FETAL FUNERALS: AN UNCONSTITUTIONAL ATTEMPT TO UNDERMINE ABORTION RIGHTS*

I. INTRODUCTION

In the spring of 2016, a new form of protest overwhelmed Indiana Governor Mike Pence. Women assembled in hordes to call his offices, informing his staff (in sometimes graphic detail) about their menstrual cycles—their cramps, their flow, their bloating, and their tampon use:

> Them: 'Good Morning, Governor Pence's office'
>
> Me: 'Good Morning. I just wanted to inform the Governor that things seem to be drying up today. No babies seem to be up in there. Okay?'
>
> Them: (Sounding strangely horrified and chipper at the same time) 'Ma'am, can we have your name?'
>
> Me: 'Sure. It's Sue.'
>
> Them: 'And your last name?'
>
> Me: 'Magina. That's M-A-G-I-N-A. It rhymes with —'
>
> Them: 'I've got it.'[1]

They incessantly posted on Pence's Facebook page, asking, for example, how to properly insert a menstrual cup:

> Dear Governor Pence,
>
> I recently switched from tampons to a menstrual cup and have found that it has an unexpected learning curve. I am having trouble with the position of my cervix at the onset of my period and as a result the cup leaks. Since you are so invested in my reproductive health and clearly understand my anatomy better than I do, I would appreciate any advice you have in cup placement and rotation techniques. Thanks![2]

What caused countless women to contact Governor Pence's office with the details of their sex lives, their menstrual cycles, and other events that may have

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1. Camila Domonoske, *Periods as Protest: Indiana Women Call Governor to Talk About Menstural Cycles*, NPR (Apr. 8, 2016, 2:36 PM), http://www.npr.org/sections/thetwo-way/2016/04/08/473518239/periods-as-protest-indiana-women-call-governor-to-talk-about-menstrual-cycles [perma: http://perma.cc/E4LT-WT5C].

2. Madi Whitman, FACEBOOK (Apr. 6, 2016), http://www.facebook.com/GovernorMikePence/posts/935871833198235 [perma: http://perma.cc/FNB9-7TUY].

occurred in and about their reproductive systems? Pence had just signed one of the most restrictive pieces of anti-abortion legislation in modern history.[3] The bill (which Pence signed "with a prayer") required (among other broad restrictions) the burial or cremation of any aborted or miscarried fetus instead of disposal of these remains as medical waste.[4] Women swiftly responded to the sweeping restrictions, noting that their governor seemed to believe that he knew what was best for the reproductive health of each and every woman across the state.[5] One citizen established a Facebook account titled "Periods for Pence," which became a rallying cry for women across Indiana, writing:

> Fertilized eggs can be expelled during a woman's period without a woman even knowing that she might have had the potential blastocyst in her. Therefore, any period could potentially be a miscarriage without knowledge. I would certainly hate for any of my fellow Hoosier women to be at risk of penalty if they do not "properly dispose" of this or report it. Just to cover our bases, perhaps we should make sure to contact Governor Pence's office to report our periods. We wouldn't want him thinking that THOUSANDS OF HOOSIER WOMEN A DAY are trying to hide anything, would we? We can ALL CALL HIM AT 317-232-4567. REPORT THOSE PERIODS! You should really let him know, since he's so concerned. It will only take a few minutes of your day, but it lets them face an undue and unjust burden, for a change![6]

The movement was more of a success than its founder—later revealed to be Laura Shanley—could have ever imagined.[7] Periods for Pence sprung into the national spotlight, and soon women from across the country were reporting their cycles to Pence's office.[8] Soon after Shanley's protest movement began, Planned Parenthood of Indiana and Kentucky was granted a preliminary injunction, which has prevented the bill from going into effect as of the publication of this Comment.[9]

What is so awful about a law requiring the burial or cremation of fetal remains? These pieces of legislation represent an unsettling trend in the anti-

3. *See, e.g.*, Mitch Smith, *'Periods for Pence' Campaign Targets Indiana Governor over Abortion Law*, N.Y. TIMES (Apr. 7, 2016), http://www.nytimes.com/2016/04/08/us/periods-for-pence-campaign-targets-indiana-governor-over-abortion-law.html [perma: http://perma.cc/SN49-XV9D].

4. *Id.*

5. Kimberly Truong, *The Brilliant Reason This Woman Calls Mike Pence Every Day*, REFINERY 29 (Nov. 4, 2016, 6:00 PM), http://www.refinery29.com/2016/11/128797/who-started-periods-for-pence-womens-movement-founder [perma: http://perma.cc/8ULS-2KWE].

6. *Periods for Politicians/Periods for Pence*, FACEBOOK (Mar. 28, 2016, 9:11 PM) http://www.facebook.com/REALP4P/ [perma: http://perma.cc/FHU6-8K8A]. A fertilized egg being expelled during a woman's period unbeknownst to the woman is well known. *See Conception: How It Works*, UCSF MED. CTR., http://www.ucsfhealth.org/education/conception_how_it_works/index.html [perma: http://perma.cc/48TK-3NBL] (last visited Nov. 6, 2018) ("In nature, 50 percent of all fertilized eggs are lost before a woman's missed menses.").

7. Truong, *supra* note 5.

8. *See, e.g.*, Domonoske, *supra* note 1.

9. Planned Parenthood of Ind. & Ky. v. Comm'r, 194 F. Supp. 3d 818, 822–23 (S.D. Ind. 2016).

abortion movement—a trend by which the fetus is treated like a legal person,[10] leading to instances in which the rights of the fetus may outweigh the rights of the pregnant woman.[11] As a result, fetal burial and cremation laws present a direct threat to the right to a safe, legal abortion.[12]

This Comment examines the development and impact of fetal burial and cremation legislation in the United States. It begins by outlining the history of abortion jurisprudence, tracking the Supreme Court's recognition of abortion access as a civil right.[13] This discussion is followed by an explanation of one of the greatest threats to abortion access: the fetal personhood movement.[14] Finally, the Comment will describe fetal burial and cremation legislation, which is a fairly new mode of attributing person-like rights to the fetus.[15] This Comment argues that fetal burial and cremation laws cannot stand because there is no legal precedent to recognize the fetus as a person;[16] because such laws unconstitutionally intrude upon a woman's right to safe, legal abortion;[17] and because this legislation entangles politics with religion in a way that is forbidden by the Establishment Clause.[18] The Comment concludes with an examination of the future of reproductive rights—including abortion access—under President Trump's anti-choice[19] administration.[20]

10. *See, e.g.*, Emma Green, *State Mandated Mourning for Aborted Fetuses*, ATLANTIC (May 14, 2016), http://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688/ [perma: http://perma.cc/SK7U-57HH].

11. See *infra* Part III.A.1 for a discussion about the dangers presented to the health, safety, and rights of pregnant women.

12. See *infra* Parts III.A.2, III.B for a discussion about the threats posed to abortion rights.

13. *See infra* Part II.A, II.C.

14. *See infra* Part II.B.

15. *See infra* Part II.D.

16. *See infra* Part III.A.4.

17. *See infra* Parts III.B–C.

18. *See infra* Part III.D.

19. Rather than referring to the anti-abortion movement as "pro-life," I will use the term "anti-choice" throughout this Comment. Author and theorist Katha Pollitt explains the reasoning behind this language choice:

> In general it makes sense to call people what they wish to be called and by which they are commonly recognized, but "pro-life" encodes too much propaganda for me: that a fertilized egg is a life in the same sense that a woman is, that it has a right to life as she does, that outlawing abortion saves lives, that abortion is the chief threat to "life" today, and that the movement to ban abortion is motivated solely by these concerns and not also by the wish to restrict sexual freedom, enforce sectarian religious views on a pluralistic society, and return women to traditional roles. It also suggests that those who support legal abortion are pro-death, which is absurd.

KATHA POLLITT, PRO: RECLAIMING ABORTION RIGHTS 13–14 (2014). I will note that many "pro-life" or "anti-choice" individuals prefer the term "anti-abortion." Matthew Schmitz, *Symposium: Whole Life v. Pro-Life?,* HUMAN LIFE REV., (Aug. 25, 2017), http://www.humanlifereview.com/symposium-whole-life-v-pro-life/#MatthewSchmitz [perma: http://perma.cc/5SDM-4RTB]. Nevertheless, I will use the term "anti-choice" for the reasons similar to those outlined by Pollitt. Specifically, the anti-abortion movement is based in restricting female sexuality and forcing women into motherhood—thus eliminating women's freedom to choose their own life paths. *See* POLLITT, *supra*, at 13–14.

20. *See infra* Part III.E. Concerns about the future of reproductive rights are mounting, as

II. OVERVIEW

A. *The Development of Abortion Jurisprudence: The Essential Decisions*

1. *Roe v. Wade*: Establishing Abortion as a Civil Right

The debate surrounding the right to an abortion has existed for most of our nation's history.[21] In 1973, the Supreme Court of the United States recognized a woman's right to an abortion in the landmark *Roe v. Wade* decision.[22] The plaintiffs in *Roe* challenged the constitutionality of a Texas law criminalizing abortion at any stage unless the procedure was performed "for the purpose of saving the life of the mother."[23] They argued that the State's criminal abortion statutes infringed upon a woman's Fourteenth Amendment Due Process right to personal liberty or, alternatively, her right to "personal, marital, familial, and sexual privacy"[24] as recognized in cases such as *Griswold v. Connecticut*.[25]

The Court approached the plaintiffs' claims by analyzing historical and

Trump and his administration have made clear their desire to overturn *Roe*. *See* Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn* Roe v. Wade *Abortion Case*, CNBC (Oct. 19, 2016, 9:31 PM; updated Oct. 19, 2016, 10:00 PM), http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html [perma: http://perma.cc/9RUA-4T7U]. For a discussion of Trump's anti-choice rhetoric and the concerns voiced by the pro-choice movement, see, for example, Anna Diamond, *Trump Strikes at Abortion with a Revived Foreign-Aid Rule*, ATLANTIC (Jan. 23, 2017), http://www.theatlantic.com/health/archive/2017/01/mexico-city-policy/514010/ [perma: http://perma.cc/MK9M-LTXM]; Kim Painter, *Ripped from the Womb? Late-Term Abortion Explained*, USA TODAY (Oct. 21, 2016, 2:38 PM; updated Oct. 21, 2016, 2:59 PM), http://www.usatoday.com/story/news/2016/10/21/doctors-trump-wrong-late-abortions/92515324/ [perma: http://perma.cc/F6NM-K3G4]; Hannah Smothers, *House of Representatives Votes to Pass H.R. 7, an Anti-Abortion Bill That Harms Low-Income Women*, COSMOPOLITAN (Jan. 24, 2017), http://www.cosmopolitan.com/politics/a8635781/house-passes-hr7/ [perma: http://perma.cc/4Z5K-3YW2]; Sabrina Tavernise & Sheryl Gay Stolberg, *Abortion Foes, Emboldened by Trump, Promise 'Onslaught' of Tough Restrictions*, N.Y. TIMES (Dec. 11, 2016), http://www.nytimes.com/2016/12/11/us/abortion-foes-donald-trump-restrictions-politics.html?utm_source=nar.al&utm_medium=urlshortener&utm_campaign=FB&_r=2 [perma: http://perma.cc/E284-K79Q]; Editorial Bd., *Protecting Reproductive Rights Under Donald Trump*, N.Y. TIMES (Dec. 7, 2016), http://www.nytimes.com/2016/12/07/opinion/protecting-reproductive-rights-under-donald-trump.html [perma: http://perma.cc/G3TP-7ZAY] [hereinafter *Protecting Reproductive Rights*].

21. *See, e.g.*, MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 627–28 (2015); Roe v. Wade, 410 U.S. 113, 138–41 (1973).

22. 410 U.S. 113, 164 (1973).

23. *Roe*, 410 U.S. at 117–18 (quoting TEX. PENAL CODE arts. 1191–94, 1196).

24. *Id.* at 129 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

25. 381 U.S. 479 (1965). The *Griswold* decision was based in the idea that the Bill of Rights guarantees certain "zones of privacy." *Id.* at 484. The Court explained that in *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), it had protected the First Amendment right to associate freely and to have privacy in one's associations. *Id.* at 483. Similarly, the Third Amendment guaranteed the right to privacy in one's home by prohibiting the quartering of soldiers without the homeowner's consent. *Id.* at 484. The Fourth Amendment also protected privacy by protecting individuals from unreasonable search and seizure of "their persons, houses, papers, and effects." *Id.* The *Griswold* Court found that marriage was a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485. The privacy rights associated with the marriage relationship guaranteed couples the right to obtain and utilize birth control without governmental intrusion. *Id.*

scientific developments and their intersections with the law. It began by noting that three justifications for criminal abortion laws had allowed such statutes to develop in the nineteenth century and continue to exist.[26] First, the criminalization of abortion was closely related to the old-fashioned desire to suppress "illicit sexual conduct."[27] The Court quickly rejected this justification, as even the defendants acknowledged that it could not stand as a legitimate state interest in the modern era.[28] Second, the criminalization of abortion had developed in a time when abortion was a dangerous medical procedure; as a result, such laws were justified in their protection of the health and safety of pregnant women.[29] In analyzing this rationale, the Court looked to scientific and medical evidence indicating that the abortion procedure had become "relatively safe" in recent years.[30] However, the Court acknowledged that even with safer abortion procedures, the state's interest in maternal health and safety did not disappear.[31] Thus, the Court found that the safety justification supported a legitimate state interest.[32] Finally, the Court noted that an alleged state interest in "protecting prenatal life" had historically motivated the regulation or criminalization of abortion.[33] It responded to this justification by acknowledging that the state may have an interest where "*potential* life is involved"—or after a fetus reaches viability.[34]

With these interests and rationales in mind, the Court turned its attention to the constitutional right to privacy. It found that the right to privacy encompassed the decision to have an abortion and determined that severe limitations on abortion access would undermine this right.[35] However, the Court also determined that "this right is not unqualified" and explained that it must be balanced with the state's legitimate interests in safety and potential life.[36] In

26. *Roe*, 410 U.S. at 147.

27. *Id.* at 148.

28. *Id.*

29. *Id.* at 149.

30. *Id.*

31. *Id.* at 149–50.

32. *Id.* at 150.

33. *Id.*

34. *Id.* The Court defined "viability" as the time at which a "fetus . . . presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. The Court did not explain where "viability" occurs in the context of its trimester framework. *See id.* at 164–66. This is likely because the point at which viability occurs may vary from pregnancy to pregnancy and as scientific knowledge evolves. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64 (1976) ("[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.").

35. *Roe*, 410 U.S. at 154. The state could, however, interfere at two points. *Id.* at 164–65. First, the state could regulate abortion after the first trimester for the purpose of protection of maternal health. *Id.* at 164. Second, the state could step in after viability to protect its interest in potential life. *Id.* at 164–65.

36. *Id.* at 154.

terms of drawing lines to determine which regulations would be appropriate, the Court found that the first trimester was the "'compelling' point" for protecting maternal safety and that viability was the "'compelling' point" for protecting the State's interest in potential life.[37] As a result, the *Roe* Court held that during the first trimester and prior to viability, the state could not interfere with a woman's right to a legal abortion.[38]

2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*: Introducing the Undue Burden Standard

Although *Roe* recognized abortion access as a fundamental right, that legal standard was altered in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[39] In *Casey*, the Court responded to continuous requests to overrule *Roe* and to eliminate a "woman's right to terminate her pregnancy in its early stages."[40] In an opinion authored by Justice O'Connor, the Court refused to honor those requests.[41] Instead, it affirmed "*Roe*'s essential holding" and refined the standard by which courts should review challenges to abortion rights.[42]

Justice O'Connor's plurality opinion drew upon principles of personal liberty and stare decisis to affirm a woman's right to abortion access.[43] In reaffirming *Roe*'s central holding, the Court explained first that a woman has a right to elect to have an abortion prior to viability without undue interference by the state.[44] Second, it affirmed that the state has the ability to restrict abortions after viability, as long as the law contains exceptions for pregnancies dangerous to the life or health of the mother.[45] Finally, the *Casey* Court maintained *Roe*'s principle that the state has legitimate interests in both the health of the woman and the potential life of the fetus she is carrying; these interests are not mutually exclusive and do not contradict one another.[46]

However, the *Casey* Court rejected *Roe*'s trimester framework[47] and its definition of abortion as a fundamental right.[48] The Court replaced the "rigid" trimester approach with the viability standard.[49] Drawing the line at viability ensured that the state could protect its interest in potential life, while ensuring that a woman's right to choose would "not become so subordinate to the State's

37. *Id.* at 163.

38. *Id.* at 164.

39. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

40. *Id.* at 844.

41. *See id.* at 846.

42. *Id.* at 846, 877 (O'Connor, Kennedy, Souter, JJ., separate opinion).

43. *Id.* at 853 (plurality opinion) ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

44. *Id.* at 846.

45. *Id.*

46. *Id.*

47. *Id.* at 873 (O'Connor, Kennedy, Souter, JJ., separate opinion).

48. *See id.* at 875.

49. *Id.* at 872.

interest in promoting fetal life that her choice exists in theory but not in fact."[50] In place of the fundamental right approach, the Court adopted the undue burden standard, which stands today as the proper means by which to evaluate challenged abortion regulations.[51] The Court explained that that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[52]

In the first application of the undue burden standard to restrictions on abortion access, the *Casey* Court analyzed provisions of the Pennsylvania Abortion Control Act of 1982.[53] The specific provisions at issue included an informed consent requirement,[54] a parental consent provision,[55] and a spousal notice and consent requirement.[56]

The Court first upheld the Act's informed consent requirement.[57] Specifically, it addressed the "waiting period" imposed by this requirement.[58] The Court found that it was a "reasonable measure" to require women to receive accurate information about fetal development and resources available to them.[59] The requirement was a means of allowing women to make an informed choice, and therefore it did not impose a substantial obstacle.[60] Further, the requirement contained exceptions for medical emergencies and allowed physicians to exercise their best medical judgment.[61] Finally, any financial burdens or time delays that resulted from the waiting period were not enough to constitute substantial obstacles.[62] The requirement only imposed a burden on access to "abortion on demand," which was a right that the *Roe* decision did not grant.[63] For these reasons, the requirement of informed consent and the mandatory waiting period did not impose an undue burden on the right to an abortion.[64] Applying its

50. *Id.*

51. *Id.* at 877.

52. *Id.* at 878.

53. *Id.* at 844 (plurality opinion); Abortion Control Act, Pub. L. No. 138, 1982 Pa. Laws 476; Act of Nov. 17, 1989, Pub. L. No. 64, 1989 Pa. Laws 592 (amending Abortion Control Act); Act of Mar. 25, 1988, Pub. L. No. 31, 1988 Pa. Laws 262 (same). All three of these acts were codified in (among other locations) 18 PA. STAT. AND CONS. STAT. ANN. §§ 3203–09 (West 1990).

54. Tit. 18, § 3205.

55. Tit. 18, § 3206.

56. Act of Nov. 17, 1989, Pub. L. No. 64, § 3, 1989 Pa. Laws 592 (codified at tit. 18, § 3209), *invalidated by Casey*, 505 U.S. at 893–94.

57. *Casey*, 505 U.S. at 881 (O'Connor, Kennedy, Souter, JJ., separate opinion). This provision required "that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'" *Id.* (quoting tit. 18, § 3205).

58. *Id.*

59. *Id.* at 883.

60. *Id.*

61. *Id.* at 883–84.

62. *Id.* at 886–87.

63. *Id.* at 887.

64. *Id.* at 884–85, 887.

analysis of the informed consent and waiting period requirement, the Court also upheld the statute's parental consent mandate.[65] Though the waiting period and parental consent provisions were permitted to stand, the Act's spousal consent requirement failed the undue burden analysis.[66]

In invalidating the spousal consent provision, the Court focused on a woman's right to safety[67] and bodily autonomy.[68] Importantly, the Court invalidated the spousal consent provision despite the fact that it would only impact a small proportion (roughly "one percent") of women.[69] As the Court explained, "the analysis does not end with the one percent of women upon whom the statute operates; it begins there."[70] Justice O'Connor explained that courts should examine abortion restrictions based on their impact on the women they affect.[71] The Court held that the spousal notification requirement violated the undue burden standard because, in most cases when it was relevant, the requirement imposed a substantial obstacle in the path of women seeking abortions.[72]

3. *Gonzales v. Carhart*: The Awakening of the Fetal Personhood Movement

Although the *Casey* Court applied the undue burden standard in analyzing the constitutionality of the provisions in question, it left little instruction as to how future courts should apply its "substantial obstacle" test.[73] Nonetheless, the undue burden standard was applied again in *Gonzales v. Carhart*.[74] *Gonzales* is

65. *Id.* at 899.

66. *Id.* at 893–94 (plurality opinion).

67. *Id.* at 893 ("[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion.").

68. *Id.* at 896 ("It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.").

69. *Id.* at 894 ("[Respondents] begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions.").

70. *Id.*

71. *Id.* ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

72. *Id.* at 895.

73. *See, e.g.*, Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2027 (1994) ("[T]he [*Casey*] joint opinion's failure to provide a systematic methodology by which to apply the standard undermine[d] the standard's force.").

74. Gonzales v. Carhart, 550 U.S. 124, 146 (2007).

most significant for its break from the Court's historical requirement "that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health."[75] Although *Roe* and *Casey* stressed the importance of balancing the state's interests in potential life and maternal safety,[76] the *Gonzales* decision departed from these concerns.[77] The Court admittedly took "moral concerns" and "respect for human life" into account in upholding a ban on intact dilatation and evacuation—a form of abortion that Congress had named "partial birth abortion" and likened to "the killing of a newborn infant."[78] This language was representative of a turning point in abortion legislation and jurisprudence because of its relation to "moral concerns" for fetal life.[79] Opponents of abortion began to shift their focus to deeming the fetus to be a legal person entitled to protection under the law.[80] The life-centered, anti-abortion attitudes expressed by Congress and by the *Gonzales* majority were part of an attack on abortion rights known as the fetal personhood movement.[81]

B. Fetal Protection Laws and the Awakening of the Personhood Movement

The fetal personhood movement is hardly new; in fact, it has existed for

75. *Id.* at 172 (Ginsburg, J., dissenting) (citing Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 327–28 (2006); *Casey*, 505 U.S. at 879 (plurality opinion); Stenberg v. Carhart, 530 U.S. 914, 929 (2000)).

76. Roe v. Wade, 410 U.S. 113, 154 (1973); *Casey*, 505 U.S. at 846.

77. *See Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting). In her dissent, Justice Ginsburg explained that the *Gonzales* decision departed from abortion-access precedent in two ways: (1) by "blur[ring] the line . . . between previability and postviability abortions," and (2) by "bless[ing] a prohibition with no exception safeguarding a woman's health." *Id.* at 171; *see also* Nora Christie Sandstad, Comment, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 LAW & INEQ. 171, 187–88 (2008).

78. *Gonzales*, 550 U.S. at 158–60 (quoting 117 Stat. 1202, notes following 18 U.S.C. § 1531 ¶ 14(L) (2000)).

79. *Id.*; *see also* Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in* Gonzales v. Carhart, 94 VA. L. REV. 1451, 1456–57 (2008) (explaining that a "fetal life discourse" was at work in *Gonzales*). This is not to say that the Justices in earlier jurisprudence were unconcerned with the moral implications of abortion. They clearly were. *See, e.g.*, *Casey*, 505 U.S. at 850 ("Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."). Instead, *Gonzales* marked a huge departure, not only in its language, but in the application of personal, moral principles to legal analysis.

80. *See* Ivey, *supra* note 79, at 1459 (discussing *Gonzales*'s "fetal life discourse" and explaining the argument it creates in favor of "respect for human life, particularly for the vulnerable"); *see also, e.g.*, Linda Greenhouse, *Justices Back Ban on Method of Abortion*, N.Y. TIMES (Apr. 19, 2007), http://www.nytimes.com/2007/04/19/washington/19scotus.html?_r=0 [perma: https://perma.cc/W57E-JBQD] (noting that then-President Bush "welcomed the ruling, saying: 'The Supreme Court's decision is an affirmation of the progress we have made over the past six years in protecting human dignity and upholding the sanctity of life. We will continue to work for the day when every child is welcomed in life and protected in law'").

81. *Personhood*, REWIRE (last updated Nov. 13, 2017), http://rewire.news/legislative-tracker/law-topic/personhood/ [perma: http://perma.cc/T4H8-A9HE].

several decades.[82] According to one organization, the main goal of the fetal personhood movement is to redefine the word "person" to "include a fertilized egg, embryo, or fetus, with the intent of outlawing abortion."[83] Over the course of time, the movement has manifested in various ways. Although explicit laws attempting to grant full personhood status to the unborn have generally failed,[84] more subtle attempts to grant rights to fetuses have succeeded in the state and federal systems.[85] These attempts include incorporating the word "fetus" in criminal statutes, the civil and criminal prosecution of pregnant women, and fetal pain laws.[86]

1. Legislative Efforts to Recognize Fetuses as Legal Persons

As illustrated by cases such as *Roe* and *Casey*, courts have been reluctant to recognize fetuses as legal persons.[87] This, however, has not stopped legislatures from granting protections to fetuses under the criminal law.[88] In *Keeler v.*

82. *Id.*; *see also, e.g.*, Jean Reith Schrodel et al., *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 93 (2000) (noting that the movement to grant the fetus separate legal rights and to recognize it as a human being was jump-started after *Roe*); Rachel Warren, Comment, *Pro [Whose] Choice: How the Growing Recognition of a Fetus' Right to Life Takes the Constitutionality out of* Roe, 13 CHAP. L. REV. 221, 232 (2009) (explaining that in the years following *Roe*, increasing numbers of states began to enact fetal personhood measures, such as including fetuses in homicide statutes).

83. NARAL PRO-CHOICE AM., "PERSONHOOD" MEASURES: EXTREME AND DANGEROUS ATTEMPTS TO BAN ABORTION 1 (2017), http://www.prochoiceamerica.org/media/fact-sheets/abortion-personhood.pdf [perma: http://perma.cc/82HQ-BFGY]. The current definition of "person" varies state to state, but as discussed *infra* Part II.B.1, fetuses are not considered legal persons.

84. *Id.*; *see also* Zach Schonfeld, *Fetal 'Personhood' Laws Defeated in Colorado and North Dakota*, NEWSWEEK (Nov. 5, 2014, 3:27 PM), http://www.newsweek.com/fetal-personhood-laws-defeated-colorado-and-north-dakota-282545/ [perma: https://perma.cc/T2W4-3YTF] ("In Colorado, voters struck down Amendment 67, which would have included unborn fetuses as 'children' in the state's criminal code . . . . It is the third such Colorado 'personhood' measure to be struck down in recent years . . . . North Dakota voters similarly rejected a ballot measure that would have added to the state constitution the words, 'The inalienable right to life of every human being at any stage of development must be recognized and protected.'").

85. NARAL PRO-CHOICE AM., *supra* note 83, at 1–2.

86. See *infra* Parts II.B.1–3 for a discussion of these means of attempting to establish fetal personhood.

87. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 150 (1973); *see also* Keeler v. Superior Court, 470 P.2d 617, 618 (Cal. 1970) (refusing to apply a murder statute in the death of a fetus because a fetus is not a human being that has been born alive), *superseded by statute*, Act of Sept. 27, 1970, ch. 1311, 1970 Cal. Stat. 2440; State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997) (choosing not to apply homicide statutes in the death of a fetus, citing the "born alive" rule); Patel v. State, 60 N.E.3d 1041, 1053 (Ind. Ct. App. 2016) (distinguishing between a fetus and a child in declining to apply a neglect of a depended statute to protect a fetus).

88. *See* CAL. PENAL CODE § 187(a) (West 2017) (as amended by Act of Sept. 17, 1970, ch. 1311, 1970 Cal. Stat. 2440); *see also, e.g.*, ALA. CODE § 13A-6-1(a)(3) (2017) (including the fetus in the definition of "person" for purposes of applying criminal statutes); ARIZ. REV. STAT. ANN. § 13-1103(B) (2017) (explicitly classifying the killing of an "unborn child" through injury to the mother as manslaughter); *id.* § 13-1104(A) (stating that a person who "intentionally causes the death of another person, including an unborn child" is guilty of second degree murder); MISS. CODE ANN. § 97-3-19(1)(d) (West 2017) (making it first-degree murder to kill "with deliberate design to effect the death

Superior Court,[89] the Supreme Court of California found that the state's murder statute did not include an unborn, viable fetus.[90] It held that the words "human being" under the statute were intended to include only those who were "born alive."[91] The California legislature reacted almost immediately to the *Keeler* decision, modifying the murder statute to read "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought."[92] Although the California murder statute does not explicitly define a "fetus" as a "human being," it nevertheless grants the fetus a heightened—and previously nonexistent—level of protection under the law.[93]

The incorporation of fetuses into murder statutes is only one method by which legislatures have pushed for fetal rights in recent years. Many state legislatures have developed laws specifically intended to punish individuals who cause the death or injury of a woman's fetus.[94] The federal government has also passed legislation creating increased protection for fetuses. The Unborn Victims of Violence Act (UVVA)[95] was passed in 2000, following the killing of Laci Peterson and the fetus she carried at the hands of her husband.[96] The law "penalizes the injury or killing of an 'unborn child' during the course of committing a crime against a pregnant woman."[97] While the UVVA's language ostensibly grants protection against heinous crimes like the Peterson murder, the statute has another incidental effect—granting a person-like level of protection to the fetus.[98]

Although such "fetal protection" laws[99] were originally intended to protect

of an unborn child").

89. 470 P.2d 617, 621 (Cal. 1970), *superseded by statute*, Act of Sept. 27, 1996, ch. 1023, 1996 Cal. Stat. 6015.

90. *Id.*

91. *Id.*

92. CAL. PENAL CODE § 187(a) (West 2017) (as amended by Act of Sept. 17, 1970, ch. 1311, 1970 Cal. Stat. 2440).

93. In the State of California, murder in the first-degree is punishable by "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." CAL PEN. CODE § 190(a). Prior to the 1970 amendment of the murder statute, California did not have a feticide statute. *Keeler*, 470 P.2d at 621.

94. *See, e.g.*, State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997).

95. Unborn Victims of Violence Act of 2004, Pub. L. No. 108–212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 (2012)).

96. *Id.*; *see also* Geneva Brown, *Bei Bei Shuai: Pregnancy, Murder, and Mayhem in Indiana*, 17 J. GENDER RACE & JUST. 221, 234 (2014).

97. Brown, *supra* note 96, at 235 (citing 18 U.S.C. § 1841).

98. *Id.* See *infra* text accompanying notes 284–86 text for a discussion of the personhood-focused intent behind the UVVA. *See also Protecting Our Silent Victims: The Unborn Victims of Violence Act of 2000: Hearing on S. 1673 Before the S. Comm. on the Judiciary*, 106th Cong. 3–4 (2000) (statement of Sen. Orrin Hatch, Chairman, Comm. on the Judiciary).

99. Legal theorist Michele Goodwin uses the phrase "fetal protection laws" to refer to any legislation that purports to protect the fetus. Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CAL. L. REV. 781, 787 (2014). Examples of "[s]uch legislation include[] feticide laws, drug policies, statutes criminalizing maternal conduct, and statues authorizing the confinement of pregnant women to protect the health of fetuses." *Id.* (footnotes

the pregnant woman and her right to carry a child—her bodily autonomy, ironically—they have been increasingly used to punish a wide range of actions performed by a woman during her pregnancy.[100] Like the Court in *Gonzales*, state actors citing such "fetal protection laws" in civil and criminal proceedings risk prioritizing the health and safety of the fetus over the health, safety, and constitutional rights of the pregnant woman.[101]

2. Civil and Criminal Confinement of Women to Protect the Health of the Fetus

Fetal protection laws may have a medically or psychologically adverse impact on mothers. For example, twenty-five weeks into her pregnancy, Samantha Burton visited her doctor for a normal prenatal examination.[102] She was told that for the sake of her fetus's health, she would be required to remain on bed rest for the remaining fifteen weeks of her pregnancy.[103] When she refused, hospital officials obtained a court order under which Samantha was required "to stay in bed at Tallahassee Memorial Hospital and to undergo 'any and all medical treatments' her doctor, acting in the interests of the fetus, decided were necessary."[104] The conditions in which Samantha was kept were "emblematic of solitary confinement; she remained alone in a dreary hospital room until her fetus died and was surgically removed three days later."[105]

Although Samantha Burton's confinement was civil, many other women face criminal prosecutions for actions performed during their pregnancies.[106] Recently, the state of Indiana charged Bei Bei Shuai with attempted feticide and murder.[107] Eight months into her pregnancy, Bei Bei was suffering from

omitted). The UVVA and California's post-*Keeler* murder statute provide further examples of such legislation, as they attempt to protect the fetus from harm and punish individuals for harming the fetus.

100. *See, e.g.*, Ruth Graham, *For Pregnant Women, Two Sets of Rights in One Body*, BOS. GLOBE (Feb. 16, 2014), http://www.bostonglobe.com/ideas/2014/02/16/for-pregnant-women-two-sets-rights-one-body/5Pd6zntIViRBZ9QxhiQgFJ/story.html [perma: http://perma.cc/6ZHG-HCMN] ("Thanks to a patchwork of state court decisions and laws passed to protect pregnant women, punish abusers, promote public health, and discourage abortions, fetuses have steadily been gaining legal rights in American courts—rights that often conflict with those of the women who carry them.").

101. *Id.*; *see also* Goodwin, *supra* note 99, at 792 (describing the experience of Alicia Beltran, who in the name of protecting her fetus from a drug addiction that she had previously overcome, was "arrested, shackled, and confined by court order to a drug treatment center for seventy-eight days," the duration of her pregnancy, "after she refused a doctor's orders to take a potentially dangerous opiate blocker").

102. Goodwin, *supra* note 99, at 792.

103. *Id.*

104. Lisa Belkin, *Is Refusing Bed Rest a Crime?*, N.Y. TIMES (Jan. 20, 2010, 12:50 PM), http://parenting.blogs.nytimes.com/2010/01/12/is-refusing-bed-rest-a-crime/?_r=0 [perma: http://perma. cc/BBR8-GZBB].

105. Goodwin, *supra* note 99, at 799–800.

106. *See id.*

107. Brown, *supra* note 96, at 221.

depression after the father of her unborn child ended their relationship.[108] Bei Bei ingested rat poison in an attempt to take her own life.[109] While she survived, her child was delivered via emergency C-section and died several days later.[110] Mourning the loss of her child, whom she had named Angel, and dealing with her own mental health issues, Bei Bei soon found herself arrested and charged with attempted feticide and murder in the death of the baby.[111] After over a year in prison, Bei Bei pleaded guilty to criminal recklessness.[112]

3. Fetal Pain Laws and Federal Efforts to Grant Personhood to the Fetus

Other states have gone beyond criminal prosecutions and sought other means by which to increase the rights of fetuses. "Fetal pain" statutes, for example, disallow abortion after approximately twenty weeks, asserting that at that point in gestation, the fetus can experience pain.[113] Such statutes have been passed in several states.[114] The U.S. House of Representatives has also made an attempt to pass fetal pain legislation through the Pain-Capable Unborn Child Protection Act.[115] Congresswoman Marsha Blackburn, a Republican from Tennessee, explained that the Act would end the "blight of late-term abortion" and protect "the most vulnerable people in our society."[116]

108. *Id.* at 224.

109. *Id.*

110. *Id.*

111. *Id.*at 224–226.

112. Graham, *supra* note 100. The plea deal in Ms. Shuai's case was likely impacted by the Indiana Court of Appeals' decision in *Patel v. State*, 60 N.E.3d 1041, 1041 (Ind. Ct. App. 2016). Purvi Patel was convicted of felony neglect of a dependent and felony feticide after she attempted to end a pregnancy at home. The Court of Appeals vacated the convictions, noting that the neglect statute did not apply to *future* dependents (like Ms. Patel's unborn fetus) and that the feticide statute was not intended to be applied against pregnant women seeking abortions. *Id.* at 1053, 1055–56. In *Patel*, then, the Indiana Court of Appeals affirmed the principle that a fetus cannot be equated with a "person" or a "human being" under the law—undermining an attempt to apply fetal protection laws against pregnant women. *Id.* at 1056.

113. *See* Goodwin, *supra* note 99, at 785 n.14.

114. *Id.*; Jeanne Mancini, *Sensible Fetal Pain Laws*, MARCH FOR LIFE (June 8, 2016), http://marchforlife.org/fetal-pain-laws/ [perma: http://perma.cc/B8XF-ZLYH] (explaining that South Carolina recently joined sixteen other states in banning abortion "halfway through pregnancy" (after nineteen weeks in the case of South Carolina's law) due to concerns about fetal pain). The Guttmacher Institute published a report on abortion bans after twenty weeks. *State Policies on Later Abortions*, GUTTMACHER INST. (Oct. 1, 2017), http://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [perma: http://perma.cc/C6GJ-B7MN]. Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, and Wisconsin all base their twenty-week bans on the assertion that a fetus can feel pain at eighteen weeks. *Id.*; *see also, e.g.*, ALA. CODE § 26-23B-5 (2017); KAN. STAT. ANN. § 65-6724 (West 2017); 63 OKL. STAT. ANN. tit. 63, § 1-745.5 (West 2017).

115. Goodwin, *supra* note 99, at 785 n.14.

116. *Blackburn: We Have a Moral Obligation to Protect Women and Babies from Dangerous Late-Term Abortions*, NAT'L RIGHT TO LIFE NEWS TODAY (June 18, 2014), http://www.nationalrighttolifenews.org/news/2014/06/blackburn-we-have-a-moral-obligation-to-protect-women-and-babies-from-dangerous-late-term-abortions/#U70LbI1dWYk [perma: http://perma.cc/TW6U-A84V]; *see also* Pain-Capable Unborn Child Protection Act, H.R. 36, 114th Cong. (2015). The

The idea that fetuses can feel pain at twenty weeks has been debated fiercely.[117] Advocates of fetal pain legislation point to the use of anesthetics during fetal surgery as evidence of fetal pain.[118] They claim that "[i]f the child who is waiting for surgery can feel pain, the child who is waiting for abortion can feel pain."[119] Medical professionals have noted, however, that anesthesia is used during fetal surgeries for other reasons—mainly to inhibit fetal movement, which makes surgery safer for the pregnant woman and the fetus.[120] Individuals who oppose fetal pain legislation assert that scientists are unsure if or when a fetus can sense pain.[121] Medical professionals are unsure exactly when pain perception develops;[122] many believe that the "capacity for conscious perception of pain can arise only after thalamocortical pathways begin to function, which may occur in the third trimester around 29 to 30 weeks' gestational age."[123] Proponents of fetal pain legislation, on the other hand, claim that pain can be perceived after the development of the thalamus, which occurs at about twenty weeks' gestation.[124] Despite conflicting reports about pain perception, fetal pain legislation is increasingly common.[125] Fifteen states have passed laws banning abortion after twenty or twenty-two weeks, based on the assertion that a fetus can feel pain at this stage of development.[126]

C. Whole Woman's Health v. Hellerstedt*: A Groundbreaking Abortion Rights Decision*

Abortion rights activists secured a victory in June of 2016, when the Supreme Court decided *Whole Woman's Health v. Hellerstedt*.[127] In determining

Pain-Capable Unborn Child Protection Act was recently resurrected, passing in the House of Representatives in October 2017. H.R. 36, 115th Cong. (2017) (as passed by House, Oct. 3, 2017).

117. MURRAY & LUKER, *supra* note 21, at 771.

118. Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sept. 16, 2013), http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?pagewanted=2&_r=2&hp&&pagewanted=all [perma: http://perma.cc/E9TF-8NTP].

119. *Id.*

120. *Id.*

121. *See generally* Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947 (2005).

122. Belluck, *supra* note 118.

123. Lee et al., *supra* note 121, at 952. Thalamocortical pathways relay sensory information to the cortex and aid in the processing of such sensory information. *See, e.g.*, THALAMOCORTICAL PATHWAYS: VIRTUAL NEUROANATOMY, CARNEGIE MELLON U. (2014), http://www.psy.cmu.edu/~coaxlab/documents/Corticothalamic_pathways.pdf [perma: http://perma.cc/RN3K-CHD5] (explaining the function of thalamocortical pathways).

124. Belluck, *supra* note 118. The thalamus is a part of the brain that sends and translates neural impulses. *Thalamus*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/science/thalamus [perma: https://perma.cc/WE3J-7BKQ] (last visited Nov. 6, 2018).

125. *Id.*

126. See *supra* note 114 for a discussion of these laws and citations to Alabama, Kansas, and Oklahoma fetal pain legislation.

127. 136 S. Ct. 2292, 2309 (2016).

the constitutionality of Texas's House Bill 2,[128] the *Whole Woman's Health* Court analyzed the *Casey* undue burden standard and provided a more workable understanding of its meaning—one in which costs to clinics, nonexistent health benefits to women, and ideologically-based discrimination against the abortion procedure (namely, making access to abortion difficult because of religious or moral objections to the procedure) could qualify as a "substantial obstacle" for women seeking abortion care.[129] The challenged provisions in *Whole Woman's Health* were known as the "admitting-privileges requirement" and the "surgical-center requirement."[130] The admitting-privileges requirement mandated that the physician providing or inducing an abortion have admitting privileges at a hospital within thirty miles of the abortion location.[131] The surgical-center requirement mandated that abortion clinics maintain the same minimum standards as ambulatory surgical centers.[132]

The Court began by describing in detail the undue burden standard.[133] It explained that a statute is unconstitutional when it furthers a valid state interest but creates a substantial obstacle for a woman seeking an abortion.[134] The undue burden standard and its "substantial obstacle" language applied to any abortion regulations, including "[u]nnecessary health regulations."[135] In *Whole Woman's Health*, the Fifth Circuit Court of Appeals implied that courts should not consider whether or not a regulation provides medical benefits to women when applying the undue burden standard.[136] This, the Supreme Court pointed out, was incorrect.[137] It explained that the *Casey* rule mandates that courts evaluate the burdens that a law creates for abortion access along with any benefit conferred by the legislation.[138] With this understanding in mind, the Court proceeded to its discussion of the provisions at issue.

The Court first addressed the admitting-privileges requirement.[139] The alleged purpose of this provision was to ensure easy, quick access to a hospital in the event of complications arising during the abortion procedure.[140] Agreeing with the United States District Court for the Western District of Texas, the Supreme Court found that the provision conferred "no such health-related

128. H.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013).

129. *See Whole Woman's Health*, 136 S. Ct. at 2300.

130. *Id.*

131. *Id.* at 2300 (citing TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2015)).

132. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 245.010(a)). The regulations for ambulatory surgical centers are laid out in TEX. HEALTH & SAFETY CODE ANN. § 243.001–050.

133. *Whole Woman's Health*, 136 S. Ct. at 2309.

134. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (O'Connor, Kennedy, Souter, JJ., separate opinion)).

135. *Id.* (alteration in original) (quoting *Casey*, 505 U.S. at 878).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 2310.

140. *Id.* at 2311.

benefit."[141] In drawing this conclusion, the Court noted the significant evidence concluding that abortion is extremely safe, and that even when complications do arise, whether a doctor has admitting privileges at a hospital does not determine the quality of care that a patient receives.[142] Additionally, the admitting-privileges requirement placed a substantial obstacle in the path of women seeking abortion care.[143] The Court explained that as the admitting-privileges requirement began to be enforced, the total number of abortion providers in Texas "dropped in half, from about 40 to about 20."[144] This was no coincidence—the Court noted that there was sufficient evidence in the record to support the conclusion that the admitting-privileges requirement directly caused these closures because abortion providers face obstacles in obtaining admitting privileges.[145] These closures would inevitably lead to "fewer doctors, longer waiting times, and increased crowding" as well as "increased driving distances" for women seeking a clinic.[146] With this combination of burdens, and lack of a health benefit, the Court concluded that the admitting-privileges provision created an undue burden for Texas women seeking abortions.[147]

In terms of the surgical-center requirement, the Court again found that the provision provided "no benefit."[148] Instead, the requirement had such a "tangential relationship to patient safety" that, rather than being necessary, it was "arbitrary."[149] The Court compared the safety of abortion to that of other outpatient procedures which were much less regulated in the state of Texas.[150] Abortion is an extremely safe procedure, resulting in only five deaths in Texas between 2001 and 2012.[151] In fact, abortion is much safer than childbirth or colonoscopy—and Texas allowed these other procedures to occur in conditions less regulated than abortion.[152] The Court determined that "[t]hese facts indicate

141. *Id.*

142. *Id.* at 2311–12 (explaining that even counsel for Texas was unable to name "a single instance in which the . . . requirement would have helped even one woman obtain better treatment").

143. *Id.* at 2312.

144. *Id.*

145. *Id.* at 2313. This struggle arises because many hospitals require a certain number of patient intakes per year before granting admitting privileges. *Id.* Due to the minimal complications arising from abortion procedures, many providers cannot meet these minimum intake requirements. *Id.*

146. *Id.* The Court noted specifically that "after the admitting-privileges provision went into effect, the 'number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000.'" *Id.* (omissions in original) (quoting Whole Woman's Health v. Lakey, 46 F. Supp. 3d 637, 681 (W.D. Tex. 2014), *vacated and remanded sub nom* Whole Woman's Health v. Hellerstedt, 833 F.3d 565 (5th Cir. 2016)).

147. *Id.* at 2313.

148. *Id.* at 2315.

149. *Id.* at 2316.

150. *Id.* at 2315. These procedures include childbirth and colonoscopy. *Id.*

151. *Id.*

152. *Id.* ("Nationwide, childbirth is 14 times more likely than abortion to result in death, but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. Medical treatment after an incomplete miscarriage often involves a procedure

that the surgical-center provision imposes a requirement that . . . is not based on differences between abortion and other surgical procedures that are reasonably related to preserving women's health" and found that the statute simply discriminated against the abortion procedure itself.[153]

The Court found further reason why the surgical-center requirement contained no health benefit. The surgical-center requirement would lead to massive costs for abortion facilities, closures because most facilities would not be able to meet these costs, and thus increased demand at the few remaining facilities.[154] In other words, "in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities."[155] The Court explained that "[h]ealthcare facilities and medical professionals are not fungible commodities," and increased demand would have a negative impact on the quality of care provided by abortion facilities.[156] If anything, these changes would be harmful to, rather than supportive of, women's health.[157]

Based on the absence of any benefit to health or safety, the overt discrimination against abortion procedures, and the difficulties it would present to women seeking quality abortion care, the Court found that the surgical-center requirement created an undue burden on the constitutional right to an abortion.[158] In so doing, the Supreme Court appears to have concluded that when a regulation causes mass clinic closures, and lacks any medical benefit, it constitutes a substantial obstacle in a woman's path to safe, legal abortion.[159] Thus, the Court provided a clarification of the undue burden standard for use in its future application.

D. New Victories Present New Challenges: The Rise of Fetal Burial and Cremation Laws

Texas introduced new anti-abortion legislation just four days after the decision in *Whole Woman's Health*.[160] This time, the state took its focus away from ostensibly protecting women's health, and concentrated more directly on fetal personhood. Texas proposed a bill that would require clinics to bury or cremate fetal remains—aborted or miscarried—instead of disposing of such

identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions." (citations omitted))

153. *Id.*

154. *Id.* at 2318.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *See id.* at 2313, 2318.

160. Whole Woman's Health v. Hellerstedt, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017) [hereinafter *Whole Woman's Health II*] (granting preliminary injunction).

remains like other medical waste.[161] Critics have called the legislation an invasion of privacy, and experts believe that it would add up to $2,000 to the cost of a single abortion.[162] Although this proposed bill might seem bizarre, Texas is hardly the first state to introduce fetal burial or cremation legislature.[163] Instead, it is one of several states joining the trend that attempts to grant personhood to fetuses while undermining the accessibility and ease of abortion care for women.[164]

1. "What if one day something horrible escaped into the sewer system?"[165]: The Arguments Presented in Favor of Fetal Burial and Cremation

Supporters of fetal burial and cremation legislation generally provide two justifications for such laws. The arguments in favor of such legislation center around claims that fetal remains deserve "dignity,"[166] and that public health and safety depend on the burial or cremation of fetal remains.[167]

Arguments surrounding the preservation of dignity for fetal remains have existed for quite some time. In 1984, a California appeals court was faced with a conflict regarding the disposition of fetal remains.[168] The case arose when law enforcement discovered the remains of 16,500 fetuses at the home of the owner of a defunct pathology laboratory.[169] After an initial investigation, the Los Angeles County District Attorney (who was legally in charge of the remains) decided to bury the fetuses to preserve them for any required additional testing.[170] It was not long before public officials and anti-choice organizations

161. 41 Tex. Reg. 9,732–41 (Dec. 9, 2016); *see also* Mark Reagan, *Texas Fetal Burial Proposal Would Add Thousands to the Cost of an Abortion*, SAN ANTONIO CURRENT (Aug. 5, 2016, 6:00 AM), http://www.sacurrent.com/the-daily/archives/2016/08/05/texas-fetal-burial-proposal-would-add-thousands-to-the-cost-of-an-abortion [perma: http://perma.cc/Z6MB-TAPG]; *Texas Officials Push Harmful Measure That Would Require Fetal Tissue to Be Buried or Cremated*, NARAL PRO-CHOICE TEX. (July 22, 2016), http://prochoicetexas.org/blog/2016/07/texas-officials-push-harmful-measure-require-fetal-tissue-buried-cremated/ [perma: http://perma.cc/8YSM-8HPL]; Genevieve Cato, *Texas Uses Rule Change to Push Backdoor Abortion Regulations*, BURNT ORANGE REP. (July 21, 2016), http://www.burntorangereport.com/diary/32275/texas-reaches-new-low-backdoor-abortion-regulations [perma: http://perma.cc/F47V-5AEN].

162. Reagan, *supra* note 160.

163. Green, *supra* note 10.

164. See *infra* Parts II.D.1–3 for a discussion of fetal burial and cremation legislation; *see also* Green, *supra* note 10.

165. Mary Tuma, *Fetal Burial Saga Continues*, AUSTIN CHRON. (Aug. 5, 2016, 12:50 PM), http://www.austinchronicle.com/daily/news/2016-08-05/fetal-burial-saga-continues/ [perma: http://perma.cc/Y2G2-3TD9].

166. Rebecca Hersher, *Judge Blocks Texas Rule That Would Require Burial or Cremation of Fetal Tissue*, NPR (Dec. 15, 2016, 6:47 PM), http://www.npr.org/sections/thetwo-way/2016/12/15/505757998/judge-blocks-texas-rule-that-would-require-burial-or-cremation-of-fetal-tissue [perma: http://perma.cc/HNL5-X4MD].

167. Tuma, *supra* note 165.

168. Feminist Women's Health Ctr. v. Philibosian, 203 Cal. Rptr. 918, 919 (Cal. Ct. App. 1984).

169. *Id.*

170. *Id.* at 919.

had something to say about the fetal remains in question.[171] Then-President Ronald Reagan demanded a "memorial service for these *children*."[172] Anti-choice physician Dr. Joseph Wood created posters with manipulated photos of the fetuses, complete with the phrase "American Holocaust."[173] Eventually, the District Attorney contracted with a cemetery and arranged for the disposition of the remains.[174] The cemetery, however, made an agreement with the Catholic League of Southern California, allowing the League to hold a religious burial service for the fetuses.[175] The League's president explained that the purpose of the service was to recognize the fetus as a human being.[176]

The Feminist Women's Health Center filed suit, asserting that the remains should be disposed of according to the law and that a religious service violated (among other constitutional provisions) the Establishment Clause.[177] Ultimately, the appeals court agreed.[178] It noted that the religious belief that a fetus is a person is not "universally held" and applied the factors for determining whether a measure violates the Establishment Clause, as laid out in *Lemon v. Kurtzman*.[179] To survive constitutional scrutiny under *Lemon*, (1) the statute or action "must have a secular purpose," (2) "its principal or primary effect must be one that neither advances nor prohibits religion," and (3) the statute or act "must not foster an excessive governmental entanglement with religion."[180] The court ultimately concluded that the state of California's preference for the belief that the fetus is a person (through its representative, the Los Angeles District Attorney) was unconstitutional.[181]

171. *Id.*

172. *Id.* (emphasis added).

173. *Id.* at 920–21.

174. *Id.*

175. *Id.*

176. *Id.* at 924. In his application to intervene, he explicitly stated: "Together with many other citizens having religious convictions, I believe, based both on religious and scientific information, that a fetus is an infant, a human and spiritual being, and my brother or sister in Christ." *Id.*

177. *Id.* at 921–22. While Establishment Clause challenges to abortion restrictions had previously failed, Harris v. McRae, 448 U.S. 297, 319 (1980), the *Feminist Women's Health Center* challenge was slightly different in nature. While the Hyde Amendment, challenged in *Harris*, is explicitly anti-abortion, the burial arrangement in this case was focused instead on giving dignity and "life" to the fetus. *Feminist Women's Health Ctr.*, 203 Cal. Rptr. at 924. For this reason, the *Harris* Court's "clos[ing] [of] the door on Establishment Clause claims against abortion restrictions" did not block an Establishment Clause challenge in *Feminist Women's Health Center*. *See* Mary Zeigler, *Commentary on* Harris v. McRae, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 242, 242 (Kathryn M. Stanchi et al. eds., 2016).

178. *Feminist Women's Health Ctr.*, 203 Cal. Rptr. at 919–20.

179. 403 U.S. 602 (1971); *Feminist Women's Health Ctr.*, 203 Cal. Rptr. at 924–25.

180. *Lemon*, 403 U.S. at 612–13.

181. *Feminist Women's Health Ctr.*, 203 Cal. Rptr. at 924–25. The court explained that the District Attorney obtained the fetuses as part of a criminal investigation, and so "the disposal of the evidence [was] his responsibility." *Id.* at 922–23. His decision to allow that the fetuses be disposed of in a religious burial service, then, constituted an "executive action" that was "an outgrowth of the legislative act which conferred prosecutorial discretion upon him." *Id.* at 923. As a result, there was sufficient state action for the constitutional protections of the Establishment Clause to apply. *Id.*

Despite challenges like the one described above, the dignity justification persisted into the twenty-first century and is still offered in support of fetal burial and cremation legislation. In Indiana, for example, anti-choice organizations have stressed that the burial or cremation of fetal remains would protect the "civil rights" of the "unborn."[182] Mike Pence, who signed House Bill 1337 while Governor of Indiana, said that he did so with a "prayer" for the "children" that it would protect.[183] Lawmakers and anti-choice advocates are fully aware that the fetus is not a person at law.[184] Commentators suggest that attempting to provide "dignity" for a fetus with knowledge that the law does not view the fetus as a person indicates that the goal of fetal burial and cremation legislation is to grant unprecedented personhood rights to the fetus.[185]

Other advocates of fetal burial and cremation legislation have turned their focus to public health. These individuals, such as Texas Governor Greg Abbott, assert that new disposition requirements will enhance protection of public health and safety.[186] During a hearing on Texas's proposed fetal burial and cremation legislation, anti-choice advocate Carol Everett warned of a mass HIV outbreak, which would occur when a hypothetical sewer line carrying fetal remains broke down.[187] Many opponents of the legislation found Everett's comments farfetched, and broke out in "hearty laughs."[188] There is no evidence that fetal remains are any more dangerous to the public health than other medical waste.[189] Further, opponents of these fetal burial laws note that states already have sanitary disposal procedures for fetal remains.[190] Regardless of these objections, legislation requiring the burial or cremation of fetal remains is gaining popularity.[191] Most recently, Texas and Indiana have presented new regulations that fundamentally modify the means by which fetal remains may be disposed.[192]

2. Texas Fetal Disposition Regulations

Texas was quick to respond to the Supreme Court's ruling in *Whole Woman's Health*. As discussed above, Texas introduced fetal burial and

182. Mitch Smith & Erik Eckholm, *Federal Judge Blocks Indiana Abortion Law*, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/us/federal-judge-blocks-indiana-abortion-law.html?_r=1 [perma: http://perma.cc/E7ZZ-7BXD].

183. *Id.*

184. *See* Green, *supra* note 10.

185. *Id.*

186. Alexa Ura, *Texas Won't Give Up on Fetal Burial Rule*, WASH. POST (Sept. 23, 2016), http://www.washingtonpost.com/news/post-nation/wp/2016/09/23/texas-wont-give-up-on-fetal-burial-rule/?utm_term=.a0c217663f64 [perma: http://perma.cc/B7W5-6M5S].

187. Tuma, *supra* note 165.

188. *Id.*

189. *See id.*

190. Planned Parenthood of Ind. & Ky. v. Comm'r, 194 F. Supp. 3 818, 832 (S.D. Ind. 2016).

191. Green, *supra* note 10.

192. *See infra* Parts II.D.2–3.

cremation legislation only four days after the *Whole Women's Health* decision.[193] As of the late 2018 publication of this Comment,[194] Texas law allows for seven methods of disposal for "pathological waste"—a term that includes surgically removed human materials along with the byproducts of miscarriage or abortion.[195] These methods include discharge to a sanitary sewer system, disinfection or incineration followed by disposal in a sanitary landfill, and interment.[196] The modified regulation creates a new category of remains, titled "fetal tissue."[197] The definition of "fetal tissue" is broad and encompasses fetal remains from a miscarriage or abortion at any stage of gestation.[198] Interestingly, this term does not include umbilical cords or placenta—other tissue associated with pregnancy and presumably of the same sanitary nature as the fetus itself.[199] According to the Texas regulation, fetal tissue may only be disposed of in three ways—interment, disinfection and interment, or incineration and interment.[200] The regulation's definition of "interment" includes entombment or burial and cremation "followed by placement of the ashes in a niche, grave, or scattering of ashes as authorized by law."[201] Additionally, the regulation does not allow for a "safe harbor" period during which tissue could be sent to pathology or crime labs to examine allegations of sexual assault.[202] In fact, the regulation makes no exception for *any* pathology needs.

The final regulation was published on December 9, 2016, and was set to go into effect on December 19, 2016.[203] Instead, several pro-choice groups—including Whole Woman's Health—filed suit seeking a temporary restraining order or, alternatively, a preliminary injunction.[204] Their complaint alleged that the regulation placed burdens on women's rights to religious freedom and privacy.[205] Additionally, because of the limits it would place on abortion providers, the plaintiffs alleged that the law would limit abortion access and

193. *Whole Woman's Health II*, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017) (granting preliminary injunction).

194. "Current" Texas law refers to the law as it stands because a court has enjoined the proposed regulation.

195. Complaint at 5, *Whole Woman's Health II*, 231 F. Supp. 3d 218 (No. A–16–CA–1300–SS).

196. *Id.*

197. *Id.* at 6 (citing 41 Tex. Reg. 9,732–41 (Dec. 9, 2016) (codified at 25 TEX. ADMIN. CODE § 1.132–37 (2016))).

198. *Id.* at 7.

199. *Id.* at 8. It is unclear why lawmakers chose not to include umbilical cords and placenta in the regulation. The author of this Comment assumes the decision was made to humanize the fetus, as those tissues are not found on the human body after birth.

200. *Id.* at 6.

201. *Id.* at 7 (citing 41 Tex. Reg. 9,732–41 (Dec. 9, 2016)).

202. *Id.* at 2.

203. *Id.* at 11; Jennifer Ludden, *Lawsuit Challenges Fetal Burial Rule in Texas*, NPR (Dec. 12, 2016, 5:52 PM), http://www.npr.org/sections/thetwo-way/2016/12/12/505304688/lawsuit-challenges-fetal-burial-rule-in-texas [perma: http://perma.cc/7DMZ-9TTX].

204. Ludden, *supra* note 203.

205. Complaint, *Whole Woman's Health II*, *supra* note 195, at 12–13.

impermissibly tread upon the constitutional right to safe, legal abortion.[206]

On December 15, 2016, Judge Sam Sparks of the U.S. District Court for the Western District of Texas issued a temporary restraining order preventing the regulation from taking effect.[207] After an additional hearing, Sparks granted a preliminary injunction to block the regulation's enforcement until a full decision could be made on the merits.[208] Judge Sparks determined that the plaintiffs had satisfied each of the criteria for a preliminary injunction.[209]

In addressing the likelihood of success on the merits, Sparks discussed the vagueness of the regulations as well as their likely violation of the undue burden standard.[210] First, he determined that the regulations were more than likely unconstitutionally vague, as they invited arbitrary and discriminatory enforcement.[211] For example, the regulations do not make clear exactly which types of tissue are considered "fetal tissue."[212] Even the Texas Department of State Health Services (DSHS)—the author of the regulations—appeared to be unsure of what was included in the definition of "fetal tissue."[213] If DSHS was confused as to which types of tissue the regulations covered, it would be impossible for healthcare providers to know how to comply with the regulations.[214] Such a lack of clarity could easily lead to arbitrary and discriminatory enforcement of the regulations, especially considering Texas's eagerness to undercut abortion access.[215] For these reasons, Judge Sparks determined that the plaintiffs were substantially likely to succeed on the merits of an unconstitutional vagueness claim.[216]

Judge Sparks next moved to the undue burden analysis, noting that the decision in *Whole Woman's Health* had elaborated upon and clarified this

206. *Id.* at 14.

207. Hersher, *supra* note 166.

208. *Whole Woman's Health II*, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017) (granting preliminary injunction). The court discussed how granting "a preliminary injunction is an 'extraordinary equitable remedy.'" *Id.* at 225 (quoting Jackson Women's Health Org. v. Currier, 760 F.3d 448, 452 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016)). A preliminary injunction is appropriate where the movant shows "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Id.* at 226 (quoting *Jackson Women's Health Org.*, 760 F.3d at 452). The movant carries the burden of persuasion on all four of these elements. *Id.*

209. *Id.* at 233. Judge Sparks performed a complete analysis using the standard for granting a preliminary injunction. Here, I will only discuss the first element—the likelihood of success on the merits. This analysis is the most relevant to my Comment and is the most in-depth portion of Judge Sparks's order.

210. *Id.* at 226.

211. *Id.*

212. *Id.*

213. *Id.* 226–27 ("For example, DSHS's own attorney could not articulate what types of tissue fell within the definition of fetal tissue as set forth in the Amendments.").

214. *Id.*

215. *Id.* at 227 (explaining "the State's eagerness to find health deficiencies in the wake of the Supreme Court's decision in *Whole Woman's Health*").

216. *Id.*

standard.[217] He explained that when a state restricts abortion access, it must assert a legitimate state interest.[218] If the asserted interest is legitimate, then the court must balance any burden the law places on abortion access with the benefits the law provides.[219] Judge Sparks was unconvinced that DSHS had asserted a legitimate state interest.[220] By the time of the preliminary injunction hearing, DSHS's only asserted state interest was in "afford[ing] the level of protection and dignity to the unborn children as state law afford [sic] to adults and children" or in respecting the dignity of the fetus.[221] Although abortion jurisprudence has recognized the state's interest in preserving potential life,[222] Judge Sparks determined that the Texas regulations did nothing to further such an interest.[223] Specifically, he noted that the regulations would be utilized not only after an induced abortion, but also after miscarriage or ectopic pregnancy.[224] After these events occur, any potential for life no longer exists.[225] With this observation in mind, Judge Sparks expressed concerns that the true purpose of the regulation was to establish that life begins at conception.[226] To Judge Sparks, the state's asserted interest appeared to be a mere pretext for restricting abortion access.[227]

Even if the State of Texas had asserted a legitimate interest, Sparks determined that it was likely that any benefits of the regulations were outweighed by the burdens the law imposed on abortion access.[228] Although the full impact of the regulations would be difficult to predict, evidence suggested that it could be substantial.[229] First, Judge Sparks noted that fetal burial and cremation requirements could cause grief and shame for women—feelings that could discourage women from seeking necessary gynecological care.[230] Next, he addressed concerns about the willingness and ability of vendors to dispose of fetal remains in a manner consistent with the regulations.[231] Although the state pointed to two vendors willing to dispose of the remains, Judge Sparks was unconvinced that these organizations were capable of performing the job.[232] First, neither vendor had the proper permits for storing, transporting, and

217. *Id.* at 227–28.
218. *Id.* at 228.
219. *Id.* at 229.
220. *Id.*
221. *Id.*
222. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 150 (1973).
223. *Whole Woman's Health II*, 231 F. Supp. 3d 218, 229 (W.D. Tex. 2017).
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 230.
229. *Id.*
230. *Id.* at 230–31.
231. *Id.* at 231.
232. *Id.*

disposing of medical waste.[233] Second, one of the vendors was a Catholic organization, which raised serious questions about religious freedoms.[234]

The record therefore suggested that only one facility in the entire state was both willing and able to store and dispose of fetal remains in compliance with the regulations.[235] It was unclear whether this vendor would be willing to work with abortion providers.[236] This uncertainty led Judge Sparks to conclude that there may not be enough vendors in Texas to dispose of fetal tissue in compliance with the regulations.[237] The minimal amount of vendors would make it nearly impossible for abortion providers to follow the regulations.[238] As a result, the regulations had the potential to be a "major, if not fatal, blow to healthcare providers performing abortions."[239] The regulations' potential burden, then, was astronomical.[240] This consideration, paired with the lack of a legitimate state interest, led Judge Sparks to conclude that the burdens of the legislation substantially outweighed any purported benefits.[241] Consequently, Judge Sparks concluded that there was a high likelihood of success in proving that the regulations constituted an undue burden on abortion rights.[242] After concluding that the plaintiffs had satisfied the other criteria for a preliminary injunction, Judge Sparks granted the equitable remedy and blocked the fetal burial regulations from taking effect.[243] As of this Comment's late 2018 publication, the case went to trial and a permanent injunction was issued on September 5th, 2018, based on a finding that legislation violated the undue burden standard and the Equal Protection Clause.[244]

3. Indiana House Enrolled Act (H.E.A.) 1337

One of the most famous introductions of fetal burial and cremation legislation occurred in Indiana in March of 2016.[245] At that time, then-Governor Mike Pence signed H.E.A. 1337, which included many abortion restrictions, such

233. *Id.*

234. *Id.* ("Plaintiffs submitted evidence demonstrating a policy requiring the burial of fetal tissue in a Catholic cemetery distresses patients who have different religious views or do not see fetal tissue as a person.").

235. *Id.*

236. *Id.*; *see also* DAVID S. COHEN & KRYSTEN CONNON, LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM 58, 104 (2015); Part III.B. (discussing the difficulties abortion providers face in establishing professional relationships).

237. *Whole Woman's Health II*, 231 F. Supp. 3d at 231–32.

238. *Id.* at 232.

239. *Id.*

240. *See id.*

241. *Id.*

242. *Id.*

243. *Id.* at 233

244. *See* Whole Woman's Health v. Smith, No. A-16-CV-01300-DAE, slip op. at 43, 52–53 (W.D. Tex. Sept. 5, 2018). Texas's new Health and Human Services Commissioner, Charles Smith, has appealed the case to the Fifth Circuit. *See* Notice of Appeal, Whole Woman's Health v. Smith, No. A-16-CV-01300-DAE (W.D. Tex. Sept. 5, 2018).

245. *See supra* Section I; *see also* Green, *supra* note 10.

as a requirement that facilities in possession of miscarried and aborted fetuses bury those remains.[246] Essentially, this provision requires abortion providers and healthcare facilities to arrange and pay for the burial or cremation of fetal tissue after an abortion or miscarriage—regardless of the gestational age of the fetus.[247] It also equates a fetus with human remains by requiring that clinics obtain "burial transit" permits for the transportation of fetal remains.[248] Under Indiana law, a "burial transit permit" is defined as "a permit for the transportation and disposition of a dead human body."[249]

Indiana's fetal disposition bill was challenged almost immediately on several grounds (and became the subject of a protest by women in Indiana and across the country).[250] On June 30, 2016, just before H.E.A. 1337 was set to go into effect, Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana issued a preliminary injunction blocking its enactment.[251]

In issuing the injunction, Judge Pratt first found that the plaintiff "produced evidence that compliance with the new fetal tissue disposition provisions will result in a meaningful increase in its expenses."[252] She then examined the plaintiff's claims that the fetal tissue disposition provisions violated substantive due process and equal protection.[253] Judge Pratt only examined the due process claims, and began by examining the state's alleged interests.[254] The state provided several interests that were furthered by the provision, including "(1) to treat fetal remains with the same dignity as other human remains; (2) promoting respect for human life by ensuring proper disposal of fetal remains; and (3) ensuring that fetal remains be treated with humane dignity."[255] Judge Pratt found that none of these interests were legitimate, as federal and state courts have continuously held that a fetus is not a legal person.[256] If a fetus is not a "person," she explained, there was "no legal basis for the State to treat fetal remains with 'the same' dignity as human remains."[257] Like Judge Sparks in Texas, Judge Pratt also concluded that although the state does have an interest in *potential* life, that interest evaporates when the potential for life is no longer

246. H.E.A. 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016).

247. Complaint at 5–6, Planned Parenthood of Ind. & Ky. v. Comm'r, 194 F. Supp. 3d 818 (S.D. Ind. 2016) (No. 1:16-cv-00763-TWP-DML).

248. *Id.*

249. *Planned Parenthood of Ind. & Ky.*, No. 1:16-cv-00763-TWP-DML, slip op. at 5 (S.D. Ind. Sept. 22, 2017) (quoting IND. CODE ANN. § 23-14-31-5 (West 2017)) (granting Planned Parenthood summary judgment).

250. Domonoske, *supra* note 1.

251. *Planned Parenthood of Ind. & Ky.*, 194 F. Supp. 3d at 839; *see also* Smith & Eckholm, *supra* note 182.

252. *Planned Parenthood of Ind. & Ky.*, 194 F. Supp. 3d at 825.

253. *Id.* at 813.

254. *Id.*

255. *Id.* at 832 (citations omitted).

256. *Id.*

257. *Id.*

present (as is the case in a miscarriage or abortion).[258] Even the *Gonzales* opinion recognized that the state's interest exists only as long as the potential for life exists.[259] With no showing of a legitimate state interest, Judge Pratt concluded that the plaintiff had borne its burden and issued a preliminary injunction.[260]

In a related challenge to the Texas regulations, Judge Pratt granted summary judgment in favor of Planned Parenthood of Indiana and Kentucky.[261] Judge Pratt's order granting summary judgment echoes some of the conclusions made in her order granting the preliminary injunction.[262] For example, in granting summary judgment, Judge Pratt again noted that the state may assert an interest in *potential* life, but that any such potential does not exist after miscarriage or abortion.[263] Thus, the State could not justify its fetal disposition legislation by analogizing it with fetal protection laws or traditional, explicit anti-abortion legislation.[264] Further, Judge Pratt concluded once again that the State's asserted interest in treating fetal remains in the same manner as other human remains was not legitimate.[265] Because the Supreme Court has consistently refused to deem a fetus a "person" under the Fourteenth Amendment, Judge Pratt found "no legal basis for the State to require health care providers to treat fetal remains in the same manner as human remains."[266]

Judge Pratt also responded to the State's "bold" assertion that a fetus is in fact a human being.[267] Like the Supreme Court in *Roe* and *Casey*, she refused to resolve this "moral question."[268] Instead, she indicated that courts should respect an individual's very personal opinion about whether or not she views the fetus as the equivalent of a human being.[269] Consequently, Judge Pratt made only a *legal* conclusion: there was no legal basis under which she could recognize the fetus as a human being or consequentially recognize fetal tissue as analogous to human remains.[270] Thus, the State had not asserted a legitimate interest to justify its

258. *Id.* at 832–33.

259. *Id.* (citing Gonzales v. Carhart, 550 U.S. 124, 163 (2007)).

260. *Id.* at 838.

261. *Planned Parenthood of Ind. & Ky.*, No. 1:16-cv-00763-TWP-DML, slip op. at 21 (S.D. Ind. Sept. 22, 2017).

262. *Id.* at 17.

263. *Id.*

264. *Id.*

265. *Id.* at 16.

266. *Id.* at 16–17.

267. *Id.* at 18.

268. *Id.* Both the *Roe* and *Casey* Courts refuse to call a fetus a "person" (or even a "life") and instead refer to it as a "potential life." Roe v. Wade, 410 U.S. 113, 150 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992). In *Roe*, the Court noted the wide religious and philosophical disagreement on when life begins, and explicitly stated that "the unborn have never been recognized in the law as persons in the whole sense." *Roe*, 410 U.S. at 161–62.

269. *Planned Parenthood of Ind. & Ky.*, slip op. at 18 ("Whether or not an individual views fetal tissue as essentially the same as human remains is each person's own personal and *moral* decision. The Court cannot resolve this moral question." (citations omitted)).

270. *Id.*

fetal burial and cremation legislation.

Importantly, Judge Pratt also concluded that even if the State *had* asserted a legitimate interest in equating the fetus with human remains, this interest was not rationally related to the provision at issue.[271] This was the case because the provision did not actually treat fetal tissue in the same way as human remains.[272] For example, Indiana law disallows the simultaneous cremation of multiple human bodies unless an authorized party provides written consent.[273] However, under H.E.A. 1337, fetal remains from "an unspecified number of patients" could be simultaneously cremated.[274] Indiana's fetal burial and cremation legislation as written would treat fetal remains in a substantially different way from human remains, and therefore could not possibly fulfill its alleged goal of providing human dignity to fetal remains.[275] Because the provisions could not survive even deferential rational basis review, Judge Pratt found that they violated the Due Process Clause of the Fourteenth Amendment and granted summary judgment in favor of the plaintiffs.[276] With that, a federal judge explicitly concluded that Indiana's fetal burial and cremation legislation was unconstitutional and permanently disallowed its enactment.[277]

III. DISCUSSION

Federal judges' consistent invalidation of fetal burial and cremation provisions speaks volumes about the blatant unconstitutionality of such laws. Because such legislation fails the deferential rational basis test, it also violates the undue burden standard as well as the Establishment Clause. This Comment proposes that fetal burial and cremation legislation exists for one underlying reason: to grant legal personhood to the fetus and thereby undermine abortion rights. After an examination of the general dangers of granting legal personhood to a fetus, this Comment will argue that fetal burial and cremation laws are unconstitutional for two reasons. First, such regulations violate the undue

271. *Id.* at 19. Judge Pratt utilized rational basis review because the parties agreed that the fetal disposition provisions did not impact a fundamental right. *Id.* at 15. Where a provision does not implicate a fundamental right, a state need only show that the "intrusion upon . . . liberty is rationally related to a legitimate government interest." *Id.* at 15–16 (omission in original) (quoting Hayden *ex rel.* A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 576 (7th Cir. 2014)). Ultimately, the burden of proving that a provision is not rationally related to a legitimate state interest lies with the plaintiff. *Id.* at 16. Rational basis review offers extreme deference to the state; so long as *any* "conceivable state of facts that supports the policy," the law will be permitted to stand. *Id.*; *see also* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402 (2016). Thus, the fact that Judge Pratt found that the provisions failed the rational basis test is reflective of their overt unconstitutionality. *See* Chemerinsky, *supra*, at 402 ("The rational basis test is enormously deferential to the government and only rarely has the Supreme Court invalidated laws as failing rational basis review.").

272. *Planned Parenthood of Ind. & Ky.*, slip op. at 16.

273. *Id.* at 20.

274. *Id.* at 19.

275. *Id.* at 20.

276. *Id.*

277. *Id.*

burden standard laid out in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and elaborated upon in *Whole Woman's Health v. Hellerstedt*. Second, forced burial or cremation of the fetus endorses the sectarian belief that life begins at conception and that the fetus is a person, which thus violates the Establishment Clause. Finally, the Comment concludes with an examination of the future of reproductive rights and fetal personhood under President Trump's anti-choice administration.

A. The Dangers of Fetal Personhood in General

1. Dangers to Pregnant Women

Over time, fetal protection laws have progressed from protecting pregnant women to punishing them.[278] This should come as no surprise, as increasing the rights of the fetus necessarily requires limiting the rights of the woman who carries it. To understand the impact of legislation that increasingly values the rights of the fetus over the rights of the woman, one merely needs to look at real-world examples. One such example is Samantha Burton's story.[279] In a discussion of Ms. Burton's forced medical confinement, Michele Goodwin, a groundbreaking researcher in the field of fetal protection laws, noted the deleterious effects of solitary confinement on mental health:

> Forced medical solitary confinement, while distinct from prison solitary confinement, shares relevant parallels that trigger human and constitutional rights concerns pertaining to the deprivation of liberty, forced institutional restraint, isolation from the general population and community, the denial of contact, loss of freedom to move within a facility, mental health deterioration, and stigma.[280]

Despite the wealth of research regarding the damaging impact of solitary confinement, and Ms. Burton's requests to return home to her family, the legal system decided that the health of her fetus was too important to risk.[281] The court specifically set forth a standard grounded in the notion that "between parent and child, the ultimate welfare of the child is the ultimate controlling factor."[282] The court's language is both important and unsettling, as it equates an unborn fetus with a "child." With these words, the court expressed a desire to grant person-like rights to not only Ms. Burton's fetus, but to all fetuses. Ms. Burton's experience illustrates an all-too-common interpretation of fetal protection laws, in which fetal health is more important than maternal autonomy or safety.[283] Additionally, the *Burton* case provides insight as to the dangerous consequences of granting person-like rights to fetuses.

278. See *supra* Part II.B and notes 93–101 for a discussion of this phenomenon.

279. See *supra* notes 102–05 and accompanying text for a discussion of Samantha Burton's experience; *see also* Goodwin, *supra* note 99, at 799.

280. Goodwin, *supra* note 99, at 799.

281. *Id.*

282. *Id.* at 801 (quoting Burton v. State, 49 So. 3d 263, 265 (Fla. Dist. Ct. App. 2010)).

283. *See generally id.*

2. Dangers to Abortion Rights

An examination of the motives underlying fetal protection legislation also provides insight into the dangerous potential these laws hold. The UVVA, introduced at the federal level,[284] provides an excellent example of the personhood-oriented, anti-abortion motivation underlying laws that grant increased protection to the fetus. Although the UVVA's language appears to provide a level of protection against heinous crimes like the Peterson murder, congressional hearings on the statute reveal its true purpose: granting legal personhood to fetuses.[285] During such a hearing, Senator Orrin Hatch stated: "I cannot imagine why anyone would oppose this bill. The only reason for opposition that I can suppose is that some in the pro-choice movement believe that our bill draws attention to the effort to dehumanize, desensitize, and depersonalize the unborn child."[286] Senator Hatch's concerns about dehumanizing or depersonalizing the fetus indicate that he believes the fetus to be a human being or a person (and thus deserving of humanization). These opinions align closely with the personhood movement's desire to establish legal personhood for the fetus.[287] Of course, the ultimate goal of the personhood movement is to stop all safe, legal abortion.[288] Thus, with this statement, Senator Hatch succinctly explained the personhood movement's true purpose—undermining abortion rights.[289]

3. Dangers to Fetuses that Would Result in Nonviable Births

The impact of fetal protection laws on abortion access is notable and profound.[290] The recent development of "fetal pain" legislation provides a prime example of the effect that fetal protection laws and the personhood movement have on abortion access.[291] For instance, despite the mounting evidence that the fetus cannot feel pain so early in gestation,[292] many states have banned or attempted to ban abortion at twenty weeks.[293] The fetal personhood movement and its desire to grant full legal rights to the embryo or fetus at any stage of

284. See *supra* notes 95–98 and accompanying text for a discussion of the UVVA.

285. Brown, *supra* note 96, at 234; *Protecting Our Silent Victims: Hearing on S. 1673 Before the H. Comm. on the Judiciary*, *supra* note 98, at 3–4 (statement of Sen. Orrin Hatch, Chairman, Comm. on the Judiciary).

286. *Protecting Our Silent Victims: Hearing on S. 1673 Before the H. Comm. on the Judiciary*, *supra* note 98, at 3 (statement of Sen. Orrin Hatch, Chairman, Comm. on the Judiciary).

287. See *supra* note 83 and accompanying text for a definition of the personhood movement.

288. See *supra* note 83 and accompanying text for an explanation of the personhood movement's ultimate goal of eliminating legal abortion.

289. *Protecting Our Silent Victims: Hearing on S. 1673 Before the H. Comm. on the Judiciary*, *supra* note 98, at 3 (statement of Sen. Orrin Hatch, Chairman, Comm. on the Judiciary).

290. *See* MURRAY & LUKER, *supra* note 21, at 775 (explaining the "rapid increase of state-level legislation affecting abortion" in the wake of *Gonzales*).

291. *Id.* at 771.

292. *See generally* Lee et al., *supra* note 121.

293. See *supra* notes 113–26 and accompanying text for a discussion of the development of fetal pain laws.

development drive these restrictions on abortion access.[294] Restricting abortion at twenty weeks, however, is dangerous not only for pregnant women, but also for the very fetuses that anti-choice politicians seek to protect.

The few abortions that do occur after twenty weeks (only about 1.5% of all abortions) often are the result of desperate, dangerous circumstances.[295] At this stage in a pregnancy, women undergo testing which may reveal deadly fetal anomalies—the sort of anomalies that result in short, painful lives for their babies.[296] These anomalies include problems with brain development,[297] complications caused by the now-prominent Zika infection,[298] and muscular underdevelopment that could make it impossible for the fetus to breathe outside of the womb.[299]

Regardless of these risks, politicians who support fetal pain legislation would prefer that these women carry their pregnancies to term because of inconclusive and challenged evidence that the fetus may experience pain in utero.[300] In other words, the anti-choice movement's desire to grant person-like rights to the unborn disregards not only the life of the mother, but the life of the "person" that fetal pain laws seek to "protect." The ultimate result, and the only victory for the anti-choice movement, is an extremely restrictive ban on abortion with no benefit to women or children. Thus, the fetal personhood movement has yielded legislation that has caused dangerous and health-averse conditions—all for the sake of restricting abortion access.

294. See *supra* Part II.B for a discussion about the personhood movement that has been manifested through various legislative efforts, civil and criminal confinement of women, and fetal pain laws.

295. NARAL PRO-CHOICE AM., ABORTION BANS AT 20 WEEKS: A DANGEROUS RESTRICTION FOR WOMEN 2–3 (2017), http://www.prochoiceamerica.org/wp-content/uploads/2017/01/3.-Abortion-Bans-at-20-Weeks-A-Dangerous-Restriction-for-Women.pdf [perma: http://perma.cc/MT4U-59PY].

296. Tara Haelle, *No, Late-Term Abortions Don't 'Rip' Babies Out of Wombs—And They Exist for a Reason*, FORBES (Oct. 20, 2016, 4:24 AM), http://www.forbes.com/sites/tarahaelle/2016/10/20/no-late-term-abortions-dont-rip-babies-out-of-wombs-but-they-are-needed/#e9a50171bc4a [perma: http://perma.cc/JKR2-9NXT].

297. For example, Dana Weinstein underwent a routine sonogram after the twenty-week mark in her pregnancy. *See, e.g.*, Kate Sheppard, *Why This Woman Chose to Abortion—At 29 Weeks*, MOTHER JONES (July 11, 2011, 5:00 AM), http://www.motherjones.com/politics/2011/07/late-term-abortion-29-weeks-dana-weinstein [perma: http://perma.cc/T4V7-UZES]. There, she learned that her fetus had significant abnormalities in brain development—abnormalities that could not have been detected before twenty weeks. *Id.* If Weinstein's fetus were carried to term and survived, the resulting child would have suffered from debilitating seizures "difficult or impossible to control with medication." *Id.* (quoting unnamed source from National Institutes of Health).

298. Haelle, *supra* note 296.

299. Jia Tolentino, *Interview with a Woman Who Recently Had an Abortion at 32 Weeks*, JEZEBEL (June 15, 2016, 11:30 AM), http://jezebel.com/interview-with-a-woman-who-recently-had-an-abortion-at-1781972395 [perma: http://perma.cc/Z22X-6A5S].

300. *See* Sheppard, *supra* note 297 ("That anti-abortion groups have premised their 20-week bans in a number of states on 'fetal pain' ignores the fact . . . that in [this expecting mother's] case she sought to end the suffering of her baby.").

4. Dangers to Legal Precedent

Legislation that grants personhood to fetuses is not only medically dangerous—it is legally unprecedented. The Supreme Court has consistently refused to define when life begins, and as a result has refused to consider the fetus a legal person—referring to it instead as a *potential life*.[301] Judicial interpretations of state statutes criminalizing neglect of a dependent provides further support for the assertion that fetuses are not legal persons.

In *Herron v. State*,[302] the Indiana Court of Appeals was asked to determine whether one such statute should apply to a woman whose baby was born with cocaine in his system.[303] In the state of Indiana, a dependent was defined as an "unemancipated *person* who is under eighteen . . . years of age" or "a *person* of any age who is mentally or physically disabled."[304] The court noted that Indiana's statutes on feticide and murder explicitly distinguished between a fetus and a person.[305] The statute in question only criminalized action that placed a present dependent in harm's way—a present person.[306] Because the law had consistently distinguished between a fetus and a person, the neglect statute could not apply to a woman's actions during pregnancy.[307] The Indiana Court of Appeals again applied this reasoning in July of 2016 when it determined that the neglect of a dependent statute could not be applied against Purvi Patel for her attempt to self-perform a medication-induced abortion.[308]

The "born alive" rule and related jurisprudence provide further illustration of the courts' refusal to recognize fetuses as legal persons. This rule explains that legally the terms "human being" or "person" are intended to include only those who are born alive.[309] In the *Keeler* decision, a California court applied the born alive rule to a fetus that died in utero after a pregnant woman was brutally beaten, holding that a fetus is not a human being and thus cannot be born "alive."[310] Also in the criminal context, the Florida Supreme Court in *State v.*

301. *See* Roe v. Wade, 410 U.S. 113, 150 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

302. 729 N.E.2d 1008 (Ind. Ct. App. 2000)

303. *Herron*, 729 N.E.2d at 1009.

304. *Id.* at 1010 (emphasis added).

305. *Id.*

306. *Id.* at 1011.

307. *Id.*

308. See *supra* note 112 and accompanying text for further discussion of *Patel*. The medication abortion (also referred to as the medical abortion or the abortion pill) involves the use of medication, rather than a surgical procedure, to terminate a pregnancy. *Medication Abortion*, GUTTMACHER INST. (May 19, 2017), http://www.guttmacher.org/evidence-you-can-use/medication-abortion [perma: http://perma.cc/65KB-CF7U].

309. *See, e.g.*, Keeler v. Superior Court, 470 P.2d 617, 621–22 (Cal. 1970), *superseded by statute*, Act of Sept. 17, 1970, ch. 1311, 1970 Cal. Stat. 2440.

310. See *supra* notes 87–93 and accompanying text for a discussion of *Keeler*. In that case, the Supreme Court of California refused to apply a murder statute in the death of a nonviable fetus. *Keeler*, 470 P.2d at 622. It reasoned that the words "human being" should apply to only those who are born alive. *Id.*

Ashley similarly refused to prosecute a woman for manslaughter in the death of her fetus, citing the born alive rule.[311] The *Ashley* court found it inappropriate to "abrogate willy-nilly a centuries-old principle of the common law" by using the born alive rule to punish a woman for her own actions during pregnancy.[312] State reactions to the born alive rule, as expressed by California's legislative response to *Keeler*, are careful to differentiate between fetuses and persons in murder and manslaughter statutes.[313] Thus, even attempts to grant increased protection to the fetus acknowledge that it is *not* a legal person.[314]

Granting burial rights to the fetus is a relatively new strategy in the personhood movement.[315] However, fetal burial and cremation laws carry with them the same dangerous potential as other forms of fetal personhood legislation.

B. Costs and Impact of Fetal Burial and Cremation Laws on Abortion Access

Media outlets and pro-choice groups have analyzed the practical implications of fetal burial and cremation laws.[316] This task has not been easy, as legislation requiring that fetal remains be disposed of like the remains of persons is fairly new and complex. However, it is likely that the additional labor and the necessity of new relationships between abortion clinics and funeral organizations will be costly and difficult to set into place.[317]

Logistically, abortion clinics have cited the difficulty of forming working relationships with funeral homes or organizations with the means to cremate fetal remains.[318] Planned Parenthood Southeast,[319] for example, has emphasized the hardships that abortion clinics already face in working with outside businesses.[320] In a country where abortion providers are stigmatized and

311. State v. Ashley, 701 So. 2d 338, 342 (Fla. 1997). In *Ashley*, a pregnant teenager shot herself in the stomach. *Id.* at 339. Her fetus was not killed by the bullet, but was surgically removed and died because it was not viable. *Id.* Ashley was originally charged with murder and manslaughter. *Id.* at 340. The court determined that fetal protection legislation was not intended to apply against pregnant women. *Id.* at 342.

312. *Id.*

313. CAL. PENAL CODE § 187(a) (West 2017) (as amended by Act of Sept. 17, 1970, ch. 1311, 1970 Cal. Stat. 2440).

314. *See, e.g.*, *id.*

315. *See* Rebecca Grant, *The Latest Anti-Abortion Trend? Mandatory Funerals for Fetuses*, NATION (Oct. 11, 2016), https://www.thenation.com/article/the-latest-anti-abortion-trend-mandatory-funerals-for-fetuses/ [perma: http://perma.cc/XD3Y-623W].

316. *See, e.g.*, *id.*; Green, *supra* note 10.

317. Grant, *supra* note 315 (noting that abortion providers expect difficulty in establishing relationships with funeral homes, and that funeral homes will encounter logistical issues in burying remains that are "the size of a prune").

318. *Id.*

319. Planned Parenthood Southeast services individuals in Georgia, Alabama, and Mississippi. *See Patient Resources*, PLANNED PARENTHOOD SOUTHEAST, http://www.plannedparenthood.org/planned-parenthood-southeast/patient-resources [perma: http://perma.cc/47JN-M4WS] (last visited Nov. 6, 2018).

320. *See* Grant, *supra* note 315.

threatened, it is difficult to perform basic business tasks such as obtaining office space or purchasing new furniture.[321] Landlords and businesses who hesitate to work with abortion providers are somewhat justified—many have personally experienced threats or decreased business as a result of doing business with such providers.[322] It is plausible to conclude that abortion providers will have an equally difficult time finding funeral homes or cremation sites willing to do business with them. In fact, Judge Sparks made such a determination in granting a preliminary injunction against Texas's fetal burial and cremation regulations.[323] If abortion providers cannot form these business relationships, they are effectively barred from complying with laws such as Indiana H.E.A. 1337's fetal disposition requirements.[324]

The costs to abortion providers and their patients are also of grave concern. In its letter opposing Texas's fetal disposition legislation, the Funeral Consumers Alliance of Texas noted that the average cost of burial or cremation services is $2,000.[325] The Alliance's director, Jim Bates, is one of many who suspect that this price will be added to the cost of an abortion, and that clinics simply will not be able to bear it.[326] Instead, Mr. Bates says, the cost will most likely be shifted to the woman seeking abortion care.[327] With the price of a first trimester abortion already averaging at $500, it is difficult to imagine that many women will be able to afford care at *any* higher cost.[328] This added cost of abortion care is just one of several reasons that fetal burial and cremation laws violate the undue burden standard and therefore are unconstitutional.

C. The Undue Burden Standard and Fetal Burial and Cremation Legislation

Fetal burial and cremation legislation cannot withstand scrutiny under *Casey*'s undue burden standard as refined in *Whole Woman's Health*.[329] Fetal burial and cremation laws impose a series of burdens upon women and their

321. *Id.*; *see also, e.g.*, COHEN & CONNON, *supra* note 247, at 58, 104.

322. *See* COHEN & CONNON, *supra* note 247, at 58, 104.

323. See *supra* Part II.D.2 for a discussion of Judge Sparks's analysis.

324. *See Whole Woman's Health II*, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017).

325. Grant, *supra* note 315; Reagan, *supra* note 160.

326. Reagan, *supra* note 160.

327. *Id.*

328. *See The Cost of Abortion, When Providers Offer Services and Harassment of Abortion Providers All Remained Stable Between 2008 and 2012*, GUTTMACHER INST. (Feb. 2, 2014), http://www.guttmacher.org/news-release/2014/cost-abortion-when-providers-offer-services-and-harassment-abortion-providers-all [perma: http://perma.cc/L5C8-N7HK] [hereinafter *The Cost of Abortion*] ("[W]e know that cost still poses a huge barrier for many women seeking abortion services." (quoting Rachel Jones)). Further, women who depend on Medicaid cannot use insurance to cover abortion costs. The Hyde Amendment blocks all federal Medicaid funding to abortion, with only limited exceptions for cases of rape or incest and to save the life of the pregnant woman. *Public Funding for Abortion*, ACLU, http://www.aclu.org/other/public-funding-abortion?redirect=public-funding-abortion [perma: http://perma.cc/V6X9-24LV] (last visited Nov. 6, 2018). Most states have followed the federal government and have created blocks on public funding for abortion. *Id.*

329. See *supra* Parts II.A.2, II.C for discussions on *Casey* and *Whole Woman's Health*.

healthcare providers.[330] As discussed above, the cost that a "fetal funeral" would add to already expensive abortion care is potentially enormous.[331] Abortion care that is not affordable is by no means accessible; if the cost of an abortion were truly to increase by $2,000, then it follows that many women would have no means of paying for the medical procedure.[332]

Additionally, abortion providers have expressed concerns about developing professional relationships with funeral homes or cremation sites.[333] Abortion providers have historically struggled in partnering with other businesses, such as landlords.[334] On-site harassment of abortion providers and consistent, often disruptive protesting create tension between abortion clinics and their landlords.[335] Sometimes, the businesses and business owners associated with abortion providers are themselves subject to harassment and protest.[336] For example, abortion providers have reported that anti-choice protestors targeted their landlords and potential landlords.[337] One provider explained that after she and a landlord agreed to sign a lease, the property was vandalized, and its owner pulled out of the contract, fearing for his own safety.[338] The struggles that abortion providers face in connecting with businesses will surely exist in the context of establishing relationships with funeral directors or cremation sites.[339] Practically speaking, some clinics will not be able to establish these relationships and thus will be unable to meet the requirements of fetal burial and cremation legislation. As Judge Sparks pointed out in analyzing Texas's fetal burial and cremation regulations, this could be a fatal blow to abortion providers.[340]

When abortion clinics cannot meet statutory requirements, they are often forced to close their doors.[341] This was the result after Texas passed House Bill 2. Prior to the bill's passing, there were forty abortion clinics in the state.[342] After the bill's admitting privileges requirement went into effect, however, that number was slashed in half.[343] Only seven clinics would remain in the entire State of Texas if the bill's surgical-center requirements were enforced.[344] As a result,

> the number of women of reproductive age living more than 50 miles from a clinic doubled . . . ; those living more than 100 miles . . .

330. See *supra* Part III.B for a discussion of these burdens.
331. Reagan, *supra* note 160.
332. *See The Cost of Abortion*, *supra* note 337; Grant, *supra* note 315.
333. See *supra* notes 327–33 and accompanying text for a discussion about these concerns.
334. *See, e.g.*, COHEN & CONNON, *supra* note 245, at 58, 104.
335. *Id.*
336. *See id.* at 54.
337. *Id.*
338. *Id.*
339. *Whole Woman's Health II*, 231 F. Supp. 3d 218, 231–32. (W.D. Tex. 2017).
340. *Id.*
341. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).
342. *Id.* at 2301.
343. *Id.*
344. *Id.*

> increased by 150% . . . ; those living more than 150 miles . . . increased by more than 350% . . . ; and those living more than 200 miles . . . increased by about 2,800%.[345]

While it is unclear how many clinics would close their doors in light of Indiana's H.E.A. 1337 and similar legislation, the *Whole Woman's Health* decision held that substantial clinic closures and the resulting distances placed between women and abortion clinics can constitute a "substantial obstacle in the path of a woman's choice," and thus be unconstitutional.[346]

Perhaps the most significant burden imposed by fetal burial and cremation legislation is the effective ban it places on medication abortions.[347] Many women prefer the medication abortion, as it is safe, noninvasive, and allows for increased privacy.[348] As a result, medication abortions are increasingly common,[349] likely because most abortions occur within the first seven weeks of a pregnancy.[350] Although the medication abortion is only used up to the ninth or tenth week of gestation,[351] laws like H.E.A. 1337 require burial or cremation of the fetus regardless of gestational age.[352] Medication abortions typically occur at a woman's home.[353] Most often, they involve light or heavy bleeding, and the embryo[354]—not even yet a fetus—is passed into a toilet or onto a sanitary pad.[355] Doctors who prescribe medication abortion, therefore, have no way of ensuring that the embryo or fetus is either buried or cremated.[356] As a result, it seems

345. *Id.* at 2302.

346. *Id.* at 2312 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).

347. Grant, *supra* note 324. As discussed *supra* in note 308, the medication abortion allows women to terminate a pregnancy without a surgical procedure. Women undergoing a medication abortion are given two pills: mifepristone and misoprostol. *Medication Abortion*, *supra* note 308. The woman takes the mifepristone in-clinic, but takes the misoprostol several hours later, usually in the comfort of her home. *The Abortion Pill*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/learn/abortion/the-abortion-pill [perma: http://perma.cc/9C76-H6K3] (last visited Nov. 6, 2018). The medication abortion is extremely effective and safe. *Id.* The option is available early in pregnancy, and can be obtained up to ten weeks gestation. *Id.*

348. *The Abortion Pill*, *supra* note 347.

349. *Id.*; *see also The Overall Number of U.S. Abortions Continues to Decline, While the Proportion that Are Medication Abortion Increases*, GUTTMACHER INST. (June 30, 2016), http://www.guttmacher.org/infographic/2016/overall-number-us-abortions-continues-decline-while-proportion-are-medication [perma: http://perma.cc/E3NB-6F6F] [hereinafter *Overall Number of Abortions*].

350. Heather D. Boonstra, *Medication Abortion Restrictions Burden Women and Providers—And Threaten U.S. Trend Toward Very Early Abortion*, GUTTMACHER INST. (Mar. 19, 2013), http://www.guttmacher.org/about/gpr/2013/03/medication-abortion-restrictions-burden-women-and-providers-and-threaten-us-trend [perma: http://perma.cc/AC6J-DJAU] (explaining that after the year 2007, approximately 73% of abortions occurred within the first seven weeks of pregnancy).

351. *Abortion Facts*, NAT'L ABORTION FED'N, http://prochoice.org/education-and-advocacy/about-abortion/abortion-facts/ [perma: http://perma.cc/H7U8-G8UD] (follow the "What is Medical Abortion?" link) (last visited Nov. 6, 2018).

352. H.E.A. 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016).

353. *Abortion Facts*, *supra* note 351.

354. The average size of an embryo at this time is one-fifth of an inch or smaller. *Id.*

355. *The Abortion Pill*, *supra* note 347.

356. *See* Grant, *supra* note 324. Even if a patient attempted to comply with these disposition

doubtful that states that require the burial or cremation of the fetus will allow medication abortions to continue (at least in the private, at-home manner by which they occur now).[357] Since approximately seventy-three percent of abortions occur within the first seven weeks of pregnancy,[358] and because many early abortions are medication-induced,[359] a law that effectively blocks access to medication abortion undoubtedly places a "substantial obstacle" in the way of a woman's previability right to choose.

Additionally, it would be laughable to argue that fetal burial and cremation laws provide any medical benefit. The state proponents of such legislation do not even attempt to argue that the burial or cremation of a fetus provides any medical benefit or increased medical safety.[360] Notably, there is no evidence that fetal remains are more dangerous than developed human remains so as to require special precautions in their disposal; most states, like Indiana, already have sanitary disposal procedures for fetal remains because they have disposal procedures for medical waste.[361] There is also no conceivable health or medical benefit to the women who undergo abortions or miscarriages and who would be subject to the terms of such legislation.[362] In the absence of *any* medical benefit, and in the presence of several obstacles presented to the woman's right to safe and legal abortion, fetal burial and cremation legislation cannot survive the undue burden analysis.[363] As a result, these laws are unconstitutional and cannot stand.

D. First Amendment Religious Freedom Implications of Fetal Burial and Cremation Laws

The plaintiffs in *Whole Woman's Health II* presented a particularly interesting argument when they alleged that Texas's fetal burial and cremation requirements had free exercise implications.[364] This assertion can be interpreted in two ways. First, as the Texas plaintiffs alleged, these regulations force citizens to accept a view that may be contrary to their religious or moral beliefs: that life begins at conception.[365] Second, even if an individual were to share the belief

rules, what is the practical value of burying or cremating a maxi-pad?

357. *See id.* While the Texas regulations do not apply to pregnancy termination that occurs outside a medical facility, Indiana's law and others like it contain no such exception. *See Whole Woman's Health II*, 231 F. Supp. 3d 218, 230 (W.D. Tex. 2017).

358. Boonstra, *supra* note 350.

359. *See id.*; *see also Overall Number of Abortions*, *supra* note 349.

360. *See Whole Woman's Health II*, 231 F. Supp. 3d at 222.

361. Planned Parenthood of Ind. & Ky. v. Comm'r, 194 F. Supp.3 d 818, 833 (S.D. Ind. 2016).

362. *See Whole Woman's Health II*, 231 F. Supp. 3d at 222. In fact, these provisions may cause adverse effects on women's health. *See id.* at 230–31 (explaining that forced fetal burial or cremation may cause women guilt and shame, which may deter some from seeking gynecological care at all).

363. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2311–13, 2318 (2016).

364. Complaint, *Whole Woman's Health II*, *supra* note 195, at 11–12.

365. *Id.* at 11. District Court Judge Sam Sparks seemed to agree with the plaintiffs, noting that the Texas regulations "appear[] to be inferentially establishing the beginning of human life as conception, potentially undermining the constitutional protection afforded to personal beliefs . . . ."

that her fetus was a human life, then forcing her to bury or cremate the remains could violate the precepts of religions that opt for different disposition of the dead.[366] Each of these arguments has merit and contributes to the conclusion that fetal burial and cremation legislation is unconstitutional. Additionally, as this Comment will argue, there are Establishment Clause implications when a state endorses the view that a fetus is a legal person.

As mentioned in Part II.A.1, the Supreme Court in *Roe v. Wade* explicitly stated that it did not decide when life began.[367] The Court provided several justifications for this choice. Mainly, it noted that religious bodies, philosophers, and medical doctors had been unable to reach a "consensus" on the issue.[368] It contrasted the view held by Jews and many Protestants—that life does not begin until birth—with the Roman Catholic opinion that life begins at conception.[369] Because of the existence of such conflicting views, the Court did not find it appropriate for the judiciary to make a determination of when life legally begins.[370]

This analysis is reflected in the claims presented against Texas's fetal disposition regulations.[371] As discussed above, fetal burial and cremation legislation is enacted for the purpose of granting legal personhood to the fetus.[372] Many of these laws, such as the regulations presented in Texas and Indiana, require burial or cremation at any point in gestation.[373] Consequently, these laws necessarily demand that the fetus be considered a "person" from the moment the sperm meets the egg.[374] This requirement rather explicitly favors the view shared by Catholics and other Christians that life begins at conception. Forcing an individual who does not subscribe to such a view to treat her fetus as a "person" is extraordinarily problematic under the First Amendment.[375]

The Establishment Clause, applied to the states through the Fourteenth Amendment,[376] prohibits state governments from making a law that favors or

Whole Woman's Health II, 231 F. Supp. 3d at 230–31.

366. Some religions require the performance of specific rituals during disposition of the dead. *See, e.g.*, Hayley MacMillen, *5 Different Religions & How They Deal with Their Dead*, REFINERY 29 (Feb. 25, 2015, 6:10 P.M.), http://www.refinery29.com/religious-death-beliefs [perma: http://perma.cc/478F-L9HX]. For example, Islam requires that the corpse be treated with respect and be washed before burial. *Id.* When the state mandates that remains be interred in a specific way, this ritual is effectively prohibited.

367. Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins.").

368. *Id.*

369. *Id.* at 160.

370. *Id.*

371. Complaint, *Whole Woman's Health II*, *supra* note 195, at 16–18.

372. See *supra* Part III.A for a discussion of the fetal personhood movement and the use of fetal disposition regulations to grant full legal rights to the fetus.

373. *See, e.g.*, *Whole Woman's Health II*, 231 F. Supp. 3d 218, 224 (W.D. Tex. 2017).

374. *See id.* at 229.

375. *See* U.S. CONST. amend. I; Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (explaining the Establishment Clause and laying out the test for evaluating Establishment Clause challenges).

376. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

supports a particular religion.[377] California also has an establishment clause in its constitution.[378] In *Feminist Women's Health Center*,[379] a California appeals court determined that a district attorney's involvement in facilitating a Catholic[380] burial for fetuses constituted the state's showing preference to certain religious beliefs over others.[381] It found that the "primary effect" of the District Attorney's decision would be to "give symbolic support" to religious beliefs—such as those of the Catholic League planning to perform the burial service—that life begins at conception and that the fetus is therefore a person.[382] Such "symbolic support"—even in the absence of the explicit endorsement of Catholicism—violated the Establishment Clause.[383]

Although the fetal burial and cremation legislation discussed in this Comment is not explicitly religious, it nevertheless crosses the line of unconstitutional governmental preference of religion. This legislation is ostensibly secular in nature, and therefore likely passes *Lemon*'s requirement that a secular purpose exist for the measure in question.[384] However, these statutes provide an impermissible state approval of the view that miscarried or aborted fetuses are deceased persons deserving of public mourning.[385] Like the District Attorney in *Feminist Women's Health Center*, state actors that advance fetal burial and cremation legislation provide symbolic support to religious entities that believe that fetuses are persons.[386] Therefore, they fail to satisfy the second *Lemon* factor; their primary effect is to provide support to a particular religious conviction.[387]

Even if a court were to determine that without an explicit legislative endorsement of religion,[388] fetal burial and cremation legislation creates an "excessive government entanglement with religion" and therefore fails *Lemon*'s

377. *Id.*

378. CAL. CONST. art. I, § 4.

379. See *supra* notes 177–90 and accompanying text for a complete discussion of the *Feminist Women's Health Center* case.

380. Most Catholics adhere to the view that fetuses are human beings or persons. *See* Jon O'Brien, *The Catholic Case for Abortion Rights*, TIME (Sept. 22, 2015), http://time.com/4045227/the-catholic-case-for-abortion-rights/ [perma: http://perma.cc/8KNW-76UC].

381. Feminist Women's Health Ctr. v. Philibosian, 203 Cal. Rptr. 918, 1088 (Cal. Ct. App. 1984).

382. *Id.* at 1089.

383. *Id.*

384. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). See *supra* note 180 and accompanying text for a discussion of the *Lemon* factors.

385. *See Feminist Women's Health Ctr.*, 203 Cal. Rptr. at 925 (explaining that the Catholic League did "not have the right . . . to have the state's imprimature [sic] on [their] expression" of their view that the fetuses in that case were murdered humans deserving of public mourning).

386. *Id.*

387. *Id.*; *Lemon*, 403 U.S. at 612.

388. *Feminist Women's Health Ctr.*, 203 Cal. Rptr. at 925 ("Either the public act of disposing of the fetuses with no government display of religiosity, or the private expression of protected ideas would be proper. The impropriety comes from proceeding with the public act when the private group's intent to use that public act to frame and support the private expression is widely known.")

third factor.[389] The *Feminist Women's Health Center* court explained that the First Amendment was enacted largely to protect from "political division along religious lines."[390] Mandating the burial or cremation of fetuses does exactly that: it creates a dividing line between politicians based on their often-religious opinions regarding when life begins.[391] This division becomes clear after examining the intent of fetal burial and cremation supporters. In Indiana, for example, then-Governor Pence directly stated the religious nature of his support for H.E.A. 1337 by signing it "with a prayer."[392] Under *Lemon*, such "entanglements between church and state" undercut the First Amendment's requirement of governmental impartiality and are not constitutionally permissible.[393] Fetal burial and cremation legislation impedes upon religious freedoms and constitutional protections and therefore cannot stand.

E. The Future of Fetal Disposition, Personhood, and Abortion Rights Under an Anti-Choice Administration

As this Comment was being written, Donald Trump was elected President of the United States. It is impossible to discuss anti-choice laws and policies without acknowledging that such laws are passed by conservative governmental regimes. Trump's campaign went beyond the mere "conservative" view and explicitly demonized abortion.[394] In this Part, I will first discuss the anti-choice rhetoric that ran rampant in Trump's campaign and that has continued to dominate his administration. I will then address federal and state attacks on abortion rights that have occurred following Trump's election. Finally, I will discuss the response of the pro-choice movement to these attacks and how the pro-choice movement will move forward.

1. Anti-Choice Rhetoric in Trump's Campaign and Administration

When Donald Trump was elected President of the United States, pro-choice advocates across the United States panicked.[395] Candidate Trump had spent his campaign telling explicit lies about abortion, including his now-famous tirade explaining that late term abortion involves "rip[ping]" a fetus from the womb just days before birth.[396] Obstetricians were quick to point out that abortions do

389. *Lemon*, 403 U.S. at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664. 674 (1970)).

390. *Feminist Women's Health Ctr.*, 203 Cal. Rptr. at 926 (quoting James M. Zoetewey, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships* 3 PEPP. L. REV. 279, 287 (1976)).

391. *See* Green, *supra* note 10.

392. Hannah Levintova, *Pence Signed a Law Requiring Burial or Cremation of Aborted Fetuses*, MOTHER JONES (July 15, 2016, 5:54 PM), http://www.motherjones.com/politics/2016/07/trumps-vp-pick-passed-law-requiring-funerals-aborted-fetuses [perma: http://perma.cc/5VL2-2U9K]. Specifically, while signing the bill, Pence said, "I sign this legislation with a *prayer* that God would continue to bless these precious *children*, mothers, and families." *Id.* (emphasis added).

393. *Lemon*, 403 U.S. at 620–21.

394. *Cf.* Levintova, *supra* note 392.

395. *See, e.g.*, *Protecting Reproductive Rights*, *supra* note 20.

396. Painter, *supra* note 20.

not occur at nine months—instead, any induction of labor so late in gestation is simply referred to as delivery.[397] The misinformation that President Trump provides to his supporters demonizes abortion—a constitutional right—and contributes to a dangerous anti-choice rhetoric in which personhood measures like fetal burial and cremation laws can thrive.

The individuals Trump has selected to run his administration also are notorious enemies of abortion rights. For example, Jeff Sessions, the Attorney General of the United States, is a major opponent of the right to safe, legal abortion.[398] The *New York Times* Editorial Board has pointed out that with Sessions as Attorney General, the Department of Justice is "unlikely to defend reproductive rights."[399] Trump also selected Mike Pence as his running mate—the same Mike Pence who, as discussed above, signed Indiana's most restrictive abortion regulations in recent history.[400] Trump's decisions and commentary on abortion have brought to light valid questions about the future of reproductive rights in the United States.

The concerns of pro-choice advocates are not unfounded. Soon after Election Day, Trump appeared on 60 Minutes and confirmed his desire to overturn *Roe v. Wade*.[401] Many anti-choice legislators and advocates believe that Trump's presidency will allow their agenda to advance.[402] For example, Marjorie Dannenfelser, President of the Susan B. Anthony List,[403] threw her group's support behind Trump when he committed himself in writing to the organization's top four priorities.[404] These include "putting anti-abortion justices on the Supreme Court; passing a national 20-week ban like Ohio's; eliminating federal money for Planned Parenthood as long as its clinics perform abortions; and making permanent the Hyde Amendment, passed annually by Congress to ban taxpayer-funded abortions."[405] Having a President in office who explicitly supports the anti-choice movement's main goals is deeply alarming. In fact, anti-choice politicians already are using Trump's election as fuel to accelerate the widespread passage of restrictive abortion bans.[406]

397. *See id.* ("'There are no nine-month abortions' . . . . '[A]t 38 or 39 weeks it's always an induction and simply called delivery'. . . ." (quoting obstetrician-gynecologist Jen Gunter)).

398. *Protecting Reproductive Rights*, *supra* note 20.

399. *Id.*

400. See *supra* Part II.D.3 and accompanying text for a discussion of Indiana House Enrolled Act 1337.

401. Tavernise & Stolberg, *supra* note 20.

402. *Id.*

403. The Susan B. Anthony List is an anti-choice organization that encourages the election of anti-choice politicians. SUSAN B. ANTHONY LIST, http://www.sba-list.org/ [perma: http://perma.cc/3L47-VQBC] (last visited Nov. 6, 2018).

404. Tavernise & Stolberg, *supra* note 20.

405. *Id.*

406. *See id.*

2. Federal Attacks on Reproductive Rights Under the Trump Administration

Within days of Trump's inauguration, the federal government executed two major attacks on abortion access: the reinstatement of the Mexico City Policy and the signing of House Bill 7.[407] Just one day after the anniversary of the *Roe v. Wade* decision, President Trump signed an executive order reinstating the Mexico City Policy, known by its opponents as the "Global Gag Rule."[408] Former President Ronald Reagan first enacted this policy, which serves to block all U.S. family planning funding to foreign organizations that provide abortion care or even discuss abortion with their patients.[409] This rule was introduced despite the fact that the Helms Amendment, passed in 1976, already prohibits federal tax dollars from funding abortion care abroad.[410] Studies have shown that while the Mexico City Policy was in effect, unplanned pregnancies and abortions actually increased in number.[411] President Trump appears to have ignored the Global Gag Rule's ineffectiveness and in signing the order has made clear his willingness to undermine women's health and the wellbeing of children for the sake of the anti-choice movement.[412]

Additionally, President Trump's reinstatement of the Reagan-era anti-choice policy[413] raises questions about whether he aligns with President Reagan on other abortion-related issues. As discussed above, President Reagan endorsed the idea that fetuses are children (and therefore, persons under the law) deserving of mourning and burial.[414] Although President Trump has not yet revealed his opinions on fetal personhood, his willingness to take extreme action against abortion funding so early in his presidency should raise concerns about whether he would approve of laws (like fetal burial and cremation legislation) that recognize the fetus as a legal person. Adding to the confusion is the fact that President Trump's attitudes on abortion have changed throughout the years, making it more difficult to predict his views on issues such as fetal personhood.[415]

The second attack on abortion access occurred one day after President

407. Diamond, *supra* note 20; Smothers, *supra* note 20.

408. Diamond, *supra* note 20.

409. *Id.*

410. *Id.*

411. *Id.* ("In *New York* magazine, the journalist Lisa Ryan recently reported on a set of studies that tracked the effect of the policy on abortion abroad. One, conducted by International Food Policy Research Institute in 2015, looked at the Mexico City policy's impact in Ghana. When the policy was in place, a number of clinics curbed services or closed completely. There was an upswing in unintended pregnancies, with 20 percent ending in abortion, explains Ryan.").

412. *See id.*

413. *Id.*

414. Feminist Women's Health Ctr. v. Philibosian, 203 Cal. Rptr. 918, 1080 (Cal. Ct. App. 1984).

415. *See* Meet the Press, *Trump in 1999: 'I am very pro-choice'*, NBC NEWS (July 8, 2017), http://www.nbcnews.com/meet-the-press/video/trump-in-1999-i-am-very-pro-choice-480297539914 [perma: http://perma.cc/V24F-EBB3].

Trump reinstated the Global Gag Rule.[416] The House of Representatives passed House Bill 7, a bill designed to make the Hyde Amendment[417] permanent.[418] House Bill 7 goes beyond the current ban, which eliminates federal funding for abortion through Medicaid—it also prohibits multistate insurance under the Affordable Care Act from covering abortion care.[419] As a result, the bill would prevent millions of American women from using insurance to assist in paying for their abortions.[420] Pro-choice advocates have pointed out that this bill—like the Hyde Amendment itself—has its greatest impact on low-income women.[421] House Bill 7 would not only decrease safe, legal abortion access for these women; it would also place them in physical danger.[422]

The tragic story of Rosie Jimenez illustrates this point.[423] After the Hyde Amendment was enacted in 1976, Rosie could not afford the abortion she needed—so she arranged to obtain a cheaper, illegal abortion.[424] After the procedure, Rosie contracted a severe infection in her uterus.[425] After a tracheotomy, hysterectomy, and seven days of painful suffering, Rosie died.[426] She was only twenty-seven years old.[427] Rosie's death triggered conversations about the dangers of cutting off abortion access.[428] With the House's passing of House Bill 7, Rosie's story is once again extremely relevant.[429]

In November of 2017, the House of Representatives introduced a tax plan with a provision that alarmed many people.[430] The enormous tax bill includes a

416. Smothers, *supra* note 20.

417. The Hyde Amendment blocks federal funding for abortion care by "exclud[ing] abortion from the comprehensive health care services provided to low-income people by the federal government through Medicaid." *Public Funding for Abortion*, *supra* note 328.

418. Smothers, *supra* note 20.

419. H.R. 7, 115th Cong. (2017).

420. Smothers, *supra* note 20.

421. *Id.*

422. *Id.* House Bill 7, like the Hyde Amendment, contains exceptions for rape, incest, and endangerment to the life of the pregnant woman. H.R. 7. However, these exceptions do *not* protect women who simply wish to terminate a pregnancy and cannot afford to do so. *See* Smothers, *supra* note 20. Ultimately, women who truly wish to obtain an abortion will do so legally or illegally and may be placed in extreme physical danger. *See* Alexa Garcia-Ditta, *Reckoning with Rosie*, TEX. OBSERVER (Nov. 3, 2015, 8:29 AM), http://www.texasobserver.org/rosie-jimenez-abortion-medicaid/ [http://perma.cc/TS4U-MB75].

423. Smothers, *supra* note 20; *see also* Garcia-Ditta, *supra* note 422.

424. Garcia-Ditta, *supra* note 422 As Garcia-Ditta points out, the Hyde Amendment was designed to prevent women from obtaining abortions. *Id.* However, all the amendment succeeded in was "forc[ing] them to seek less expensive options." *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. Smothers, *supra* note 20. House Bill 7 has been received in the Senate and referred to the Committee on Finance. H.R. 7 at 1.

430. Jeremy W. Peters & Deborah B. Solomon, *Tax Overhaul Bears Gifts for Conservatives, Including Rights for 'Unborn'*, N.Y. TIMES (Nov. 4, 2017), http://www.nytimes.com/2017/11/04/us/politics/tax-bill-unborn-children.html [perma: http://perma.cc/C3LT-N94D].

provision that allows expecting parents to "designate a 'child in utero' as a beneficiary of a 529 plan."[431] The provision specifies that a "child in utero" is a "member of the species Homo sapiens, *at any stage in development*, who is carried in the womb."[432] Critics of the provision have been quick to point out that it would constitute federal recognition of the fetus as a "child" or a "person" with rights.[433] Thus, a personhood measure has made an appearance in proposed federal law.

The Senate tax bill did not include language allowing fetuses to stand as 529 plan beneficiaries. Senate lawmakers initially included a provision similar to that of the House bill, but later removed it because it did not directly relate to taxes and spending.[434] Importantly, then, the Senate did *not* remove the fetal personhood measure from its bill on the grounds that a fetus is not a human being—instead, they did so based on a technical rule for tax legislation.[435] Regardless of its ultimate fate, the mere fact that a personhood measure made its way into a federal tax bill is disturbing, since efforts to humanize and grant rights to the fetus are all too often part of an effort to undermine abortion rights.[436]

3. State Attacks on Reproductive Rights Following Trump's Election

Anti-choice state legislatures have also been motivated by Trump's victory. Shortly following Trump's election, Ohio's legislature passed two abortion bans: one at six weeks, and one at twenty weeks.[437] Neither contained an exception for rape, incest, or the health of the pregnant woman.[438] Even anti-choice politicians were surprised that the six-week ban passed, and they readily cited President Trump's victory as a driving force behind their "victory."[439] Governor John Kasich vetoed the six-week "heartbeat bill," which could have stopped a woman's ability to obtain an abortion before she even realized she was pregnant.[440] However, he did sign the twenty-week ban in a move that many

431. *Id.*

432. *Id.* (emphasis added).

433. *See id.*

434. Sahil Kapur, *Senate Bill Doesn't Include Tax Break for 'Unborn Children'*, BLOOMBERG POLITICS (Dec. 4, 2017, 10:16 AM), http://www.bloomberg.com/news/articles/2017-12-04/senate-bill-doesn-t-have-house-s-tax-break-for-unborn-children [perma: https://perma.cc/V4Y4-A48U]; *see also* Jen Kirby & Emily Stewart, *What Did and Didn't Make It into the Final GOP Tax Bill*, VOX (Dec. 19, 2017, 1:00 PM), http://www.vox.com/platform/amp/policy-and-politics/2017/12/19/16783634/gop-tax-plan-provisions [perma: http://perma.cc/7M89-NTNW].

435. Kapur, *supra* note 434 (explaining that the provision was removed to ensure compliance with the "Byrd Rule, which prohibits changes that aren't directly related to taxes and spending").

436. See *supra* Part II.B for a discussion about various efforts made to enact fetal protection measures.

437. Tavernise & Stolberg, *supra* note 20.

438. *Id.*

439. *See id.* ("'President-elect Trump has drastically shifted the dynamics' . . . . 'I honestly could not have foreseen this victory a week or a month ago'" (quoting Republican Ohio State Representative Christina Hagan).

440. Jessie Balmert, *Kasich Vetoes 'Heartbeat Bill,' Signs Less Restrictive Abortion Ban*, USA TODAY (Dec. 13, 2016, 4:04 PM, updated Dec. 13, 2016 6:56 PM),

considered a "bait-and-switch."[441] Anti-choice politicians used the six-week ban to incite panic in the pro-choice community, and believed that the twenty-week alternative would come off as "generous."[442] Those politicians forget that restricting abortion access implicates the constitutional rights and safety of women. Further, they ignore the fact that restricting access to abortion does not stop abortion—it stops safe, legal abortion.[443]

Another disturbing news story came from Tennessee, where a woman was charged with a felony after allegedly attempting to induce her own abortion with a coat hanger.[444] Anna Yocca was originally charged with first-degree murder when she "tried to poke her womb with [a] wire hanger."[445] The murder charges were later dropped, and a grand jury issued an indictment charging Yocca with aggravated assault with a weapon, attempted procurement of a miscarriage, and criminal abortion.[446] Yocca remained imprisoned from December 2015 to January 2017, when she pleaded guilty to one felony count in exchange for her release.[447]

Yocca's case has drawn attention on both sides of the abortion debate, and has cast light on Tennessee's extremely restrictive abortion regulations.[448] Tennessee is a state of ninety-five counties, but only four of those counties have an abortion provider.[449] A woman seeking an abortion in Tennessee is required to make multiple trips to a provider because of forty-eight hour waiting periods and counseling requirements.[450] With Trump's election and the strength it has provided to the anti-choice movement, reproductive rights groups in Tennessee

http://www.usatoday.com/story/news/politics/2016/12/13/kasich-vetoes-heartbeat-bill-passes-20-week-ban/95372940/ [perma: http://perma.cc/5FJT-LUHF].

441. Jon Comulada, *John Kasich Pulled a Bait-and-Switch with a Major Abortion Bill in Ohio*, UPWORTHY (Dec. 14, 2016), http://www.upworthy.com/john-kasich-pulled-a-bait-and-switch-with-a-major-abortion-bill-in-ohio [perma: http://perma.cc/WH47-L2KT].

442. *See id.*

443. See *infra* notes 445–53 and accompanying text for a discussion of the desperate, unsafe measures women take in the absence of practical access to legal abortion.

444. Tavernise & Stolberg, *supra* note 20.

445. Katie Mettler, *Tennessee Woman Who Attempted Coat Hanger Abortion Faces Three New Felony Charges*, WASH. POST (Nov. 18, 2016), http://www.washingtonpost.com/news/morning-mix/wp/2016/11/18/tenn-woman-who-attempted-coat-hanger-abortion-faces-three-new-felony-charges/?utm_term=.90567c513a8d [perma: http://perma.cc/5CXU-4BK5]. The specific reasons that Ms. Yocca attempted to self-induce an abortion are not clear. *See id.*; Lisa McClain-Freeney, *Anna Yocca in TN Pleads Guilty Despite Unconstitutionality of the Charge*, NAT'L ADVOCATES FOR PREGNANT WOMEN: BLOG (Jan. 10, 2017, 4:13 PM), http://advocatesforpregnantwomen.org/blog/2017/01/anna_yocca_in_tn_pleads_guilty.php [perma: http://perma.cc/XVD6-3NYD].

446. Mettler, *supra* note 445. Anna's fetus did not die during the attempted self-induced abortion—instead, Yocca delivered a living baby via emergency c-section—which likely explains why the murder charges were dropped. Liam Stack, *Woman Accused of Coat-Hanger Abortion Pleads Guilty to Felony*, N.Y. TIMES (Jan. 11, 2017), http://www.nytimes.com/2017/01/11/us/tennessee-abortion-crime.html [perma: http://perma.cc/S6XS-HXK8].

447. Mettler, *supra* note 445; Stack, *supra* note 446.

448. Mettler, *supra* note 445.

449. Tavernise & Stolberg, *supra* note 20.

450. Mettler, *supra* note 445.

fear "a really extreme abortion ban."[451] Yocca's case has been widely cited as a reminder of what happens when women lose access to safe, legal abortion.[452] Strict regulations do not eliminate abortions—they only make women seeking such medical care desperate and willing to take extreme measures to obtain the procedure.[453]

4. Responses by the Pro-Choice Movement

Hope is not lost for the reproductive rights movement. Though the future is admittedly bleak, pro-choice advocates are not losing motivation.[454] States always are able to pass their own protections for abortion funding and other reproductive care.[455] Some have already done so—in Montana, for example, federal family planning funding was moved to a state-legislature-controlled account.[456] This measure protects that funding from federal interference.[457] Reproductive rights organizations have already begun to work overtime, understanding that their jobs will become more difficult in coming years.[458] Their work is largely funded by donations, which have increased in number following Trump's election.[459] For example, Planned Parenthood has seen an increase in donations since the November 2016 election, with many donations being made "in honor" of Vice President Mike Pence.[460] Further, federal courts will stand between many anti-abortion regulations and the women whose rights they seek to limit. The fact that federal judges have blocked fetal burial and cremation legislation in several states is encouraging in this regard—such attacks on a woman's right to choose will not withstand constitutional muster.[461] The pro-

451. Tavernise & Stolberg, *supra* note 20.

452. *Id.*; Mettler, *supra* note 445.

453. *See* Mettler, *supra* note 445.

454. *Protecting Reproductive Rights*, *supra* note 20.

455. *Id.*

456. *Id.*

457. *Id.*

458. *See* Olga Khazan, *How Activists Are Protecting Reproductive Rights Under Donald Trump*, ATLANTIC (Jan. 25, 2017), http://www.theatlantic.com/health/archive/2017/01/protecting-reproductive-rights-state-by-state/514364/ [perma: http://perma.cc/7RZ6-FMF7].

459. *See ACLU and Planned Parenthood See 'Unprecedented' Rise in Donations After Donald Trump's Election*, TIME (Nov. 14, 2016), http://time.com/4570796/aclu-planned-parenthood-donation-increase-donald-trump/ [perma: http://perma.cc/4ZE6-WSYZ].

460. Lisa Ryan, *Planned Parenthood Has Already Received 82,000 Donations from 'Mike Pence'*, N.Y. MAG.: THE CUT (Dec. 8, 2016, 4:00 PM), http://nymag.com/thecut/2016/12/how-many-planned-parenthood-donations-came-from-mike-pence.html [perma: http://perma.cc/P35F-S772].

461. Despite the fact that fetal burial and cremation legislation is clearly unconstitutional, any future review of these laws may be impacted by changes in the makeup of the Supreme Court of the United States. When President Trump nominated then-Judge Neil Gorsuch to the Court, he "fulfilled his campaign promise of 'a[n anti-choice] justice in the mold of Justice Scalia.'" Jeanne Mancini, *Neil Gorsuch Will Strengthen the Fight Against Abortion Rights*, TIME (Mar. 20, 2017), http://time.com/4705897/neil-gorsuch-anti-abortion/ [perma: http://perma.cc/FZ8H-WANA] (quoting President Trump). In addition to the confirmation of Gorsuch, Justice Kennedy retired from the Court in July 2018 and was replaced by Brett Kavanaugh. Jacob Pramuk & Marty Steinberg, *Justice Kennedy Retiring from Supreme Court*, CNBC (June 27, 2018, 2:01 PM),

choice movement is determined to protect the right to safe, legal abortion.

IV. CONCLUSION

The anti-choice movement has employed increasingly creative tactics in its effort to undermine abortion rights. Most recently, states have introduced legislation mandating the burial and cremation of fetuses. States such as Indiana and Texas justify these laws as granting "dignity" to fetal remains, but this argument ignores the fact that the fetus is not—and has never been—a legal person. "Fetal funeral" laws are merely a means of granting personhood—and the legal protections that come with it—to the fetus.

Fetal personhood is legally unprecedented and presents dangers to women, fetuses, and abortion rights. Laws requiring the burial or cremation of a fetus place major unconstitutional obstacles in a woman's path to safe, legal abortion and thus violate the undue burden standard articulated in *Casey* and clarified in *Whole Woman's Health*. Further, these laws violate the Establishment Clause of the First Amendment. As such, fetal burial and cremation legislation cannot pass constitutional muster and must be invalidated.

http://www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html [perma: http://perma.cc/GN64-7JLF]; Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), http://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [perma: http://perma.cc/SJ82-GJPY]. Many have said that Kennedy's retirement, and the appointment of another Trump-nominated justice, could be devastating for the right to safe, legal abortion. *See, e.g.*, Ariane de Vogue, *Anthony Kennedy Retirement Watch at a Fever Pitch*, CNN (updated June 26, 2017, 8:29 AM), http://www.cnn.com/2017/06/24/politics/anthony-kennedy-retirement-rumors/index.html [perma: http://perma.cc/LE3P-9RKM]. This concern is amplified by Justice Kavanaugh's track record, which includes several allegations of sexual assault and a passionate dissent in *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting), that allowed a migrant teenage girl to obtain an abortion.