PREGNANCY JUSTICE

PATIENT FORWARD

The Role of the Viability Line in Pregnancy Criminalization

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I. Introduction

The concept of the fetal viability line is one that is inconsistently defined and erratically applied. This murkiness around viability exposes why the legislation of pregnancy timelines has multifaceted and dangerous consequences that extend far beyond access to abortion. This report investigates the history and implications of enshrining the viability line into law and unpacks the ways in which that entrenchment cultivates the criminalization of pregnant women and pregnancy-able people.

This report will explore:

- How the integration of the viability line into legal frameworks is an effective tool to subjugate, stigmatize, and punish women and pregnancy-able people.
- The pathways to pregnancy criminalization that are forged through the integration of the "viability line" into law across the United States, namely: 1) viability lines explicitly providing embryos and fetuses with legal rights at "viability"[1]; 2) viability lines implicitly providing embryos and fetuses with legal rights at viability; 3) viability lines implicit or explicitly providing embryos and fetuses with legal rights, depending on the state; or 4) viability lines leading to/being interpreted as/constituting an incremental step toward assigning embryos and fetus legal rights at viability.
- How an act that would otherwise be legal becomes an illegal one solely because the person is pregnant with a "viable" fetus.
- How the State's interest in preserving fetal life may be used to supplant a pregnant person's constitutional decision-making authority and health, thus undermining decision-making by the pregnant person and leading to hospitals overriding advanced directives and sanctioning forced medical procedures all in the name of preserving fetal "life."

Prosecutions of pregnant people under certain state laws are justified by the concept that an embryo or fetus has legal rights that can be violated; under these frameworks, a fetus is always a potential victim with legal rights and a pregnant person who does anything the State determines is violative of those rights will be punished or have their rights curtailed because of their actions during pregnancy. For these reasons, this report examines the threats the viability line poses to civil and human rights, how it contributes to the corrosion of positive maternal health outcomes, and how it undermines pregnant women and pregnancy-able people's inherent and inalienable rights to life.

II. The History of the Viability Line in Legal Precedent

The notion of "viability" is a relatively modern medical concept. The viability line is the product of decades of advancements in medical knowledge and technology. Potential fetal viability is generally understood as the point in pregnancy at which a fetus is considered capable of surviving outside the uterus.[2] Clinicians use fetal viability to determine whether care is appropriate following a preterm delivery. For much of the United States' history, however, both the courts and lawmakers have used other markers to assign moral and legal significance to a pregnancy.

A. Quickening, the "Born Alive" Rule,[3] and The Evolution of Prenatal Injury Precepts in Tort Law

The question of viability has deep roots in notions of "quickening," an ancient concept ascribing political, legal, and moral significance to the first in utero movements of a fetus felt by a pregnant woman to confirm the fact of a pregnancy and estimate a due date. "Quickening" comes from the Old English word cwic, meaning "alive." Prior to that knowledge, Aristotle considered the moral significance of a fetus as increasing with its development. His theory, "centered on 'ensoulment', suggested that the embryo is a 'vegetative soul' potentially equivalent to that of plant life, but it attains a more sentient existence and soul as it attains a human shape—when the fetal body is formed, and movement can be perceived."[4]

Quickening represented both a milestone in fetal development and the unknown moment where external actors could name a fetus and transform it into a living being independent of the woman carrying it, thus justifying the assignment of legal rights and protections to the fetus by State actors. Scientifically speaking, quickening was an imperfect way to articulate life, but for centuries it reliably served as a meaningful point in pregnancy to conceptually attribute life to a developing fetus. Indeed, in 1765, William Blackstone's Commentaries on the Laws of England stated that life "begins in the contemplation of law as soon as an infant is able to stir in the mother's womb." Under this "quickening doctrine" in English and early American common law and later in 19th century state abortion statutes, "quickening" became the demarcation mark for whether an abortion was acceptable and legal, and to what degree it was criminalized. In an 1812 case, *Commonwealth v. Bangs*, a Massachusetts court noted that pre-quickening abortions were outside the scope of the law.[5] "Quickening", for all intents and purposes, is the earliest form of fetal personhood.

From its earliest days, "quickening" opened a divide between legal-political terminology and scientific terms of art.

> The concept of "quickening" could *not* tell a physician or a midwife whether a fetus was healthy or would survive birth; to the contrary, and as practitioners are well aware, any number of physiological or external factors can affect a pregnancy, and it is difficult to determine the cause of an adverse pregnancy outcome.

Accordingly, while quickening could be used to draw a line to regulate abortion, it could not support an evidentiary standard for injuries sustained in the womb prior to birth. Another approach was required to prove that the fetus was "alive" in the womb at the time of injury and that some material act was the proximate cause of its injury or death.[6] In response to this dilemma, courts developed a "born alive" standard, where a claim could be made out for prenatal injuries only if the child was subsequently born alive. As recently as the 1940s, most jurisdictions in the United States followed this common law "born alive" rule where a fetus only gained legal rights and living person status upon a "live birth."[7]

The "born alive" rule was mostly deployed in tort law, which focuses on interpersonal wrongdoing and is meant to provide financial relief to injured parties, impose liability on parties responsible for the injury, and deter others from doing harm. Under the "born alive" rule, the fetus was not a party that could sue for harm done to it. For example, if a pregnant person were driving and was hit by another car, they could sue the other driver for injuries they sustained. But that pregnant person could not sue to recover damages for injuries their fetus suffered in utero, because that fetus was not yet "born alive" and thus not an independent party that had suffered harm.[8]

While there were critics of the "born alive" rule,[9] most courts universally applied it. In 1884, the Massachusetts Supreme Court ruled in the seminal case *Dietrich v. Inhabitants of Northampton* that a pregnant woman could not recover for injuries on behalf of her fetus because "the unborn child was a part of the mother at the time of the injury" and so "any damage to it which was not too remote to be recovered for at all was recoverable by her."[10] Finding that no case had ever decided that a fetus could "maintain an action for injuries received by it while in its mother's womb",[11] the court rejected the idea that the "degree of maturity reached by the embryo at the moment of the organic lesion or wrongful act" was material to the analysis, instead ruling that a fetus became a person and had legal rights only upon birth.[12]

A landmark case, *Bonbrest v. Kotz*, decided over 60 years later in 1946, paved the way for state tort laws to recognize the concept of prenatal injury, introducing for the first time the concept of viability as the critical threshold for that liability. In *Bonbrest*, the U.S. District Court for the District of Columbia held that an infant could sue for

injuries sustained during her mother's pregnancy.[13] The court contended that there had been "a direct injury to a viable child," and that a viable child was "not a 'part' of the mother" but instead was "capable of living outside the womb;"[14] the court defined "viable" as "mean[ing] that the foetus [sic] has reached such a stage of development that it can live outside of the uterus."[15] The court emphasized this notion of viability, noting that the fetus "has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable now of being ushered into the visible world."[16]

Unlike the *Dietrich* finding, the court held that "[h]ere . . . we have a viable child—one capable of living outside the womb—and which has demonstrated its capacity to survive by surviving—are we to say now it has no locus standing in court or elsewhere?"[17] Thus, the court concluded, a viable fetus must be able to sue on its own behalf, as its own party, for injuries it suffered.

Scholars have debated what led to this embrace of a viability standard. Some have argued that courts were originally loath to recognize prenatal injury because it was difficult to prove and might result in actions being brought in bad faith, but, with scientific advancements, courts relaxed restrictions around the submission of medical testimony.[18] Others have noted that given the other areas of law that recognized fetuses as parties, such as property and criminal law (*see infra*), it became illogical for tort law to refuse to give fetuses the right to sue.[19]

> What is clear is that as medical technologies advanced to the degree that it made fetuses "capable now of extra-uterine life" and made it possible to take "living children . . . from dead mothers,"[20] viable fetuses became parties with rights to litigate.

Regardless of the reasons, *Bonbrest* reflected a dramatic change. In 1949, state supreme courts in Minnesota and Ohio relied on *Bonbrest* to rule that state tort laws should recognize prenatal injuries to viable fetuses. In *Verkennes v. Corniea*, the Minnesota Supreme Court determined that the state's wrongful death statute could be used in an action for the death of an unborn child due to prenatal injury because "there is no question here about the viability of the unborn child, or its capacity for a separate and independent existence."[21] The Ohio Supreme Court ruled in *Williams v. Marion Rapid Transit,* that a child who suffered injuries while in utero and was born prematurely—but survived—could sue for the prenatal injuries it incurred.[22] In *Williams*, the court stated that a key principle of tort law is that "if a wrong has been committed there should be a remedy"[23] and quoted *Bonbrest* directly: "in the instant case we are dealing with a viable child, one capable of living and which demonstrated its capacity to survive by surviving."[24]

Of importance here is that *Williams* emphasized that "at the time of the injury the child concededly was so far matured that it had reached the period of viability, such a stage of development that the

death of the mother could not have deprived it of life."[25] In subsequent decades, several other states ruled similarly,[26] with some states going even further and recognizing liability for prenatal injury to nonviable fetuses.[27] Within the nation's Courts, a fetus was now capable of incurring injury or harm meriting judicial redress—a determination that hinged more often than not on the question of viability.

B. The Vagueness of "Viability"

While viability indicates a capacity for life, it is not a guarantee of it.[28]

> **Accordingly, despite the aforementioned entrenchment of fetal viability principles into law, whether a fetus is in fact viable—that is, whether the fetus will live outside the womb at a particular point in pregnancy with or without medical intervention—remains impossible for physicians, let alone for politicians and legal actors, to definitively determine.**

Indeed, the American College of Obstetricians and Gynecologists ("ACOG") notes viability can occur between 23 and 28 weeks of pregnancy and is a complex determination dependent on factors such as gestational age, genetics, weight, and available medical care: "[t]here is no definite diagnosis of viability and no test that can definitively determine whether a fetus could survive outside of the uterus."[29] As ACOG explains, "even with all available factors considered, it still isn't possible to definitively predict survival" for a fetus deemed viable.[30] Ultimately, a medical professional can only estimate when a particular fetus becomes viable,[31] an estimation that often relies in part on the gestational age of a fetus, which is a guess in and of itself—especially as the pregnancy progresses.[32] Indeed, fetuses of identical gestational ages can have very different ex-utero viability, *i.e.* the ability to survive outside the uterus once delivered. In fact, a study across 24 academic hospitals revealed that the type of medical treatment administered for infants born at 22 weeks varies dramatically; some hospitals administer scant medical treatment, while others administer multiple lifesaving measures, contributing to widely varying rates of survival for fetuses born at identical gestations.[33]

C. The Viability Line in Abortion Law

The legal concept of viability was not constitutionally significant within the context of abortion laws until the U.S. Supreme Court's 1973 decision in *Roe v. Wade*.[34] In *Roe*, the Supreme Court recognized a fundamental constitutional right to abortion, requiring that any state regulation of abortion be justified by a compelling interest.[35] Under this new formulation, the states had an "important and legitimate interest in the life of the mother," which became "compelling" at the end of the first trimester. Prior to that, states could not restrict a right to an abortion except to impose minimal medical safeguards. At the "compelling interest" mark, however, states could restrict the right to an abortion where the restriction was reasonable and narrowly tailored to protect the pregnant person's health.[36]

Additionally, the Court determined that the State had an "important and legitimate interest in potential life," which became "compelling" at the point of viability because "the fetus presumably has the capability of meaningful life outside the mother's womb." After viability, the Supreme Court held, a state could prohibit abortions, except where necessary to protect the woman's life or health.[37] Under the *Roe* framework, "viable" was defined as any fetus "potentially able to live outside the mother's womb, albeit with artificial aid," and posited that viability is "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[38]

Two decades later, in *Planned Parenthood v. Casey*, the Supreme Court dismissed *Roe*'s trimester framework, focusing instead on viability once again ushered in by legal considerations of progress in science. Since deciding *Roe*, the Court held, "advances in neonatal care have advanced [the] viability [line] to a point somewhere earlier," to perhaps "23 to 24 weeks," but "the attainment of viability may continue to serve as the critical fact" for regulating abortion,[39] partly because "there is no line other than viability which is more workable."[40]

The Court ruled that before viability, states could not enact abortion restrictions if those restrictions imposed an "undue burden" on the right to abortion, *i.e.*, had "the purpose or effect of placing a substantial obstacle in the path of a [pregnant person] seeking an abortion of a nonviable fetus."[41] After viability, states could regulate or ban abortion as long as they provided exceptions for the pregnant woman's life and health.[42] *Casey* integrated viability lines to "justify the lines we draw,"[43] noting that "no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips."[44] Put simply, the integration of viability in *Casey* was not because the viability line was clearly definitive of life or made any medical sense, but because it was an effective legal and legislative benchmark.

In the decades that followed, state legislatures pushed the boundaries of what constituted an "undue burden" and "viability,"[45] culminating in the Supreme Court's June 24, 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which ended the federal constitutional right to an abortion.[46] In doing so, *Dobbs* allowed states to regulate or ban abortion at any point in pregnancy without regard to viability.[47] Despite the impossibility of determining a uniform point of viability, and despite the overturning of cases giving viability constitutional significance,[48] the viability line remains relevant in abortion legislation across the country. Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Missouri, Montana, North Dakota, Rhode Island, Washington, and Wyoming, all prohibit abortion after "viability," albeit with various exceptions for a pregnant person's life and/or health. Many other states ban abortion at gestational ages that are functionally commensurate with viability lines: Ohio and Wisconsin ban abortions after 20 weeks (since fertilization); Kansas' ban begins at 22 weeks; Massachusetts, Nevada, New Hampshire, New York, and Pennsylvania ban abortions at or around 24 weeks; and Virginia bans abortion in the third trimester.[49]

The Supreme Court's overruling of *Roe* and *Casey* inspired advocates to safeguard the right to abortion in state constitutions.[50] Those efforts to protect abortion, however, often came with a reintroduction of the viability line, effectively limiting the constitutional protections to abortions prior to viability. Indeed, in November 2022, Michigan voters approved a ballot initiative that established a constitutional right to "reproductive freedom." However, the ballot initiative allowed the state "to regulate abortion after fetal viability."[51] *See Appendix for additional post-Dobbs abortion rights ballot initiatives incorporating the viability line*.

III. Integration of the Viability Line in Non-Abortion Cases

While the viability line has factored into several aspects of legal reproductive justice discourse and legal debates before *Roe* and post-*Dobbs*, with regard to cultural socialization and government intervention, the integration of the viability line must be clearly recognized as an effective tool to subjugate, stigmatize, and punish women and all pregnancy-able people on the basis of their reproductive capacity.

A. The Viability Line and Fetal Personhood

"Fetal personhood" is the idea that fetuses (and, increasingly, embryos and blastocysts) are people, with all the same rights as anyone else.[52] Proponents of fetal personhood principles often root their argument in the 14th Amendment, which guarantees equal protection under the law. Under this rubric, fetuses deserve to be treated on an equal footing as any person. This framework effectively grants a fetus the same rights and protections as a living child, thus subordinating pregnant women's inalienable rights to those of the fetus they carry during their own pregnancy. While personhood is dangerous because it grants rights to a fetus (and, in some states, fertilized eggs and embryos), personhood also unlocks a whole panoply of state action, coercion, and violence under the auspices of "protecting" pregnant women.

Carried out to its logical end, if a fetus is considered a separate person under the law, there are virtually no limits to what state actors can do under the guise of protecting those "persons"; up to and including using deadly force to protect that "person" in danger of harm. The sort of dystopian extremes this could be taken to may seem far-fetched, but the ugly past realities of American history[53] inform the scope of current possibilities, which include empowering law enforcement to protect fetal "persons" at all costs.[54] Lest these warnings seem like mere hyperbole, Wisconsin's Act 292 permits juvenile courts to take physical custody of an "unborn child"—and thereby physically detain a pregnant person, solely on the suspicion that the pregnant person may use or have used controlled substances.[55]

Under a fetal viability legal framework, before viability, a fetus is not a legal person; following viability, it is. This framework creates instant and unsustainable conflict: "[f]etal 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.'"[56] As Pregnancy Justice noted in its 2013 report on arrests of and forced interventions on pregnant people in the United States from 1973 to 2005:

> [C]onsistent with the goals of personhood measures, prosecutors, hospital attorneys, and judges . . . claim that [*Roe*] establishes that viable fetuses must be treated as legal persons fully separate from the pregnant woman. This misstatement of *Roe*'s actual holding has been used in numerous cases as authority for depriving pregnant women of their liberty.[57]

States have seized upon this misinterpretation to justify the explicit and implicit incorporation of fetal personhood principles into law. Since at least 2007, Ohio legislation has recognized the legal rights of a fetus upon reaching viability within the state's criminal code. *See* Ohio Rev. Code Ann. § 2901.01 (West) ("[A]s used in any section . . . that sets forth a criminal offense, 'person' includes all of the following: . . . (ii) An unborn human who is viable.").[58] While some states have granted fetal personhood through legislation, other states have judicially incorporated fetal personhood upon viability into certain aspects of statutory construction, resulting in laws with devastating consequences for women and all pregnant people.[59]

Everywhere in the United States, however, albeit differently expressed across the nation, four truths remain: 1) viability is explicitly fetal personhood at viability; 2) viability is implicitly fetal personhood at viability; 3) viability is either implicit or explicit fetal personhood, depending on the state; or 4) viability leads to/has been interpreted as/is an incremental step toward fetal personhood. Regardless of which path is taken, all roads lead to the criminalization of pregnant women.

1. *The Criminalization of Substance Use During Pregnancy*

Allegations of substance use can lead to prosecutions of pregnant people for "child abuse," "chemical endangerment," or "homicide" whether or not the pregnancy ended in a stillbirth or a live birth.[60] In these cases, "state law did not actually make ingesting drugs illegal, let alone prohibit pregnancy and drug use; nor were the substances controlled *because* of concerns about fetal development."[61] Instead, an act that would otherwise be legal becomes an illegal one solely because the person is pregnant.

> These prosecutions and interpretations of state law are justified by the concept that a fetus is a potential victim to be protected against all "outsiders" and thus a pregnant woman's rights are curtailed to prevent her from becoming a perpetrator against her own pregnancy, and, thus, her own body.

In no small part because Alabama, Oklahoma, and South Carolina's courts have expansively interpreted the personhood of viable fetuses, these states lead the country in pregnancy-related arrests.[62] In most of these cases, a court

argued that the purpose of the relevant statutes—whether wrongful death, child abuse, or homicide—is to "protect" human life. The evolution of this jurisprudence shows how these statutes are used to criminalize and control women's lives and behavior and not used in any way to benefit fetuses.

a) *South Carolina*

In 1997, the Supreme Court of South Carolina became the first state supreme court to hold that the word "child" in the state's child abuse and endangerment statute included viable fetuses, and therefore that a defendant could be prosecuted under that statute for ingesting cocaine during her third trimester of pregnancy.[63] The court's findings in *Whitner v. State* built on a long history of fetal personhood jurisprudence, including a 1960 decision holding that the state's wrongful death statute could be applied to an infant who died four hours after birth due to injuries sustained after viability because "a fetus having reached a period of prenatal maturity where it is capable of independent life apart from its mother *is a person*."[64] Cases in the following decades underscored this reasoning, regardless of whether the fetus was eventually born alive.[65]

By 1984, the Court had applied the state's murder statute to viable fetuses because "it would be 'grossly inconsistent . . . to construe a viable fetus as a "person" for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.'"[66] *Whitner* simply extended these concepts even further, concluding that "it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."[67] *Whitner*'s holding exemplifies how the establishment of fetal personhood in one area of law allows the concept to steadily extend, making it possible to recognize viable fetuses as persons in other areas. It is why the *Whitner* court cited both *Roe* and *Casey* for the preposition that "the United States Supreme Court has repeatedly held that the states have a compelling interest in the life of a viable fetus,"[68] not only "after the fetus is viable, but *throughout* the expectant mother's pregnancy"[69], signifying that later efforts would allow the state to apply the child abuse statute to all fetuses, not just viable ones.

Shortly after the *Whitner* decision, the South Carolina Legislature amended its homicide by child abuse statute, which had included the phrase "death of a child under the age of eleven," to "child."[70] Three years later, the South Carolina Supreme Court relied on that amendment to uphold the conviction of a woman for homicide by child abuse after giving birth to a stillborn baby that had cocaine in its system.[71] The court explained that the Legislature amended the statute after the court "had specifically held that the term child includes a viable fetus," and so the Legislature must not have intended to "exempt [viable] fetuses from the statute's operation."[72]

While the South Carolina Supreme Court has, to date, confined its holdings to "viable" fetuses, with the overturning of *Roe* and *Casey*, any constraints on South Carolina's application of criminal statutes solely to fetuses have been removed.

b) *Alabama*

Like South Carolina, Alabama has used viability as the gateway to establish fetal personhood in criminal and civil law. Alabama, however, has made those laws applicable from the moment of conception. While Alabama was one of the last states to abandon the "born alive rule" completely and recognize prenatal injury, its use of a viability-dependent legal frame—from the moment of conception till birth—has made it the leader in fetal personhood-based pregnancy criminalization.

In 1972, Alabama's Supreme Court held that a woman whose fetus suffered prenatal injury when she was almost eight months pregnant—and was born alive but died five days later—could sue for wrongful death of her fetus.[73] The Court's finding resolved what was, in its opinion, a foundational and incongruous contradiction; namely that it was "a great crime to kill the child after it is able to stir in the mother's womb";[74] but "a defendant . . . responsible criminally for the homicide of a fetal child . . . would have no similar responsibility civilly."[75] The court reasoned that medical science had advanced to the point that society recognized that a viable fetus was not part of its mother but a distinct being, and that to deny a cause of action for wrongful death "would give protection to an alleged tort-feasor."[76]

Almost as soon as the Alabama Supreme Court embraced the viability line, it rejected it. Mere months after *Roe* was decided, the Court held that viability was irrelevant if the facts of a case concerned a fetus that suffered prenatal injuries before viability, was born alive, and died shortly after.[77] The court reasoned that "there is no valid medical basis for a distinction based on viability, especially where the child has been born alive" because "the fetus is just as much an independent being prior to viability as it is afterwards."[78] Alabama went a step farther by moving the viability line backwards, not forward in time, noting that "*from the moment of conception*, the fetus or embryo . . . has a separate existence within the body of its mother."[79]

A year later, the Alabama Supreme Court held in *Eich v. Town of Gulf Shores* that a mother who was eight and a half months pregnant could sue for the wrongful death of her fetus when a car accident led to the birth of a stillborn fetus.[80] Here, the Court found that a fetus born alive after a prenatal injury was not a necessary prerequisite to sustain a wrongful death action, and rather "[t]o deny recovery where the injury is so severe as to cause the death of a fetus subsequently stillborn, and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth, would only serve the tortfeasor by rewarding him for his severity in inflicting the injury."[81] The court now relied on its own "deeply engrained principle of Alabama jurisprudence that the paramount purpose of our wrongful death statutes is the preservation of human life."[82] The *Eich* court noted that in *Roe*, the U.S. Supreme Court had stated that after the first trimester, "the state has a valid interest and duty in protecting such prenatal life," which had been relied on in some states for wrongful death actions for stillborn fetuses.[83] The *Eich* court emphasized that a fetus is a potential human life at the time

of its injury, whenever that injury occurred, and reasoned that allowing a wrongful death action was consistent with the purpose of the statute.[84] This state of play—the application of wrongful death actions to fetuses suffering prenatal injuries before or after viability and later born alive or stillborn—continued for the next two decades until the Court's 1993 decisions in *Lollar v. Tankersley* and *Gentry v. Gilmore*.

In *Lollar* and *Gentry*, the Alabama Supreme Court held that the wrongful death statute did not apply to a prenatal injury that caused the death of a nonviable fetus at the time of the injury.[85] In *Lollar*, the court held:

> Contrary to the contention that the *Eich–Wolfe–Huskey* trilogy abrogated the viability requirement, a close reading of these cases reveals that viability was the common—indeed, the decisive—consideration, in each case. *Huskey* and *Eich* allowed recovery because the fetus was viable at the time of the injury, and *Wolfe* allowed recovery because the fetus survived the injury long enough to *attain* viability.[86]

Regardless of how the *Eich*, *Wolfe*, and *Huskey* cases are interpreted, the *Lollar* court found that "a cause of action for death resulting from a pre-natal [sic] injury requires that the fetus attains viability either before the injury or before death results from the injury."[87] The *Lollar* court also resisted the idea that a fetus that never reached viability is a "minor child" within the wrongful death statute, partly because few states at that point had defined "child" that way.[88] The holding in *Gentry* relied on substantially similar facts and on the same reasoning.[89]

Nearly two decades later, in 2011, the Alabama Supreme Court overruled *Lollar* and *Gentry*, now holding that Alabama's wrongful death statute applied to previable fetuses who suffered prenatal injuries and were still previable at the time of death.[90] In *Mack v. Carnack*, a 12-week pregnant woman who was involved in a car accident subsequently suffered a miscarriage.[91] Contradicting its own reasoning in *Lollar*, the Court explained that "viability was *not* the 'decisive' consideration" in *Huskey*, *Wolfe*, and *Eich*.[92] Rather, the Court emphasized the "lack of a principled distinction based on viability" and cited "substantial decisional authority and well respected secondary sources for the proposition that, in all good conscience, fairness, and logic, a duty of care is owed to a fetus even if it has not yet attained the ability to live outside the womb."[93] In support of this jurisprudential shift, the Court argued that six jurisdictions now permitted wrongful death actions even where the death of the fetus occurred before the fetus was viable.[94]

Perhaps most importantly, the Court noted that at the time *Lollar* and *Gentry* were decided, Alabama's homicide statutes applied only to persons "who had been born and [were] alive at the time of the homicidal act."[95] But in 2006, the Alabama state legislature passed the Brody Act, changing the definition of "person" within its homicide laws to "a human being, including an unborn child in utero at any stage of development, *regardless of viability*."[96] This amendment indicated "clear legislative intent to

protect even nonviable fetuses from homicidal acts," and since the wrongful death statute was meant "to prevent homicides," the wrongful death statute must apply to nonviable fetuses.[97] The Court further emphasized "the need for congruence between the criminal law and our civil wrongful-death statutes."[98] Finally, the court explained that the viability rule benefitted tortfeasors because one who causes the immediate death of a nonviable fetus escapes liability, while a tortfeasor whose injury does not result in fetal death—or results in death only after the fetus attains viability—may be liable.[99]

Fully emboldened by its own sweeping jurisprudence, in its 2012 decision in *Hamilton v. Scott*, the Court held that Alabama's wrongful death statute applied to the wrongful death of *any* fetus, even if the death occurred before viability.[100] In a concurrence by Judge Tom Parker that was later cited by Mississippi in its petition for certiorari to the U.S. Supreme Court in *Dobbs*[101], Parker argued:

> [T]his Court reaffirms that the lives of unborn children are protected by Alabama's wrongful-death statute, regardless of viability. . . . *Roe*'s statement that unborn children are not "persons" within the meaning of the Fourteenth Amendment is irrelevant to the question whether unborn children are "persons" under state law. . . .[T]the other parts of the superstructure of *Roe,* including the viability standard, are not controlling outside abortion law . . . . *Roe*'s viability rule was based on inaccurate history and was mostly unsupported by legal precedent. Medical advances since *Roe* have conclusively demonstrated that an unborn child is a unique human being at every stage of development.[102]

Before *Roe*, Alabama courts did not recognize prenatal injury in tort law. Contemporary with *Roe*, Alabama courts determined that Alabama's wrongful death statute applied to prenatal injuries to viable fetuses. Contemporary to *Casey*, Alabama courts moved away from viability. In the 2011 and 2012 run-up to *Dobbs*, Alabama's held that any fetus could suffer a wrongful death.

Throughout this lineage of cases, the entrenchment of fetal personhood in civil and criminal law in Alabama had not yet been used to target pregnant women themselves. But that changed in 2013, when the Alabama Supreme Court, in another opinion authored by Judge Parker, ruled in *Ex parte Ankrom* that from the moment of conception, a fetus is a "child" under the state's criminal chemical endangerment law,[103] thus allowing a pregnant woman to be convicted for child abuse when she tested positive for drugs prior to giving birth.[104] While drug use is legal in Alabama, drug use while pregnant is a felony.[105]

The decision was an affirmance of the Alabama Court of Criminal Appeals decision which referenced South Carolina's *Whitner v. State* case (*see supra* II(A)(1)(a)) and held that the term "child" in the state's chemical endangerment law included a viable fetus,[106] reasoning that the Alabama legislature had said its public policy was to protect life[107] and that the Alabama Supreme Court in *Eich* had held that "minor child" in the state's wrongful

death statute included a viable fetus.[108] The Alabama Supreme Court largely adopted the appellate court's reasoning, noting that the plain meaning of the word "child" is "broad enough to encompass all children, born and unborn"[109], and that "child" had been construed in other areas of Alabama law to include a viable fetus.[110] Notably, the Alabama Supreme Court found that "child" encompassed *all* fetuses: "we expressly reject the Court of Criminal Appeals' reasoning insofar as it limits the application of the chemical-endangerment statute to a *viable* unborn child."[111]

> In its view, the plain meaning of "child" contained no viability distinction, and cases that incorporated viability in their definitions had been overruled.[113]

The court further concluded that "outside the right to abortion created in *Roe* and upheld in *Planned Parenthood*, the viability distinction has no place in the laws of this State."[113] While not before the Court to decide, the judicial impulse to entrench fetal personhood principles triumphed.

A year later, the Court underscored *Ankrom*'s holding in a new decision, holding that "the use of the word 'child' in the chemical-endangerment statute includes all children, born and unborn."[114] Repeating *Ankrom's* reasoning,[115] Judge Parker noted that the Court has "affirmed Alabama's policy of protecting life at every stage of development in our recent decisions . . . and in our decision today. . . . This Court again held that there is no valid basis for the viability standard."[116] Chief Justice Moore went a step further in his concurrence:

> States have an obligation to provide to unborn children at any stage of their development the same legal protection from injury and death they provide to persons already born. Because a human life with a full genetic endowment comes into existence at the moment of conception, the self-evident truth that "all men are created equal and are endowed by their Creator with certain unalienable rights" encompasses the moment of conception. *Legal recognition of the unborn as members of the human family derives ultimately from the laws of nature and of nature's God.*[117]

Read together, these cases clearly paved the way for the February 2024 decision in *LePage vs. Center for Reproductive Medicine, P.C.*, which ruled that frozen embryos are children and thus can be the subject of wrongful death suits,[118] a holding that instantaneously endangered the use of IVF in Alabama as commonly practiced.[119] Relying heavily on the *Mack* and *Hamilton* rulings,[120] the court also referenced *Ankrom*'s assertion that a child is "an 'unborn or recently born person."[121] Judge Parker's *LePage* concurrence quoted his own *Hicks* concurrence: "This case presents an opportunity for this Court to continue a line of decisions affirming Alabama's recognition of the sanctity of life from the earliest stages of development."[122]

Perhaps more than any other state, Alabama demonstrates how viability is a means to a fetal personhood end; that is, where pregnancy is concerned, viability stretches both backwards and forwards and once a state recognizes a fetus—viable or nonviable—as a person, the ability to criminalize pregnancies and pregnancy outcomes becomes unlimited and immediate upon fertilization.

c) *Oklahoma*

Oklahoma's path towards criminalizing substance use during pregnancy is more direct than Alabama's and just as alarming.

Like Alabama, Oklahoma abandoned the "born alive" rule much later than other states. In 1976, the Oklahoma Supreme Court in *Evans v. Olson* overruled two prior cases and recognized "the right of a viable unborn child to a cause of action for injury and wrongful death."[123] Like other jurisdictions that disavowed the "born alive" rule, the court cited advances in scientific knowledge, as well as the "great weight of the law in this country" recognizing viable fetuses.[124]

By 1994, Oklahoma had abandoned the "born alive rule" in criminal cases. In *Hughes v. State*, the Oklahoma Court of Criminal Appeals overruled nearly forty years of "born alive" rule precedent establishing that "[a] child cannot be the subject of homicide until its complete expulsion from the body of the mother, and must be alive and have independent existence."[125] Noting that under the "born alive" rule, a stillborn fetus could not be the victim of a homicide,[126] the Court held instead that "whether or not it is ultimately born alive, an unborn fetus that was viable at the time of injury is a 'human being' which may be the subject of a homicide."[127] The court reasoned that medical advances abolished the need for the born alive rule and then explained that "the citizens of Oklahoma would be best served by a definition of 'human being' in the context of [the state's homicide laws] which does not rely upon an obsolete, antiquated common law."[128] To the *Hughes* court, the purpose of the state's homicide laws "is, ultimately, to protect human life," and a "viable human fetus is nothing less than human life," and so "the term 'human being' in [the state's homicide laws]—according to its plain and ordinary meaning—includes a viable fetus."[129] The court also explained that it wished to be consistent with *Evans*[130] and that "in light of the civil liability which can be imposed under Oklahoma law for the wrongful death of a viable human fetus, it would be most unjust to refuse to extend protection to a viable human fetus under Oklahoma's general homicide statute."[131] As in South Carolina and Alabama, fetal personhood seeped into criminal law in the name of "consistency" and "protecting human life."

Twelve years after *Hughes*, in 2006, the Oklahoma Legislature amended the definition of "human being" in its homicide statutes to explicitly include an "unborn child," defined as "the unborn offspring of human beings from the moment of conception."[132] By 2020, the Oklahoma Court of Criminal Appeals relied on that amendment and *Hughes* to hold in *State v. Green* that Oklahoma's criminal child neglect law could be used to prosecute a woman who used drugs while 33 weeks pregnant.[133] The criminal child neglect law

enumerated the class of persons protected as any "child under eighteen (18) years of age."[134] The *Green* court first reviewed Oklahoma statutes for use and definition of "person," "child," and "human being," but found that "these terms have no general or universal meaning within our statutes."[135]

The court then turned to *Hughes*, noting that its decision had been based on the purpose of the homicide statute, which "is, ultimately, to protect human life," and "[a] viable human fetus is nothing less than human life."[136] The *Green* court explained:

> Using similar reasoning, we find the purpose of [the child neglect statute] is ultimately to protect from abuse, neglect, or exploitation the most vulnerable among us: children. A child several weeks away from birth, as was the fetus in this case, is every bit as vulnerable to and in need of protection from neglect and its potential harm as a child one minute after birth. To interpret [the child neglect statute] to deny that protection to the unborn child in this case is to thwart the clear trajectory that Oklahoma law has been on for at least the past quarter century, which is to protect children, born and unborn, from potential harm because they cannot protect themselves. Just as the term human being, 'according to its plain and ordinary meaning—includes a viable human fetus[,]' so too does the term "child" in the very statute intended to protect children from neglect.[137]

The *Green* court rejected the defendant's contention that the criminal child neglect law should not apply to the pregnant person, and ultimately held that "just as a viable fetus may be the victim of a homicide or an assault with a dangerous weapon, so too may he or she be a victim of child neglect under the facts presented," no matter who the perpetrator is.[138] Notably, the court did not "opine whether an unborn human offspring is a child for purposes of the entirety of" the state's criminal code.[139]

In 2021's *State v. Allen*, the Oklahoma Court of Criminal Appeals relied on *Green* to justify the prosecution of a mother for child neglect when the mother and baby tested positive for methamphetamine upon the baby's birth and the mother "had ingested methamphetamine as recently as a few days before giving birth."[140] The court's opinion provided little of its reasoning, noting simply that "[t]he present case is controlled by *Green*," which the court characterized as holding that "a viable fetus may be the victim of . . . child neglect."[141] Although the *Allen* court confined their ruling to "a viable fetus," a concurring judge seemed to imply that any fetus could be a victim of child neglect, whether viable or not, noting that "all persons should take notice that a child in the womb will be protected under Oklahoma law."[142]

Oklahoma courts' slippery and interchangeable use of "unborn child" and "viable fetus" muddy the waters of criminal child neglect in Oklahoma. Regardless, Oklahoma sees a viable fetus as a person and prosecutes pregnant people in the name of fetal personhood accordingly.

2. *Fetal Homicide and Feticide Laws*

In the years following *Roe*, anti-abortion groups often advocated for the passage of laws making it a crime to cause the loss of someone else's pregnancy by exploiting a tragic case where a person experienced pregnancy loss because of another's actions. "Fetal homicide" or "feticide" laws are now in effect in 38 states, with the vast majority applying to any stage of pregnancy. These laws paved the way for criminalizing any pregnant person experiencing pregnancy loss.[143] Nevada[144] and Washington[145] define the killing of an "unborn quick child" as manslaughter, although neither statute defines "quick child." Of the laws that apply only upon viability, some confer personhood upon a viable fetus and explicitly assert that a pregnant person cannot be criminally prosecuted for fetal homicide or feticide of their own pregnancy, while others fail to make this vital distinction. The variable and undefined legal gap has led to confusion and harsh pregnancy criminalization charges, up to and including murder, a fact underscored by varying applications as seen in a cross-section of states.[146]

Maryland, for example, allows the prosecution for murder or manslaughter of a viable fetus,[147] defined as "that stage when, in the best clinical judgment of the qualified provider based on the particular facts of the case before the qualified provider, there is a reasonable likelihood of the fetus's sustained survival outside the womb."[148] The statute does not apply to "an act or failure to act of a pregnant woman with regard to her own fetus," and should not be "construed to confer personhood or any rights on the fetus."[149] The law has not been used frequently, but it recently came into the spotlight when the Maryland Court of Appeals ruled that a woman could be charged for second-degree murder for the death of her newborn child, despite the fact that the homicide statute explicitly states it should not be applied to a pregnant person's actions with regards to their own fetus.[150]

Michigan's manslaughter law, by contrast, states that "[t]he willful [sic] killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter."[151] Until February 13, 2024, Michigan also criminalized as manslaughter "[a]ny person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother" (that section was repealed during the 2023 Legislative Session).[152] Michigan's penal code does not define "quick child,"[153] but in 1973, the Michigan Supreme Court interpreted the law to apply only to viable fetuses in *Larkin v. Cahalan*.[154] The court in *Larkin* relied on *Roe*'s holding that "the state has a compelling interest in the protection of human life from and after the point of viability," reasoning that "[o]ur duty is to read the Michigan act to be consistent with the Federal Constitution," and so "child" must mean "a viable child in the womb of its mother."[155]

Michigan also criminalizes intentional, grossly negligent, or careless or reckless conduct result[ing] in a miscarriage or

stillbirth"; "death to the embryo or fetus"; or "great bodily harm or serious or aggravated injury to the embryo or fetus"—seemingly without regard to viability.[156] That statute does not apply to "[a]n act committed by the pregnant individual."[157]

Massachusetts, for its part, does not have a fetal homicide law,[158] but in 1984, the Massachusetts Supreme Court held in *Commonwealth v. Cass* that the stillbirth of an eight-month-old fetus, whose mother had been injured by a motorist, constituted vehicular homicide. The majority held that a viable fetus constitutes a "person" under the vehicular homicide law:

> [I]nfliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide. If a person were to commit violence against a pregnant woman and destroy the fetus within her, we would not want the death of the fetus to go unpunished. We believe that our criminal law should extend its protection to viable fetuses.[159]

The court had no view as to "whether it is homicide to cause the death of a nonviable fetus."[160] A decade later, in 2000, the Court reiterated that a defendant could be prosecuted for involuntary manslaughter for causing the death of a viable fetus[161] but notably stated that it preferred to define "viability" as close to the United States Supreme Court's definition, *i.e.* "when . . . there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."[162] Thus, in a case involving involuntary manslaughter, the Massachusetts Supreme Court looked to abortion law for its definition of "viability."[163]

In Kentucky, the state Supreme Court held in 2004's *Commonwealth v. Morris*[164] that a "human being" includes a viable fetus in the state's homicide statutes.[165] After a car accident killed a pregnant woman and her fetus, "[a] post-mortem examination revealed that the child was a viable fetus who would have been born a healthy baby had she not sustained a fatal brain injury in the collision."[166] The court determined that it was time to discard the "born alive" rule "in favor of recognizing that a viable fetus can be the victim of a homicide," in part because viability was recognized in *Roe* "as the 'compelling' point at which 'the fetus then presumably has the capability of meaningful life outside the mother's womb,' and the earliest time at which a state may proscribe consensual abortions.'"[167] Nine days after the oral argument in *Morris*, the Kentucky Legislature created the new offense of "fetal homicide," defining an "unborn child" as "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."[168] The *Morris* court concluded:

> Since the human being that is the subject of this appeal was a viable fetus, it is unnecessary to address in this opinion whether killing a nonviable fetus would violate [the manslaughter in the second-degree statute].[169] Presumably, future homicides of nonviable fetuses will be prosecuted under [the fetal homicide statute].[170]

Kentucky's statute is one that exempts "any acts of a pregnant woman that caused the death of her unborn child," but *Morris* and the subsequent fetal homicide statute demonstrate how granting personhood upon viability may lead to personhood upon conception.

B. The Viability Line and Criminalized Pregnancy Outcomes Cases

When the viability line is enshrined in state legislation, court decisions, or constitutional amendments in any form, the criminalization of pregnancy outcomes often follows. The legal landscape is littered with examples of how the viability line has been used to criminalize an array of pregnancy outcomes, from miscarriage, stillbirth, to suspected abortions. Examples of pregnant women being criminalized for their pregnancy losses based on their fetus having reached viability are not rare.

Most are cases of first impression for courts or involve a prosecutor applying new interpretations of old laws.

In Utah in 2004, a 28-year-old white woman and mother of two children was charged with criminal homicide after she gave birth to twins, one of whom was stillborn.[171] Court documents alleged she caused the stillbirth by refusing to have cesarean surgery.[172] As the Salt Lake County district attorney's office explained: "[t]he decision came down to whether the dead child—a viable, if unborn, being as defined by Utah law—died as a result of another person's action or failure to take action. That judgment . . . is required by Utah's feticide law, which was amended in 2002 to protect the fetus from the moment of conception."[173] The office argued that *Roe* allowed states to ban abortion after viability, and so states could also make it a crime to indirectly cause the death of a fetus after viability.[174] The woman eventually pleaded guilty to two lesser counts of child endangerment and was put on probation.[175]

In 2010, a 22-year-old white woman in Iowa who was also the mother of two children fell down a staircase while pregnant.[176] Worried about the wellbeing of her fetus, she immediately sought medical assistance, and professionals confirmed she and her fetus were unharmed. However, during her conversation with hospital staff, she mentioned considering an abortion earlier in her pregnancy. The staff reported her to the police out of "fear" that the fall was not an accident but an intentional attempt to end the pregnancy, leading to her arrest on attempted feticide charges under Iowa's feticide law.[177] Viability played a pivotal role in the subsequent dismissal of the charges as an attempted feticide charge is only applicable in the third trimester, and her pregnancy was in its second; had the fetus been considered viable, she likely would have faced the felony attempted feticide charge.[178]

In Indiana in 2011, a 34-year-old Chinese woman who attempted suicide while 33 weeks pregnant was charged with murder pursuant to an Indiana statute that defined murder as "knowingly or intentionally kill[ing] a fetus that has attained viability."[179] The State's charging

information indicated that she "did knowingly kill a fetus that had attained viability, namely: voluntarily ingested rat poison when approximately thirty-three (33) weeks pregnant causing [her fetus] to be born in distress and subsequently die[.]"[180] In 2013, the woman pled guilty to a misdemeanor charge of criminal recklessness and was released from jail.[181] That same year, also in Indiana, a 33-year-old South Asian woman was convicted of feticide after she ingested mifepristone and misoprostol and gave birth to "a live baby of approximately twenty-five to thirty weeks gestation who died shortly after birth."[182] The State asserted that the woman should be convicted of feticide because her fetus "was on or past the age of viability," and so she "knowingly or intentionally terminate[d] a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus."[183] An Indiana appeals court vacated the woman's conviction, holding that "the legislature did not intend for the feticide statute . . . to be used to prosecute women for their own abortions."[184] For both women, the Court's finding was too late to prevent the years of court dates, jail time, and trauma they both endured.

In one of the more tragic and well-known stories involving pregnancy loss criminalization, a 34-year-old Black woman in Ohio was told by her physician in December 2023 to go to the hospital because she was miscarrying her non-viable fetus. The hospital had concerns about whether they could treat the woman under Ohio's abortion restriction laws, and so she waited at the hospital for care for over 19 hours over the course of two days while the hospital's ethics community debated the question.[185] She eventually returned home in pain and frustration and miscarried in her bathroom. Upon returning to the hospital for treatment for the miscarriage she had just endured in her home, a nurse reported her to police, who went into her home and searched for her fetus.[186] Prosecutors subsequently charged the woman with the felony of "abuse of a corpse," defined in Ohio law as "treat[ing] a human corpse in a way that the person knows would outrage reasonable family" or "community sensibilities."[187]

While the Ohio criminal code does not define "human corpse," it defines "person" as including "[a]n unborn human who is viable." "Viable," in turn, is defined as "the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support."[188] The woman was told by multiple healthcare providers that her fetus was non-viable,[189] but Ohio's criminal code establishes a fetus as viable and thus a person at some generalized "stage of development."

> Ohio's definition of viability implies that where a "realistic possibility" exists that other fetuses at the same stage of development could survive outside the womb, any non-viable fetus could be a person too—and thus a "human corpse."

Relevantly, a month before the woman's arrest, Ohio approved a ballot initiative,

Issue I, which created a constitutional right to abortion until viability.[190]

The trial judge in the woman's case referred to Issue 1 during a hearing: "There are better scholars than I am to determine the exact legal status of this fetus, corpse, body, birthing tissue, whatever it is. Matter of fact, I'm assuming that's what . . . Issue 1's all about[;] at what point something becomes viable."[191] A grand jury eventually declined to indict her,[192] but her charge suggests that the murky idea of viability plays a significant role in how prosecutors conceive of charging unfortunate pregnancy outcomes.

Ohio laws now contain at least three definitions for viability: the criminal code defines viability as "the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support;"[193] the abortion ban defines viability as "the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support;"[194] and the constitution defines viability as "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."[195] Confusion around the intersection of criminal laws with viability is likely to continue in Ohio, despite voter-supported initiatives to the contrary.

C. The Viability Line and the Denial of Autonomy Over Healthcare Decision-Making

Another dangerous implication of the use of the viability line as a legal barometer is that in many situations, a pregnant person whose fetus reaches viability loses autonomy over their own healthcare decisions.

1. Forced Cesarean Surgeries and Other Medical Procedures

A bedrock principle of constitutional law is that a competent person has the right to refuse unwanted medical treatment.[196] Over the past decades, however, several courts have ordered pregnant women to submit to cesarean surgeries and other medical procedures against their wishes or have endorsed hospitals that have done so. In many of these cases, courts invoke the viability of the fetus and the state's interest in protecting fetal life. Documented cases of forced intervention are rare, and while of little comfort to those who survived the criminalization cases detailed in this section, higher courts ultimately came to just decisions.[197]

In 1999, the U.S. District Court of Northern Florida held that an order compelling a pregnant woman to submit to a cesarean surgery did not violate her substantive constitutional rights.[198] While in labor at home, a sheriff entered her house and forced her to go to the hospital to give birth against her will.[199] The District Court acknowledged that the woman had a

general right to refuse unwanted medical treatment, but relied on *Roe* to determine that the rights of the fetus overrode the woman's:

> Whatever the scope of [the pregnant woman]'s personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child. This is confirmed by *Roe v. Wade*, 410 U.S. 113 (1973). There the Court recognized the state's increasing interest in preserving a fetus *as it progresses toward viability*. The Court concluded that by the point of viability—roughly the third trimester of pregnancy—the state's interest in preserving the life of the fetus outweighs the mother's own constitutional interest in determining whether she will bear a child. The balance tips far more strongly in favor of the state in the case at bar, because here the full-term baby's birth was imminent, and more importantly, here the mother sought only to avoid a particular procedure for giving birth, not to avoid giving birth altogether.[200]

The State's interest in preserving fetal life supplants a pregnant person's constitutional decision-making authority so long as a pregnancy "progresses towards" viability.

Similarly, in a 2004 case from Pennsylvania, a hospital sought a court order to force a pregnant woman to undergo cesarean surgery against her wishes. Counsel for the hospital cited *Roe* for the proposition that "Baby Doe, a full term viable fetus, has certain rights, including the right to have decisions made for it, independent of its parents, regarding its health and survival."[201] A Pennsylvania court granted the order, awarding the hospital custody of the fetus before, during, and after delivery and giving the hospital the right to force the woman to undergo cesarean surgery without her consent.[202] In the court's view, because the fetus was viable, what the hospital thought was best for the fetus overrode what the pregnant woman thought was best for herself. As with the Florida case, the woman's constitutional right to refuse medical treatment was overlooked. More recently, in an ongoing 2019 New York case, a hospital forced a woman to have cesarean surgery over her express religious objections. A New York trial court determined that the forced cesarean surgery did not constitute sex or gender discrimination because "the rights of a viable fetus [were] at stake."[203] The court cited *Roe*: "the State recognizes an interest in the protection of viable fetal life after the first 24 weeks of the pregnancy," and "this interest in the well-being of a viable fetus is sufficient to override a mother's objection to medical treatment."[204] Other courts have come to the same conclusion, sanctioning or ordering forced cesarean surgeries in the name of protecting a "viable fetus."[205]

Still other courts have sanctioned other forced medical procedures.[206] An Illinois trial court ordered a pregnant woman to submit to blood transfusions she refused on religious grounds, endowing a

"temporary custodian" with the right "to consent" to the "invasive medical procedure," which was performed by doctors who "'yelled at and forcibly restrained, overpowered and sedated' her."[207] Although the appellate court overturned the decision and held there was no basis for appointing a guardian ad litem for the fetus, the appellate court noted that the issue was "whether a competent, pregnant woman's right to refuse medical treatment, which, in this case involves religiously offensive blood transfusions, may be overridden by the State's substantial interest in the welfare of the viable fetus."[208] The State argued that the court should balance "the State's interests in the viable fetus as against the mother's expressed desire to forego a blood transfusion."[209] The court conceded that *Roe* made it clear that "[i]n the abortion context, the state's important and legitimate interest becomes compelling at viability,"[210] but that "[t]his is not an abortion case."[211] The court determined that "we cannot impose a legal obligation upon a pregnant woman to consent to an invasive medical procedure for the benefit of her viable fetus," citing *Casey* for the proposition that a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role."[212]

2. Advanced Directive / Living Will Laws with Pregnancy Exclusions

Pregnancy exclusions are provisions in living will (or advance directive) laws that invalidate an individual's advance directive if they are pregnant; the rationale being that a woman loses the right to decide her end-of-life treatment if pregnant because her fetus matters more than her own decisions about her life. More than 30 states have advance directive laws with pregnancy exclusions. Nine states invalidate a pregnant person's end-of-life directive regardless of whether a fetus can survive: Alabama, Indiana, Kansas, Michigan, Missouri, South Carolina, Texas, Utah, and Wisconsin. In these states, an individual who is, for example, only a month pregnant and whose fetus has no chance of survival could nevertheless be kept artificially alive for the duration of their pregnancy in contravention of their express wishes.[213]

The viability line plays a vital role in these pregnancy exclusions; hospitals are generally more willing to ignore a pregnant person's advance directive the closer their fetus is to reaching viability. In Georgia, for example, a pregnant person's advance directive may only be followed if the fetus is not viable. Georgia's statutory provision does not specify if "viable" refers to a stage of gestational development or to the chances of survival of a particular fetus if the pregnancy is continued to term, leaving room for misinterpretation and individual discretion.[214] Louisiana, by contrast, states that advance directives *must* be interpreted to "preserve human life, including the life of an unborn child if . . . the probable [] age of the unborn child is twenty or more weeks."[215]

Such laws led to national outrage in 2014 when a Texas hospital refused to disconnect a woman from her ventilator because she was 14 weeks pregnant, even though she was brain dead and she had made it clear that she did not want to be kept alive by machines; the Texas Advance Directives Act states that "a doctor may not withdraw or withhold life-sustaining

treatment from a pregnant patient." An agonizing two-month legal battle ensued: in briefing, the hospital argued that *Roe* provides that the state has a compelling interest in prenatal life, and thus that the hospital could override the pregnant woman's wishes.[216] A judge eventually ruled against the hospital and ordered the woman's doctors to remove her ventilator, but the patient and her family had already endured unimaginable pain through bearing (and witnessing) the traumatic violation of her bodily autonomy.[217]

A particularly salient and gruesome example of how viability line enforcement interferes with pregnant women's constitutional right to make end-of-life decision-making can be found in a 1987 D.C. case, *In re A.C.*.[218] A 27-year-old, critically ill, 26 weeks pregnant woman, alongside her doctors and family, decided to preserve her life as long as possible with the hope that she could deliver her fetus once it had reached 28 weeks. Unable to stop her decline, the hospital sought a declaratory order from a District of Columbia trial court "as to what it should do in terms of the fetus."[219] After a hasty hearing, the trial court determined that while the surgery would most likely be highly beneficial to the fetus and dangerous for the mother, the mother should be kept alive because "the fetus was viable, *i.e.*, capable of sustained life outside of the mother, given artificial aid," although given the mother's medical history, "it had only a fifty to sixty percent chance of survival."[220] Citing *Roe*, the court determined that the State "had an interest in protecting the potential life of the fetus," and ordered the performance of cesarean surgery against the pregnant woman's wishes.[221] The trial court relied on an earlier D.C. trial court decision, *In re Maydun*, in which the court held that forcing a pregnant person to have a cesarean surgery did not violate her constitutional rights because the state's compelling interest in the viable fetus' life overrode her general right to deny medical treatment.[222] The hospital performed the cesarean surgery shortly after the trial court's order. The fetus was born alive, but as suspected, was not viable and died two hours later. As for the woman, she died two days later, with the surgery listed as a contributing factor to her death.[223]

A panel of the District of Columbia Court of Appeals upheld the trial court's order, offering "condolences" to the family and noting that very few courts had addressed the issue.[224] The Court of appeals noted that "when a fetus becomes viable . . . the state has a compelling interest in protecting the 'potentiality of human life,' as well as the life and health of the mother . . . With a viable fetus, a balancing of interests must replace the single interest of the mother . . ."[225]

> In a terrifying example of how easily women's rights are subordinated by courts, the panel noted that the woman's "significant interest in her bodily integrity" and the risk of death were not "dispositive," considering the fetus' "chance of surviving delivery."[228]

When the District of Columbia Court of Appeals later reheard the case with the

benefit of full briefing and expert input, it noted that the real issue was "who has the right to decide the course of medical treatment for a patient who, although near death, is pregnant with a viable fetus."[227] The court ultimately held:

> [I]n virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus. If the patient is incompetent or otherwise unable to give an informed consent to a proposed course of medical treatment, then her decision must be ascertained through the procedure known as substituted judgment.[228]

The court held that the forced cesarean surgery violated the pregnant woman's right to "accept or forego medical treatment," noting a body of authority denying the government power to compel "one person to permit a significant intrusion upon his or her bodily integrity" even for the benefit of another person's health.[229] The court noted that "the state's interest in preserving life must be truly compelling to justify overriding a competent person's right to refuse medical treatment,"[230] and determined that the state's interest in the woman's fetus's potential survival was not compelling enough to override her wishes.[231] To the contrary, "in virtually all cases the decision of the patient, albeit discerned through the mechanism of substituted judgment, will control. We do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional. This is not such a case."[232] While the court considered the viability of the fetus in its judgment, it also noted that "it is proper for the court, in a case such as this, to weigh (along with all the other factors) the mother's prognosis, the viability of the fetus, the probable result of treatment or non-treatment for both mother and fetus, and the mother's likely interest in avoiding impairment for her child together with her own instincts for survival."[233]

III. Conclusion

While this paper is not an exhaustive list of all the ways the viability line can and has been construed to criminalize and police people who are pregnancy-able, it provides an important starting point and diagnostic tool from which to grapple with the far-ranging implications—across all types of pregnancy outcomes—of enshrining the viability line in abortion rights legislation and beyond.

For much of our country's history, the viability line had no legal or policy significance; following the "born alive rule," a fetus had no legal rights until birth. As science and medicine advanced, and as more jurisdictions began to recognize a concept of fetal "viability," the fetus was transformed into a potential victim of a tort or a crime independent of the pregnant woman who carried it. This viability line was then introduced into abortion jurisprudence by *Roe v. Wade*, and, in the decades that have followed, has become an essential weapon of social control and harm against women, literally forming the basis of justification for incarceration, government interference,

and the disregard of fundamental constitutional rights around end-of-life decision making and medical care.

The throughline between these invasions of bodily autonomy is fetal personhood: viability approaches create a perfect framework to justify depriving pregnant women of their rights by arguing that once a fetus has reached viability, it transmogrifies into a person whose existence and legal rights take precedence over the woman carrying it.

> These violative decisions that center fetal personhood are, clearly, not made by the fetus, but by a wide array of actors: judges, prosecutors, health care workers and any range of individual more interested in controlling the bodies of women and pregnancy-able people and their jurisdiction over themselves than creating true standards for ensuring and advancing fetal and maternal health.

Our hope is that this report will provide important context and history to give a foundation to resist these dangerous and damaging efforts at controlling the lives and bodies of women, both in law and in life.

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IV. Appendix of Post-*Dobbs* State Abortion Rights Ballot Initiatives Incorporating the Viability Line

STATE	STATUS	LANGUAGE
ARIZONA **Abortion Access Act**	Passed in the November 2024 election	Prohibits state interference in abortion access before "fetal viability," defined as "the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures."[234]
FLORIDA **Amendment to Limit Government Interference with Abortion**	Failed in the November 2024 election	Would have prohibited state interference in abortion access before fetal viability; "viability" is not defined in the text of the constitutional amendment.[235]
MICHIGAN **Ballot Proposal 3, Reproductive Freedom For All**	Passed in the November 2022 election	Established constitutional right to "reproductive freedom." Allowed "state to regulate abortion after fetal viability," defined as "the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without

		the application of extraordinary medical measures."[236]
MISSOURI **Right to Reproductive Freedom Amendment**	Passed in the November 2024 election	Guarantees a right to "reproductive freedom" under the Missouri Constitution, including abortion only up to fetal viability, defined as "the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures."[237]
MONTANA **Right to Abortion Initiative**	Passed in the November 2024 election	Prohibits the government from denying or burdening the right to abortion before fetal viability. Fetal viability is defined as "the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures."[238]
NEBRASKA **Reproductive Rights Amendment**	Failed in the November 2024 election	Would have guaranteed a fundamental right to abortion until fetal viability, defined as "the point in pregnancy when, in the professional judgment of the patient's treating health care practitioner, there is a significant

		likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures."[239]
NEVADA **Reproductive Rights Amendment**	Passed in the November 2024 election	Guarantees a fundamental right to abortion until fetal viability, defined as "the point in pregnancy when, in the professional judgment of the patient's treating health care practitioner, there is a significant likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures."
OHIO **Issue 1**	Passed in the November 2023 election	Established a right to abortion up to fetal viability, defined as "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."[240]
SOUTH DAKOTA **Right to Abortion Amendment**	Failed in the November 2024 election	Would have established a trimester framework for regulating abortion, essentially codifying *Roe v. Wade:* During the first trimester, South Dakota could not regulate a pregnant person's decision to have an abortion; during the second trimester the state could only regulate abortion "in ways that are

		reasonably related to the physical health of the pregnant woman"; and during the third trimester, the state could regulate or prohibit abortion, except "when abortion is necessary, in the medical judgment of the woman's physician, to preserve the life and health of the pregnant woman."[241] Although the language of the ballot initiative did not explicitly reference viability, the third trimester is generally understood to start around the 28th week of pregnancy,[242] coinciding with the outer limit of viability.
VIRGINIA **Constitutional Amendment for Reproductive Freedom**	Could be on the ballot in November 2026	Would allow the government to "regulate the provision of abortion care in the third trimester, provided that in no circumstance" shall the state "prohibit an abortion (i) that in the professional judgment of a physician is medically indicated to protect the life or physical or mental health of the pregnant individual or (ii) when in the professional judgment of a physician the fetus is not viable.[243]

Endnotes

[1] The idea that an embryo or a fetus has legal rights equal to those of a pregnant woman or pregnancy-able person is the very definition of fetal personhood. *See* Pregnancy Justice, *Fetal Personhood Legal Landscape*, https://www.pregnancyjusticeus.org/legal-landscape/ (last checked Mar. 16, 2025).

[2] *See* American College of Obstetricians and Gynecologists, *Facts Are Important: Understanding and Navigating Viability*, https://www.acog.org/advocacy/facts-are-important/understanding-and-navigating-viability (last checked Mar. 16, 2025).

[3] The "born alive rule" should not be confused with "born alive laws." Born alive laws are statutory creations used to extend criminal laws, such as homicide or assault, to "defend" fetal rights or ensure medical care to a fetus in utero or once an infant has been delivered. Put simply, they constitute one of many efforts to reconstitute abortion care into criminal conduct.

[4] Elizabeth Romanis, *Is 'Viability' Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, J.L. and Biosciences 1, 7 (2020).

[5] *Commonwealth v. Bangs*, 9 Mass. 387 (1812).

[6] Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VALPARAISO U. L. REV. 563, 575 (1987).

[7] For a comprehensive review of the common law "born alive" rule, *see* Gerard Casey, BORN ALIVE: THE LEGAL STATUS OF THE UNBORN CHILD IN ENGLAND AND THE U.S.A. (2005) and Sheryl Anne Symonds, *Wrongful Death of the Fetus: Viability Is Not a Viable Distinction*, 8 SEATTLE U. L. REV. 103 (1984).

[8] *See Preconception Injuries: Viable Extension of Prenatal Injury or Inconceivable Tort?*, 12 VALPARAISO U. L. REV. 143, 143 (1997) ("Viewed as part of his mother, the unborn child was denied legal recognition and, a fortiori was neither owed a duty of care nor capable of stating a cause of action for injuries sustained prior to live birth.").

[9] *See, e.g.*, *Allaire v. St. Luke's Hosp.,* 56 N.E. 638, 641–42 (Ill. 1900) (Boggs, J. dissenting) (arguing a fetus should be considered a legal entity when it reaches viability, not when it is born), *overruled by Amann v. Faidy*, 114 N.E.2d 412 (Ill. 1953); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, Book 1, 118 (Philadelphia: J.B. Lippincott Co., 1893) ("An infant *in ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.") (citations omitted).

[10] *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (Mass. 1884), *abrogation recognized by Angelini v. OMD Corp.*, 575 N.E.2d 41 (Mass. 1991).

[11] *Id.* at 15.

[12] *Id.* at 16.

[13] *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

[14] *Id.* at 140.

[15] *Id.* at 140 n.8.

[16] *Id.* at 141.

[17] *Id.* at 140.

[18] *See, e.g.*, *Child's Right of Action for Prenatal Injuries*, 25 IND. L.J. 91, 93 (1949).

[19] *Montreal Tramways v. Leveille*, 4 D.L.R. 337, 344 (S.C.C. 1933) ("The wrongful act which constitutes the crime may constitute also a tort, and if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort.").

[20] *Bonbrest*, 65 F. Supp. at 140.

[21] *Verkennes v. Corniea*, 38 N.W.2d 838, 840–41 (Minn. 1949) (citing *Bonbrest*, 65 F. Supp. at 140, 142).

[22] *Williams v. Marion Rapid Transit*, 87 N.E.2d 334, 340 (Ohio 1949).

[23] *Id.* at 338.

[24] *Id.* at 340.

[25] *Id.*

[26] *See, e.g.*, *Huskey v. Smith*, 265 So. 2d 596 (Ala. 1972); *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982); *Amann v. Faidy*, 114 N.E.2d 412, 417–18 (Ill. 1953); *Britt v. Sears*, 277 N.E.2d 20 (Ind. 1971); *Hale v. Manion*, 368 P.2d 1 (Kan. 1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633, (La. 1981) (rehearing opinion); *Keyes v. Constr. Serv., Inc.*, 165 N.E.2d 912 (Mass. 1960); *Damasiewicz v. Gorsuch*, 79 A.2d 550 (Md. 1951); *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971); *Steggall v. Morris*, 258 S.W.2d 577 (Mo. 1953); *Poliquin v. Macdonald*, 135 A.2d 249 (N.H. 1957); *Woods v. Lancet*, 102 N.E.2d 691 (N.Y. 1951); *Mallison v. Pomeroy*, 291 P.2d 225 (Or. 1955); *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966); *Hall v. Murphy*, 113 S.E.2d 790 (S.C. 1960); *Puhl v. Milwaukee Auto. Ins. Co.*, 99 N.W.2d 163 (Wis. 1959), *overruled on other grounds by Matter of Stromsted's Est.*, 299 N.W.2d 226 (Wis. 1980).

[27] *See, e.g.*, *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971) (allowing recovery by child for injuries sustained by it as a nonviable fetus); *Bennett v. Hymers*, 147 A.2d 108, 110 (N.H. 1958) (["A]n infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of injury."); *Kelly v. Gregory*, 282 A.D. 542 (N.Y. 1953) (allowing recovery for injury to a three-month-old fetus).

[28] Rachel Fleishman, *I'm a neonatologist. This is what happens when a baby is born 5 months early*, NBC News (May 7, 2022) https://www.nbcnews.com/think/opinion/roe-opponents-babies-born-limits-viability-rcna27557 (last checked Mar. 16, 2025).

[29] *Id.* ACOG emphasizes that medically, the word "viable" itself has two potential meanings: "In the first, 'viability' addresses whether a pregnancy is expected to continue developing normally. In early pregnancy, a normally developing pregnancy would be deemed viable, whereas early pregnancy loss or miscarriage would not. In the second, 'viability' addresses whether a fetus might survive outside of the uterus. Later in pregnancy, a clinician may use the term 'viable' to indicate the chance for survival that a fetus has if delivered before it can

fully develop in the uterus." *Id.* Although this medical distinction has been exploited by anti-abortion advocates, *see* Ashley Moody, *Ashley Moody: Pro-abortion amendment ballot summary would "mislead voters"*, FLA. VOICE NEWS (Oct. 6, 2023, 12:53 PM), https://flvoicenews.com/ashley-moody-pro-abortion-amendment-ballot-summary-would-mislead-voters (Florida Attorney General arguing that a Florida ballot initiative enshrining abortion access in the state's constitution is "misleading" because "'viability' has two meanings when it comes to pregnancy"), in abortion laws and other laws governing people with reproductive capacity, "viability" universally refers to the point in pregnancy at which a fetus could survive outside the uterus.

[30] *Facts Are Important*, *supra* note 1.

[31] *Periviable Birth*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/clinical/clinical-guidance/obstetric-care-consensus/articles/2017/10/periviable-birth (last visited July 12, 2024) ("When a specific estimated probability for an outcome [of a viable fetus] is offered, it should be stated clearly that this is an estimate for a population and not a prediction of a certain outcome for a particular patient in a given institution.").

[32] *Methods for Estimating the Due Date*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/05/methods-for-estimating-the-due-date#:~:text=Clinical%20Considerations%20in%20the%20Second%20Trimester,-Using%20a%20single&text=Gestational%20age%20assessment%20by%20ultras (last visited July 12, 2024)
(noting that gestational age assessment between 14 weeks and 21 weeks has an accuracy of ± 7 to 10 days; gestational age assessment between 22 weeks and 27 weeks has an accuracy of ± 10 to 14 days; and "[g]estational age assessment . . . in the third trimester (28 0/7 weeks of gestation and beyond) is the least reliable method, with an accuracy of ± 21-30 days.").

[33] Matthew A. Rysavy, et al, *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801 (2015), https://pubmed.ncbi.nlm.nih.gov/25946279/.

[34] The year before the Supreme Court decided *Roe v. Wade*, the U.S. District Court for the District of Connecticut suggested that "the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable." *Abele v. Markle*, 351 F. Supp. 224, 232 (D. Conn. 1972), *vacated sub nom. Markle v. Abele ., 410 U.S. 951, 93 S. Ct. 1417, (1973)* ("vacated and case remanded . . . for further consideration in light of *Roe v. Wade*").

[35] *Roe v. Wade*, 410 U.S. 113, 155 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

[36] *Id.* at 163.

[37] *Id.* at 163–64.

[38] *Id.* at 160.

[39] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

[40] *Id.* at 870.

[41] *Id.* at 876–77.

[42] *Id.* at 879.

[43] *Id.* at 870.

[44] *Id.* at 860.

[45] *See, e.g.*, Michael F. Moses, *Casey and Its Impact on Abortion Regulation*, 31 FORDHAM URBAN L.J. 3 (2004), https://ir.lawnet.fordham.edu/ulj/vol31/iss3/7/.

[46] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

[47] *Id.* at 231.

[48] *Id.*

[49] *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies/ (current as of March 5, 2025).

[50] *See, e.g.* John Dinan, *The Constitutional Politics of Abortion Policy After* Dobbs*: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. 27 (2023), https://scholarworks.umt.edu/mlr/vol84/iss1/4/.

[51] MI. CONST. art. 1, § 28 (West, Westlaw through Nov. 2022 amendments); Prop. 22-3, 2022 Leg., 100th Sess. (Mich. 2022) (approved by voters at the Nov. 8, 2022 election).

[52] The concept of fetal personhood is a right-wing political idea whose incorporation into legal reality has long been a legislative and cultural priority for the Republican party. The concept has gained momentum and traction in the past year through various legal and political vehicles, from the 2024 GOP party platform, https://cdn.nucleusfiles.com/be/beb1a388-1d88-4389-a67d-c1e2d7f8bedf/2024-gop-platform-july-7-final.pdf?utm_medium=email&utm_source=ncl_amplify&utm_campaign=240708-2024_gop_platform_make_america_great_again&utm_content=ncl-4NsN8UE5x2&_nlid=4NsN8UE5x2&_nhids=g95bUYd (last visited Mar. 18, 2025) (stating the support of states in establishing fetal personhood through the 14th Amendment of the United States Constitution, which grants equal protection under the law to all American citizens); to the incorporation of Project 2025's plans into the foundational fabric of the Trump administration, https://static.project2025.org/2025_MandateForLeadership_FULL.pdf, 6 (last checked Mar. 18, 2025) (stating that "[c]onservatives in the states and in Washington, including in the next conservative Administration, should push as hard as possible to protect the unborn in every jurisdiction in America."); to the legislative efforts of self-titled "abortion abolitionists" whose focus is to extend legal rights and provide constitutional protections to blastocysts, embryos, and fetuses, Life at Conception Act of 2025, H.R. 722, 119 Cong. (2025).

[53] College of Charleston, Lowcountry Digital History Initiative, *Hidden Voices: Enslaved Women in the Lowcountry and U.S. South: Exploitation through Reproductive Labor*, https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/enslaved-women-and-slaveholder/reproductive-exploitation (last checked Feb. 14, 2025).

[54] The Brookings Institute, *The criminalization of abortion and surveillance of women in a post-Dobbs world*, https://www.brookings.edu/articles/the-criminalization-of-abortion-and-surveillance-of-women-in-a-post-dobbs-world/.

[55] Pregnancy Justice, "Wisconsin's Unborn Children Protection Act (Act 292)", https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/WI-act-292-12-12.pdf

[56] Pregnancy Justice, When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond 1 (2022), https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-personhood-with-appendix-UPDATED-1.pdf (quoting Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force Women to Forfeit Theirs,* Ms. Magazine (Apr. 15, 2021), https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant/).

[57] Lynn M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pols., Pol'y, & L. 299, 325 (Apr. 2013) (citing Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights?*, 10 Harv. Women's L.J. 9, 58 (1987)).

[58] Although Ohio Rev. Code Ann. § 2901.01 (West) stipulates that the definition of "person" as including a viable fetus should not apply to "an act or omission of the woman that occurs while she is or was pregnant," the inclusion of a viable fetus as a person in the criminal code has led to pregnancy criminalization for acts that occurred just after giving birth, see *infra* at n. 195.

[59] Pregnancy Justice, Unpacking Fetal Personhood: The Radical Tool That Undermines Reproductive Justice 8-11 (Sept. 2024), https://www.pregnancyjusticeus.org/resources/unpacking-fetal-personhood/.

[60] *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pols., Pol'y & L. 299, 322–26 (2013).

[61] Brief for National Advocates for Pregnant Women et al. as Amici Curiae Supporting Respondents 14–15, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), No. 19-1392, https://www.supremecourt.gov/DocketPDF/19/19-1392/193710/20210924170501991_19-1392%20Brief.pdf.

[62] Purvaja S. Kavattur et al., Pregnancy Just., The Rise of Pregnancy Criminalization: A Pregnancy Justice Report 4 (Sept. 2023), www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf.

[63] *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

[64] *Id.* (quoting *Hall v. Murphy,* 113 S.E.2d 790, 793 (S.C. 1960)).

[65] *Id.* at 780 (citing *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964)).

[66] *Id.* (quoting *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984) (citing *Fowler*, 138 S.E.2d 42)).

[67] *Id.*

[68] *Id.* at 783 (first citing *Roe*, 410 U.S. at 165; then citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833; and then citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989)).

[69] *Id.* at 786 (citing *Planned Parenthood of Southeastern Pennsylvania, 505 U.S. at 877*, 505 U.S. at 877)).

[70] S.C. Code Ann. §16-3-85, *amended by* 2000 Acts No. 261, § 1.

[71] *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003). The South Carolina Supreme Court later overturned McKnight's conviction because of ineffective assistance of counsel but did not overrule its decision that the homicide by child abuse statute applied to viable fetuses. *McKnight v. State,* 661 S.E.2d 354 (S.C. 2008).

[72] *Id.* at 175.

[73] *Huskey v. Smith*, 265 So. 2d 596 (Ala. 1972).

[74] *Id.* at 597 (citing *Clarke v. State*, 23 So. 671 (1897)).

[75] *Huskey*, 265 So. 2d at 597–98.

[76] *Id.* at 761.

[77] *Wolfe v. Isbell*, 280 So. 2d 758, 759 (Ala. 1973).

[78] *Id.*

[79] *Id.*

[80] *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974).

[81] *Id.* at 355; *id.* at 355 n.2 (citing *Huskey*, 265 So. 2d 596 and *Wolfe*, 280 So. 2d 758).

[82] *Id.* at 356.

[83] *Id.* at 357 (citing *Roe*, 410 U.S. at 162).

[84] *Id.* at 358.

[85] *Lollar v. Tankersley*, 613 So. 2d 1249 (Ala. 1993), *overruled by Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011)); *Gentry v. Gilmore*, 613 So. 2d 1241 (Ala. 1993), *overruled by Mack v. Carmack,*, 79 So. 3d 597.

[86] *Lollar*, 613 So. 2d at 1252.

[87] *Id.*

[88] *Id.* at 1252–53.

[89] *Gentry*, 613 So. 2d at 1244.

[90] *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011).

[91] *Id.* at 598.

[92] *Id.* at 600–07, 606.

[93] *Id.* at 606 (citing *Wolfe*, 280 So. 2d at 355).

[94] *Id.* at 609 (citations omitted).

[95] *Id.* at 610 (quoting Ala. Code § 13A-6-1(2) (as of 1993)).

[96] Ala. Code § 13A-6-1(A)(3) (amendment became effective July 1, 2006).

[97] *Mack*, 79 So. 3d at 610–11.

[98] *Id.* at 611.

[99] *Id.*

[100] *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012).

[101] Petition for Writ of Certiorari on Behalf of Petitioners, *Dobbs v. Jackson Women's Health. Org.*, 597 U.S. 215 (2022) (No. 19-1392), 2020 WL 3317135, at *4, 18 (quoting Hamilton v. Scott, 97 So.3d 728, 742 (Parker. J., concurring specially)).

[102] *Hamilton*, 97 So. 3d at 738–46 (Parker, J., concurring specially).

[103] Ala. Code §26-15-3.2 (West 2006, current through 2024 Legislative Session) ("A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following . . . Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia.").

[104] *Ex parte Ankrom*, 152 So. 3d 397, 411–12 (Ala. 2013).

[105] *Compare* Ala. Code § 13A-12-201–340 (criminalizing distribution and possession of controlled substance, but not use of controlled substances) *with Ex parte Ankrom*, 152 So. 3d 397 (Ala. 2013) (allowing the prosecution of a pregnant person for substance use under Ala. Code § 26-15-3.2 (2006)).

[106] *Ankrom v. State*, 152 So. 3d 373, 379 (Ala. Crim. App. 2011)) *aff'd sub nom. Ex parte Ankrom,* 152 So. 3d 397 (Ala. 2013).

[107] *Id.* at 379.

[108] *Id.* (citing *Eich*, 300 So. 2d 354).

[109] *Ex parte Ankrom*, 152 So.3d at 411.

[110] *Id.*at 413–14.

[111] *Id*. at 421.

[112] *Id.* at 419.

[113] *Id*. at 419.

[114] *Ex parte Hicks*, 153 So. 3d 53, 54 (Ala. 2014).

[115] *Id*. at 58–63.

[116] *Id.* at 73–75 (Parker, J., concurring specially).

[117] *Id.* at 71 (Moore, C.J., concurring specially) (emphasis added).

[118] *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024), reh'g denied (May 3, 2024), *cert. denied sub nom. Ctr. For Reprod. Med., P.C. v. Burdick-Aysenne*, 145 S. Ct. 280 (2024)).

[119] *See* Michelle J. Bayefsky et al., *The Real Impact of the Alabama Supreme Court Decision in LePage v. Center for Reproductive Medicine*, JAMA NETWORK (Mar. 4, 2024), https://jamanetwork.com/journals/jama/fullarticle/2816050 ("Patients with multiple embryos available for transfer freeze additional embryos for future use. . . . If these embryos are considered to be human children, however, the embryos will not be able to be destroyed or used in research or for any other purpose."). On March 7, 2024, Alabama Governor Kay Ivey

signed a bill into law that protects IVF clinics from civil or criminal embryos; "[h]owever, the bill does not negate the state supreme court's decision that extrauterine embryos are equivalent to children and many unresolved questions remain." *Id.*

[120] *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591, at *4 (Ala. Feb. 16, 2024), *reh'g denied* (May 3, 2024), *cert. denied sub nom. Ctr. For Reprod. Med., P.C. v. Burdick-Aysenne*, 145 S. Ct. 280 (2024) (citing *Mack*, 79 So. 3d at 611 and *Hamilton*, 97 So. 3d at 735).

[121] *Id.* (quoting *Ex parte Ankrom*, 152 So. 3d at 431 (Shaw., J, concurring in part and concurring in the result)).

[122] *LePage*, 2024 WL 656591 at *4 (Parker, J., concurring specially) (quoting *Hicks*, 153 So. 3d at 72 (Parker, J., concurring specially)).

[123] *Evans v. Olson*, 550 P.2d 924, 925 (Okla. 1976) (citing *Howell v. Rushing*, 261 P.2d 217 (Okla. 1953) and *Padillow v. Elrod*, 424 P.2d 16 (1967)).

[124] *Id.* at 927.

[125] *Hughes v. State*, 868 P.2d 730, 731 (Okla. Crim. App. 1994) (quoting *Elliot v. Mills*, 335 P.2d 1104, 1111 (Okla. Crim. App. 1959)). *Hughes* also overruled *State v. Harbert*, 758 P.2d 826 (Okla. Crim. App. 1988), in which the Oklahoma Court of Criminal Appeals held that a viable fetus was not a "person" within the meaning of a state assault and battery statute. *Hughes*, 868 P.2d at 734.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 733–34.

[129] *Id.* at 734.

[130] In the Oklahoma court system, the Oklahoma Supreme Court has final jurisdiction over civil appeals, and the Oklahoma Court of Criminal Appeals has final jurisdiction over criminal appeals.

[131] *Id.* (citing *Evans*, 550 P.2d at 927–28).

[132] Okla. Stat. Ann. tit. 21, § 691 (West) (amended 2006).

[133] *State v. Green*, 474 P.3d 886, 887 (Okla. 2020).

[134] Okla. Stat. Ann. tit. 21, § 843.5(C) (West) (as of 2020).

[135] *Green*, 474 P.3d at 890.

[136] *Id.* at 891 (quoting *Hughes*, 868 P.2d at 734)).

[137] *Id.* (quoting *Hughes*, 868 P.2d at 734).

[138] *Id.* at 891–893, 893.

[139] *Id.* at 893.

[140] *State v. Allen*, 492 P.3d 27, 28–29 (Okla. Crim. App. 2021).

[141] *Id.* at 29 (quoting *Green*, 474 P.3d at 893).

[142] *Id.* at 30 (Lumpkin, J., specially concurring).

[143] Purvaja Kavattur, *A World Without Roe*, INQUEST (Mar. 26, 2022), https://inquest.org/a-world-without-roe/; Editorial, *The Feticide Playbook, Explained*, N.Y. TIMES (Dec. 28, 2018); Cynthia Soohoo & Dana Sussman, *The Threat of Murder Charges for Abortion Already Exists*, JURIST (May 14, 2022), https://www.jurist.org/commentary/2022/05/cynthia-soohoo-dana-sussman-abortioncriminal-charges/.

[144] Nev. Rev. Stat. Ann. §200.210 (West, current through 2023 Legislative Session).

[145] Wash. Rev. Code Ann. § 9A.32.060 (West, current through 2023 Legislative Session).

[146] Noa Yachot, *Who will be prosecuted for abortion if fetuses are recognized as people*?, THE GUARDIAN (May 18, 2022, 5:00 PM), https://www.theguardian.com/law/2022/may/18/abortion-prosecution-fetal-homicide-law; *see also* PREGNANCY JUST., WHO DO FETAL HOMICIDE LAWS PROTECT? AN ANALYSIS FOR A POST-*ROE* AMERICA (2022), https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-homicide-brief-with-appendix-UPDATED.pdf. In addition to the 38 states with fetal homicide or feticide laws, Massachusetts has recognized judicially that a fetus can be the victim of homicide, *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984).

[147] Md. Code Ann., Crim. Law § 2-103 (West 2013, current through 2023 General Assembly Session).

[148] Md. Code Ann., Health-Gen. § 20-209 (West 2013, current through 2023 General Assembly Session).

[149] Md. Code Ann., Crim. Law § 2-103 (West 2013, current through 2023 General Assembly Session).

[150] *Akers v. State*, No. 0925, 2024 WL 338958 (MD. App. Ct. Jan. 30, 2024). The decision was appealed to the Maryland Supreme Court where it was reversed and remanded for a new trial in February 2025. In its decision, the Supreme Court noted that Maryland recognizes the fundamental difference between a baby and a fetus, rejecting the concepts of fetal personhood by refusing to recognize, for example, "a cause of action for the wrongful death of a *nonviable* fetus . . ." *Akers v. State*, 490 Md. 1, 30 (2025) (emphasis added).

[151] Mich. Comp. Laws Ann. § 750.322 (West, current through 2024 Regular Session).

[152] Mich. Comp. Laws Ann. § 750.323 (West, current through 2024 Regular Session).

[153] Mich. Comp. Laws Ann. § 750.1–568 (West, current through 2024 Regular Session).

[154] *Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973).

[155] *Id.* at 180 (citing *Roe*, 410 U.S. at 163–65).

[156] Mich. Comp. Laws Ann. § 750.90a–f (West, current through 2024 Regular Session).

[157] Mich. Comp. Laws Ann. § 750.90f (West, current through 2024 Regular Session).

[158] Mass. Gen. Laws.ch. 263–80 (West, current through 2024 Regular Session).

[159] *Commonwealth v. Cass*, 467 N.E.2d 1324, 1329 (Mass. 1984) (citations omitted). Soon after *Cass*, the Massachusetts Supreme Court held that a viable fetus is a person for the purposes of the common law crime of murder and allowed a prosecution for involuntary manslaughter

of a 27-week-old fetus. *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989).

[160] *Id.* n.8.

[161] *Commonwealth v. Crawford*, 722 N.E.2d 960, 963 (Mass. 2000).

[162] *Id.* at 967 (first quoting *Colautti v. Franklin*, 439 U.S. 379, 388–89 (1979) *abrogated by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022); and then quoting *Roe*, 410 U.S. at 160). The Massachusetts Supreme Court reiterated the *Colautti* definition of "viability" in *Commonwealth v. Ronchi*, 202 N.E.3d 499, 520 (Mass. 2023) (noting jury instructions that "[a] fetus is viable when there is a reasonable likelihood of the fetus's sustained survival outside the womb, with or without artificial support").

[163] *Id.*

[164] *Commonwealth v. Morris*, 142 S.W.3d 654, 654 (Ky. 2004).

[165] Ky. Rev. Stat. Ann. §§ 507.010–060 (West 2004, current through 2024 Regular Session).

[166] *Morris*, 142 S.W.3d at 654.

[167] *Id.* at 659–60 (quoting *Roe*, 410 U.S. at 163–64).

[168] KY. REV. STAT. ANN. § 507A.010 (West 2004, current through 2024 Regular Session).

[169] KY. REV. STAT. ANN. § 507.040 (West 2004, current through 2024 Regular Session).

[170] *Morris*, 142 S.W.3d at 660.

[171] Alexandria Sage, *Mom Arrested After Utah Stillbirth*, CBS NEWS (Mar. 12, 2004), https://www.cbsnews.com/news/mom-arrested-after-utah-stillbirth/.

[172] *State v. Rowland*, No. 041901649 (Utah Dist. Ct.- 3d Apr. 7, 2004) (Fuchs, J.); *see also* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLS., POL'Y & L. 299, 323 (2013).

[173] Kirk Johnson, *Harm to Fetus Becomes Issue in Utah and Elsewhere*, N.Y. TIMES (Mar. 27. 2004), https://www.nytimes.com/2004/03/27/us/harm-to-fetuses-becomes-issue-in-utah-and-elsewhere.html.

[174] *Id.*

[175] Linda Thomson, *Rowland accepts plea bargain in twin's death*, DESERET NEWS (Apr. 8, 2004,4:46 PM), https://www.deseret.com/2004/4/8/19821876/rowland-accepts-plea-bargain-in-twin-s-death/.

[176] Amie Newman, *Pregnant? Don't Fall Down the Stairs*, REWIRE (Feb. 15, 2010, 4:07 PM), https://rewirenewsgroup.com/article/2010/02/15/pregnant-dont-fall-down-stairs/; *see also* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 86–87 (2020).

[177] *Id.*

[178] Iowa Code Ann. §707.7 (West, current through 2023 Legislative Session) ("Any person who attempts to intentionally terminate a human pregnancy, with the knowledge and voluntary consent of the pregnant person, after the end of the second trimester of the pregnancy where the death of the fetus does not result commits attempted feticide. Attempted feticide

is a class 'D' felony.").

[179] *See B.S. v. State*, 966 N.E.2d 619, 622–23 (Ind. Ct. App. 2012), *overruled on other grounds by Fry v. State*, 990 N.E.2d 429 (Ind. 2013). B.S. was charged with murder under *Ind. Code Ann.* § 35-42-1-1(4) (WEST)which was amended in 2018 to include "[a] person who: . . . knowingly or intentionally kills a fetus in any stage of development," dispensing with the previous requirement of viability. B.S. was also charged with attempted feticide under Ind. Code Ann. § 35-42-1-6 (West, current through 2023 Legislative Session), which theoretically "does not apply to . . . the pregnant mother whose pregnancy is terminated."

[180] *B.S.*, 966 N.E.2d at 626.

[181] Diane Penner, *Women freed after plea agreement in baby's death*, INDIANAPOLIS STAR (Aug. 2, 2013, 9:33 PM), https://www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/.

[182] *Patel v. State*, 60 N.E.3d 1041, 1043 (Ind. Ct. App. 2016).

[183] *Id.* (quoting *Ind. Code Ann.* §35-42-1-6).

[184] *Id.* at 1044.

[185] Jericka Duncan et al., *Brittany Watts, Ohio woman charged with felony after miscarriage at home, describes shock of her arrest*, CBS NEWS (Jan. 26, 2024, 12:49 PM), https://www.cbsnews.com/news/brittany-watts-the-ohio-woman-charged-with-a-felony-after-a-miscarriage-talks-shock-of-her-arrest/.

[186] *Id*.

[187] Ohio Rev. Code Ann. § 2927.01 (West, current through 2023 Legislative Session).

[188] Ohio Rev. Code Ann. §2901.01(A)(14)(B)(1)(a)(ii), 2901.01(A)(14)(B)(1)(c)(ii) (West, current through 2023 Legislative Session).

[189] *See supra* note 240.

[190] Susan Tebben & Nick Evans, *Ohio voters pass Issue 1 constitutional amendment to protect abortion and reproductive rights*, OHIO CAP. J. (Nov. 7, 2023, 9:09 PM), https://ohiocapitaljournal.com/2023/11/07/ohio-voters-pass-issue-1-constitutional-amendment-to-protect-abortion-and-reproductive-rights/.

[191] Julie Carr Smyth, *A Black woman was criminally charged after a miscarriage. It shows the perils of pregnancy post-Roe*, AP NEWS (Dec. 16, 2023, 1:01 PM), https://apnews.com/article/ohio-miscarriage-prosecution-brittany-watts-b8090abfb5994b8a23457b80cf3f27ce.

[192] *See supra* note 116.

[193] Ohio Rev. Code Ann. § 2901.01(A)(14)(B)(1)(a)(ii), 2901.01(A)(14)(B)(1)(c)(ii) (West, current through 2023 Legislative Session).

[194] Ohio Rev. Code Ann. § 2919.16(M) (West, current through 2023 Legislative Session).

[195] Ohio Const. art. 1, § 22(C)(1).

[196] *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 278–79 (1990).

[197] *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997) (overturning a trial court's order forcing

a pregnant woman to submit to a blood transfusion); *Taft v. Taft*, 446 N.E.2d 395, 397 (Mass. 1983) (overturning the Probate and Family Court's judgment ordering a woman to submit to a "purse strings" operation in order to carry her pregnancy to term); *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc) (overturning a lower court's order forcing a woman to submit to a cesarean surgery).

[198] *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999).

[199] *Id.* at 1250.

[200] *Id.* at 1251.

[201] Motion for Special Injunction Order and Appointment of Guardian, *WVHCS-Hosp., Inc. v. Doe*, No. 3- E 2004 at 3 (Pa. Ct. Co. Pl. Luzerne County Jan. 14, 2004)

[202] *WVHCS- Hosp., Inc. v. Doe*, No. 3- E 2004 (Pa. Ct. Co. Pl. Luzerne County Jan. 14, 2004); *see also* Lynn M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLS., POL'Y, & L. 299, 325 (Apr. 2013).

[203] *Dray v. Staten Is. Hosp.*, No. 500510/2014, 2019 WL 13079315 (N.Y. Sup. Ct. Oct. 4, 2019).

[204] *Id.* (internal citations omitted).

[205] *See, e.g.*, *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981) (citing *Roe* and stating that "[a] viable unborn child has the right under the U.S. Constitution to the protection of the State," so the hospital could force a pregnant woman to have a cesarean surgery); *In re Madyun*, No. 189–86, 114 Daily Wash. L. Rptr 2233 (D.C. Super. Ct. July 26, 1986) (ordering a pregnant woman to have a cesarean surgery because, according to *Roe*, "[a]t the point of 'viability,' the state's interest becomes 'compelling'") (affirmed by D.C. Court of Appeals in unpublished decision); *In re Baby Jeffries*, No. 14004 (Jackson Cnty. P. Ct. Mich. May 24, 1982) (ordering a woman to undergo cesarean surgery "for the benefit of her viable fetus").

[206] *In re Unborn Baby Wilson*, No. 81-108 AV (Calhoun Cnty. P. Ct. Feb. 3, 1981) (compelling a diabetic woman to accept all medical treatment, including insulin by injection, to protect her fetus from harm), *aff'd*, No. 81-108 AV (Calhoun Cnty. P. Ct. Mar. 9, 1981), *leave to appeal denied*, No. 57436 (Mich. Ct. App. July 28, 1981); *Crouse Irving Mem'l Hosp., Inc. v. Paddock*, 485 N.Y.S.2d 443, 444 (N.Y. Sup. Ct. 1985) (allowing a hospital to continue to administer blood transfusions to a pregnant woman against her wishes because "[t]he highest Court of this State has made it clear that the State has a vital interest in the welfare of children, an interest that will override even the parents' most fervently held religious beliefs"); *Raleigh Fitkin–Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964) (ordering nonconsensual blood transfusion because the "child is quick, the pregnancy being beyond the 32nd week"); *Appl. of Jamaica Hosp.*, 491 N.Y.S.2d 898, 899 (N.Y. Sup. Ct. 1985) (ordering a forced blood transfusion because the judge "considered the fetus as a potentially viable human being in a life-threatening situation," even though the fetus was only 18 weeks, and the U.S. Supreme Court had held that "the state has a significant interest in protecting the potential of human life represented by an unborn fetus, which increases throughout the course of pregnancy, becoming 'compelling' when the fetus reaches viability") (quoting *Roe*, 410 U.S. at 162–63); *Taft v. Taft*, 446 N.E.2d 395, 397 (Mass. 1983) (overturning the Probate and Family Court's

judgment ordering a woman to submit to a "purse strings" operation in order to carry her pregnancy to term, but noting that "[p]erhaps the State's interest, in some circumstances, might be sufficiently compelling . . . to justify such a restriction on a person's constitutional right of privacy").

[207] *In re Fetus Brown*, 689 N.E.2d 397, 399–400 (Ill. App. Ct. 1997) (quoting the Illinois Circuit, Cook County unpublished trial court opinion); *see also* Brief for National Advocates for Pregnant Women et al. as Amici Curiae Supporting Respondents 19, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), No. 19-1392, https://www.supremecourt.gov/DocketPDF/19/19-1392/193710/20210924170501991_19-1392%20Brief.pdf.

[208] 689 N.E.2d at 399.

[209] *Id.* at 402.

[210] *Id.* at 404 (citing *Roe*, 410 U.S. at 163–64).

[211] *Id.* at 405.

[212] *Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania,* 505 U.S. at 852).

[213] *Pregnancy Exclusions*, COMPASSION & CHOICES, https://www.compassionandchoices.org/resource/pregnancy-exclusions?_ (last visited July 12, 2024).

[214] Ga. Code Ann. §31-32-9 (West, current through 2023 Legislative Session).

[215] La. Stat. Ann.§ 1151:9 (West, current through 2023 Legislative Session).

[216] *Munoz v. John Peter Smith Hosp.*, No. 096-270080-14 (Tarrant Cnty., Tex 96th Jud. Dist, Jan. 23, 2014).

[217] Wade Goodwyn, *The Strange Case of Marlise Munoz and John Peter Smith Hospital*, NPR (Jan. 28, 2014, 5:44 PM), https://www.npr.org/sections/health-shots/2014/01/28/267759687/the-strange-case-of-marlise-munoz-and-john-peter-smith-hospital; *see also We don't need another Marlise Munoz tragedy*, DALLAS NEWS (Feb. 9, 2015, 10:38 PM), https://www.dallasnews.com/news/2015/02/10/we-dont-need-a-repeat-of-the-marlise-munoz-tragedy/ ("Her family watched in torment for the next two months as her body literally decomposed. When her husband tried to hold her hand, the bones in her fingers cracked. When he bent to kiss her forehead, he could smell the odor of decaying flesh. The body that had once housed a lively, intelligent woman was a rotting corpse forced to incubate a deformed fetus.").

[218] *In re A.C.*, 533 A.2d 611 (D.C. 1987) *reh'g granted, judgment vacated sub nom.* Matter of A.C., 539 A.2d 203 (D.C. 1988), and on *reh'g,* 573 A.2d 1235 (D.C. 1990).

[219] *Id.* at 612–13.

[220] *In re A.C.*, 573 A.2d 1235, 1239 (D.C. 1990) (en banc) (citation omitted).

[221] 533 A.2d at 613 (citing *Roe*, 410 U.S. 113).

[222] *Id.* (citing *In re Madyun*, No. 189–86, 114 Daily Wash. L. Rptr 2233 (D.C. Super. Ct. July 26, 1986) (affirmed in an unpublished opinion)).

[223] 573 A.2d at 1237.

[224] 533 A.2d at 613–17.

[225] *Id.* at 611, 614 (quoting *Roe*, 410 U.S. at 160–62).

[226] *Id.* at 614, 616.

[227] *In re A.C.*,573 A.2d 1235 at 1237.

[228] *Id.*

[229] *Id.* at 1243–47 (citations omitted).

[230] *Id.* at 1246.

[231] *Id.* at 1247.

[232] *Id.* at 1252.

[233] *Id.* at 1251.

[234] Ariz. Appl. For Serial No. Initiative Pet., Arizona for Abortion Access Application for Constitutional Amendment (Sept. 12, 2023), https://apps.arizona.vote/electioninfo/assets/47/0/BallotMeasures/I-05-2024%20Arizona%20for%20Abortion%20Access.pdf. As of April 2, 2024, organizers said the ballot initiatives had received enough signatures to qualify for the November 2024 election. *See* Ana Faguy, *Arizona Abortion Rights Initiative Wins Enough Support to Appear on November Ballot, Groups Say*, FORBES (Apr. 2, 2024, 12:32 PM), https://www.forbes.com/sites/anafaguy/2024/04/02/arizona-abortion-rights-initiative-wins-enough-support-to-appear-on-november-ballot-groups-say/?sh=6005f89d3c84.

[235] FLA. DIV. ELECTIONS, Amendment to Limit Government Interference With Abortion 23-07, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=83927&seqnum=1 (last visited July 123, 2024). The Florida Supreme Court approved the proposed amendment for placement on the ballot on April 1, 2024. *See* Advisory Op. to the Att'y Gen. re: Limiting Government Interference With Abortion., No. SC2023-1392 (Fla. Apr. 1, 2024).

[236] MI. CONST. art. 1, § 28 (West, Westlaw through Nov. 2022 amendments); Prop. 22-3, 2022 Leg., 100th Sess. (Mich. 2022) (approved by voters at the Nov. 8, 2022 election).

[237] MISSOURIANS FOR CONST. FREEDOM AMENDMENT, https://moconstitutionalfreedom.org/wp-content/uploads/2024/01/Missourians-for-Constitutional-Freedom-Amendment.pdf (last visited July 12, 2024). Organizers are currently gathering signatures to qualify to appear on the November 2024 ballot. *See* Chris Walker, *Missouri Voters Start Signature Drive to Put Abortion Rights on November Ballot*, TRUTHOUT (Jan. 18, 2024), https://truthout.org/articles/missouri-voters-start-signature-drive-to-put-abortion-rights-on-november-ballot/.

[238] *See* Mara Silvers, *Montana Supreme Court rewrites abortion language; signature gathering moves closer*, MONT. FREE PRESS (Apr. 1, 2024), https://montanafreepress.org/2024/04/01/montana-supreme-court-rewrites-abortion-ballot-language-signature-gathering-moves-closer/. The Montana Attorney General blocked the ballot initiative in January 2024, organizers appealed the Attorney General's decision, and the Montana Supreme Court released revised ballot language on April 1, 2024. The initiative's supporters, Montanans Securing Reproductive Rights, have begun to gather signatures, but

it is unclear whether the Attorney General or the state legislature will continue to fight the initiative.

[239] Nev. Notice of Intent Statewide Initiative or Referendum Pet., The Nevada Reproductive Rights Amendment (Dec. 6, 2023), https://www.nvsos.gov/sos/home/showpublisheddocument/12633/638375592027970000 (last visited July 12, 2024). As of April 2, 2024, organizers said they had garnered enough signatures to qualify for the November 2024 ballot. *See* News 4 & Fox 11 Digital Staff, *Nevada abortion rights amendment surpasses signature threshold for ballot*, NEWS 4 (Apr. 2, 2024, 10:18 AM), https://mynews4.com/news/local/nevada-abortion-rights-amendment-surpasses-signature-threshold-for-ballot.

[240] Ohio Const. Article I,1, § 22 (West, Westlaw through November 2023 Election); 2023 Statewide Issue No.1, 2023 Leg. (Ohio 2023) (approved by voters at the Nov. 7, 2023 statewide election).

[241] S.D. Initiated Const. Amendment Pet., An Initiated Amendment Establishing a Right to Abortion in the State Constitution (Sept. 19, 2022), https://sdsos.gov/elections-voting/assets/2024CARickWeilandabortionpetition.pdf. Organizers are currently gathering signatures to qualify to appear on the November 2024 ballot. *See* Jack Dura, *GOP lawmakers try to thwart abortion rights ballot initiative in South Dakota*, AP NEWS (Feb. 22, 2024, 4:08 PM), https://apnews.com/article/south-dakota-abortion-ballot-initiative-dd0da89de4fd6d1ef133a57d697e3faf.

[242] *How Your Fetus Grows During Pregnancy: Frequently Asked Questions*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/womens-health/faqs/how-your-fetus-grows-during-pregnancy (last visited July 12, 2024).

[243] Virginia Senate Joint Resolution No. 247 (January 8, 2025), https://lis.blob.core.windows.net/files/1011617.PDF