

August 17, 2022

## When Fetuses Gain Personhood:

### Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond

After initial stumbling blocks, the fetal personhood movement has gained alarming steam.<sup>1</sup> The idea of a fetus as a legal person has gone from a fringe idea, for which “political will” did not exist, to the ascendant framework of anti-abortion states.<sup>2</sup> This fringe theory now has the ear of the U.S. Supreme Court, with Justice Alito’s majority opinion in *Dobbs* laying breadcrumbs for a fetal right to life under the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>3</sup>

As ascendant as the concept of fetal personhood has become, we have yet to reckon with what it really will, or could, mean. Anti-abortion activists may conveniently “ignore the full consequences of granting fertilized eggs constitutional rights” but, as Lynn M. Paltrow warned, we do so at our peril.<sup>4</sup> To grapple with the full range of radical implications is to recognize at the same time the absurdity and the danger. Fetal personhood and pregnant people’s personhood cannot coexist: fetal personhood “fundamentally change[s] the legal rights and status of all pregnant women” and forces them to “forfeit” their own personhood once fetal persons have taken up residence inside their bodies.<sup>5</sup> The words of an anti-abortion voter capture exactly this dynamic: “I understand women saying, ‘I need to control my own body,’ but once you have another body in there, that’s their body.”<sup>6</sup> The pregnant person’s body is no longer her own.

As the dissenters in *Dobbs* lamented, the majority of the Supreme Court now “says that from the very moment of fertilization, a woman has no rights to speak of” – women have been consigned to “second-class citizenship.”<sup>7</sup> The majority opinion in *Dobbs* cites the Mississippi legislature’s findings that the fetus has a heartbeat, hair, fingernails, and toenails.<sup>8</sup> Pregnant persons, too, have heartbeats, hair, fingernails, toenails; as Irin Carmon put it, “I, Too, Have a Human Form.”<sup>9</sup> Yet their personhood is robbed from them, debased as the personhood of fetuses is elevated. Personhood is a legal concept, not a sociological one; one can believe that fetuses have moral value without conceding that they should be equal to, or take precedence over, pregnant people under the law.

Now that the Pandora’s box of fetal personhood has been opened, and the Supreme Court has sown the seeds for a constitutional right to life for fetuses, it is time to reckon with the full ramifications of fetal legal personhood. Fetal personhood promoters or skeptics alike might claim

<sup>1</sup> *The Personhood Movement*, ProPublica, <https://www.propublica.org/article/the-personhood-movement-timeline>.

<sup>2</sup> Kaia Hubbard, *The Push To Make Fetuses People – And Abortion Murder*, US News (May 6, 2022), <https://www.usnews.com/news/national-news/articles/2022-05-06/the-push-to-make-fetuses-people-and-abortion-murder>.

<sup>3</sup> See *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_\_\_ (slip op. at 4, 5, 29, 31–32) (2022) (repeatedly using the language “unborn human being”).

<sup>4</sup> Lynn M. Paltrow, *Constitutional Rights for the “Unborn” Would Force Women to Forfeit Theirs*, Ms. Magazine (April 15, 2021), <https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant/>.

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

<sup>6</sup> 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>.

<sup>7</sup> *Dobbs*, 597 U.S. \_\_\_\_ (slip op., dissent at 2, 15) (Breyer, J., Kagan, J., and Sotomayor, J., dissenting).

<sup>8</sup> *Dobbs*, 597 U.S. \_\_\_\_ (slip op. at 7).

<sup>9</sup> Irin Carmon, *I, Too, Have a Human Form*, New York Magazine (May 19, 2022), <https://nymag.com/intelligencer/2022/05/roe-v-wade-draft-opinion-pregnant-body-erased.html>.

these possibilities are far-fetched law school hypotheticals, an absurd faux-Pandora's Box or slippery slope,<sup>10</sup> but if the present reality of pregnancy criminalization and abortion restrictions shows anything, it is that seemingly far-fetched possibilities too easily become reality. Many would scoff at the idea that a pregnant person could be criminalized for falling down the stairs,<sup>11</sup> getting shot in the stomach,<sup>12</sup> or taking prescription medication.<sup>13</sup> Yet those are all real cases. We should take all potential implications seriously, recognizing possible future ramifications while also acknowledging the bitter past and present of policing and criminalization of pregnancy. As Professor Lani Guinier wrote, “the distress of the racially marginalized is the ‘first sign of a danger that threatens us all.’”<sup>14</sup> And, as Professor Aziza Ahmed expressed, “[i]f we pay attention to those whose lives have already been destroyed by an inability to access abortion, we can see our collective future and the depths the challenges to come.”<sup>15</sup>

When personhood ballot measures have been introduced in the past, they have often been defeated at the polls, even in conservative states<sup>16</sup> – arguably not so much because of support for abortion but because of the fear about consequences for IVF, ectopic pregnancies, and miscarriage care<sup>17</sup> – or been thrown out by state supreme courts.<sup>18</sup> But, upon review of the existing legal scaffolding of fetal personhood, what stands out is how much is already on the books: how little the law would actually have to be changed; how easy it could be for aggressive prosecutors to use the edifice of personhood against pregnant people; and how easy it could be for aggressive activist courts to marshal that edifice as evidence of a broad commitment to fetal personhood and protection.

<sup>10</sup> See, e.g., Helen M. Alvaré, *Personhood: Law, Common Sense, and Humane Opportunities*, 76 Wash. & Lee L. Rev. Online 99 (2020).

<sup>11</sup> Christine Taylor, a pregnant 22-year-old and mother of two, tripped and fell down a flight of stairs in her home in Iowa. She immediately sought medical care from emergency medical professionals, who determined that neither she nor the fetus was harmed. After Taylor confided in hospital staff that she had contemplated an abortion earlier in her pregnancy, staff reported her to the police. The police arrested her for attempted feticide shortly after she left the hospital. Charges were eventually dropped. See Amie Newman, *Pregnant? Don't Fall Down the Stairs*, Rewire (February 15, 2010), <https://rewirenewsgroup.com/article/2010/02/15/pregnant-dont-fall-down-stairs/>; Michele Goodwin, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD*, 86–87 (2020).

<sup>12</sup> *Alabama v. Jones*, 68-CC-2019-000719.00 (Ala. Cir. Ct. 2019). “Marshaé Jones, an Alabama woman who lost a pregnancy after she was shot in the stomach during an altercation, was charged with manslaughter for allegedly causing the death of her fetus by initiating a fight while knowing she was five months pregnant. A week after her story drew national attention, the district attorney announced that she would not be prosecuted.” National Advocates for Pregnant Women (NAPW), *Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers* (June 2022), [https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2022/06/1.Confronting-Pregnancy-Criminalization\\_6.22.23-1.pdf](https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2022/06/1.Confronting-Pregnancy-Criminalization_6.22.23-1.pdf); Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. Davis L. Rev. 195, 198–203 (2020); P.R. Lockhart, *The Alabama woman indicted after a miscarriage will not be prosecuted*, Vox (Jul. 3, 2019), <https://www.vox.com/identities/2019/7/3/20681511/marshae-jones-alabamamiscarriage-shooting-charges-dismissed>.

<sup>13</sup> *Alabama v. Blalock*, 41-CC-202-000134.00 (Ala. Cir. Ct. 2022). Kimberly Blalock, an Alabama woman who renewed her longstanding, medically necessary prescription to manage her chronic pain during pregnancy, was charged with felony Unlawful Possession or Receipt of Controlled Substances. The prosecution ultimately dropped the charge, “but only after Ms. Blalock agreed to submit to a drug test and clinical assessment, both of which confirmed that Ms. Blalock is not using any non-prescription drugs and has no substance use disorder (SUD).” National Advocates for Pregnant Women, *Felony Charge Dropped Against Alabama Mother Who Renewed Valid Prescription to Manage Chronic Pain During Pregnancy* (February 23, 2022), <https://www.nationaladvocatesforpregnantwomen.org/felony-charge-dropped-against-alabama-mother-who-renewed-valid-prescription-to-manage-chronic-pain-during-pregnancy/>.

<sup>14</sup> Aziza Ahmed, *The Supreme Court Clearly Doesn't Care About Women's Lives*, Ms. Magazine (June 27, 2022), <https://msmagazine.com/2022/06/27/supreme-court-abortion-rights-loss-dobbs-roe-black-latina-women/>.

<sup>15</sup> *Id.*

<sup>16</sup> Colorado (2008, 2010, 2014); Mississippi (2011); North Dakota (2014). *Personhood*, Rewire (updated August 28, 2020), <https://rewirenewsgroup.com/legislative-tracker/law-topic/personhood/>.

<sup>17</sup> Maya Manian, *Lessons from Personhood's Defeat*, 74 Ohio St. L. J. 1, 12–17 (2013); Denise Grady, *Medical Nuances Drove 'No' Vote in Mississippi*, N.Y. Times (November 14, 2011), <https://www.nytimes.com/2011/11/15/health/policy/no-vote-in-mississippi-hinged-on-issues-beyond-abortion.html>; Rob Mank, *Doctors Call Mississippi "Personhood" Initiative Dangerous*, CBS News, Nov. 4, 2011, [http://www.cbsnews.com/8301-503544\\_162-57318625-503544/doctors-call-mississippi-personhood-initiative-dangerous/](http://www.cbsnews.com/8301-503544_162-57318625-503544/doctors-call-mississippi-personhood-initiative-dangerous/).

<sup>18</sup> *In re Initiative Pet. No. 395, State Question No. 761*, 286 P.3d 637 (Okla. 2012); *DesJarlais v. State, Off. of Lieutenant Gov.*, 300 P.3d 900 (Alaska 2013).

Misapplication of existing law is a chronic and persistent problem in pregnancy criminalization and will continue to pose grave challenges – now without the prior guardrails of *Roe* and *Casey* to rein it in. We can prepare for what is to come by looking to what has already come to pass.

## The Legal Edifice of Personhood

### Overview

- **At least 11 states<sup>19</sup> have extremely broad personhood language that could be read to affect all state laws**, civil and criminal, whether by establishing in the state constitution an inalienable right to life; declaring in an anti-abortion law (often in the preamble) a general rule of construction or policy to extend the protection of all state laws to fetuses and acknowledge all rights, privileges, and immunities on their behalf; or stating in a general definition section which applies across all state laws that “person” includes a fetus.
  - In addition, a **broad personhood bill** was recently introduced in **Ohio**.
- **At least 5 states<sup>20</sup> define “person” (or “individual” or “human being”) to include a fetus throughout the state criminal code.**
  - In addition, **at least two states<sup>21</sup> define an “unborn child” as “a member of the species Homo sapiens, at any stage of development, who is carried in the womb” throughout the criminal code.** These definition sections do not then make the leap that “unborn child” is encompassed within the definition of “person” throughout the criminal code.
- **At least 27 states<sup>22</sup> include personhood or personhood-adjacent language in anti-abortion laws** (e.g., “member of species Homo sapiens,” “unborn human being,” “unborn human individual,” “dignity of all human life,” “persons, born and unborn,” “class of human beings,” etc.).
- **38 states have feticide laws** authorizing homicide charges to be brought for causing the loss of a pregnancy.
  - In **21 of the 38 states<sup>23</sup>**, the criminal code has expanded the definition of a homicide victim, or a charge similar to homicide, to relate to a zygote, embryo, and fetus. In **seven of those states<sup>24</sup>**, terms such as **“person,” “human being,” or “another”** have been **redefined in the homicide code** to include a zygote, embryo, or fetus.

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<sup>19</sup> Alabama, Arizona (preliminary injunction issued, but only as applied to abortions that remain legal in the state; litigation ongoing), Arkansas, Georgia, Kansas, Kentucky, Missouri, Montana, Pennsylvania, Tennessee, Utah.

<sup>20</sup> Kentucky, Louisiana, Ohio, South Dakota, Texas.

<sup>21</sup> Alaska and Wyoming.

<sup>22</sup> Alabama, Arizona, Arkansas, Georgia, Idaho, Iowa, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin.

<sup>23</sup> Alabama, Arizona, Arkansas, California, Idaho, Indiana, Kansas, Maryland, Mississippi, Montana, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, Wyoming.

<sup>24</sup> Alabama, Arkansas, Kansas, Mississippi, New Hampshire, Oklahoma, Tennessee.

- **At least 7 states/territories<sup>25</sup>** have statutes declaring that, as a general matter, **“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.”**
- In at least **2 states<sup>26</sup>**, the highest state courts have held a viable fetus to be a person for the purpose of **state constitutional provisions guaranteeing every person a remedy by due course of law** for injury done to them in their person. Both of these cases involved plaintiffs who suffered injuries in utero and survived but then sued to recover damages from those injuries.
- **Every state and territory has at least some statutes or case law defining or interpreting “person,” “minor,” or “child” to include a fetus for the purpose of a particular law**, including (but not limited to) trusts and estates, anatomical gift acts, child abuse and neglect, wrongful death, negligence claims for prenatal injuries, workers’ compensation, and insurance.

### **The Broadest Personhood Provisions**

Eleven states have the most radical and wide-ranging personhood provisions, which do not confine personhood to the context of a specific statute but rather purport to extend it to all laws of the state. Kansas’s provision, for example, lays out a general rule of construction: “the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents.”<sup>27</sup> Alabama and Arkansas have constitutional amendments,<sup>28</sup> while Arizona, Georgia, Kansas, Kentucky, Missouri, Montana, Pennsylvania, Tennessee, and Utah have personhood provisions embedded within anti-abortion laws, often in the preamble, and framed as an interpretation policy, rule of construction, or general statement of state policy.<sup>29</sup>

There is a great deal of uncertainty around what these broad provisions actually mean, how they will be implemented, or whether they are self-executing or require additional legislation for concrete applications. As expressed by the district court judge who recently issued a preliminary injunction against Arizona’s personhood provision (but only as applied to abortions that remain legal in the state), the “Interpretation Policy either does absolutely nothing, or it does something. What that something might be is a mystery or, as Defendants put it, ‘anyone’s guess.’”<sup>30</sup> The Supreme Court of Arkansas found in 1994 that the state’s constitutional amendment is *not* a “self-executing provision” that would, in itself, bar the state from any activity allowing or aiding abortion because it “does not provide any means by which the policy is to be effectuated.”<sup>31</sup>

<sup>25</sup> California, Guam, Idaho, Louisiana, Montana, North Dakota, South Dakota.

<sup>26</sup> Ohio, Oregon.

<sup>27</sup> Kan. Stat. Ann. § 65-6732 (West).

<sup>28</sup> Art. I, § 36.06 / AL CONST Amend. No. 930; Ark. Const. Amendment 68, § 2.

<sup>29</sup> Ariz. Rev. Stat. Ann. § 1-219; Ga. Code Ann. § 1-2-1 (West); Corporations; Kan. Stat. Ann. § 65-6732 (West); Ky. Rev. Stat. Ann. § 311.720 (West); Mo. Rev. Stat. § 1.205; Mont. Code Ann. § 50-20-102 (West); 18 Pa. Stat. and Cons. Stat. Ann. § 3202 (West); Tenn. Code Ann. § 39-15-214 (West); Utah Code Ann. § 76-7-301.1 (West); Utah Code Ann. § 78B-3-109 (West).

<sup>30</sup> *Isaacson v. Brnovich*, CV-21-01417-PHX-DLR 1, 2 (D. Ariz. July 11, 2022).

<sup>31</sup> *Knowlton v. Ward*, 889 S.W.2d 721, 726 (Ark. 1994).

In *Webster v. Reproductive Health Services*, the U.S. Supreme Court declined to rule on the constitutionality of Missouri’s broad personhood language because the preamble was merely “precatory” and “the extent to which the preamble’s language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide.”<sup>32</sup> Only when the preamble had been “applied to restrict...activities...in some concrete way” would the Court be “empowered” to “pass on [its] constitutionality.”<sup>33</sup> Soon after *Webster*, the Supreme Court of Missouri stated that the preamble “set out a canon of interpretation enacted by the general assembly directing that the time of conception and not viability is the determinative point at which the legally protectable rights, privileges, and immunities of an unborn child should be deemed to arise” and “set[] out the intention of the general assembly that Missouri courts should read all Missouri statutes *in pari materia* with this section.”<sup>34</sup>

Despite the enormous scope of this language, Missouri courts have not read *all* statutes in accordance with this canon of interpretation; rather, they have rejected outlandish attempted applications, such as dating the victim’s age from conception instead of birth in a child molestation case.<sup>35</sup> Even though Missouri’s provision specifies that it does not create a cause of action against a woman “for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care,”<sup>36</sup> prosecutors have weaponized the provision to “criminalize pregnant and postpartum women for perceived risks during pregnancy.”<sup>37</sup> Such prosecutions “demonstrate the dangerous fallacy of the *Webster* Court’s assertion that a personhood provision may be allowed to go into effect because it is only intended to ‘express [a] value judgment’ rather than ‘applied to restrict the activities’ of pregnant women or their medical providers.”<sup>38</sup>

The radical personhood bill introduced recently in Ohio<sup>39</sup> will be a test of the climate for personhood laws after *Dobbs*.

## Personhood Throughout Criminal Codes

At least five states – Kentucky,<sup>40</sup> Louisiana,<sup>41</sup> Ohio,<sup>42</sup> South Dakota,<sup>43</sup> and Texas<sup>44</sup> – define “person,” “individual,” or “human being” to include a fetus throughout the criminal code, not just in the context of feticide statutes. In many criminal laws, the idea of a fetal person is ludicrous. Even so,

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<sup>32</sup> 492 U.S. 490, 505 (1989).

<sup>33</sup> *Id.*

<sup>34</sup> *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo. 1995).

<sup>35</sup> *State v. Crider*, 554 S.W.3d 460, 462 (Mo. App. W. Dist. 2018).

<sup>36</sup> Mo. Rev. Stat. § 1.205.4.

<sup>37</sup> Brief of National Advocates for Pregnant Women et al. as Amici Curiae in Support of Plaintiffs-Appellees Seeking Affirmance in Part and Reversal in Part at 8–9, in *Isaacson*, CV-21-01417-PHX-DLR.

<sup>38</sup> *Id.* (citing *Webster*, 492 U.S. at 506–07).

<sup>39</sup> Morgan Trau, *Ohio Republicans introduce bill to recognize ‘personhood’ from conception*, ABC News 5 Cleveland (July 11, 2022), <https://www.news5cleveland.com/news/politics/ohio-politics/ohio-republicans-introduce-bill-that-could-ban-ivf-by-recognizing-personhood-from-conception>.

<sup>40</sup> *Com. v. Morris*, 142 S.W.3d 654 (Ky. 2004) (holding that “human being” in penal code definitions in Ky. Rev. Stat. Ann. § 500.080 (West) includes a viable fetus).

<sup>41</sup> La. Stat. Ann. § 14:2.

<sup>42</sup> Ohio Rev. Code Ann. § 2901.01 (West).

<sup>43</sup> S.D. Codified Laws § 22-1-2.

<sup>44</sup> Tex. Penal Code Ann. § 1.07 (Vernon).

these sweeping definitions throughout the criminal codes could open the door to a dizzying array of statutes being mobilized in pregnancy criminalization.<sup>45</sup>

In addition, at least two states – Alaska<sup>46</sup> and Wyoming<sup>47</sup> – define an “unborn child” as “a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb” throughout the criminal code. These definition sections do not then make the leap that “unborn child” is encompassed within the definition of “person.” These definitions would thus apply whenever criminal laws use the words “unborn child” but not whenever they use the word “person.”

The highest courts in Alabama, Oklahoma, and South Carolina have expanded criminal child abuse, neglect, and/or endangerment statutes to include fetuses within the definition of “child.”<sup>48</sup> These decisions have accelerated the rate of pregnancy prosecutions dramatically in their respective states. The Alabama decision predated Alabama’s personhood constitutional amendment. Such decisions have served as judicially enacted “‘personhood’ measure[s] in disguise.”<sup>49</sup> While the expansion to include fetuses does not automatically transfer to other statutes, these decisions pave the way for prosecutors to charge pregnant and postpartum people under other criminal statutes and argue for further expansion.

### Personhood Language in Anti-Abortion Laws

At least twenty-seven states – Alabama,<sup>50</sup> Arizona,<sup>51</sup> Arkansas,<sup>52</sup> Georgia,<sup>53</sup> Idaho,<sup>54</sup> Indiana,<sup>55</sup> Iowa,<sup>56</sup> Kansas,<sup>57</sup> Kentucky,<sup>58</sup> Louisiana,<sup>59</sup> Michigan,<sup>60</sup> Minnesota,<sup>61</sup> Mississippi,<sup>62</sup> Missouri,<sup>63</sup>

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<sup>45</sup> See National Association of Criminal Defense Lawyers, *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights Into Criminal Wrongs* (August 2021), <https://www.nacdl.org/Document/AbortioninAmericaLegOverreachCriminalizReproRights>.

<sup>46</sup> Alaska Stat. Ann. § 11.81.900 (West).

<sup>47</sup> Wyo. Stat. Ann. § 6-1-104 (West).

<sup>48</sup> *Ex parte Ankrom*, 152 So. 3d 397, 429 (Ala. 2013); *State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

<sup>49</sup> *Press Statement: National Advocates for Pregnant Women’s Lynn Paltrow on Alabama Supreme Court’s Decision in “Personhood” Measure in Disguise Case* (January 12, 2013), <https://www.nationaladvocatesforpregnantwomen.org/press-statement-national-advocates-for-pregnant-womens-lynn-paltrow-on-alabama-supreme-courts-decision-in-personhood-measure-in-disguise-case/>.

<sup>50</sup> Ala. Code § 26-21-1; Ala. Code § 26-23F; Ala. Code § 26-23H; Ala. Code § 26-22.

<sup>51</sup> Ariz. Rev. Stat. Ann. § 13-3603.02 (litigation ongoing).

<sup>52</sup> Ark. Code Ann. § 20-16-1402 (West); Ark. Code Ann. § 20-16-1802 (West); AR ST § 5-61-303; Ark. Code Ann. § 20-16-2002 (West); Ark. Code Ann. § 20-16-1102 (West).

<sup>53</sup> Ga. Code Ann. § 31-9A-2 (West); Ga. Code Ann. § 31-9B-1 (West).

<sup>54</sup> Idaho Code Ann. § 18-8801 (West); Idaho Code Ann. § 18-604 (West); Idaho Code Ann. § 39-9302 (West); Idaho Code Ann. § 39-9303 (West); Idaho Code Ann. § 18-502 (West); Idaho Code Ann. § 39-9304 (West).

<sup>55</sup> Ind. Code Ann. § 16-34-2-3 (West) (“born-alive” law).

<sup>56</sup> Iowa Code Ann. § 146B.1 (West).

<sup>57</sup> Kan. Stat. Ann. § 65-6709 (West).

<sup>58</sup> Ky. Rev. Stat. Ann. § 311.772 (West) (currently blocked; litigation ongoing); Ky. Rev. Stat. Ann. § 311.7701 (West); Ky. Rev. Stat. Ann. § 311.7702 (West); Ky. Rev. Stat. Ann. § 311.7704 (West); Ky. Rev. Stat. Ann. § 311.7811 (West).

<sup>59</sup> La. Stat. Ann. § 40:1061.25; La. Stat. Ann. § 14:87.3; La. Stat. Ann. § 40:1061.1.1; La. Stat. Ann. § 40:1061.28; La. Stat. Ann. § 40:1061.1.

<sup>60</sup> Mich. Comp. Laws Ann. § 750.213a (West).

<sup>61</sup> Minn. Stat. Ann. § 145.4241; Minn. Stat. Ann. § 145.4235 (West).

<sup>62</sup> Miss. Code Ann. § 41-41-191 (West); Miss. Code Ann. § 41-41-34.1 (West); Miss. Code Ann. § 41-41-407 (West); Miss. Code Ann. § 41-41-405 (West); Miss. Code Ann. § 73-25-29 (West).

<sup>63</sup> Mo. Ann. Stat. § 188.026 (West); Mo. Ann. Stat. § 188.010 (West); Mo. Ann. Stat. § 188.037 (West); Mo. Ann. Stat. § 188.027 (West).

Montana,<sup>64</sup> Nebraska,<sup>65</sup> New Hampshire,<sup>66</sup> North Dakota,<sup>67</sup> Ohio,<sup>68</sup> Oklahoma,<sup>69</sup> Pennsylvania,<sup>70</sup> South Carolina,<sup>71</sup> South Dakota,<sup>72</sup> Tennessee,<sup>73</sup> Texas,<sup>74</sup> Utah,<sup>75</sup> and Wisconsin<sup>76</sup> – include fetal personhood or personhood-adjacent language in anti-abortion laws. (There is overlap between this list and the list of states with the broadest provisions because some states have both sweeping personhood provisions and additional anti-abortion laws with personhood language.)

This personhood language ranges from the most explicit – e.g., Kentucky’s trigger law defining an “unborn human being” as “an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth”<sup>77</sup> – to the more ambiguous or personhood-adjacent – e.g, Iowa’s law defining an “unborn child” as an “an individual organism of the species homo sapiens from fertilization until live birth.”<sup>78</sup>

These laws do not explicitly state that they are intended to apply to all other laws of the state or confer full and equal protection of the laws to fetal “persons.” For the more explicit personhood language, the legal debate may be whether such a definition can be imported to other statutory contexts or even across the entire state code. For the more ambiguous language, the legal debate may be whether it confers personhood or some form of intermediate status less than full personhood.

### **Symbolic and Expressive Resolutions and Laws**

States hostile to abortion have also made symbolic and expressive resolutions and laws elevating religiously-infused ideas of personhood. Tennessee, for example, passed a law calling for a “Tennessee Monument to Unborn Children, In Memory of the Victims of Abortion: Babies, Women, and Men” to be built on the state capitol campus.<sup>79</sup> The preamble situates this monument as in line with monuments against slavery and genocide, characterizing slavery, genocide, and abortion as practices “justified on the idea that some humans have less value than others.”<sup>80</sup> The only outdoor monument to women on the Tennessee State Capitol grounds is the Confederate Women’s Monument. Women and girls of color in Tennessee will thus see a monument to unborn life and to white supremacy but not to anyone who looks like them. They will have their personhood symbolically

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<sup>64</sup> Mont. Code Ann. § 50-20-602 (West).

<sup>65</sup> Neb. Rev. Stat. Ann. § 28-3,103 (West).

<sup>66</sup> N.H. Rev. Stat. Ann. § 329:48.

<sup>67</sup> N.D. Cent. Code Ann. § 14-02.1-02 (West).

<sup>68</sup> Ohio Rev. Code Ann. § 2919.19 (West); R.C. § 2919.20; Ohio Rev. Code Ann. § 2919.192 (West); Ohio Rev. Code Ann. § 2317.56 (West).

<sup>69</sup> 63 Okl.St. Ann. § 1-730; Okla. Stat. Ann. tit. 63, § 1-745.2 (West); 63 Okl.St. Ann. § 1-755; Okla. Stat. Ann. tit. 63, § 1-738.7 (West).

<sup>70</sup> 18 Pa. Stat. and Cons. Stat. Ann. § 3203 (West); 18 Pa.C.S.A. § 3203; 18 Pa. Stat. and Cons. Stat. Ann. § 3216 (West); 18 Pa. Stat. and Cons. Stat. Ann. § 3212 (West).

<sup>71</sup> S.C. Code Ann. § 44-41-610; S.C. Code Ann. § 44-41-430.

<sup>72</sup> S.D. Codified Laws § 34-23A-1; S.D. Codified Laws § 34-23A-10.1; S.D. Codified Laws § 34-23A-33; S.D. Codified Laws § 34-23A-32; S.D. Codified Laws § 34-23A-1.4.

<sup>73</sup> Tenn. Code Ann. § 39-15-211 (West); Tenn. Code Ann. § 39-15-213 (West); Tenn. Code Ann. § 39-15-219 (West).

<sup>74</sup> Tex. Health & Safety Code Ann. § 170A.001 (West).

<sup>75</sup> Utah Code Ann. § 78B-3-109 (West).

<sup>76</sup> Wis. Stat. Ann. § 940.04 (West) (litigation ongoing); Wis. Stat. Ann. § 20.927 (West).

<sup>77</sup> Ky. Rev. Stat. Ann. § 311.772 (West) (currently blocked; litigation ongoing).

<sup>78</sup> Iowa Code Ann. § 146B.1 (West).

<sup>79</sup> Tenn. Code Ann. § 4-8-305 (West).

<sup>80</sup> *Id.*

denied by simultaneous glorification of white supremacy and of “fetal persons” over living, breathing women.

The analogy to slavery and genocide made here is echoed in the legislative findings of abortion laws, as in Alabama’s Human Life Protection Act that declares “more than 50 million babies have been aborted in the United States since the *Roe* decision in 1973, more than three times the number who were killed in German death camps, Chinese purges, Stalin’s gulags, Cambodian killing fields, and the Rwandan genocide combined.”<sup>81</sup> It also makes disturbing appearances in judicial opinions. For example, a Kentucky appellate court justice’s 1994 concurrence claimed (1) that “[t]he law created in [Dred] Scott and the Nuremberg Laws at least granted some status to the persons involved, repugnant as it was. African Americans were classified not as citizens but as property, and Jews were reduced to a condition of being not quite human. In *Roe*, the personhood of the unborn child is relatively ignored” and (2) that “abortions without regulation are no more legal and safe than are lynchings.”<sup>82</sup>

This symbolic framing of the rejection of fetal personhood as morally equivalent to, or even *worse* than, slavery and “German death camps” is especially insulting given that the denial of the reproductive autonomy of Black women was the economic and social foundation of slavery<sup>83</sup> and that Jewish law requires that the life of a woman be prioritized over her fetus and that life does not begin until birth.<sup>84</sup>

In addition, Oklahoma passed a revolving fund for the State Board of Education labeled the “Public Education on the Humanity of the Unborn Child Fund.”<sup>85</sup> Oklahoma has also repeatedly officially recognized Rose Day, an annual anti-abortion rally, at the state capitol as a “a reminder to all members of the House of Representatives that the fight to save the unborn will continue until legal protection for the lives of unborn children has been restored.”<sup>86</sup> The 2019 House Resolution to that effect declared that “all human life is sacred from the point of conception” and “embryonic stem cell research leads to the destruction of embryonic human beings.”<sup>87</sup> As the U.S. Supreme Court erodes the Establishment Clause,<sup>88</sup> there is even less protection against these religiously-infused state expressions of the sanctity of life and of fetal personhood.

In addition, Michigan passed a House Resolution in 2021 to “affirm the right to life of every unborn child in this state and call for the enforcement of all laws regulating or limiting the practice of abortion.”<sup>89</sup> While this is not a binding personhood provision, its wide-ranging language is troubling as an expression of collective sentiment.

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<sup>81</sup> Ala. Code § 26-23H (currently blocked by preliminary injunction).

<sup>82</sup> *Cabinet for Hum. Res. v. Women’s Health Servs., Inc.*, 878 S.W.2d 806 (Ky. Ct. App. 1994) (McDonald, J., concurring).

<sup>83</sup> Michele Goodwin, *No, Justice Alito, Reproductive Justice is in the Constitution*, N.Y. Times (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html>.

<sup>84</sup> See, e.g., National Council of Jewish Women, *Abortion and Jewish Values Toolkit*, [https://www.ncjw.org/wp-content/uploads/2020/05/NCJW\\_ReproductiveGuide\\_Final.pdf](https://www.ncjw.org/wp-content/uploads/2020/05/NCJW_ReproductiveGuide_Final.pdf).

<sup>85</sup> 63 Okl.St. Ann. § 1-755.

<sup>86</sup> Okl. H.R. 1001 (2017); Okl. H.R.1022 (2018); Okl. H.R.1003 Rose Day (2019).

<sup>87</sup> Okl. H.R.1003 Rose Day (2019).

<sup>88</sup> See, e.g., *Kennedy v. Bremerton*, 597 U.S. \_\_\_\_ (2022); *Carson v. Makin*, 596 U.S. \_\_\_\_ (2022).

<sup>89</sup> 2021–2022 MI H.R. 22.

## Fetal Homicide

Thirty-eight states have fetal homicide laws authorizing homicide charges to be brought for causing the loss of a pregnancy.<sup>90</sup> In twenty-one of those states,<sup>91</sup> the definition of a victim of homicide (or a different charge similar to homicide) in the state criminal code has been extended to relate to a zygote, embryo, and fetus.<sup>92</sup> In seven of those states, terms such as “person,” “human being,” or “another” in the context of homicide offenses have been redefined to include a zygote, embryo, or fetus,<sup>93</sup> thus creating explicit overlap between feticide and fetal personhood. The other seventeen states have a unique statute or chapter in the criminal code for causing the loss of a pregnancy.<sup>94</sup>

Twenty-eight of the states with fetal homicide laws have “explicit language precluding charging pregnant people in relation to their own pregnancies,”<sup>95</sup> and statutory language in two additional states “implies the same exception.”<sup>96</sup> However, “[e]ven in states where the fetal homicide laws prohibit charging pregnant people, overzealous prosecutors still prosecute them, either by improperly charging them with a homicide crime or bringing other criminal charges for pregnancy loss experiences.”<sup>97</sup> Even when those charges are dropped or the pregnant person is found not guilty, the trauma of being dragged through the criminal justice system is deeply scarring. Even worse, people often accept plea deals and experience the collateral consequences of a conviction for the rest of their lives.

Fetal homicide laws have already been weaponized to prosecute people for their own pregnancy losses. After *Dobbs*, such prosecutions will likely accelerate and “potentially result in additional criminal charges related to abortion, assisted reproductive technology, and certain forms of contraception.”<sup>98</sup>

### “Unborn Child Deemed Existing Person...”: Contingent Personhood

At least seven states and territories – California, Guam, Idaho, Louisiana, Montana, and North Dakota, South Dakota – have statutes declaring that, across the board, “[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

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<sup>90</sup> Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. National Advocates for Pregnant Women (NAPW), *Who Do Fetal Homicide Laws Protect? An Analysis for a Post-Roe America*, August 17, 2022, <https://www.nationaladvocatesforpregnantwomen.org/who-do-fetal-homicide-laws-protect-an-analysis-for-a-post-ro-america/>

<sup>91</sup> Alabama, Arizona, Arkansas, California, Idaho, Indiana, Kansas, Maryland, Mississippi, Montana, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. NAPW, *Who Do Fetal Homicide Laws Protect*, *supra* note 90.

<sup>92</sup> NAPW, *Who Do Fetal Homicide Laws Protect*, *supra* note 90.

<sup>93</sup> Ala. Code § 13A-6-1; Ark. Code Ann. § 5-1-102; Kan. Stat. Ann. § 21-5419; Miss. Code Ann. § 97-3-37; N.H. Rev. Stat. Ann. §§ 630:1-a– 630:3; Okla. Stat. Ann. tit. 21, § 691; Tenn. Code Ann. § 39-13-214.

<sup>94</sup> Alaska, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, and Virginia.

<sup>95</sup> Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Washington, West Virginia, and Wisconsin. NAPW, *Who Do Fetal Homicide Laws Protect*, *supra* note 90.

<sup>96</sup> California and Nevada. NAPW, *Who Do Fetal Homicide Laws Protect?*, *supra* note 90.

<sup>97</sup> NAPW, *Who Do Fetal Homicide Laws Protect?*, *supra* note 90.

<sup>98</sup> *Id.*

its subsequent birth.”<sup>99</sup> The language is virtually identical in California, Guam, Idaho, Montana, North Dakota, and South Dakota.

The Louisiana statute echoes this language but adds that “[i]f the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.”<sup>100</sup> The Supreme Court of Louisiana clarified in 1997 that this statute “does not confer actual legal personality; it provides that the fetus shall only be ‘considered’ as a natural child and it limits the fictional personality of the fetus to matters that advance the interests of the fetus.”<sup>101</sup> “Natural personality,” on the other hand, “commences from the moment of live birth and terminates at death. Accordingly, article 25 establishes the general rule that an unborn fetus is not recognized as possessing legal personality.”<sup>102</sup>

In California, this provision has been construed as “confer[ring] various rights upon an unborn child—including the rights to inherit, to own property, and to recover for prenatal injuries—provided the child is born alive.”<sup>103</sup> Case law from the 1930s to 1950s cited this provision in holding that a fetus was a “minor illegitimate child” who could, through a guardian ad litem, enforce a right to support against its father.<sup>104</sup> In the 1990s, it was deployed in contexts of paternity proceedings<sup>105</sup> and workers’ compensation.<sup>106</sup> Such applications have not seemed to pit the fetus against a pregnant person to restrict her liberty.

Three key contingencies in these laws, and the case law applying them, provide guardrails against their potential (mis)application. Recognition of personhood is:

- (1) framed as a convenient legal fiction for a specific purpose, rather than as a broad, generally applicable declaration of when all rights and protections commence;
- (2) contingent upon birth; and
- (3) contingent upon such recognition being in the child’s interests.

Even so, in states hostile to abortion, such provisions may be cited as evidence of a broader state policy in favor of fetal personhood or protection. The more explicit qualifying language used in Louisiana’s statute provides better guardrails against misapplication than the contingent, yet still concerningly broad language, in the other six statutes. Still, though, the statute could be weaponized

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<sup>99</sup> Cal. Civ. Code Ann. § 43.1 (West); 19 G.C.A. § 1104; Idaho Code Ann. § 32-102 (West); La. Civ. Code Ann. art. 26; Mont. Code Ann. § 41-1-103 (West); N.D. Cent. Code Ann. § 14-10-15 (West); S.D. Codified Laws § 26-1-2. A similar rule of construction is suggested in Michigan case law. *See, e.g., McLain v. Howald*, 79 N.W. 182 (Mich. 1899) (“For all purposes of construction, a child en ventre sa mere is considered as a child in esse, if it will be for its benefit to be so considered.”).

<sup>100</sup> La. Civ. Code Ann. art. 26.

<sup>101</sup> *Wartelle v. Women’s and Children’s Hosp., Inc.*, 704 So. 2d 778, 781 (La. 1997).

<sup>102</sup> *Id.*; La. Civ. Code Ann. art. 25.

<sup>103</sup> *Cheyanna M. v. A.C. Nielsen Co.*, 78 Cal. Rptr. 2d 335 (Cal. App. 2d Dist. 1998).

<sup>104</sup> *Kyne v. Kyne*, 100 P.2d 806 (Cal. App. 1st Dist. 1940); *Application of Clarke*, 309 P.2d 142 (Cal. App. 2d Dist. 1957); *People v. Yates*, 298 P. 961 (Cal. Super. App. Dept. 1931).

<sup>105</sup> *Cheyanna M.*, 78 Cal. Rptr. 2d 335.

<sup>106</sup> *Snyder v. Michael’s Stores, Inc.*, 945 P.2d 781 (Cal. 1997).

by state actors to undermine the rights of pregnant persons, particularly in light of Louisiana's broader fetal personhood regime.<sup>107</sup>

Additional qualifying language should be added to any such statute to state explicitly that the recognition of personhood may not be applied to undermine the pregnant person's personhood, liberty, or bodily autonomy.

### **State Constitutional Due Process**

The Ohio and Oregon Supreme Courts held, in 1949 and 1955 respectively, that a viable fetus subsequently born alive was a person for the purpose of state constitutional provisions guaranteeing every person a remedy by due course of law for injury done to them in their person.<sup>108</sup> Both of these cases involved plaintiffs who suffered injuries in utero, survived, and sued to recover damages for those prenatal injuries. The personhood conferred is thus contingent upon subsequent birth. These are midcentury cases that have not generated significant recent case law. Even so, they are potential citations for claims about a preexisting legal edifice of personhood and a state's commitment to fetal protection.

### **Other Bodies of Law: Child Abuse, Wrongful Death, Negligence, Insurance**

Every state and territory has statutory law and/or case law defining or interpreting "person" (or "human being," "minor," "child," etc.) to include a fetus for the purpose of a particular law or cause of action. Personhood pops up in a veritable cornucopia of areas including wrongful death, negligence, trusts and estates, property, insurance, anatomical gift acts, and child abuse and neglect statutes.

Some preexisting bodies of law defining a fetus as a "person" or "child" for specific statutory purposes may seem innocuous. But, even if in application they remain confined to their statutory contexts, they can be mobilized in arguments claiming preexisting widespread legal protection of fetuses. In extending the state's wrongful death statute to apply to the loss of a fetus, the Supreme Court of Michigan invoked a property law providing for the appointment of a guardian ad litem for "unborn persons" as "legislative recognition of the personhood of the unborn," reasoning outward that "[i]f property interests of unborn persons are protected by the law, how much more solicitous should the law be of the first unalienable right of man—the right to life itself?"<sup>109</sup> A federal district court in North Carolina cited a concurrence in a wrongful death case to generalize outward to the sweeping proposition that "[t]he public policy of North Carolina recognizes that an unborn infant is a person."<sup>110</sup> The U.S. Supreme Court adopted similar logic in *Webster* when it declined to strike down

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<sup>107</sup> As discussed above, Louisiana defines "person" to include a fetus throughout the criminal code (La. Stat. Ann. § 14:2) and includes personhood language in its anti-abortion laws (La. Stat. Ann. § 40:1061.25; La. Stat. Ann. § 14:87.3; La. Stat. Ann. § 40:1061.1.1; La. Stat. Ann. § 40:1061.28; La. Stat. Ann. § 40:1061.1).

<sup>108</sup> *Williams v. Marion Rapid Transit*, 87 N.E.2d 334 (Ohio 1949); *Mallison v. Pomeroy*, 291 P.2d 225 (Or. 1955).

<sup>109</sup> *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971).

<sup>110</sup> *Ft. Dearborn Life Ins. Co. v. Turner*, 521 F. Supp. 2d 499 (E.D.N.C. 2007), modified on reconsideration sub nom. *Ft. Dearborn Life Ins. Co. v. Turner for A.R.Y.*, 2:06-CV-4-H(3), 2008 WL 11429285 (E.D.N.C. Jan. 31, 2008).

Missouri’s sweeping personhood language, mentioning that “[s]tate law has offered protections to unborn children in tort and probate law.”<sup>111</sup>

Broad statements of personhood drawn from preexisting civil bodies of law, especially wrongful death, are taken out of their intended, confined contexts and used as fodder for the expansion of pregnancy criminalization. When the Supreme Court of South Carolina expanded the definition of “child” in the child abuse and endangerment statute to include a fetus, it cited prior interpretation of the wrongful death statute to include a viable fetus within “person” to assert that “South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges.”<sup>112</sup>

When the Supreme Court of Alabama expanded the meaning of “child” in the “chemical endangerment of a child” statute to include a fetus, it too relied in part on prior interpretation of “minor child” in the state’s wrongful death statute to include a viable fetus.<sup>113</sup> The concurring opinion cited, in addition to wrongful death, the tort cause of action for prenatal injuries and the fact that all states allow a court to “appoint a guardian ad litem to represent the interests of an unborn child in various matters including estates and trusts.”<sup>114</sup> Drawing on those bodies of law, the concurrence declared that “the decision of this Court today is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by law.”<sup>115</sup>

Similarly (though unsuccessfully), a justice on the Supreme Court of Kansas dissenting from the majority’s decision to enjoin an anti-abortion law cited:

Kansas’ longstanding policy of protecting the unborn—even outside the abortion context. For instance, Kansas criminalizes homicides of the unborn; refuses to execute pregnant convicts; permits wrongful death actions for the unborn; gives no effect to a living will when the patient is pregnant; and provides for the representation of the unborn in trust and probate proceedings.<sup>116</sup>

In addition, a dissenting justice on the Supreme Court of Michigan cited a wrongful death law in a fetal homicide case to claim that “the personhood of a viable unborn child has been accepted beyond peradventure in the jurisprudence of this state.”<sup>117</sup>

Legislatures can also draw upon these bodies of law in drafting anti-abortion laws, as in a New Hampshire Fetal Life Protection Act that adopted the “opinion that the fetus from the time of conception becomes a separate organism and remains so throughout its life,” pulling that language

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<sup>111</sup> *Webster*, 492 U.S. at 506.

<sup>112</sup> *Whitner*, 492 S.E.2d at 779.

<sup>113</sup> *Ankrom*, 152 So. 3d at 404.

<sup>114</sup> *Id.* at 425–29 (Parker, J., concurring).

<sup>115</sup> *Id.* at 429 (Parker, J., concurring).

<sup>116</sup> *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 552 (Kan. 2019) (Stegall, J., dissenting) (“See K.S.A. 2018 Supp. 21-5419(c) (homicides of unborn children); K.S.A. 22-4009 (prohibition against execution of a pregnant convict); K.S.A. 2018 Supp. 60-1901(b) (action for wrongful death of unborn child); K.S.A. 65-28,103 (living will has no effect during pregnancy); K.S.A. 59-2205 (representation of unborn in a probate proceeding); K.S.A. 59-2254 (representation of unborn in a trust accounting); K.S.A. 58a-305 (appointment of representative for unborn individual under Kansas Uniform Trust Code)).

<sup>117</sup> *People v. Guthrie*, 334 N.W.2d 616 (Mich. 1983) (Ryan, J., dissenting).

verbatim from a case recognizing a wrongful death cause of action for a fetus, and citing as additional support a feticide statute encompassing a fetus within the word “another.”<sup>118</sup>

### *Criminal Child Abuse and Civil Child Welfare Statutes*

Criminal child abuse statutes (spanning a range of offenses including child neglect, child deprivation, chemical endangerment, and delivery of a controlled substance to a minor) and civil child welfare statutes have been key arenas in which fetal personhood has been weaponized to regulate and punish pregnant people and tear families apart. The highest courts in Alabama, Oklahoma, and South Carolina have expanded criminal child abuse (or, in Alabama, “chemical endangerment of a child”) statutes to include fetuses within the definition of “child.”<sup>119</sup> These decisions have accelerated the rate of pregnancy prosecutions dramatically in their respective states and served as judicially enacted “‘personhood’ measure[s] in disguise.”<sup>120</sup>

Many other courts have rejected the extension of criminal statutes to police and punish pregnant and postpartum people.<sup>121</sup> In the 2007 case *State v. Wade*, a Missouri appellate court held that, although Missouri’s sweeping personhood language “generally provides legal authority for protecting the rights of unborn children,” it states explicitly that “[n]othing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.”<sup>122</sup> Thus, given this exclusion and the fact that the “plain language” of the statute does not mention fetuses, the child endangerment statute did not apply to a pregnant person’s substance use.<sup>123</sup>

But even decisions like *Wade* have “proved insufficient to dissuade Missouri prosecutors from continuing to try to criminalize pregnant and postpartum women for perceived risks during pregnancy [and] the vast majority of women—disproportionately women of color and those who are low-income—are compelled to accept plea deals rather than put the prosecution to its proof.”<sup>124</sup> Prosecutors have been “undeterred” by the exception *Wade* cited, claiming it is no barrier to prosecution of pregnant women.<sup>125</sup> A prosecutor who “brought charges against twenty-two pregnant

<sup>118</sup> N.H. Rev. Stat. Ann. § 329:48 (citing *Bennett v. Hymers*, 147 A.2d 108 (N.H. 1958); N.H. Rev. State. Ann § 630:1-a: IV).

<sup>119</sup> *Ex parte Ankrom*, 152 So. 3d 397, 429 (Ala. 2013); *State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

<sup>120</sup> *Press Statement: National Advocates for Pregnant Women’s Lynn Paltrow on Alabama Supreme Court’s Decision in “Personhood” Measure in Disguise Case* (January 12, 2013), <https://www.nationaladvocatesforpregnantwomen.org/press-statement-national-advocates-for-pregnant-womens-lynn-paltrow-on-alabama-supreme-courts-decision-in-personhood-measure-in-disguise-case/>.

<sup>121</sup> *Reinesto v. Super. Ct. of State In and For County of Navajo*, 894 P.2d 733 (Ariz. App. 1st Div. 1995); *Arms v. State*, 471 S.W.3d 637 (Ark. 2015); *Reyes v. Super. Ct.*, 141 Cal. Rptr. 912 (Cal. App. 4th Dist. 1977); *People v. Jones*, 464 P.3d 735 (Colo. 2020); *State v. Gethers*, 585 So. 2d 1140 (Fla. 4th Dist. App. 1991); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *Herron v. State*, 729 N.E.2d 1008 (Ind. App. 2000); *Com. v. Welch*, 864 S.W.2d 280 (Ky. 1993); *State v. Armstard*, 991 So. 2d 116 (La. App. 2d Cir. 2008), *writ denied*, 998 So. 2d 89 (La. 2009); *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *People v. Jones*, 894 N.W.2d 723 (Mich. App. 2016); *People v. Hardy*, 469 N.W.2d 50 (Mich. App. 1991); *State v. Wade*, 232 S.W.3d 663, 665 (Mo. Ct. App. 2007); *Sheriff, Washoe County, Nev. v. Encoe*, 885 P.2d 596 (Nev. 1994); *State v. Mondragon*, 203 P.3d 105 (N.M. App. 2008); *State v. Martinez*, 137 P.3d 1195 (N.M. App. 2006); *People v. Morabito*, 580 N.Y.S.2d 843 (N.Y. City Ct. 1992); *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *State v. Stegall*, 828 N.W.2d 526 (N.D. 2013); *State v. Clemons*, 996 N.E.2d 507 (Ohio App. 4th Dist. 2013); *State v. Cervantes*, 223 P.3d 425 (Or. App. 2009); *Cmmw. v. Dischman*, 195 A.3d 567 (Pa. Super. 2018); *Youngblood v. State*, 2-06-329-CR, 2007 WL 2460225 (Tex. App.—Fort Worth Aug. 31, 2007) (unreported); *Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007); *Ward v. State*, 188 S.W.3d 874 (Tex. App.—Amarillo 2006); *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994); *State v. Dum*, 916 P.2d 952 (Wash. App. Div. 3 1996); *State v. Louk*, 786 S.E.2d 219 (W. Va. 2016).

<sup>122</sup> *Wade*, 232 S.W.3d at 665.

<sup>123</sup> *Id.*

<sup>124</sup> Brief of National Advocates for Pregnant Women et al. as Amici Curiae in Support of Plaintiffs-Appellees Seeking Affirmance in Part and Reversal in Part, *supra* note 37, at 8–9.

<sup>125</sup> *Id.* at 9.

or postpartum women in Jackson County argued that a mother ‘directly’ endangered the unborn child by ingesting an already illegal drug’ and that Missouri’s personhood provision put her ‘on notice...that she could be prosecuted for child endangerment.’”<sup>126</sup>

In the civil context, twenty-four states and D.C. consider substance use during pregnancy child abuse under civil child welfare statutes.<sup>127</sup> At least three states – Minnesota, North Dakota, and South Dakota – consider prenatal substance use grounds for civil commitment, e.g., forced enrollment in inpatient drug treatment programs.<sup>128</sup> Wisconsin’s child welfare code allows the state to take custody of a pregnant person with even fewer protections than civil commitment. Its statute provides a particularly chilling example of how such laws deprive pregnant people of liberty. In 1997, the Wisconsin legislature amended the Children’s Code to define “unborn child” as a “human being from the time of fertilization to the time of birth”<sup>129</sup> and enacted the “Unborn Child Protection Act,” which allows “juvenile courts to take physical custody of an ‘unborn child’—and thereby physically detain a pregnant person—on the suspicion that a person is pregnant and has consumed or *may* consume alcohol or a controlled substance during their pregnancy.”<sup>130</sup> In 2017, in *Loertscher v. Anderson*, a federal trial judge held the law unconstitutional and enjoined its enforcement.<sup>131</sup> The Seventh Circuit vacated the injunction after Tammy Loertscher moved out of state but the “substance of the decision was neither addressed nor overturned.”<sup>132</sup> Despite the unconstitutionality of Wisconsin’s law, approximately 460 women per year for the past five years have been jailed, coerced into medical treatment, or put under house arrest under its auspices.<sup>133</sup>

In addition, courts in (at least) California, Georgia, Michigan, New Jersey, New York, Ohio, Tennessee, Texas, Vermont, West Virginia, and Wisconsin have stretched existing civil child welfare laws to cover fetuses.<sup>134</sup> Courts have mobilized older bodies of law, including wrongful death, negligence, and dramshop liability, for the broad proposition that “[s]ince a child has a legal right to begin life with a sound mind and body...it is within [the child’s] best interest to examine all prenatal conduct bearing on that right.”<sup>135</sup> As the phrase “all prenatal conduct” illustrates, judicial expansion of child welfare statutes to encompass fetuses drags all manner of legal conduct during pregnancy into

<sup>126</sup> *Id.* at 9 (citing State’s Response to Motion to Dismiss, *State v. Smith*, No. 16CR2000-00964 (Mo. Cir. Ct. Jackson County Feb. 8, 2008)).

<sup>127</sup> Guttmacher Institute, *Substance Use During Pregnancy* (updated August 1, 2022),

<https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>.

<sup>128</sup> *Id.*; Alcohol Policy Information System, *Pregnancy and Alcohol: Civil Commitment*,

<https://alcoholpolicy.niaaa.nih.gov/apis-policy-topics/civil-commitment/20/about-this-policy>; Minn. Stat. Ann. § 253B.02; N.D. Cent. Code Ann. § 50-25.1-16 (West) (“controlled substances”); N.D. Cent. Code Ann. § 50-25.1-18 (West) (“alcohol abuse”); S.D. Codified Laws § 34-20A-70; Wis. Stat. Ann. § 48.19.

<sup>129</sup> Wis. Stat. Ann. § 48.02 (West).

<sup>130</sup> NAPW, *Wisconsin’s ‘Unborn Children Protection Act’ (Act 292)*,

<https://www.nationaladvocatesforpregnantwomen.org/fact-sheet-wisconsins-unborn-child-protection-act-act-292/>.

<sup>131</sup> 259 F. Supp.3d 902 (W.D. Wis. 2017).

<sup>132</sup> NAPW, *supra* note 130.

<sup>133</sup> NAPW, *supra* note 130.

<sup>134</sup> *See, e.g., In re Troy D.*, 263 Cal. Rptr. 869 (Cal. App. 4th Dist. 1989); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981); *Matter of Baby X*, 293 N.W.2d 736 (Mich. App. 1980); *Hoener v. Bertinato*, 171 A.2d 140 (N.J. Juv. & Dom. Rel. 1961); *Matter of Stefanel Tyesha C.*, 556 N.Y.S.2d 280 (N.Y. App. Div. 1st Dept. 1990); *Matter of Fathima Ashanti K.J.*, 558 N.Y.S.2d 447 (N.Y. Fam. Ct. 1990); *Matter of Smith*, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985); *Dept. of Soc. Services on Behalf of Mark S. v. Felicia B.*, 543 N.Y.S.2d 637 (N.Y. Fam. Ct. 1989); *In re Unborn Child*, 683 N.Y.S.2d 366; *Ruiz*, 500 N.E.2d 935; *In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000); *In re Adrianna S.*, 520 S.W.3d 548, 557 (Tenn. Ct. App. 2016); *In re Benjamin M.*, 310 S.W.3d 844 (Tenn. Ct. App. 2009); *In re S.M.L.D.*, 150 S.W.3d 754 (Tex. App.—Amarillo 2004); *Cervantes-Peterson v. Texas Dept. of Fam. & Protective Services*, 221 S.W.3d 244 (Tex. App.—Hous. [1st Dist.] 2006); *In re M.M.*, 133 A.3d 379 (Vt. 2015); *In re A.L.C.M.*, 801 S.E.2d 260 (W. Va. 2017); *In re Termination of Parental Rights to Gabriella M.*, 625 N.W.2d 360 (Wis. App. 2001) (unpublished).

<sup>135</sup> *See, e.g., Baby X*, 293 N. W.2d at 738–39.

the net of state surveillance and punishment. States mobilize civil child welfare laws most often against substance use but also across a wide range of contexts, including to justify coercive medical interventions.

Other courts have rejected at least some instances of the expansion of civil child welfare statutes.<sup>136</sup> The number of courts that have had to reject such arguments illustrates just how many times, and in how many places, such expansion has been attempted by aggressive prosecutors and family regulation agencies. Case law is conflicting and protection of pregnant people is precarious. With the ascendance of fetal personhood ideology and law and the contraction of constitutional liberties, more states may follow the dangerous and damaging path charted by Alabama, Oklahoma, and South Carolina.

### Civil Wrongful Death Claims

Wrongful death statutes are a preexisting legal edifice that have gradually been amended or interpreted in over forty states to include fetuses within the definition of “person” or otherwise allow recovery for fetal death (e.g., through a separate cause of action for death of an “unborn child”).<sup>137</sup> Prior to the wave of statutory amendment and judicial expansion, the general principle was embodied in Justice Oliver Wendell Holmes’ 1884 opinion in *Dietrich v. Inhabitants of Northampton*: the fetus was “a part of the mother,” so “any damage to it which was not too remote to be recovered for at all was recoverable by” the mother.<sup>138</sup>

Professors Jill Wieber Lens and Greer Donley argue that, while “recognition of separateness between mother and (unborn) child in a wrongful death claim is usually seen as an antiabortion victory” because of the inclusion of fetuses within the definition of “person,” the way that a wrongful death claim recognizes a “self-other relationship...reflects how most women feel that the death of their stillborn baby is the death of a child, and something much graver than a broken leg.”<sup>139</sup> Lens and

<sup>136</sup> See, e.g., *Matter of App. in Pima County Juv. Severance Action* No. S-120171, 905 P.2d 555 (Ariz. App. 2d Div. 1995); *In re Steven S.*, 178 Cal. Rptr. 525 (Cal. App. 2d Dist. 1981); *In re Valerie D.*, 613 A.2d 748 (Conn. 1992); *New Jersey Dept. of Children and Families, Div. of Youth and Fam. Services v. A.L.*, 59 A.3d 576 (N.J. 2013); *New Jersey Div. of Child Protec. and Permanency v. Y.N.*, 104 A.3d 244 (N.J. 2014); *Matter of Fletcher*, 533 N.Y.S.2d 241 (N.Y. Fam. Ct. 1988); *Interest of L.J.B.*, 199 A.3d 868 (Pa. 2018); *Albertson v. Pierce County*, 186 Wash. App. 1002 (Wash. App. Div. 1 2015) (unpublished).

<sup>137</sup> *Mack v. Carmack*, 79 So. 3d 597, 599–611 (Ala. 2011) (per curiam); Alaska Stat. Ann. § 09.55.585 (West); *Summerfield v. Superior Court*, 698 P.2d 712, 724 (Ariz. 1985) (en banc); ARK. CODE ANN. § 16-62-102 (Supp. 2015); *Hatala v. Markiewicz*, 224 A.2d 406, 408 (Conn. Super. Ct. 1966); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557, 558 (Del. Super. Ct. 1956); *Greater Se. Cmty. Hosp. v. Williams*, 482 A.2d 394, 398 (D.C. 1984); *Porter v. Lassiter*, 87 S.E.2d 100, 102–03 (Ga. Ct. App. 1955); *Castro v. Melchor*, 366 P.3d 1058, 1065–66 (Haw. Ct. App. 2016), *aff'd*, 414 P.3d 53 (Haw. 2018); *Volk v. Baldazo*, 651 P.2d 11, 12, 15 (Idaho 1982); 740 ILL. COMP. STAT. ANN. 180 / 2.2 (West 2010); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833–34 (Iowa 1983) (en banc); IND. CODE § 34-23-2-1(b)-(c) (2019); KAN. STAT. ANN. § 60-1901(a)-(c) (Supp. 2015); *Mitchell v. Couch*, 285 S.W.2d 901, 904-06 (Ky. 1955); LA. CIV. CODE ANN. art. 26 (2010); *State ex rel. Odham v. Sherman*, 198 A.2d 71, 72-73 (Md. 1964); *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916, 917 (Mass. 1975); MICH. COMP. LAWS ANN. § 600.2922a(1) (West 2017); *Verkennes v. Corniea*, 38 N.W.2d 838, 841 (Minn. 1949); MISS. CODE ANN. § 11-7-13 (2019); *Connor*, 898 S.W.2d 89; NEB. REV. STAT. § 30-809(1) (2019); *White v. Yup*, 458 P.2d 617, 623-24 (Nev. 1969); *Poliquin v. Macdonald*, 135 A.2d 249 (N.H. 1957); *Salazar v. St. Vincent Hosp.*, 619 P.2d 826, 830 (N.M. Ct. App. 1980); *DiDonato v. Wortman*, 358 S.E.2d 489, 490 (N.C. 1987); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D. 1984); *Werling v. Sandy*, 476 N.E.2d 1053, 1054 (Ohio 1985); OKLA. STAT. ANN. tit. 12, § 1053F (West 2015); *Libbee v. Permanente Clinic*, 518 P.2d 636, 638 (Or. 1974) (en banc); *Amadio v. Levin*, 501 A.2d 1085, 1089 (Pa. 1985); *Presley v. Newport Hosp.*, 365 A.2d 748, 756 (R.I. 1976) (Bevilacqua, C.J., concurring in part and dissenting in part); *Fowler v. Woodward*, 138 S.E.2d 42, 44-45 (S.C. 1964); S.D. CODIFIED LAWS § 21-5-1 (1984); TENN. CODE ANN. 20-5-106(d) (1992); TEX. CIV. PRAC. & REM. CODE ANN. § 71.003 (West 2008); *Carranza v. U.S.*, 267 P.3d 912 (Utah 2011); *Vaillancourt v. Med. Ctr. Hosp. of Vermont, Inc.*, 425 A.2d 92, 94 (Vt. 1980); *Moen v. Hanson*, 537 P.2d 266, 268 (Wash. 1975) (en banc); *Baby Farley v. Sartin*, 466 S.E.2d 522, 535 (W. Va. 1995); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107, 112 (Wis. 1967). See, generally, Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. Rev. 437 (2020).

<sup>138</sup> *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884).

<sup>139</sup> Greer Donley and Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood* 75 Vand. L. Rev. 1, 30 (forthcoming).

Donley further argue that wrongful death personhood is distinct from anti-abortion fetal personhood because it “creates no legal rights for the fetus” but rather gives the parent alone the right to recover based on the “lost developing relationship.”<sup>140</sup> This distinction is important, in part, because these laws benefit many pregnant people who suffer pregnancy loss as a result of negligent conduct and want to recover damages for their significant loss.

Some statutes and cases have made the kind of distinction that Donley and Lens lay out, emphasizing that the wrongful death cause of action for death of a fetus is intended to protect the rights and interests of *parents*, not of the fetus itself.<sup>141</sup> The Supreme Court of Iowa, for example, stated: “we can and do set completely aside all the philosophical arguments about the status of the unborn.... What is involved here is a right of recovery given to a parent. The parent’s loss does not depend on the legal status of the child; indeed the absence of the child is the crux of the suit.”<sup>142</sup> Additionally, the Virginia statute, carves out a separate category of “fetal death” rather than defining a fetus as a person and makes explicit that “[n]othing in this section shall be construed to create a cause of action for a fetal death against the natural mother of the fetus.”<sup>143</sup>

While the nuanced distinction Donley and Lens draw is compelling, it may not rein in anti-abortion activists. Even when recovery is limited to parents, an estranged former partner can attempt to use the wrongful death cause of action as a tool of harassment and anti-abortion activism. Several troubling cases illustrate how this legal edifice can be wielded as a sword against pregnant people and medical providers. In a 1986 case, an Arkansas man attempted to bring a wrongful death suit against the estate of his former partner after she was killed in a car accident and her fetus did not survive.<sup>144</sup> He filed a claim on behalf of the fetus and a derivative suit on behalf of himself and the couple’s children, claiming that the deceased woman negligently caused the death of the fetus.<sup>145</sup> The Supreme Court of Arkansas dismissed all his claims as barred by parental immunity doctrine.<sup>146</sup>

A Wisconsin appellate court, though, allowed a father to bring a wrongful death action for a fetus to recover against the mother’s automobile insurer for the mother’s allegedly negligent driving, which he claimed was the cause of her stillbirth.<sup>147</sup>

In 2019, soon after Alabama’s broad personhood amendment was approved by voters, an Alabama man filed a wrongful death claim against an abortion clinic on behalf of a fetus two years after his ex-girlfriend had an abortion.<sup>148</sup> (His claim was ultimately dismissed on appeal because his brief failed to comply with briefing rules.<sup>149</sup>) Similarly, in 2020, an Arizona man filed a wrongful death suit against an abortion clinic concerning the abortion his ex-wife had four years prior.<sup>150</sup> As Civia

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<sup>140</sup> *Id.*  
<sup>141</sup> See, e.g., *Volk*, 651 P.2d at 15 (explaining that wrongful death law “protects the rights and interests of the parents, and not those of the decedent child”).

<sup>142</sup> *Dunn*, 333 N.W.2d 830 at 833–34.

<sup>143</sup> Va. Code Ann. § 8.01-50 (West).

<sup>144</sup> *Carpenter v. Bishop*, 720 S.W.2d 299 (Ark. 1986).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 300.

<sup>147</sup> *Tesar v. Anderson*, 789 N.W.2d 351, 361 (Wis. App. 2010).

<sup>148</sup> E.J. Dickson, *Alabama Court Awards Aborted Fetus the Right to Sue Abortion Clinic*, Rolling Stone (March 6, 2019), <https://www.rollingstone.com/culture/culture-news/abortion-court-sue-fetus-rights-alabama-804213/>.

<sup>149</sup> *Magers v. Alabama Women's Ctr. Reprod. Alternatives, LLC*, 325 So. 3d 788 (Ala. 2020).

<sup>150</sup> Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic Over the Abortion She Had Four Years Ago*, ProPublica (July 15, 2022), <https://www.propublica.org/article/arizona-abortion-father-lawsuit-wrongful-death>.

Tamarkin, president of the National Council of Jewish Women’s Arizona chapter, put it: the case is “a trial balloon to see how far the attorney and the plaintiff can push the limits of the law, the limits of reason, the limits of science and medicine.”<sup>151</sup> These cases show how civil suits under preexisting laws, including but not limited to wrongful death claims, can be mobilized to “intimidate providers” and harass and punish people who have had abortions in a manner similar to suits under SB 8-style laws.<sup>152</sup>

Wrongful death statutes – intended to protect and recognize reproductive harm – thus become another weapon with which ex-partners can harass their former partners. These anti-abortion uses of wrongful death claims highlight what one Michigan appellate court labeled the “inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the *same* fetus under the wrongful death act.”<sup>153</sup> This dynamic is akin to arguments that defendants convicted under feticide laws have made: that it denies them equal protection to charge them while a pregnant person herself could abort the same fetus.<sup>154</sup>

Another distinct concern is importation of the wrongful death personhood definition into other statutory contexts. In a 2022 Illinois case, an alleged intoxicated driver crashed into the vehicle of a pregnant woman, killing her.<sup>155</sup> The fetus did not survive.<sup>156</sup> The father of the fetus, as special administrator of the estate of the fetus, sued the driver under the state’s wrongful death and dramshop acts.<sup>157</sup> Illinois’s Dramshop Act “imposes ‘no-fault’ liability for selling or giving intoxicating liquors to persons who subsequently injure third parties.”<sup>158</sup> The appellate court decision rejected the extension of the definition of person from the Wrongful Death Act to the Dramshop Act because, while the legislature amended the Wrongful Death Act to include a fetus, it had not done the same for the Dramshop Act.<sup>159</sup>

### *Negligence Claims Against Mothers for Prenatal Injuries*

As a general matter, parental tort immunity doctrine bars a child from suing a parent for damages.<sup>160</sup> While some states have abolished or abandoned this immunity, others have held firm to it. Courts in Illinois,<sup>161</sup> Massachusetts,<sup>162</sup> South Dakota,<sup>163</sup> and Texas<sup>164</sup> have declined to recognize a cause of action of a fetus against a mother for negligence. An Illinois appellate court acknowledged that the text of the state’s Wrongful Death Act “does not specifically prevent an unborn fetus from asserting a claim against an allegedly negligent mother” but declined to recognize either a legally

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Toth v. Goree*, 237 N.W.2d 297, 301 (Mich. App. 1975).

<sup>154</sup> *See, e.g., Kiss v. State*, 316 S.W.3d 665 (Tex. App.–Dallas 2009).

<sup>155</sup> *Herndon v. Kaminski*, 2022 IL App (2d) 210297, 1, *appeal denied*, 128342, 2022 WL 1738669 (Ill. May 25, 2022).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2.

<sup>159</sup> *Herndon v. Kaminski*, 2022 IL App (2d) 210297, *appeal denied*, 128342, 2022 WL 1738669 (Ill. May 25, 2022).

<sup>160</sup> *Chamness v. Fairtrace*, 511 N.E.2d 839 (Ill. App. 5th Dist. 1987).

<sup>161</sup> *Natl. R.R. Passenger Corp. v. Terracon Consultants, Inc.*, 13 N.E.3d 834, 838 (Ill. App. 5th Dist. 2014). *See also Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

<sup>162</sup> *Remy v. MacDonald*, 801 N.E.2d 260 (Mass. 2004).

<sup>163</sup> *Geiser*, 763 N.W.2d 469.

<sup>164</sup> *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999).

cognizable duty of a mother to a fetus or a cause of action by a fetus against a mother.<sup>165</sup> The Supreme Court of South Dakota held that a fetus has rights against a third party but not against its mother.<sup>166</sup> Where a child’s conservator sued the child’s mother for damages allegedly caused by the mother’s drug use during pregnancy, a Texas appellate court declined to recognize a tort cause of action for negligent or grossly negligent conduct during pregnancy.<sup>167</sup>

However, a disturbing body of case law across several states has recognized a cause of action by a fetus, or subsequently born child, against its mother for prenatal injuries. The New Hampshire Supreme Court briefly nodded to what distinguishes a pregnant person from an external actor – the “unique” relationship between mother and fetus – before concluding that “we are not persuaded that based upon this relationship, a mother’s duty to her fetus should not be legally recognized.”<sup>168</sup> The court reasoned that “[i]f a child has a cause of action against his or her mother for negligence that occurred after birth and that caused injury to the child, it is neither logical, nor in accord with our precedent, to disallow that child’s claim against the mother for negligent conduct that caused injury to the child months, days, or mere hours before the child’s birth.”<sup>169</sup> In this case, **a woman who was seven months pregnant was struck by a car while crossing the street and, the next day, delivered her daughter, by emergency cesarean surgery. The court permitted the child to sue her mother for negligence for “failing to use reasonable care in crossing the street and failing to use a designated crosswalk.”**<sup>170</sup> The dissent rightly pointed to the “intrusion into the privacy and physical autonomy rights of women” and “profound implications that such a rule of law holds for all women in this state who are, or may become, pregnant.”<sup>171</sup> Such a duty could “govern such details...as her diet, sleep, exercise, sexual activity, work and living environment, and, of course, nearly every aspect of her health care,” stretching to “the mother’s every waking and sleeping moment.”<sup>172</sup>

A Florida appellate court also recognized a cause of action of a child against their mother for alleged prenatal negligence, also in a case in which a pregnant woman was injured in a car accident and delivered her daughter the next day.<sup>173</sup> The mother’s insurance company argued that such a cause of action conflicted with the Florida Supreme Court’s holding that, under Florida law, a mother has “common-law immunity from criminal prosecution for causing death or injury to her fetus.”<sup>174</sup> The court dismissed this argument, however, as not dictating the same result in the civil negligence context.<sup>175</sup>

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<sup>165</sup> *Natl. R.R. Passenger Corp.*, 13 N.E.3d at 838. See also *Stallman*, 531 N.E.2d 355.

<sup>166</sup> *Geiser*, 763 N.W.2d 469.

<sup>167</sup> *Chenault*, 989 S.W.2d 474.

<sup>168</sup> *Bonte for Bonte v. Bonte*, 616 A.2d 464 (N.H. 1992).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 467 (Brock, C.J., and Batchelder, J., dissenting).

<sup>172</sup> *Id.* at 467–68 (Brock, C.J., and Batchelder, J., dissenting).

<sup>173</sup> *Natl. Cas. Co. v. N. Tr. Bank of Fla., N.A.*, 807 So. 2d 86 (Fla. 3d Dist. App. 2001).

<sup>174</sup> *Id.* at 88 (discussing *State v. Ashley*, 701 So. 2d 338, 341 (Fla. 1997)).

<sup>175</sup> *Id.*

Fathers have also used negligence law to regulate and sanction the behavior of their (former) partners. In the New Hampshire case discussed above, the child's father brought a negligence claim against the mother on his own behalf, as well as on behalf of their child.<sup>176</sup>

Some case law has permitted an infant to sue a hospital for injuries sustained as a result of transfusion of RH-negative blood into a woman with RH-positive blood even where such transfusion occurred several years prior to conception.<sup>177</sup> If an infant has a cause of action against its mother for injuries in utero, and against a hospital for preconception negligence, could it also have a cause of action against a mother for conduct occurring years prior to conception?

As the New Hampshire and Wisconsin cases illustrate, a negligence claim is not confined by what behavior is illegal; negligence could include any behavior a court finds falls short of a certain standard of care it deems fit to impose on pregnant people. Pregnant people have already been criminalized for noncriminal behaviors like falling down the stairs.<sup>178</sup> As the 'rules' about what pregnant persons should or should not do get ever more elaborate and fastidious, the definition of negligent behavior could widen. This legal structure allows children themselves, and fathers suing on behalf of fetuses that did not survive, to become an arm of the state policing the behavior of their mothers. This allows children and fathers alike to exert the kind of dominion over women that *Casey* decried.<sup>179</sup>

As Michele Goodwin highlights, a special duty of rescue and care is imposed on pregnant people alone, while tort law as a general matter rejects such a duty and, in case law about bone marrow and organ transplants, "the no duty rule with regard to familial relationships remains robust and intact."<sup>180</sup> A person cannot be forced to donate bone marrow or a kidney to their dying sibling,<sup>181</sup> but a pregnant person can be forced to submit to a coercive medical intervention or held liable for failing to cross the street cautiously enough. This disparate treatment should be considered a denial of equal protection.

The retort is that pregnant people are *not* similarly situated to anyone else because their condition is unique. However, "similarly situated" should not be read so narrowly as to mean only those *identically* situated, or else pregnant people are denied all protection precisely because of the very condition that makes them most vulnerable to coercion. As Goodwin argues:

it would be a mistake to read *McFall v. Shimp*, *In re Richardson*, *In re Guardianship of Pescinski*, and *Curran v. Bosze* as isolated cases that simply apply to bone marrow and organ transplants to the extent that in each, the courts collectively emphasize the importance of bodily integrity, autonomy, informed consent, and best interest of individuals from whom bodily resources are demanded. The courts are moved and

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<sup>176</sup> *Bonte*, 616 A.2d at 464.

<sup>177</sup> See, e.g., *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977).

<sup>178</sup> Newman, *supra* note 11; Goodwin, *supra* note 11, 86–87.

<sup>179</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).

<sup>180</sup> Michele Goodwin, *If Embryos and Fetuses Have Rights*, U.C. IRVINE Legal Studies Research Paper Series No. 2018–27, 1, 43.

<sup>181</sup> See, e.g., *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (Pa. Com. Pl. 1978) (bone marrow transplant; cousin); *In re Richardson*, 284 So. 2d 185 (La. C. App. 1973) (kidney; sibling); *In re Guardianship of Pescinski*, 226 N.W.2d 180 (Wis. 1975) (kidney; sibling); *Curran v. Bosze*, 566 N.E. 2d 1319 (Ill. 1990) (blood test and bone marrow; siblings).

sympathetic to those who are dying, but wisely find no room in law to violate the first principles of medicine: *first do no harm* and fundamental principles of law that respect human dignity and autonomy with regard to the body.<sup>182</sup>

### *Workers' Compensation*

Courts in several states have allowed a child to bring a workers' compensation suit against their mother's employer for in utero injuries. In 1997, the Supreme Court of California held that the workers' compensation exclusivity rule did not bar a child's cause of action for their own injuries allegedly caused by her mother breathing toxic fumes in the workplace.<sup>183</sup> The court rejected the reasoning of a prior California appellate case<sup>184</sup> that, because "the fetus in utero is inseparable from its mother," injury to the fetus was necessarily "derivative" of the mother's injury.<sup>185</sup> Similarly, the Supreme Court of Colorado allowed a separate cause of action because "the injury to the child was separate and distinct and subjects the employer to separate liability."<sup>186</sup> In reaching the same result, a Louisiana appeals court used explicit personhood language: "the unborn child...is a person, a human being, and not merely a piece of tissue from the mother's body," so harm to the fetus was just as separate an injury as if the mother had slipped and dropped her infant child because of slippery conditions at work.<sup>187</sup> In a Washington case in which a pregnant person did actually lose her footing on a slippery floor, the Supreme Court of Washington also allowed a separate cause of action by the child for prenatal injuries.<sup>188</sup>

With the spread of fetal personhood laws and ideology, the number of such claims could increase, creating a risk that employers will force pregnant people to go on leave or be wary of hiring them, or even people who *might* become pregnant in the future, because they fear liability for miscarriages or prenatal injuries. Limiting the employment opportunities available to people with capacity for pregnancy would be both immoral and illegal. In the 1991 decision, *United Automobile Workers v. Johnson Controls*, the U.S. Supreme Court held that "fetal protection" policies prohibiting women from knowingly working in potentially hazardous occupations discriminated on the basis of sex and violated Title VII and the Pregnancy Discrimination Act of 1978.<sup>189</sup> The Court emphasized that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."<sup>190</sup>

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<sup>182</sup> Goodwin, *supra* note 180, at 39.

<sup>183</sup> *Snyder*, 945 P.2d 781.

<sup>184</sup> *Bell v. Macy's California*, 261 Cal. Rptr. 447 (Cal. App. 1st Dist. 1989), *disapproved of by Snyder*, 945 P.2d 781.

<sup>185</sup> *Snyder*, 945 P.2d at 786.

<sup>186</sup> *Pizza Hut of Am., Inc. v. Keefe*, 900 P.2d 97, 101 (Colo. 1995).

<sup>187</sup> *Adams v. Denny's Inc.*, 464 So. 2d 876, 877-78 (La. App. 4th Cir. 1985), *writ denied*, 467 So. 2d 530 (La. 1985).

<sup>188</sup> *Meyer v. Burger King Corp.*, 26 P.3d 925 (Wash. 2001).

<sup>189</sup> 499 U.S. 187 (1991).

<sup>190</sup> *Id.* at 206.

## Insurance

Case law in at least Georgia,<sup>191</sup> Indiana,<sup>192</sup> Iowa,<sup>193</sup> Kentucky,<sup>194</sup> New Jersey,<sup>195</sup> New Mexico,<sup>196</sup> North Carolina,<sup>197</sup> New York,<sup>198</sup> Ohio,<sup>199</sup> and Tennessee<sup>200</sup> has interpreted “person” within assorted insurance policies and contracts to include a fetus. In a New York case, grandparents were appointed temporary guardians and granted custody of the fetus in order to then have it be covered by the grandfather’s health insurance, also illustrating the entanglement of child custody law with fetal personhood.<sup>201</sup> Interpretation of “person” in this context is shaped by the canon of construction that where an insurance policy or contract is ambiguous it should be construed in favor of the insured party.<sup>202</sup>

One Pennsylvania court, on the other hand, held that a policy will not be read to require coverage of a fetus unless such coverage is “specifically provided by the plain language” and the plain meaning of a person does not include a fetus.<sup>203</sup>

An alternative to treating the fetus as a separate entity is treating a pregnancy loss as a “serious injury” to the pregnant person.<sup>204</sup> In New York, after the Queens District Attorney dropped a murder count for death of a fetus in the wake of the passage of New York’s Reproductive Health Act,<sup>205</sup> there was a question of whether the Reproductive Health Act meant that “loss of a fetus” could no longer be a free-standing threshold injury in car-related personal injury actions.<sup>206</sup> A practice commentary suggested that the insurance law<sup>207</sup> should remain unchanged because it was framed around injury to the parent rather than injury to the fetus as an independent victim.<sup>208</sup>

## **Application and Implications**

### **Denial of Medical Care**

Fetal personhood ideology and laws are already being used to deny medical care to pregnant persons or even people who are not pregnant but could become so. Even a nonviable fetus or ectopic pregnancy gets elevated to the status of a person and prioritized over the person who could die or

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<sup>191</sup> *Gulf Life Ins. Co. v. Brown*, 351 S.E.2d 267 (Ga. App. 1986) (life insurance policy).

<sup>192</sup> *Progressive Ins. Co. v. Bullock*, 841 N.E.2d 238 (Ind. Ct. App. 2006) (uninsured motorist).

<sup>193</sup> *Craig v. IMT Ins. Co.*, 407 N.W.2d 584 (Iowa 1987) (uninsured motorist).

<sup>194</sup> *Orange v. State Farm Mut. Auto. Ins. Co.*, 443 S.W.2d 650 (Ky. 1969) (automobile liability policy).

<sup>195</sup> *Sobeck by Sobeck v. Centennial Ins. Co.*, 560 A.2d 1309 (N.J. Super. L. Div. 1988) (personal injury).

<sup>196</sup> *State Farm Mut. Auto. Ins. Co. v. Luebbers*, 119 P.3d 169 (N.M. App. 2005) (uninsured motorist).

<sup>197</sup> *Ft. Dearborn Life Ins. Co. v. Turner*, 521 F. Supp. 2d 499 (E.D.N.C. 2007), *modified on reconsideration sub nom. Ft. Dearborn Life Ins. Co. v. Turner for A.R.Y.*, 2:06-CV-4-H(3), 2008 WL 11429285 (E.D.N.C. Jan. 31, 2008) (life insurance).

<sup>198</sup> *In re Guardianship of Baby K.*, 727 N.Y.S.2d 283 (N.Y. Sur. 2001) (health insurance).

<sup>199</sup> *Peterson v. Nationwide Mut. Ins. Co.*, 197 N.E.2d 194 (Ohio 1964) (automobile liability).

<sup>200</sup> *Hollis v. Doerflinger*, 137 S.W.3d 625 (Tenn. Ct. App. 2003).

<sup>201</sup> *Baby K.*, 727 N.Y.S.2d 283.

<sup>202</sup> *See, e.g., Hollis*, 137 S.W.3d at 629.

<sup>203</sup> *Reiman v. Erie Ins. Co.*, 6 Pa. D. & C.4th 627, 629 (Pa. Com. Pl. 1990).

<sup>204</sup> *See, e.g., McKendry v. Thornberry*, 872 N.Y.S.2d 658 (N.Y. Sup. Ct. 2009).

<sup>205</sup> Ashley Southall, *Prosecutor Drops Abortion Charge in Queens Murder Case, Stirring Debate*, N.Y. Times (February 10, 2019), [www.nytimes.com/2019/02/10/nyregion/abortion-murder-queens.html](http://www.nytimes.com/2019/02/10/nyregion/abortion-murder-queens.html).

<sup>206</sup> N.Y. C.P.L.R. 3212 (McKinney).

<sup>207</sup> N.Y. Ins. Law § 5102 (McKinney).

<sup>208</sup> N.Y. C.P.L.R. 3212 (McKinney) (2021 Practice Commentary by Hon. Mark C. Dillon).

suffer grave injuries, including those that cause infertility, without prompt treatment. Because the medical procedures and medications used for miscarriage care are identical to those used for abortion, newly implemented abortion laws have already blocked or delayed treatment.<sup>209</sup> In one horrifying example, a woman from Texas suffering a miscarriage, “doubled over in pain and screaming,” was denied a dilation and curettage procedure and “sent home [from the hospital] with instructions to return only if her bleeding was so excessive that it filled a diaper more than once an hour.”<sup>210</sup> A study that followed 28 patients experiencing inevitable pregnancy loss in Texas after passage of SB8 and SB2, a law making it a felony to administer medicine to end a pregnancy even in the setting of a maternal medical emergency, found that almost all patients suffered complications.<sup>211</sup> Even when doctors do prescribe misoprostol, some pharmacies have been making patients wait for “extra approval” and go through other additional hurdles to fill their prescriptions even when they need treatment urgently.<sup>212</sup>

As Professor Jamie Abrams warns, the lives of cancer patients with the capacity to become pregnant are also imperiled by abortion bans and fetal personhood.<sup>213</sup> Abrams described how, when she was diagnosed with breast cancer, she became “a person who would need an abortion if pregnant because cancer treatments would compromise a healthy birth” and birth would “delay needed cancer care” and a person “advised to discontinue hormonal contraception because it might stimulate the growth of cancer cells.”<sup>214</sup> Patients like her, but who live in states in which an embryo or fetus is a person from the moment of fertilization, will be suspended in terrifying limbo as doctors make decisions *for* them “under an amorphous cloud of state-imposed liability.”<sup>215</sup> Patients are thus denied bodily integrity and decisional autonomy, forced to sacrifice their own personhood and right to life for the sake of the ‘fetal person’ within their bodies.

The reach of personhood extends even prior to pregnancy, as some patients have reported being denied access to prescriptions that have possible teratogenic or abortifacient effects.<sup>216</sup> Patients who take mifepristone, misoprostol, and methotrexate are especially vulnerable to such denials, as all three medications are “often prescribed for other conditions”: for example, mifepristone for Cushing’s syndrome (a hormonal disorder), misoprostol for ulcers or miscarriage management, and methotrexate for autoimmune disorders and cancer.<sup>217</sup> The policing of pregnancy thus extends even beyond the borders of pregnancy itself: every person with the capacity for pregnancy is dragged into the orbit of criminalization and treated not as a person with medical needs but rather as a potential

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<sup>209</sup> Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. Times (July 17, 2022),

<https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html>.

<sup>210</sup> *Id.* See also Carrie Feibel, *Because of Texas abortion law, her wanted pregnancy became a medical nightmare*, NPR (July 26, 2022),

<https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare>; Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans – Texas Senate Bill 8*, N. Engl. J. Med. (August 2022).

<sup>211</sup> Shivani Patel, MD et al., *Maternal morbidity and fetal outcomes among pregnant women at 22 weeks’ gestation or less with complications in 2 Texas hospitals after legislation on abortion*, Am. J. Ob. Gyn. (August 2022), <https://doi.org/10.1016/j.ajog.2022.06.060>

<sup>212</sup> Belluck, *supra* note 209.

<sup>213</sup> Jamie Abrams, *What moving from Kentucky to Virginia after I was diagnosed with cancer reveals about Roe*, NBC News (July 7, 2022),

<https://www.nbcnews.com/think/opinion/end-of-roe-kentucky-virginia-divergent-health-care-systems-for-women-rcna37215>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> 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-pharmacies.html?smtyp=cur&smid=tw-nytimes>.

<sup>217</sup> *Id.*

vessel for a possible future person. Such a system relegates anyone with the capacity for pregnancy to second-class medical care and citizenship, forcing living, breathing persons to live in unnecessary pain and peril because at some hypothetical point in time they might become the host of a fetal person.

## Forced Medical Interventions

With the simultaneous expansion of fetal personhood and contraction of the liberty of pregnant persons, there may be a rise in forced medical interventions like cesarean surgeries and blood transfusions. Even prior to *Dobbs*, some courts allowed such interventions, often relying on child abuse statutes.<sup>218</sup> These cases also demonstrate how preexisting court rules and statutes allowing for the appointment of a guardian ad litem for a ‘fetal person’ are weaponized against pregnant people. There is strong case law against forced interventions in some states,<sup>219</sup> but even when a court challenge is ultimately successful on appeal, the harm to the pregnant person’s autonomy, dignity, bodily integrity, and/or health cannot be undone. Such harms disproportionately impact poor people and people of color.

## Contraception

Anti-abortion advocates have deliberately and effectively sown misinformation to create disagreement on what constitutes abortion by claiming, despite all medical evidence to the contrary, that some forms of contraception are abortifacients.<sup>220</sup> This deliberate misleading renders the legal meaning of “abortion” in hostile states ambiguous enough that there will be confusion over how far bans reach. Mere days after *Dobbs*, a hospital system in the Kansas City area had already ceased to provide emergency contraception at its Missouri locations in order to, according to a spokesperson, “ensure we adhere to all state and federal laws—and until the law in this area becomes better defined.”<sup>221</sup> Also within days after *Dobbs*, a Missouri attorney had prepared a memo outlining how a “zealous prosecutor” could bring a case regarding birth control usage.<sup>222</sup> Anti-abortion state representative Mary Elizabeth Coleman claimed that the hospital system’s interpretation of Missouri’s abortion ban is incorrect.<sup>223</sup> However, the law is ambiguous, and we have seen again and again that

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<sup>218</sup> See, e.g., *Jefferson*, 274 S.E.2d 457 (C-section); *Raleigh Fitkin-Paul Morgan Meml. Hosp. and Ann May Meml. Found. in Town of Neptune v. Anderson*, 201 A.2d 537 (N.J. 1964) (blood transfusion); *Application of Jamaica Hosp.*, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985) (blood transfusion); *New Jersey Div. of Youth and Fam. Services v. V.M.*, 974 A.2d 448 (N.J. Super. App. Div. 2009) (C-section).

<sup>219</sup> See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. App. 1990); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. 1st Dist. 1994) (C-section); *In re Brown*, 689 N.E.2d 397 (Ill. App. 1st Dist. 1997) (blood transfusion); *Taft v. Taft*, 446 N.E.2d 395 (Mass. 1983) (“purse string” operation to “hold pregnancy”); *New Jersey Div. of Youth and Fam. Services v. L.V.*, 889 A.2d 1153 (N.J. Super. Ch. Div. 2005) (HIV treatment); *Dray v. Staten Island U. Hosp.*, 75 N.Y.S.3d 59 (N.Y. App. Div. 2d Dept. 2018) (C-section; litigation ongoing); *Cox v. Ct. of Com. Pleas of Franklin County, Div. of Dom. Rel., Juv. Branch*, 537 N.E.2d 721 (Ohio App. 10th Dist. 1988) (prenatal care).

<sup>220</sup> Imani Gandy, *Birth Control Doesn't Cause Abortions—and Conservatives Know It*, ReWire (July 1, 2021), <https://rewirenewsgroup.com/ablc/2021/07/01/birth-control-doesnt-cause-abortions-and-conservatives-know-it/>.

<sup>221</sup> Jonathan Shorman, *Kansas City area health system stops providing Plan B in Missouri because of abortion ban*, Kansas City Star (July 1, 2022), <https://amp.kansascity.com/news/politics-government/article262988028.html>.

<sup>222</sup> Spencer Fane, *Missouri's Newly-Effective Abortion Law's Impact on Health Care Providers*, [https://f.datasrvr.com/fr/822/29172/IMPACT\\_OF\\_DOBBS\\_ON\\_MO\\_ABORTION\\_LAW\(18912179.1\).pdf](https://f.datasrvr.com/fr/822/29172/IMPACT_OF_DOBBS_ON_MO_ABORTION_LAW(18912179.1).pdf).

<sup>223</sup> Shorman, *supra* note 221.

rogue, aggressive prosecutors can stretch the bounds of law to police the bodies of people with the capacity for pregnancy.

## IVF

Researchers at the Guttmacher Institute and Power to Decide warned that after *Dobbs*, IVF is vulnerable to being banned in at least thirty states: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Nebraska, New Mexico, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming.<sup>224</sup> IVF could be banned, or its current clinical practices curtailed, on the basis of feticide laws, abortion bans, and/or personhood laws. This is because IVF often involves the creation of embryos (potential persons under the law) that are not used; if those embryos are destroyed, as is common, a person might have been killed.

In at least twenty-nine of the states that have feticide laws, those laws “apply to the earliest stages of pregnancy, which include ‘any state of gestation/development,’ ‘conception,’ ‘fertilization’ or ‘post-fertilization.’”<sup>225</sup> But in eighteen of those states, the laws “only apply to fertilized eggs in the womb or in utero,”<sup>226</sup> making them inapplicable to the pre-implantation treatment of embryos created through ART procedures.<sup>227</sup> While in eight states, the feticide statute applies “from fertilization until birth,”<sup>228</sup> “all but one state include statutory language that either explicitly excludes charges for assisted reproductive technology or fertility treatment,<sup>229</sup> or implicitly excludes charges by clarifying the fertilized egg’s location in utero,<sup>230</sup> or has an exception for lawful medical procedures.”<sup>231</sup>

Abortion bans that define life as beginning at fertilization could also jeopardize IVF.<sup>232</sup> Attorneys general offices in Alabama, Arkansas, and Oklahoma have all claimed that their abortion bans do not have implications for IVF treatments, while other states have “not yet clarified” the extent of their bans, and the Idaho attorney general’s office said it will “defer questions on potential enforcement to prosecutors” in the state’s fourty-four counties.<sup>233</sup> Lawyers, clinics, and patients are skeptical of any such blanket claims that IVF is safe, given that many abortion laws do not address IVF directly and aggressive prosecutors will shape how they are applied.<sup>234</sup>

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<sup>224</sup> Giulia Carbonaro, *Roe v. Wade Being Overturned Could See IVF Banned in at Least 30 States*, Newsweek (June 14, 2022), <https://www.newsweek.com/roe-v-wade-being-overturned-ivf-banned-30-states-1715576>; Power, *7 in 10 Women Feel Pressured To Have a Child Without Help*, <https://www.withpower.com/modern-fertility>.

<sup>225</sup> Carbonaro, *supra* note 224.

<sup>226</sup> Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, Ohio, South Carolina, Tennessee, Wisconsin, and Wyoming.

<sup>227</sup> NAPW, *Who Do Fetal Homicide Laws Protect?*, *supra* note 90.

<sup>228</sup> Kansas, Louisiana, Ohio, Pennsylvania, South Dakota, Texas, West Virginia, and Wisconsin.

<sup>229</sup> Texas’s statute states it does not apply to “lawful medical procedures in assisted reproduction.” Tex. Penal Code Ann. § 19.06. West Virginia’s statute also provides an exception for fertility treatment, as well as “lawful procedures involving embryos that are not in a stage of gestation in utero.” W. Va. Code Ann. § 61-2-30(d)(2)-(3).

<sup>230</sup> Kansas, Louisiana, Ohio, and Wisconsin all include language clarifying the law’s application to an egg in utero.

<sup>231</sup> Pa. Stat. and Cons. Stat. Ann. § 2608(a)(2). NAPW, *Who Do Fetal Homicide Laws Protect?*, *supra* note 90.

<sup>232</sup> Aria Bendix, *States say abortion bans don’t affect IVF. Providers and lawyers are worried anyway*, NBC (June 29, 2022), <https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556>.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Personhood measures also threaten IVF because if a fertilized egg or embryo is a person, “discarding an embryo...would be considered homicide.”<sup>235</sup> Physicians have expressed fear that, if passed, Ohio’s sweeping personhood bill would ban IVF.<sup>236</sup>

IVF is both common and politically popular. Concern about IVF being affected largely drove the defeat of Mississippi’s personhood measure at the ballot boxes.<sup>237</sup> Some anti-abortion voters vehemently support IVF access and will thus mobilize against personhood measures despite their desire to see abortion banned. Politics may have shifted since the earlier defeats of personhood at the polls, but there is at least some hope that the political unpopularity of restricting IVF will operate as a restraint. It can at least be an opportunity for coalition building against personhood measures, given the importance of IVF to LGBTQ+ families and families across the political spectrum who experience difficulty conceiving and the potential blocs of anti-abortion voters who want to protect IVF.

Ultimately, it will be political considerations, not constitutional ones, that serve as the limit on efforts to restrict IVF.<sup>238</sup> But clinical practices like cryopreservation, preimplantation genetic testing, embryo discard, multiple transfers, and selective reductions render IVF vulnerable in state legislatures and courts even in the face of that political popularity.<sup>239</sup> In *Dobbs*, Justice Alito claims that “[w]hat sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is [that]...abortion destroys what those decisions call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’”<sup>240</sup> The Supreme Court, then, or a state court drawing upon the reasoning of *Dobbs*, “might easily group embryo destruction as more like abortion because of its involvement with the destruction of ‘potential life.’ If anything, it is easier to see how the Supreme Court might reach such a decision because there is not a countervailing claim to a woman’s gestational bodily autonomy raised by, for example, a prohibition on IVF.”<sup>241</sup> Defining the right at issue as narrowly as possible – as the right to IVF rather than broader substantive due process rights to procreative autonomy and parental decision-making recognized in *Griswold*, *Eisenstadt*, *Skinner*, *Meyer*, and *Pierce* – the Court could readily claim that a right to IVF lacks roots in history or tradition.<sup>242</sup> An amicus brief filed in *Dobbs* in support of Mississippi, “Brief of Hannah S. – A Former IVF Frozen Embryo and John and Marlene S. – Adoptive Parents of the First ‘Adopted’ Frozen Embryo in America”<sup>243</sup> may signal a coming strategy.

Courts and legislatures in several states have set limits on embryonic personhood in the context of divorce proceedings, wrongful death claims, and inheritance laws.

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<sup>235</sup> *Id.*

<sup>236</sup> Trau, *supra* note 39.

<sup>237</sup> Manian, *supra* note 17; Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 Am. J. of L. & Med. 573 (2013).

<sup>238</sup> I. Glenn Cohen, Judith Daar, and Eli Y. Adashi, *What Overturning Roe v Wade May Mean for Assisted Reproductive Technologies in the U.S.*, JAMA (June 6, 2022).

<sup>239</sup> *Id.*

<sup>240</sup> *Dobbs*, 597 U.S. \_\_\_\_ (slip op. at 32).

<sup>241</sup> Cohen, Daar, and Adashi, *supra* note 238.

<sup>242</sup> *See, e.g., Michael H v. Gerald D.*, 491 U.S. 110 (1989), in which Justice Scalia’s opinion for the Court defined the right at issue at the lowest level of generality, as an adulterous biological father seeking to disrupt a family unit, in order to hold that it was not deeply rooted in history or tradition.

<sup>243</sup> Brief of Hannah S. – A Former IVF Frozen Embryo and John and Marlene S. – Adoptive Parents of the First ‘Adopted’ Frozen Embryo in America as Amici Curiae in Support of Petitioners, *Dobbs*, 597 U.S. \_\_\_\_.

Divorce proceedings have been a site of great contestation over preserved embryos. The highest courts in Colorado, Iowa, New York, and Tennessee have declined to recognize pre-embryos as “persons.” The Supreme Court of Colorado looked to two statutes outside of the context of marriage dissolution to determine that Colorado law as a general matter “provides that pre-embryos are not “persons.”<sup>244</sup> The Supreme Court of Iowa found that a child custody statute did not apply to frozen embryos.<sup>245</sup> The New York Court of Appeals also held that cryopreserved pre-zygotes are not “persons for constitutional purposes” and their disposition “does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice,” thus rejecting a wife’s action for sole custody that broke from the informed consent forms both parties signed indicating that any such dispute would be resolved by donating the pre-zygotes to the IVF program for research purposes.<sup>246</sup> The Supreme Court of Tennessee held that pre-embryos could be considered neither “persons” nor “property”; rather, they occupied “an interim category that entitles them to special respect because of their potential for human life.”<sup>247</sup> The Court stated that bestowing on pre-embryos “legally cognizable interests separate from those of their progenitors...would doubtless have had the effect of outlawing IVF programs in the state of Tennessee.”<sup>248</sup>

In addition, a Missouri appellate court found, in a divorce case in which the wife sought to continue IVF over her husband’s objection, that frozen pre-embryos could not, consistent with the potential future parents’ constitutional rights to “procreational autonomy,” be considered “children” under the dissolution of marriage statute.<sup>249</sup> Even with Missouri’s sweeping personhood language, “the General Assembly’s declarations relating to the potential life of the frozen pre-embryos were not sufficient to justify any infringement upon the freedom and privacy of husband and wife to make their own intimate decisions regarding procreation.”<sup>250</sup>

Wrongful death claims on behalf of pre-embryos and embryos have failed in Illinois, Arizona, and Ohio. An Illinois appellate court held that its state Wrongful Death Act does not allow a cause of action for loss of an embryo created through IVF that has not been implanted.<sup>251</sup> An Arizona appellate court declined to recognize a “cryopreserved, three-day-old eight-cell pre-embryo” as a “person.”<sup>252</sup> One Ohio appellate court held that patients had no wrongful death cause of action based on destruction of frozen embryos because embryos had no statutory rights prior to implantation.<sup>253</sup> Another found that a trial court’s treatment of frozen embryos as “property” was not abuse of discretion.<sup>254</sup>

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<sup>244</sup> *In re Marriage of Rooks*, 429 P.3d 579 (Colo. 2018) (citing Colo. Rev. Stat. Ann. § 13-21-1204 (West); Colo. Rev. Stat. Ann. § 18-3.5-110 (West)).

<sup>245</sup> *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

<sup>246</sup> *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998).

<sup>247</sup> *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh'g in part*, 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

<sup>248</sup> *Id.* at 595.

<sup>249</sup> *McQueen v. Gadberry*, 507 S.W.3d 127, 145 (Mo. App. E. Dist. 2016).

<sup>250</sup> *Id.* at 147.

<sup>251</sup> *Miller v. Am. Infertility Group of Illinois, S.C.*, 897 N.E.2d 837 (Ill. App. 1st Dist. 2008).

<sup>252</sup> *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. App. 1st Div. 2005).

<sup>253</sup> *Penniman v. U. Hosps. Health System, Inc.*, 130 N.E.3d 333 (Ohio App. 8th Dist. 2019).

<sup>254</sup> *Id.* (quoting *Cwik v. Cwik*, 2011-Ohio-463) (“[c]ourts have not afforded frozen embryos legally protected interests akin to persons” and “trial court's treatment of the embryos as property was not an abuse of discretion”). See also *In re Pacific Fertility Ctr. Litig.*, No. 18-cv-01586-JSC (N.D. Cal. 2022).

Louisiana, by statute, has declared that inheritance rights do not flow to an in vitro fertilized egg unless it is subsequently born in a live birth or whenever rights otherwise begin to attach to a fetus.<sup>255</sup>

At the federal level, a federal district court in Maryland dismissed a set of claims filed “by” a cryopreserved embryo on behalf of “herself” and “those similarly situated” claiming that an Executive Order lifting limits on federally funded stem cell research violated due process, equal protection, and freedom from involuntary servitude under the Fifth, Fourteenth, and Thirteenth Amendments.<sup>256</sup> The court held that an embryo cannot show an injury in fact because it cannot show invasion of a legally protected interest because it is incapable of possessing such an interest since it is not a legal person.<sup>257</sup>

Several courts have sought to stake out a middle ground between property and personhood. A Michigan appellate court, for example, described a “third view—one that is most widely held”: “the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons.”<sup>258</sup> The Missouri appellate court discussed above that declined to recognize pre-embryos as constitutional persons still nodded to the fact they are “entitled to special respect” and are “unlike traditional forms of property.”<sup>259</sup> Similarly, the Supreme Court of Tennessee held that “preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”<sup>260</sup> There can be room for this recognition so long as courts articulate carefully and clearly that this middle ground is *not* personhood and that, as the Michigan appellate court noted, the idea that a preembryo is a “human subject, which requires that it be accorded the rights of a person,” is “extreme” and untenable.<sup>261</sup>

Other states, however, have made strides toward recognizing personhood or using IVF regulation as a way to advance a state preference for embryo disposition. In 2009, Georgia passed the first “embryo adoption” law in the nation.<sup>262</sup> While it did not extend full personhood protection to embryos,<sup>263</sup> its sponsor did assert that shifting the language from donation to adoption suggested that a “shared legal classification” as “children” was appropriate.<sup>264</sup> An Arizona law requires a court in a divorce proceeding to “[a]ward the in vitro human embryos to the spouse who intends to allow [them] to develop to birth.”<sup>265</sup>

## Embryonic Research

Embryonic personhood would also call into question the legality of embryonic research. Eleven states have already banned, or “effectively banned,” research on embryos and embryonic stem cells,

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<sup>255</sup> La. Stat. Ann. § 9:133.

<sup>256</sup> *Doe v. Obama*, 670 F. Supp. 2d 435 (D. Md. 2009), *aff’d*, 631 F.3d 157 (4th Cir. 2011).

<sup>257</sup> *Id.*

<sup>258</sup> *Markiewicz v. Markiewicz*, No. 355774, 2022 WL 883683 (Mich. Ct. App. Mar. 24, 2022) (unreported).

<sup>259</sup> *McQueen* at 149.

<sup>260</sup> *Davis*, 842 S.W.2d at 597.

<sup>261</sup> *Markiewicz*, No. 355774 at 5.

<sup>262</sup> Goodwin, *supra* note 180, at 7.

<sup>263</sup> Elaine S. Povich, *Abortion Bans May Add to Uncertainty Over Embryo Donation*, Pew Charitable Trusts (June 10, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/10/abortion-bans-may-add-to-uncertainty-over-embryo-donation#:~:ext=Georgia%27s%202009%20law%2C%20one%20of.personhood%E2%80%9D%20protections%20to%20an%20embryo>.

<sup>264</sup> Goodwin, *supra* note 180, at 7.

<sup>265</sup> Ariz. Rev. Stat. Ann. § 25-318.03.

while other states have laws expressly allowing such research.<sup>266</sup> In the states in which such research is legal, “people undergoing IVF are often given the choice to donate any excess fertilized embryos to scientific research.”<sup>267</sup> Professor Glenn Cohen argues that Justice Alito’s framing of abortion as distinct from other rights because it destroys an “unborn human being” “makes it very, very clear after *Dobbs* that any state that wants to prohibit the destruction of embryos as part of research is free to do so.”<sup>268</sup> Cohen points out that, under trigger laws that date the beginning of life to the moment of fertilization, every embryo is an unborn child.<sup>269</sup> The American Society for Reproductive Medicine issued a report about the potential implications of trigger laws, stating that “[o]ne could argue that discarding an embryo or donating an embryo for research is an intentional or attempted killing of a live unborn child and constitutes an abortion” under Utah’s trigger law.<sup>270</sup>

### **(Former) Partners Suing to Block Abortions**

Preexisting bodies of law have converged in a horrifying manner where men have sought to enjoin their (former) pregnant partners from obtaining an abortion. Four cases, from 1974, 1977, 1983, and 2021, illustrate three different strategies. All four plaintiffs were unsuccessful: the first and second because the court denied the claims, the third and fourth because the cases were moot due to the women having obtained abortions during the pendency of the cases. Even so, the manner in which the plaintiffs framed the issues could reveal future strategies now that the guardrails of *Roe* and *Casey* – especially *Casey*’s language rejecting men’s dominion over women<sup>271</sup> – have been torn down.

In the 1974 Massachusetts case, the estranged husband asserted that he had a fundamental right under *Griswold v. Connecticut* to prevent his “child” from being aborted.<sup>272</sup> The highest Massachusetts court rejected this argument because substantive due process cases protecting marital and procreative rights “involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens.”<sup>273</sup> Strikingly, though, in the initial proceedings, one justice on the court had entered a temporary restraining order blocking the woman’s abortion and appointed a guardian ad litem for the “unborn child,” who then filed a report.<sup>274</sup> The preexisting legal edifice allowing the appointment of a guardian ad litem for a fetus was thus weaponized against the woman.

Similarly, in the 1977 New Jersey case, the former partner unsuccessfully asserted that his “right to procreate” allowed him to block the pregnant woman’s decision.<sup>275</sup>

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<sup>266</sup> Matt Reynolds, *Embryonic Research Could Be the Next Target After Roe*, Wired (July 20, 2022), <https://www.wired.com/story/roe-wade-embryo-research/>.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> American Society for Reproductive Medicine, *State Abortion Trigger Laws: Potential Implications for Reproductive Medicine* (July 1, 2022), [https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/dobbs/cpl-report\\_impact-of-state-trigger-laws-on-reproductive-medicine\\_final.pdf](https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/dobbs/cpl-report_impact-of-state-trigger-laws-on-reproductive-medicine_final.pdf).

<sup>271</sup> *Casey*, 505 U.S. at 898.

<sup>272</sup> *Doe v. Doe*, 314 N.E.2d 128, 130 (Mass. 1974).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 129.

<sup>275</sup> *Rothenberger v. Doe*, 374 A.2d 57, 58 (N.J. Super. Ch. Div. 1977).

In the 1983 Maryland case, the issues set forth in the case included “[w]hether the child abuse laws of Maryland apply to a fetus being aborted.”<sup>276</sup> While that issue was not decided due to mootness, and the U.S. Supreme Court denied certiorari, the framing shows what could flow from fetal personhood, especially in states in which “child” has already been held to encompass a fetus under child abuse or neglect statutes in the context of substance use.

In the 2021 Maryland case, the father framed the issues accordingly: “Does the father of a preborn child have standing to assert his unborn child’s right to life under the Due Process Clause of the Fourteenth Amendment, as recognized by President Reagan in 1988 by his promulgation of Presidential Proclamation No. 5761, commonly referred to as the ‘Declaration of Independence for the Preborn?’” and “Should this Court “follow the science” and hold that the life of a human being begins at the point of conception?”<sup>277</sup>

The progression of these challenges illustrates a shift in framing from the man’s right to the fetus’s right, reflecting the rise of personhood ideology, and a shift from using preexisting law to asserting a new fetal right to life. In the wake of Texas’s SB 8, the idea of a private individual wielding “a sword of government assistance to enable him to overturn the private decisions of his fellow citizens”<sup>278</sup> is all too real.

### **Prosecution for Out-of-State Abortions**

Professors David Cohen, Greer Donley, and Rachel Rebouché argue that, while “[a]s a general matter, states cannot use ordinary criminal laws to prosecute people for crimes outside of their borders,” the rule has “enough gaps” to make prosecution of out-of-state abortions a threat.<sup>279</sup> The “effects doctrine” permits states to prosecute people for actions out of state that have “detrimental effects in the state.”<sup>280</sup> With Georgia’s sweeping personhood provision in effect, a Georgia citizen obtaining an abortion out of state “would have the effect of killing a ‘living, distinct’ Georgian deserving of ‘full legal protection,’” so an “aggressive prosecutor could...argue that the out-of-state killing has the in-state effect of removing a recognized member of the Georgia community from existence and prosecuting...recognizes the full legal protection required” by the personhood law.<sup>281</sup> They note that prosecutions for out-of-state murders are “rare” under the effects doctrine, but prosecutors chomping at the bit to enforce their abortion bans and/or personhood laws might try out the strategy.<sup>282</sup> They might even extend it to people who work at the out-of-state clinic or helped the patient travel, as “[o]nce a state declares a fetus a separate life, the effects doctrine could result in almost endless criminal prosecutions.”<sup>283</sup>

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<sup>276</sup> *Hagerstown Reprod. Health Services v. Fritz*, 454 A.2d 846 (Md. 1983).

<sup>277</sup> *Ead v. Hagerstown Reprod. Health Services*, 2021 WL 4281310 1, fn. 5 (Md. Spec. App. Sept. 21, 2021) (unreported).

<sup>278</sup> *Doe*, 314 N.E.2d at 130.

<sup>279</sup> David S. Cohen, Greer Donley, and Rachel Rebouché, *The New Abortion Battleground*, 123 Colum. L. Rev. 1, 22 (forthcoming 2023) (draft), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4032931](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 22–23.

<sup>282</sup> *Id.* at 23.

<sup>283</sup> *Id.*

## Taxes

Georgia’s broad personhood law is the first personhood law that has gone into effect that explicitly specifies that a fetus qualifies as a “dependent minor” for state income tax exemptions.<sup>284</sup> The idea, though, is not entirely novel. When Georgia passed its embryo adoption law, lawmakers suggested it was “possible that a Federal Adoption Tax Credit will now be available to parents to offset the legal costs of adoption.”<sup>285</sup>

In 2017, House Republicans inserted personhood language into their federal tax plan: the bill sought to designate “unborn child[ren]” (defined as “child in utero” — “a member of the species homo sapiens, at any stage of development, who is carried in the womb”) as beneficiaries in 529 college savings plans.<sup>286</sup> It was a political gesture rather than a genuine extension of benefits because “[e]xpectant parents already can put a 529 plan in their own name and switch the beneficiary when their child is born. That’s because 529 plans require the beneficiary’s social security number, which fetuses don’t have.”<sup>287</sup> The personhood provision was ultimately stripped from the bill while it was in the Senate because it violated the Byrd rule.<sup>288</sup>

While the Republican bill was a failed political gesture, Georgia has already taken steps to implement its amended tax code. Soon after Georgia’s personhood law went into effect, the Georgia Department of Revenue announced that people may claim “any unborn child with a detectable human heartbeat” as a dependent in Tax Year 2022.<sup>289</sup> The dependent personal exemption for each fetus is \$3,000.<sup>290</sup> The Department indicated that people should retain “relevant medical records or other supporting documentation” to support such an exemption claim — “in case the department has questions” — and that it will release further information later this year.<sup>291</sup> The Department did not respond to reporters’ questions regarding what documentation would be accepted and what it would do concerning cases of pregnancy loss.<sup>292</sup> The Department has released some information, but it still only refers to “relevant medical documentation.”<sup>293</sup>

Given how many pregnancies end in abortion, miscarriage, or stillbirth, such a policy will sow logistical chaos. Is documentation verifying pregnancy recommended or required? What forms of documentation? Would fetuses get some form of “life certificate” with a provisional social security number? Given the time lag between filing taxes and obtaining a return, would the agency monitor the progress of pregnancies? If someone claimed a dependent child credit for a fetus and then did not

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<sup>284</sup> Ga. Code Ann. § 48-7-26 (West). Several states have established state income tax credits for stillbirth, including Arkansas, North Dakota, Minnesota, and Connecticut.

<sup>285</sup> Goodwin, *supra* note 180, at n. 13.

<sup>286</sup> Tax Cuts and Jobs Act, H.R. 1 (2017), 115th Congress § 1.

<sup>287</sup> Christine Grimaldi, *Republicans Inject Extremist Fetal ‘Personhood’ Language Into Tax Plan (Updated)*, Rewire (November 2, 2017), <https://rewirenewsgroup.com/article/2017/11/02/republicans-inject-extremist-fetal-personhood-language-tax-plan/>.

<sup>288</sup> Tax Cuts and Jobs Act, H.R. 1 (2017), 115th Congress § 1.

<sup>289</sup> Caitlin Cruz, *Georgia Will Start Issuing Tax Exemptions for Fetuses*, Jezebel (August 2, 2022), <https://jezebel.com/georgia-will-start-issuing-tax-exemptions-for-fetuses-1849362723>.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> Georgia Dep’t of Revenue, *Guidance related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act* (August 1, 2022), <https://dor.georgia.gov/press-releases/2022-08-01/guidance-related-house-bill-481-living-infants-and-fairness-equality-life>.

claim such a credit for a child the following year, would that discrepancy be investigated, turning the system into yet another site of surveillance of pregnant people?

## Population Counts

Georgia's broad personhood provision is the first personhood law that has gone into effect that explicitly recognizes fetuses as natural persons for the purposes of state population counts.<sup>294</sup> Again, it remains to be seen how this will be implemented and whether it is a mere gesture or an actual policy plan. If taken seriously, this provision could sow chaos as well, creating divergent state and federal census counts. If abortion opponents were more likely to report 'fetal persons,' apportionment could skew in their favor. Any count would be both an undercount and overcount, missing many fetuses and counting many that will not survive to birth. Again, it could become yet another site of surveillance of pregnant people. As with taxes, thinking through any of the logistics exposes the absurdity at the heart of the law.

## Child Support

Defining a fetus as a child or person from the earliest stages of pregnancy would suggest that a child support obligation could begin prior to birth to aid, for example, in pregnancy-related expenses and purchase of cribs, clothing, toys, and the like. There is some scattered precedent for such an obligation, intertwined with paternity proceedings and the older legal apparatus of illegitimacy.<sup>295</sup> Case law and regulations from several other states reject the idea of a support obligation beginning prior to birth.<sup>296</sup> In Missouri, a pregnant person cannot get a divorce until after birth.<sup>297</sup> A Missouri lawyer, Danielle Drake, pointed out what she sees as the underlying "double standard in...how the state treats an unborn child in a divorce proceeding compared to in abortion law": the state's divorce law "does not see fetuses as humans" because "[y]ou can't have a court order that dictates visitation and child support for a child that doesn't exist."<sup>298</sup>

Recently, though, Senators Marco Rubio and Kevin Cramer introduced the Unborn Child Support Act to amend the Social Security Act to allow (but not require) pregnant people to request child support beginning from the month of conception.<sup>299</sup> This bill echoes Professor Shari Motro's call for "preglimony."<sup>300</sup> This kind of measure is a particularly risky strategy for asserting fetal personhood because it masks the peril of personhood ideology while allowing anti-abortion activists to claim that they are indeed providing for the needs of the people who are forced to remain pregnant and give

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<sup>294</sup> Ga. Code Ann. § 1-2-1 (West).

<sup>295</sup> *Kyne*, 100 P.2d 806; *Clarke*, 309 P.2d 142; *Yates*, 298 P. 961; *Shinall v. Pergeorelis*, 325 So. 2d 431 (Fla. Dist. Ct. App. 1975); *Malek v. Yekani-Fard*, 422 So. 2d 1151 (La. 1982).

<sup>296</sup> *Waites v. State*, 226 S.E.2d 621 (Ga. App. 1976); KS R CSG GUIDELINE III; *Baby X. v. Misiano*, 366 N.E.2d 755 (Mass. 1977); *Alma Evans Trucking v. Roach*, 714 P.2d 1147, 1148 (Utah 1986).

<sup>297</sup> Ryan Krull, *Pregnant Women Can't Get Divorced in Missouri*, Riverfront Times (July 13, 2022), <https://www.riverfronttimes.com/news/pregnant-women-cant-get-divorced-in-missouri-38092512>.

<sup>298</sup> *Id.*

<sup>299</sup> Chloe Folmar, *Rubio proposes child support regulations beginning at conception*, The Hill (July 15, 2022), <https://thehill.com/homenews/senate/3561573-rubio-proposes-child-support-regulations-beginning-at-conception/>.

<sup>300</sup> Shari Motro, *Preglimony*, 63 Stan. L. Rev. 647 (2011); Shari Motro, *The Price of Pleasure*, 104 NW. U. L. Rev. 917 (2010); Shari Motro, *Responsibility Begins at Conception*, N.Y. TIMES (July 6, 2012), <https://perma.cc/87KV-F2VY>.

birth. Such an assertion then bolsters spurious claims (like those asserted in the petitioner’s brief in *Dobbs*<sup>301</sup>) that the financial burdens of pregnancy and parenthood have been alleviated or even eliminated, rendering abortion unnecessary for women’s equal citizenship and economic advancement.

## **Bizarre Attempted Applications**

### *Age*

After the Supreme Court in *Webster* declined to block Missouri’s sweeping personhood language because it was merely “precatory,” litigants began using that language for creative and bizarre legal arguments. Several litigants tested out what it would really mean to implement the idea that life begins at conception.

A candidate for the state legislature, seeking to evade the existing age limit for candidacy, argued that his age should be dated from conception instead so that he could run sooner. The Eighth Circuit affirmed the district court’s denial of the legislator’s motion for a preliminary injunction to block the Secretary of State and Attorney General from refusing to certify him as a candidate. The Circuit held that it was for Missouri courts to determine what effect, if any, to give to the preamble and age would be calculated from birth for the purposes of the age requirement.<sup>302</sup> The U.S. Supreme Court denied cert.

A defendant prosecuted for child molestation unsuccessfully argued that the minor victim’s age should be calculated from her date of conception.<sup>303</sup> Similarly, a defendant in a statutory rape case unsuccessfully attempted to date the victim’s age from conception in order to argue that she was above seventeen years old.<sup>304</sup>

These failed suits demonstrate the absurdity that follows when one takes a personhood measure literally and seeks to hold the state to its word that life begins at conception or fertilization. One could imagine similar suits regarding statutory age requirements for voting, drinking, or driving. While these suits failed, some states have shown a willingness to play around with the definition of birth and the question of when life begins for the purposes of the law. The Supreme Court of Michigan, in a 1971 case, used the following language:

The phenomenon of birth is an arbitrary point from which to measure life. True, we reckon age by counting birthdays. The Chinese count from New Years. The choice is arbitrary.... The fact of life is not to be denied. Neither is the wisdom of the public policy which regards unborn persons as being entitled to the protection of the law.<sup>305</sup>

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<sup>301</sup> Brief for Petitioners, *Dobbs*, 597 U.S. \_\_\_\_.

<sup>302</sup> *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990).

<sup>303</sup> *State v. Crider*, 554 S.W.3d 460, 462 (Mo. App. W. Dist. 2018).

<sup>304</sup> *State v. Lee*, 637 S.W.3d 446 (Mo. App. W. Dist. 2021), *reh’g and/or transfer denied* (Nov. 23, 2021), *transfer denied* (Feb. 8, 2022).

<sup>305</sup> *O’Neill*, 188 N.W.2d at 787–88.

A Michigan law, the Legal Birth Definition Act, tried to adjust the legal meaning of birth in order to ban some forms of abortion. It was struck down as unconstitutional in 2007 but illustrates how states play with the legal meanings of birth, death, and life in order to restrict abortion. The legislative findings emphasized that *Roe* “made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes,” leaving room for states to set those meanings.<sup>306</sup> Here, the legislature defined birth to encompass certain abortion procedures by declaring that “when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person.”<sup>307</sup>

### *Carpool Lanes*

In 2021, a Texas Republican legislator introduced a bill to allow pregnant people to drive in the High Occupancy Vehicle (HOV) Lane “regardless of whether the vehicle is occupied by a passenger other than the operator’s unborn child.”<sup>308</sup> This “kooky” law is intended to be a “backdoor to fetal personhood,” setting a precedent “to recognize a fetus as a legal person...as part of the Texas GOP’s longterm plan to criminalizing abortion entirely.”<sup>309</sup>

In 2006, an Arizona woman had attempted this same argument, but the court rejected her claim, emphasizing that “carpool rules are meant to fill empty space in a vehicle, and cops can’t conduct pregnancy tests.”<sup>310</sup> The legislative intent to encourage carpooling was not served by fetal passengers and the logistics of enforcement were impossible.

In June of 2022, a pregnant Texas woman, Brandy Bottone, argued that the overturning of *Roe* meant that her fetus should count as a passenger.<sup>311</sup> A deputy responded that she needed to have “two bodies outside of the body.”<sup>312</sup> A fetus is encompassed within “person” throughout the Texas Penal Code but not the Transportation Code.<sup>313</sup> Bottone emphasized that she made the argument she did not because she supports or opposes *Dobbs* but rather because “[i]t just didn't make sense” that these two bodies of law had contradictory definitions of personhood.<sup>314</sup> Her response illustrates that a person does not have to be a supporter of abortion rights to understand the internally inconsistent contradictory logic and application of fetal personhood. If fetal personhood arguments are marshaled to strip rights from pregnant people, why can’t pregnant people marshal such arguments to their benefit as well?

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<sup>306</sup> Mich. Comp. Laws Ann. § 333.1082 (West).

<sup>307</sup> *Id.*

<sup>308</sup> Caitlin Cruz, *Texas Republican Proposes Bill to Let Pregnant People Drive in the HOV Lane*, Jezebel (October 15, 2021), <https://jezebel.com/texas-republican-proposes-bill-to-let-pregnant-people-d-1847871298>.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Timothy Bella, *Pregnant woman given HOV ticket argues fetus is passenger, post-Roe*, Wash. Post (July 10, 2022), <https://www.washingtonpost.com/nation/2022/07/09/texas-abortion-pregnant-woman-hov-bottone/>.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> Eric Levenson, *A pregnant woman got a ticket for driving in the HOV lane in Texas. She says her fetus was her passenger*, CNN (July 11, 2022), <https://www.cnn.com/2022/07/11/us/pregnant-woman-hov-lane/index.html>.

## Incarceration

If fetuses are legal persons, incarcerating a pregnant person necessarily entails incarcerating a second person who has neither committed a crime nor stood trial. A number of states already have laws setting special standards for treatment of pregnant inmates.<sup>315</sup> Kansas law provides that the state cannot execute a pregnant prisoner.<sup>316</sup> But, taking the logic of fetal personhood at its word, those laws are all utterly insufficient because they fail to redress the fundamental problem that an innocent ‘person’ is being incarcerated.

Taking personhood seriously, would the state have to appoint a lawyer or guardian ad litem for the fetus as well as for the pregnant person? ‘Unborn persons’ can already be appointed guardians ad litem in cases involving forced medical interventions or in probate or trusts and estates proceedings. Given that preexisting edifice, it is not as much of a stretch as it might seem to imagine fetal representation in criminal proceedings. In a 1993 New York case, a husband seeking to enjoin his pregnant wife from leaving the city claimed that the definition of “person” for the purposes of habeas corpus petitions included a fetus.<sup>317</sup> The court declined to issue the writ because no New York case had held the state’s habeas law to include a fetus.<sup>318</sup> Even so, this case illustrates how former or current partners can mobilize fetal personhood to control the movement of pregnant people.

Pregnancy has been used *against* prisoners. In a 2017 Pennsylvania case, for example, Britnee Rose Becker, a pregnant woman incarcerated on drug charges, was denied immediate parole because the trial court wanted to “protect” her fetus from the risk that she would use heroin while on parole.<sup>319</sup> The Superior Court affirmed the denial, holding that Becker was not entitled to review of her substantive due process claim and denying her equal protection claim.<sup>320</sup>

These cases suggest that fetal personhood is a one-way street: when fetal rights are expanded, pregnant people’s rights shrink. While the logic of fetal personhood could hypothetically be mobilized to the benefit of pregnant people – e.g., by asserting that they cannot be incarcerated – such efforts are most likely to fail or backfire into even greater contraction of pregnant people’s rights.

## Immigration

Professor Chatman suggests that, following the logic of personhood, deporting a pregnant immigrant woman who conceived her fetus in the U.S. would mean deporting a U.S. citizen.<sup>321</sup> Birthright citizenship would seem to require birth, but Chatman argues that granting “natural personhood at a point before birth brings application of the Fourteenth Amendment into question and may thus give a fetus citizenship rights—but only in those states” where fetuses are defined as persons, creating an uneven meaning of citizenship.<sup>322</sup> Can a fetus have an immigration status separate and apart from that of its mother, as a child can? One Nebraska statute declares that “unborn

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<sup>315</sup> See, e.g., NC ST § 148-25.5; S.C. Code Ann. § 24-13-35; VT ST T. 28 § 801a.

<sup>316</sup> Kan. Stat. Ann. § 22-4009 (West).

<sup>317</sup> *Wilner v. Prowda*, 601 N.Y.S.2d 518 (Sup. Ct. 1993).

<sup>318</sup> *Id.*

<sup>319</sup> *Cmmw. v. Becker*, 172 A.3d 35 (Pa. Super. 2017).

<sup>320</sup> *Id.*

<sup>321</sup> Carliss N. Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process, and Citizenship*, 76 Wash. & Lee L. Rev. Online 91, 92 (2020).

<sup>322</sup> *Id.* at 94.

children do not have immigration status” and are thus not within the scope of a law regarding public benefits for non-citizens.<sup>323</sup>

## Public Benefits

Akin to child support, if a fetus is a person, a pregnant person should be able to collect public benefits for an additional child from the earliest stages of pregnancy. Some states have already instituted some form of benefit program treating the fetus as a recipient of benefits, e.g., through “unborn child payments” under the “family investment program” authorized by the Social Security Act;<sup>324</sup> “needy child” assistance under Medical Assistance for Needy Persons;<sup>325</sup> or an “unborn child option” under the Children’s Health Insurance Program (CHIP), which “allows states to consider an unborn child a low-income child eligible for coverage of prenatal care if other conditions of eligibility under the Children’s Health Insurance Program are met.”<sup>326</sup> Missouri’s “Show-Me Healthy Babies Program,” a separate CHIP, clarifies:

[c]overage for an unborn child enrolled in the show-me healthy babies program shall include all prenatal care and pregnancy-related services that benefit the health of the unborn child and that promote healthy labor, delivery, and birth. Coverage *need not include services that are solely for the benefit of the pregnant mother*, that are unrelated to maintaining or promoting a healthy pregnancy, and that provide no benefit to the unborn child.<sup>327</sup>

Similarly, a 1976 New York case asserted that “an unborn child has certain needs which are separate and distinct from those of the mother,” so it can receive Aid for Dependent Children benefits.<sup>328</sup> When the Aid to Families with Dependent Children infrastructure was in place (before it was replaced by TANF), the U.S. Supreme Court held in 1975 that dependent “child,” within the Social Security Act eligibility criteria for AFDC “refers to an individual already born, with an existence separate from its mother, and does not encompass unborn child,” so states receiving federal funds may but are not *required* to offer benefits to fetuses as dependent children.<sup>329</sup>

State welfare benefit statutes and regulations become another route for establishing fetal personhood, as in Wisconsin statutes defining “unborn child” as “a person from the time of conception until it is born alive.”<sup>330</sup> To act as if the expenses and services a ‘fetal person’ needs can be separated out from things “solely for the benefit of the pregnant mother” is a strange fiction elevating the fetus as a separate individual and denying the full personhood of the pregnant person. Such a division elides the need for holistic care and wellbeing of the pregnant person. The same additional

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<sup>323</sup> Neb. Rev. Stat. Ann. § 4-110 (West).

<sup>324</sup> Iowa Code Ann. § 249A.3 (West).

<sup>325</sup> Minn. Stat. Ann. § 256B.055 (West). *See also* S.D. Codified Laws § 28-6B-6 (“Medical Care for Unborn Children”); Wis. Stat. Ann. § 49.665 (West); Wis. Stat. Ann. § 49.471 (West).

<sup>326</sup> Conn. Gen. Stat. Ann. § 17b-292b (West). *See also* Mo. Ann. Stat. § 208.662 (West); Neb. Rev. Stat. Ann. § 68-972 (West).

<sup>327</sup> Mo. Ann. Stat. § 208.662 (West).

<sup>328</sup> *Catoe v. Lavine*, 378 N.Y.S.2d 623 (N.Y. App. Div. 2d Dept. 1976).

<sup>329</sup> *Burns v. Alcalá*, 420 U.S. 575, 580–81 (1975).

<sup>330</sup> Wis. Stat. Ann. § 49.665 (West).

benefits could be provided directly to pregnant people, to whom they are being distributed in any case, and framed as benefits to *them* rather than to some separate persons who happen to reside inside other people.

As Dorothy Roberts has shown so powerfully, the welfare system has been a site of state surveillance, regulation, and coercion of pregnant people, especially people of color.<sup>331</sup> A state program providing welfare benefits to an “unborn child” could become entangled with the broader family regulation system, stepping in to penalize pregnant people for perceived failures in appropriate prenatal care or behavior during pregnancy.

## **Arguments Against Personhood Measures**

### *Constitutional Arguments*

#### **Not Deeply Rooted in History and Tradition**

*Dobbs* demonstrates that the current Supreme Court now interprets the Due Process Clause of the Fourteenth Amendment using the *Washington v. Glucksberg* test, which declares that only rights “deeply rooted in this Nation’s history and tradition and “implicit in the concept of ordered liberty” are protected.<sup>332</sup> Such a method bakes in the 19th-century subordination of anyone who is not a white man and spells the unraveling of a century of substantive due process jurisprudence.<sup>333</sup> Thus, the fight over whether fetuses are persons under the Fourteenth Amendment could play out as a question of whether fetal personhood is deeply rooted in history and traditions.

State courts have already had occasion to explore this question of older common law meanings of legal personhood. Unsurprisingly, the same evidence has been marshaled to reach opposite conclusions, but there is robust and widespread case law suggesting a consensus view that fetal personhood is *not* deeply rooted. Numerous courts – including in Colorado, Florida, Georgia, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, and Vermont – have described the increasing recognition of fetal legal personhood in state law as a decided *break* from common law traditions, citing relatively recent shifts in medical and scientific knowledge and capacity.<sup>334</sup> The governing principle at common law, “[a]s far back as the 17th century,” was the “born alive” rule.<sup>335</sup> Feticide laws were thus a sharp break from the “prevailing common law view throughout the United States” since its founding.<sup>336</sup> The Supreme Court of Florida stated that the very idea of punishing

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<sup>331</sup> Dorothy Roberts, *KILLING THE BLACK BODY: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

<sup>332</sup> *Dobbs*, 597 U.S. \_\_\_\_ (slip op. at 5); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>333</sup> Reva Siegel, *The Trump court limited women's rights using 19th-century standards*, Wash. Post (June 25, 2022),

<https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-19th-century-standards/>.

<sup>334</sup> See, e.g., *People v. Vercelletto*, 514 N.Y.S.2d 177 (N.Y. Co. Ct. 1987); *Wallace v. Wallace*, 421 A.2d 134, 135 (N.H. 1980); *Billingsley v. State*, 360 S.E.2d 451 (Ga. App. 1987); *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969); *In re Roberts' Est.*, 286 N.Y.S. 476 (N.Y. Sur. 1936); *In re Peabody*, 158 N.E.2d 841, 844, 845 (N.Y. 1959); *Byrn v. New York City Health & Hosps. Corp.*, 286 N.E.2d 887, 888 (N.Y. 1972); *Robin v. Village of Hempstead*, 321 N.Y.S.2d 20, 24 (N.Y. Sup. Ct. 1971); *Ruiz*, 500 N.E.2d 935; *Com. v. Booth*, 766 A.2d 843 (Pa. 2001); *Kine v. Zuckerman*, 4 Pa. D. & C. 227 (Com. Pl. 1924); *State v. Amaro*, 448 A.2d 1257, 1260 (R.I. 1982); *Ashley*, 701 So. 2d at 341; *State v. Oliver*, 563 A.2d 1002, 1003 (Vt. 1989).

<sup>335</sup> *Oliver*, 563 A.2d at 1003.

<sup>336</sup> *Id.*

pregnant people themselves goes against the common law, which intended to protect women, not punish them.<sup>337</sup> As the Supreme Court of New Hampshire put it:

Although it is true that at common law, the existence of a child en ventre sa mere was recognized for some purposes, all such rights conferred were contingent upon live birth. The fetus took nothing and had no rights as a fetus. It was only the prospective child if born alive which could enforce and enjoy the rights. All such rights terminated if the fetus aborted or was stillborn.... Nowhere...did the common law give a fetus a cause of action or any other right.<sup>338</sup>

A fetus was *not* a “person” at common law<sup>339</sup> and “the law has never considered the unborn foetus as having a separate ‘juridical existence’...or a legal personality or identity ‘until it sees the light of day.’”<sup>340</sup> Any recognition of rights was “contingent” upon live birth.<sup>341</sup> As a New York appellate court expressed:

it was generally believed at common law that the unborn child was physically a part of the mother and legal personality was accorded to it merely as a fictional device in anticipation of birth. We think it unlikely, therefore, that the framers of the Fifth Amendment, dealing with an amendment concerned with criminal trials, the need for indictment, protection against double jeopardy, and loss of life, liberty or property without due process, gave any consideration to whether a child en ventre sa mere was within the protection of that amendment.<sup>342</sup>

Similarly, the expansion of wrongful death statutes to include fetuses as persons is framed as modern tort law’s “rejection...of the antiquated notion of the common law that an unborn child is merely part of his mother's body”<sup>343</sup> in light of “growing social awareness of the individuality of the unborn.”<sup>344</sup> A Pennsylvania court in 1924 went so far as to say that “There is no doubt that at early common law an injury to an unborn child was looked upon as an injury to the mother exclusively,” as the fetus was “not yet a human being.”<sup>345</sup>

Thus, as the Rhode Island Supreme Court stated, “it is only by legislative action that the unborn child will acquire the status and protection under our criminal statutes which are thus far denied by common law and rules of statutory interpretation.”<sup>346</sup> If the legislature does not explicitly

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<sup>337</sup> *Ashley*, 701 So. 2d at 341; see also *Byrn*, 286 N.E.2d at 888.

<sup>338</sup> *Wallace v. Wallace*, 421 A.2d 134, 135 (N.H. 1980).

<sup>339</sup> *Billingsley*, 360 S.E.2d 451.

<sup>340</sup> *Endresz*, 248 N.E.2d at 904–06 (citing *Peabody*, 158 N.E.2d at 844–45; *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229, 232 (Neb. 1951)).

<sup>341</sup> *Endresz*, 248 N.E.2d at 904.

<sup>342</sup> *Byrn v. New York City Health & Hosps. Corp.*, 329 N.Y.S.2d 722 (N.Y. App. Div. 2d Dept. 1972), *aff'd*, 286 N.E.2d 887 (N.Y. 1972).

<sup>343</sup> *Hempstead*, 321 N.Y.S.2d at 24.

<sup>344</sup> *Ruiz*, 500 N.E.2d 935.

<sup>345</sup> *Kine*, 4 Pa. D. & C. 227.

<sup>346</sup> *Amaro*, 448 A.2d at 1260.

include the word “unborn” or “fetus,” the “common-law meaning of the term ‘person’” (that is, not including a fetus) governs.<sup>347</sup>

In 1981, the Supreme Court of North Carolina drew upon “our own consideration of the historical background of the law in our own State” and “practical considerations,” as well as *Roe*, to hold that the fetus is not a legal “person” within the North Carolina Constitution.<sup>348</sup>

The same common law evidence has been marshaled to opposite ends, as in a Supreme Court of New Hampshire case arguing that “common law has always been most solicitous for the welfare of the fetus in connection with its inheritance rights as well as protecting it under the criminal law.”<sup>349</sup> However, even that case acknowledged that its recognition of fetal personhood for the purposes of wrongful death actions broke from “early orthodox views [that] must give way to justice and logic.”<sup>350</sup> The common law indeed had some solicitude but its protections were quite distinct from full legal personhood.

Given the tendency to cherry pick history, the robust evidence that fetal personhood is a relatively recent movement and a marked departure from history and tradition may not be of much avail. Even so, it is important to remember just how new and fringe the current fetal personhood movement is. This movement is *not* the same as the common law solicitude for limited and contingent purposes (e.g., inheritance for a posthumous child). This movement is a sweeping, radical reconstitution with myriad and harrowing ramifications for which even its architects are unprepared.

### **Establishment Clause and Free Exercise Clause**

Christian beliefs about when life begins are so foundational to the personhood movement that the movement cannot be separated from the ideology. Some personhood laws do not even attempt to mask religious underpinnings. Emboldened by the Supreme Court’s increasing solicitude for freedom to exercise religion and decreasing solicitude for freedom from the establishment of religion, anti-abortion legislators are making no secret of the religious motivation behind personhood laws. A 2019 Missouri law declared:

In recognition that *Almighty God* is the author of life, that all men and women are “endowed by their Creator with certain unalienable Rights, that among these are Life”, and that article I, section 2 of the Constitution of Missouri provides that all persons have a natural right to life, it is the intention of the general assembly...to:

- (1) Defend the right to life of all humans, born and unborn;
- (2) Declare that the state and all of its political subdivisions are a “sanctuary of life” that protects pregnant women and their unborn children....<sup>351</sup>

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<sup>347</sup> *Id.*

<sup>348</sup> *Stam v. State*, 275 S.E.2d 439 (N.C. 1981).

<sup>349</sup> *Poliquin*, 135 A.2d at 251.

<sup>350</sup> *Id.*

<sup>351</sup> Mo. Ann. Stat. § 188.010 (West) (emphasis added).

A South Carolina personhood bill introduced in the 2021-2022 legislative session, which failed to pass, stated:

(C) The General Assembly acknowledges that *personhood is God-given, as all men are created in the image of God.*

(D) The General Assembly finds that the Preamble to the Constitution of the State of South Carolina contains the sovereign peoples' acknowledgment of *God as the source of constitutional liberty*, saying: 'We the people of the State of South Carolina...grateful to God for our liberties, do ordain and establish this Constitution....'<sup>352</sup>

A Kansas statute regarding the Exercise of First Amendment Rights, on the other hand, explicitly laid out that nothing in the act shall be construed to “protect actions or decisions to end the life of any adult or child, born or unborn.”<sup>353</sup> Religious liberty is thus a one-way street: Christian beliefs about personhood can be codified while religious traditions that do *not* regard a fetus as a “child” or person are explicitly denied by statute.

The simultaneous establishment of religion by the state and denial of free exercise of religion to non-Christians should ring First Amendment alarm bells. While the arguments should be strong, at least three Establishment Clause challenges to personhood provisions have failed.

In 1992, litigants challenged Utah’s sweeping personhood language as a violation of the Establishment Clause and Free Exercise Clause.<sup>354</sup> They argued that the language embodies a “religious viewpoint” and “mirrors and therefore endorses the position of the Church of Jesus Christ of Latter Day Saints.”<sup>355</sup> They emphasized that the language was “virtually identical” to the official LDS policy published two weeks prior to adoption and the Governor had publicly acknowledged how his Mormon beliefs influenced his views on abortion.<sup>356</sup> The federal district court, however, cited *Harris v. McRae* as precedent in which the Supreme Court, “confronted with much stronger allegations of improper religious influence on the legislative process,” did not find an Establishment Clause violation.<sup>357</sup> As in *McRae*, then, the Utah act “coincides with religious tenets” but had a legitimate “secular purpose.”<sup>358</sup> It was “as fully consistent with a traditional moral framework as it is with the viewpoint of any one or several religions.”<sup>359</sup> The district court thus dismissed the Establishment Clause claim.

The district court then dismissed the Free Exercise Clause as well because the Utah preamble was “a neutral, generally applicable law” and did not involve “a concomitant violation of another constitutional protection” because “there is no free speech right to solicit criminal acts” and the “right to practice a profession” is “created by the State, and is subject to the State’s criminal laws.”<sup>360</sup>

<sup>352</sup> 2021–2022 Senate Bill 3568: Personhood Act of South Carolina (emphasis added).

<sup>353</sup> Kan. Stat. Ann. § 60-5305(a)(5) (West).

<sup>354</sup> *Jane L. v. Bangert*, 794 F. Supp. 1537, 1549 (D. Utah 1992).

<sup>355</sup> *Id.* at 1543.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 1544.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 1547.

Two different Texas litigants in the mid-2000s challenged the definition of “individual” in the state’s penal code (“Individual’ means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth”)<sup>361</sup> as an Establishment Clause violation. Both appellate courts, applying the (now-abandoned) *Lemon* test, rejected these challenges. Both held that the definition serves a legitimate secular purpose of protecting the “unborn” from criminal acts and, citing *McRae*, a statute is not unconstitutional merely because it accords with religious views.<sup>362</sup>

That these Free Exercise and Establishment Clause challenges have failed in the past does not mean that they are not a worthwhile litigation strategy, especially where language is so explicitly religious. The advisability of such a challenge will depend on each state’s jurisprudence and judicial composition.

A current Kentucky challenge shows promise: a Kentucky court found that the state’s abortion ban might violate the state constitution’s prohibition on endorsement of religion because of the legislature’s finding that life begins at fertilization, which adopts “the religious tenets of specific sects or denominations.”<sup>363</sup>

And given the Supreme Court’s recent expansion of religious rights, some litigants are hoping to bring new lawsuits based on religious liberty to the Supreme Court. For instance, a Florida synagogue has filed a lawsuit challenging Florida’s new abortion ban as a violation of religious freedom because “Jewish law says that life begins at birth, not at conception” and, because “[a] woman is not just entitled to have an abortion [in Judaism], she is required to have an abortion to protect her mental wellbeing, to protect her health, to protect her safety.”<sup>364</sup> Thus, the law “would prohibit Jewish women from practicing Jewish law.”<sup>365</sup>

## Vagueness

Another strategy is to argue that personhood measures are void for vagueness. The district court order preliminarily enjoining Arizona’s sweeping personhood “Interpretation Policy” found that the plaintiffs were likely to succeed on the merits of their claim “because three features of the Interpretation Policy conspire to make it unconstitutionally vague”:

1. It “offers no guidance on what it means to ‘acknowledge’ the equal rights of the unborn, especially if acknowledgment means something less than including the unborn within the express definition of ‘person.’”
2. It is “incongruous with other aspects of Arizona law—specifically, provisions that do not define ‘person’ to include an ‘unborn child’ and provisions that permit and regulate abortion.”

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<sup>361</sup> Tex. Penal Code Ann. § 1.07 (Vernon).

<sup>362</sup> *Flores v. State*, 215 S.W.3d 520 (Tex. App. 2007), *aff’d*, 245 S.W.3d 432 (Tex. Crim. App. 2008).

<sup>363</sup> *EMW Womens Surgical Center v. Daniel Cameron*, No. 22-CI-3225, Opinion and Order Granting Temporary Injunction, [https://www.aclu-ky.org/sites/default/files/22ci3225-order\\_12.pdf](https://www.aclu-ky.org/sites/default/files/22ci3225-order_12.pdf).

<sup>364</sup> Jillian Kestler-D’Amours, *Religious freedom: The next battleground for US abortion rights?* Al Jazeera (June 17, 2022), <https://www.aljazeera.com/news/2022/6/17/religious-freedom-the-next-battleground-for-us-abortion-rights>. The complaint can be found [here](#). For more information on abortion and Jewish law, see National Council of Jewish Women, *Abortion and Jewish Values Toolkit*, [https://www.ncjw.org/wp-content/uploads/2020/05/NCJW\\_ReproductiveGuide\\_Final.pdf](https://www.ncjw.org/wp-content/uploads/2020/05/NCJW_ReproductiveGuide_Final.pdf).

<sup>365</sup> Kestler-D’Amours, *supra* note 364.

3. “[T]hese uncertainties create an intolerable risk of arbitrary enforcement. Medical providers should not have to guess about whether the otherwise lawful performance of their jobs could lead to criminal, civil, or professional liability solely based on how literally or maximalist state licensing, law enforcement, and judicial officials might construe the Interpretation Policy’s command.”<sup>366</sup>

The state itself could offer no explanation of what the interpretation policy would actually do,<sup>367</sup> highlighting just how much even fetal personhood advocates have failed to grapple with or explain the ramifications of such measures. If the architects of personhood measures do not even understand what they mean, how can the people living under them sort through all the chaos and confusion?

Courts resisting the expansion of child abuse statutes to include fetuses have also relied on vagueness arguments, emphasizing that pregnant people lacked notice that they could be prosecuted because child abuse statutes contained no explicit language about fetuses.<sup>368</sup>

### *Statutory Interpretation*

#### **Ordinary and Public Meaning**

With textualism and originalism ascendant, some courts will consider whether fetuses are included within “person,” “child,” or “minor” based on claims about the ordinary or public meaning at the time of statutory enactment. Courts have already engaged in such interpretation – unsurprisingly, with opposite results. The Supreme Court of South Dakota, for instance, declared that even in 1978 “the ordinary and popular meaning of ‘child’ included ‘an unborn or recently born human being’” and “[m]ore recent dictionaries also support this meaning.”<sup>369</sup> The Supreme Court of Alabama asserted that “the dictionary definition...provides the meaning ordinary people would give the word,” then cited two dictionaries to support its conclusion that the ordinary meaning of “child” includes a fetus.<sup>370</sup>

The Supreme Court of Utah, on the other hand, stated that “‘child’ in its ordinary and usual sense [means] a child which has been born.”<sup>371</sup> To support this reading, the Court cited the U.S. Supreme Court’s conclusion in *Burns v. Alcala* that, since “words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary,...Congress used the word ‘child’ to refer to an individual already born, with an existence separate from its mother.”<sup>372</sup> The Supreme Court of Kansas also reasoned that “[w]e do not ordinarily use the term child to mean an

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<sup>366</sup> *Isaacson*, CV-21-01417-PHX-DLR, at 14–15.

<sup>367</sup> *Id.* See also *SisterSong Women of Color Reproductive Justice Collective v. Kemp*, 472 F.Supp.3d 1297, 1302 (N.D. Ga. 2020) (“even the litigants in this case are forced to guess” which lawful actions would be made unlawful....”).

<sup>368</sup> See, e.g., *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994); *Encoe*, 885 P.2d 596; *Louk*, 786 S.E.2d 219; *Morabito*, 580 N.Y.S.2d 843; *Com. v. Kemp*, 18 Pa. D. & C.4th 53 (Com. Pl. 1992).

<sup>369</sup> *State v. Vargas*, 869 N.W.2d 150 (S.D. 2015).

<sup>370</sup> *Ankrom*, 152 So.3d at 404–05.

<sup>371</sup> *Alma Evans Trucking*, 714 P.2d at 1148 (Utah 1986).

<sup>372</sup> *Id.* at 1148–49.

unborn child. When we intend to indicate the latter we couple the noun with the descriptive adjective.”<sup>373</sup>

In 2011, the Supreme Court of Utah again stated that “minor child” is ordinarily used to refer to children postpartum and not *in utero* but this time shifted the inquiry. The court claimed that the “relevant question is not whether “minor child” is *ordinarily* used to encompass children *in utero*, but whether those words conceivably could be used in that way” since the statutory context reveals that the legislature intended to use “minor child” not in its “ordinary sense but in a sense that accounts for the undisputed right of a parent to sue for injury to a fetus who survives a tortfeasor's wrongful acts.”<sup>374</sup> As evidence that “minor child” *could* encompass a fetus, the Court pointed to how “the term ‘child’ is used extensively in the popular press to refer to the unborn, including in publications (like the New York Times) that could hardly be thought to be tainted by a so-called “anti-abortion political rhetoric.”<sup>375</sup> This invocation of the “popular press” highlights how important it is for news outlets to exercise caution in their language, as sloppy and unscientific wording can cede ground to the personhood movement in a manner that may end up being mobilized in court. At the same time, the same publications can be invoked to opposite ends, as in Justice Nehring’s dissent, which points out that “the term ‘minor child’ has appeared in the pages of the *Times* 2,886 times without ever referring to a fetus.”<sup>376</sup>

A Tennessee appellate court tried to stake out a middle ground: because of the “vast disagreement” over whether a fetus is a “child,” it reasoned that the court was required to look beyond the plain meaning of the language to determine if the legislature intended “child under eight” to encompass a fetus for the purposes of a statute regarding termination of parental rights.<sup>377</sup> After looking across the whole statutory scheme, including child abuse statutes and their judicial construction,<sup>378</sup> the court held that the term “child under eight” *did* encompass a “child in utero.”<sup>379</sup>

## Legislative Intent

One of the most common arguments against judicial expansion of a statute to include a fetus within the definition of “child” or “person” is that when a legislature intends to include a fetus it does so explicitly, as illustrated by preexisting statutes referring to an “unborn child” or fetus in a specific context and for specific reasons.<sup>380</sup> The legislature is “capable of distinguishing between an unborn child and a person born alive since it has enacted legislation acknowledging the distinction,” so “[h]ad the legislature decided that a fetus was entitled to the protection of the guardianship statutes, it would have so legislated.”<sup>381</sup> To include a fetus would thus be to “rewrite” the statute,<sup>382</sup> usurping the legislative function.

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<sup>373</sup> *In re Adoption of Nelson*, 451 P.2d 173, 176 (Kan. 1969).

<sup>374</sup> *Carranza*, 267 P.3d at 917–18.

<sup>375</sup> *Id.* at 918.

<sup>376</sup> *Id.* at 920 (Nehring, J., dissenting).

<sup>377</sup> *Adrianna S.*, 520 S.W.3d at 557.

<sup>378</sup> *See In re Benjamin M.*, 310 S.W.3d 844 (Tenn. Ct. App. 2009).

<sup>379</sup> *Adrianna S.*, 520 S.W.3d at 557.

<sup>380</sup> *See, e.g., Reinesto*, 894 P.2d 733.

<sup>381</sup> *In re Guardianship of J.D.S.*, 864 So. 2d 534, 538 (Fla. Dist. Ct. App. 2004).

<sup>382</sup> *Milton v. Cary Med. Ctr.*, 538 A.2d 252, 256 (Me. 1988).

Furthermore, it does not make sense to import the meaning from a different statute because the purpose shaping those other statutes in recognizing fetal personhood might not be at all relevant to the specific statute at hand. As the Supreme Court of Iowa noted, “the common denominator in all three of our cases that consider the legal status of a fetus is our focus on the purpose of the law at issue and the legislative intent reflected by that purpose.”<sup>383</sup> Because, for example, “the factors that are relevant in determining the custody of children in dissolution cases are simply not useful in determining how decisions will be made with respect to the disposition and use of a divorced couple's fertilized eggs...we conclude the legislature did not intend to include fertilized eggs or frozen embryos within the scope” of the child custody statute.<sup>384</sup>

Of course, the legislature could then clarify the law to include a fetus, but this approach of interpretation at least adds an initial guardrail rather than allowing any law to be expanded simply because a “person” includes a fetus in at least one statute or body of law (as is the case in every state).

One Florida case, though, tried to swing this rule of interpretation the opposite way, claiming that “[i]f the Legislature had intended to exclude a viable, unborn child from the meaning of the word ‘person’...it would have expressly done so. Since it did not, we conclude that the Legislature used the word ‘person’ in a broad and unrestrictive sense.”<sup>385</sup>

### Absurdity

A general principle of statutory interpretation is that statutes should be construed so as to avoid an absurd or unreasonable result. Several courts have recognized that absurd results would flow from recognizing fetal personhood. An Arizona court, for example, found that a stillborn fetus was not a “dead human body” within the meaning of a criminal statute regarding abandonment or concealment of a human body.<sup>386</sup> In coming to this result, the court emphasized: “we cannot presume the legislature intended to criminalize a woman's failure to report a miscarriage to the authorities in the very early stages of pregnancy” because a court should avoid reaching an “absurd result” in construing a statute.<sup>387</sup>

Similarly, a Massachusetts court reasoned that “[a]bsurd consequences would follow if a fetus were treated as a son or daughter, or as a brother or sister, under the intestacy law”; a fetus may be a *conditional* heir, but that condition is live birth.<sup>388</sup>

When a Pennsylvania court dismissed charges against a pregnant woman for recklessly endangering another person, recklessly endangering the welfare of children, and delivery of cocaine, it noted the “slippery slope” of absurd consequences that could flow from such charges.<sup>389</sup> If such statutes were applied to behavior during pregnancy, “they could have an unlimited scope and create an indefinite number of new “crimes” – including use of “over-the-counter cold remedies and sleep aids,” cigarettes, and alcohol – as the law “could be construed as covering the full range of a pregnant

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<sup>383</sup> *Witten*, 672 N.W.2d at 776.

<sup>384</sup> *Id.*

<sup>385</sup> *Miller v. Highlands Ins. Co.*, 336 So. 2d 636 (Fla. 4th Dist. App. 1976), *quashed sub nom. Stern v. Miller*, 348 So. 2d 303 (Fla. 1977).

<sup>386</sup> *State v. Lockwood*, 218 P.3d 1008, 1011 (Ariz. App. 2d Div. 2009).

<sup>387</sup> *Id.*

<sup>388</sup> *Harding v. DeAngelis*, 657 N.E.2d 758, 761 (Mass. App. 1995).

<sup>389</sup> *Com. v. Kemp*, 18 Pa. D. & C.4th 53, 63 (Com. Pl. 1992).

woman's behavior – a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.”<sup>390</sup> The “dangerous policy of criminally prosecuting pregnant women for their alleged drug use threaten[s] such serious health consequences for pregnant addicts and their fetuses that the Legislature could not possibly have intended such an unreasonable application of this penal law.”<sup>391</sup>

The Supreme Court of Maryland, in holding that a pregnant woman’s substance use could not form the basis for a conviction under the reckless endangerment of a child statute, emphasized the absurd consequences that would follow:

[I]f, as the State urges, the statute is read to apply to the effect of a pregnant woman's conduct on the child she is carrying, it could well be construed to include not just the ingestion of unlawful controlled substances but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature—everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability.<sup>392</sup>

Similarly, the Supreme Court of Kentucky noted that, under the prosecution’s theory that behavior by the pregnant person could be criminal abuse, the defendant:

could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self-abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road?<sup>393</sup>

As discussed above, when the New Hampshire Supreme Court recognized a cause of action of a child against a mother for prenatal injuries, the dissenters warned that a legal duty of a pregnant

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<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Kilmon*, 905 A.2d at 311.

<sup>393</sup> *Welch*, 864 S.W.2d at 283.

person to her fetus could “govern such details...as her diet, sleep, exercise, sexual activity, work and living environment, and, of course, nearly every aspect of her health care,” stretching to “the mother’s every waking and sleeping moment.”<sup>394</sup>

## **Competing Canons of Construction**

Where a criminal statute is ambiguous as to whether “person” or “child” includes a fetus, the rule of lenity would dictate that any such ambiguity should be construed against the state. Appellate courts in New Mexico and Georgia took this approach in concluding that a viable fetus is not a “human being” or “person” within each state’s respective vehicular homicide statute.<sup>395</sup>

In the context of insurance, however, ambiguity is construed in favor of the insured and against the insurance company, so a court is more likely to hold that a fetus is an insured “person.”<sup>396</sup> Similarly, courts construe remedial statutes like wrongful death codes liberally and in favor of the plaintiff seeking relief.<sup>397</sup> These competing canons of construction will thus operate against or in favor of fetal personhood depending on the statutory context.

## **Recommendations**

### **Reject or Repeal Personhood Laws**

Personhood laws are radical and dangerous in ideology and in practical effect. New personhood measures should be rejected and existing personhood measures should be repealed.

### **Pass Affirmative Laws that Explicitly Reject Personhood<sup>398</sup>**

Laws protecting reproductive healthcare should affirmatively state that embryos and fetuses are not persons with independent rights and protections. Colorado’s Reproductive Health Equity Act, for example, states that “[a] fertilized egg, embryo, or fetus does not have independent or derivative rights under the laws of this state.”<sup>399</sup>

In addition, general definitions sections in statutory codes should define “person” to exclude a fetus. For example, the definition of “Natural Persons” throughout Puerto Rico’s Civil Code states: “Birth determines civil personality and capacity. A child shall be considered as born when completely separated from his mother's womb.”<sup>400</sup>

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<sup>394</sup> *Bonte*, 616 A.2d 464 at 467–68 (Brock, C.J., and Batchelder, J., dissenting).

<sup>395</sup> *State v. Willis*, 652 P.2d 1222, 1223 (N.M. App. 1982); *Billingsley*, 360 S.E.2d 451.

<sup>396</sup> *See, e.g., Gulf Life Ins. Co.*, 351 S.E.2d 267.

<sup>397</sup> *See, e.g., State v. Oliver*, 563 A.2d 1002 (Vt. 1989).

<sup>398</sup> Donley and Lens assert that rejecting fetal personhood should not foreclose the ability to pursue a wrongful death claim for the loss of a fetus because such a claim is “not based on the pregnant person and fetus as separate legal persons. A wrongful death claim creates no legal rights for the fetus. To the contrary, the only one with a legal right under the wrongful death claim is the parent.” Donley and Lens, *supra* note 139, at 31. While a wrongful death claim recognizes a parent’s grief following a pregnancy loss, legislatures and courts must make clear that it does not create any cognizable interest for the State or for ex-partners or others who may seek to bring such a claim against the pregnant person. In other words, any legislature or court recognizing such a claim must be explicit that the claim is only cognizable when it expands, rather than contracts, the rights of the pregnant person.

<sup>399</sup> Colo. Rev. Stat. Ann. § 25-6-403 (West).

<sup>400</sup> 31 L.P.R.A. § 81.

## Minimizing Potential Harm in Existing Laws: Careful Wording, Explicit Limits, Clear Exclusions

Careful wording, explicit limits, and clear exclusions from liability can serve as tools to fight the expansion of fetal personhood and the regulation and punishment of pregnant and postpartum people by aggressive prosecutors and activist courts. Consider, for example, the following statutes.

- A law that does use the phrase “unborn child” clarifies that “[u]se of the term...is solely for the purposes of facilitating the implementation of section 50 of article V of the state constitution and its use shall not affect any other law or statute nor shall it create any presumptions relating to the legal status of an unborn child or create or affect any distinction between the legal status of an unborn child and the legal status of a fetus.”<sup>401</sup>
- Colorado’s civil statute allowing for the recovery of damages for unlawful termination of pregnancy and criminal statute for “Offenses Against Pregnant Women” contain the explicit caveat: “Nothing in this part...shall be construed to confer the status of ‘person’ upon a human embryo, fetus, or unborn child at any stage of development prior to live birth.”<sup>402</sup> Both also exclude pregnant people themselves and medical providers from liability or prosecution.
- “It is the express intent of the general assembly that nothing in this section shall be construed to grant to a fetus any legal right not possessed by a fetus prior to July 1, 1979.”<sup>403</sup>

Nuances like *person OR fetus* are important because they allow parties to craft arguments that the legislature made expressly clear that a fetus is distinct from a person because, if not, the language “or fetus” would be superfluous. For example, a party in Virginia argued that the wrongful death act’s distinction between “death of a person” and “fetal death” indicated that the legislature “considered and rejected changing the definition of a person.”<sup>404</sup> Similarly, a woman charged with an offense like concealment of a corpse in a state could potentially draw upon statutes separating out “dead body or dead fetus.”<sup>405</sup>

The more careful and explicit the wording throughout the state code, the easier it is for a defense attorney to argue and a court to hold that “to read the word ‘person’ in the...statute to encompass an unborn fetus would be to use the rubric of construction to rewrite the statute”<sup>406</sup> because “when our Legislature intends to include an unborn child...it writes that language into the statute...with absolute clarity.”<sup>407</sup>

While rogue prosecutors may still bring charges even where a statute explicitly excludes a pregnant person from liability, explicit exclusions can still function as an important tool in getting

<sup>401</sup> Colo. Rev. Stat. Ann. § 25.5-3-106 (West).

<sup>402</sup> Colo. Rev. Stat. Ann. § 13-21-1204 (West); Colo. Rev. Stat. Ann. § 18-3.5-110 (West).

<sup>403</sup> Tenn. Code Ann. § 39-15-208 (West).

<sup>404</sup> *Healey v. Perfectly Female Women’s Health Care, P.C.*, 99 Va. Cir. 357 (2018).

<sup>405</sup> See, e.g., Conn. Gen. Stat. Ann. § 7-47b (West); D.C. Code Ann. § 7-231.17 (West); Mich. Comp. Laws Ann. § 333.2803 (West).

<sup>406</sup> *Milton v. Cary Med. Ctr.*, 538 A.2d 252, 256 (Me. 1988).

<sup>407</sup> *Louk*, 786 S.E.2d 219. See also *Reinesto*, 894 P.2d 733; *People v. Ward*, 72 Cal. Rptr. 2d 531 (Cal. App. 4th Dist. 1998); *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977), disapproved of by *Ochoa v. Super. Ct.*, 703 P.2d 1 (Cal. 1985), disapproved of by *Shalabi v. City of Fontana*, 489 P.3d 714 (Cal. 2021); *Love v. State*, 450 So. 2d 1191 (Fla. Dist. Ct. App. 1984); *State v. Dunn*, 916 P.2d 952 (Wash. App. Div. 3 1996); *State v. Luster*, 419 S.E.2d 32, 34 (Ga. App. 1992).

charges dismissed. In a 2018 Pennsylvania case, for example, the court cited a “clear and unambiguous” exclusion of a pregnant person from liability when it dismissed a charge of aggravated assault of an unborn child against a pregnant woman who had suffered an opioid overdose.<sup>408</sup>

### “Subjective, Relational” Fetal Value

Lens and Donley argue that, even though anti-abortion activists have weaponized grief over pregnancy loss to advance fetal personhood measures, abortion rights advocates can and should acknowledge the “subjective, relational value” of fetuses “without ceding ground on abortion rights.”<sup>409</sup> This concept acknowledges that some pregnant people see their fetuses as having moral value and become attached to them in utero. There is nothing problematic about recognizing this reality so long as it remains distinct from *legal personhood*, which necessarily devalues the pregnant person by equating their life with the fetus’s life.

Some courts have adopted the body part theory, which frames injury to the fetus as injury to the body of the pregnant person rather than to a separate individual.<sup>410</sup> The fetus can be described, for example, as “living tissue of the body of the mother...for which the mother has a legal cause of action the same as she has for a wrongful injury to any other part of her body.”<sup>411</sup> As the highest New York court expressed it, “[b]ecause the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes.”<sup>412</sup> This theory has its limits, as Donley and Lens describe: “[t]he claim is the same whether her leg is injured or she gives birth to her six-pound stillborn child. Presumably a jury would award more emotional distress damages for pregnancy loss than for a broken leg, but no guarantee exists because damages are individualized, not objective.”<sup>413</sup>

A Connecticut case illustrates a potential middle ground between the body part theory and personhood, perhaps more aligned with Lens and Donley’s framework of subjective fetal value. The court posits that, though “a stillborn fetus does not have survivors in the same legal sense that a once living human being has survivors...the mother nevertheless retains at least a quasi-property right in the body” because “a mother who has carried a fetus for nineteen weeks can understandably view its body as symbolic not only of the physical presence that she once felt in her own body but also of the hopes and dreams she once had for the future.”<sup>414</sup> The law can “recognize the existence and legitimacy of such emotions” and symbols.<sup>415</sup>

The court also drew upon language from the American Fertility Society ethics standard:

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<sup>408</sup> *Dischman*, 195 A.3d at 571.

<sup>409</sup> Donley and Lens, *supra* note 139, at 1.

<sup>410</sup> See, e.g., *Singleton v. Ranz*, 534 So. 2d 847, 848 (Fla. Dist. Ct. App. 1988); *Krishnan v. Ramirez*, 42 S.W.3d 205 (Tex. App. 2001); *Johnson v. Verrilli*, 511 N.Y.S.2d 1008 (N.Y. Sup. Ct. 1987), *aff’d as modified*, 526 N.Y.S.2d 600 (N.Y. App. Div. 2d Dept. 1988); *Modaber v. Kelley*, 348 S.E.2d 233 (Va. 1986); *State v. Sandoval*, 821 A.2d 247 (Conn. 2003); *Smith v. Borello*, 804 A.2d 1151, 1158 (Md. 2002), *opinion after certified question answered*, 50 Fed. Appx. 107 (4th Cir. 2002) (unpublished); *St. Clair v. State*, 26 S.W.3d 89 (Tex. App.—Waco 2000).

<sup>411</sup> *Singleton*, 534 So. 2d at 848.

<sup>412</sup> *Broadnax v. Gonzalez*, 809 N.E.2d 645 (N.Y. 2004).

<sup>413</sup> Donley and Lens, *supra* note 139, at 30.

<sup>414</sup> *Janicki v. Hosp. of St. Raphael*, 744 A.2d 963, 969 (Conn. Super. 1999).

<sup>415</sup> *Id.*

The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.<sup>416</sup>

Legislatures seeking to recognize reproductive injuries and pregnancy loss should be explicit and cautious with language to ensure that laws intended to benefit people who have suffered injuries or lost pregnancies are not turned into weapons against pregnant people themselves or political tools to set a precedent for fetal personhood in order to strip away reproductive freedoms.

## **Conclusion**

Lawmakers cannot control the ramifications and consequences of their laws, especially with aggressive prosecutors all too willing to push the boundaries of what is legal or permissible. It is thus no answer to claim that the ramifications outlined above are fantastical and that common sense can save us. Common sense has not protected pregnant persons from all manner of nonsensical state interventions and prosecutions. Pregnancy criminalization, past and present, makes the seemingly dystopian all too real. Claiming that we are not on a slippery slope is a flimsy effort to mask the deliberate, giddy progression right down that slope by actors seeking to regulate and punish pregnant people. Understanding the landscape of fetal personhood exposes its underlying denial of liberty and autonomy to pregnant and postpartum people. We must work not only to reject and dismantle fetal personhood ideology, but also to affirmatively safeguard and advance the full personhood and equality of all people with the capacity for pregnancy.

*We are grateful for the work of NAPW legal intern and lead author Katherine Fleming and NAPW Staff Attorney Emma Roth.*

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<sup>416</sup> *Id.* at 970.

Appendix

**Broadest Personhood Provisions**

State	Text of Law
<b>Alabama</b>	<p>Art. I, § 36.06 / AL CONST Amend. No. 930</p> <p>(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the <b>rights of unborn children</b>, including the <b>right to life</b>.</p> <p>(b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the <b>protection of the rights of the unborn child in all manners and measures lawful and appropriate</b>.</p>
<b>Arizona</b>	<p>Ariz. Rev. Stat. Ann. § 1-219</p> <p>A. The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, <b>all rights, privileges and immunities available to other persons, citizens and residents of this state</b>, subject only to the constitution of the United States and decisional interpretations thereof by the United States supreme court.</p> <p>B. This section does not create a cause of action against:</p> <ol style="list-style-type: none"><li>1. A person who performs <b>in vitro fertilization</b> procedures as authorized under the laws of this state.</li><li>2. A woman for <b>indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care</b>.</li></ol> <p>*Preliminary injunction issued July 11, 2022, but only blocked provision’s application to abortions that remain lawful in Arizona.</p>
<b>Arkansas</b>	Ark. Const. Amendment 68, § 2

	<p>The policy of Arkansas is to <b>protect the life of every unborn child from conception until birth</b>, to the extent permitted by the Federal Constitution.</p> <p><i>Knowlton v. Ward</i>, 889 S.W.2d 721, 726 (1994) held that this provision was not a “self-executing provision” that would have prohibited the state from engaging in any activity that allowed or increased access to abortion care, as the <b>amendment “does not provide any means by which the policy is to be effectuated.”</b></p>
<b>Georgia</b>	<p>Ga. Code Ann. § 1-2-1 Persons and their rights</p> <p>(b) <b>“Natural person”</b> means any human being including an unborn child.</p> <p>(d) Unless otherwise provided by law, any natural person, including an unborn child with a detectable human heartbeat, shall be included in <b>population based determinations</b>.</p> <p>(2) “Unborn child” means a member of the species <i>Homo sapiens</i> at any stage of development who is carried in the womb.</p>
<b>Kansas</b>	<p>Kan. Stat. Ann. § 65-6732 (West)</p> <p>(1) the life of each human being begins at fertilization;</p> <p>(2) unborn children have interests in life, health, and well-being that should be protected; and</p> <p>(3) the parents of unborn children have protectable interests in the life, health, and well-being of the unborn children of such parents.</p> <p>“On and after July 1, 2013, <b>the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents</b> of this state, subject only to the constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the Kansas constitution and the Kansas Statutes Annotated.”</p>

<p><b>Kentucky</b></p>	<p>Ky. Rev. Stat. Ann. § 311.720</p> <p>As used in KRS 311.710 to 311.820, <b>and laws of the Commonwealth unless the context otherwise requires:</b></p> <p>(6) “Fetus” means a human being from fertilization until birth;</p> <p>(8) “Human being” means any member of the species homo sapiens from fertilization until death;</p>
<p><b>Missouri</b></p>	<p>Mo. Rev. Stat. § 1.205</p> <p>1. The general assembly of this state finds that:</p> <p>(1) The life of each human being begins at conception;</p> <p>(2) Unborn children have protectable interests in life, health, and well-being;</p> <p>(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.</p> <p>2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, <b>all the rights, privileges, and immunities available to other persons, citizens, and residents of this state</b>, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.</p> <p>3. As used in this section, the term “unborn children” or “unborn child” shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.</p> <p>4. <b>Nothing</b> in this section shall be interpreted as creating a cause of action against a woman for <b>indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.</b></p>

<p><b>Montana</b></p>	<p>Mont. Code Ann. § 50-20-102</p> <p>(1) The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we <b>reaffirm the intent to extend the protection of the laws of Montana in favor of all human life</b>. It is the <b>policy of the state to preserve and protect the lives of all human beings</b> and to provide protection for the viable human life.</p> <p>(c) the holdings referred to in subsections (2)(a) and (2)(b) apply to unborn persons in order to <b>extend to unborn persons the inalienable right to defend their lives and liberties</b>;</p>
<p><b>Pennsylvania</b></p>	<p>18 Pa. Stat. and Cons. Stat. Ann. § 3202</p> <p>(c) Construction.—In <b>every relevant civil or criminal proceeding in which it is possible to do so</b> without violating the Federal Constitution, the <b>common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws</b> and to further the public policy of this Commonwealth encouraging childbirth over abortion.</p>
<p><b>Tennessee</b></p>	<p>Tenn. Code Ann. § 39-15-214</p> <p>(5) At conception, a new and genetically distinct human being is formed;</p> <p>(6) The state has a legitimate, substantial, and compelling interest in <b>protecting the rights of all human beings, including the fundamental and absolute right of unborn human beings to life, liberty, and all rights protected by the Fourteenth and Ninth Amendments to the United States Constitution</b>;</p> <p>(63) The use of abortion as a means to prefer one (1) sex over another or to discriminate based on disability or race is antithetical to the core values equality, freedom, and human dignity enshrined in both the United States and Tennessee Constitutions. The elimination of bias and discrimination against pregnant women, their partners, and their family members, including unborn children, is a fundamental obligation of government in order to guarantee those who are, according to the Declaration of Independence, “endowed by their Creator with <b>certain unalienable Rights</b>” can enjoy “Life, Liberty, and the pursuit of Happiness.”</p>
<p><b>Utah</b></p>	<p>Utah Code Ann. § 76-7-301.1 (West)</p>

*[preamble to abortion criminal code]*

It is the intent of the Legislature to protect and guarantee to unborn children their **inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.**

### Personhood Throughout Criminal Codes

*Defining “Person,” “Individual,” or “Human Being” to Include a Fetus Throughout the Criminal Code*

State	Text of Law or Case
Kentucky	<i>Com. v. Morris</i> , 142 S.W.3d 654 (Ky. 2004) (holding that “human being” in penal code definitions (Ky. Rev. Stat. Ann. § 500.080 (West)) includes a viable fetus)
Louisiana	La. Stat. Ann. § 14:2  (7) “Person” includes a human being from the moment of <b>fertilization</b> and <b>implantation</b> ....
Ohio	Ohio Rev. Code Ann. § 2901.01 (West)  (B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, “person” includes all of the following: ... (ii) An unborn human who is <b>viable</b> . ...  (B)(2) Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term “person” that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense in any of the following manners:

(a) Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an **abortion** with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. An abortion that violates the conditions described in the immediately preceding sentence may be punished as a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, 2903.14, 2903.21, or 2903.22 of the Revised Code, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate section 2919.12, division (B) of section 2919.13, or section 2919.15, 2919.151, 2919.17, or 2919.18 of the Revised Code, may be punished as a violation of section 2919.12, division (B) of section 2919.13, or section 2919.15, 2919.151, 2919.17, or 2919.18 of the Revised Code, as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with section 2919.12 of the Revised Code.

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an **act or omission of the woman that occurs while she is or was pregnant** and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

<p><b>South Dakota</b></p>	<p>S.D. Codified Laws § 22-1-2</p> <p>(31) “Person,” any natural person, <b>unborn child</b>...;</p> <p>(50A) “Unborn child,” an individual organism of the species homo sapiens from <b>fertilization</b> until live birth;</p>
<p><b>Texas</b></p>	<p>Tex. Penal Code Ann. § 1.07 (Vernon)</p> <p>(26) “Individual” means a human being who is alive, including an unborn child at every stage of gestation from <b>fertilization</b> until birth.</p> <p>(49) “Death” includes, for an individual who is an unborn child, the failure to be born alive.</p>

*Defining “Unborn Child” Throughout the Criminal Code*

<p><b>State</b></p>	<p><b>Text of Law or Case</b></p>
<p><b>Alaska</b></p>	<p>Alaska Stat. Ann. § 11.81.900 (West)</p> <p>(66) “unborn child” means a member of the species Homo sapiens, <b>at any stage of development</b>, who is carried in the womb;</p>
<p><b>Wyoming</b></p>	<p>Wyo. Stat. Ann. § 6-1-104 (West)</p> <p>(xviii) “Unborn child” means a member of the species homo sapiens, <b>at any state of development</b>, who is carried in a womb;</p>

*Judicially Expanding “Child” to Include Fetus*

State	Text of Law or Case
<b>Alabama</b>	<p><i>Ex parte Ankrom</i>, 152 So. 3d 397 (Ala. 2013) (expanding “chemical endangerment of a child” statute to apply to pregnant people, asserting that the “<b>plain meaning</b>” of “child” includes a fetus at any stage of pregnancy)</p> <p>152 So. 3d at 429 (Parker, J., concurring) (“the decision of this Court today is in keeping with the widespread legal recognition that unborn children are <b>persons with rights that should be protected by law.</b>”)</p>
<b>Oklahoma</b>	<p><i>State v. Green</i>, 474 P.3d 886, 891 (Okla. Crim. App. 2020) (expanding the definition of “child under eighteen” in criminal child neglect statute to include a fetus) (“Just as the term <b>human being</b>, ‘according to its <b>plain and ordinary meaning</b>—includes a viable human fetus[,]’ so too does the term ‘child’ in the very statute intended to protect children from neglect.”)</p>
<b>South Carolina</b>	<p><i>Whitner v. State</i>, 492 S.E.2d 777, 779 (S.C. 1997) (expanding the definition of “child” in child abuse and endangerment statute to include a fetus) (“South Carolina law has long recognized that viable fetuses are <b>persons holding certain legal rights and privileges.</b>”)</p>