. Carr*, 369 U.S. 186 (1962) (argued first on April 19–20, 1961, and then reargued on October 9, 1961); and *Brown v. Board of Education*, 347 U.S. 483 (1954) (argued first on December 9–11, 1952, and then reargued on December 7–9, 1953). For a discussion of the two oral arguments in the *Roe* case, see Catherine Martin Christopher, *Nevertheless She Persisted: Comparing Roe v. Wade’s Two Oral Arguments*, 39 SETON HALL L. REV. 307, 310–27 (2018).

¹⁵⁴ Although the 23 *amicus* briefs filed in the *Roe* case were viewed at the time as “voluminous,” the number of *amicus* briefs filed in Supreme Court cases has exponentially increased in every term since. Transcript of Oral Argument at 17, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://www.supremecourt.gov/pdfs/transcripts/1972/70-18_10-11-1972.pdf [https://perma.cc/C4UB-2TG2]. As a recent example, there were over 140 *amicus* briefs filed in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022); see also Jamie R. Abrams & Amanda Potts, *The Rhetoric of Abortion in Amicus Briefs*, 89 MO. L. REV. 399, 401 (2024) (studying *amicus* briefs “filed in *Roe v. Wade* (and its companion case *Doe v. Bolton*), *Planned Parenthood v. Casey*, and *Dobbs v. Jackson Women’s Health Organization*”) (footnotes omitted); Allison Orr Larsen, *Opinion | The Supreme Court Decisions on Guns and Abortion Relied Heavily on History. But Whose History?*, POLITICO (July 26, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249#:~:text=On%20The%20Bench,Opinion%20%7C%20The%20Supreme%20Court%20Decisions%20on%20Guns%20and%20Abortion%20Relied,advocacy%20groups%2C%20not%20professional%20historians> [https://perma.cc/264A-XDQD].

¹⁵⁵ *Roe v. Wade*, 410 U.S. 113, 157–58 (1973).

¹⁵⁶ After the Supreme Court decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1991), those opposed to abortion health care continued to refine their opposition by more subtly equating fetuses to living human beings in a wide variety of non-abortion contexts, thereby forwarding the legal fetal personhood agenda along with the anti-abortion health care agenda. See, e.g., Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement after Planned Parenthood v. Casey*, 22 FEMINIST FORMATIONS 101, 118 (2010).

¹⁵⁷ See, e.g., Admin. Comm. of the Nat’l Conf. of Cath. Bishops, *Pastoral Message on Abortion*, PRIESTS FOR LIFE (Feb. 13, 1973), <https://www.priestsforlife.org/magisterium/bishops/73-02-13pastoralmessageonabortionnccbadmincommittee.htm> [https://perma.cc/7M3V-4DP2].

¹⁵⁸ See *infra* Part V.

¹⁵⁹ The reaction to the *Roe* case persisted long after these immediate reactions, although its true import was not appreciated even in the decade following the case. Ten years after *Roe*, Justice Blackmun, the primary author of the *Roe* decision, stated that, “Fifty years from now, depending on the fate of the constitutional amendment, abortion probably will not be as great

(NCCB) issued a statement in opposition to the Court's decision. Although not yet promoting legal fetal personhood, the statement encouraged personnel at Catholic health facilities to "refuse" to provide abortion health care, despite the Court's ruling, and pledged to present a case recognizing that life began "at conception."¹⁶⁰ Six days later, the first "Human Life Amendment" seeking to establish legal fetal personhood for the entire country was introduced in Congress.¹⁶¹ Known as the Hogan-Helms Amendment, this joint resolution defined a human being as existing from the "moment of conception."¹⁶² This proposed amendment did not pass,¹⁶³ but the idea to forward and pass a national law establishing fetal personhood in response to the *Roe* decision took firm hold, with initial efforts spearheaded predominantly by religious based groups.¹⁶⁴

Efforts to establish legal fetal personhood continued to gain steam throughout 1973. In September of that year, in advance of an upcoming national conference, the Administrative Committee of the NCCB issued a statement declaring that, "a constitutional amendment is ... the only viable means to correct the disastrous legal situation created by [*Roe*]."¹⁶⁵ In November 1973, the U.S. National Conference of Catholic Bishops met. In reaction to the *Roe* Court's holding that there was a constitutional basis in the 14th Amendment in which the (limited) right to abortion health care resided, the NCCB determined that "[t]he only certain way to repair effectively the damage perpetrated by the Court's opinions [would be] to amend the Constitution to provide clearly and definitively a constitutional base for legal

a legal issue. I think it will continue to be a moral issue, however." Richard Carelli, *Legalized Abortion a Decade Later*, SANTA CRUZ SENTINEL, Jan. 16, 1983, at 65.

¹⁶⁰ *Statement of the Committee for Pro-Life Affairs of the NCCB*, PRIESTS FOR LIFE (Jan. 24, 1973), <https://www.priestsforlife.org/magisterium/bishops/73-01-24prolifeaffairscommittee.htm> [https://perma.cc/3CPD-2K6K].

¹⁶¹ H.R.J. Res. 261, 93d Cong. (1973).

¹⁶² *Id.*

¹⁶³ Note that while this Amendment did not pass, the 1973 Helms Amendment to the U.S. Foreign Assistance Act did pass. That Amendment bans the use of federal funds for abortion under any circumstance. See Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, 16 GUTTMACHER POL'Y REV. 9, 9 (2013), <https://www.guttmacher.org/gpr/2013/09/abortion-restrictions-us-foreign-aid-history-and-harms-helms-amendment> [https://perma.cc/9FBM-3SYW].

¹⁶⁴ A leading scholar of the time, Harriet Pilpel, immediately recognized the far-reaching danger of the Hogan-Helms Amendment and of bestowing legal fetal personhood on not-yet-existing entities. See Harriet F. Pilpel, *The Fetus as Person: Possible Legal Consequences of the Hogan-Helms Amendment*, 6 FAM. PLAN. PERSPS. 6, 6–7 (1974).

¹⁶⁵ Admin. Comm. of the Nat'l Conf. of Cath. Bishops, *Statement on the Anti-Abortion Amendment*, PRIESTS FOR LIFE (Sept. 18, 1973), <https://www.priestsforlife.org/magisterium/bishops/73-09-18antiabortionamendnccbadmincommittee.htm> [https://perma.cc/2ULZ-U L58].

protection of unborn human beings.”¹⁶⁶ It was out of this meeting that the National Committee for a Human Life Amendment, Inc. (NCHLA) was formed.¹⁶⁷ The purpose of the NCHLA is, *inter alia*, to “protect the lives of children conceived but not yet born.”¹⁶⁸

Between the publication of *Roe* and the early 1980s, over 250 versions of a “human life amendment” were introduced in Congress.¹⁶⁹ Together, these hundreds of bills garnered only twenty days of hearings, and none stood a chance of passage.¹⁷⁰ The first meaningful movement achieved by any of these bills occurred when then-Senator Orrin Hatch was able to push his Human Life Amendment proposal through the full Senate Judiciary Committee in 1982.¹⁷¹ This proposal garnered significant support, including a public endorsement from then presidential candidate Ronald Reagan.¹⁷² Entitled the Human Life Federalism Amendment (HLFA) the bill sought to end constitutional support for the right to abortion.¹⁷³ The proposal was debated on June 27 and 28, 1983.¹⁷⁴ While abortion supporters opposed the HLFA for its blatant attempt to undercut *Roe*, abortion opponents attacked it because it did not address the fetal personhood issue directly.¹⁷⁵ Hatch

¹⁶⁶ RESOLUTION OF THE NATIONAL CONFERENCE OF CATHOLIC BISHOPS ON THE PRO-LIFE CONSTITUTIONAL AMENDMENT, U.S. CONF. OF CATH. PRIESTS 1 (1973), <https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/upload/ProLife-Constitutional-Amendment.pdf> [<https://perma.cc/5Z6G-WKPM>].

¹⁶⁷ Robert N. Lynch, *The National Committee for a Human Life Amendment, Inc.: Its Goals and Origins*, 20 CATH. LAW. 303, 303 (1974).

¹⁶⁸ *Id.* at 304.

¹⁶⁹ See generally NAT’L COMM. FOR A HUM. LIFE AMEND., INC., HUMAN LIFE AMENDMENTS: 1973-2003 (2004), <https://web.archive.org/web/20070927034423/http://www.nchla.org/datasource/ldocuments/HLA1st7303.pdf> [<https://perma.cc/8RT3-2MPA>] (compiling a list of all the versions of “human life amendments” introduced to Congress between 1973 and 2003).

¹⁷⁰ See generally NAT’L COMM. FOR A HUM. LIFE AMEND., INC., HUMAN LIFE AMENDMENT HIGHLIGHTS: UNITED STATES CONGRESS (1973-2003) (2004), <https://www.humanlifeaction.org/downloads/sites/default/files/HLAhighlights.pdf> [<https://perma.cc/7ZRC-JR5C>] (summarizing the legislative history of the “human life amendments”).

¹⁷¹ See S.J. Res. 110, 97th Cong. (1981).

¹⁷² Chuck Donovan, *An Enduring Legacy: Ronald Reagan’s Pro-Life Influence on America*, THE HUM. LIFE REV. (June 8, 2022), <https://humanlifereview.com/an-enduring-legacy-ronald-reagans-pro-life-influence-on-america> [<https://perma.cc/6ABL-UW65>].

¹⁷³ NAT’L COMM. FOR A HUM. LIFE AMEND., INC., HUMAN LIFE AMENDMENTS: MAJOR TEXTS 2 (2004), <https://www.humanlifeaction.org/downloads/sites/default/files/HLAmaajortexts.pdf> [<https://perma.cc/S65D-RWF5>].

¹⁷⁴ The transcript of the full June 28th debate (the longer of the two) can be accessed here. 129 CONG. REC. 17,504 (1983), <https://www.congress.gov/bound-congressional-record/1983/06/28/senate-section> [<https://perma.cc/9PZL-Z6RZ>].

¹⁷⁵ Ronald K. L. Collins & David M. Skover, *The Senator and the Constitution: An Interview with Orrin G. Hatch*, 16 HASTINGS CONST. L.Q. 141, 146-48 n.39 (1989).

withdrew the HLFA from full Senate consideration that year.¹⁷⁶ The following year, Senator Hatch reintroduced the bill and it moved forward as the Hatch/Eagleton Amendment.¹⁷⁷ In June 1983 this became the only iteration of the Human Life Amendment to reach a formal floor vote in Congress.¹⁷⁸

Although no Amendments since have gone as far, they have continued to be introduced—over 300 Human Life Amendments, many of which contained specific legal fetal personhood language,¹⁷⁹ have been proposed since the *Roe* decision was published.¹⁸⁰

B. Other Proposed Federal Legislation and Pronouncements

Despite the brief hearing held for the Hatch/Eagleton Amendment, it was clear to many anti-abortion health care and pro legal fetal personhood legislators that the Human Life Amendments, regardless of iteration, would never achieve their goal. So, in addition to continuing to forward versions of the Human Life Amendment, they began introducing other legislation aimed at establishing legal personhood from the moment of conception. In an effort to raise awareness of the issue, in 1984 President Ronald Reagan began the first of what would become “National Sanctity of Human Life Sundays.”¹⁸¹ On the 1988 National Sanctity of Human Life Sunday, he expanded his vision

¹⁷⁶ Despite the fact that anti-abortion advocates were split, many of them blamed progressive organizations for the bill’s failure. *See, e.g.*, Letter from Ernest Ohlhoff, Exec. Dir., Nat’l Comm. for a Hum. Life Amend., Inc., to “Pro-Life Friend” (June 1983), https://www.reaganlibrary.gov/public/digitallibrary/smf/publicliaison/blackwell/box-011/40_047_7006969_011_007_2017.pdf [<https://perma.cc/X6RQ-EKTE>] (blaming Planned Parenthood, NOW and NARAL and asking supporters for financial donations).

¹⁷⁷ *See* S.J. Res. 3, 98th Cong. (1983).

¹⁷⁸ The Amendment received 49 supporting votes in the Senate on June 28, 1983, falling 18 votes short of the 67 required for passage. *See* NAT’L COMM. FOR A HUM. LIFE AMEND., INC., *supra* note 170, at 2.

¹⁷⁹ *See generally* NAT’L COMM. FOR A HUM. LIFE AMEND., INC., *supra* note 173 (providing a sample of some of the language utilized in these proposals).

¹⁸⁰ *See generally* NAT’L COMM. FOR A HUM. LIFE AMEND., INC., *supra* note 169 (identifying the over 300 Human Life Amendments introduced before Congress). For a discussion of the six different types of Human Life Amendments, *see* Am. Life League, *Human Life Amendment: Remedy for Roe v. Wade*, ETERNAL WORD TELEVISION NETWORK (2025), <https://www.ewtn.com/catholicism/library/human-life-amendment-remedy-for-roe-v-wade-9591> [<https://perma.cc/5W2U-ZWTY>].

¹⁸¹ Ronald Reagan, *Proclamation 5147 -- National Sanctity of Human Life Day, 1984*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Jan. 14, 1984), <https://www.reaganlibrary.gov/archives/speech/proclamation-5147-national-sanctity-human-life-day-1984> [<https://perma.cc/5ZDA-ST25>].

to specifically “declare the unalienable personhood of every American, from the moment of conception.”¹⁸²

Using President Reagan’s language, the “Sanctity of Life Act” was first proposed in 1995.¹⁸³ Introduced in the House of Representatives, this bill sought to legally establish that human life begins at conception.¹⁸⁴ The bill also sought to prohibit the Supreme Court of the United States from exercising any jurisdiction over litigation addressing the rights “of human persons between conception and birth.”¹⁸⁵ Although referred out, the bill never passed. Representative Ron Paul re-introduced very similar versions of the bill five times—in 2005,¹⁸⁶ in 2007,¹⁸⁷ again in 2007,¹⁸⁸ in 2009,¹⁸⁹ and in 2011,¹⁹⁰ none of which were ever made into law.¹⁹¹ The “Sanctity of Human Life Act” was a similar piece of legislation introduced by Paul Broun in 2011.¹⁹² This bill proposed a recognition that life began “with fertilization” or with “cloning.”¹⁹³ Although this Act also never made it into law it did attract sixty-four Republican cosponsors.¹⁹⁴

¹⁸² Ronald Reagan, *Proclamation 5761 -- National Sanctity of Human Life Day, 1988*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Jan. 14, 1988), <https://www.reaganlibrary.gov/archives/speech/proclamation-5761-national-sanctity-human-life-day-1988#:~:text=Now%2C%20Therefore%2C%20I%2C%20Ronald,death%2C%20and%20I%20do%20proclaim%2C> [https://perma.cc/5ZDA-ST25].

¹⁸³ The term “sanctity of human life,” is supposed to insinuate that every human life has value, is equal and exists regardless of developmental stage, from conception through natural death. For a discussion exploring the phrase and why it is not properly a rights concept, see Heike Baranzke, “*Sanctity-of-Life*”—*A Bioethical Principle for a Right to Life?*, 15 ETHIC THEORY & MORAL PRAC. 295, 295–306 (2012).

¹⁸⁴ H.R. 2087, 104th Cong. (1995).

¹⁸⁵ *Id.*

¹⁸⁶ H.R. 776, 109th Cong. (2005).

¹⁸⁷ H.R. 1094, 110th Cong. (2007).

¹⁸⁸ H.R. 2597, 110th Cong. (2007).

¹⁸⁹ H.R. 2533, 111th Cong. (2009).

¹⁹⁰ H.R. 1096, 112th Cong. (2011).

¹⁹¹ Rand also introduced the “We the People Act” in 2005, which, had it been made law, would have limited the jurisdiction of courts to hear cases involving the right of privacy, including those related to reproduction. See *We the People Act*, H.R. 4379, 109th Cong. (2005).

¹⁹² Sanctity of Human Life Act, H.R. 212, 112th Cong. (2011).

¹⁹³ *Id.*

¹⁹⁴ One of these co-sponsors was Rep. Todd Akin. The following year, Akin, who had just won the Republican primary to challenge Dem. Sen. Claire McCaskill, said that women who are victims of “legitimate rape” rarely get pregnant as “the female body has ways to try to shut that whole thing down.” John Eligon & Michael Schwartz, *Senate Candidate Provokes Ire with ‘Legitimate Rape’ Comment*, N.Y. TIMES (Aug. 19, 2012), <https://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html> (on file with authors).

Also in 1995, anti-abortion and pro-legal fetal personhood proponents proposed the first federal “Partial-Birth Abortion Ban Act.”¹⁹⁵ This was another effort to demonize abortion health care as seeking to kill already born human beings.¹⁹⁶ Although the bill passed both Houses of Congress it was vetoed by then President Bill Clinton.¹⁹⁷ Nevertheless, its proponents persisted, and were able to pass the bill eight years later, which was signed into law by then President George W. Bush.¹⁹⁸ Although held unconstitutional by several lower courts, the law was eventually upheld by the U.S. Supreme Court in 2007.¹⁹⁹

More recently, the “Life at Conception Act” was introduced by Senator Rand Paul in 2021.²⁰⁰ This proposed law would have given equal protection under the 14th Amendment to any human being at all stages of life, including “the moment of fertilization,” and included exceptions for both birth control and IVF.²⁰¹ The Life at Conception Act failed, but in the wake of the *Dobbs* decision, proponents of legal fetal personhood tried again.²⁰² In January 2023, Speaker of the House Republican Mike Johnson introduced his version of the aptly titled “Life at Conception Act,” which defined a human being from the “moment of fertilization, cloning, or other moment.”²⁰³ This proposed law would also have given equal protection under the 14th Amendment to any human being at all stages of life, including “the moment of fertilization” but did not include any exceptions.²⁰⁴ This no exceptions bill garnered 125 Republican cosponsors.²⁰⁵

¹⁹⁵ Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. (1995).

¹⁹⁶ Heather D. Boonstra, *The Antiabortion Campaign to Personify the Fetus: Looking Back to the Future*, 2 GUTTMACHER POL’Y REV. 3, 3–4 (1999).

¹⁹⁷ Press Release, Bill Clinton, Remarks by the President on House Resolution 1833 (Apr. 10, 1996), <https://clintonwhitehouse6.archives.gov/1996/04/1996-04-10-remarks-of-president-on-hr-1833-veto.html> [<https://perma.cc/2QKF-BCSA>].

¹⁹⁸ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201. Note there was also a failed 1997 attempt. Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. (1997).

¹⁹⁹ *Gonzales v. Carhart*, 550 U.S. 124, 125 (2007).

²⁰⁰ Life at Conception Act of 2021, S. 99, 117th Cong. (2021).

²⁰¹ *Id.*

²⁰² We note that the *Dobbs* case not only reignited the push for legal fetal personhood, but it has also had internationally recognized devastating human rights consequences for Americans. AMNESTY INT’L, ABORTION IN THE USA: THE HUMAN RIGHTS CRISIS IN THE AFTERMATH OF DOBBS 3637 (2024).

²⁰³ Life at Conception Act, H.R. 431, 118th Cong. (2023).

²⁰⁴ *Id.*

²⁰⁵ There was also a renewed effort to push the 2024 Republican candidate for U.S. President to endorse the “human life amendment to the Constitution” in the Party’s platform revision. See Shane Goldmacher & Jonathan Swan, *Social Conservatives Push Trump on the G.O.P.’s Anti-Abortion Platform*, N.Y. TIMES (June 28, 2024), <https://www.nytimes.com/2024/06/28/us/politics/trump-abortion-letter.html> (on file with authors).

In the wake of these failed efforts, proponents of nationwide legal fetal personhood tried a new tactic, introducing a resolution, instead of a bill, in the House of Representatives.²⁰⁶ In June 2023, Colorado Republican Doug Lamborn introduced House Resolution 464, “Acknowledging that unborn children are legal and constitutional persons who are entitled to the equal protection of the laws.”²⁰⁷ This resolution declared that a “human being begins his or her life cycle at fertilization” and this includes “human conceptus, zygote, morula, blastocyst, embryo, and fetus.”²⁰⁸ As recognized, the goal post-*Dobbs* is legal fetal personhood, and HR 464 was touted as the “north star” of that movement.²⁰⁹ The resolution, which had 24 Republican co-sponsors, was referred to committee.²¹⁰ And all along, as legal fetal personhood proponents were continually stymied in Congress,²¹¹ they increasingly turned their attention to the states and the courts.²¹²

C. Legal Fetal Personhood in Federal Courts

Advocates of legal fetal personhood had long lamented, particularly since the *Roe* decision, what they saw as the failure of judges to agree with their position. In 2016, the legal fetal personhood movement began to focus more heavily on judges, when President Donald Trump began packing the federal courts.²¹³ As one obvious illustration, Justice Amy Coney Barrett refused to

²⁰⁶ Resolutions are forwarded to express sentiments and goals; they do not become binding law.

²⁰⁷ H.R. Res. 464, 118th Cong. (2023).

²⁰⁸ *Id.*

²⁰⁹ *Statement on the Recognizing Life Resolution H.Res. 464*, FOUND. TO ABOLISH ABORTION, <https://faa.life/statement-on-hres-464> [<https://perma.cc/YK9U-U56D>]; see also Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 805 (2024) (recognizing that post-*Dobbs*, anti-abortion health care groups have made it clear that they are not content to allow states to make their own abortion decisions, but are seeking legal fetal personhood).

²¹⁰ H.R. Res.464, 118th Congress (2023).

²¹¹ Note that the increasing number of state level recognitions of fetal personhood, detailed in Section IV, did eventually bring the issue back to Congress, after the well-publicized 2002 murder of pregnant Laci Peterson by her husband. Congress then passed the ‘Unborn Victims of Violence Act,’ also known as ‘Laci and Connor’s Law,’ which made a fetus a separate crime victim for a long list of federally charged criminal activities. Unborn Victims of Violence Act, 18 U.S.C. § 1841. When signing the bill into law, then President George W. Bush stated that the new law recognized that there are “two” persons victimized by the crimes at issue. George W. Bush, *President Bush Signs Unborn Victims of Violence Act of 2004*, THE WHITE HOUSE (Apr. 1, 2004, 2:57 PM), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040401-3.html> [<https://perma.cc/HH3V-RGNM>].

²¹² Throughout the years these bills were being introduced, attempts were made to grant “unborn children” rights in tax benefits, child support guidelines, college savings plans, birth control bills, and safety-net programs, such as food assistance. See, e.g., Child Tax Credit for Pregnant Moms Act of 2023, S. 2092, 118th Cong. (2023).

²¹³ Jeffrey F. Addicott, *Reshaping American Jurisprudence in the Trump Era – The Rise of “Originalist” Judges*, 55 CAL. W.L. REV. 341, 342 (2019).

respond to a question during her Supreme Court confirmation hearing asking whether a ban on IVF would be constitutional.²¹⁴ Because of their willingness to overturn precedent and subsume the rights of pregnant people, these self-styled “originalists” became a focus of the anti-abortion/pro legal fetal personhood movement.²¹⁵ And, for a number of years now, they have been delivering.²¹⁶

One instance in which this has happened is in the EMTALA cases mentioned *infra*.²¹⁷ In these cases, the question being litigated is whether pregnant persons presenting at EMTALA covered emergency rooms can get abortion health care post-*Dobbs* if they are determined to have a condition for which abortion is the standard of care.²¹⁸ In the Texas case, *Becerra*, the rights of the fetus overtook the rights of the pregnant person in the context of EMTALA.²¹⁹ The judicial effort to raise the legal status of the fetus, even at the expense of the pregnant person, was evident not just in the result, but

²¹⁴ James Bickerton, *Amy Coney Barrett's Remarks About IVF Resurface After Alabama Embryo Ruling*, NEWSWEEK (Feb. 25, 2024, 7:38 AM), <https://www.newsweek.com/amy-coney-barretts-remarks-about-ivf-resurface-after-alabama-embryo-law-1872712> (on file with authors).

²¹⁵ Another focus of the movement of late, outside the scope of this article, has been the Republican party platform. Although the platform is thought to have softened its opposition to abortion, it has remained steadfast in its commitment to legal fetal personhood, a loftier goal, as abortion is just one of the issues subsumed within it. Mary Ziegler, *The Only Part of Trump's RNC Abortion Platform That Matters*, SLATE (July 15, 2024, 10:25 AM), <https://slate.com/news-and-politics/2024/07/rnc-2024-trump-abortion-platform-republicans.html> (on file with authors).

²¹⁶ Emily Bazelon, *Why 'Fetal Personhood' Is Roiling the Right*, N.Y. TIMES (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/magazine/fetal-personhood-alabama-ivf.html> (on file with authors).

²¹⁷ We note that even outside the two states most directly involved in the EMTALA litigation, the impact is being felt by pregnant people nationwide, who are increasingly being refused care. In other words, those seeking to protect a fetus at the expense of a pregnant person are putting both the pregnant person and the pregnancy at increased risk. Amanda Seitz, *Emergency Rooms Refused to Treat Pregnant Women, Leaving One to Miscarry in a Lobby Restroom*, AP News (Apr. 19, 2024, 3:41 PM), [https://apnews.com/article/pregnancy-emergency-care-abortion-supreme-court-ro-9ce6c87c8fc653c840654de1ae5f7a1c#:~:text=WASHINGTON%20\(AP\)%20%E2%80%94%20One%20woman,her%20away%20from%20the%20facility](https://apnews.com/article/pregnancy-emergency-care-abortion-supreme-court-ro-9ce6c87c8fc653c840654de1ae5f7a1c#:~:text=WASHINGTON%20(AP)%20%E2%80%94%20One%20woman,her%20away%20from%20the%20facility) (on file with authors); Karen Rodriguez, *'We Don't Deliver Babies Here': Hospitals Turn Away Pregnant Patients*, SCRIPPS NEWS (July 24, 2024, 10:56 AM), <https://www.scrippsnews.com/us-news/we-don-t-deliver-babies-here-hospitals-turn-away-pregnant-patients> [<https://perma.cc/5L7G-LGM3>].

²¹⁸ Fentiman, *supra* note 60, at 595 n.422.

²¹⁹ The *Becerra* court read the lack of Congressional intent to permit the state of Texas to determine that fetal person rights prevailed in the EMTALA context. *Texas v. Becerra*, 623 F. Supp. 3d 696, 727–28 (N.D. Tex. 2022); *see also* *Texas v. Becerra*, 89 F.4th 529, 533 (5th Cir. 2024) (affirming the Texas district court's decision and continuing to ascribe personhood to the fetus by referring to the “unborn child” as separate and distinct from the pregnant person).

in the language of the opinion itself.²²⁰ Unlike the Idaho EMTALA case, where the court regularly referred to the “patient” at issue as the “pregnant patient,”²²¹ the Texas court ascribed personhood to the fetus, using words like “unborn child.”²²²

Using the language of legal fetal personhood is a strategy employed by many courts seeking to establish the legal personhood of the unborn. Throughout the *Dobbs* opinion, the majority repeatedly refers to embryos and fetuses as “unborn human being.”²²³ In fact, *Dobbs* is a harbinger for the next steps in the legal fetal personhood movement.²²⁴ During oral argument, several Justices indicated that they saw the issue as implicating more than just the right to abortion currently before them,²²⁵ and the majority opinion seems to speak on both sides of the issue of fetal personhood. On one hand, the majority stated that their opinion “[was] not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.”²²⁶ Then the Court stated that nothing in the Constitution required the conclusion that a fetus lacked all human rights, primarily the right to life, before birth.²²⁷

Thus, while the use of the legal term “person” to apply to embryos and fetuses in a wide variety of circumstances has been increasingly common in

²²⁰ Kate Zernike, ‘Unborn Child’ or ‘Fetus’: Parsing Word Choices on Abortion at the Supreme Court, N.Y. TIMES (Apr. 24, 2024), <https://www.nytimes.com/2024/04/24/us/politics/abortion-law-emergency-ban-fetus-unborn-child.html#:~:text=unborn%2Dchild.html,'Unborn%20Child%20or%20Fetus'%3A%20Parsing%20Word%20Choices,personhood%2C%20and%20prohibiting%20abortion%20entirely> (on file with authors).

²²¹ See generally *United States v. Idaho*, 623 F. Supp. 3d 1096 (D. Idaho 2022) (referring to the patient(s) as the “pregnant patient(s)” throughout the opinion).

²²² *Becerra*, 623 F. Supp. 3d at 704, 725–33, 735–37.

²²³ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 301 (2022).

²²⁴ Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, THE NEW YORKER (June 5, 2019), <https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars> (pre-*Dobbs* article noting that future court rulings based on legal fetal personhood could go beyond *Roe* and hold that it is “unconstitutional for any state to allow abortions at all”) (on file with authors).

²²⁵ Justice Thomas specifically said that his question was not about abortion, but about any rights in bodily autonomy held by the pregnant person when engaging in a behavior that would harm the fetus. Transcript of Oral Argument at 50, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_bq7d.pdf [<https://perma.cc/K8WT-BBD4>]. Justice Alito asked counsel for both sides about the rights of personhood beginning at conception and not at viability, implying that that could be the factor for personhood. *Id.* at 32, 66. Justice Barrett said that the imposition on the autonomy of the pregnant person in forcing them to remain pregnant was lessened where they could avail themselves of safe haven and adoption choices post-pregnancy. *Id.* at 56–58.

²²⁶ *Dobbs*, 597 U.S. at 263.

²²⁷ *Id.*

multiple courts on multiple fronts for quite some time,²²⁸ *Dobbs* was a big advancement in the march toward legal fetal personhood,²²⁹ and the *Becerra* decision was an additional step.²³⁰ The *Dobbs* dissent clearly saw where the majority was leading on personhood, noting the decision meant that “from the very moment of fertilization, a woman has no rights to speak of.”²³¹ As we detailed *infra*, this is because declaring an entity a person from the moment of conception threatens the rights and bodily autonomy of the pregnant person—and would also be in contravention of international norms.²³² Although SCOTUS has thus far declined to rule directly on the issue of legal fetal personhood, the issue continues to bubble up through the courts.²³³

IV. LEGAL FETAL PERSONHOOD IN THE STATES

When national efforts to formally establish legal fetal personhood failed, proponents of the movement shifted their primary focus to the states.²³⁴ This has resulted in dozens of varied attempts to create legal fetal personhood, as well as a resulting tension between clinicians trying to care for pregnant

²²⁸ See generally FLEMING & ROTH, *supra* note 34 (summarizing the myriad ways states have already accepted fetal personhood and the implications therein).

²²⁹ In trying to establish that abortion was not a historically recognized right, the *Dobbs* court relied on many of the exact same sources the *Roe* court had cited for the opposite proposition, such as Henry de Bracton, Sir Edward Coke, and William Blackstone. Compare *Dobbs*, 597 U.S. at 217 (“[T]he great common-law authorities—Bracton, Coke, Hale, and Blackstone—all wrote that a post-quickening abortion was a crime.”), with *Roe v. Wade*, 410 U.S. 113, 133–34 n.21 (1973) (citing Coke, Hale, Blackstone, and discussing Bracton, for the assertion that abortions performed before “quickening” were not indictable under the common law).

²³⁰ See Carlisle, *supra* note 117; *A Woman’s Rights: Part 8: The Future of Personhood Nation*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-law-pro-life.html> (on file with authors); Texas v.

Becerra, 623 F. Supp. 3d 696, 726 (N.D. Tex. 2022).

²³¹ *Dobbs*, 597 U.S. at 360 (Breyer, J., dissenting).

²³² Human rights protections under international law begin at birth. See Letter from Global Justice Center et al. to United Nations 18 n.108 (Mar. 2, 2023), https://www.globaljusticecenter.net/wp-content/uploads/2023/06/UNSpecialProceduresLetter_AbortionRightsUS.pdf [<https://perma.cc/3VMX-N8UH>] (noting that rights under the International Declaration of Human Rights and under the Covenant on Civil and Political Rights are not applicable pre-birth).

²³³ The Rhode Island Supreme Court held, *inter alia*, that the fetuses (and other plaintiffs) in the case had no standing. *Benson v. McKee*, 273 A.3d 121, 130–31 (R.I. 2022). The plaintiffs had petitioned for a writ of certiorari on the question of, *inter alia*, whether “unborn Petitioners, regardless of gestational age, categorically lacked standing to advance their claims?” Petition for a Writ of Certiorari, *Doe v. McKee*, 143 S. Ct. 309 (2022) (No. 22-201), https://www.supremecourt.gov/DocketPDF/22/22-201/236882/20220901130349933_Petition%20Brief.pdf [<https://perma.cc/H9KT-M5HJ>]. SCOTUS declined review, without comment. *Benson v. McKee*, 273 A.3d 121 (R.I. 2022), *cert. denied sub nom. Doe v. McKee*, 143 S. Ct. 309 (2022).

²³⁴ *Fetal Personhood Law in the United States*, LEGAL VOICE (2024), <https://legalvoice.org/legal-fetal-personhood-timeline> [<https://perma.cc/U62D-NPDH>] (comprehensive timeline showing growth of fetal personhood efforts).

patients and increasingly intrusive legal limits to that care.²³⁵ In this section we discuss the various attempts to establish legal fetal personhood at the state level and examine the disquieting number of states where these efforts have been successful.²³⁶

A. State Courts Grapple with the Value of a Fetus

Long before *Roe*, state courts grappled with defining the point in time when a fetus had legal value independent of the pregnant person.²³⁷ These state court discussions occurred primarily in the torts law arena, revolving around monetary compensation for injuries inflicted on fetuses and the potential for recovery under state wrongful death statutes.²³⁸ For decades, the predominant questions revolved around elevator malfunctions, car accidents, and decisions made by medical providers. For example, if a pregnant woman was injured in an accident days before giving birth, should injuries to the fetus be considered as distinct from those to the pregnant person?²³⁹ What if the fetus is stillborn following the accident?²⁴⁰ Is a doctor liable for malpractice related to injuries potentially inflicted on a fetus from x-ray treatments performed on the pregnant person?²⁴¹ These opinions from the late-nineteenth and early twentieth-centuries, while inching into the realm of legal fetal personhood, remained largely centered on the pain and suffering of the pregnant person and any potential compensation connected to harm done to their fetuses.

²³⁵ Carmel Shachar et al., *Fetal Personhood Laws and Their Implications for Health Care*, 332 J. AM. MED. ASS'N 1231, 1231–32 (2024).

²³⁶ While municipalities have also made their own attempts to expand the definition of personhood, that discussion is beyond the scope of this article. *See generally* Laura Hermer, *Municipal Abortion Bans: When Local Control Clashes with State Power*, 32 AM. U. J. GENDER SOC. POL'Y & L. 279 (2024) (detailing the strategy of enforcing limits on reproductive health care availability at the most local levels).

²³⁷ As noted earlier, state definitions of when pregnancy begins vary, but the medically accepted definition is that it begins at implantation. *See* Gold, *supra* note 24, at 7.

²³⁸ *See, e.g.*, *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 14–15 (Mass. 1884), the first case addressing the issue of whether a fetus was independent of the pregnant person in connection with recovery for personal injury. *See also* *Bonbrest v. Kotz*, 65 F. Supp. 138, 139 (D.C. 1946) (denying the defendant's motion for summary judgment in a civil action brought on behalf of an infant); *Verkennes v. Cornica*, 38 N.W.2d 838, 839 (Minn. 1949) (discussing a wrongful death action brought by the administrator of the estate of “Baby Girl Rita Verkennes”); *Woods v. Lancet*, 102 N.E.2d 691, 691–92 (N.Y. 1951) (discussing a civil action on behalf of Woods, an infant, filed by his guardian ad litem).

²³⁹ *See* *Allaire v. St. Luke's Hosp.*, 56 N.E. 638, 642 (Ill. 1900), where the majority of the Supreme Court of Illinois agreed that, until birth, a fetus is one-in-the-same with the pregnant person and, therefore, not a distinct individual capable of being injured separately.

²⁴⁰ *See* *Youman v. McConnell & McConnell, Inc.*, 7 La. App. 315, 317 (La. Ct. App. 1927), where a Louisiana court held that a fetus is not a distinct legal person until they are born alive and thus, a pregnant person could not recover damages when her fetus was stillborn following an accident.

²⁴¹ *Stemmer v. Kline*, 17 A.2d 58, 59 (N.J. Cir. Ct. 1940), *rev'd*, 26 A.2d 489 (N.J. 1942).

In the early 1970s, as *Roe* was working its way through the federal courts and anti-abortion health care advocates found larger platforms, the conversation in the state courts shifted. Instead of discussing the fetus in terms of its personal value (both monetary and moral) to the pregnant person, courts began to debate giving individual rights and protections to the fetus separate from those of the pregnant person.²⁴² This shifted the framework of the debate to one where the pregnant person's rights conflict with, and are often superseded by, the rights of the fetus.²⁴³

B. State Constitutional Efforts

In the states, the legal fetal personhood movement initiated efforts to enshrine legal fetal personhood through state constitutional amendments.²⁴⁴ While these efforts started off slowly, by the early 2000s, ballot measures aimed at recognizing legal fetal personhood proliferated.²⁴⁵ In the early to mid-aughts, five state ballot measures seeking to expand states' definition of personhood to include fetuses were introduced, although all were defeated by voters.²⁴⁶ In addition to these defeated measures, lawmakers proposed numerous ballot initiatives that ultimately failed to qualify for the ballot.²⁴⁷

²⁴² See *Steinberg v. Brown*, 321 F. Supp. 741, 747 (N.D. Ohio 1970); see also *Cheaney v. Indiana*, 285 N.E.2d 265, 269 (Ind. 1972) ("When the rights of the unborn child come in conflict with the rights of the mother, the State can and must strike a balance between these interests.").

²⁴³ See, e.g., Raymond Tatalovich & Byron W. Daynes, *The Trauma of Abortion Politics*, COMMONWEAL, Nov. 20, 1981, at 644 (noting abortion politics in the 1970s and the proliferation of court cases in this period, with some beginning to recognize fetal legal rights).

²⁴⁴ In addition to forwarding ballot initiatives that would have established legal fetal personhood, lawmakers in states with limited access to abortion are also trying to prevent citizens from using the ballot initiative process to restore abortion rights. For example, in 2024, Mississippi lawmakers considered reinstating a citizen initiative process that would not allow abortion law changes to be part of the ballot process. Michael Goldberg, *Mississippi Ballot Initiative Proposal Would Not Allow Changes to Abortion Laws*, AP NEWS (Jan. 24, 2024, 7:33 PM), https://apnews.com/article/mississippi-ballot-initiative-abortion-2da2169722fc76035d2200f9d3cc3e4c?utm_source=copy&utm_medium=share (on file with authors).

²⁴⁵ The earliest effort was by Rhode Island in 1986. See *History of Abortion Ballot Measures*, BALLOTPEDIA (2024), https://ballotpedia.org/History_of_abortion_ballot_measures#Personhood_amendments [https://perma.cc/7SPP-RJLM].

²⁴⁶ Three of these were in Colorado: Amendment 67 (2014), Initiative 62 (2010), and Initiative 48 (2008). *Id.* Another, Initiative 26, was in Mississippi (2011), and Measure 1 was in North Dakota (2014). *Id.*

²⁴⁷ While few fetal personhood initiatives succeed in making it onto the ballot, numerous measures have been proposed and failed: Iowa (2010), Kansas (2010), Mississippi (2010 and 2015), Missouri (2010), Montana (2010, 2012, and 2016), Oregon (2010), Alabama (2012), Alaska (2012 and 2014), Arizona (2012), Arkansas (2012), California (2012 and 2014), Colorado (2012), Florida (2012), Kansas (2012), Nevada (2012), Oklahoma (2012), Ohio (2013 and 2014), Georgia (2014), Wisconsin (2014), South Carolina (2016), Oklahoma (2022), Nebraska (2024), and Maine (2024). See *Proposed Ballot Measures That Were Not on a Ballot*, BALLOTPEDIA (2025), https://ballotpedia.org/Proposed_ballot_measures_that_were_not_on_a_ballot#2010 [https://perma.cc/7EJM-FYPM].

Efforts continue, however.²⁴⁸ For example, in 2022, Montana voters defeated a ballot measure that would have defined infants born alive at any stage of gestational development as legal “persons” and requiring that medical care be provided for them.²⁴⁹ In 2024, Oklahoma proposed a joint house resolution to enact a constitutional amendment to refine the definition of personhood as beginning at conception.²⁵⁰ That same year, Nebraska proposed a constitutional personhood amendment that also would have defined life as starting at conception, outlawing nearly all abortions in the state with no exceptions to protect the life or health of the pregnant person.²⁵¹ The proposal failed to collect the required number of signatures to make it onto the statewide ballot.²⁵²

Undeterred by these failures, proponents of legal fetal personhood redirected their efforts to other areas of legislation in which to advance their narrative while avoiding the formal label of legal fetal personhood.²⁵³ The issuance of birth and death certificates provide an example of this.²⁵⁴ Starting in the early 2000s, Arizona began issuing birth certificates for stillborn births,²⁵⁵ a practice that has now expanded to over thirty states, and is continuing to spread.²⁵⁶ Two more recent examples are found in Montana

²⁴⁸ We also note that any successful amendment would likely lead to not only a confusing and little understood interpretative mess, but it could also conflict with other state laws. *See, e.g.,* Jonathan L. Marshfield, *Will Voters Have the Final Say on Abortion Rights in Florida?*, STATE CT. REP. (Apr. 18, 2024), <https://statecourtreport.org/our-work/analysis-opinion/will-voters-have-final-say-abortion-rights-florida> [<https://perma.cc/T9QD-32JX>].

²⁴⁹ *See 2022 Abortion-Related Ballot Measures*, BALLOTPEDIA (2024), <https://ballotpedia.org/2022-abortion-related-ballot-measures> [<https://perma.cc/TD9R-WE2J>].

²⁵⁰ *See* H.R.J. Res. 1046, 59th Leg., 2d Sess. (Okla. 2024).

²⁵¹ Aaron Sanderford, *Proposed ‘Personhood’ Amendment Would Outlaw Almost All Abortions in Nebraska*, NEB. EXAM’R (May 21, 2024, 5:18 PM), <https://nebraskaexaminer.com/briefs/proposed-personhood-amendment-would-outlaw-almost-all-abortions-in-nebraska> [<https://perma.cc/KY5P-DVZX>].

²⁵² *Nebraska Establish Personhood of Preborn Children Amendment (2024)*, BALLOTPEDIA (2024), [https://ballotpedia.org/Nebraska_Establish_Personhood_of_Preborn_Children_Amendme nt_\(2024\)#cite_note-SoS-2](https://ballotpedia.org/Nebraska_Establish_Personhood_of_Preborn_Children_Amendme nt_(2024)#cite_note-SoS-2) [<https://perma.cc/5G4E-2TQJ>].

²⁵³ Note that several other areas of legal scholarship evaluate the idea of personhood in other contexts, such as animal rights and corporations. *See, e.g.,* Steven Wise, *Chimps Have Feelings and Thoughts. They Should Also Have Rights*, TED (Mar. 2015), https://www.ted.com/talks/steven_wise_chimps_have_feelings_and_thoughts_they_should_also_have_rights [<https://perma.cc/2VHN-CGLM>]; Ciara Torres-Spelliscy, *The History of Corporate Personhood*, BRENNAN CTR. FOR JUST. (Apr. 8, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/history-corporate-personhood> [<https://perma.cc/ZM2Y-3JL6>].

²⁵⁴ *See infra* Sections V.A.3, V.B.3 for specific discussions of this issue in Idaho and Texas.

²⁵⁵ ARIZ. REV. STAT. ANN. § 36-330 (2024). The process for acquiring such a certificate is available online. ARIZ. DEP’T OF HEALTH SERVS., CERTIFICATE OF BIRTH RESULTING IN STILLBIRTH 1 (2024), <https://www.azdhs.gov/documents/director/administrative-counsel-rules/rules/guidance/gd-109-phs-vrs.pdf> [<https://perma.cc/F2Z3-ZPFR>].

²⁵⁶ *See infra* Sections V.A–B, for discussions of how this specifically played out in the two states we highlight, Idaho and Texas.

and Illinois. In 2023 Montana enacted a law creating a “nonviable birth” state certificate for pregnancies ending between six- and twenty-weeks gestation.²⁵⁷ And in 2024, Illinois passed a law, effective in 2025, that issues certificates for fetuses of twenty weeks gestation and above.²⁵⁸ Minnesota, meanwhile, passed a bill retroactively amending their state law providing a tax credit for “parents of stillborn children” so long as a certificate of birth resulting in stillbirth has been issued.²⁵⁹

C. Fetal Personhood Language in State Abortion Laws

The overlap between the legal fetal personhood and anti-abortion movements provides yet another example of how fetal personhood language has shaped the tone of proposed legislation. By incorporating language into abortion laws referring to fetuses as rights bearing individuals, lawmakers serve two ends: restricting access to abortions and endowing fetuses with personhood status from the moment of conception.²⁶⁰ For example, in 2005, South Dakota passed a law updating its abortion counseling requirements to require medical providers to explicitly inform patients that the procedure would terminate “a whole, separate, unique, living human being.”²⁶¹ Four other states, Indiana, Kansas, Missouri, and North Dakota, similarly attempted to update abortion counseling requirements, with North Dakota succeeding in passing a similar law.²⁶²

²⁵⁷ See *State Legislation Tracker*, GUTTMACHER INST. (2025), <https://www.guttmacher.org/state-legislation-tracker> [https://perma.cc/XZ8R-VFLY]. Note that Montana uses the term “nonviable birth” as the medically accepted definition of stillbirth, which is “the death of a fetus at or after the 20th week of pregnancy.” *What Is Stillbirth?*, EUNICE KENNEDY SHRIVER NAT’L INST. OF CHILD HEALTH & HUM. DEV. (Aug. 25, 2023), <https://www.nichd.nih.gov/health/topics/stillbirth/topicinfo> [https://perma.cc/E4CG-9F2P].

²⁵⁸ 410 ILL. COMP. STAT. 535/20.5 (2025).

²⁵⁹ MINN. STAT. § 290.0685 (2024); H.R. 447, 93d Leg., Reg. Sess. (Minn. 2023).

²⁶⁰ Note that other cases, pre-*Dobbs*, have also assessed the idea of fetal personhood in the context of abortion laws. See, e.g., *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1328 (N.D. Ga. 2020) (enjoining an abortion law defining personhood to include an “unborn child” on vagueness grounds); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506–07 (1989) (holding that a section of a Missouri abortion law stating that life begins at conception could be read as a preamble unripe for a substantive due process challenge). Note that after the *Webster* decision, the state supreme court read this preamble as a valid canon of interpretation. See *Connor v. Monkem Co.*, 898 S.W.2d 89, 92 (Mo. 1995) (en banc).

²⁶¹ See S.D. CODIFIED LAWS § 34-23A-10.1 (2021). This law remained in effect until the U.S. Supreme Court’s 2022 decision in *Dobbs* when South Dakota’s trigger law went into effect and banned all abortions except those necessary to save the life of the pregnant person. See S.D. CODIFIED LAWS § 22-17-5.1 (2025).

²⁶² See *Laws Affecting Reproductive Health and Rights: 2009 Trends at Midyear*, GUTTMACHER INST. (July 2009), <https://www.guttmacher.org/2009/07/laws-affecting-reproductive-health-and-rights-2009-trends-midyear> [https://perma.cc/RJ4G-PRMB].

More recently, in 2021, the state of Arizona passed Senate Bill 1457, which was signed into law by then Governor Doug Ducey. The bill banned certain abortions²⁶³ and conveyed personhood on fertilized eggs, embryos, and fetuses.²⁶⁴ This personhood provision required that all Arizona statutes be interpreted to give fetuses, embryos, and fertilized eggs the same rights as birthed and living people.²⁶⁵ Before the full Arizona legislature voted on the bill, anti-abortion legislators realized that the broad language would include IVF embryos, potentially meaning that every person involved in the IVF process would potentially be liable if IVF embryos were intentionally or accidentally destroyed, or used for research purposes.²⁶⁶ Although **there is no difference** between IVF embryos and other embryos, *see supra* section II.B, Arizona legislators added an amendment to the bill's language prohibiting any legal causes of action against persons who "perform" IVF.²⁶⁷ The law was immediately challenged in court²⁶⁸ and in July 2022, after the *Dobbs* decision was issued, the personhood provision was enjoined by the Arizona federal district court.²⁶⁹

In recent years, multiple states have considered bills that would recognize personhood at conception. During the 2021–22 session, the Ohio legislature considered House Bill 704, which would recognize personhood as beginning at the moment of conception and effectively ban all abortions.²⁷⁰ Introduced during the 2022–23 legislative session, Vermont's House Bill 174 sought to

²⁶³ One part of the bill, the Reason Ban, prohibited abortions when the physician knew that the termination was desired because of a genetic abnormality. *See* ARIZ. REV. STAT. ANN. §§ 13-3603.02, 36-2157 (2021). This ban also had a reporting requirement. *See* ARIZ. REV. STAT. ANN. §§ 36-2158(A)(2)(d), 36-2161(A)(25) (2021).

²⁶⁴ *See* ARIZ. REV. STAT. ANN. § 1-219 (2021).

²⁶⁵ *Id.*

²⁶⁶ S. JOURNAL, 55th Leg., 1st Reg. Sess. 378 (Ariz. 2021).

²⁶⁷ Maria Polletta, *Republican Lawmakers Revive Sweeping Anti-Abortion Proposal in Arizona*, ARIZ. REPUBLIC (Apr. 22, 2021, 11:54 AM), <https://www.azcentral.com/story/news/politics/legislature/2021/04/19/arizona-anti-abortion-bill-revived/7290633002> [<https://perma.cc/FJT3-9H69>].

²⁶⁸ *Isaacson v. Brnovich*, 563 F. Supp. 3d 1024, 1029 (D. Ariz. 2021). The plaintiffs sought a preliminary injunction prior to the law taking effect. *Id.* The court denied that request as to the personhood provision, which the plaintiffs appealed. *Id.* at 1047. Because of the procedural history of the case, the court looked at the case before it as a renewed motion for a preliminary injunction. *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1254–55 (D. Ariz. 2022).

²⁶⁹ *Isaacson*, 610 F. Supp. 3d at 1257. In finding the personhood rule of statutory construction unconstitutionally vague, the court held that when the "dust settle[d]" around the status of abortion in Arizona, even under the strictest of the possible laws contemplated, some abortions would be legal. *Id.* at 1254. If the personhood rule of statutory construction were to stand, abortion providers would likely be liable under some Arizona laws newly interpreted to accord an embryo the same rights as an individual, but they would have no way of knowing exactly what laws that would be. *Id.* at 1254–55.

²⁷⁰ *See* H.R. 704, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

confer personhood to all fetuses at 24 weeks' gestation.²⁷¹ During both the 2022–23 and 2023–24 legislative sessions, the Missouri legislature considered legislation which would give “unborn children . . . the same rights . . . as are secured . . . to any other human person.”²⁷² In fact, twenty-three states considered bills in the 2023–24 session that sought to restrict abortion health care rights by fetal personhood.²⁷³ One of these proposals, in West Virginia, would have established legal human life as beginning “at conception,” consisting of “two sexes, male and female,” as “provided in the Biblical Book of Genesis.”²⁷⁴ All of the above bills failed to pass.

As of this writing, states are already beginning to submit bills forwarding the legal fetal personhood agenda within abortion laws for the 2024–25 legislative session. As one example, eight South Carolina Republican representatives have refiled the “Prenatal Equal Protection Act,” a bill that failed to pass last session.²⁷⁵ Should this bill become law, it would mandate that fetuses at every stage of development, from fertilization to birth, be considered legal persons, thus completely eviscerating the narrow window of six weeks within which state residents are currently able to access abortion health care.²⁷⁶ In Missouri, a Republican representative has announced his intention to refile a legal fetal personhood bill in 2025 that failed in 2024, that would define a human being as beginning “at conception.”²⁷⁷ These latest

²⁷¹ See H.R. 174, 2023 Gen. Assemb., Reg. Sess. (Vt. 2023).

²⁷² See H.R. 167, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); H.R. 1616, 102d Gen. Sess., 2d Reg. Sess. (Mo. 2024). Note that while Missourians voted on, and approved, an amendment to overturn the state's abortion ban in November 2024, legal fetal personhood proponents sought to undercut voters by getting a fetal personhood law passed—and the state's Attorney General immediately stated that some abortion restrictions could still be enforced. Anna Sporre, *Missouri Voters Approve Amendment 3, Overturn State's Abortion Ban*, MO. INDEP. (Nov. 5, 2024, 10:37 PM), <https://missouriindependent.com/2024/11/05/missouri-voters-overturn-states-near-total-abortion-ban> [https://perma.cc/29NV-XEJT]; Anna Sporre, *Missouri AG Lays Out Abortion Restrictions He Argues Remain in Place Despite Amendment 3*, MO. INDEP. (Nov. 27, 2024, 9:28 AM), <https://missouriindependent.com/2024/11/27/missouri-attorney-general-andrew-bailey-amendment-3-enforcement> [https://perma.cc/5E33-UKHA]; Anna Claire Vollers, *Conservatives Push to Declare Fetuses as People, with Far-Reaching Consequences*, STATELINE (July 31, 2024, 5:00 AM), <https://stateline.org/2024/07/31/conservatives-push-to-declare-fetuses-as-people-with-far-reaching-consequences> [https://perma.cc/6BV4-92RZ].

²⁷³ See *State Legislation Tracker*, *supra* note 256.

²⁷⁴ H.R. 5041, 2024 Leg., Reg. Sess. (W. Va. 2024).

²⁷⁵ H.R. 3537, 126th Gen. Assemb., Reg. Sess. (S.C. 2025).

²⁷⁶ Under this proposed bill, persons getting abortions would be committing murder, which under the South Carolina criminal code, can evoke the death penalty. S.C. CODE ANN. § 16-3-20 (2010) (defining aggravating circumstances as including the “murder of a child eleven years of age or under”).

²⁷⁷ Scott McCauley, *Seitz to Pre-File Pro-Life Legislation, Other Bills for Upcoming Session*, LEGENDS 1063 (Nov. 8, 2024, 12:00 AM), <https://www.legends1063.fm/news/local-news/seitz-to-pre-file-pro-life-legislation-other-bills-for-upcoming-session> [https://perma.cc/6JQ7-HYSD].

filings are following the pattern familiar in fetal personhood creep—the continual push to normalize the concept of legal fetal personhood.

D. State Criminal Laws with Fetal Personhood Language

The most common way that states have placed fetal rights in direct contention with the rights of the pregnant individual are through state criminal laws. Often, as discussed in more detail in sections V.A.2 and V.B.2 *infra*, this involves holding the pregnant person themselves liable for fetal conditions or loss due to suspected or confirmed drug use while pregnant.²⁷⁸ Much of this does not require the enactment of any new laws or policies but rather the broad interpretation of current statutory language found in drug and child welfare laws and the choice by prosecutors to enforce them in new ways.²⁷⁹ Even more alarming is that some of the laws now used to prosecute pregnant people were originally passed under the guise of protecting them.²⁸⁰

Laws such as possession of a controlled substance,²⁸¹ distribution of drugs to a minor, corruption of a minor, and child abuse and neglect²⁸² are all examples of long-standing statutory schemes that the fetal personhood movement has weaponized in recent decades to punish pregnant people.²⁸³

²⁷⁸ Some of the earliest examples of this push to monitor and punish drug use by primarily low-income and BIPOC pregnant people is exemplified by the war on drugs and the so-called “crack babies” hysteria in the 1980s. See Odette Yousef, *How ‘Fetal Personhood’ in Alabama’s IVF Ruling Evolved from Fringe to Mainstream*, NPR (Mar. 14, 2024, 5:01 AM), <https://www.npr.org/2024/03/14/1238102768/fetal-personhood-alabama-ivf#:~:text=Odette%20Yousef-,How%20fetal%20personhood%20in%20Alabama's%20IVF%20ruling, evolved%20from%20fringe%20to%20mainstream&text=via%20Getty%20Images-,Alabama's%20state%20capitol%20in%20Montgomery%2C%20Ala,earlier%20this%20year.&text=The%20Alabama%20Supreme%20Court's%20decision,many%20who%20oppose%20abortion%20rights> [https://perma.cc/U2HK-QQJS].

²⁷⁹ See, e.g., AMNESTY INT’L, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 16 (2017), <https://www.amnesty.org/en/wp-content/uploads/2021/05/AMR5162032017ENGLISH.pdf> [https://perma.cc/V5UK-XEEJ] (noting that criminalization of pregnancy often occurs by using laws not specific to pregnancy against pregnant people).

²⁸⁰ Robert Baldwin III, *Losing a Pregnancy Could Land You in Jail in Post-Roe America*, NPR (July 3, 2022, 5:27 AM), <https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss> [https://perma.cc/4WWB-LPQ8].

²⁸¹ While fetal viability is still a factor considered in many of these scenarios, that is increasingly not the case. An example is found in Alabama, where a pregnant woman was charged with felony unlawful possession of a controlled substance in connection with refilling a long-standing prescription to manage chronic pain. FLEMING & ROTH, *supra* note 34, at 2 n.13.

²⁸² Currently, twenty-four states and the District of Columbia have laws treating substance use during pregnancy as child abuse. See Melissa Gira Grant, *The Growing Criminalization of Pregnancy*, THE NEW REPUBLIC (May 5, 2022), <https://newrepublic.com/article/166312/criminalization-abortion-stillbirths-miscarriages> [https://perma.cc/99T3-JZD3].

²⁸³ For a discussion of how various areas of criminal law have been weaponized against pregnant people in recent years see Cynthia Dailard & Elizabeth Nash, *State Responses to Substance*

In 1997, South Carolina became the first state to uphold a criminal child abuse conviction against a pregnant person for using cocaine during pregnancy.²⁸⁴ As usual, the efforts that led to this first conviction began years before; in South Carolina in 1989 a state hospital in Charleston joined forces with law enforcement officials to test pregnant people seeking medical care for cocaine exposure.²⁸⁵

Since then, these laws have proliferated, and many have been upheld. For example, Wisconsin's Unborn Child Protection Act²⁸⁶ goes as far as allowing pregnant people to be placed in civil detention if they are suspected of substance use under the guise of fetal protection.²⁸⁷ In 2013, the Alabama Supreme Court ruled that the state's chemical endangerment law, written to protect children from dangerous methamphetamine labs, could be used to prosecute pregnant people who use drugs during pregnancy.²⁸⁸ In doing so, the court held that the word "child" encompassed those in utero.²⁸⁹ Under this law, pregnant women who use drugs and deliver healthy babies face up to a decade in prison, and those who miscarry or have a stillbirth can be sentenced to ninety-nine years.²⁹⁰ And in 2014, Tennessee enacted a short-lived law that was the first to directly allow the prosecution of pregnant people for drug use during pregnancy.²⁹¹

Abuse Among Pregnant Women, 3 GUTTMACHER POL'Y REV. 3, 3-6 (2000), https://www.guttmacher.org/sites/default/files/article_files/gr030603.pdf [https://perma.cc/6UWA-7DJH].

²⁸⁴ *Whitner v. South Carolina*, 492 S.E.2d 777, 786 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998).

²⁸⁵ Emily Figdor & Lisa Kaeser, *Concerns Mount Over Punitive Approaches to Substance Abuse Among Pregnant Women*, 1 GUTTMACHER POL'Y REV. 3, 3-5 (1998), https://www.guttmacher.org/sites/default/files/article_files/gr010503.pdf [https://perma.cc/Y8G2-TGQC]. This policy was later found to be in violation of the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001).

²⁸⁶ See H.R. 463, 1997 Leg., Reg. Sess. (Wis. 1997).

²⁸⁷ Phoebe Petrovic, *Policing Pregnancy: Wisconsin's 'Fetal Protection' Law Forces Women Into Treatment or Jail*, PBS WIS. (Dec. 14, 2022), <https://pbswisconsin.org/news-item/policing-pregnancy-wisconsin-fetal-protection-law-forces-women-into-treatment-or-jail> [https://perma.cc/TT44-LLD7].

²⁸⁸ *Ex Parte Ankrom*, 152 So. 3d 397, 429 (Ala. 2013).

²⁸⁹ *Id.* at 414.

²⁹⁰ Amy Yurkanin, *She Lost Her Baby, Then Her Freedom*, THE MARSHALL PROJECT (Sept. 1, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/09/01/she-lost-her-baby-then-her-freedom> [https://perma.cc/Z9JS-EXYG].

²⁹¹ Although Tennessee's "Fetal Assault Law," expired in 2016, it has been reintroduced numerous times. See Caroline K. Darlington et al., *Revisiting the Fetal Assault Law in Tennessee: Implications and the Way Forward*, 22 POL'Y, POL., & NURSING PRAC. 93, 94 (2021). For a discussion of the Fetal Assault Law's impact on pregnant people from marginalized populations, see ORISHA A. BOWERS ET AL., SISTERREACH, TENNESSEE'S FETAL ASSAULT LAW: UNDERSTANDING ITS IMPACT ON MARGINALIZED WOMEN 4-5(2018), https://www.pregnancyjusticeus.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf [https://perma.cc/2BL8-J3BG].

Arrests and prosecutions under these laws revolve around the idea of the fetus needing the state to protect it against the actions of the pregnant person.²⁹² By granting the fetus legal rights separate from the pregnant person, this creates an adversarial relationship between the fetus and the pregnant person.²⁹³ In recent decades states have also expanded who can be a victim of a crime, modifying homicide laws to authorize charges to be brought against a person for causing the loss of a pregnancy.²⁹⁴ These “feticide laws” first appeared in Minnesota in 1986.²⁹⁵ The idea gained momentum, and over the years prosecutors began bringing feticide charges more frequently.²⁹⁶ As one example, in 2018, a pregnant Alabama woman named Marshae Jones was involved in a physical fight, suffered a gunshot wound and miscarried. Although the shooter was initially charged, after a grand jury declined to indict them, Jones was charged with manslaughter for initiating the fight and not properly protecting her pregnancy.²⁹⁷ Although the case was dismissed, charges against pregnant people continued, and Indiana became the first state to convict a woman of feticide.²⁹⁸ Feticide laws have even been used against pregnant people who attempt suicide, even though all fifty states have stopped criminalizing suicide.²⁹⁹ This highlights the very real risk that when legal fetal personhood exists, pregnant people with mental health challenges become criminals instead of patients.³⁰⁰ Even when not used, the very existence of state feticide laws has led health care

²⁹² See *infra* Sections V.A–B for greater details regarding the broad implications of enforcement of these laws and the range of choices that they impact.

²⁹³ Instances of enforcement of criminal laws against pregnant women are particularly prevalent against low-income women of color. Of the over 1,000 instances where pregnant people were detained because of allegations that they harmed their fetus, over 70% were low income and almost 60% were people of color. See Paltrow & Flavin, *supra* note 53, at 310.

²⁹⁴ *State Homicide Laws That Recognize Unborn Victims*, NAT’L RIGHT TO LIFE (Apr. 2, 2018), <https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302> [<https://perma.cc/83TP-4D8Q>].

²⁹⁵ MINN. STAT. § 609.2663 (2024).

²⁹⁶ See *infra* Sections V.A.3, V.B.3 for specific discussions of this issue in Idaho and in Texas.

²⁹⁷ Sarah Mervosh, *Alabama Woman Who Was Shot While Pregnant Is Charged in Fetus’s Death*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/pregnant-woman-shot-marshae-jones.html> (on file with authors); *Alabama v. Jones*, No. CC19-719 (Ala. Cir. Ct. dismissed July 3, 2019).

²⁹⁸ *A Woman’s Rights: Part 2: The Feticide Playbook, Explained*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-murder-charge.html> (on file with authors).

²⁹⁹ Most notable is the now infamous case of Bei Bei Shuai, who was initially charged with feticide after attempting suicide. Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 848 (2014).

³⁰⁰ *Human Rights Crisis: Abortion in the United States After Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023, 12:01 AM), <https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs> [<https://perma.cc/MR9H-DDBE>] (referencing Section II.A, which discusses the impact of abortion restrictions on women’s bodily and decisional autonomy).

professionals to report pregnant people to authorities when they are merely processing their feelings within the confines of a supposedly trusted relationship.³⁰¹ Feticide laws are currently on the books in thirty-nine states.³⁰²

These criminal laws continue to expand, both in their definitions and in whom they target. Some seek to further control not only pregnant people, but the medical professionals that care for them.³⁰³ One example is a proposed 2019 Ohio bill that defined a fertilized egg as an “unborn child” and sought to restrict medical care provided in instances of ectopic pregnancies. The law proposed criminal charges, including murder, be brought against any physician who performed an abortion on a person experiencing an ectopic pregnancy if they did not first attempt to “reimplant an ectopic pregnancy into the woman’s uterus”—a medical impossibility.³⁰⁴ Other efforts seek to introduce new criminal laws with definitions more overtly addressing fetuses as persons.³⁰⁵

E. Legal Fetal Personhood in Other State Laws

In an overall effort to advance the legal fetal personhood agenda, states have also been incorporating fetal personhood language into statutes outside

³⁰¹ See, e.g., Amie Newman, *Pregnant? Don't Fall Down the Stairs*, REWIRE NEWS GRP. (Feb. 15, 2010, 4:07 PM), <https://rewirenewsgroup.com/2010/02/15/pregnant-dont-fall-down-stairs> [<https://perma.cc/X5VX-KU7H>] (discussing the case of an Iowa woman who shared her pregnancy fears with medical staff who then reported her to the police, leading to her subsequent arrest).

³⁰² See *State Legislation Tracker*, *supra* note 256 (tracking proposed legislation related to regulating pregnancy); Lori K. Mans, Note, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights?*, 15 U. FLA. J.L. & PUB. POL'Y 295, 300–03 (2003) (laying out the development of feticide laws in U.S. states).

³⁰³ See, e.g., Sarah McCammon & Cary Aspinwall, *4 States Are Using Fetal Personhood to put Women Behind Bars*, NPR (Aug. 11, 2023), <https://www.npr.org/2023/08/11/1193393737/4-states-are-using-fetal-personhood-to-put-women-behind-bars> [<https://perma.cc/LXN6-5393>] (discussing how four states, Alabama, Mississippi, Oklahoma and South Carolina, are using personal medical information to prosecute pregnant people).

³⁰⁴ Jessica Glenza, *Ohio Bill Orders Doctors to 'Reimplant Ectopic Pregnancy' or Face 'Abortion Murder' Charges*, THE GUARDIAN (Nov. 29, 2019, 3:54 AM), <https://www.theguardian.com/us-news/2019/nov/29/ohio-extreme-abortion-bill-reimplant-ectopic-pregnancy> [<https://perma.cc/JF4V-HNFF>].

³⁰⁵ As three examples, Alaska legislators introduced a bill in 2024 defining a human entity as one “that has the moral right of self-determination.” H.R. 107, 33d Leg., 1st Sess. (Alaska 2023); In Colorado, lawmakers introduced a bill which would have defined a human person for purposes of the state criminal code as existing “at any stage of development, from fertilization at the fusion of a human spermatozoon with a human ovum.” H.R. 24-1224, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2024); In South Carolina, legislators attempted to pass a bill that would have redefined a person in various sections of the state criminal code to include “an unborn child at any stage of development.” H.R. 3549, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).

of abortion restrictions and criminal law.³⁰⁶ This includes having fetuses qualify for tax exemptions, count on census records, and generate child support payments.³⁰⁷ These additional attempts further normalize the language of legal fetal personhood and blend the line between the value of a fetus and the rights of a fetus.³⁰⁸

For example, a 2019 Georgia law, the Living Infants Fairness and Equality Act (the “LIFE Act”), has been interpreted to mean that fetuses, as early as six weeks gestation, qualify for dependent personal tax exemptions.³⁰⁹ It also allows state officials to count fetuses towards the state’s official population count.³¹⁰ And it allows for child support payments to fetuses, as they are now defined as children.³¹¹ Several other states have recently introduced variations of bills that would also provide child support payments to fetuses as children. In Kentucky, a 2024 legislative proposal would have allowed actions for child support to be filed “any time following conception.”³¹² In Arizona, one proposed bill would have allowed a woman to receive child support backdated to the date of her positive pregnancy test,³¹³ and another proposal would have paid rape survivors to carry resulting

³⁰⁶ See, e.g., Lydia Wheeler, *Fetal Rights Laws’ Impact Extends from Abortion to HOV Lanes*, BLOOMBERG L. (July 27, 2022, 3:45 AM), <https://news.bloomberglaw.com/us-law-week/fetal-rights-laws-impact-extends-from-abortion-to-hov-lanes> (on file with authors).

³⁰⁷ See Bridget J. Crawford et al., *Unintended Consequences of Fetal Personhood Statutes: Examples from Tax, Trusts, and Estates*, 25 GEO. J. GENDER & L. 1159, 1169 n.62 (2024) (warning of the dangers of the increased incursion of fetal personhood language in tax, trust, and estate law, and proposing rules of construction to manage their inevitable progression).

³⁰⁸ We note that after the *LePage* decision in Alabama, discussed more fully in Section II.B, *supra*, some of these proposals were pulled back because of the fear that they would compromise the ability of IVF clinics to stay open. One example was a 2024 Florida bill, which would have established civil liability for the wrongful death of “unborn children.” Civil Liability for the Wrongful Death of an Unborn Child, S. 476, 2024 Leg., Reg. Sess. (Fla. 2024); see also *Florida Lawmaker Pulls Bill on Wrongful Death of Unborn Children After Alabama IVF Ruling*, AP NEWS (Feb. 27, 2024, 2:24 PM), <https://apnews.com/article/abortion-ivf-florida-government-5dd83218142757e1dbbd7e447fa37f32> (on file with authors) (“A Florida bill to allow people to file wrongful death lawsuits over the death of a fetus is being shelved because of the political fallout from an Alabama Supreme Court decision that frozen embryos are legally protected children.”).

³⁰⁹ The LIFE Act was initially ruled unconstitutional in 2020, but that ruling was reversed in 2022 following the decision in *Dobbs*. See Press Release, Ga. Dep’t of Revenue, Guidance Related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act (Aug. 1, 2022), <https://dor.georgia.gov/press-releases/2022-08-01/guidance-related-house-bill-481-living-infants-and-fairness-equality-life> [<https://perma.cc/6DHQ-5G5K>].

³¹⁰ *Id.*

³¹¹ Living Infants and Fairness Equality (LIFE) Act, H.R. 481, 2019 Gen. Assemb., Reg. Sess. (Ga. 2019).

³¹² H.R. 243, 2024 Gen. Assemb., Reg. Sess. (Ky. 2024).

³¹³ H.R. 2502, 56th Leg., 1st Reg. Sess. (Ariz. 2023). The bill made it through the state House. Howard Fischer, *Arizona House OKs Mandating Child Support from Date of Conception*, ARIZ. DAILY

pregnancies to term.³¹⁴ In Alabama, the proposal would have mandated that any child-support orders entered within a year of birth be retroactively applied to nine months prior to the birth.³¹⁵ Kansas lawmakers passed a proposal to extend child support to fetuses “from fertilization,” but the bill was vetoed by the Governor.³¹⁶ In Mississippi, the effort, which died in committee, was framed at fathers paying for a child “in the mother’s womb.”³¹⁷ Missouri’s failed effort would have had child support payments begin starting at “six weeks from conception” as “determined by the mother’s physician.”³¹⁸ The issue of a pregnancy counting as a ‘person’ for purposes of car pool lanes has also been bubbling up.³¹⁹

Most recently, proponents of legal fetal personhood have also begun trying to insert language describing an embryo or fetus as an “unborn human being” into voters’ pamphlets. For example, in August 2024 the Arizona state supreme court held that Republican opponents to a proposed state constitutional amendment guaranteeing abortion, the Arizona Abortion Access Act, could use personhood language in a pamphlet that would be sent

STAR (Apr. 17, 2024), https://tucson.com/news/local/government-politics/arizona-house-oks-mandating-child-support-from-date-of-conception/article_214dc8a0-c1ea-11ed-88ae-1b8511eb9a39.html (on file with authors).

³¹⁴ H.R. 2500, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

³¹⁵ S. 237, 2024 Leg., Reg. Sess. (Ala. 2024). Note that some Alabama lawmakers voted against the measure based on the amount of money the law would cost fathers. Ralph Chapoco, *Alabama House Judiciary Committee Rejects Bill Requiring in Utero Child Support*, ALA. REFLECTOR (Apr. 25, 2024, 6:59 AM), <https://alabamareflector.com/2024/04/25/alabama-house-judiciary-committee-rejects-bill-requiring-in-utero-child-support> [https://perma.cc/K6P7-HMGP].

³¹⁶ S. 425, 2024 Leg., Reg. Sess. (Kan. 2024); John Hanna, *Kansas’ Governor Vetoes a Bill for Extending Child Support to Fetuses*, AP NEWS (May 10, 2024, 4:01 PM), <https://apnews.com/article/abortion-kansas-child-support-fetuses-10aaec4ed3abcfee921d2d7391383f> (on file with authors).

³¹⁷ H.R. 318, 2024 Leg., Reg. Sess. (Miss. 2024).

³¹⁸ H.R. 2285, 102d Gen. Assemb., 2d Reg. Sess. (Mo. 2024).

³¹⁹ See *infra* Section V.B.5 for a discussion of how this issue has come up in Texas. We note here that the issue has also come up in Arizona and in Utah. Megan Pickett, *Bill Allowing Pregnant Women to Use HOV Lane Rejected in Senate*, ABC4 UTAH (Feb. 13, 2023, 5:34 PM), <https://www.abc4.com/news/politics/pregnant-women-and-hov-lane-bill-passes-house-moves-to-senate/#:~:text=It%20was%20rejected%20in%20a,by%20a%20Utah%20Senate%20committee.&text=It%20also%20states%20that%2C%20if,the%20claim%20can%20be%20disputed> (on file with authors); H.R. 256, 2023 Leg., Gen. Sess. (Utah 2023); Kit Silavong & Alexis Dominguez, *Arizona House Bill Would Allow Pregnant Drivers to Use HOV Lane*, ARIZ.’S FAM. (Feb. 1, 2023, 7:31 PM), <https://www.azfamily.com/2023/02/01/arizona-house-bill-could-allow-pregnant-drivers-use-hov-lane> (on file with authors); H.R. 2417, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

to all voters in the state.³²⁰ In its ruling, the court held that the phrase "unborn human being" complied with the state's impartiality requirement.³²¹

F. States That Have Implemented Legal Fetal Personhood

As of publication, nineteen states have some form of fetal personhood provisions in their state laws.³²² Two states, Alabama and Arkansas, have succeeded in passing constitutional amendments to expand the definition of "child" to include fetuses from the point of conception.³²³ Numerous states have embedded a legal fetal personhood provision within their abortion laws, framing it as a general rule of construction and general statement of state policy.³²⁴ For example, Pennsylvania's statute provides that "[i]n every relevant . . . proceeding . . . the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws."³²⁵ Similar to the language used by Pennsylvania, four states have fetal personhood provisions in their general rules of statutory construction, requiring all laws of the state to be interpreted and construed to recognize

³²⁰ Sejal Govindarao, *Fetus Can Be Referred to as 'Unborn Human Being' in Arizona Abortion Measure Voters Pamphlet*, AP NEWS (Aug. 14, 2024, 7:26 PM), <https://apnews.com/article/arizona-abortion-rights-ballot-measure-b0ea37c92692533da109fd74a07b25f7> (on file with authors).

³²¹ Kanishka Singh, *Arizona Supreme Court Says Fetus Can Be Called 'Unborn Human' in Voter Pamphlet*, REUTERS (Aug. 15, 2024, 12:05 PM), <https://www.reuters.com/legal/arizona-supreme-court-says-fetus-can-be-called-unborn-human-voter-pamphlet-2024-08-14> (on file with authors).

³²² Alabama (ALA. CONST. art. I, § 36.06), Alaska (ALASKA STAT. § 11.81.900 (2024)), Arizona (ARIZ. REV. STAT. ANN. § 1-219 (2021)), Arkansas (ARK. CONST. amend. LXVIII), Georgia (GA. CODE § 1-2-1 (2024)), Kansas (KAN. STAT. ANN. § 65-6732 (2021)), Kentucky (KY. REV. STAT. ANN. § 500.080 (West 2024); Kentucky v. Morris, 142 S.W.3d 654, 660 (Ky. 2004) (holding that "human being" in penal code definitions includes a viable fetus)), Louisiana (LA. STAT. ANN. § 14:2 (2024)), Missouri (MO. REV. STAT. § 1.205 (2024)), Montana (MONT. CODE ANN. § 50-20-102 (2024)), Ohio (OHIO REV. CODE ANN. § 2901.01 (LexisNexis 2024)), Oklahoma (Oklahoma v. Green, 474 P.3d 886, 891 (Okla. Crim. App. 2020) (expanding the definition of "child" in state criminal neglect statute to include a fetus)), Pennsylvania (18 PA. CONS. STAT. § 3202 (2024)), South Carolina (Whitner v. South Carolina, 492 S.E.2d 777, 779 (S.C. 1997), cert. denied, 118 S. Ct. 1857 (1998) (expanding the definition of "child" in child welfare statute to include a fetus)), South Dakota (S.D. CODIFIED LAWS § 22-1-2 (2022)), Tennessee (TENN. CODE ANN. § 39-15-214 (2024)), Texas (TEX. PENAL CODE ANN. § 1.07 (West 2023)), Utah (UTAH CODE ANN. § 76-7-301.1 (LexisNexis 2024)), and Wyoming (WYO. STAT. ANN. § 6-1-104 (2024)).

³²³ See ALA. CONST. art. I, § 36.06; ARK. CONST. amend. LXVIII.

³²⁴ These include, e.g., Kentucky (KY. REV. STAT. ANN. § 311.720 (West 2017); but see Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1043 (W.D. Ky. 1998), *aff'd*, 224 F.3d 576 (6th Cir. 2000) (relying on Roe v. Wade, 410 U.S. 113 (1973) to enjoin § 311.720)), Montana (MONT. CODE ANN. § 50-20-102 (2024)), Pennsylvania (18 PA. CONS. STAT. § 3202 (2024)), Tennessee (TENN. CODE ANN. § 39-15-214 (2024)), and Utah (UTAH CODE ANN. § 76-7-301.1 (LexisNexis 2024)).

³²⁵ 18 PA. CONS. STAT. § 3202(c) (2024).

legal fetal personhood from conception.³²⁶ With respect to states' criminal codes, five states have successfully embedded legal fetal personhood in their criminal codes by defining "person" throughout their criminal codes to include a fetus.³²⁷ Two additional states define "unborn child" throughout their criminal codes to begin at any stage of development, conditioning it only on being "carried in a womb."³²⁸

In sum, legal fetal personhood has been steadily encroaching on the rights of pregnant people, and people of reproductive age, in states across the nation. While this has occurred most obviously in abortion and criminal law, from the examples above we can see that legal fetal personhood has made inroads into many other areas of state law as well. In the section below, we now turn to two specific examples.

V. THE STRATEGY OF CREEP

As explained, the establishment of legal fetal personhood would mean a coinciding loss of personhood for not only the pregnant person, but for all pregnant-capable persons. Understanding that this is unpalatable for most people, proponents of legal fetal personhood have begun what we term "fetal personhood creep," the slow advancement of legal fetal personhood with the simultaneous slow erosion of women's autonomy. As demonstrated below, this strategy follows a predictable pattern.

First, proponents work to normalize language referring to a fetus as an "unborn child." The state includes this language in abortion health care bans. Once these "prerequisites" have occurred, the state then begins creeping more clearly towards legal fetal personhood. They start by introducing and passing laws alleged to protect pregnant people, followed by laws holding pregnant people in traditionally vulnerable communities liable for pregnancy behaviors, followed by official pronouncements of the worth and value of fetal loss, and culminating in attempts to directly establish legal fetal personhood.³²⁹ Along the way there are increasingly strict laws attempting to fully control the reproductive behavior of young adults. These incursions,

³²⁶ Arizona (ARIZ. REV. STAT. ANN. § 1-219 (2021)), Georgia (GA. CODE ANN. § 1-2-1 (2024)), Kansas (KAN. STAT. ANN. § 65-6732 (2021)), and Missouri (MO. REV. STAT. § 1.205 (2024)).

³²⁷ Kentucky (Kentucky v. Morris, 142 S.W.3d 654, 660 (Ky. 2004); KY. REV. STAT. ANN. § 500.080 (West 2024)), Louisiana (LA. STAT. ANN. § 14:2 (2024)), Ohio (OHIO REV. CODE ANN. § 2901.01 (LexisNexis 2023)), South Dakota (S.D. CODIFIED LAWS § 22-1-2 (2022)), and Texas (TEX. PENAL CODE ANN. § 1.07 (West 2023)).

³²⁸ Alaska (ALASKA STAT. ANN. § 11.81.900 (2024)) and Wyoming (WYO. STAT. ANN. § 6-1-104 (2024)). Separately, we also note that Wyoming's 2023 law, known as the "Life is a Human Right Act," is enjoined and that litigation in the case is ongoing. *See* Life is a Human Right Act, WYO. STAT. ANN. §§ 35-6-120–139 (West 2023); Johnson v. Wyoming, No. 18853, 2023 WL 2711603, at *2 (Wyo. Dist. Ct. Mar. 22, 2023).

³²⁹ Naturally, not every state follows the exact same, simultaneous linear pattern, and sometimes efforts to establish legal fetal personhood overlap.

clothed in innocuous language and starting from the margins, are designed to normalize the conversation: that it is allowable, and even appropriate, to police the behavior of pregnant people. Once that conversation is normalized, it is a smaller step to the imposition of legal fetal personhood overall.

To illustrate fetal personhood creep, we provide two examples from the states: Idaho and Texas. Both states have extremist anti-abortion bans,³³⁰ both have been on the forefront of the push to prevent EMTALA covered ERs from providing medically necessary abortion care,³³¹ and both provide examples of how advocates of legal fetal personhood have made continual inroads in their respective states. For each, we explain the infiltration of legal fetal personhood in the laws, legislatures and culture of the state.

A. Idaho

Idaho exemplifies fetal personhood creep. The state does not have a constitutional or statutory blanket provision stating that a fetus has full legal rights; however, it has been creeping towards *de facto* legal fetal personhood for years.³³² Idaho began using overt fetal personhood language in state

³³⁰ *Map: Where Abortion Is Banned, Restricted, Protected Across the US*, ABC7 CHI. (May 31, 2023), <https://abc7chicago.com/abortion-ban-map-where-banned-restricted-protected/13299140> [<https://perma.cc/2CMD-HG9C>]; Alejandra O'Connell-Domenech, *Here Are Five States With the Most Restrictive Abortion Laws in the Country*, THE HILL (May 5, 2022), <https://thehill.com/changing-america/respect/equality/3478896-here-are-five-states-with-the-most-restrictive-abortion-laws-in-the-country> (on file with authors).

³³¹ Heipt, *supra* note 61, at 389–94.

³³² On the way, Idaho has become one of the most extreme anti-abortion health care states in the nation and was the first state to pass a law attempting to restrict the right to travel between states to obtain abortion health care. Dubbed “Abortion Trafficking,” the law makes it a crime, punishable by 2 to 5 years in prison, for any person to “recruit, harbor or transport” a pregnant minor in procuring an abortion if they have the “intent” to conceal that action from the minor’s parent. IDAHO CODE ANN. § 18-623 (West 2023). The law was challenged in court by Legal Voice, The Lawyering Project, and Stoel Rives and is partially on hold as the litigation proceeds. *Matsumoto v. Labrador*, 122 F.4th 787, 816 (9th Cir. 2024); *see also* Paul S. Berman et al., *Conflicts of Law and the Abortion War Between the States*, 172 U. Pa. L. Rev. 399, 472–76 (2024) (discussing the lawsuit filed by the U.S. Department of Justice, seeking “declaratory judgment that Idaho’s abortion ban was preempted by EMTALA ‘in situations where an abortion is necessary stabilizing treatment for an emergency medical condition.’”) (footnote omitted). As has happened before, Idaho’s “lead” was a model for other states, and the following year several states introduced similar laws, with Tennessee becoming the second state in the country to create and then ban the new crime of abortion trafficking. 2024 Tenn. Pub. Acts 1032; S. 1971, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024). There are two lawsuits challenging the Tennessee law: *Complaint, Welty v. Dunaway*, No. 24-768, 2024 WL 3245612, at *1 (M.D. Tenn. June 28, 2024) (No. 24-768), 2024 WL 3106418; *Complaint, SisterReach, Inc. v. Skrmetti*, No. 24-2446 (M.D. Tenn. filed June 27, 2024). We also note that Alabama, Louisiana, Maine, Mississippi and Oklahoma all tried, and failed, to pass similar ‘Idaho style’ abortion travel bans in 2024, and New Hampshire has already filed a copycat bill for the 2025 legislative session. *See, e.g.*, Colin Booth, *NH Republicans Backtrack on Election Promises, Propose New Abortion Restrictions*, GRANITE POST (Dec. 11, 2024), <https://granitepostnews.com/2024/>

statutes in 1973, the same year that *Roe v. Wade* was decided, with the introduction of Idaho Code §§ 18-604 to 18-610.³³³ Fetal personhood creep has continued since then. As noted above, this began in two ways. The trend first began with the normalization of language that changes “fetus” to “unborn child,” which Idaho legal fetal personhood proponents have engaged in for fifty-one years.³³⁴ Although Idaho was a frontrunner in this area, the tactic is in line with the actions of other opponents to abortion health care.³³⁵ Secondly, Idaho continued including fetal personhood language in abortion health care restrictions.³³⁶ After that, the creep towards full legal fetal personhood continued, via considering pregnancy loss to be the loss of a child, restricting the reproductive health care rights of young

12/11/nh-republicans-backtrack-on-election-promises-propose-new-abortion-restrictions [https://perma.cc/5QR6-LHQ2]. Idaho has also been “first in the nation” in restricting other civil and social rights for its citizens. In 2020, Idaho became the first state in the nation to pass a law banning transgender girls from participating in sports. That law was challenged by Legal Voice, the ACLU and Cooley, LLP and the case remains ongoing. *Hecox v. Little*, 479 F. Supp. 3d 930, 988–89 (D. Idaho 2020). The state was one of the first two to ban teaching critical race theory. Char Adams et al., *Map: See Which States Have Passed Critical Race Theory Bills*, NBC NEWS (June 17, 2021, 1:54 PM), <https://www.nbcnews.com/news/nbcblk/map-see-which-states-have-passed-critical-race-theory-bills-n1271215> [https://perma.cc/4RJ1-XZW2]. And Idaho was a leader in the movement to force libraries to remove books based on content they deemed harmful to children. Audrey Dutton, *What Idaho's Republican Primary Tells Us About America's Culture Wars*, PROPUBLICA (June 4, 2024, 5:00 AM), <https://www.propublica.org/article/idaho-republican-primary-election-culture-wars> [https://perma.cc/HYG6-KC4M].

³³³ This statutory scheme covers the crimes and punishments for abortion in the state, including a definitions section that equates “fetus” with “unborn child” for purposes of the chapter as a whole. IDAHO CODE §§ 18-604–610 (2024).

³³⁴ As just a few examples, Republican Senator Todd Lakey, who would go on to sponsor the Abortion Travel Ban discussed *infra* Section V.A.4, has long used fetal personhood language in legislative hearings. See, e.g., *Relating to Abortion: Hearing on S 1385 Before the S. Comm. on State Affs.*, 65th Leg., 2d Reg. Sess. 4 (Idaho 2020), https://iso.legislature.idaho.gov/MediaPub/2020/AgendaMinutes/200310_ssta_0800AM-Minutes.pdf [https://perma.cc/LVU8-P7N8] (using “unborn child” to refer to fetuses on the legislative floor). Republican Kevin Andrus equated individuals “pre” and “post” birth in discussing a bill designed to discourage abortion health care when fetuses are diagnosed with Down’s Syndrome. See *Abortion - Down Syndrome: Hearing on H.R. 302 Before the H. Comm. on State Affs.*, 66th Leg., 1st Reg. Sess. 1 (Idaho 2021), https://iso.legislature.idaho.gov/MediaPub/2021/AgendaMinutes/210312_hsta_0900AM-Minutes.pdf [https://perma.cc/W576-6Z8H].

³³⁵ See generally CLAIRE SHENNAN, PREGNANCY JUST., WHO DO FETAL HOMICIDE LAWS PROTECT? AN ANALYSIS FOR A POST-ROE AMERICA (Cindy Soohoo ed., 2022), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-homicide-brief-with-appendix-UPDATED.pdf> [https://perma.cc/E44R-58WU] (discussing how opposition to abortion health care advocates have used real-life tragedies to normalize the concept of fetal personhood); see also Margaux Bouaziz, *Abortion and Democracy or How the Authority to Regulate Abortion Has Not Been (and Will Not Be) Returned to the People and Their Elected Representatives*, 22 IDEAS, Oct. 1, 2023 at 8 n.1, <https://journals.openedition.org/ideas/16614#quotation> [https://perma.cc/7K25-43NG] (noting that Trump appointees embrace fetal personhood); Cynthia Soohoo, *An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81 (2023) (discussing current claims for prenatal or fetal personhood after *Dobbs*).

³³⁶ See IDAHO CODE §§ 18-8801, 18-604, 18-502, 39-9303 (2024).

adults, holding pregnant people responsible for real or perceived fetal dangers, and passing laws ostensibly aimed at protecting pregnant people but in reality beginning the process of prioritizing the pregnancy over the pregnant person.³³⁷ Once the conversation around fetal rights in these circumstances is normalized, it paves the way for bolder steps.³³⁸ In this section, we explain how each step in the process occurred in Idaho.

1. Laws to ‘Protect the Pregnant Person’

States inching their way toward legal fetal personhood generally begin by passing laws that they claim are for the protection of the pregnant person, generally by increasing criminal law penalties if a crime is committed against a pregnant person or if in the commission of a crime a person suffers a pregnancy loss.³³⁹ Because criminal harm to a pregnancy is a harm to the pregnant person, legislatures like Idaho’s could have decided to increase the penalties for crimes perpetrated against a pregnant person because of their pregnant status. Instead, they chose to keep the penalties pertaining to the pregnant person as they were and then add a second, separate victim—the fetus. When these crimes result in pregnancy loss they are generally called “fetal homicide” or “feticide” laws.³⁴⁰ Because these laws are the “entry point” to legal fetal personhood, they do not always use the language of personhood, such as “unborn child” in their title.³⁴¹

Idaho amended their murder and manslaughter statutes to include fetal homicide in 2002.³⁴² As happened at the federal level after the murder of Laci

³³⁷ Along the way, Idaho advocates for reproductive justice and personal autonomy have fought back against these encroachments and have achieved some victories. See, e.g., *infra* note 383.

³³⁸ Frances A. McMorris, *Courts are Giving New Rights to Fetuses*, WALL ST. J., Sept. 4, 1996, at B1, B6.

³³⁹ Crimes against women, pregnant women in particular, and most clearly Black and BIPOC pregnant women, have often been the justification for the laws discussed in this section. These acts of violence are, of course, better combatted by addressing the root causes of gender-based violence and not by laws imposing legal fetal personhood in after the fact punishments. See generally Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991–1999*, 95 AM. J. PUB. HEALTH 471 (2005) (discussing the prevalence of homicide among pregnant and post-partum women).

³⁴⁰ These laws stand in contrast to the common law “born alive” rule which generally held that there had to be a born person for there to be any level of criminal homicide. Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43, 45–49 (2008) (summarizing the born alive rule and its adoption in the United States).

³⁴¹ At last count, over thirty U.S. states have fetal homicide laws with the onset of applicability generally sometime between conception and viability. Chancey B. Herbolzheimer, *Fetal Homicide Laws: The Policing of Women’s Bodies*, 8 INQUIRIES J. 1, 1 (2016).

³⁴² The first U.S. state to pass a feticide law was Minnesota, in 1986. Susan Hatters Friedman et al., *Evolving Abortion Law and Forensic Psychiatry*, 50 J. AM. ACAD. PSYCHIATRY & L. 494, 497 (2022); see also *Whitner v. South Carolina*, 492 S.E.2d 777, 780 (S.C. 1997), *cert. denied*, 118 S.

Peterson, *see infra*, the Idaho changes were also motivated by a singular violent act that garnered significant press attention (in this case the beating of a pregnant teenager that resulted in the loss of her pregnancy) and was also titled after the name the girl was planning on giving her baby.³⁴³ The amendment was forwarded by Republican Harold Bunderson in the Senate and Republican Celia Gould in the House.³⁴⁴ The stated purpose for the amendment was a realization that “misdemeanor battery was the likely maximum charge that could be made against a man in Idaho, who threw a pregnant woman to the ground and brutally and repeatedly kicked her in the stomach, causing the death of her unborn child.”³⁴⁵ Specifically, the amendment added the words, “including, but not limited to, a human embryo or fetus,” immediately after each mention of the words “human being.”³⁴⁶ A new chapter was also added, which defined embryo and fetus as “any human in utero” for all of these amendments.³⁴⁷ The law was signed by then Governor Dirk Kempthorne and took effect July 1, 2002.³⁴⁸ In Idaho, in contrast to many other states, for a defendant to be guilty of murder, manslaughter or aggravated assault *of a fetus* it is irrelevant how far along the pregnancy is or if the defendant was aware of the pregnancy.³⁴⁹

Changing the definition of “human being” to include embryos or fetuses in this context built on an earlier Idaho court case, *Volk v. Baldaño*, which held that a cause of action could be brought for the death of a viable fetus

Ct. 1857 (1998) (discussing how the South Carolina Supreme Court had recognized the crime of feticide).

³⁴³ *Idaho House OKs Fetal Protection Bill*, MIDLAND REP.-TELEGRAM (Mar. 12, 2002), <https://www.mrt.com/news/article/Idaho-House-OKs-Fetal-Protection-Bill-7809839.php> (on file with authors) (explaining the impetus for “Noah’s Law”).

³⁴⁴ Sen. Bunderson was against abortion health care in almost all circumstances, *see Harold Bunderson’s Issue Positions (Political Courage Test)*, VOTE SMART (2021), <https://justfacts.vote-smart.org/candidate/political-courage-test/2902/harold-bunderson> [https://perma.cc/QQ4P-WAQM]; *see also* Matthew Preusch, *National Briefing | Northwest: Idaho: Abortion Debate*, N.Y. TIMES, Feb. 27, 2002, at A19, <https://www.nytimes.com/2002/02/27/us/national-briefing-northwest-idaho-abortion-debate.html> (on file with authors) (noting that the Bunderson bill was advanced to the House along with a competing bill).

³⁴⁵ STATEMENT OF PURPOSE, S. 1344, 56th Leg., 2d Reg. Sess. at 1 (Idaho 2002).

³⁴⁶ S. 1344, 56th Leg., 2d Reg. Sess. (Idaho 2002). The chapter on aggravated 16.02 was also amended to include any batteries committed, “[u]pon the person of a pregnant female, [that] causes great bodily harm, permanent disability or permanent disfigurement to an ‘embryo’ or ‘fetus.’” *Id.*

³⁴⁷ *Id.*; Idaho’s broad definition of fetus/embryo for its fetal homicide law stands in contrast to those in other states which require fetal viability for their feticide statutes. Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 79 (2009).

³⁴⁸ ‘Noah’s Law’ Principals Not Invited, THE LEWISTON TRIB. (Apr. 3, 2002), <https://www.lmtribune.com/northwest/noahs-law-principals-not-invited-e2f11276> (on file with authors) (noting that the law gives a “fetus” the same rights as a “person”).

³⁴⁹ In some other states, the defendant’s awareness of the pregnancy is an element of the crime. *See, e.g.*, 720 ILL. COMP. STAT. 5/9-1.2 (2024).

under Idaho's wrongful death statutes.³⁵⁰ As the dissent in *Volk* recognized, the Court's holding contained a potential Pandora's Box of consequences, as the "decision open[ed] the door for suits by the husband against the wife when she negligently causes herself to miscarry, whether in an automobile wreck or otherwise."³⁵¹ When the Idaho legislature amended their wrongful death statutes twenty years after the *Volk* decision, they did not address the case, and their silence was later used in support of an unsuccessful argument that the amendments covered all fetuses, at all stages, regardless of viability.³⁵²

Like many of the feticide laws passed across the country, advocates in Idaho framed their laws as "protecting women," "combating domestic violence," and "acknowledging loss."³⁵³ But these laws have not curbed gender violence.³⁵⁴ They have only reframed personal loss into a legal status argument in a long-term effort to end reproductive health care choices. An example is found in Idaho's laws on domestic relations. Within this code section, Idaho law holds that, "[a] child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests, in the event of its subsequent birth."³⁵⁵ Despite rhetoric suggesting that these allusions to fetal personhood within the domestic relations context are also part of a plan to protect women from domestic violence, the evidence shows that people prosecuted for "pregnancy crimes" are often those who first came to the attention of law enforcement because of violent relationships and that their abusers are often not charged or are charged with lessor crimes.³⁵⁶

It is clear that Idaho's legal fetal personhood laws forwarded under the guise of "protection" are thinly veiled attempts to downgrade the status of pregnant people and leave them vulnerable to prosecution themselves.

³⁵⁰ *Volk v. Baldazo*, 651 P.2d 11, 15 (Idaho 1982). In that case, the Idaho Supreme Court rejected the common law legal status of the fetus and held that the death of a fetus could be compensated under IDAHO CODE §§ 5-310–311 (1972). *Id.*

³⁵¹ *Volk*, 651 P.2d at 18 (Bakes, C.J., dissenting).

³⁵² *Santana v. Zilog, Inc.*, 95 F.3d 780, 786 (9th Cir. 1996) (deciding to "leave any further expansion of Idaho's tort law to the Idaho legislature or courts").

³⁵³ Although these laws began being proposed years ago, in some states they sit on the books as a placeholder step in the march toward legal fetal personhood for years before being used. See, e.g., Annmarie Timmins, *Fetal Homicide Law Used for the First Time Last Week Was 20 Years in the Making*, N.H. BULL. (Mar. 21, 2024, 5:00 AM), <https://newhampshirebulletin.com/2024/03/21/fetal-homicide-law-used-for-the-first-time-last-week-was-20-years-in-the-making> [<https://perma.cc/KMP7-TZNA>] (explaining the incrementalist strategy used in passing N.H.'s fetal homicide bill and its first use in 2024).

³⁵⁴ *WCA Statistics*, WOMEN'S & CHILD.'S ALL. (2021), <https://wcaboise.org/about-us/statistics> [<https://perma.cc/6X46-X8JQ>].

³⁵⁵ *Volk*, 651 P.2d at 13 (majority opinion). IDAHO CODE § 32-102 has been held to be limited to situations involving "divorce, custody, property settlement and similar types of proceedings." *Id.* at 15.

³⁵⁶ Tuerkheimer, *supra* note 118, at 691–92.

Recently, an increasing number of pregnant Idahoans have been prosecuted, and threatened with jail time, even when their pregnancies ended in healthy births and even though state law does not compel such prosecutions.³⁵⁷ In fact, women themselves have been prosecuted under feticide laws, regardless of whether the state law at issue says they are exempt, or like Idaho's law, are silent on the issue.³⁵⁸

2. Laws That Hold Pregnant People Responsible for Fetal Ailments or Failures

Another step in the incremental march towards fetal personhood are laws that hold pregnant people responsible for not only the loss of their pregnancy or any real injury to their pregnancy, but also for behaviors that could have injured their fetus, even if there is no actual injury.³⁵⁹ These are the laws that set the stage for increased behavioral control of pregnant people, by normalizing the idea that pregnant people should legally suffer consequences for actions that the state has decided are unallowed behaviors, but may not have actually harmed the fetus. In many states, this area of control usually starts by targeting pregnant people using drugs.³⁶⁰ It would be difficult to find a more glaring example of this than the 1991 opinion written by the then Attorney General of Idaho Larry Echohawk in response to a question from then Governor Cecil Andrus.³⁶¹

The question presented to the Idaho AG was whether, when a woman was “suspected” of using drugs, the state could intervene, “to control the woman’s conduct.”³⁶² Although acknowledging that Idaho’s Child Protective Act “does not provide protection for the unborn,” the AG kept looking for

³⁵⁷ Kelsey Turner, *Since Dobbs, Idaho Mothers Increasingly Accused of Child Abuse While Pregnant*, IDAHO CAP. SUN (Nov. 1, 2024, 3:51 PM), <https://idahocapitalsun.com/2024/11/01/since-dobbs-idaho-mothers-increasingly-accused-of-child-abuse-while-pregnant> [https://perma.cc/35T3-VA4A].

³⁵⁸ Noa Yachot, *Who Will Be Prosecuted for Abortion if Fetuses Are Recognized as People?*, THE GUARDIAN (May 18, 2022, 5:00 AM), <https://www.theguardian.com/law/2022/may/18/abortion-prosecution-fetal-homicide-law> [https://perma.cc/BME3-3DWU].

³⁵⁹ As previously noted, *supra* note 22, we use the word “fetus” to refer to all stages of pregnancy. However, it is worth highlighting that Idaho has statutory language that defines pregnancy “age” as “calculated from the fertilization of the human ovum.” IDAHO CODE § 18-502 (2011).

³⁶⁰ Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 HASTINGS CTR. REP. S19, S19 (2017) (reporting on a South Carolina case where a black woman was convicted after a stillbirth and observing how that case “inspired similar prosecutions of other poor black women and then of other women”).

³⁶¹ One of the Idaho AG’s duties is to provide official legal opinions to certain state officials, and those of statewide interest are published. *See Opinions*, OFF. OF THE ATT’Y GEN.: STATE OF IDAHO (2025), <https://www.ag.idaho.gov/office-resources/opinions> [https://perma.cc/P5E R-LJ9C].

³⁶² LARRY ECHOHAWK, ATT’Y GEN. OF IDAHO, IDAHO ATTORNEY GENERAL’S ANNUAL REPORT: OPINIONS AND SELECTED INFORMAL GUIDELINES FOR THE YEAR 1991 5 (1991).

a way to control pregnant drug users in the state.³⁶³ Relying on: (a) Idaho's recognition of the fetus in probate,³⁶⁴ workers compensation and domestic relations laws,³⁶⁵ (b) the right to be born with sound mind and body,³⁶⁶ (c) the fact that a pregnant woman's right to privacy does not include the right to use illegal drugs,³⁶⁷ and (d) the state's interest in potential life, the AG concluded that these interests "override the woman's interest."³⁶⁸

This belief, so blatantly acknowledged, that Idaho has a right to "control" a pregnant person has continued to underlie many of the state's actions around pregnant people.³⁶⁹ A current Idaho case, *Rossow v. Jeppesen*, illustrates this belief.³⁷⁰ In this case, an Idaho woman gave birth to a healthy baby. Post-birth, Rossow tested positive for THC and the medical facility forwarded her test result to the Idaho Department of Health and Welfare.³⁷¹ In a subsequent interview with the child protective services worker assigned to the case, Rossow stated that she had used marijuana to help manage her pregnancy caused nausea and vomiting.³⁷² Based on these statements, Rossow was

³⁶³ *Id.* at 5–7 (stating that "Idaho's Child Protective Act, Idaho Code § 16-1601, et seq., presently would not permit the state to intervene in the case of gestational drug abuse in order to protect the fetus").

³⁶⁴ IDAHO CODE §§ 15-1-403(b)(3), 15-3-1101 (2024).

³⁶⁵ IDAHO CODE § 32-102 (2024).

³⁶⁶ The opinion offered no Idaho support for this principle but referenced a N.J. case. *See Smith v. Brennan*, 157 A.2d 497, 503 (N.J. 1960).

³⁶⁷ The AG's conclusion here relied on an earlier Idaho case, *Idaho v. Kelly*, 678 P.2d 60 (Idaho Ct. App. 1984), *cert. denied*, 469 U.S. 918 (1984), a case that did not involve pregnancy when it held that there was no "fundamental right to possess or to grow marijuana." *Kelly*, 678 P.2d at 70.

³⁶⁸ ECHOHAWK, *supra* note 362, at 17.

³⁶⁹ In 2005, Republican Senator Denton Darrington introduced a bill to criminalize pregnant people who ingested controlled substances. S. 1218, 58th Leg., 1st Reg. Sess. (Idaho 2005). For purposes of the bill, the word "child" included both embryos and fetuses. The bill never made it to a floor vote. In 2006, Senator Darrington tried again, introducing a similar bill. S. 1337, 58th Leg., 2d Reg. Sess. (Idaho 2006). Again, "child" was redefined to include embryos and fetuses. This version of the proposal made it out of the state senate but never made it to the floor of the state house of representatives. Senator Darrington continued to introduce and support bills seeking to force pregnant people to make only certain approved choices with their bodies. For example, he supported a 2012 bill to force ultrasounds on women seeking legal abortion care. *See* Cheri D. Smith, *Mandatory Ultrasound Statutes and the First Amendment, Shifting the Constitutional Perspective*, 20 Cardozo J.L. & Gender 855, 860 n.40 (2014).

³⁷⁰ *Rossow v. Jeppesen*, No. 23-131, 2023 WL 7283401, at *1 (D. Idaho Nov. 3, 2023).

³⁷¹ Under Idaho law, THC is a controlled substance, but alcohol is not. IDAHO CODE § 37-2701 (2022).

³⁷² Numerous studies exist illustrating how the application of testing and reporting substance laws, particularly for pregnant people, disproportionately impact BIPOC and disadvantaged communities. Katherine E. MacDuffie et al., *Protection Versus Progress: The Challenge of Research on Cannabis Use During Pregnancy*, 146 PEDIATRICS S93, S95 (2020); *see also* DARLA BISHOP ET AL., JACOB'S INST. OF WOMEN'S HEALTH, BRIDGING THE DIVIDE WHITE PAPER: PREGNANT

assigned a level two designation.³⁷³ Individuals in Idaho with a level two designation are deemed a “medium to high risk” to children, and subject to placement on the Child Protection Central Registry, regardless of any criminal violations.³⁷⁴ Anyone conducting an employment (or any other) background check on Rossow would learn that she was on the Registry.³⁷⁵ Rossow exhausted her appeals, but the designation was upheld and in 2023 a class action lawsuit on behalf of her and others similarly situated was filed.³⁷⁶ The state moved to dismiss the lawsuit and the court issued a ruling in late 2023, dismissing Rossow’s vagueness and overbreadth claims and giving Rossow the opportunity to amend her equal protection and state constitutional claims.³⁷⁷ Rossow filed an amended complaint in December 2023.³⁷⁸

As the *Rossow* case demonstrates, it is irrelevant to legal fetal personhood proponents whether the baby is born healthy, since the motivation is to control the behavior of the pregnant person. Cord blood cases provide yet another example. In these cases, authorities test the umbilical cord after birth, regardless of the health of the baby, sometimes without consent, to mine for drug residue. This tactic has been used for decades, often resulting in conviction of the mother.³⁷⁹ Idaho is no exception to this tactic; the state tests cord blood and uses the results to leverage prosecutions.³⁸⁰ In Idaho, this often happens in criminal plea deal negotiations or in unpublished cases, outside public scrutiny.³⁸¹ Idaho’s intrusions into the privacy and bodies of pregnant people are having the expected result: people are avoiding medical

WOMEN AND SUBSTANCE USE: OVERVIEW OF RESEARCH & POLICY IN THE UNITED STATES 53–54 (2017) (highlighting that mandatory reporting of positive drug tests and punitive policies disproportionately impact mothers of color and women who use public services).

³⁷³ IDAHO ADMIN. CODE r. 16.06.01.563 (2022).

³⁷⁴ *Id.*

³⁷⁵ *Idaho Background Check Unit*, IDAHO DEP’T OF HEALTH & WELFARE (June 20, 2024), <https://healthandwelfare.idaho.gov/bcu> [<https://perma.cc/9KU6-QG4E>].

³⁷⁶ Complaint for Declaratory and Injunctive Relief Against Dave Jeppesen, *Rossow v. Jeppesen*, No. 23-131 (D. Idaho Mar. 30, 2023), ECF No. 1.

³⁷⁷ *Rossow v. Jeppesen*, No. 23-131, 2024 WL 4528477, at *1 (D. Idaho Oct. 18, 2024).

³⁷⁸ (Verified First Amended) Complaint for Declaratory and Injunctive Relief Against All Defendants, *Rossow v. Jeppesen*, No. 23-131 (D. Idaho Dec. 1, 2023), ECF No. 25. As of this writing, the case remains in active litigation.

³⁷⁹ See, e.g., Tamar Lewin, *Court in Florida Upholds Conviction for Drug Delivery by Umbilical Cord*, N.Y. TIMES, Apr. 20, 1991, at 6, <https://www.nytimes.com/1991/04/20/us/court-in-florida-upholds-conviction-for-drug-delivery-by-umbilical-cord.html> (on file with authors).

³⁸⁰ See, e.g., *In re Doe*, 437 P.3d 922, 923 (Idaho 2019).

³⁸¹ See, e.g., *Idaho v. Baker*, No. 40613, 2014 WL 1673116, at *1 (Idaho Ct. App. Apr. 24, 2014); other case information in the possession of the authors.

care and seeking to keep all remnants of pregnancy out of the hands of the state.³⁸²

All of these instances prove the state's continued attempts to "control the conduct" of pregnant people based on even a "suspicion" of illicit behavior. This blanket principle is easily extrapolated to cover many lifestyle choices.³⁸³ It does not take great imagination to see Idaho going further and seeking to control more intimate lifestyle choices, under the guise of ensuring optimal fetal health.

It also bears stating that these attempts to control the body of a pregnant person "for the good of the fetus," are occurring in a state that has long allowed religious groups exemptions from criminal prosecution, and civil liability, for the deaths of their children that are attributable to medical neglect.³⁸⁴ This broad exemption means that more actually born children die of medical neglect in Idaho than in any other state,³⁸⁵ and that statistic is even grimmer for certain faith sects within the state.³⁸⁶

³⁸² As one example, an Idaho woman tried to hide an umbilical cord and placenta to avoid drug testing. *Mother Steals Daughter's Placenta to Conceal Drug Use*, AP NEWS (July 12, 2017, 4:58 PM), <https://apnews.com/general-news-55db2fca66c549d19d69e72ccc44a3a7> (on file with authors).

³⁸³ When the pregnant person does not comport their behavior as directed, states have gone further. As one example, when a Wisconsin woman did not sufficiently halt her drug use, a court approved a request to give the state custody of her fetus. Alison Delsite, *When Does Life Begin?*, SUNDAY PATRIOT-NEWS, Dec. 15, 1996, at F1. The decision was later overturned. Tamar Lewin, *Detention of Pregnant Woman for Drug Use Is Struck Down*, N.Y. TIMES, Apr. 23, 1997, at A16, <https://www.nytimes.com/1997/04/23/us/detention-of-pregnant-woman-for-drug-use-is-struck-down.html> (on file with authors). Even when pregnant people do change their behavior, states have criminally pursued them for their past actions. Cary Aspinwall, *'They Railroad Them': The States Using 'Fetal Personhood' Laws to Criminalize Mothers*, THE GUARDIAN (July 25, 2023, 6:00 AM), <https://www.theguardian.com/world/2023/jul/25/states-using-fetal-personhood-laws-to-criminalize-mothers> [<https://perma.cc/LC3A-KP3B>].

³⁸⁴ IDAHO CODE § 18-1501(4) (2005) ("The practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to have violated the duty of care to such child."); IDAHO CODE § 16-1627(3) (2005) ("[T]he court shall take into consideration any treatment being given the child by prayer through spiritual means alone, if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment.").

³⁸⁵ *Child Faith-Deaths in Idaho*, CHILD ABUSE IN IDAHO: DEADLY & LEGAL (2025), <https://idahochildren.org/articles/worst-in-nation/#:~:text=> [<https://perma.cc/88FH-UUWN>]; Nicole Blanchard, *Idaho Faith Healing Exemption Still Unchanged. Canyon County Counts 8 More Deaths*, IDAHO STATESMAN (Jan. 13, 2023, 9:33 AM), <https://www.idahostatesman.com/news/politics-government/state-politics/article270467052.html> (on file with authors).

³⁸⁶ Jason Wilson, *Letting Them Die: Parents Refuse Medical Help for Children in the Name of Christ*, THE GUARDIAN (Apr. 13, 2016, 10:30 AM), <https://www.theguardian.com/us-news/2016/apr/13/followers-of-christ-idaho-religious-sect-child-mortality-refusing-medical-help> [<https://perma.cc/9S82-429C>].

3. Legal Acknowledgements of Pregnancy Loss as Child Loss

As we explained *infra*, while the value of a pregnancy is real, it is incorrect to ascribe that value as a legal one belonging to a separate fetal person. In an incrementalist effort to get to legal fetal personhood, a common next step is to bestow the accoutrements of personhood on pregnancy loss.³⁸⁷ The motivation is clear: if those seeking to control the behavior of pregnant people can't (yet) declare that all fetuses are actual people, they can help get there by asserting that dead fetuses are legal people.³⁸⁸

This is frequently done by making death certificates available in all cases where pregnancy ends. Even before the *Dobbs* decision, lawmakers seeking to restrict reproductive health care options had begun forwarding bills to force medical facilities—and abortion clinics—to categorize miscarriages and the remains of abortions as legally human.³⁸⁹ While these laws are usually proposed under the guise of “respecting women’s loss,” they are more properly seen as part and parcel of fetal personhood creep.³⁹⁰ As illustration, after years of advocacy, the idea of having fetal remains treated as those of an already born human became normalized and states began passing these laws.³⁹¹

In Idaho, the definition of “fetal death” covers any pregnancy that ends before birth, irrespective of the duration of that pregnancy.³⁹² The parent(s) of a miscarried fetus can request a miscarriage certificate,³⁹³ and certificates

³⁸⁷ Elizabeth Kimball Key, Note, *The Forced Choice of Dignified Disposal: Government Mandate of Interment or Cremation of Fetal Remains*, 51 U.C. DAVIS L. REV. 305, 320–23 (2017).

³⁸⁸ Emma Green, *State-Mandated Mourning for Aborted Fetuses*, THE ATL. (May 14, 2016), <https://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688> (on file with authors).

³⁸⁹ Fresh Air, *Abortion Opponents Push for ‘Fetal Personhood’ Laws, Giving Rights to Embryos*, NPR (Apr. 4, 2024, 3:12 PM), <https://www.npr.org/2024/04/04/1242774406/abortion-opponents-push-for-fetal-personhood-laws-giving-rights-to-embryos> (on file with authors).

³⁹⁰ Nor do these laws speak to the wide range of religious and emotional avenues people may employ after a pregnancy loss. Forcing a death certificate or a burial are often counter to what women want. See, e.g., Ivey DeJesus, *Fetal Remains Bill Draws Criticism from Pa. Lawmakers and Advocates on Funeral Services for Miscarriages and Abortions*, PENNLIVE: THE PATRIOT-NEWS (Oct. 31, 2019, 1:40 AM), <https://www.pennlive.com/news/2019/10/fetal-remains-bill-would-force-women-in-pa-to-have-funeral-services-for-miscarriages-and-abortions.html> (on file with the authors).

³⁹¹ Shachar et al., *supra* note 234, at 1231; *Fetal Personhood Law in the United States*, *supra* note 233.

³⁹² IDAHO CODE § 39-241(8) (2024) (“‘Fetal death’ means death prior to the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy; the death is indicated by the fact that after such expulsion or extraction, the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.”).

³⁹³ IDAHO CODE § 39-9305 (2024); Note that such certificates are only available when “a physician, a physician’s assistant or an advanced practice registered nurse” certify that a miscarriage has taken place. *Id.*

can be requested up to one year after the event.³⁹⁴ The state has also enacted laws that seeks to ensure that miscarriages and stillbirths are not used as “cover” for abortions. Idaho law defines a stillbirth as fetal death occurring after either twenty weeks of pregnancy or when fetal weight is at least 12.35 ounces (about three-quarters of one pound).³⁹⁵ Any such fetal deaths must be officially reported.³⁹⁶ If the stillbirth does not occur in a medical institution, the attending medical officer must provide information about the event; if the stillbirth occurs outside the presence of enumerated medical personnel, as many do, and anyone has a question about the stillbirth, Idaho code requires a coroner’s investigation.³⁹⁷

As expected, those opposed to abortion health care and the autonomy of a pregnant person want Idaho to go further.³⁹⁸ A bill introduced in 2009 would have offered death certificates for fetal loss that happened before the 20th week of pregnancy.³⁹⁹ Although that attempt failed, current Idaho law makes it a “duty” to provide all information to the state,⁴⁰⁰ and failure to do so subjects one to both monetary penalties and imprisonment.⁴⁰¹ Idaho has also passed an “Unborn Infants Dignity Act” which seeks to prevent the “unlawful disposition” of “unborn infants.”⁴⁰² When this bill was introduced in the Idaho Senate, co-sponsor Cliff Bayer⁴⁰³ often used the term “pre-born babies” to describe the population he was serving.⁴⁰⁴ In the same hearing, Sen. Bayer yielded significant time to the executive director of the group

³⁹⁴ *File a Delayed Death, Stillbirth, or Miscarriage Certificate*, IDAHO DEPT. OF HEALTH & WELFARE (Jan. 26, 2023), <https://healthandwelfare.idaho.gov/services-programs/birth-marriage-death-records/file-delayed-death-stillbirth-or-miscarriage> [<https://perma.cc/VQ22-YV8H>].

³⁹⁵ IDAHO CODE § 39-260 (2024).

³⁹⁶ Abortions, which are almost completely banned in Idaho, do not fall under this statutory scheme and are addressed elsewhere in Idaho code, both civilly and criminally.

³⁹⁷ IDAHO CODE § 39-260 (2024). Under this code section, only physicians, physician assistants or advanced practice registered nurses are sufficient medical personnel.

³⁹⁸ *Lawmaker Wants Miscarriage Death Certificate*, KHQ (Mar. 4, 2009), https://www.khq.com/news/lawmaker-wants-miscarriage-death-certificate/article_b64d21f5-ce6a-5ab9-b8c9-091531c458db.html [<https://perma.cc/5SND-XFM3>].

³⁹⁹ H.R. 214, 60th Leg., 1st Reg. Sess. (Idaho 2009).

⁴⁰⁰ IDAHO CODE § 39-272 (2024).

⁴⁰¹ IDAHO CODE § 39-273 (2024).

⁴⁰² IDAHO CODE § 39-9302 (2024). As pointed out at a hearing on the bill by then Sen. Cherie Buckner-Webb, federal law already prohibited the sale of fetal tissue. *Relating to the Idaho Unborn Infants Dignity Act: Hearing on S 1404 Before the S. Comm. on State Affs.*, 63d Leg., 2d Reg. Sess. 6 (Idaho 2016).

⁴⁰³ Sen. Bayer is no longer serving in the state legislature. The bill’s co-sponsor, Sen. Todd Lakey, remains a current legislator and is often involved in efforts to restrict the autonomy of pregnant capable people in the state. See Govindarao, *supra* note 319.

⁴⁰⁴ *Relating to the Idaho Unborn Infants Dignity Act: Hearing on S 1404 Before the S. Comm. on State Affs.*, IDAHO LEG., at 51:35, 52:36 (Mar. 18, 2016), <https://lso.legislature.idaho.gov/MediaArchive/ShowMediaByCommittee.do> [<https://perma.cc/TX5E-9YM7>].

Idaho Chooses Life, who also populated his testimony with references to “pre-born children” or “pre-born child.”⁴⁰⁵ Idaho’s Administrative Code provides additional regulations. When removing a stillbirth, or expired fetus, the attendant medical personnel is responsible for assuring that the death was from a natural cause.⁴⁰⁶ Both monetary fines and imprisonment are available when one “disposes” of a “stillborn fetus without a permit or other authorization.”⁴⁰⁷

This effort to recategorize pregnancy loss as the loss of an already living legal person is yet another step in the “legal fetal personhood playbook” that seeks to change the conversation.⁴⁰⁸ Once a miscarriage and an abortion are “people enough” for a death certificate, then they may be “people enough” for other purposes.⁴⁰⁹ Of course, this strategy has other consequences. Laws requiring the treatment of all fetal remains as those of people often not only require a death certificate, but also burial or cremation.⁴¹⁰ These laws easily impact not only “selective reduction” as employed in IVF, *see infra*, but also fertilized eggs used in A.R.T. procedures.⁴¹¹

4. Laws Targeting Minors

Laws seeking to forward legal fetal personhood also progress in lockstep with the introduction of measures designed to control the sexual and reproductive lives of young adults. These attempts are worth highlighting, as they forward the legal fetal personhood agenda, and they also strive to

⁴⁰⁵ *Id.* at 55:55, 59:21, 59:55.

⁴⁰⁶ IDAHO ADMIN. CODE r. 16.02.08.850 (2022).

⁴⁰⁷ IDAHO CODE § 39-273 (2024).

⁴⁰⁸ This issue is happening in many states beyond the two highlighted here, often resulting in charges being filed against a person who has suffered a miscarriage. One recent additional example occurred in Ohio, where a woman who miscarried at twenty-two weeks was charged with abuse of a corpse. Like many people, she miscarried while in the bathroom, and the prosecutor decided that because the fetus was not small enough to pass easily, she should be liable. Thankfully in this case the Grand Jury decided otherwise. Remy Tumin, *Grand Jury Declines to Indict Ohio Woman Who Miscarried at Home*, N.Y. TIMES (Jan. 11, 2024), <https://www.nytimes.com/2024/01/11/us/brittany-watts-ohio-miscarriage.html#:~:text=A%20grand%20jury%20in%20Ohio,and%20could%20endanger%20other%20patients> (on file with authors).

⁴⁰⁹ Fresh Air, *supra* note 389. Note that recognizing the value of a pregnancy, and the impact of the loss of a wanted pregnancy, could very well merit some recognition—but that recognition is not properly legal personhood.

⁴¹⁰ We add that these laws do not always make sense. For example, Idaho Code § 18-8702 (No Public Funds for Abortion Act), refers to a “dead, unborn child,” as a result of miscarriage which would presumably require a burial even if it had never had the potential to sustain life. IDAHO CODE § 18-8702 (2021).

⁴¹¹ Marie Solis, *A New Anti-Abortion Bill Could Require Death Certificates for Fertilized Eggs*, VICE (Nov. 21, 2019, 12:55 PM), <https://www.vice.com/en/article/pennsylvania-fetal-burial-bill-death-certificates-for-miscarriage-abortion-fertilized-eggs-hb1890> [https://perma.cc/Z73J-ZF2Q].

normalize the idea that controlling the behavior of pregnant people (here, young adults), is acceptable. In the realm of reproductive justice, it is beyond dispute that laws targeting minors never stop at minors; instead, once minor's behaviors are regulated, those laws are expanded to cover the same behaviors by adults.⁴¹²

Young adults face particular challenges in all areas of reproductive health care. As a group they have fewer resources than older adults and are often the targets of forced disclosure laws that seek to limit their privacy.⁴¹³ For minors already facing systematic barriers because of structural inequities, these limitations are compounded.⁴¹⁴ This is a particular problem in Idaho, which has been “first in the nation” in limiting the rights of minors to obtain health care and health care information. Two recent examples illustrate that minors in the state of Idaho have been particular targets for state control.

In 2023, Idaho passed a first-in-the-nation law, seeking to isolate minors from trusted adults willing to help them access information about, and access to, abortion health care.⁴¹⁵ This “Abortion Travel Ban” makes it a felony for an adult, with an “intent to conceal” their actions,⁴¹⁶ from “recruiting, harboring, or transporting” a pregnant minor, even if the abortion care is legal where procured.⁴¹⁷ This law, which is being challenged on First Amendment, Vagueness and Right to Travel grounds, puts Idaho in the dubious position of being the first state in the U.S. to try to stop people from

⁴¹² Mary Ziegler, *Abortion Restrictions Targeted at Minors Never End There*, THE ATL. (Apr. 28, 2023), <https://www.theatlantic.com/ideas/archive/2023/04/idaho-abortion-trafficking-law-criminalizing-minors/673877/> (on file with authors).

⁴¹³ Tevah Platt, *Abortion Policy Is Changing Every Day. Minors Are the Most Vulnerable— and the Least Understood*, UNIV. OF MICH. INST. FOR SOC. RSCH.: POPULATION STUD. CTR. (May. 8, 2024), <https://psc.isr.umich.edu/news/abortion-policy-is-changing-every-day-minors-are-the-most-vulnerable-and-the-least-understood> [<https://perma.cc/7J6E-U8FW>].

⁴¹⁴ Amanda E. Bryson et al., *Call to Action: Healthcare Providers Must Speak Up for Adolescent Abortion Access*, 70 J. ADOLESCENT HEALTH 189, 189–90 (2022); see also JAMILLE FIELDS ALLSBROOK & NORA ELLMANN, CTR. FOR AM. PROGRESS, A PROACTIVE ABORTION AGENDA: FEDERAL AND STATE POLICIES TO PROTECT AND EXPAND ACCESS 13 (2021) (“Thirty-seven states have laws requiring parental involvement for a minor to access an abortion. And 36 states require minors seeking to access an abortion independently to obtain a judicial bypass through a court order.”) (footnotes omitted).

⁴¹⁵ Note that pregnancy overall contains well-documented physical risks. Grace Keegan et al., *Trauma of Abortion Restrictions and Forced Pregnancy: Urgent Implications for Acute Care Surgeons*, 8 TRAUMA SURGERY & ACUTE CARE OPEN, no. 1, Jan. 29, 2023, at 3.

⁴¹⁶ The “intent to conceal” is undefined in the statute and can mean anything from actively hiding one’s actions to not proactively communicating with parents. We believe this statute is poorly written on purpose. When it is unclear what a law forbids, and that same law has severe criminal penalties, Idahoans will naturally step back from the line to avoid criminal behavior, which in this case will further isolate Idaho minors in crisis. See Bryan Clark, *Abortion to Book Bans: Legislature Is Using this Tactic to End-Run the Constitution* | Opinion, IDAHO STATESMAN (May 8, 2024, 4:00 AM), <https://www.idahostatesman.com/opinion/readers-opinion/article288392865.html> (on file with authors).

⁴¹⁷ IDAHO CODE §18-623 (2024).

traveling from state to state just because they do not approve of the reasons for the travel.⁴¹⁸ In other words, this is a bolder step than we have seen before, where the state is overtly trying to stop pregnant people from traveling.

Idaho continued its race to the bottom in 2024, with the passage of a law that allows parents access to all health care records of a minor, including past records, and forbids the provision (or solicitation) of broadly defined “health care services” to young adults unless parental consent is obtained beforehand.⁴¹⁹ The breadth of this law is staggering. It impacts not just doctors, but everyone from counselors to suicide prevention hotlines.⁴²⁰ This outcome is not a surprise; although he signed the bill into law, Idaho Gov. Brad Little transmitted a letter noting his concern with the impact the new law would have on the mental health of adolescents in the state.⁴²¹

Between these two new laws alone, Idaho is furthering their fetal personhood creep—trying out laws to control the behavior of minors that, once entrenched, will be the launching pad for extending those same laws to all pregnant people in the state. The current reality is that young people in Idaho are unable to reach out to trusted adults for confidential help about a wide variety of matters. A further, more overt, determination of legal fetal personhood would assuredly condemn pregnant young people in Idaho to forced pregnancy and forced parenthood.

5. Bolder Steps

Once proponents of legal fetal personhood have “normalized” the conversation via incrementalist laws purporting to “protect” the pregnant person, laws blaming the pregnant person, laws applying the rituals of death and mourning to fetuses, and the advancement of laws controlling the behavior of young adults, the next step is to introduce legislation that would fully grant legal personhood to fetuses regardless of the impact this would have on pregnant people, A.R.T., and the law overall. Over time, these steps have gotten bolder.

As noted, *infra*, Idaho has previously seen the introduction of bills seeking to expand the definition of fetuses. But, building on the foundations

⁴¹⁸ See *supra* note 330 and accompanying text.

⁴¹⁹ IDAHO CODE § 32-1015 (2024).

⁴²⁰ Crystal Pyrak, *A Major Change Is Coming to Health Care Access for Idaho Children. Here's What to Know*, IDAHO CAP. SUN (July 1, 2024, 4:20 AM), <https://idahocapitalsun.com/2024/07/01/a-major-change-is-coming-to-health-care-access-for-idaho-children-heres-what-to-know> (on file with authors).

⁴²¹ Letter from Brad Little, Governor of Idaho, to Scott Bedke, Lieutenant Governor of Idaho (Mar. 1, 2024) (on file with authors). Despite his concerns about the health of young adults in his state and his recognition that the poorly written bill would likely cause confusion for health care workers statewide, Gov. Little still signed the bill.

detailed above, the state has recently gone further. In 2024, Republican Representative Julianne Moore introduced House Bill 400, a wide-ranging proposal that sought to, *inter alia*, expand the definition of human to include “preborn child” throughout Idaho Code, including sections related to murder, manslaughter and battery.⁴²² Public commentary was overwhelmingly against the bill’s passage, including testimony raising concerns that the law could hold pregnant people liable for miscarriages.⁴²³ In reaction, the bill was held back, and never advanced.⁴²⁴

The failure of House Bill 400, and of the efforts preceding it, are not a final defeat of legal fetal personhood in the state. This is an incrementalist movement that understands that there is value in every loss they experience and that has a long-term vision for ultimate victory.⁴²⁵ House Bill 400 got a committee hearing, and the next attempt may be heard on the floor of one chamber. And the one after that may advance to a second chamber. And on. This will continue until allies in states like Idaho legally and effectively establish what we all know to be true; that the value of a fetus is profound, but it is not a legal person.⁴²⁶ To hold otherwise diminishes the life and value of the pregnant person.

⁴²² H.R. 400, 67th Leg., 2d Reg. Sess. (Idaho 2024)

⁴²³ Clark Corbin, *Bill Seeking to Change ‘Fetus’ to ‘Preborn Child’ in Idaho State Law Held in Committee*, IDAHO CAP. SUN (Jan. 22, 2024, 4:15 PM), <https://idahocapitalsun.com/2024/01/22/bill-seeking-to-change-fetus-to-preborn-child-in-idaho-state-law-held-in-committee> (on file with authors). Note that this concern has a basis. See Cary Aspinwall, *Some States Are Turning Miscarriages and Stillbirths Into Criminal Cases Against Women*, THE MARSHALL PROJECT (Oct. 31, 2024, 6:00 AM), <https://www.themarshallproject.org/2024/10/31/stillbirth-oklahoma-arkansas-women-investigated> [<https://perma.cc/597B-DNUV>]; see also *supra* Section II.C.1 (discussing how legal fetal personhood subjects pregnant people to surveillance).

⁴²⁴ H.R. 400, 67th Leg., 2d Reg. Sess. (Idaho 2024). Note Rep. Young also advanced an earlier bill in the same session that sought to accomplish similar ends and also did not advance. H.R. 381, 67th Leg., 2d Reg. Sess. (Idaho 2024).

⁴²⁵ In addition to the laws and proposed laws detailed herein, Idaho also used to have a law that permitted all Idahoans the right to make an enforceable advance directive (also called a living will). The law had one exception: That all living wills were null and void for the duration of a pregnancy. The law was challenged by Legal Voice, If/When/How, Compassion & Choices, and Perkin Coie. In 2021, Idaho’s federal district court held the exception invalid. *Almerico v. Denney*, 532 F. Supp. 3d 993, 1002 (D. Idaho 2021); see also *Federal Court Rules Idaho’s “Pregnancy Exclusion” for Living Wills Is Unconstitutional*, LEGAL VOICE (Apr. 6, 2021), <https://legalvoice.org/federal-court-rules-idahos-pregnancy-exclusion-for-living-wills-is-unconstitutional> [<https://perma.cc/4BRT-ZS9N>] (noting the federal district court held that the pregnancy exclusion violated both the First and Fourteenth Amendments). Unfortunately, pregnant Texas residents have not yet had the same success. See *infra* Section V.B.1.

⁴²⁶ We note that the legality of IVF in Idaho is very much in doubt as well. When asked about the potential criminal liability of women and medical professionals engaged in IVF, the current Idaho Attorney General said only that he would, at least initially, “defer” to state prosecutors. PATTY MURRAY, S. COMM. ON HEALTH, EDUC., LAB., & PENSIONS, IMPACTS OF A POST-ROE AMERICA: THE STATE OF ABORTION POLICY AFTER *DOBBS* 25 (2022). More recently, the Idaho Republican Party’s 2024 party platform specifically opposed all actions which end human life, including the destruction of embryos. IDAHO GOP, IDAHO REPUBLICAN PARTY PLATFORM 15 (2024).

It also bears stating that House Bill 400 was introduced in the only state in the country that allowed its Maternal Mortality Review Committee (MMRC) to lapse.⁴²⁷ MMRCs are bodies that exist in every state, Puerto Rico and the District of Columbia, in order to review the causes of pregnancy related deaths in an effort to prevent reoccurrences.⁴²⁸ This is a committee more necessary in Idaho than anywhere else—the state’s maternal mortality rate has risen over 100% since 2019 and as of this writing, the state has the highest maternal mortality rate in the nation.⁴²⁹ In 2024 the legislature reinstated the MMRC, and data should once again be available beginning in 2025.⁴³⁰ That data will provide information as to the impact Idaho’s increasingly restrictive laws have had on the safety of childbearing in the state. Data is already available as to the impact the state’s laws are having on physician exodus and labor and delivery closures. Currently, Idaho is ranked 51st in the country (behind Puerto Rico) in physician supply.⁴³¹ Doctors, particularly ob-gyns, are fleeing the state in direct response to the legislature’s continued attacks on medical decision making and its criminalization of standard of care treatment.⁴³² This has left Idaho with only four high-risk obstetricians to serve the entire state.⁴³³ This is all the more difficult because

⁴²⁷ *Maternal Mortality Review Committees*, GUTTMACHER INST. (Sept. 1, 2023), <https://www.guttmacher.org/state-policy/explore/maternal-mortality-review-committees> [https://perma.cc/KXJ8-AYCB].

⁴²⁸ *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 38 U.S. States, 2020*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (May 28, 2024), [https://www.cdc.gov/maternal-mortality/php/data-research/index.html#:~:text=Maternal%20mortality%20review%20committees%20\(MMRCs,\(pregnancy%20associated%20deaths](https://www.cdc.gov/maternal-mortality/php/data-research/index.html#:~:text=Maternal%20mortality%20review%20committees%20(MMRCs,(pregnancy%20associated%20deaths) [https://perma.cc/SG7P-3KME].

⁴²⁹ Cassidy Randall, *North Idaho Has Drifted to the Extreme Right. One Republican Thinks It’s Hit Its Limit*, POLITICO (May 19, 2024, 12:00 PM), <https://www.politico.com/news/magazine/2024/05/19/idaho-moderates-combating-state-extremism-00151819> (on file with authors).

⁴³⁰ H.R. 399, 67th Leg., 2d Reg. Sess. (Idaho 2024).

⁴³¹ Edward McEachern et al., *EMTALA Must Be Upheld to Protect the Sacred Space Between Idaho Doctors and Patients | Opinion*, IDAHO STATESMAN (June 12, 2024, 4:00 AM), <https://www.idahostatesman.com/opinion/readers-opinion/article289188199.html> (on file with authors).

⁴³² Amelia Huntsberger, *If You Aren’t Sure Why Doctors Are Leaving Idaho, It’s Because You’re Not Listening to Them*, IDAHO CAP. SUN (Apr. 16, 2024, 4:00 AM), <https://idahocapitalsun.com/2024/04/16/if-you-arent-sure-why-doctors-are-leaving-idaho-its-because-youre-not-listening-to-them> (on file with authors); Kylie Cooper, *I Came to Provide Care for Complicated Pregnancies; I’m Leaving Because of Idaho’s Abortion Bans*, IDAHO CAP. SUN (Feb. 10, 2023, 4:10 AM), <https://idahocapitalsun.com/2023/02/10/i-came-to-provide-care-for-complicated-pregnancies-im-leaving-because-of-idahos-abortion-bans> (on file with authors); Nicole Karlis, *Strict Abortion Laws Are Driving an Exodus of Women’s Health Specialists*, SALON (June 30, 2023, 2:59 PM), <https://www.salon.com/2023/06/30/strict-abortion-laws-are-driving-an-exodus-of-womens-health-specialists> [https://perma.cc/3SSK-5A89]; Sareen Habeshian, *New Doctors Avoid Residencies in States with Abortion Bans*, AXIOS (Apr. 18, 2023), <https://www.axios.com/2024/05/09/doctors-residencies-states-abortion-bans> (on file with authors).

⁴³³ Kyle Pfannenstiel, *Idaho Is Losing OB-GYNs After Strict Abortion Ban. But Health Exceptions Unlikely This Year*, IDAHO CAP. SUN (Apr. 5, 2024, 4:30 AM), <https://idahocapitalsun.com/>

as doctors leave, Idaho is also losing entire labor and delivery units, leaving swaths of the state with absolutely no coverage.⁴³⁴

B. Texas

Like Idaho, Texas does not have a constitutional or statutory blanket provision providing fetuses with full legal rights. However, it too has been creeping towards *de facto* legal fetal personhood for years.⁴³⁵ As in Idaho, fetal personhood proponents in Texas have sought to normalize the language of fetal personhood and have included this language in abortion health care restrictions. As explained more fully below, Texas also has laws that equate pregnancy loss with the loss of a child, that restrict the reproductive health care rights of young adults, that hold pregnant people responsible for real or perceived fetal dangers, and that elevate the worth of the pregnancy over the worth of the pregnant person. In this section, we explain how each step in the process of legal fetal personhood creep has occurred so far in Texas.

1. Laws to ‘Protect the Pregnant Person’

While legal fetal personhood creep has the same ultimate end regardless of the state, the particular means that each state utilizes and how they do it depend on a variety of factors.⁴³⁶ Thus, while many of Texas’ endeavors to forward legal fetal personhood under the guise of protecting the pregnant person mirror those in Idaho, the state has also advanced efforts of its own. One such example of this involves the autonomy of pregnant people to make their own medical decisions.

2024/04/05/idaho-is-losing-ob-gyns-after-strict-abortion-ban-but-health-exceptions-unlikely-this-year (on file with authors); McKay Cunningham, *Survey Shows Idaho’s Maternal Health Doctors Are Leaving the State, or Soon Will*, IDAHO CAP. SUN (Apr. 7, 2023, 4:00 AM), <https://idahocapitalsun.com/2023/04/07/survey-shows-idahos-maternal-health-doctors-are-leaving-the-state-or-soon-will> (on file with authors).

⁴³⁴ Kelcie Moseley-Morris, *Idaho Doctor Who Worked at Closed Maternity Ward Says Abortion Ban Harmed Recruiting*, IDAHO CAP. SUN (Apr. 22, 2024, 4:30 AM), <https://idahocapitalsun.com/2024/04/22/idaho-doctor-who-worked-at-closed-maternity-ward-says-abortion-ban-harmed-recruiting> (on file with authors); Nicole Karlis, *Idaho is Becoming an OBGYN Desert, Threatening the Lives of Mothers and Infants*, SALON (Mar. 14, 2024, 7:06 PM), <https://www.salon.com/2024/03/12/idaho-is-becoming-an-obgyn-desert-threatening-the-lives-of-mothers-and-infants> [https://perma.cc/T7Q2-VFUV].

⁴³⁵ Second largest in both area and population, Texas is often in the headlines for extremist legislation and court decisions that curtail the rights of pregnant people. See, e.g., Laurie Sobel et al., *Who Decides When a Patient Qualifies for an Abortion Ban Exception? Doctors vs. The Courts*, KFF (Dec. 14, 2023), <https://www.kff.org/policy-watch/who-decides-when-patient-qualifies-for-abortion-ban-exception> [https://perma.cc/LJC8-R3Y8] (noting Texas’ prominence in the news for a recent case involving a woman seeking an abortion exception, although the case could have occurred in any one of several states).

⁴³⁶ These factors include the state’s political, religious, economic and racial constituencies. See Melinda Cooper, *The Anti-Abortion Movement and the Ghost of Margaret Sanger*, DISSENT MAG. (2023), <https://www.dissentmagazine.org/article/the-anti-abortion-movement-and-the-ghost-of-margaret-sanger> [https://perma.cc/Q3KH-M7E4].

Unlike Idaho, current Texas law does not allow advance directives for pregnant people.⁴³⁷ Advance directives are legal documents prepared to communicate desired medical care in the event of future incompetency. While numerous states retain laws restricting the ability of doctors to end artificial life support for pregnant patients, a dozen of these, including Texas, have laws so restrictive that they *automatically* invalidate an advance directive if there is a pregnancy.⁴³⁸ There are numerous rationales given for stripping the right to make medical decisions over one's own body away when pregnant: the most prevalent is the assumption that any decisions made by a non-pregnant person would never be sanctioned by that same person once they are pregnant.⁴³⁹ Under this rationale, no competent pregnant person would ever agree to an advance directive that compromises a pregnancy.⁴⁴⁰ Therefore, taking this right away from a pregnant person "protects" them against themselves.⁴⁴¹

An unfortunate example of this policy occurred in 2013, when Texan Marlise Muñoz experienced a blood clot in her lungs that rendered her brain-dead.⁴⁴² Notwithstanding Muñoz's family informing the hospital that she did not want to be kept alive by machines under any circumstances, the hospital kept Muñoz connected to a ventilator, intending to keep her that way until her 14-week old fetus was delivered or died.⁴⁴³ It took national attention and

⁴³⁷ See TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2023).

⁴³⁸ See TEX. HEALTH & SAFETY CODE ANN. §§ 166.049 (West 2023), 166.098 (West 2015), §166.033 (West 2015); see generally Tessa Stuart, *Alabama's War on Women*, ROLLING STONE (May 20, 2024), <https://www.rollingstone.com/politics/politics-features/alabama-fetal-personhood-ivf-abortion-1235018366> [https://perma.cc/Y5L2-U4EC] ("[I]n Texas . . . a hospital kept a brain-dead woman alive for almost two months — against her own advanced directive and the wishes of her family — in deference to a state law that prevents doctors from removing a pregnant person from life support."); Joan H. Krause, *Pregnancy Advance Directives*, 44 CARDOZO L. REV. 805, 823 (2023).

⁴³⁹ See Sherry F. Colb, *Excluding Pregnant Women from the Right to Terminate Life Support*, VERDICT: JUSTIA (Jan. 22, 2014), <https://verdict.justia.com/2014/01/22/excluding-pregnant-women-right-terminate-life-support> [https://perma.cc/7HQ4-EWCK].

⁴⁴⁰ Pressure for pregnancy exemptions in advance directives came from religious quarters. See generally Wendy Adele Humphrey, "But I'm Brain-Dead and Pregnant": *Advance Directive Pregnancy Exclusions and End-of-Life Wishes*, 21 WM. & MARY J. WOMEN & L. 669 (2015) (noting that pregnancy exceptions to advance directive laws were added to, *inter alia*, ease the concerns of religious constituencies such as the Roman Catholic Church).

⁴⁴¹ See Elizabeth Villarreal, *Pregnancy and Living Wills: A Behavioral Economic Analysis*, 128 YALE L.J.F. 1052, 1075 (2019) (noting that proponents of these statutes might think they are protective of pregnant women).

⁴⁴² Wade Goodwyn, *The Strange Case of Marlise Munoz and John Peter Smith Hospital*, NPR (Jan. 28, 2014, 5:44 PM), <https://www.npr.org/sections/health-shots/2014/01/28/267759687/the-strange-case-of-marlise-munoz-and-john-peter-smith-hospital> (on file with authors).

⁴⁴³ Muñoz's husband sued the hospital for "cruel and obscene mutilation of a corpse." The court ordered the hospital to declare Muñoz dead and to remove all life-sustaining treatment from her body. *Id.* Despite the Muñoz family's subsequent efforts to change the law, pregnant

a state district judge's opinion before the hospital was made to pronounce Muñoz dead—after over two months.⁴⁴⁴

Like Idaho, other incremental shifts towards recognizing legal fetal personhood in Texas involve amending state criminal laws to increase the penalties for acts against a pregnant person and to recognize two separate victims when a crime is perpetrated against a pregnant person—all under the guise that the changes are being made for the benefit of pregnant people. For example, in 2003, Texas updated their Penal Code to amend the definition of “person” to include a fetus at any stage of development.⁴⁴⁵ Another amendment changed the definition of “death” throughout the criminal code to include “the failure to be born alive.”⁴⁴⁶ With these changes, causing the death of a fetus at any stage of gestational development, regardless of the extent of harm suffered by the pregnant person, constitutes capital murder.⁴⁴⁷ Although these changes have not added any real protection to the lives of pregnant Texans, they have resulted in increased criminal charges for those that perpetrate violence against a pregnant person.⁴⁴⁸

Also in 2003, the Texas Wrongful Death Act was amended to recognize fetuses at every stage of development as individuals. This amendment allows

people in Texas still do not have full advance directive rights. *Family of Brain-Dead Pregnant Woman Now Fighting to Change State Law*, ABC NEWS (Mar. 4, 2015, 11:52 AM), <https://abcnews.go.com/Health/family-brain-dead-pregnant-woman-now-fighting-change/story?id=29384762> [<https://perma.cc/73BW-VAXZ>]; see also Alison M. Whelan, “Marlise’s Law”: Protecting the Autonomy and Dignity of Brain-Dead Pregnant Women, BILL OF HEALTH: THE PETRIE-FLOM CTR.: HEALTH L. POL’Y, BIOTECHNOLOGY, & BIOETHICS AT HARV. L. SCH. (Mar. 16, 2015), <https://petrieflom.law.harvard.edu/2015/03/16/marlises-law-protecting-the-autonomy-and-dignity-of-brain-dead-pregnant-women> [<https://perma.cc/FMW5-SPN9>] (discussing the filing and debate over “Marlise’s Law,” “which would repeal the Texas law that currently prohibits pregnant women from exercising their advance directives”).

⁴⁴⁴ *A Woman’s Rights: Part 6: Can a Corpse Give Birth?*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-exclusion-law.html> (on file with authors).

⁴⁴⁵ TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2023).

⁴⁴⁶ TEX. PENAL CODE ANN. § 1.07(a)(49) (West 2023).

⁴⁴⁷ The offense of capital murder in Texas is automatically triggered if a person murders someone under the age of 10 years old. See TEX. PENAL CODE ANN. § 19.03(a)(8) (West 2023). While the death of a fetus at any stage of development constitutes murder under Texas law, the Penal Code specifically precludes bringing charges against pregnant people in relation to the loss of their pregnancy. See TEX. PENAL CODE ANN. § 19.06(1) (West 2003).

⁴⁴⁸ As one example, in 2022 Texan Amanda Luna miscarried after being severely beaten by her husband while five weeks pregnant. See *Luna v. Texas*, 687 S.W.3d 79, 90–91 (Tex. Ct. App. 2024). In addition to facing criminal charges for the beating, her husband was charged with the death of the fetus, a charge brought for “the good of his wife.” See Elizabeth Howard & Kortney Williams, *Capital Murder in the Death of a 5-Week-Old Fetus*, 52 TEX. PROSECUTOR, no. 3, May–June 2022, at 1, 24. At the consolidated trial, her husband was sentenced to life in prison without the possibility of parole for capital murder of the fetus. *Luna*, 687 S.W.3d at 89.

a civil cause of action in connection to a fetal death.⁴⁴⁹ Prior to this, Texas courts had clearly stated that wrongful death actions could not be brought due to the death of a fetus not born alive.⁴⁵⁰ Advocates for this change downplayed the potential far-reaching effects of granting personhood status to the unborn, instead emphasizing that the law seeks to protect a pregnant person's "right to carry [their] pregnancy to term" and provides just consequences for wrongdoing.⁴⁵¹

By equating fetuses with individuals—and their destruction as murder—Texas' current feticide and wrongful death statutes lay the groundwork for harsh penalties for abortion providers and those seeking abortion services. At the 2024 Texas Republican Party Convention in San Antonio, the idea of fetal personhood led the delegates to adopt a policy plan proclaiming that "abortion is not healthcare, it is homicide."⁴⁵² This stance necessarily pits the rights of the pregnant person against the rights of their fetus. If legal fetal personhood becomes a reality, this could mean the death penalty for abortion providers and for people who receive an abortion.⁴⁵³

Proponents of the anti-abortion and pro fetal personhood movements have justified the prosecution of abortion providers by arguing that the abortion industry "preys" on the pregnant person who is a "second victim."⁴⁵⁴ Yet, despite their assertion that they seek only to protect pregnant people, lawmakers in Texas have made numerous attempts in recent years to

⁴⁴⁹ See TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (West 2003).

⁴⁵⁰ In *Witty v. American General Capital Distributors, Inc.*, the Texas Supreme Court held that the Texas Wrongful Death Act does not permit recovery for the loss of a stillborn fetus because the state legislature did not intend for "individual" to include the unborn. *Witty v. Am. Gen. Cap. Distribs., Inc.*, 727 S.W.2d 503, 504 (Tex. 1987). Similarly, in 1997 the Texas Supreme Court held that there could be no recovery for a stillborn fetus as separate individual but that a pregnant person could recover for their mental anguish in connection with negligent acts "that cause[d] the loss of a fetus as part of the woman's body." *Edinburg Hosp. Auth. v. Treviño*, 941 S.W.2d 76, 79 (Tex. 1997) (emphasis in original).

⁴⁵¹ See Michelle Haynes, Note, *Inner Turmoil: Redefining the Individual and the Conflict of Rights Between Woman and Fetus Created by the Prenatal Protection Act*, 11 TEX. WESLEYAN L. REV. 131, 132 (2004); Kelley Shannon, *Legislator: Bill Protects Unborn, Doesn't Restrict Abortions*, PLAINVIEW HERALD (Dec. 9, 2002), <https://www.myplainview.com/news/article/Legislator-Bill-protects-unborn-doesn-t-8806702.php> (on file with authors).

⁴⁵² RICH TOWNSEND ET AL., REPUBLICAN PARTY OF TEX., 2024 PLATFORM AND RESOLUTIONS OF THE REPUBLICAN PARTY OF TEXAS 32 (2024), <https://texasgop.org/wp-content/uploads/2024/06/2024-RPT-Platform.pdf> [<https://perma.cc/UA5H-76Q3>].

⁴⁵³ The Source, *The Endgame of 'Fetal Personhood'*, TEX. PUB. RADIO (June 24, 2024, 11:16 AM), <https://www.tpr.org/podcast/the-source/2024-06-24/the-endgame-of-fetal-personhood> [<https://perma.cc/UX35-PGHR>]; Carter Sherman, *Texas Republicans Open to Death Penalty for Abortion Providers*, THE GUARDIAN (May 30, 2024, 3:53 PM), <https://www.theguardian.com/world/article/2024/may/30/texas-republicans-vote-death-penalty-abortion-providers> [<https://perma.cc/N92H-YY6X>].

⁴⁵⁴ See Sarah Corning, Note, *Recentring Pregnancy: A Response to Fetal Personhood*, 35 STAN. L. & POL'Y REV. 322, 326 (2024).

criminalize abortion seekers.⁴⁵⁵ These proposals would subject both physicians who perform abortions and the pregnant people who receive them to criminal charges.⁴⁵⁶ The first of these bills was proposed in 2017 and was poorly received by the citizens of the state.⁴⁵⁷ A second, similar, bill was proposed in 2021 and also failed, but attempts will undoubtedly continue.⁴⁵⁸

2. Laws That Hold Pregnant People Responsible for Fetal Ailments or Failures

As in Idaho, the next step in Texas' fetal legal personhood creep was to hold the pregnant person legally responsible for actions the state wants to control, whether those actions negatively impacted a pregnancy or not.⁴⁵⁹ In Texas, this step in the march towards legal fetal personhood targets pregnant people using, or suspected of using, controlled substances.⁴⁶⁰ For example, if a Texas pregnant person's prenatal drug or alcohol abuse results in physical injury to their born child, this conduct qualifies as physical abuse.⁴⁶¹

⁴⁵⁵ See H.R. 948, 85th Leg., Reg. Sess. (Tex. 2017); H.R. 3326, 87th Leg., Reg. Sess. (Tex. 2021).

⁴⁵⁶ See Tex. H.R. 948; Tex. H.R. 3326.

⁴⁵⁷ See Tex. H.R. 948; see also Patrick Svitek, *Texas Rep Placed Under State Protection After Filing Bill to Ban Abortions*, THE TEX. TRIB. (Jan. 30, 2017, 12:00 PM), <https://www.texastribune.org/2017/01/30/tinderholt-placed-under-dps-protection-after-death> [<https://perma.cc/XX5Y-MEF6>] ("State Rep. Tony Tinderholt, R-Arlington, has been placed under the protection of the Texas Department of Public Safety after receiving death threats following his filing of a bill to criminalize abortion in Texas.").

⁴⁵⁸ H.R. 3326, 87th Leg., Reg. Sess. (Tex. 2021). Note that under Texas's child abuse statute, "child" does not encompass a fetus. TEX. FAM. CODE ANN. § 261.001 (West 2023). Even with the current statutory exemption in place, prosecutors have still sought to punish pregnant people who undergo abortion procedures. For example, in 2022, a woman was arrested and charged with murder after having taken misoprostol. See Anna Betts, *Woman Who Was Charged with Murder After Abortion Sues Texas Prosecutor*, N.Y. TIMES (Mar. 30, 2024), <https://www.nytimes.com/2024/03/30/us/texas-abortion-murder-charge-lawsuit.html> (on file with authors). After spending two nights in jail the charges were dropped and prosecutors were forced to admit that there was no legal basis for the charges. *Id.*

⁴⁵⁹ Cary Aspinwall, *These States Are Using Fetal Personhood to Put Women Behind Bars*, THE MARSHALL PROJECT (July 25, 2023, 6:00 AM), <https://www.themarshallproject.org/2023/07/25/pregnant-women-prosecutions-alabama-oklahoma> [<https://perma.cc/HZ7B-BVZ9>].

⁴⁶⁰ The Texas child abuse statute can be found under TEX. FAM. CODE § 261 (2023). TEX. HEALTH & SAFETY CODE § 481.122(d) (2021) defines "child" as a person younger than 18 years old, with no further explanation. A Texas Attorney General Opinion from 2005 concluded that "child" in this context does not cover the unborn and therefore there is no duty to report pregnant drug users to law enforcement. See GREG ABBOTT, ATT'Y GEN. OF TEX., OPINION NO. GA-0291 7 (2005), <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2005/ga0291.pdf> [<https://perma.cc/7MJT-UNSPJ>].

⁴⁶¹ 40 TEX. ADMIN. CODE § 707.455 (2020). The statute specifically states that prenatal drug use that physically harms a child under the age of one year old qualifies as physical abuse. *Id.* As of April 1, 2025, a new provision requires the state's Health and Human Services Commission to provide hospital discharge data for all state Medicaid recipients regarding the treatment of newborn children for prenatal drug or alcohol exposure to the Texas Department of Family and Protective Services.

Prenatal drug use is even a ground for termination of parental rights in Texas if a court finds that the parent gave birth to a child “born addicted to alcohol or a controlled substance” or that the parent’s conduct “endanger[ed] the physical or emotional well-being of the child.”⁴⁶² This occurred in 2006, when the Texas Department of Family and Protective Services terminated a mother’s parental rights after she admitted to using cocaine near the end of her pregnancy and the child showed symptoms of drug withdrawal.⁴⁶³ The Texas Court of Appeals upheld the termination of parental rights, finding that it was in the best interest of the child.⁴⁶⁴ Further, a pregnant person in Texas is liable for neglectful supervision if they know they are pregnant and they use drugs or alcohol, regardless of any injury to the fetus.⁴⁶⁵ Legal fetal personhood proponents have tried to go further and have a fetus qualified as a child under Texas’ injury to a child statute.⁴⁶⁶ In *Collins v. State*, Debra Ann Collins was charged with recklessly causing injury to her child after she smoked crack cocaine while pregnant and her infant was born exhibiting signs of withdrawal.⁴⁶⁷ On appeal, the court overturned the conviction because the state’s Penal Code limited the definitions of “child,” “person,” and “individual” to those who were born alive.⁴⁶⁸ As of this writing, Texas courts have not reexamined this holding in detail.⁴⁶⁹

Inspired to prevent fetal personhood from further creep in this area, in 2021, eight Texas Democrats proposed House Bill 4055, to add a “safe harbor” provision for health care providers that would allow providers *not* to report child abuse or neglect in certain circumstances.⁴⁷⁰ This amendment would only come into play when a pregnant person voluntarily admitted to using controlled substances and either: (1) provided proof that they either

⁴⁶² See TEX. FAM. CODE ANN. §§ 161.001(a)(1)–(2), (b)(1)(R) (West 2023). Prenatal use of narcotics may qualify as conduct that endangers the well-being of a child under Texas law. See *In re W.A.B.*, 979 S.W.2d 804, 807 (Tex. Ct. App. 1998).

⁴⁶³ *Cervantes-Peterson v. Texas Dept. of Fam. & Protective Servs.*, 221 S.W.3d 244, 247–49 (Tex. Ct. App. 2006).

⁴⁶⁴ See *id.* at 254–55; see also *In re D.D.G.*, 423 S.W.3d 468, 472 (Tex. Ct. App. 2014) (terminating parental rights after a newborn tested positive for methamphetamine at birth).

⁴⁶⁵ 40 TEX. ADMIN. CODE § 707.467(d) (2022). Prenatal drug use that “jeopardized the infant’s emotional or physical health” is sufficient to find that the infant was endangered. *Id.*

⁴⁶⁶ See *Collins v. Texas*, 890 S.W.2d 893, 897–98 (Tex. Ct. App. 1994). Texas’ injury to a child statute defines “child” as a person under 14 years and does not include fetuses. TEX. PENAL CODE ANN. § 22.04(c)(1) (West 2021).

⁴⁶⁷ *Collins*, 890 S.W.2d at 895.

⁴⁶⁸ *Id.* at 897–98.

⁴⁶⁹ See Meghan Horn, Note, *Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse*, 14 WM. & MARY J. WOMEN & L. 635, 637 n.9 (2008).

⁴⁷⁰ See H.R. 4055, 87th Leg., Reg. Sess. (Tex. 2021). Generally, doctors and nurses in Texas are required to report suspected child abuse and neglect if they have reasonable cause to believe the child has been abused. See TEX. FAM. CODE ANN. § 261.101(b) (West 2021).

enrolled in or completed a substance abuse treatment program or (2) the provider determined there was no immediate risk to the fetus.⁴⁷¹ The bill also would have also prohibited the Department of Family and Protective Services from investigating a report of child abuse or neglect if the pregnant person successfully completed a treatment program.⁴⁷² While the bill passed the House, it failed to progress further.⁴⁷³

3. Legal Acknowledgments of Pregnancy Loss as Child Loss

As in other states, the movement for legal fetal personhood made further inroads in Texas by requiring that death certificates be filed for pregnancy loss. In Texas, these are required when a pregnancy ends at 20 weeks or more, or where the miscarried fetus weighs 350 grams or more (about three-quarters of one pound).⁴⁷⁴ Notably, the state differentiates between “fetal death” and “infant death” with the former covering a death that occurs during pregnancy, labor, or delivery and the latter being a death occurring after delivery up until the age of one.⁴⁷⁵ Texas also allows for, but does not require, “Certificates of Birth Resulting in Stillbirth” for pregnancies ending at 20 weeks or more.⁴⁷⁶ In 2021, lawmakers attempted to take this a step further by allowing “life certificates” for “preborn children” at any point in pregnancy.⁴⁷⁷ These certificates, a precursor to a birth certificate, would have formally recognized the legal personhood of an “unborn child.”⁴⁷⁸ The bill failed to pass.⁴⁷⁹

⁴⁷¹ Tex. H.R. 4055.

⁴⁷² The treatment program must be under the supervision of the referring or treating physician. *Id.*

⁴⁷³ *See id.*

⁴⁷⁴ TEX. HEALTH & SAFETY CODE ANN. § 674.001(2) (West 2007); SARAH CHILDRESS & SOMAYEH ARABPOUR, TEXAS DEP’T OF STATE HEALTH SERVS. – VITAL STAT. SECTION, LOCAL REGISTRARS & FETAL DEATH REGISTRATION: 2021 VIRTUAL REGIONAL CONFERENCE 5 (2021), <https://www.dshs.texas.gov/sites/default/files/vs/partners/conference/2021/VR-C-Day-2-IRs-Fetal-Death-Registration.pdf> [<https://perma.cc/S3HH-3KAT>].

⁴⁷⁵ TEX. DEP’T OF STATE HEALTH SERVS. – VITAL STAT. SECTION, HANDBOOK ON FETAL DEATH REGISTRATION 4 (2019), <https://www.dshs.texas.gov/sites/default/files/vs/partners/docs/FetalDeathRegistrationHandbook.pdf> [<https://perma.cc/6VA4-TLP5>].

⁴⁷⁶ TEX. HEALTH & SAFETY CODE ANN. § 192.0022 (West 2015); TEXAS DEP’T OF STATE HEALTH SERVS., APPLICATION FOR CERTIFICATE OF BIRTH RESULTING IN STILLBIRTH 1 (2022), https://www.dshs.texas.gov/sites/default/files/vs/doc/ISS_Stillbirth_FINAL_rev-02_22.pdf [<https://perma.cc/38LF-VGLQ>].

⁴⁷⁷ *See* H.R. 2676, 87th Leg., Reg. Sess. (Tex. 2021).

⁴⁷⁸ It is unclear what legal rights this formal recognition of personhood would have granted to the fetus and/or how the pregnant person could have used the “life certificate,” however, the proposed bill stated that it could be used “in the same manner” and for the same purposes as birth certificates. *Id.*

⁴⁷⁹ *Id.*

Other attempts to recognize fetal death as equivalent with those of already born people include a 2017 law signed by Governor Greg Abbott.⁴⁸⁰ This law required hospitals and clinics to bury or cremate all fetal remains, whether the tissue was procured from abortion, stillbirth, miscarriage, or treatment for ectopic pregnancy, and regardless of the pregnant patients' personal wishes.⁴⁸¹ Proponents of this law made no attempt to frame the requirement as one to improve public health or safety and instead touted it as necessary to give voice to the unborn, while wholly disregarding the voices of the pregnant people affected by such changes.⁴⁸² They argued that since regulations pertaining to the burial of adult remains are "appropriate" so too were regulations requiring "unborn babies" to be buried if they "died" from miscarriage or abortion.⁴⁸³ The law was immediately challenged in court and preliminarily enjoined.⁴⁸⁴ Undeterred and unwilling to wait until the lawsuit reached a final judgment, Texas lawmakers passed Senate Bill 8 (discussed in more detail *infra*), which created an entire chapter in the Texas Health and Safety Code pertaining solely to the disposal of fetal tissue.⁴⁸⁵ Plaintiffs to the original lawsuit filed an amended complaint to challenge the sections pertaining to the treatment of fetal tissue and those too were permanently struck down.⁴⁸⁶

4. Laws Targeting Minors

As in Idaho, young adults in Texas face particular challenges accessing reproductive care.⁴⁸⁷ The state ranks ninth in the nation for its teen pregnancy rate and is number one nationally for repeat teen pregnancies.⁴⁸⁸

⁴⁸⁰ See 25 TEX. ADMIN. CODE §§ 1.132–1.136 (2018).

⁴⁸¹ *Id.*

⁴⁸² See Press Release, Gov. Greg Abbott, Protecting the Vulnerable (July 21, 2017), <https://gov.texas.gov/news/post/icymi-governor-greg-abbott-protecting-the-vulnerable> [<https://perma.cc/F8FL-2EDJ>].

⁴⁸³ Jackie Wang, *Should Abortion Clinics Have to Bury Fetal Remains? Suit Over Texas Law Goes to Trial*, THE DALL. MORNING NEWS (July 13, 2018, 5:49 PM), <https://www.dallasnews.com/news/courts/2018/07/13/should-abortion-clinics-have-to-bury-fetal-remains-suit-over-texas-law-goes-to-trial> (on file with authors).

⁴⁸⁴ See *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 233 (W.D. Tex. 2017).

⁴⁸⁵ See TEX. HEALTH & SAFETY CODE ANN. §§ 697.001–009 (West 2017).

⁴⁸⁶ See *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606, 615–16 (W.D. Tex. 2018).

⁴⁸⁷ Jennifer Gerson, *Abortions Are Now All but Impossible to Get for Minors in Texas*, THE 19TH (Sept. 17, 2021, 5:00 AM), <https://19thnews.org/2021/09/texas-abortion-minors> [<https://perma.cc/FNA9-N83G>].

⁴⁸⁸ *May Connections*, PLANNED PARENTHOOD OF GREATER TEX., May 2022, at 2, https://m.plannedparenthood.org/uploads/filer_public/0e/70/0e70b338-7a59-4398-b33a-5655af40de61/may_22-ag-newsletter.pdf (on file with authors).

Notwithstanding these statistics, the state continues to champion the rights of the unborn over their already living young citizens.⁴⁸⁹

Texas is one of thirty-five states that require pregnant minors seeking an abortion without parental notification or consent to go through a judicial bypass process and obtain an order from a judge.⁴⁹⁰ The judge must determine if the minor seeking the abortion shows subjectively sufficient levels of maturity and competence to make the decision without parental input.⁴⁹¹ As intended, this is a burdensome process that is particularly difficult for pregnant young adults in a hostile state to navigate.⁴⁹² In 2021, lawmakers sought to add an additional hurdle to this already burdensome process with House Bill 1171, which sought to have attorneys appointed as representatives for the fetuses in these proceedings.⁴⁹³ The law failed to pass.⁴⁹⁴

The current state of abortion restrictions in Texas, discussed *infra*, further compounds the already challenging landscape minors in the state must navigate in order to access health care.⁴⁹⁵ With almost all abortion health care banned in Texas, minors now must travel to a neighboring state for care in

⁴⁸⁹ In Texas, pregnant minors can consent to pregnancy tests and to any treatments involving their pregnancy, including hospital, medical, or surgical treatment. The only health care they cannot consent to is abortion care. TEX. FAM. CODE ANN. § 32.003(a)(4) (West 2007).

⁴⁹⁰ See *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Sept. 1, 2023), <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> [<https://perma.cc/L73E-G542>].

⁴⁹¹ TEX. FAM. CODE ANN. §§ 33.001–014 (West 2016). Under this chapter a physician can only terminate the pregnancy of a minor (1) once they receive consent after they provide 48 hours' notice to a parent or to the court or (2) they properly certify the existence of an emergency.

⁴⁹² See generally TEX. JUD. BRANCH, RULES AND FORMS FOR A JUDICIAL BYPASS OF PARENTAL NOTICE AND CONSENT UNDER CHAPTER 33 OF THE FAMILY CODE (2022), <https://txcourts.gov/media/1454840/parental-notification-rules.pdf> [<https://perma.cc/WL R4-WATC>] (highlighting the extensive requirements to get a judicial bypass of parental notice and consent). In addition to the unique hurdles that Texas imposes on minors seeking abortion care, the state has also historically required health care facilities to collect and report additional data in connection with minors' care. In 2017, in support of House Bill 215, which increased the reporting requirements for doctors who performed abortions on minors, Texas Governor Greg Abbott insisted that the increased data collection was “to protect these young mothers.” See Press Release, Gov. Greg Abbott, Governor Abbott Signs Legislation to Strengthen Abortion Reporting Requirements (Aug. 16, 2017), <https://gov.texas.gov/news/post/gov-ernor-abbott-signs-legislation-to-strengthen-abortion-reporting-requirem> [<https://perma.cc/P33G-38Q4>].

⁴⁹³ See H.R. 1171, 87th Leg., Reg. Sess. (Tex. 2021).

⁴⁹⁴ The recent abortion bans now in effect in Texas, discussed in more detail in Section V.B.5, *infra*, raise even more concerns over the judicial bypass process. Given that the pregnant person's life must be in danger in order for an abortion to be legally performed, how might a minor apply for judicial bypass and maintain the confidentiality of their abortion while also suffering a life-threatening medical emergency?

⁴⁹⁵ See Gerson, *supra* note 487.

all but the narrowest of circumstances.⁴⁹⁶ The logistics of accessing timely care, particularly in situations where a young adult wishes to keep their pregnancy confidential, necessarily eliminates any choice many Texas minors may have once had.⁴⁹⁷

5. Bolder Steps

As noted, *infra*, Texas expanded the definition of “human” to include fetuses at any stage of development throughout its penal code more than twenty years ago. More recently, two sets of laws, Senate Bill 8 and House Bill 1280, further expanded the legal fetal personhood agenda. Together, these laws ban virtually all abortions at any stage of pregnancy.⁴⁹⁸ The laws provide exceedingly narrow exceptions for pregnant people at risk of death and threaten criminal penalties for people who perform abortion procedures or “engage[] in conduct that aids or abets” an abortion procedure.⁴⁹⁹

Enacted in early 2021, Senate Bill 8, also known as the “Texas Heartbeat Act,” or “SB 8,” prohibits abortions after detection of a fetal heartbeat and also outlaws the “aiding and abetting” of abortions.⁵⁰⁰ The law allows any private citizen to report and sue a person who performs an abortion⁵⁰¹ or “aids and abets” a person seeking one, including providing funds to pay for the procedure.⁵⁰² Effectively allowing every citizen to act as a bounty hunter, Senate Bill 8 not only allows, but encourages, the surveillance of pregnant

⁴⁹⁶ See *Find A Clinic | Encuentre una Clínica*, JANE’S DUE PROCESS (Sep. 27, 2022), <https://janedueprocess.org/find-abortion-clinic> [<https://perma.cc/D6W9-4SUS>].

⁴⁹⁷ As noted *supra* Section V.B.4, pregnant minors often lack the resources of older adults and many do not have the freedom of movement to seek timely care in another state. See Joanna L. Grossman, *The Texas Abortion Law Is a Nightmare for Pregnant Teens*, WASH. MONTHLY (Sept. 7, 2021), <https://washingtonmonthly.com/2021/09/07/the-texas-abortion-law-is-a-nightmare-for-pregnant-teens> [<https://perma.cc/NK5G-SEKT>].

⁴⁹⁸ See H.R. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

⁴⁹⁹ Senate Bill 8 not only authorizes any person who is not a state officer to bring a civil action against those who perform an abortion or “aid and abet” an abortion, but even those who “intend[] to engage” in either of those activities. See S. 8, 87th Leg., Reg. Sess. (Tex. 2021); TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(a) (West 2021).

⁵⁰⁰ See Tex. S. 8.

⁵⁰¹ In 2023, House Bill 3058 took effect, which provides an affirmative defense for physicians who are sued under Senate Bill 8 in connection with providing health care to pregnant patients whose water breaks too early or have ectopic pregnancies. See H.R. 3058, 88th Leg., Reg. Sess. (Tex. 2023).

⁵⁰² *Id.* While the statute itself provides a mechanism for any private citizen to bring a lawsuit against a person “aiding or abetting” an abortion, courts have struggled to find that plaintiffs who are not directly affected by the abortion in some way, such as the pregnant person’s partner or family, have standing to bring suit. See *Gomez v. Braid*, No. 22-829, 2024 Tex. App. LEXIS 1254, at *1, *5 (Tex. Ct. App. Feb. 21, 2024).

people and their actions.⁵⁰³ Relying on this law, in 2023 a Texas man sued three of his ex-wife's friends for "aiding and abetting" her abortion.⁵⁰⁴ He learned of their actions by taking and going through his wife's phone.⁵⁰⁵ In his complaint, he argued that under Texas law the rights of a fetus are the same as the rights of a living person.⁵⁰⁶ While the lawsuit was eventually dropped, the defendants had to hire counsel, and endure the trials of litigation and publicity.⁵⁰⁷ As expected, while this was the first time a Texas man used SB 8 in this manner, it would not be the last.⁵⁰⁸

House Bill 1280, also known as the "Human Life Protection Act," was also passed in 2021 but did not immediately take effect; it was intended to be "triggered" and go into effect 30 days after a Supreme Court final judgment overturning *Roe*.⁵⁰⁹ Following the Court's June 2022 decision in *Dobbs*, this so-called "trigger-law" did just that and effectively banned nearly all abortions

⁵⁰³ Dahlia Lithwick & Mark Joseph Stern, *Sued for Offering Friendship*, SLATE (Mar. 15, 2023, 5:45 AM), <https://slate.com/news-and-politics/2023/03/texas-lawsuit-suing-friends-explained.html> (on file with the authors).

⁵⁰⁴ Brief for Petitioner at 1, *Silva v. Noyola*, No. 23-375 (Tex. Dist. Ct. dismissed Oct. 10, 2024).

⁵⁰⁵ See Katherine Fleming, Note, *Wrongful Death: A Loaded Gun of Fetal Personhood and Intimate Intimidation*, 47 HARV. J.L. & GENDER 229, 231–32 (2024); Emily Bazelon, *Husband Sued Over His Ex-Wife's Abortion; Now Her Friends Are Suing Him*, N.Y. TIMES (May 4, 2023), <https://www.nytimes.com/2023/05/04/us/texas-man-suing-ex-wife-abortion.html> (on file with authors) (noting that two of the women countersued for invasion of privacy); see also Plaintiff's Original Petition at 1–8, *Silva v. Noyola*, No. 23-375 (Tex. Dist. Ct. dismissed Oct. 10, 2024) (alleging murder and wrongful death based on facts Silva obtained by reading and photographing his ex-wife's text messages).

⁵⁰⁶ The lawsuit alleged claims for wrongful death and conspiracy. See Plaintiff's Original Petition, *supra* note 505, at 8–11.

⁵⁰⁷ The lawsuit was dropped, with prejudice, on October 10, 2024. See Plaintiff's Notice of Non-Suit with Prejudice at 1, *Silva v. Noyola*, No. 23-375 (Tex. Dist. Ct. dismissed Oct. 10, 2024). That same day, two of the defendants agreed to drop their countersuit. Defendants Noyola's and Carpenter's Notice of Non-Suit with Prejudice at 1, *Silva v. Noyola*, No. 23-375 (Tex. Dist. Ct. dismissed Oct. 10, 2024).

⁵⁰⁸ More recently, Texan Collin Davis submitted a now sealed petition asking a court to allow him to depose witnesses to ascertain who might have "aided or abetted" his ex-girlfriend when she went to Colorado in February 2024 for an abortion. See Andrea González-Ramírez, *A Texas Man Wants His Ex Investigated for Getting an Abortion*, THE CUT (May 6, 2024), <https://www.thecut.com/article/texas-out-of-state-abortion-collin-davis.html> [<https://perma.cc/U93B-97LV>]. Note that Colorado has a shield law in place whose purpose, *inter alia*, is to protect Coloradans who help citizens from other states access legal abortion health care in their state. S. 23-188, 75th Gen. Assemb., Reg. Sess. (Colo. 2023).

⁵⁰⁹ Texas was one of thirteen states that enacted "trigger laws," laws meant to restrict or ban abortion a certain number of days after any Supreme Court ruling overturning *Roe*. See Joe Hernandez, *Here's What Could Happen Now That the Supreme Court Has Overturned Roe v. Wade*, NPR (June 24, 2022, 4:27 PM), <https://www.npr.org/2022/05/03/1096094942/roe-wade-overturned-what-happens-next#:~:text=The%20opinion%20overturning%20Roe%20does,seismic%20consequences%20for%20the%20country> (on file with authors).

in the state, foregoing any gestational age limit (as is found in SB 8).⁵¹⁰ While the Human Life Protection Act allows for a narrow exception if the life of the pregnant person is at risk or if they are at a “serious risk of substantial impairment of a major bodily function,” even then the health care provider’s actions must provide the best opportunity for the fetus to survive.⁵¹¹ Similar to the language of Texas’s Penal Code, the Act recognizes personhood from fertilization, making abortion health care illegal at all stages of pregnancy.⁵¹² The law also subjects health care providers who violate the law to criminal liability, a civil penalty, and mandatory revocation of their medical license if they are a physician.⁵¹³

As a result of these increasingly severe restrictions, not only are patients leaving Texas, so are medical providers, making prenatal care more difficult to access.⁵¹⁴ Texas leads the nation in maternity ward closures, leaving pregnant people with increasingly fewer options for accessing any type of pregnancy-related care, regardless of whether they intend to carry the pregnancy to term or not.⁵¹⁵ Health care providers who stay in-state have become more hesitant to counsel patients about their options, even out-of-

⁵¹⁰ See H.R. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

⁵¹¹ *Id.* The Texas Medical Board released rules clarifying how physicians should interpret the life of the pregnant person exception and require that physicians document in detail the efforts made to preserve the pregnancy. See Selena Simmons-Duffin & Diane Webber, *New Rules Are in the Works About Abortion Bans in Texas. Almost Nobody’s Happy*, NPR (May 25, 2024, 8:00 AM), <https://www.npr.org/sections/shots-health-news/2024/05/25/g-s1-550/abortion-bans-proposed-rules-texas-medical-board> (on file with authors).

⁵¹² Tex. H.R. 1280. As one example of the harsh effects this law has in application, in 2022 Amanda Zurawski found out at seventeen weeks pregnant that she had suffered a preterm rupture of membranes and that it was inevitable that she would miscarry. Although she was at risk of infection, doctors refused to immediately perform an abortion and instead sent her home because a fetal heartbeat was still detectable. Zurawski developed septic shock three days later and only then did doctors induce delivery of her then stillborn fetus. Due to the severity of her infection at that time, Zurawski needed surgical reconstruction of her uterus, lost one of her fallopian tubes, and remained in intensive care for three days. See *Texas v. Zurawski*, 690 S.W.3d 644, 655 (Tex. 2024).

⁵¹³ See TEX. HEALTH & SAFETY CODE ANN. §§ 170A.004–005 (West 2022).

⁵¹⁴ In 2022, 15% of Texas’ 254 counties had no doctor and approximately two-thirds had no Ob-gyn. The state projects that the physician shortage it is facing will increase by more than 50% over the next decade. See TEX. DEP’T OF STATE HEALTH SERVS., TEX. HEALTH & HUM. SERVS., PHYSICIAN SUPPLY AND DEMAND PROJECTIONS 2021-2032 6–7(2022), <https://www.dshs.texas.gov/sites/default/files/legislative/2022-Reports/Physician-Supply-and-Demand-Projections-2021-2032.pdf> [<https://perma.cc/76DE-35CN>]; see also Eleanor Klibanoff, *Texas’ “Maternity Deserts” Grow as Staff Shortages Close Rural Labor and Delivery Units*, THE TEX. TRIB. (Jan. 20, 2022, 5:00 AM), <https://www.texastribune.org/2022/01/20/rural-hospital-texas-maternity-care-obstetrics> [<https://perma.cc/7QWY-ECN2>] (“Only 40% of Texas’ rural hospitals offer labor and delivery services, forcing some patients to drive hundreds of miles to give birth.”).

⁵¹⁵ Claire Suddath, *West Texas Is a Dangerous Place to Be Pregnant. It’s Getting Worse.*, TEX. MONTHLY (Aug. 9, 2022), <https://www.texasmonthly.com/news-politics/alpine-west-texas-scarce-pregnancy-care> (on file with authors).

state options that remain legal.⁵¹⁶ And Texas patients needing abortions are increasingly being given C-sections, procedures with much higher risks than abortions, so that medical professionals can avoid being prosecuted for providing abortion health care.⁵¹⁷ And extremist lawmakers in the state have been vocal about preventing providers, and others, from counseling patients about their out-of-state options. One group, the Texas Freedom Caucus, has highlighted the need to enforce SB 8 to “[s]top those aiding and abetting out-of-state abortions.”⁵¹⁸ Like Idaho and its “Abortion Travel Ban,” *supra*, Texas aims to expand its reach beyond its own borders.

And after all these attempts, the idea of legal fetal personhood, however poorly understood, has made its way into Texans’ language and life, and citizens themselves have also tried to use the concept to their own advantage. A bold example occurred in 2022, when a pregnant driver, Brandy Bottone, was cited for driving solo in an HOV lane.⁵¹⁹ In an effort to avoid the citation, she claimed her pregnancy as a second legal person. Although her citation was ultimately dismissed, Bottone was issued another citation a month later for again driving solo in an HOV lane.⁵²⁰ Although pregnant people in Texas are still being cited for driving solo in HOV lanes,⁵²¹ the incident did inspire the introduction of two separate bills, both named after Bottone, to allow

⁵¹⁶ Reluctant to speak publicly, or provide their names if they do, many physicians have also resorted to speaking in pseudo-code to patients rather than providing explicit counseling regarding abortion care. One ob-gyn (who declined to be identified) shared that instead of counseling patients to seek abortion care out of state, colleagues now say things such as “The weather’s really nice in New Mexico right now,” leaving patients to read between the lines and seek out their own care. See Selena Simmons-Duffin, *3 Abortion Bans in Texas Leave Doctors ‘Talking in Code’ to Pregnant Patients*, NPR (Mar. 1, 2023, 5:06 AM), <https://www.npr.org/sections/health-shots/2023/03/01/1158364163/3-abortion-bans-in-texas-leave-doctors-talking-in-code-to-pregnant-patients> [https://perma.cc/BJ82-PB3Y].

⁵¹⁷ See Mary Tuma, *Fearing Legal Threats, Doctors Are Performing C-Sections in Lieu of Abortions*, THE NATION (Apr. 17, 2024), <https://www.thenation.com/article/society/c-sections-abortions-terrifying-new-reality> [https://perma.cc/6MF7-H7FR].

⁵¹⁸ *Legislative Priorities*, TEX. FREEDOM CAUCUS (2015), <https://www.freedomfortexas.com/priorities> [https://perma.cc/DFS5-9NPJ].

⁵¹⁹ Pooja Salhotra, *Does a Fetus Count in the Carpool Lane? Texas’ Abortion Law Creates New Questions About Legal Personhood*, THE TEX. TRIB. (Sept. 13, 2022, 5:00 AM), <https://www.texastribune.org/2022/09/13/texas-personhood-laws-abortion-law> [https://perma.cc/DU4K-G8C4].

⁵²⁰ Vanessa Romo, *Pregnant Woman Who Claimed Her Fetus Was an HOV Lane Passenger Gets Another Ticket*, NPR (Sept. 2, 2022, 5:30 AM), <https://www.npr.org/2022/09/02/1120628973/pregnant-woman-dallas-fetus-hov-lane-passenger-ticket> [https://perma.cc/ZA4G-FHAT].

⁵²¹ Maryann Martinez, *Texas Tries to Have It Both Ways: Lone Star State Ticketed Second Pregnant Woman for HOV Lane Drive, Issued Warrant for Her Arrest . . . After Banning Kate Cox from Abortion Despite Risky Pregnancy with Fetus That Will Die*, DAILY MAIL (Dec. 14, 2023, 4:32 PM), <https://www.dailymail.co.uk/news/article-12861127/Texas-tries-ways-Lone-Star-State-ticketed-second-pregnant-woman-HOV-lane-drive-issued-warrant-arrest-banning-Kate-Cox-abortion-despite-risky-pregnancy-fetus-die.html> [https://perma.cc/C2KJ-XBGL].

pregnant people to drive in Texas HOV lanes.⁵²² In other words, assertions of legal fetal personhood in Texas have now crept from proposed extremist laws to traffic court.

Finally, despite all the hyperbole about the well-being of Texas mothers and children, it is worth noting that the state is doing poorly in protecting both. Texas consistently ranks in the ten states with the highest rates of maternal mortality, and in some years, “leads” the world.⁵²³ And, since the enactment of SB 8 and the Human Life Protection Act in 2021, infant deaths in Texas have increased by 13% and infant deaths from fetal anomalies have increased by 23%.⁵²⁴ It is clear that the legal fetal personhood movement serves little beyond political ends.

VI. CONCLUSION

Unable to directly pass laws subverting the autonomy of pregnant people to their pregnancies, proponents of legal fetal personhood have shifted to a strategy of creep. As illustrated by the examples of Idaho and Texas, this incrementalist approach involves separating out vulnerable subpopulations of pregnant people, controlling the language around pregnancy, and exploiting the pain that exists in pregnancy loss. Should supporters of legal fetal personhood succeed by using this back-door approach, both pregnant people and those of reproductive age will be subject to a wide array of intrusive surveillance and control.

⁵²² Briahn Hawkins, *Texas Bill Filed to Allow Pregnant Drivers to Use HOV Lanes*, WFAA (Nov. 16, 2022, 8:00 AM), <https://www.wfaa.com/article/news/local/texas/texas-bill-pregnant-women-people-drivers-allowed-in-hov-lanes/287-a53ea1c3-8817-4d92-b265-bbba72b9b1ca> [https://perma.cc/QC4S-7MH3].

⁵²³ *October Connections*, PLANNED PARENTHOOD OF GREATER TEX., October 2022, at 1, https://www.plannedparenthood.org/uploads/filer_public/9a/ff/9affdf8a-ce53-49c0-8b69-c2e7ee1b8d91/ppgt22-newsletter-oct.pdf (on file with authors); Molly Redden, *Texas Has Highest Maternal Mortality Rate in Developed World, Study Finds*, THE GUARDIAN (Aug. 20, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2016/aug/20/texas-maternal-mortality-rate-health-clinics-funding> [https://perma.cc/SK7B-HCDG].

⁵²⁴ A study conducted by researchers at John Hopkins University claims a direct causation between Texas’ abortion bans and infant mortality, due in part to the bans’ lack of exceptions for fetal anomalies. See Mary Tuma, *A New Study Confirms That the Texas Abortion Ban “Is Responsible” for a Rise in Infant Deaths*, THE NATION (July 9, 2024), <https://www.thenation.com/article/society/study-texas-abortion-ban-infant-deaths> [https://perma.cc/NUP3-CXK6].