

# RECENTERING PREGNANCY: A RESPONSE TO FETAL PERSONHOOD

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*Post-Dobbs, states are pursuing fetal personhood rights while pregnant people are losing theirs. Ever since Roe v. Wade was decided, the anti-abortion movement has been strategizing on how to establish fetal personhood. For decades, Roe protected the right to an abortion, but abortion-hostile states nevertheless drafted fetal protection laws that were used to punish and control pregnant people for their conduct while pregnant. Now, post-Dobbs, states are pursuing comprehensive fetal personhood laws, and blatantly prioritizing fetal life at the expense of pregnant people’s health and safety. This Note argues for recentring pregnancy—the pregnant person and the experience of pregnancy—in our law, policy, and advocacy. Fetal protection laws should be drafted, as they were originally, to ensure the protection of pregnant people. Fetal personhood measures should be resisted, as they only portend more harm to pregnant people. And more attention must be paid to the pain, injury, and risk of death that accompanies pregnancy, in order to improve the lives of pregnant people and expose the violence inflicted by fetal personhood policies and abortion bans.*

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## INTRODUCTION

Laura Pemberton refused a c-section, so her doctors sought a court order to force her to undergo the procedure. The sheriff strapped her legs together and took her to a hospital, where the doctors performed the forced c-section, pursuant to a judge's authorization.<sup>1</sup>

Brittany Watts, who was carrying a nonviable fetus, miscarried at home after hospital staff delayed her induction for two days.<sup>2</sup> Feeling sick after the miscarriage, she returned to the hospital, where a nurse reported Watts to the police.<sup>3</sup> Watts was then arrested for abuse of a human corpse, simply because she miscarried at home.<sup>4</sup>

Amanda Zurawski was denied a necessary abortion because the doctor did not think she was in critical enough condition to justify one. So, her doctor waited until she went into sepsis before treating her. The scar tissue from the infection permanently closed one of her fallopian tubes, making it harder for her to ever conceive again.<sup>5</sup>

The harms that these women experienced are the result of living under a legal system that relegates pregnant people to supporting roles in their own pregnancies. Under the guise of fetal protection, the anti-abortion movement has successfully passed laws that prioritize the fetus over the pregnant person; laws that are used to control and punish pregnant people. Pregnant people's own pain and personhood is ignored, and law enforcement treats pregnant people as adversaries of their own fetuses. Now that *Dobbs v. Jackson Women's Health* overturned *Roe v. Wade* and abortion is no longer a constitutional right,<sup>6</sup> states

1. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 306-07 (2013).

2. Jericka Duncan, Rachel Bailey, Cassandra Gauthier & Hilary Cook, *Brittany Watts, Ohio Woman Charged with Felony After Miscarriage at Home, Describes Shock of her Arrest*, CBS NEWS (Jan. 26, 2024, 12:49 PM EST), <https://perma.cc/U8ZD-HAS7>.

3. *Id.*

4. *Id.*

5. Plaintiffs' First Amended Verified Petition for Declaratory Judgment and Application for Temporary and Permanent Injunction, *Zurawski v. State of Texas*, No. D-1-GN-23-000968, at 1, 6-9 (Tex. Dist. Ct. May 22, 2023) [hereinafter Petition].

6. In 1973, in *Roe v. Wade*, the Supreme Court decided that the Due Process Clause of the Fourteenth Amendment protected the right to an abortion and established the trimester framework. In the first trimester, the state could not regulate abortion access; in the second trimester, the state could regulate abortion if the regulation was reasonably related to maternal health; and in the third trimester, a state could prohibit abortion entirely, as long as it allowed for exceptions when abortion was necessary to save the life or health of the mother. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). In *Casey v. Planned Parenthood*, the Court replaced the trimester

are pursuing personhood measures more aggressively than ever,<sup>7</sup> pregnant people are under rapidly heightened levels of surveillance,<sup>8</sup> and reproductive healthcare providers are failing to care for their patients.<sup>9</sup>

The anti-abortion theory of fetal personhood, however, is a legal and biological fiction. It rests on the conception of the fetus as independent from the pregnant person, and pregnancy as a benign event. In this Note, I argue that we must recenter pregnancy—the pregnant person and the experience of pregnancy—in our law, policy, and advocacy. By centering pregnancy, our laws can afford pregnant people rights without the risk of punishment and stop the incredible injuries that abortion-hostile states are inflicting on pregnant people.

Fetal protection laws are inextricably linked to the anti-abortion movement's push for full fetal personhood rights. The difference between fetal protection and fetal personhood, however, is important. "Fetal protection laws" refer to state laws that were passed and/or amended to include the fetus as a protected party. For example, adding "fetus" to a state homicide or wrongful death law. Thus, under the state's laws, fetuses have rights under select laws; they do not have full personhood rights. "Fetal personhood" refers to laws and/or state constitutional amendments that grant fetuses full personhood, meaning the fetuses are treated the same under all laws as any other person. Under *Roe*—which established the constitutional right to an abortion—states could have fetal protection laws but not fetal personhood laws, because if a fetus had full personhood rights, then abortion would be murder. This Note explains the harms that result from fetal protection laws, proposes a reform to such laws, and argues that a careful construction of fetal protection is necessary in order to prevent the passage and enforcement of full fetal personhood rights, which would pose even more risks to the autonomy of pregnant people.

Starting in the 1980s, scholars started bringing attention to the new fetal protection laws and the harms to pregnant people they portended.<sup>10</sup> A couple scholars proposed changes to states' laws to foreclose the possibility of arresting

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framework with the undue burden test, wherein a court asks if the abortion regulation imposes a "substantial obstacle[] in the path of a woman seeking an abortion before the fetus attains viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992), *overruled by Dobbs*, 597 U.S. 215. Both *Roe* and *Casey* were overruled by the Court's decision in *Dobbs*, in which the Court returned the authority to regulate abortion to the states. *Dobbs*, 597 U.S. at 215.

7. See Haley Weiss, *America's Second Year Post-Roe Will Be Even More Contentious*, TIME (June 25, 2023, 8:00 AM EDT), <https://perma.cc/DC2S-C3B7>.

8. See Katrina Kimport, *Here's What We Can Expect Post-Dobbs, According to Research*, UNIV. CAL. S.F. (Sept. 7, 2022), <https://perma.cc/U8QJ-RLGY>.

9. See *infra* Part IV.

10. See, e.g., Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Sandra L. Smith, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Applications*, 41 WM. & MARY L. REV. 1845 (2000); Mary Beth Hickbox-Howard, *The Case for Pro-Choice Participation in Drafting Fetal Homicide Laws*, 17 TEX. J. WOMEN & L. 317 (2008).

pregnant people.<sup>11</sup> However, the scholars' work assumed the existence of *Roe*; a future where the right to an abortion was fundamental. Therefore, this Note revisits the problem of fetal protection laws post-*Dobbs*. I catalog the harms done to pregnant people before and after *Dobbs* under the guise of fetal protection, demonstrating how *Dobbs* has only emboldened abortion-hostile states and trigger-happy prosecutors. My proposed reform of criminal and tort law is more explicitly protective of pregnant people, in an attempt to hamstring prosecutors. And I identify other laws that states should amend to ensure pregnant people's liberty. This Note also connects the fetal protection laws to the growing fetal personhood movement. When past scholars wrote about fetal protection laws, full fetal personhood was an impossibility because of *Roe*. Now, states' fetal protection laws are being used to push full fetal personhood, which threatens to upend our law and strip personhood away from pregnant people. Finally, I connect fetal protection and personhood to the dismal reproductive healthcare that people are experiencing post-*Dobbs*.

American law has long recognized some form of fetal rights, no matter the national law on abortion.<sup>12</sup> However, after *Roe v. Wade* was decided, the anti-abortion movement used fetal protection laws to dampen the effect of *Roe* and control pregnant people. In Part I, I provide a short history of fetal rights law. Early fetal rights were crafted to protect the interests of the pregnant person *and* the future child, recognizing that harm to the pregnant person may also result in harm to the fetus.<sup>13</sup> It was only after states began to liberalize their abortion laws that fetal protection laws were passed that granted independent rights to the fetus.<sup>14</sup> In Part II, I describe the serious harms that pregnant people experience when fetal protection laws are used against them. I argue that the law can punish third parties for harm to pregnant people and the fetus without creating the opportunity for punishment, control, and surveillance of the pregnant person.

In Part III, I argue that fetal personhood must be rejected *in toto* because it would pose even more harm to pregnant people and families than fetal protection laws already do. Some commentators suggested that states must be forced to apply their personhood provisions to all laws, hoping that the practical untenability would foreclose a finding of personhood, or at least provide some benefit to pregnant people.<sup>15</sup> However, I explain that abortion-hostile states are willing to embrace the odd policies that will result from personhood, and any benefits that pregnant people could derive from personhood laws can be achieved by policy that prioritizes the wellbeing of pregnant people. In Part IV, I describe the pain, injury, and risk of death that accompanies pregnancy, and how fetal

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11. Smith, *supra* note 10, at 1878-84; Hickbox-Howard, *supra* note 10, at 336-40.

12. Johnsen, *supra* note 10, at 599-601.

13. *Id.*

14. *Id.* at 602.

15. See Carliss N. Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process, and Citizenship*, 76 WASH. & LEE L. REV. ONLINE 91, 91-97 (2020); see also Boom Lawyered, *Fetuses Don't Belong in Jail*, at 7:02-10:19, 11:33-12:27 (Feb. 27, 2023) (downloaded using Spotify).

protection and personhood have worsened reproductive healthcare. Post-*Dobbs*, a shocking number of healthcare providers are treating the fetus as the primary patient. Legislators and judges must be forced to reckon with the painful reality of fetal protection policies and abortion bans that treat fetuses lives as more important than the people carrying them.

The reforms I suggest in this Note are primarily directed at states that are at least somewhat protective of reproductive freedom. A state like Texas, where legislators have discussed the idea of making abortion punishable by the death penalty,<sup>16</sup> is not likely to pass laws that give pregnant people more control over their pregnancies. However, in many states, advocates for pregnant people have the chance to achieve a better reproductive reality. Even if some state legislators are anti-abortion, they could be persuaded to support laws that better protect pregnant people and their wanted pregnancies. And even states that are very protective of reproductive freedom, like California, can make legal reforms to ensure the law does not allow for police, prosecutors, and hospital staff to put the safety of the fetus before that of the pregnant person. While it is good that so many states are ensuring abortion access in their states, reproductive justice is more than abortion, and states should rise to the occasion.

## I. A BRIEF HISTORY OF FETAL RIGHTS

The argument for independent fetal rights does not have a strong footing in the history of American law. Per the traditional rule of tort law, neither parents nor the child could recover damages for prenatal injuries, even if the child was born alive.<sup>17</sup> However, gradually, states granted fetuses limited rights in some areas of the law. Even so, the fetus was not given rights independent of its mother.<sup>18</sup> At common law, a person could be charged with a misdemeanor—*not* murder—of a fetus only if the fetus was (1) was quickened; (2) was born alive; (3) lived for a brief period of time; and (4) died.<sup>19</sup> As early as 1887, states considered a fetus a person for inheritance law purposes, but only if it was born alive.<sup>20</sup> Then in 1947, the first court entertained a tort claim by a born child for injuries inflicted while they were in utero. Any civil claim or criminal charge relied on the child being born alive.<sup>21</sup> The born alive rule reflected the idea that

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16. Shannon Najmabadi, *Another Texas Lawmaker Is Attempting to Make Abortion Punishable by the Death Penalty*, TEX. TRIBUNE (Mar. 9, 2021, 2:00 PM CT), <https://perma.cc/XGN4-K2EE>.

17. WILLIAM L. PROSSER, *THE LAW OF TORTS* 335-338 (4th ed. 1971); FOWLER HARPER & FLEMING JAMES JR., *THE LAW OF TORTS* 1028-1031 (1956); Note, *Infants-Unborn Children-Liability for injuries Negligently Inflicted on Viable Unborn Child*, 63 HARV. L. REV. 173 (1949).

18. Johnsen, *supra* note 10, at 602.

19. Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 82 (2009).

20. Johnsen, *supra* note 10, at 601.

21. *Id.* at 601-02.

parents and children may want to be compensated for harm done *in utero* and parents may want to begin financially providing for their child before birth.<sup>22</sup>

The original basis for the fetal rights laws was to protect the interests of the future child *and* to recognize the pregnancy.<sup>23</sup> The laws were not drafted or conceived of as creating separate personhood right for the fetus.<sup>24</sup> The laws accounted for the fact that the individual was pregnant at the time of injury; therefore, the born child and the parents were due compensation and consequence for harm that resulted from injury to the parent.<sup>25</sup>

However, a limited construction of fetal rights that was dependent on the pregnant person's rights did not serve anti-abortion interests. The anti-abortion coalition grew concerned about the tide of liberalizing abortion laws and saw fetal rights as a way to cement anti-abortion laws.<sup>26</sup> However, instead of arguing for fetal rights in some areas of the law, the coalition wanted full personhood rights for fetuses. In the late 1960s, anti-abortion leaders argued that fetuses were people under the Fourteenth Amendment deserving of the same constitutional protection as anyone else.<sup>27</sup> If a fetus was a person, the argument went, then state legalization of abortion was unconstitutional. Texas made that argument in *Roe*, buttressed by various amicus briefs by anti-abortion groups.<sup>28</sup> The argument proved futile, however, as the Court not only rejected fetal personhood, but found abortion to be a constitutional right.<sup>29</sup> The Court noted that the Constitution fails to provide a definition of the word "person."<sup>30</sup> When the Constitution does use the word "person," it refers to *postnatal* rights, requirements, and circumstances.<sup>31</sup> Even more, the Court reasoned that when the Fourteenth Amendment was passed, there were fewer restrictions on abortion than were present in 1973, so the drafters could not have intended for "person" to include the unborn.<sup>32</sup> Finally, the Court explained that state law historically only recognized fetal rights when the child was born alive<sup>33</sup> and/or to vindicate a

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22. *Id.* at 601-03.

23. *Id.* at 601-02.

24. *Id.*

25. *Id.* It is important to reiterate the history of fetal rights laws as anti-abortion judges present a different story. For example, Judge Mitchell of the Alabama Supreme Court, in a decision finding that fetuses were "children" for the purposes of the Alabama wrongful death law, argued that the born alive rules were simply rules of evidence, not a reflection of the conception of fetal personhood at the time. *LePage v. Ctr. for Reprod. Med.*, No. SC-2022-0579, slip op. at 14 n.6 (Ala. Feb. 20, 2024).

26. MARY ZIEGLER, *ROE: THE HISTORY OF A NATIONAL OBSESSION* 4 (2023).

27. *Id.* at 3-4.

28. *Id.* at 8-9.

29. *Roe v. Wade*, 410 U.S. 113, 157 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

30. *Id.*

31. *Id.*

32. *Id.* at 158.

33. *Id.* at 161.

parent's interest,<sup>34</sup> as this Note argues.<sup>35</sup>

In response, anti-abortion leaders sought to nullify *Roe* and continue their push for fetal personhood. The movement first tried a federal fetal personhood constitutional amendment and failed.<sup>36</sup> Refusing to admit defeat, the movement changed its approach. This time, anti-abortion leaders worked towards personhood while feigning respect for *Roe*. The new strategy was to only grant fetuses rights in as many areas of the law as *Roe* allowed and grant the rights without relying on the interests of the pregnant person or the parents.

One example of this development was Missouri's fetal personhood provision, passed in 1986. The legislature found that "[t]he life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well-being."<sup>37</sup> To recognize that *Roe* was the law of the land, the drafter of the law, Andrew Puzder, included a provision clarifying that the personhood rights were still subject to Supreme Court precedent.<sup>38</sup> Therefore, in practice, the provision was not a fetal personhood measure, but a fetal protection measure because fetuses had rights in only some areas of the law.

However, Puzder had no intention of respecting *Roe*. The 1986 legislation was based on a model legislative proposal that Puzder, along with Professor Marlan Walker, outlined in a law review article in 1984.<sup>39</sup> Puzder and Walker argued that states could express their attitudes against abortion and establish broader fetal rights, as long as the legislation did not restrict the right to an abortion.<sup>40</sup> States could declare that life begins at conception if the definition is connected to non-abortion statutes, such as property, tort, and criminal law.<sup>41</sup> They strategized that by using non-abortion law as the hook, pro-choice advocates would struggle to argue against the declaration of life.<sup>42</sup> It would not be politically popular for pro-choice advocates to oppose more rights for the childbearing person who suffered a loss or wanted to protect the future child's interests.<sup>43</sup> The long-term goal of the proposed legislation was to force a conflict

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34. For example, a wrongful death action in the event of a stillbirth caused by prenatal injuries. *Id.* at 162.

35. This Note agrees with the *Roe* Court's analysis of the history of fetal rights law. However, this Note argues that, in addition to the historical evidence, the effect of fetal personhood on the rights and liberties of pregnant people demonstrates the illogic of fetal personhood.

36. See MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 41-47 (2015).

37. MO. ANN. STAT. § 1.205.

38. CYNTHIA GORNEY, *ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS* 382, 420 (1998).

39. Marlan C. Walker & Andrew F. Puzder, *State Protection of the Unborn After Roe v. Wade: A Legislative Proposal*, 13 STETSON L. REV. 237, 241 (1984).

40. *Id.* at 238-39.

41. *Id.* at 239.

42. *Id.*

43. *Id.*

with *Roe* in front of the Supreme Court, and achieve fetal personhood.<sup>44</sup>

Other states also broke with historical practice and began granting rights to the fetus *qua* fetus, instead of framing the rights as interconnected with the pregnant person's rights. By 1986, a majority of states' considered fetuses that died *in utero* as persons for the purposes of wrongful death statutes.<sup>45</sup> Similarly, certain states recognized fetuses as people for the purpose of homicide law.<sup>46</sup> Child abuse and neglect laws were also interpreted to define fetuses as children.<sup>47</sup> The new approach to fetal protection was far more expansive than the pre-*Roe* approach. These new laws did not depend on the child being born alive or connect the fetuses' rights to the pregnant person.

Although anti-abortion strategists had an ulterior motive for fetal protection laws, many of the laws were passed with the intention of protecting pregnant people.<sup>48</sup> Wrongful death claims could compensate parents for their loss and serve as a deterrent force against tortious harm to the pregnant person.<sup>49</sup> Feticide laws similarly hold people accountable for violence against pregnant people that leads to unwanted termination of their pregnancy.<sup>50</sup> Nevertheless, the new laws' conception of the fetus as a person with rights independent of the pregnant person created the opportunity for punishing pregnant people for harm to their fetus.<sup>51</sup>

Post-*Dobbs*, fetal protection laws remain on the books, and more states are looking to pass fetal personhood measures. Experts at Pregnancy Justice argue that, without the protection of *Roe*, the rates of pregnancy criminalization will rise.<sup>52</sup> In the past decade, after various erosions of the right to an abortion, Alabama, Arizona, Kansas, and Georgia passed laws or constitutional amendments defining a fetus as a person.<sup>53</sup> Since *Dobbs*, thirty-six fetal personhood bills have been proposed; eight in 2022, five in 2023, and twenty-three by May 2024.<sup>54</sup> Only one was passed and enacted,<sup>55</sup> but the trend is

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44. *Id.*

45. Johnsen, *supra* note 10, at 602 & n.11.

46. *Id.* at 602 & n.14.

47. *See, e.g.,* *Whitner v. State*, 328 S.C. 1, 11 (1997).

48. *See* Smith, *supra* note 10, at 1852 ("Yielding to popular support for a more effective feticide law, the Indiana legislature . . . enacted sweeping legislation criminalizing acts against pregnant women and fetuses."); *see also* PREGNANCY JUSTICE, *CONFRONTING PREGNANCY CRIMINALIZATION: A PRACTICAL GUIDE FOR HEALTHCARE PROVIDERS, LAWYERS, MEDICAL EXAMINERS, CHILD WELFARE WORKERS, AND POLICYMAKERS* 5 (2022), <https://perma.cc/DQ2D-GMRL>.

49. Johnsen, *supra* note 10, at 603.

50. *Id.*

51. *Id.*

52. PREGNANCY JUSTICE, *THE RISE OF PREGNANCY CRIMINALIZATION* 2 (Sept. 2023), <https://perma.cc/9RPD-HAQ2>.

53. Luke Vander Ploeg, *Can You Drive Alone in the H.O.V. Lane if You're Pregnant? A Post-Roe Quandary*, N.Y. TIMES (July 12, 2022), <https://perma.cc/A25Y-L53T>; KAN. STAT. ANN. § 21-5419.

54. *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST. (2024), <https://perma.cc/LKR4-QSKC>.

55. *Id.*



concerning. Now that abortion is no longer a constitutional right, *Roe* does not serve as a barrier to states that want to follow Puzder and Walker’s plan and trade limited fetal protection laws for full fetal personhood rights. Before discussing the state of fetal personhood politics, this Note outlines the harm that fetal protection laws have caused, how that harm was exacerbated post-*Dobbs*, and how state law and policy can be reformed to protect pregnant people.

## II. THE CASE FOR REWRITING FETAL PROTECTION LAW & POLICY

Shortly after the new fetal protection laws were passed, prosecutors and courts started using the laws to punish and control pregnant people.<sup>56</sup> Any idea that the fetal protection laws would protect the pregnant person as well as the fetus was quickly debunked. Between January 1, 2006, and June 23, 2022—the day before the *Dobbs* ruling—there were 1,396 criminal arrests of pregnant people for alleged harm to the fetus across all states.<sup>57</sup> In addition to criminal prosecutions, pregnant people became the focus of child welfare investigations. *Roe* did not protect people from such deprivations of liberty and now, post-*Dobbs*, abortion-hostile states are looking at pregnant people as potential criminals more than ever.<sup>58</sup> In this Part, I demonstrate how fetal protection laws are used to deprive pregnant people of their physical liberties, explain how *Dobbs* has compounded the risks to pregnant people, and suggest a new framework for fetal rights that properly protects pregnant people.

### A. Criminal Prosecution of Pregnant People

Under fetal protection laws, pregnant people—especially people of color and low-income people—are at increased risk of criminal prosecution for drug use during pregnancy.<sup>59</sup> In South Carolina, Regina McKnight gave birth to a stillborn baby.<sup>60</sup> The state alleged that her cocaine use caused the stillbirth, and she was arrested and charged with homicide by child abuse.<sup>61</sup> She served eight years of her twelve-year sentence before the South Carolina Supreme Court reversed her conviction.<sup>62</sup> The stillbirth was actually the result of an infection, unrelated to cocaine use.<sup>63</sup> In 2020, Brittany Poolaw arrived at the Comanche

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56. PREGNANCY JUSTICE, *supra* note 48, at 5.

57. PREGNANCY JUSTICE, *supra* note 52, at 4.

58. See *Human Rights Crisis: Abortion in the United States After Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023, 12:01 AM EDT), <https://perma.cc/2LV8-U2GH>.

59. Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1370, 1432-34; see also Michelle Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CAL. L. REV. 781, 813 (2014).

60. Paltrow & Flavin, *supra* note 1, at 306.

61. *Id.*

62. *Id.*

63. *Id.*

County Memorial Hospital in Oklahoma after suffering a miscarriage and told the police she recently used methamphetamine and marijuana.<sup>64</sup> She was convicted of first-degree manslaughter, even though there was no evidence that her drug use caused the miscarriage.<sup>65</sup> Subject to fetal protection laws, these women experienced the criminal justice system rather than the care they needed.

Pregnant people are also prosecuted for the harm inflicted on their fetus by other individuals. In 2019, Alabama resident Marshae Jones was charged with manslaughter after another woman shot her in the stomach, killing Jones' fetus.<sup>66</sup> According to the police, Jones was at fault because she allegedly started the fight.<sup>67</sup> Lieutenant Danny Reid of the Pleasant Grove Police Department stated that, "The only true victim in this was the unborn baby."<sup>68</sup> He argued that responsibility lay with her, because the fetus is "dependent on its mother to try to keep it from harm."<sup>69</sup> Jones was *shot*. To claim that she was not a victim is not only putting the fetus's life above her own but ignoring her personhood completely.

If failure to remove oneself from harm's way while pregnant can create criminal liability, will pregnant people be charged if their abusive partner harms their fetus? Domestic violence against pregnant people has increased since *Dobbs*,<sup>70</sup> and proponents of fetal protection laws argue that the laws will protect against abusive partners.<sup>71</sup> However, a society that sees fetuses as more important than the people carrying them may instead blame the abused pregnant person for not leaving the relationship sooner, even though "the most dangerous time for a survivor is when they leave the abusive partner."<sup>72</sup>

Without *Roe*, states are doubling down on their treatment of pregnant people as suspected criminals. Before *Dobbs* but after Texas Senate Bill 8<sup>73</sup> was passed, Lizelle Herrera, now Lizelle Gonzalez, was arrested and charged with murder after she induced her own abortion with misoprostol at nineteen weeks pregnant.<sup>74</sup> After taking the misoprostol, Gonzalez experienced abdominal pain

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64. Michelle Goldberg, *When a Miscarriage is Manslaughter*, N.Y. TIMES (Oct. 18, 2021), <https://perma.cc/4XT2-QZJN>.

65. *Id.*

66. Sarah Mervosh, *Alabama Woman Who Was Shot While Pregnant Is Charged in Fetus's Death*, N.Y. TIMES (June 27, 2019), <https://perma.cc/G9JQ-NPUZ>.

67. *Id.*

68. *Id.*

69. *Id.*

70. Laura Santhanam, *Why Post-Roe Abortion Restrictions Worry Domestic Violence Experts*, PBS NEWS HOUSE (June 28, 2023, 4:55 PM EDT), <https://perma.cc/8EP7-CEHN>.

71. See Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights*, 25 HASTINGS CONST. L.Q. 457, 459 (1998).

72. *Barriers to Leaving an Abusive Relationship*, CTR. FOR RELATIONSHIP ABUSE AND AWARENESS (2023), <https://perma.cc/BF2P-76AA>.

73. The Texas law prohibits abortion after a "fetal heartbeat" is detected. TEX. HEALTH & SAFETY CODE ANN. § 171.204.

74. Eleanor Klibanoff, *Texas Woman Charged with Murder for Self-induced Abortion Sues Starr County District Attorney*, THE TEXAS TRIBUNE (Mar. 30, 2024, 10:00 AM CT), <https://perma.cc/ER52-JR4W>. Misoprostol is usually used after the ingestion of mifepristone.

and vaginal bleeding, so she went to the hospital.<sup>75</sup> Unbeknownst to her, the hospital staff told the district attorney's office that she attempted an abortion.<sup>76</sup> Three days after her arrest, District Attorney Gocha Allen Ramirez dropped the charges.<sup>77</sup> Ramirez acknowledged that Texas law does not allow for a murder charge against a person for getting an abortion.<sup>78</sup> Although the word "individual"<sup>79</sup> in the criminal homicide law could refer to a fetus, the law explicitly exempts from prosecution "conduct committed by the mother of the unborn child."<sup>80</sup> In March 2024, Gonzalez filed a lawsuit against the Starr County district attorneys for "the deprivation of liberty, reputational harm, public humiliation, distress, pain, and suffering she experienced."<sup>81</sup>

In 2023, Brittany Watts was twenty-two weeks pregnant when she found out her pregnancy was not viable.<sup>82</sup> After initially going to the hospital, she miscarried in her bathroom at home.<sup>83</sup> Afraid the toilet was going to clog, she scooped out some of the water and tissue in a bucket and dumped the bucket outside.<sup>84</sup> Afterwards, Watts tried to go about her day, but became visibly ill during her hair appointment, so she returned to the hospital.<sup>85</sup> The nurse who treated her called 911 and told the dispatcher that she was treating a mother who delivered at home and came in without the baby.<sup>86</sup> As police officers went to Watts's house to search for the fetus, another officer interviewed Watts at the hospital for an hour.<sup>87</sup> Shortly after Watts went home to recover, the police came to her house and arrested her.<sup>88</sup> Watts was charged with abuse of a corpse, which in Ohio is a felony carrying up to a \$2,500 fine and up to one year in prison.<sup>89</sup> Ohio law prohibits a person from treating a "human corpse" in a way that outrages reasonable family or community sensibilities.<sup>90</sup> The problem for Watts was that the law does not define "human corpse,"<sup>91</sup> which allowed prosecutors

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Mifepristone stops the pregnancy from progressing and misoprostol induces the emptying of the uterus. *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (Mar. 20, 2024), <https://perma.cc/K7X9-XNQH>. However, people can take only misoprostol and induce an abortion.

75. Klibanoff, *supra* note 74.

76. *Id.*

77. *Id.*

78. *Id.*

79. TEX. PENAL CODE § 19.01.

80. TEX. PENAL CODE § 19.06(1).

81. Klibanoff, *supra* note 74 (internal quotation marks omitted).

82. Duncan et al., *supra* note 2.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. OHIO REV. CODE ANN. § 2927.01.

91. *Id.*

to argue that her reaction to her miscarriage was unlawful. While representing her, Watts's attorney Traci Timko was continuously told that a person cannot flush a fetus.<sup>92</sup> When Timko asked the prosecutors what Watts was supposed to do instead, the state had no response.<sup>93</sup> Ultimately, the grand jury did not indict Watts.

Gonzalez's and Watts's cases demonstrate how prosecutors post-*Dobbs* are emboldened to conduct prosecutions that have little to no legal justification. Pregnant people are met with a presumption of suspicion. When the default reaction to an adverse pregnancy outcome is criminal punishment, the pregnant person is no longer safe to seek medical treatment.

## B. Fetal Protection in Child Welfare

### 1. Child Removal and Involuntary Confinement

Child welfare caseworkers, relying on child abuse laws, initiate child removal proceedings because of the alleged harm created by pregnant people's<sup>94</sup> conduct. States have taken custody of women's existing children and/or the fetus, the latter of which results in the state taking physical custody of the pregnant person. Oklahoman Julie Starks was arrested in a trailer that was "allegedly being used . . . to manufacture methamphetamine."<sup>95</sup> Starks was charged with manufacturing methamphetamine and the Rogers County juvenile court took "emergency custody" of Starks's fetus, thereby taking custody of Starks herself.<sup>96</sup> While in custody, Starks lost twelve pounds and experienced dehydration, premature labor, a urinary tract infection, and a sinus problem.<sup>97</sup> Despite the physical deprivation of Starks, the court continued Starks's confinement.<sup>98</sup> The juvenile court then concluded that the fetus was deprived, even though there was no evidence that Starks used illegal drugs while pregnant, and no evidence that anything she inhaled in the trailer harmed the fetus.<sup>99</sup> Instead, the prosecutor argued that it was common sense that inhalation of the chemicals would harm a fetus.<sup>100</sup> In 2020, Jade Dass was taking Suboxone to help in her recovery from an opioid addiction when she found out she was

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92. Duncan et al., *supra* note 2.

93. *Id.*

94. Child welfare departments—or the family regulation systems—over police Black communities, especially pregnant Black women. In her research, Professor Dorothy Roberts found that Black women were disproportionately prosecuted for using drugs while pregnant, and thus more likely to have their children taken from them. DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD* 36-39 (2022).

95. Paltrow & Flavin, *supra* note 1, at 318.

96. *Id.* at 319.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

pregnant.<sup>101</sup> Her health care provider told her to keep taking Suboxone because it would not hurt the fetus, and Arizona’s Medicaid agency confirmed.<sup>102</sup> However, upon giving birth to her baby she was told that her baby would be monitored for signs of withdrawal, even though only Suboxone came up on the baby’s drug test.<sup>103</sup> Eight days after she gave birth, the Department of Child Services took custody of her child.<sup>104</sup>

Medical and child welfare institutions have refused to support pregnant people even when the person is directly asking for help. In the early 2000s, Rachael Lowe voluntarily went to a hospital to receive help for her addiction to Oxycontin.<sup>105</sup> Instead of helping her, hospital staff reported her to state authorities, and she was subsequently held against her will in a psychiatric ward.<sup>106</sup> Her detention was authorized by Wisconsin’s “Cocaine Mom Law,” which permits juvenile courts to take physical custody of a fetus—and therefore the pregnant person—when the states suspects that the “expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs.”<sup>107</sup> During her involuntary confinement, Lowe did not receive prenatal care and was prescribed Xanax.<sup>108</sup> Instead of pursuing harm reduction strategies that could protect the fetus as well, hospital staff and child welfare caseworkers deny pregnant people their basic physical liberty and proper healthcare.

For an arrest or child welfare investigation to occur, the authorities must find out that a pregnant person tested positive for drugs, induced their own abortion, or had a miscarriage. The primary way the authorities learn of such private information is through reports from hospital staff. In sixty-one cases where adults were investigated for their pregnancy outcomes, forty-five percent of the cases were reported to law enforcement by healthcare providers and social workers.<sup>109</sup> Rachel Lowe was reported to law enforcement by hospital staff. In Lizelle Gonzalez’s case, hospital staff reported her self-induced abortion to the district attorney’s office. Brittany Watts’s nurse rubbed Watts’s back and told her that “everything was gonna be okay” before reporting Watts’s miscarriage to the police.<sup>110</sup> Rampant reporting from healthcare providers erodes trust between the provider and patient and does not achieve better health outcomes.<sup>111</sup>

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101. Shoshana Walter, *They Followed Doctors’ Orders. Then Their Children Were Taken Away.*, N.Y. TIMES MAG. (last updated July 1, 2023), <https://perma.cc/TZ8M-NNTQ>.

102. *Id.*

103. *Id.*

104. *Id.*

105. Paltrow & Flavin, *supra* note 1, at 307.

106. *Id.*

107. *Id.*; WIS. STAT. ANN. § 48.193.

108. Paltrow & Flavin, *supra* note 1, at 307.

109. LAURA HUSS, FARAH DIAZ-TELLO & GOLEEN SAMARI, SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS 3 (2022), <https://perma.cc/RLU4-TKW>.

110. Duncan et al., *supra* note 2.

111. *Opposition to Criminalization of Individuals During Pregnancy and Postpartum*

Although many state laws require healthcare providers to report abuse and neglect, hospitals and providers can take measures to recenter the pregnant person in their care. Pregnancy Justice, a legal advocacy organization, offers guidance for healthcare providers to help them abide by the law while minimizing the harm done to pregnant people.<sup>112</sup> Hospitals in California and Massachusetts have adopted policies that require written consent before conducting a drug test on a pregnant person.<sup>113</sup> The Mass General Brigham Hospital is also requiring written consent before conducting a drug test on the infant, and will not report a positive drug test to child welfare authorities unless there are other concerns of abuse or neglect.<sup>114</sup> Hospitals in both states have recognized that a parent with a substance abuse disorder is not *ipso facto* a case of abuse or neglect.

## 2. Forced Medical Interventions

The child welfare system is also used to force medical treatment on pregnant people. Florida resident Samantha Burton refused to go on bed rest per her doctor's recommendation.<sup>115</sup> She had a job and two toddlers to take care of.<sup>116</sup> Nevertheless, her doctor alerted the state, and a state court authorized Burton's involuntary confinement.<sup>117</sup> The court ordered her to undergo "any and all medical treatments" her doctor directed.<sup>118</sup> Days after her she was confined, Burton miscarried alone in a room that looked more like a jail cell than a hospital room.<sup>119</sup> Multiple women have been forced to undergo c-sections—authorized by hospital administration or a court order—because the doctors think the procedure is best for the baby but the women refuse to consent.<sup>120</sup> In one case, a woman's husband was forcibly removed from the hospital, and her wrists and ankles were tied down in order to perform the c-section.<sup>121</sup> Unless the patient is incompetent or otherwise unable to consent and the court makes a substituted

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*Period*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Dec. 2020), <https://perma.cc/4TF7-2B55>.

112. PREGNANCY JUSTICE, *supra* note 52, at 36-43; *Alameda Health System Policy*, ALAMEDA HEALTH SYS., <https://perma.cc/PC63-6VX7> (archived date May 15, 2024); Molly Farrar, *These Massachusetts Hospitals Won't Automatically File Neglect Reports for Babies Born With Drugs in Their Systems*, BOSTON.COM (Apr. 2, 2024), <https://perma.cc/8Vfy-KBxf>.

113. *Alameda supra* note 112; Farrar, *supra* note 112.

114. *Id.*

115. Goodwin, *supra* note 59, at 792.

116. Lisa Belkin, *Is Refusing Bed Rest a Crime?*, N.Y. TIMES (Jan. 12, 2010, 12:50 PM), <https://perma.cc/P3SM-CR7C>.

117. *Id.*

118. *Id.*

119. Goodwin, *supra* note 59, at 792.

120. *Id.*; *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 247 Ga. 86, 88 (1981).

121. Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights?*, 10 HARV. WOMEN'S L.J. 9, 9-10 (1987).

judgment, forced c-sections are unconstitutional.<sup>122</sup> Nevertheless, plaintiffs have struggled to get the highest court to pay attention to blatantly unlawful c-sections. In *Webster v. Reproductive Health Services*, an abortion clinic challenged Missouri's 1986 fetal personhood provision. The plaintiff-appellees' brief to the Supreme Court told the story of how, when a Missouri woman refused a c-section, the hospital petitioned a court to override her refusal.<sup>123</sup> The court ordered the c-section to be performed pursuant to the personhood provision "because the life, health and well-being of the unborn child...may be jeopardized."<sup>124</sup> According to the court, the surgical intrusion into the woman's body without her permission was "outweighed by the duty of the state to protect a living unborn human being."<sup>125</sup> The Supreme Court allowed the provision to stand without so much as mentioning the forced c-section.

### C. A Proposal For Fetal Protection Law Reform

The civil and human rights violations that result from fetal protection laws raise the question of whether and how to draft fetal protection laws. One option is to remove fetal protection provisions from state laws entirely.<sup>126</sup> However, a state's residents may not desire that outcome. Fetal protection laws can correspond with the pregnant person's interests. Pregnant people and their families experience great emotional and psychological harm from the loss of a pregnancy, and many families want civil and criminal punishment for the injury inflicted against the pregnant person *and* the fetus.<sup>127</sup> However, vesting the fetus with independent rights leads to serious injury against the same pregnant people.

Therefore, states should recognize the harm to the pregnancy without establishing independent fetal rights. Criminal and tort laws should create liability for third-party violence against a pregnant person that causes harm or death to the fetus, excluding any conduct to which the pregnant person consented. Drafting our laws this way accomplishes two goals: (1) the law will reflect the reality that a third party cannot inflict harm on a fetus without also harming the pregnant person, and (2) the law cannot be used to punish the pregnant person. In addition, laws prohibiting the abuse of a corpse should

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122. In re A.C., 573 A.2d 1235, 1252 (D.C. 1990).

123. Brief for Appellees at 21, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

124. *Id.*

125. *Id.*

126. For example, Oregon's wrongful death statute does not allow for wrongful death claims for the death of a fetus. OR. REV. STAT. ANN. § 30.020.

127. See Ethan Millman, *Woman Files Wrongful Death Lawsuit After Losing Pregnancy at Astroworld*, ROLLING STONE (May 12, 2022), <https://perma.cc/HLT4-WWEP>; see also Jesse Bedayn, *Police who Fatally Shot a Pregnant Woman Are Sued by her Family in Colorado*, ASSOCIATED PRESS (last updated Aug. 16, 2023, 7:42 PM PDT), <https://perma.cc/EQW2-ENB3>; see also Shelly Bradbury, *'I Want Their Badges': Family of Pregnant Woman Killed by Colorado Police Officer Files Lawsuit*, VIRGINIAN-PILOT (last updated Aug. 16, 2023, 8:47 AM), <https://perma.cc/S8A4-HNSV>.

clearly exempt instances of miscarriage and self-induced abortion. And state child abuse law should not allow the state to take physical custody of the pregnant person under the guise of protecting the fetus. Protecting the fetus without centering the personhood of the pregnant person leads to cruel prosecutions that leave no one safer.

California's recent debate over its fetal homicide law shows how important it is to carefully draft fetal protection laws. California law defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought."<sup>128</sup> Section 187 specifically excludes any act that "was solicited, aided, abetted, or consented to by the person pregnant with the fetus."<sup>129</sup> However, in between 2017 and 2019, Adora Perez and Chelsea Becker were charged with murder after giving birth to stillborn babies.<sup>130</sup> Once hospital staff learned that the women relapsed while pregnant, the staff called the police.<sup>131</sup> Both women spent over a year in jail or prison before the cases received statewide attention.<sup>132</sup> After Becker's charges were dismissed and Perez's conviction vacated,<sup>133</sup> California Attorney General Rob Bonta issued a legal alert to clarify that California's Penal Code Section 187 "does not impose criminal liability on a person carrying a fetus for allegedly causing the miscarriage or stillbirth of that fetus."<sup>134</sup> The alert explained that because people consent to their own voluntary actions, a pregnant person cannot be criminally liable for their conduct that allegedly caused the death of their fetus.<sup>135</sup> In fact, the Republican lawmaker who proposed that "fetus" be added to the state's murder statute only intended for prosecutions against "third party's willful assault on a pregnant woman."<sup>136</sup> However, the law did not accurately reflect that intention. A separate law could have been passed creating the crime of "murder of a fetus," specifying that "murder of a fetus is the unlawful killing of a fetus by a party, not including the pregnant person, with malice aforethought." Had that law been passed, Perez and Becker would have had more protection from prosecution while they were experiencing unbelievable grief over the loss of their babies.

States' concern for fetuses combined with the vilification of pregnant people has victimized pregnant people under the laws that are supposed to protect them. Pregnancy and pregnancy loss are enormously difficult experiences that should be treated with grace. Pregnant people should feel supported by their community.

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128. CAL. PENAL § 187(a).

129. *Id.* at § 187(b)(3).

130. Jessica Pishko, *California Prosecutions for Pregnancy Loss Spark Outrage, and a Bill to Stop Future Investigations*, BOLTS (June 6, 2022), <https://perma.cc/39QP-Q4BZ>.

131. *Id.*; Sam Levin, *She Was Jailed for Losing a Pregnancy. Her Nightmare Could Become More Common*, THE GUARDIAN (June 4, 2022, 1:00 EDT), <https://perma.cc/CCS4-HJ2>.

132. Pishko, *supra* note 130.

133. *Id.*

134. *Legal Alert: Penal Code 187 and "the Unlawful Killing of . . . a Fetus"*, CAL. DEP'T OF JUST.: OFF. OF THE ATT'Y GEN. (Jan. 6, 2022), <https://perma.cc/TAJ4-9S7T>.

135. *Id.*

136. Levin, *supra* note 131.



However, under strict fetal protection laws, pregnant people are treated as made-to-order incubators for the state. A person's entire life could be surveilled; what they eat and drink, whether they are taking their prenatal vitamins, whether they are resting enough, whether they are being active enough, whether they go into a hot tub or on an airplane, what type of procedures they consent to, et cetera. Fetal protection laws have created a hostile environment for some pregnant people who cannot trust law enforcement, doctors, nurses, coroners, or drug treatment centers.<sup>137</sup> And post-*Dobbs*, treatment of pregnant people is only getting worse, as people forced to remain pregnant are under constant suspicion of illegal abortions. Fetal protection laws, when poorly written and unconstrained, deprive pregnant people of their basic liberties. If states want to provide legal recourse for harm to fetuses, the policy must be tied to the personhood of the pregnant person and pose no risk of enforcement against the pregnant person.

### III. THE FIGHT OVER FETAL PERSONHOOD

Post-*Dobbs*, states are pursuing full personhood rights for fetuses, unencumbered by *Roe*.<sup>138</sup> Beyond the argument that fetal personhood would inevitably lead to violence against pregnant people, another argument against fetal personhood is that it is logistically and legally untenable and unworkable. Opponents of personhood argue that if states are going to treat fetuses as people under all laws—and thereby override people's reproductive rights—they should be forced to deal with all the ways personhood could change the law.<sup>139</sup> For example, states should then allow pregnant people to receive child support, file their fetuses as dependents for tax purposes, and be released from prison because their fetus is being wrongfully detained.<sup>140</sup> The hope is that the practical untenability of fetal personhood will cause the anti-abortion movement to abandon the theory or lose in the courts.<sup>141</sup> And if the personhood argument succeeds, at least pregnant people could receive more support and perhaps be released from prison. In this Part, I argue that the “call their bluff” strategy does not consider states' willingness to upend their law in pursuit of personhood.

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137. Poor parents and parents of color—especially Black and indigenous parents—are surveilled by child protective services more than white and wealthy parents. See “*If I Wasn’t Poor, I Wouldn’t Be Unfit*”: *The Family Separation Crisis in the US Child Welfare System*, HUM. RTS. WATCH (Nov. 17, 2022), <https://perma.cc/RBF3-3PC6>.

138. See Ava Sasani, *Georgia Abortion Law Says a Fetus Is Tax Deductible*, N.Y. TIMES (Aug. 4, 2022), <https://perma.cc/58RV-SCBR>; see also Molly Hennessy-Fisker & Rachel Roubein, *South Carolina Senate Passes 6-week Abortion Ban, Sends Bills to Governor*, WASH. POST (May 23, 2023, 6:50 PM EDT), <https://perma.cc/9FGJ-Y2XJ>.

139. Chatman, *supra* note 15; see also Boom Lawyered, *supra* note 15, at 7:02-7:40, 9:30-9:53.

140. Chatman, *supra* note 15, at 92, 94-95; Boom Lawyered, *supra* note 15, 7:45-9:20.

141. See Chatman, *supra* note 15, at 97; see also Boom Lawyered, *supra* note 15, at 7:02-7:40, 9:30-10:19, 11:33-12:27, 22:35.

Therefore, any embrace of personhood would strengthen the anti-abortion argument for constitutional fetal personhood, risk a national abortion ban, and lead to more harm to pregnant people and their families. Any benefit pregnant people can derive from fetal personhood can be accomplished by pregnancy-centered law and policy.

#### A. The Policy Implications of Fetal Personhood

In June 2022, Brandy Bottone was given a ticket for driving alone in a high-occupancy vehicle lane in Dallas, Texas.<sup>142</sup> Bottone, who was in her third trimester of pregnancy at the time, told the officer that she was not alone in the car because she considered her fetus a person.<sup>143</sup> Her argument was immediately picked up by Texas Right to Life, the largest anti-abortion organization in the state, who issued a statement that fetuses “should be recognized as Texans in all areas of society.”<sup>144</sup>

Bottone’s case was reminiscent of the first civil case in Missouri concerning fetal personhood after the Supreme Court allowed the state’s personhood provision to stand in *Webster*. A twenty-year-old attempted to use the personhood provision to avoid the state’s driving while intoxicated law (DWI).<sup>145</sup> Per state law, people under the age of twenty-one automatically lost their license upon a conviction of DWI.<sup>146</sup> The defendant argued that his license should not be taken away, because if life began at conception, the defendant was not twenty years old, but twenty-one.<sup>147</sup> The judge ruled against the defendant, but his would not be the last case.<sup>148</sup> Decades later, Missourians would try to use the provision’s potential effect on age to try and evade criminal punishment<sup>149</sup> and run for office.<sup>150</sup>

Ultimately, the Missouri courts rejected the age change arguments for reasons of impracticability,<sup>151</sup> but anti-abortion states today are not as concerned with logistics. Shortly after Brandy Bottone’s case made the news, Georgia opened up HOV lanes for pregnant people, citing its personhood provision.<sup>152</sup>

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142. Luke Vander Ploeg, *Can You Drive Alone in the H.O.V. Lane if You’re Pregnant? A Post-Roe Quandary*, N.Y. TIMES (July 12, 2022), <https://perma.cc/JQP2-FLWM>.

143. *Id.*

144. *Id.*

145. Joseph Albright, *High Court’s Abortion Ruling Leaves Missouri at a Crossroads Again*, ATL. J. CONST. (Sept. 17, 1989), <https://perma.cc/G4LZ-JVTF>.

146. *Id.*

147. *Id.*

148. Nancy Vessell, *New Twists in Rights of Unborn: Missouri Cases Push Law Beyond Abortion Issues*, THE KANSAS-CITY STAR (Aug. 21, 1989), <https://perma.cc/MP8E-M4YP>.

149. *State v. Crider*, 554 S.W.3d 460, 461 (Mo. Ct. App. 2018); *State v. Lee*, 637 S.W.3d 446, 449 (Mo. Ct. App. 2021).

150. *Stiles v. Blunt*, 912 F.2d 260, 261 (8th Cir. 1990).

151. *Id.* at 269; *Crider*, *supra* note 149, at 462.

152. Susanna Capelouto, *Georgia HOV Lanes Now Open for Pregnant People, State Officials Confirm*, WABE (Sept. 2, 2022) <https://perma.cc/ZB9Z-NWMJ>.

Texas lawmakers introduced a similar bill.<sup>153</sup> And states' application of personhood law extends beyond traffic offenses. The Georgia Department of Revenue announced that residents could claim their fetuses on their taxes,<sup>154</sup> and Alabama lawmakers introduced a bill that would similarly amend its tax law.<sup>155</sup> In addition, Georgia clarified that fetuses are now counted on census surveys, and women can file for child support once they can detect the fetus's heartbeat.<sup>156</sup> Florida Senator Marco Rubio introduced legislation that would allow courts to award child support to pregnant women, and Governor Ron DeSantis expressed support for the idea.<sup>157</sup> Anti-abortion states seem more than happy to embrace the policy implications of personhood. The administrative headaches or logical inconsistencies of personhood will not be a deterrent for these states post-*Dobbs*.

One controversial potential implication of personhood—the release of pregnant people from prison—is currently being litigated. Florida attorney William Norris filed a writ of habeas corpus on behalf of Natalia Harrell's "unborn child" in Florida's Third District Court of Appeal.<sup>158</sup> Norris argued that the fetus is a "person" under the Florida and United States Constitutions.<sup>159</sup> Therefore, Norris argued, the fetus has a right to due process before being incarcerated.<sup>160</sup> The decision in the fetus's case suggests that some Florida judges are willing to consider a drastic affirmation of personhood. The court denied the writ of habeas corpus, but not on the merits of the claim.<sup>161</sup> Instead, Judge Thomas Logue found that the writ failed because of the lack of an adequate factual record, and dismissed the petition without prejudice, recommending pursuit of the case in a circuit court.<sup>162</sup>

Ironically, Florida does not even have a fetal personhood provision. Instead, Norris argued that the Florida legislature has expressed an intent to afford protections to fetuses.<sup>163</sup> Even the dissenting judge agreed with Norris on that point, explaining that Florida recognizes fetal rights in the homicide statute, the murder statute, and trust and estate law.<sup>164</sup> Norris's argument echoes Puzder and Walker's 1984 idea: protections for fetuses in other areas of the law should be

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153. H.B. 521, 2023 Leg., 88th Sess. (Tex. 2023).

154. Sasani, *supra* note 138.

155. H.B. 182, 2023 Leg. Sess. (Ala. 2023).

156. Sasani, *supra* note 138.

157. Zachary Halaschak, *DeSantis Says Men Should 'Absolutely' Provide Child Support to Pregnant Women*, WASH. EXAM'R (Sept. 6, 2023, 8:22 PM), <https://perma.cc/23RW-LJW5>.

158. Julia Carrie Wong, *Lawyer Argues Fetus of Jailed Pregnant Woman is Being Illegally Detained*, THE GUARDIAN (Feb. 27, 2023, 4:50 EST), <https://perma.cc/D9QL-6K7A>.

159. *Id.*

160. *Id.*

161. *Unborn Child, etc. v. Director James Reyes, et al.*, 356 So. 3d 326, 327 (Fla. Dist. Ct. App. 2023) (unpublished opinion).

162. *Id.*

163. *Id.* at 329.

164. *Id.* Dissenting Judge Monica Gordo explained that Florida recognizes the possibility that a mother's lawful incarceration will result in an unborn child being in a correctional facility. *Id.*

used to establish personhood that applies to all state laws. If Norris's case is ultimately successful, it may prove that anti-abortion advocates do not even need to pass new personhood laws to achieve fetal personhood; they can simply rely on the existing patchwork of fetal protection laws. That possibility makes even more pressing this Note's argument in Part II that if a state is to have fetal protection laws, they must be drafted such that they cannot be used to prosecute pregnant people for their conduct while pregnant.

## B. The False Potential of Fetal Personhood

Norris's case raises an interesting tension: personhood policies could benefit pregnant people.<sup>165</sup> Bad prenatal care is often an issue of expense, not desire.<sup>166</sup> Therefore, ordering people to financially support their pregnant partner would help pregnant people access better prenatal care. And releasing pregnant people from prison advances reproductive justice goals, which include "the right to nurture [your] children in a safe and healthy environment."<sup>167</sup> Pregnant people experience horrible treatment while incarcerated.<sup>168</sup> The prison environment entails worse prenatal care than people would receive otherwise.<sup>169</sup> In many jurisdictions, pregnant people are shackled with "handcuffs, leg irons and/or waist chains . . . during transport, labor, delivery, and post-delivery."<sup>170</sup>

However, advocates can argue for more support of pregnant people and the release of incarcerated pregnant people by focusing on the pregnant person, while avoiding the harms that come with fetal personhood. States can pass "pregnancy support" laws, whereby people are ordered to share the cost of prenatal care with their partners. And states can order the release of pregnant and postpartum people from prison. Pregnant people are released from prison in Costa Rica in the advanced stages of pregnancy, in Nicaragua in the last three months of pregnancy, and in Colombia in the two months or less before delivery.<sup>171</sup> In 2021, Minnesota became the first state to pass a law that allows the Commissioner of Corrections to release pregnant and postpartum people

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165. See Boom Lawyered, *supra* note 15, 7:45-9:20.

166. Leana Wen, *I'm Pregnant. What Would Happen if I Couldn't Afford Health Care?*, NPR (Mar. 11, 2017, 5:00 AM ET), <https://perma.cc/7P4L-F5RL>; *Study: Financial Hardship Prevalent During and After Pregnancy*, INST. HEALTHCARE POL'Y & INNOVATION UNIV. MICH. (Dec. 13, 2021), <https://perma.cc/N472-HQUF>.

167. *Reproductive Justice*, IN OUR OWN VOICE: NAT'L BLACK WOMEN'S REPROD. JUST. AGENDA, <https://perma.cc/Y7CM-G4TJ>.

168. See Susan Hatters Friedman, Aimee Kaempf & Sarah Kauffman, *The Realities of Pregnancy and Mothering While Incarcerated*, 51 J. AM. ACAD. PSYCHIATRY L. 1 (May 13, 2020).

169. Anna Roh, *Forced to Give Birth Alone: How Prisons and Jails Neglect Pregnant People Who Are Incarcerated*, COLUM. UNIV. MAILMAN SCH. OF PUB. HEALTH (Feb. 28, 2022), <https://perma.cc/SGY7-H8LZ>.

170. Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AMA J. ETHICS 779, 779-781 (2013).

171. *Pregnancy and Childbirth in Prison*, PENAL REFORM INT'L (2022), <https://perma.cc/9JSQ-EYAR>.

from prison and into community alternatives.<sup>172</sup> The Minnesota legislature passed the law because of the harms experienced by *both* the pregnant person and the baby.<sup>173</sup> As a policy matter, fetal personhood laws would not allow for the community alternatives for incarcerated parents postpartum. Alternatives for the postpartum period are crucial because the postpartum bonding period is incredibly important for the parent and the baby, and incarcerated people experience higher rates of postpartum depression.<sup>174</sup>

Finally, even if fetal personhood law got a pregnant person out of jail, the same logic could be used to put them back in if the state deems their conduct to be child abuse, as discussed in Part II. For example, a pregnant person may be released from prison, but then sent back for child abuse because they were, for example, staying at their friend's house, where someone was manufacturing methamphetamine.<sup>175</sup>

The main limitation of this argument is the fact that the most abortion-hostile states would not pass pregnancy support laws, because the potential of fetal personhood laws to control and punish pregnant people is the greater goal for them than facilitating healthy pregnancies. In Etowah County, Alabama, pregnant people are neglected and mistreated in the Etowah County detention center.<sup>176</sup> Etowah County personnel have failed to give detainees necessary prenatal care, have refused to take a woman with a high-risk pregnancy to the hospital when her water broke, and have left bleeding pregnant people alone in a cell with no medical attention.<sup>177</sup>

Advocates may find that using fetal personhood to get more support for pregnant people is better than nothing. That may be true; however, this Note urges advocates and policymakers to consider the possibility that a state like Alabama may still deny those protections to pregnant people while ushering in the punitive measures.

### C. The Stakes of Fetal Personhood

Ultimately, fetal personhood would create even more problems for pregnant people and families than the limited fetal protection laws. States' personhood measures threaten to shift the Overton window towards a serious consideration of constitutional personhood by the federal courts, which the anti-abortion

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172. Maura Ewing, *Minnesota Will Be the First State to Stop Separating Incarcerated Moms and Newborns*, WASH. POST (June 7, 2021, 12:43 PM EDT), <https://perma.cc/Q37V-UUAJ>; *Healthy Start Act*, MINN. DEP'T CORR., <https://perma.cc/286J-TB4M> (archived May 15, 2024).

173. *Healthy Start Act*, *supra* note 172.

174. *Id.*

175. See Paltrow & Flavin, *supra* note 1, at 318-19.

176. Diana Kawka, *The Criminalization of Pregnancy: Etowah County, Alabama Should Raise Alarms for Women*, LAW & INEQ. (Jan. 12, 2024), <https://perma.cc/7RPT-RWHS>.

177. *Id.*

movement hopes would result in a nation-wide abortion ban.<sup>178</sup> Additionally, fetal personhood could open pregnant people up to more prosecution than fetal protection laws do. If fetuses have all the same rights as people, legislators may feel emboldened to create criminal liability for *receiving* an abortion, as opposed to only targeting those who perform or help people perform abortions. Legislators may also remove the exceptions to the abortion bans, which include exceptions for life-threatening pregnancies, and/or pregnancies resulting from rape or incest, et cetera.<sup>179</sup>

Apart from harsher abortion laws, fetal personhood laws could also be used to control pregnant people's lives even when there is no risk of harm to the fetus. An abusive ex-partner could petition for visitation with his unborn child, which would force the pregnant person to interact with their abusive ex-partner. A pregnant person could be charged with kidnapping for going to another state while pregnant without the consent of the other parent. Already, husbands are suing their wives' doctors and friends, who help the woman access an abortion, with wrongful death of the fetus.<sup>180</sup> The litigation intimidates abortion providers and harasses ex-partners for their reproductive choices, a form of domestic violence experts have coined "litigation abuse."<sup>181</sup> Reproductive coercion has only recently received attention as a form of abuse,<sup>182</sup> and fetal personhood would give abusive partners even more leverage over their partners.

Fetal personhood laws could also make it harder to get pregnant in the first place. In vitro fertilization (IVF) is an assisted fertility process wherein an egg is removed from the ovaries and combined with viable sperm to develop into embryos.<sup>183</sup> Some embryos will be implanted, others will be frozen for future use, and others may not survive the freezing and thawing process.<sup>184</sup> Unused embryos are routinely discarded.<sup>185</sup> IVF has been a saving grace for many couples, especially for same-sex couples. However, personhood laws threaten its legality. Missouri's personhood law defines an "unborn child" as offspring of human beings at *every stage* of biological development.<sup>186</sup> Arizona and Georgia

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178. Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES (updated June 21, 2023), <https://perma.cc/B238-CQ2V>.

179. *Abortion Gestational Limits and Exceptions*, KAISER FAM. FOUND. (last updated May 9, 2024), <https://perma.cc/MC8D-9VDN>.

180. Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic Over the Abortion She Had Four Years Ago*, PROPUBLICA (July 15, 2022, 5:00 AM EDT), <https://perma.cc/YC4P-VZ67>; *Texas Man Suing Over Abortion Accused of Abuse in Court Docs*, AP NEWS (May 2, 2023, 3:23 PM PDT), <https://perma.cc/Z4AW-AJUU>.

181. *Litigation Abuse*, WOMENS LAW.ORG (last updated Mar. 24, 2022), <https://perma.cc/WLV2-T5EK>.

182. See Shivani Patel & Kathryn O'Donnell, *What Women and Men Need to Know About Reproductive Coercion*, UT SW. MED. CTR. (Jan. 14, 2020), <https://perma.cc/HZ9N-Z8SN>.

183. *IVF (In Vitro Fertilization)*, CLEVELAND CLINIC (last updated Mar. 2, 2022), <https://perma.cc/YN2G-HURR>.

184. *Id.*

185. *Id.*

186. MO. ANN. STAT. § 1.205.

also recognize the rights of “unborn children,” although it is unclear whether they would count embryos as unborn children.<sup>187</sup> If embryos are given personhood rights, clinics might have to stop freezing embryos, which would require people to go through more egg retrievals, thereby increasing the already burdensome physical and financial cost of IVF.<sup>188</sup> Clinics may also have to stop performing selection reduction—terminating one of multiple pregnancies in the uterus—which would leave the pregnant person with multiple fetuses, putting them at a higher risk of pregnancy complications.<sup>189</sup>

In February 2024, the Alabama Supreme Court launched the opening salvo against IVF. The court decided that the term “children” in the state’s wrongful death statute includes frozen embryos created via IVF.<sup>190</sup> Embryos *in utero* were already considered children under the statute; the decision expanded the statute to include “extrauterine children,” in the words of Justice Mitchell.<sup>191</sup> The facts of the case are bizarre. The three couples who brought the suit were patients at an IVF clinic.<sup>192</sup> One day, a patient from another area of the hospital walked into the IVF clinic, took several embryos out of the storage facility, and dropped them on the ground because the sub-zero temperature burned the patient’s hands.<sup>193</sup> The couples sued the clinic for common-law negligence and wantonness, breach of contract, and wrongful death.<sup>194</sup> Although the ruling means that the hopeful parents can be compensated, it risks their access to IVF in the future.

Shortly after the ruling, IVF clinics across the state halted their work out of concern for legal liability.<sup>195</sup> The ruling caused an uproar across the state and the country.<sup>196</sup> In response, the Alabama legislature quickly passed a law that provides immunity from civil lawsuits and criminal prosecutions to “any individual or entity when providing or receiving services related to in vitro fertilization.”<sup>197</sup> Fertility advocates have expressed that the law does not provide enough protection for IVF.<sup>198</sup> They may be right. The law does not immunize companies that provide necessary “goods” used in IVF treatment from civil

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187. ARIZ. REV. STAT. ANN. § 1-219; GA. CODE ANN. § 1-2-1.

188. Fiorella Valdesolo, *The Connection Between Fertility Treatments and the Overturning of Roe v. Wade*, VOGUE (Jan. 27, 2023), <https://perma.cc/N9HF-T7K9>.

189. *Id.*

190. *LePage v. Ctr. for Reprod. Med.*, No. SC-2022-0579, slip op. at 3 (Ala. Feb. 20, 2024).

191. *Id.*

192. *Id.*

193. *Id.* at 4-5.

194. *Id.* at 5.

195. Aria Bendix, *Three Alabama Clinics Pause IVF Services After Court Rules That Embryos Are Children*, NBC NEWS (last updated Feb. 22, 2024, 4:20 PM PST), <https://perma.cc/E4ZN-PNK5>.

196. Adam Edelman, *Alabama Governor Signs Bill to Protect IVF Treatments Into Law*, NBC NEWS (last updated Mar. 6, 2024, 7:46 PM PST), <https://perma.cc/D8UJ-U32>.

197. ALA. CODE § 6-5-810.

198. Edelman, *supra* note 196.

suits.<sup>199</sup> Therefore, companies could be chilled from selling goods used in IVF to Alabama fertility doctors. And even with the new law purporting to protect IVF, the Mobile Infirmary Medical Center—the hospital at the center of the couples’ lawsuit—will stop all IVF services at the end of 2024 because of “litigation concerns.”<sup>200</sup>

A closer look at the Alabama Supreme Court’s ruling raises concerns that more expansive personhood arguments could succeed. The majority opinion adopted the strategy of fetal protection by concluding that frozen embryos were children *for the purposes of wrongful death law*.<sup>201</sup> The decision did not give frozen embryos full personhood rights in all areas of the law. However, Justice Mitchell argued that the word “child” was not ambiguous; it clearly included frozen embryos.<sup>202</sup> He explained that even if the word “child” were ambiguous, Article I, § 36.06(b) of the Alabama Constitution, which states that “it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate,” “resolve[s] the ambiguity in favor of protecting unborn life.”<sup>203</sup> And in a footnote, Justice Mitchell argued that the common law “born alive” rules—which only allowed civil or criminal legal action for harm to the fetus if the child was born alive—functioned only as a rule of evidence and did not mean that the drafters denied fetal personhood.<sup>204</sup> The Alabama Constitution on its face grants full fetal personhood except where it would be unlawful and inappropriate.<sup>205</sup> Although policies that protect fetuses at the expense of the health, safety, and liberty of pregnant people should not be deemed “lawful and appropriate,”<sup>206</sup> the Alabama Supreme Court seems poised to grant fetuses more rights.

The shift from limited fetal protection laws to comprehensive fetal personhood would raise innumerable policy questions: Is everyone legally nine months older? Would that change if they were born premature? Which parent gets custody of embryos?<sup>207</sup> All in all, however, abortion-hostile states have indicated that the impracticality of these implications will not stop them from pursuing fetal personhood laws. Therefore, advocates for pregnant people should take care not to legitimize personhood laws, which have the potential to take even more rights from pregnant people. Even the hypothetical benefits of personhood laws—like financial support for pregnant people and the release of incarcerated pregnant people from prison—can be accomplished by drafting

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199. *Id.*

200. Sara Moniuszko, *Alabama Hospital to Stop IVF Services at End of the Year due to “Litigation Concerns”*, CBS NEWS (April 4, 2024, 12:26 PM EDT), <https://perma.cc/HEU2-4SE5>.

201. LePage, *supra* note 190, at 2.

202. *Id.* at 11-13.

203. *Id.* at 15-16.

204. *Id.* at 14 n.6.

205. ALA. CONST. art. 1, § 36.06.

206. *Id.* at § 36.06(b).

207. *See* McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2016).



policy that centers the wellbeing of the pregnant person.

#### IV. WHO IS THE PATIENT? THE FETUS OR THE PREGNANT PERSON?

In *Dobbs v. Jackson Women's Health Organization*, the majority opinion included the word “pain” only three times, two of which referred to the pain a fetus might feel.<sup>208</sup> Nowhere in the opinion did the majority discuss how pregnancy and labor can lead to pain, injury, health complications, and/or death, in disproportionate numbers for women of color. Now, states are pursuing fetal personhood laws and abortion bans that center the fetus and ignore the reality of pregnancy and labor. In this Part, I discuss the physical effects of pregnancy and argue that a discussion of these effects should inform reproductive rights advocacy. Of course, reproductive rights should be respected regardless of how someone experiences pregnancy and labor. However, anti-abortion judges—many of whom have never and will never be pregnant—cannot be allowed to decide what the experience of pregnancy entails. This Part also argues that, in many hospitals, fetuses have become the primary patient post-*Dobbs*, which leads to negligent and cruel treatment of pregnant people by their healthcare providers.

It is important to recognize that the physical effects of pregnancy have been used as a justification for discrimination against women. Women have fought against the presumption that they cannot or should not do their job or attend school because they are pregnant.<sup>209</sup> However, Judge Matthew Kacsmaryk was not motivated by feminist principles when he argued that pregnancy is a “normal physiological state” in his order staying Federal Drug Administration approval of drug mifepristone, which terminates a pregnancy.<sup>210</sup> Instead, the insistence that pregnancy is a harmless experience was necessary for him to justify the erosion of reproductive rights. However, to truly respect pregnant people is to acknowledge their experiences and empower them to make the decisions that are best for them, while ensuring that they are not punished for their decisions. The infusion of fetal protection in hospital policies, however, only leaves pregnant people at greater risk of injury and death.

##### A. The Physical Effects of Pregnancy

The list of pregnancy complications and side effects is long. Common side

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208. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253, 2269 n.50, 2284 (2022).

209. Susan Kelemen Gardin & Gary A. Richwald, *Pregnant and Employment Leave: Legal Precedents and Future Policy*, 7 J. PUB. HEALTH POL'Y 458, 459 (1986); *Supporting the Academic Success of Pregnant and Parenting Students*, U.S. DEP'T OF EDUC. (June 2013), <https://perma.cc/2SNB-R5WQ>.

210. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2023 WL 2825871, \*19 (N.D. Tex. Apr. 7, 2023), *aff'd in part, vacated in part*, No. 23-10362, 2023 WL 5266026 (5th Cir. Aug. 16, 2023).

effects of pregnancy can include fatigue, frequent urination, bloating, light spotting, cramping, constipation, hemorrhoids, nasal congestion, gingivitis, nausea with or without vomiting, among others.<sup>211</sup> Complications of pregnancy can include high blood pressure, gestational diabetes, preeclampsia, depression and anxiety, severe nausea and vomiting, iron-deficiency anemia, ectopic pregnancy, placental problems, musculoskeletal disorders, and more.<sup>212</sup> During vaginal labor, vaginal tears can occur. The most severe tear, fourth-degree vaginal tear, can take four to six weeks or more to repair.<sup>213</sup> Even after the fourth-degree tear is repaired, the person may experience infection, separation of the repaired area, fecal incontinence, and urinary incontinence.<sup>214</sup> For those who have their baby via c-section, recovery can take four to eight weeks.<sup>215</sup> The risks of a c-section include “infection of the bladder or uterus” and “injury to the urinary tract.”<sup>216</sup> And people giving birth have suffered debilitating postpartum Post-Traumatic Stress Disorder because of traumatic births.<sup>217</sup>

In 2021, the maternal mortality rate was the highest it has been since 1965, ranking the United States fourth in countries with the highest maternal mortality rate;<sup>218</sup> 1,205 pregnant people died during or after pregnancy, which was a forty percent increase from 861 people in 2020.<sup>219</sup> And “for every woman who dies in childbirth in the U.S., 70 more come close.”<sup>220</sup> Post-*Dobbs* abortion bans have worsened existing pregnancy outcomes. Black women are already two times more likely to suffer serious complications during pregnancy, and three times more likely to die as women of other races.<sup>221</sup> Post-*Dobbs*, sixty-eight percent of obstetrics and gynecology specialists said the effects of the decision have “worsened their ability to manage pregnancy-related emergencies,” sixty-four percent said the decision has “worsened pregnancy-

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211. *Symptoms of Pregnancy: What Happens First*, MAYO CLINIC (last updated Mar. 13, 2024), <https://perma.cc/JLL7-YUQZ>; *Pregnancy Gingivitis*, CLEVELAND CLINIC (last updated Mar. 7, 2022), <https://perma.cc/LS6X-33LL>.

212. Christian Nordqvist, *Foot Size Often Grows During Pregnancy*, MEDICALNEWS TODAY (Mar. 4, 2013), <https://perma.cc/CA94-8XX2>; *What Are Some Common Complications of Pregnancy?*, EUNICE KENNEDY SHRIVER NAT’L INST. OF CHILD HEALTH AND HUMAN DEV. (last updated Apr. 20, 2021), <https://perma.cc/SEB4-4M2R>.

213. *Vaginal Tears in Childbirth*, MAYO CLINIC (Aug. 15, 2023), <https://perma.cc/5NV5-TD87>.

214. *Id.*

215. *Going Home After a C-Section*, MOUNT SINAI, <https://perma.cc/AA26-Y9XD> (archived May 15, 2024).

216. *Id.*

217. W. Schwab, C. Marth & A. M. Bergant, *Post-traumatic Stress Disorder Post Partum*, 72 NAT’L LIBR. MED. 56 (2012).

218. Lauren Tousignant, *Even Before Roe Was Overturned, Maternal Mortality Rates Were Going Up*, JEZEBEL (Mar. 17, 2023, 4:59 PM), <https://perma.cc/7JNR-Q73C>.

219. *Id.*

220. Renee Montagne, *For Every Woman Who Dies in Childbirth in the U.S., 70 More Come Close*, NPR KPBS (May 10, 2018, 7:00 AM ET), <https://perma.cc/J724-6WXD>.

221. Kim Bellware & Emily Guskin, *Effects of Dobbs on Maternal Health Care Overwhelmingly Negative, Survey Shows*, WASH. POST (June 21, 2023, 5:00 AM EDT), <https://perma.cc/F29Q-YRX>.

related mortality,” and seventy percent said the decision has exacerbated “racial and ethnic inequities in maternal health.”<sup>222</sup>

#### B. Becoming “Sick Enough”: When the Fetus Becomes the Primary Patient

The grim state of post-*Dobbs* reproductive care is on center stage in Texas, where the Center for Reproductive Rights is represented plaintiffs who were denied obstetrical care because of Texas’ vague emergency exception to its abortion ban. As a result of the denial of care, all the plaintiffs suffered risks to their health and/or fertility.<sup>223</sup> Kiersten Hogan found out she had cervical insufficiency around nineteen weeks pregnant.<sup>224</sup> Her doctor told her that she would likely lose the pregnancy, but that the hospital could not do anything because the fetus still had a heartbeat.<sup>225</sup> She had to wait until she went into labor or got “sick enough” to justify an abortion.<sup>226</sup> Hospital staff told her that if she left the hospital, it could be used as evidence that she was trying to get an abortion.<sup>227</sup> Kiersten felt scared and trapped in the hospital.<sup>228</sup> Elizabeth Weller was put on antibiotics after being told that if she did not terminate her pregnancy—the baby was not developed enough to survive—she could lose her uterus or possibly die.<sup>229</sup> Hospital administration, however, barred the abortion because she “wasn’t sick enough.”<sup>230</sup> So, Elizabeth went home and spent three days with extreme vomiting, abdominal pain, and constant leaking of amniotic fluid out of her body.<sup>231</sup> Her abortion was finally approved after she had developed a serious infection.<sup>232</sup> Elizabeth felt as if the state of Texas wanted her to suffer.<sup>233</sup>

Texas resident Lizelle Gonzalez experienced a painful delay and an unnecessary c-section. When Gonzalez first went to the hospital, the staff detected a fetal heart rate, so she was sent home.<sup>234</sup> She returned to the hospital in an ambulance the next day.<sup>235</sup> This time, there was no detected fetal heart

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222. Brittni Frederiksen, Usha Ranji, Ivette Gomez & Alina Salganicoff, *A National Survey of OBGYN’s Experiences After Dobbs*, KAISER FAM. FOUND. (June 21, 2023), <https://perma.cc/BUJ5-FNGB>.

223. Petition, *supra* note 5, at 1.

224. *Id.* at 35.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 39.

230. *Id.*

231. *Id.*

232. *Id.* at 40.

233. *Id.*

234. Klibanoff, *supra* note 74.

235. *Id.*

rate.<sup>236</sup> She was diagnosed with an “incomplete spontaneous abortion.” According to Gonzalez’s lawsuit, a c-section was conducted to extract the fetus.<sup>237</sup> If a pregnancy is at nineteen weeks—which is how far along Gonzalez was—the usual method for termination is dilation and evacuation (D&E).<sup>238</sup> The cervix is dilated and the stillborn is evacuated with suction and/or forceps.<sup>239</sup> Whether Gonzalez’s medical team was afraid of legal consequences or personally opposed to D&E simply because it is also used in abortions, their decision to put her through a c-section is alarming. As explained above, a c-section is a major surgery with accompanying risks and a long recovery time. D&E, on the other hand, is “evidence-based and medically preferred because it results in the fewest complications for women compared to alternative procedures.”<sup>240</sup> The anti-abortion movement’s inability to accept that abortions are necessary healthcare procedures is putting people’s lives at risk. Medical schools in abortion-hostile states are largely not teaching students how to perform abortions.<sup>241</sup> A medically unnecessary c-section is crude and cruel substitute for a safe abortion.

Brittany Watts’s troubling arrest was also the result of hospital staff delaying care. When Watts went to the hospital because she was leaking fluid, she waited eight hours to be treated, but nurses told her they were “still waiting” to see what they could do.<sup>242</sup> Watts left the hospital, even though doctors told her she was at risk of hemorrhage, sepsis, and even death.<sup>243</sup> The next day, Watts returned to the hospital.<sup>244</sup> She was given an IV and waited eleven hours for an induction that never happened.<sup>245</sup> Unbeknownst to Watts, the excessive wait time was because her case had been referred to the ethics committee by a doctor.<sup>246</sup> A note from the committee shows that the hospital staff was concerned that Watts thought she was getting an abortion.<sup>247</sup> The note clarified that the ethics committee would approve an induction if she was at “high risk of bleeding or serious infection that could lead to death.”<sup>248</sup> The committee dictated that staff should have a “well documented conversation” with Watts to explain that the

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236. *Id.*

237. *Id.*

238. *Id.*; Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, GUTTMACHER INST. (Feb. 21, 2017), <https://perma.cc/8PUD-JYRE>.

239. Donovan, *supra* note 238.

240. *Id.*

241. Sara Hutchinson, *Abortion Bans Complicate Medical Training, Risk Worsening OB/GYN Shortages*, WASH. POST (Oct. 13, 2023, 6:00 AM EDT), <https://perma.cc/PUB5-DJAL>.

242. Duncan et al., *supra* note 2.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

procedure is meant to prevent harm to her, not to terminate a pregnancy.<sup>249</sup> The committee's concern was misplaced, however, because Ohio law allows abortion up to twenty-two weeks and Watts was twenty-one weeks and six days pregnant.<sup>250</sup>

Watts's interminable wait for healthcare demonstrates how, post-*Dobbs*, hospitals neglect pregnant people for fear of legal consequence. Watts had no idea the ethics committee was considering her own case.<sup>251</sup> No one explained why she was waiting so long. Another doctor who saw Watts noted that Watts had an abruption and needed immediate care before she "bleed[s] to death."<sup>252</sup> However, that one doctor failed to draw the ethics committee's attention away from the politics of abortion. Watts's nurse also seemed to fear legal liability. When she called 911, she told the dispatcher "I need to have someone . . . to direct me on what I need to do."<sup>253</sup> Under fear of legal action, hospitals assume a defensive posture when treating pregnant people that multiplies the risks people face during pregnancy.

States are pursuing fetal personhood rights while pregnant citizens are losing theirs. As legislators pass harsher abortion bans and fetal personhood laws, they must be faced with the risks and realities of pregnancy. The fact that pregnancy is the "process essential to perpetuating human life"<sup>254</sup> does not negate that it is a process that includes pain, injury, and risk of death. Abortion care is a crucial tool in combating maternal mortality and morbidity. There is nothing rational about forcing people to take on unnecessary risks or taking a lifesaving tool away from doctors. Future equal protection arguments for the right to an abortion and against fetal personhood should highlight the incredible physical effects of pregnancy and labor.<sup>255</sup> States claim that abortion restrictions are passed to protect women's health,<sup>256</sup> but the restrictions only make pregnancy more dangerous.<sup>257</sup>

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249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2023 WL 2825871, \*19 (N.D. Tex. Apr. 7, 2023).

255. See Complaint at 18, 25-27, *Planned Parenthood South Atlantic v. South Carolina*, No. 2022-001062 (S.C. 2022), for an example of how to do this.

256. See e.g., Reva B. Siegel, Serena Mayeri, & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 82 (2022).

257. "Of those studies that have been conducted, most have found a significant decrease in maternal mortality when abortion laws became less restrictive." Su Mon Latt, Allison Milner & Anne Kavanagh, *Abortion Laws Reform May Reduce Maternal Mortality: An Ecological Study in 162 Countries*, 19 BMC WOMEN'S HEALTH 30611257, at 2 (2019), <https://perma.cc/F22F-ZDCG>. "One study estimates a total abortion ban in the United States would result in an additional 140 maternal deaths annually." Anna Kheyfets et al., *The Impact of Hostile Abortion Legislation on the United States Maternal Mortality Crisis: A Call for*

## CONCLUSION

While Kiersten Hogan was waiting to be deemed “sick enough” for an abortion, a nurse told her that, because of the hospital’s religious affiliation, the hospital staff cared more about fetuses than pregnant people.<sup>258</sup> The nurse’s revelation is not surprising to those who have followed how fetal protection laws have been used to justify criminal prosecutions, child removal proceedings, and forced medical procedures on pregnant people for decades. However, post-*Dobbs*, states have become more transparent about their unique concerns for the fetus at the expense of the pregnant person, and their goal of comprehensive fetal personhood. Recentring pregnant people and their experiences can accomplish various reproductive rights and justice goals. Fetal protection laws can and should be rewritten to create liability for only third party harm to the pregnant person that results in harm to the fetus, thereby blocking the use of fetal protection laws against pregnant people. Cabining fetal protection laws in this way offers a counterargument to abortion hostile states that are using fetal protection laws to push for fetal personhood laws, which would only lead to further indignities against pregnant people. Finally, properly describing the physical risks of pregnancy in litigation and policy is paramount as the anti-abortion movement attempts to normalize caring more about fetuses than pregnant people.

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*Increased Abortion Education*, 11 FRONTIERS IN PUB. HEALTH 38115843, at 2 (2023), <https://perma.cc/9PPP-W6SR>.

258. Petition, *supra* note 5, at 36.