Article

Reproductive Objectification

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The American system of rights is individualized—premised on the concept of singular, physically separate, and autonomous people. The rise of the fetal personhood movement complicates this basic understanding. If rights attach to singular, autonomous people, and fetuses are legally people, then the body of a pregnant person becomes conceptually unintelligible as it contains potentially two, interrelated people. Such a circumstance is fundamentally a contradiction within a framework that insists that rights attach to people who are, by definition, singular, separate, and autonomous.

This Article argues that, as a result of this apparent contradiction, fetal personhood laws make the humanity of the pregnant person precarious. If the law has no framework for two rights holders in one body, then the pregnant person must be something else entirely. She becomes less of a subject and more of an object—a reproductive vessel, merely the container for another individual rights-holder. Reproductive justice scholars and advocates have long argued that laws purporting to endow the fetus with personhood exacerbate the "maternal-fetal conflict" and undermine

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pregnant people's rights. This Article argues, relying on both decades of feminist legal theory and original empirical evidence, that granting full personhood to a fetus has an even more insidious outcome—undermining the legal personhood of women entirely and recategorizing them in the eyes of the law as non-person objects. Looking across cultures and eras, it is unfortunately not difficult to ascertain what might happen when human beings are treated as objects. Such objectification results in almost certain abuse, sometimes of the most horrifying variety.

INTRODUCTION

The pregnant body is not meaningfully incorporated into mainstream legal theory. Pregnancy is ignored entirely by many legal and philosophical texts and thinkers.[1] When pregnancy *is* addressed, it is often with the continuing refrain that pregnancy is sui generis, that it has no easy legal analogy, that the reproductive process is different, set apart, and necessarily distinct from other concerns of the legal system.[2] As a result, most American legal thought treats pregnancy as an exception, and a bothersome one at that.[3]

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1. *See, e.g.*, Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 FORDHAM L. REV. 1537, 1538 (2004) (noting that the leaders of political philosophy in the twentieth century "paid no attention in their writings to the feminist movement and its ideas" (quoting Brian Barry, *Good for Us, but Not for Them*, GUARDIAN, Aug. 14, 1993, at 23)); Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860, 1860–61 (1994) (cataloging critiques of John Rawls, who has been called "the greatest philosopher of [the twentieth] century," for his failure to address issues of women and gender).

2. *See, e.g.*, People v. Cross, 45 Cal. 4th 58, 74 (2008) ("Pregnancy is a sui generis condition . . . ."); *see also* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 195 (1982) ("The instinct to treat pregnancy as a special case is deeply imbedded in our culture, indeed in every culture. It seems natural, and *right*, to treat it that way."); Michelle Oberman*, Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 469–70 (2000) ("The argument that pregnancy is *sui generis*, and therefore should be governed by distinct legal and ethical principles, is neither new nor unique to medicine. Indeed, feminists and others have raised this argument in contexts ranging from the employment setting, to efforts to secure women's rights to abortion." (footnote omitted)); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1313–14 (1991) ("[The] relation [between a woman and a fetus] has never been accorded a legal concept of its own. Because legal method traditionally proceeds by analogy and distinction, attempts at analogy between the relationship between the fetus and the pregnant woman and relations already mapped by law are ubiquitous. Had women participated equally in designing laws, we might now be trying to compare other relationships—employer and employee, partners in a business, oil in the ground, termites in a building, tumors in a body, ailing famous violinists and abducted hostages forced to sustain them—to the maternal/fetal relationship rather than the reverse. Sometimes there are no adequate analogies. As it is, the fetus has no concept of its own, but must be like something men have or are: a body part to the Left, a person to the Right. Nowhere in law is the fetus a fetus.").

3. *See* Erin Nelson, *Reconceiving Pregnancy: Expressive Choice and Legal Reasoning*, 49 MCGILL L.J. 593, 622 (2004) ("[P]art of the reason for the law's

This uneasy relationship between the law and the pregnant body stems in part from the fact that American legal thought is premised primarily on the concept of people as singular, autonomous actors housed within physically separate and distinct bodies.[4] Because the law envisions each person as necessarily individual and separate, the pregnant body is legally unintelligible.[5] The pregnant person[6] is, at least potentially, two. And one of the

difficulty in dealing with pregnancy is its inability to fit pregnancy neatly (or at all) into an existing legal category.").

4. Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1335–36 (1996) ("[L]iberal rights theory incorporates the concepts of bodily integrity and boundary: for liberal legalism, the body is the physical boundary which defines the rights-bearing subject." (footnote omitted)); Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN'S L.J. 47, 67 (1997) ("To be an individual is to be distinct and distinguishable from others, to have a wholly unique identity and a socially-accepted sense of selfness and singularity. In the liberal jurisprudence of rights, this independence — separation from others in society — is central to having one's status as a rights-bearer accepted by the state and other legal actors."). Of course, this is not the *only* available way to think about people or about bodies. *See, e.g.*, Halewood, *supra*, at 1337 ("Postmodernism, as an analytical framework, demonstrates the contingency of our culture's image of the body as an organic whole by highlighting the ways in which biotechnology breaks down the body, fragments it, and reassembles it differently."). While other frameworks have been incorporated in academic and theoretical scholarship, however, the law still generally hews to liberal theory in conceptualizing and adjudicating rights. *See* MacKinnon, *supra* note 2, at 1316 (noting that our legal system views an individual as their own self with their own rights).

5. RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 187–88 (2000) (asserting that fetal rights politics "render[] pregnant women as something other than normal human beings—they no longer fit any of the existing categories" and describing cases that "exemplif[y] the notion of pregnant women as confounding and as categorically different from other human beings"); MacKinnon, *supra* note 2, at 1316 ("In a legal system that views the individual as a unitary self, and that self as a bundle of rights, it is no wonder that the pregnant woman has eluded legal grasp, and her fetus with her."); Morris, *supra* note 4, at 50–51 ("The law currently cannot envision and address the pregnant woman as a uniquely constituted entity. The fetus and the pregnant woman provide a dilemma for the law: one person or two? Case law and statutes regarding fetal personality reveal that the law's conception of the pregnant woman is like a gestalt picture. As the fetus comes into view, the woman disappears. Look closely at the woman, and the fetus fades out of focus. Woman or fetus: the law cannot accommodate both parties and their interests at once.").

6. Throughout this Article, we sometimes use the term "pregnant people" as a recognition of the fact that not all those that can become pregnant identify as women. There are times, however, that because of the terminology utilized

two is necessarily dependent on the other. In both respects, then, the pregnant body defies the foundational idea of people as individuated, self-governing rights-holders.[7]

In the last several decades, the fetal personhood movement has aggressively advanced the idea that fetuses should not be considered *potential* life, but instead full human beings who are wholly entitled to the same rights as already-born people.[8] The fetal personhood movement has advanced this argument directly both through proposed legislation and advocacy that explicitly relies on fetal personhood,[9] but also through a number of more oblique mechanisms.[10] These arguments have gained momentum (and traction) following the Supreme Court's decision to remove the right to abortion from constitutional protection in *Dobbs v. Jackson Women's Health Organization*.[11] Importantly, advocates for fetal personhood have not insisted on a rethinking of the fundamental understanding of personhood as it exists in

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in the research that we rely on, it would be impossible for us to substitute "people" for "women" without mischaracterizing the underlying data. See *infra* Part II.D for data analysis relying on "female" identification. Additionally, as this Article tests the idea that it is the *perceived* ability for pregnancy that results in objectification and violence, we sometimes also refer to either "pregnant women" or "people who are perceived as having the potential for pregnancy." *See* discussion *infra* Part II.B. In this way, our project is more firmly directed to perceptions of gender and reproductive capacity than pregnancy or the physical capacity for pregnancy itself. We also sometimes use feminine pronouns (she/her) throughout for readability.

7. SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY 79 (1993) ("[O]ntologically speaking, the pregnant woman has been seen by our legal system as the mirror-image of the abstract subject whose bodily integrity the law is so determined to protect. For the latter, subjectivity is the essence of personhood, not to be sacrificed even in the interests of the preservation of the life of another individual."); Nelson, *supra* note 3, at 612 (noting the likely "inevitable" failure of liberal principles to address decision-making in pregnancy because the "pregnant woman does not conform to the paradigmatic example of the liberal individual").

8. Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 560 (2009) (noting that fetal personhood laws "treat the embryo or fetus as a separate, rights-holding entity" within particular legal contexts).

9. *See id.* at 558–59 (reviewing measures states have taken to create fetal personhood).

10. *E.g.*, *id.* at 560 (describing how states achieve fetal personhood goals by covert legislation that does not refer directly to fetal personhood but instead uses terms like "harm to pregnant women").

11. 597 U.S. 215 (2022).

American legal thought by problematizing the notion of the individuated, independent right's holder. Instead, the fetal personhood movement has mainly advocated for the inclusion of the fetus in the existing framework.[12] If adopted, the framework of fetal personhood would thus result in two, individuated rights-holders existing simultaneously in the pregnant body.[13]

Reproductive justice scholars and advocates have argued strenuously against fetal personhood laws and the underlying implication that fetuses are legal people due to the justifiable intuition that if the fetus is endowed with the rights of an already-born human, the rights of the pregnant person will necessarily be diminished as a result.[14] This concern is well-founded—rights themselves are not absolute but subject to curtailment in the face of countervailing interests or even others' superior rights claims.[15] In fact, the American legal system is primarily concerned with adjudicating the disputes that arise when one individual's right conflicts with another individual's right.[16]

12. *See infra* Part I.A (discussing feticide laws that use the traditional legal framework of individual rights to criminalize abortion).

13. *See infra* Part II.A (discussing the two-people-in-one-body problem).

14. *E.g.*, Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 689 (2006) (describing how the connection between fetal personhood and the "maternal-fetal conflict" has "been widely explored in feminist literature, both legal and non-legal"); Morris, *supra* note 4, at 51 ("What the fetal rights cases simultaneously mask and express is that pregnant women, under the rhetoric of fetal rights, have been characterized as subordinate to their fetuses, and have thereby experienced a loss of status and accompanying rights."); MacKinnon, *supra* note 2, at 1315 ("Now place the legal status of the fetus against the backdrop of women's tenuous to nonexistent equality. Women have not been considered 'persons' by law very long; the law of persons arguably does not recognize the requisites of female personhood yet. Separate fetal status of any sort, in a male-dominated legal system in which women have been controlled through the control of their procreative capacity, risks further entrenchment of women's inequality. If the fetus were deemed a person, it may well have more rights than women do, especially since fetal rights would be asserted most often by men in traditionally male institutions of authority: progenitors, husbands, doctors, legislators, and courts.").

15. *See* Aharon Barak, Foreword, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 42 (2002) ("Human rights are not absolute; the right of one individual is limited by the right of another. The right of the individual is also limited by the needs of society: every legal system has its own limitation formula for balancing the right of the individual against society's demands.").

16. *See, e.g.*, Vanessa E. Munro, *Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights*, 10 SOC. & LEGAL STUD. 459, 462

Thus, there is legitimate concern that endowing the fetus with the full rights of already-born people will enable the legal system to abridge the rights of a pregnant person if it adjudicates the latter as less compelling than the former in circumstances where their interests conflict.[17] At the very least, her legal ability to access abortion may be weakened or erased.[18] But quite possibly a whole host of other rights to make decisions for herself and her body could also be undermined. There is an unspoken assumption underlying these arguments that the pregnant person will still *possess* rights as an individual, but that there will be the ever-present possibility that her rights will sometimes be adjudicated as less important than the rights of the fetus she is carrying.[19] Indeed, in such a system of rights adjudication between two legal people, it would be reasonable to anticipate that sometimes the rights of a pregnant person might prevail and sometimes the rights of a fetus might prevail.

This Article argues, however, that it is not entirely accurate to say that the only potential consequence of the fetal personhood movement is to create a clash of rights between two persons

(2001) ("[T]he rhetoric of rights encourages a legal environment dominated by demands for individual entitlement, it also engenders an adjudicative function concerned primarily with evaluating competing claims rather than with meaningfully resolving complex dilemmas . . . ."); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1271 (1981) ("[T]he legal system might be conceived of as protecting individual rights by adjudicating disputes between individuals.").

17. Morris, *supra* note 4, at 55–56 ("Legal and social issues relating to abortion, fetal protection policies, and fetal rights are typically framed as conflicts of rights: the woman's right to privacy versus the fetus's right to life; the woman's right to control her body, or to refuse medical treatment, or to work versus the fetus's right to be born healthy. These conflicts are not surprising because one of the law's functions is to arbitrate and the questions it considers are necessarily constructed in terms of conflict. Conflict requires adversaries, and therefore the law must conceptually separate the fetus from the woman in order to frame and resolve the dispute.").

18. *See infra* notes 41–42 and accompanying text (discussing how the constitutionality of abortion after *Roe v. Wade* may be dependent on fetal personhood).

19. *See* Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/AC47-NDQ4] ("[A]bortion rights groups argue that establishing fetal personhood inevitably strips away the rights of a pregnant woman — her choices in a health care proxy, or about whether to have surgery, say — would have to be weighed against another equal person's.").

in which it is equally likely that the pregnant person's rights or the fetus's rights might prevail. Because our system of individual rights is constructed around the rights of an autonomous, individuated actor, there is no ready framework to describe the rights of the pregnant person concurrently with the rights, if any, of the fetal life she is sustaining.[20] It is exceedingly rare outside the context of pregnancy for two fully legal people to be necessarily and completely physically intertwined.[21] In the absence of a readily applicable legal framework for this circumstance, there is a risk that something sinister will happen to the pregnant person's rights. As the law increasingly conceives of fetuses as people, the *fundamental humanity* of the pregnant person becomes more conceptually precarious.[22] In other words, if

20. *See infra* Part II.A.

21. The one obvious counterexample is, of course, the very rare occurrence of conjoined twins. Despite robust medical research surrounding conjoined twins' anatomy and physiology, the literature and sparse case law surrounding the topic provide few answers as to the legality surrounding regulation of conjoined twins, their personhood, and their medical rights. *See generally* George J. Annas, *Conjoined Twins: The Limits of Law at the Limits of Life*, 344 NEW ENG. J. MED. 1104 (2001) (highlighting the shortcomings of legal principles as applied to conjoined twins). In the very few cases we can draw on, conjoined twins (or their parents) are permitted to elect surgeries that separate the twins, even when such surgery will inevitably lead to one twin's death. *Cf. id.* (acknowledging historic adherence to the wishes of parents of conjoined twins but discussing a controversial case in which a court ordered separation against parental wishes); M.R. Mercurio, *The Role of a Pediatric Ethics Committee in the Newborn Intensive Care Unit*, 31 J. PERINATOLOGY 1 (2011) (discussing similar legal and ethical dilemmas between parents and care providers arising from other newborn medical conditions). These cases emphasize the individuality of the twins over the connection between them, often painting one twin as a parasite—effectively sucking the lifeblood out of the other twin. Annas, *supra*, at 1107 (discussing a case in which a court painted one, less healthy conjoined twin as "poisoning" the other, healthier twin). This framing then allows for the application of various criminal law defenses to taking an action (separation surgery) that is effectively a death sentence to one twin. *See id.*; *see also* Enas Qutieshat, *The Legal Personality of Conjoined Twins*, 9 EUR. J. BUS. & MGMT. 88, 89 (2017) (raising the possibility of a self-defense claim). Despite the rarity of the occurrence of conjoined twins, however, the ethical and legal literature surrounding this issue is helpful in thinking through some of the issues that this Article addresses, and that literature is referenced and cited throughout. *See infra* notes 111, 115.

22. Of course, the harms of objectification outlined in this Article are particularly salient for individuals whose identities subject them to objectification or dehumanization already—racial and sexual minorities, indigenous people, and people with disabilities, among others. While this Article focuses on the

the law has no framework for two rights-holders in one body (if only one "person" within a body can be considered a legal subject and afforded the rights that attach to such a status) the pregnant person must become something else. If she is not a *subject*, then she must be an *object*—a reproductive vessel, merely the container for another individual rights-holder. Fetal personhood laws thus necessarily risk not only the undermining of the pregnant person's rights but also potentially their complete nullification. Through her objectification, the pregnant or potentially pregnant person is rendered ineligible for the rights that attach only to legal *subjects*.[23]

Of course, the concept of woman-as-reproductive-vessel is not solely the result of the modern movement for fetal personhood nor the legal treatment of pregnant people generally. Such reproductive objectification has extremely entrenched cultural, religious, and historical roots.[24] But this Article argues that fetal personhood laws necessarily strengthen this association between reproductive capacity and reproductive objectification. It posits that by endowing the fetus with personhood, the personhood of potentially pregnant people is necessarily (and perhaps completely) undermined.[25]

Meaningfully testing the hypothesis that fetal personhood laws result in the objectification of potentially pregnant people is a daunting task. Guiding our project, however, is the basic proposition that the objectification of individuals or groups has, historically and cross-culturally, resulted in increased rates of violence and abuse towards those individuals or groups, sometimes of the most horrifying variety.[26] When people are no longer thought of as fully human, they are no longer treated with the respect that such humanity warrants within shared cultural val-

association between perceived capacity for pregnancy and reproductive objectification, there can be no doubt that other identities can exacerbate both the strength of objectifying trends and the danger of the outcomes associated with them. *See, e.g.*, Zara Abrams, *Abortion Bans Cause Outsized Harm for People of Color*, AM. PSYCH. ASS'N (June 1, 2023), https://www.apa.org/monitor/2023/06/abortion-bans-harm-people-of-color [https://perma.cc/3TLT-6LQK] (describing disproportionate harms of increased reproductive restrictions on communities of color).

23. *See infra* Part II.B.

24. *See infra* Part II.B.

25. *See infra* Part II.B.

26. *See infra* Part II.C.

ues. This results in an increase in the physical violence they experience. Thus, if fetal personhood laws are associated with increases in the rates of violence that potentially pregnant people experience, at least one persuasive explanation for this increase would be that fetal personhood laws result in the objectification of the group experiencing the increase in violence.[27] This increase in violence is used as a proxy indicator of pregnant people's objectification, drawing on the large body of literature that connects objectification and violence. Our empirical analysis provides initial support for this association—states with fetal personhood laws often have higher levels of both intimate partner violence and violence against women of reproductive age generally.[28]

Of course, while the empirical analysis can provide evidence that fetal personhood laws are associated with increased violence towards potentially pregnant people, it does not definitively establish that it is objectification that is the mechanism for the increased violence. Therefore, our Article couples this new empirical evidence with existing feminist legal theory and examples of objectifying language and images from current legal, political, and cultural discourse.[29] Together with our empirical analysis,[30] a compelling picture of how fetal personhood has the potential to undermine women's place as full legal subjects under the law emerges.

As laws endowing a fetus with all the rights of a person are either new and/or only recently in effect, we are constrained in testing directly laws that purport to endow the fetus with the full legal rights of a person.[31] Laws that *reflect* a belief in fetal personhood, however, have existed in several forms for some time. For both practical and methodological reasons, we did not test every possible type of law that reflects fetal personhood, instead focusing on laws that: (1) demonstrate a belief in a fetal personhood, (2) have sufficient similarities across states to meaningfully create categories for comparison, and (3) are based

27. *See infra* Part II.C.

28. *See infra* Part II.D.

29. *See infra* Part II.C.

30. *See infra* Part II.D.

31. The most recent data we have regarding intimate partner violence and violence against women extends to through the end of 2019. *See infra* Parts II.C–D.

in state statute and not common law.[32] Thus, the laws we draw on for our comparative empirical analysis include feticide laws, laws allowing the forced civil commitment of pregnant people, and laws addressing the validity of pregnant people's advance directives.[33] For the reasons discussed in Part I, we do not include abortion restrictions in this analysis.[34]

Part I briefly describes the history and aims of the movement to enshrine fetal personhood in American law.[35] Part II delves deeper into the argument that fetal personhood laws result in the objectification of potentially pregnant people as reproductive vessels and that this objectification will result in increased rates of violence towards women of reproductive age.[36] This Part supplements our theoretical framework by offering a novel empirical analysis of the relationship between fetal personhood laws and violence against potentially pregnant people, concluding there is a meaningful association between the two.[37]

The Article ultimately argues that laws enshrining fetal personhood not only result in a diminution of the rights of pregnant people, but that as a result of turning potentially pregnant people into *objects*—reproductive vessels—these laws may risk increasing violence towards them as a group. Depressingly, it is an open question as to whether increases in violence towards women is a price that our society is willing to pay for enshrining fetal personhood. But this Article aims to shed light on one understudied consequence of endowing fetuses with the rights of

32. *See infra* Part I.

33. *See infra* Part I. We would have also wished to test the association between the state's denial of pregnant people's rights to refuse medical treatment, such as in the case of forced C-sections, against rates of intimate partner violence and violence against women. The lack of a statutory framework for such forced medical interventions, however, made it difficult for the analysis to accurately reflect such associations.

34. *See infra* Part I.B. Future work will further test our hypothesis that fetal personhood is associated with meaningful increases in violence against women by exploring the effect of the post-*Dobbs* legal landscape. We believe it was critical to introduce the ideas in the Article now, however, in part to add to the chorus of scholars and advocates who predict that the proliferation of fetal personhood laws is likely to have widespread (and sometimes unanticipated) negative effects, hopefully in an effort to stop any political momentum in support of such measures.

35. *See infra* Part I.

36. *See infra* Parts II.A–C.

37. *See infra* Part II.D.

people: the violence that can inevitably follow when a class of people is no longer considered fully human.

I. FETAL PERSONHOOD LAWS

Some conceptions of the fetus as a full person existed at least as early as the mid-nineteenth century,[38] if not earlier.[39] The modern fetal personhood movement, however, dates to the years after the 1973 Supreme Court opinion in *Roe v. Wade*,[40] in part due to dicta in the majority opinion that suggested, were a fetus found to be a full person under the Fourteenth Amendment, legal abortion might well be unconstitutional.[41] Fetal personhood proponents attempted unsuccessfully many times in the years following *Roe* to pass the federal Human Life Amendment.[42] When it became clear that such a strategy was unlikely to work, focus switched to state legislatures and to a variety of state laws that sought to establish personhood indirectly.[43]

38. Rebecca Kluchin, *If Courts Recognize Fetal Personhood, Women's Rights Are Curtailed*, WASH. POST (May 12, 2022), https://www.washingtonpost.com/outlook/2022/05/12/if-courts-recognize-fetal-personhood-womens-rights-are-curtailed [https://perma.cc/5XZV-KLDB] ("Claims of fetal personhood — the notion that the fetus has rights akin to a child already born — originated in the mid-19th century, when Boston physician Horatio Storer led the first movement to criminalize abortion at the state level.").

39. *See infra* notes 161–64 and accompanying text (discussing Aristotle's view on fetal personhood).

40. 410 U.S. 113 (1973).

41. *Id.* at 156–57 ("The appellee and certain *amici* argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."). The limited advocacy for fetal personhood in the years before *Roe* was limited mostly to Catholics attempting to push back on the loosening of state abortion laws to allow for abortion in cases of rape, incest, or to protect the life of the mother. *See* Zernike, *supra* note 19.

42. Since *Roe*, "Human Life Amendment" proposals have been introduced in Congress many times. The only formal vote taken on these proposals occurred in the U.S. Senate in 1983. *See, e.g.*, Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement After* Planned Parenthood v. Casey, 22 FEMINIST FORMATIONS 101, 104 (2010) (chronicling Human Life Amendment efforts and noting that the 1983 vote "effectively ended attempts to establish fetal personhood directly").

43. *Cf. id.* at 103 (noting that while *Casey* supported abortion rights generally, "it also allowed pro-life sympathizers to pursue other forms of legislation designed to establish fetal personhood as a legal principle indirectly").

State laws that reflect an underlying belief in fetal personhood steadily gained traction in the years following *Roe*, and even more dramatically since the Supreme Court's 1992 decision in *Planned Parenthood v. Casey*.[44] The decision in *Casey* marked a turning point in part because through the opinion's willingness to credit the state's "profound interest in potential life,"[45] it gave "pro-life forces the theoretical foundation needed to reinvigorate the fetal personhood discussion."[46] The pro-life movement's attempts to undermine abortion rights, combined with cultural and political factors and advances in science,[47] allowed the movement for fetal personhood to rapidly expand in the latter part of the twentieth century.[48] Successful early fetal personhood laws

44. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). *See also* Halva-Neubauer & Zeigler, *supra* note 42, at 102–03 ("[W]hile the rhetoric of fetal personhood never completely disappeared, it was transformed in the years following the 1992 decision in *Planned Parenthood v. Casey* and has been a key component of the legislative strategy pursued by pro-life interest groups from the mid-1990s up to the present."); Katherine Fleming & Emma Roth, *When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond*, PREGNANCY JUST. 3–4 (2023), https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-personhood-with-appendix-UPDATED-1.pdf [https://perma.cc/6DXC-YT32] (collecting state laws related to fetal personhood).

45. *Casey*, 505 U.S. at 878.

46. Halva-Neubauer & Zeigler, *supra* note 42, at 107.

47. *See, e.g.*, Emma Green, *Science Is Giving the Pro-Life Movement a Boost*, ATLANTIC (Jan. 18, 2018), https://www.theatlantic.com/politics/archive/2018/01/pro-life-pro-science/549308 [https://perma.cc/6BV3-86T9] (describing the coalescence of "pro-science" and "pro-life" ideologies); Amy Alspaugh et al., Opinion, *Abortion Doesn't Have to Be an Either-or Conversation*, SCI. AM. (Dec. 8, 2021), https://www.scientificamerican.com/article/abortion-doesnt-have-to-be-an-either-or-conversation [https://perma.cc/L3L5-ND25] ("The push for fetal personhood developed alongside, and is in many ways tied to, scientific advances in perinatal-neonatal medicine that enabled the fetus to survive (with extensive technological life support) outside the uterus at earlier and earlier gestations. In this way the fetus and pregnant person became separate entities, and separate patients in a health care setting."); *see also* Morris, *supra* note 4, at 58 ("Once represented on videotape and in photographs, the image of the fetus (and the fetus itself) is no longer a part of the woman who carries it. It is separate, autonomous, and part of the public world — its very nature up for debate. No longer must we rely on the word of a pregnant woman for confirmation of its existence.").

48. Editorial, *A Woman's Rights*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html [https://perma.cc/268B-S8MR] ("How the idea of fetal rights gained currency is a story of social reaction — to the Roe decision and, more

included, among others, feticide laws, laws that criminalized prenatal drug use, and abortion restrictions based on the concept of fetal pain.[49] Later, a few states successfully adopted broader language defining "person" as including fetal life either for purposes of a specific law, or for purposes of general criminal law, civil law, or both.[50] The decision in *Casey*, however, marked the moment when the "idea of a fetus as a legal person [went] from a fringe idea, for which 'political will' did not exist, to the ascendant framework of anti-abortion states."[51] Partial success of the fetal personhood movement at the federal level came in 2004, when Congress passed the Unborn Victims of Violence Act.[52] The Act made it a crime to harm or kill a fetus during an act of violence against a pregnant person, using the term "unborn child" and defining such a term to mean, "a child in utero . . . mean[ing] a member of the species homo sapiens, at any stage of development, who is carried in the womb."[53]

Nevertheless, at least up until the watershed decision in *Dobbs*, laws that sought to *directly* establish the full legal personhood of the fetus had mostly failed at both the federal and

broadly, to a perceived new permissiveness in the 1970s — combined with a determined, sophisticated campaign by the anti-abortion movement to affirm the notion of fetal personhood in law and to degrade Roe's protections.").

49. An article published in the *Harvard Women's Law Journal* in 1987, for example, discussed the recent "emergence of a legal doctrine recognizing 'fetal rights'" and listed as examples of the phenomenon:

> [T]he forcibl[e] subject[tion of a pregnant woman] to a Caesarean section despite her explicit refusal; . . . governmental restraints . . . on a pregnant woman's physical activities, diet, and lifestyle; [liability] in tort for injuries to children occasioned by their [mother's] "prenatal negligence;" and [the exclusion of] terminally ill pregnant women . . . from the protection of "living will" statutes.

Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 10–11 (1987) (footnotes omitted).

50. Fleming & Roth, *supra* note 44, at 3–4 (listing examples of such laws).

51. *Id.* at 1.

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

53. 18 U.S.C. § 1841(d).

state level.[54] The few that have succeeded, including a state constitutional amendment in Alabama,[55] have been inoperable as a result of the constitutional right to abortion as announced in *Roe*. Now that there is no longer a right to abortion as a constitutional matter, the sustainability of these fetal personhood laws will likely be the source of ongoing litigation in the coming years.[56] The numerous quotations of petitioner's phrase "unborn human being" in the majority opinion in *Dobbs*,[57] however, is a strong signal that the highest levels of the federal judiciary might be willing to entertain the idea of a fetus as a constitutionally protected, legal person.

The fetal personhood movement is both intertwined with, and conceptually distinct from, the pro-life movement. While almost everyone who believes that the fetus is an embodied person from the moment of conception will likely identify as "pro-life," not everyone in the pro-life movement agrees with the underlying framework or approaches of the fetal personhood movement. Specifically, some members of the pro-life movement might reject the fetal personhood movement's attempt to define the fetus as a *legal* person—with its potentially bizarre range of collateral consequences in areas of law outside of abortion regulation—as opposed to a person in moral or sociological terms.[58] There are

54. Personhood ballot initiatives have failed at the polls in Colorado, Mississippi, and North Dakota, *see* Fleming & Roth, *supra* note 44, at 3 n.16, and been struck down by state supreme courts in Oklahoma and Alaska. *Id.* at 3 n.18.

55. Alabama passed a constitutional amendment in 2018 which stated that it was state policy to "recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life." ALA. CONST. art. I, § 36.06.

56. For instance, Georgia's H.B. 481, which defined "natural person" to include an "unborn child" permitted fetuses to be claimed as dependents for tax purposes and instructed state officials to count fetuses as part of the state population, was struck down as unconstitutional in 2020. H.B. 481 § 4(b), Gen. Assemb., Reg. Sess. (Ga. 2019). Following the Court's decision in *Dobbs*, however, a federal court of appeals has allowed the law to be reinstated. *SisterSong Women of Color Reproductive Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1325, 1328 (11th Cir. 2022), *rev'g* 472 F. Supp. 3d 1297 (N.D. Ga. 2020).

57. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 *passim* (2022). *But see* Doe v. McKee, 143 S. Ct. 309 (2022) (mem.) (denying certiorari for the question of whether fetuses are people and therefore have constitutional rights).

58. *See, e.g.*, Fleming & Roth, *supra* note 44, at 1–2 ("Personhood is a legal concept, not a sociological one; one can believe that fetuses have moral value without conceding that they should be equal to, or take precedence over, preg-

articulable reasons to be anti-abortion that don't necessarily overlap with a belief in the full legal personhood of the fetus.[59] For that reason, while state-level abortion restrictions certainly offer some evidence about the attitudes towards fetal personhood in a given jurisdiction, they do not offer a complete nor a direct picture. Further, while fetal personhood proponents have certainly attacked abortion access directly (through the targeted regulation of abortion providers and through advocating for stricter restrictions on how and when abortion patients could receive care) they have also promoted a wide array of measures that do not deal directly with abortion, but instead advance the idea that fetal life should be extended legal protection up to and including the same protections afforded to already-born individuals.[60]

With the exception of a very few (and until recently, inoperable) state statutes and constitutional amendments that address fetal personhood directly, laws that merely reflect a belief in fetal personhood are the best available mechanism with which to test the relationship between a belief that a fetus is an individuated human entitled to the full complement of rights that accom-

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nant people under the law."); *see also* Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1692–93 (2022) (arguing that the perception and valuation of fetal life is subjective and should be within the control of the pregnant person and not the state).

59. To be clear, however, there is a large proportion of the anti-abortion movement whose ultimate goal is fetal personhood. *See* Zernike, *supra* note 19 (quoting Professor Mary Ziegler stating that "[p]ersonhood has always been the ultimate ambition of the anti-abortion movement").

60. *See supra* text accompanying notes 8–10. Recently, there has been a troubling trend towards holding pregnant women *themselves* liable under feticide laws, but such prosecutions are still relatively rare. *Cf.* Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475 (2021) (discussing the increased criminalization of pregnancy). Many feticide laws specifically state that pregnant women cannot be charged under the statute, but even for those that do not so state, courts have generally struck down such prosecutions—although not always. *Id.* at 483–84 (describing the historic trend of courts striking down prosecutions of pregnant women but noting the ongoing threat of such prosecutions). There is also a growing international movement to criminalize feticide, although often in the context of preventing the specific practice of feticide for purposes of gender selection. *See, e.g.*, Christophe Z. Guilmoto, *Sex Imbalances at Birth: Current Trends, Consequences and Policy Implications*, UNFPA ASIA & PAC. REG'L OFF. 13, 60–62 (Aug. 2012) (reporting on "the recent emergence of prenatal sex selection" and outlining possible policy interventions).

pany that status and a resulting risk of objectification and violence towards pregnant people. Several categories of such laws that we use to support our analysis are briefly described and discussed below.[61]

A. FETICIDE LAWS

Feticide laws create criminal liability for the death of a fetus at the hands of a third party. They do so either by defining a fetus as a potential homicide victim under existing criminal law or through the enactment of new laws specifically criminalizing harm towards fetal life.[62] In this Section, both the history of feticide laws and the intent of the legislatures that passed them are explored in greater detail.

Historically, the common law did not offer any special protection to fetuses until they "quickened," meaning the pregnant person could detect fetal movement.[63] Even then, harm to fetuses was not considered murder, because a child had to be "born alive" in order to be protected by criminal homicide laws.[64] Early feticide laws, passed sporadically throughout the twentieth century, limited criminal liability to the killing of a "viable" or

61. Of course, as new data is available following the decision of the Supreme Court in *Dobbs* and the resulting change in state laws, there will be a future opportunity to return to this analysis with more direct evidence of the association between fetal personhood laws, objectification, and violence.

62. *See* Fleming & Roth, *supra* note 44, at 3–4 (compiling examples of each approach).

63. *See, e.g.*, Evans v. People, 49 N.Y. 86, 90 (1872) ("[U]ntil the period of quickening there is no evidence of life; and whatever may be said of the fœtus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the fœtal movements are the first clearly marked and well defined evidences of life. Although there may be life before quickening, all the authorities agree that a child is not 'quick' until the mother has felt the child alive within her. 'Quick' is synonymous with 'living,' and both are the opposite of 'dead.' The woman is not pregnant with a living child until the child has become quick." (citation omitted)).

64. The born-alive rule requires that a murder victim must be born alive and subsequently die as a result of the defendant's conduct. *See, e.g.*, People v. Greer, 402 N.E.2d 203, 207 (Ill. 1980) ("[N]o court of last resort in this country has held that the killing of a fetus is murder unless the fetus is born alive and then expires.").

"quick" child, consistent with the common law approach.[65] Beginning in the 1980s and gaining considerable steam following the decision in *Planned Parenthood v. Casey*[66] in 1992, many new state feticide laws created criminal liability for the death of any "unborn child" from conception onward.[67]

While thirty-eight states currently have some form of criminal "feticide" law, they vary widely in their approach to what is criminalized and the language used to describe what is criminalized.[68] Some laws require fetal viability, but most do not, instead criminalizing harm or death of fetal life at any stage of a pregnancy.[69] Some define feticide as a separate crime, while others add "unborn child" as a potential victim to existing crimes, or simply define "person" within the meaning of existing violent crimes to include fetuses.[70]

The passage of many of the state feticide laws was a part of a larger effort to promote fetal personhood. In many ways, the history of feticide laws in the United States *is* the history of the fetal personhood movement.[71] It was often through feticide laws that advocates for fetal personhood were first able to insert language about the humanity of fetal life into statutes, and, in many

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65. *See, e.g.*, MICH. COMP. LAWS § 750.322 ("The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter."); NEV. REV. STAT. § 200.210 ("A person who willfully kills an unborn quick child, by any injury committed upon the mother of the child, commits manslaughter and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000.").

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

67. The comparative seriousness of the crimes charged also has ratcheted up in recent decades, with some states originally considering feticide a lower offense—such as manslaughter—and later changing the statutes to make feticide a murder or even a capital murder offense. *Cf.* Fleming & Roth, *supra* note 44, at 4 (outlining thirty-eight states' feticide laws authorizing homicide charges to be brought against those found to have terminated a pregnancy).

68. *Id.*

69. *Id.* (describing how zygotes, embryos, and fetuses can be homicide victims in twenty-one of thirty-eight states with feticide laws).

70. *Id.* at 6 (noting two states that include unborn children as "member[s] of the species Homo sapiens" throughout the criminal code regardless of the stage of its development).

71. Tuerkheimer, *supra* note 14, at 686 ("[C]riminalization of violence during pregnancy has been a story of the entrenchment of legal recognition of fetal victimhood.").

cases, the only places where such language was allowed to go into effect without successful legal challenge. Pro-choice and feminist activists often fought against these laws precisely because the implication of fetal personhood was so obviously a grave threat to women's right to abortion and bodily integrity generally.[72]

In addition to the anti-abortion motivations behind much of the feticide legislation, proponents of feticide laws have also championed their passage under a belief that they deter violence against pregnant women or at least reflect the comparative "seriousness" of a criminal offense that results in pregnancy loss.[73] Feticide laws in the modern era have often been passed in response to high profile, emotionally charged cases of pregnant women being assaulted or murdered and are even sometimes named after the slain woman (or the name she had selected for her future child).[74] For instance, the Illinois legislature enacted a feticide statute in the early 1980s after the Illinois Supreme Court partially overturned the murder conviction of Alan Greer, who beat his eight-and-a-half-month pregnant girlfriend so severely he caused her death and the death of the fetus she carried.[75] The Illinois Supreme Court found that the murder conviction for the fetus could not stand because of the "born alive"

72. Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 128 (2006) ("Some women's rights activists fear the legal recognition of fetal homicide will undermine the proper focus on the harm to the slain woman, and place a woman's abortion rights and general right to privacy in jeopardy.").

73. *See infra* note 79 and accompanying text (providing examples of statutes from a variety of states that classify crimes against pregnant people as more serious than others). *But see* Amy J. Sepinwall, *Defense of Others and Defenseless "Others*,*"* 17 YALE J.L. & FEMINISM 327, 340 (2005) ("[W]e might see the Act as an attempt to further deter violence against women, or to protect parents' interests in those fetuses that they intend to carry to term. A closer look at the Act reveals, however, that it has been promulgated for the fetus's sake, and not for the sake of the women who harbor an interest in their own bodily integrity, or the parents who care about the fetus's continued existence." (footnotes omitted)).

74. The Federal Unborn Victims of Violence Act is subtitled "Laci and Conner's Law" after Laci Peterson and her fetus, Conner, whose highly publicized murders were the topic of public attention. Sepinwall, *supra* note 73, at 338–39.

75. People v. Greer, 402 N.E.2d 203 (Ill. 1980); Michael Kevin Nowak, Comment, *Feticide in Illinois: Legislative Amelioration of a Common Law Rule*, 4 N. ILL. U. L. REV. 91, 92 (1983) (describing how the Illinois legislature discussed the *Greer* case when considering the feticide statute).

rule.[76] It was partly in response to this case that the Illinois legislature passed its own feticide law.[77]

In the face of such clearly horrific acts, legislators might be excused for their failure to pay serious attention to the potentially wide-ranging effect the language of such provisions can have on the legal understanding of when life begins and when a fetus gains legal rights of their own. The desire to offer some measure of comfort to a grieving family, combined with the desire to prevent similar future violence, likely incentivized legislators not to quibble over legislative language even if that language reflected a belief in fetal rights that was not shared by all those that ended up voting to approve a bill.

As explored in Part II, however, feticide laws that create separate categories of criminal liability for harm to fetal life do not have the effect of reducing violence against women.[78] As this Article argues, by introducing or reinforcing the idea that fetuses are people with independent rights, these feticide laws result in the objectification of pregnant people as reproductive vessels. Far from the legislative goal of reducing violence towards women and pregnant people, this objectification has the potential to spur increased violence against them.[79]

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76. *Greer*, 402 N.E.2d at 209 ("[W]e conclude that taking the life of a fetus is not murder under our current statute unless the fetus is born alive and subsequently expires as a result of the injuries inflicted.").

77. Nowak, *supra* note 75, at 92 ("The Illinois legislature responded to the *Greer* decision by enacting a feticide statute which proscribed the killing of human fetuses in limited circumstances." (footnote omitted)).

78. *See* Part II.D.

79. There is a less common legislative approach that may accomplish what feticide laws say they are designed to do—reflect the seriousness of crimes against pregnant people and reduce the violence that women face. These laws, passed in a handful of states, do not recognize causing fetal death as a crime but instead either recognize harming a pregnant person as a unique crime or have enhanced sentences for criminals who harm pregnant people. For instance, in Connecticut, the criminal code separately defines "[a]ssault of a pregnant woman resulting in termination of pregnancy" and specifies it as a "Class A" felony. *See* CONN. GEN. STAT. § 53a-59c (2023). And, in Colorado, the legislature made criminal defendants who knowingly assault or murder pregnant people ineligible for sentences in the lower range of the guidelines—and allows courts to sentence such offenders to up to twice the presumptive range. *See* COLO. REV. STAT. § 18-1.3-401(13)(a) (2023) ("The court, if it sentences a defendant who is convicted of any one or more of the offenses . . . shall sentence the defendant to a term of at least the midpoint, but not more than twice the maximum, of the presumptive range authorized for the punishment of the offense of which the

B. INVALIDATION OF ADVANCE DIRECTIVES

Beginning in the 1980s, many states passed laws dealing with advance directives, also referred to as "living wills."[80] These laws were designed to empower individuals to, among other things, make decisions regarding their wishes for continuation of medical treatment were they to become incapacitated in the future.[81] While most of the laws contained language to the effect that any adult of sound mind could draft such a document and expect that their expressed wishes would be respected, most of the laws *also* included carve out provisions for a single type of

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defendant is convicted if . . . [t]he victim of the offense was pregnant at the time of commission of the offense; and [t]he defendant knew or reasonably should have known that the victim of the offense was pregnant."). By taking this approach, state legislators reflect their commitment to the protection of pregnant people and the seriousness of crimes committed against them. *See* ROTH, *supra* note 5, at 11 (describing such sentence enhancements as positive because it "seeks to recognize that the woman has suffered an extra loss"). Indeed, many states have similar protections in their criminal codes for other vulnerable populations, such as children, the disabled, or the elderly—or for individuals whose work exposes them to additional risk, such as law enforcement. These laws accomplish the goal of reflecting the state's interest in protecting pregnant people and expressing the seriousness of crimes against them, but they do so without simultaneously defining fetuses as persons under the law. As with all of the other laws we examine here, we included these laws in our analysis. Unlike the other laws, however, the coefficient on the sentencing laws was not consistent across models and was sensitive to the inclusion of variables for other laws. We found some evidence that sentencing laws decrease harm to pregnant women, but because of the inconsistency of that evidence, we are not confident in our ability to comment on these laws. Accordingly, they are omitted from the results reported in this Article.

80. *See* Charles P. Sabatino, *The Evolution of Health Care Advance Planning Law and Policy*, 88 MILBANK Q. 211, 213–14 (2010) (detailing the proliferation of "living will" statutes in state legislatures); *see, e.g.*, ALA. CODE §§ 22-8A-1 to 22-8A-18 (2023).

81. *See, e.g.*, ALA. CODE § 22-8A-2 (2023) ("The Legislature finds that competent adult persons have the right to control the decisions relating to the rendering of their own medical care, including, without limitation, the decision to have medical procedures, life-sustaining treatment, and artificially provided nutrition and hydration provided, withheld, or withdrawn in instances of terminal conditions and permanent unconsciousness. In order that the rights of individuals may be respected even after they are no longer able to participate actively in decisions about themselves, the Legislature hereby declares that the laws of this state shall recognize the right of a competent adult person to make a written declaration instructing his or her physician to provide, withhold, or withdraw life-sustaining treatment and artificially provided nutrition and hydration . . . .").

competent adult—pregnant women.[82] The vast majority of states, mostly through statute but occasionally through official forms, currently make the stated wishes of a terminally ill pregnant patient wholly or partially irrelevant to decisions regarding the continuation of life-sustaining treatment. Some states invalidate the advance directive of a pregnant person only if there is a chance the fetus will become viable,[83] and three states will follow a pregnant person's wishes if she specifically indicates in her advance directive her wishes in the event of incapacitation while she is pregnant.[84] However, many states invalidate the advance directive of a pregnant person regardless of her specific expressed wishes, the wishes of her family or healthcare proxy, or potential or actual fetal viability.[85] In these states, a pregnant person's loved ones cannot discontinue life support consistent with the patient's written wishes but are obliged to let the state utilize her body in an effort to continue the pregnancy. A more apt reflection of the state's treatment of women as reproductive vessels would be hard to find.

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82. *See, e.g.*, ALA. CODE § 22-8A-4(e) ("The advance directive for health care of a declarant who is known by the attending physician to be pregnant shall have no effect during the course of the declarant's pregnancy.").

83. ALASKA STAT. § 13.52.055(b) (2023); ARK. CODE ANN. § 20-17-206(c) (2023); DEL. CODE ANN. tit. 16, § 2503(j) (2024); 755 ILL. COMP. STAT. 35/3(c) (2023); IOWA CODE § 144A.6(2) (2023); LA. STAT. ANN. § 40:1151.9(e) (2023); MONT. CODE ANN. § 50-9-106(7) (2024); NEB. REV. STAT. § 30-3417(1) (2023); NEV. REV. STAT. § 449A.454(6) (2023); N.H. REV. STAT. ANN. § 137-J:5(V)(c) (2023); N.D. CENT. CODE § 23-06.5-09(5) (2023); 20 PA. CONS. STAT. § 5429(a) (2023); 23 R.I. GEN. LAWS § 23-4.11-6(c) (2023); S.D. CODIFIED LAWS § 34-12D-10 (2023). Ohio's statute is unclear regarding whether potential or actual fetal viability is required. *See* OHIO REV. CODE ANN. § 2133.06 (declaring that life-saving treatment cannot be withdrawn from a pregnant individual unless, to a reasonable degree of certainty, "would not be born alive").

84. ARIZ. REV. STAT. ANN. § 36-3262 (2023); MINN. STAT. § 145C.10(g) (2023); OKLA. STAT. tit. 63, § 3101.8(c) (2023).

85. ALA. CODE § 22-8A-4(e) (2023); IND. CODE § 16-36-4-8(d) (2023); KAN. STAT. ANN. § 65-28,103(a) (2023); KY. REV. STAT. ANN. § 311.629(4) (West 2023); MICH. COMP. LAWS § 700.5507(4) (2023); MO. REV. STAT. § 459.025 (2023); S.C. CODE ANN. § 62-5-507 (2023); TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2023); UTAH CODE ANN. § 75-2a-123 (West 2023); WASH. REV. CODE § 70.122.030(1) (2023); WIS. STAT. § 154.03 (2023). Florida and Georgia take a somewhat unique approach in that they will follow a pregnant person's advance directive only if she has *both* indicated her wishes in the event of pregnancy *and* the fetus is non-viable at the time of her incapacitation. FLA. STAT. § 765.113 (2023); GA. CODE ANN. § 31-32-9(a)(1) (2023). Idaho's law was declared unconstitutional in recent litigation. *See* IDAHO CODE § 39-4510, *invalidated by* Almerico v. Denney, 532 F. Supp. 3d 993 (D. Idaho 2021).

Proponents of these laws support them for a variety of reasons. Some assume that they necessarily reflect the wishes of the incapacitated pregnant woman, likely out of the presumed ubiquity of maternal selflessness. Of course, such a position is belied by the fact that, in most states, even an advance directive stating a pregnant person's wish to discontinue life-sustaining treatment *even in the event of her pregnancy* would be legally ignored. Other advocates more explicitly believe that the state can and should choose fetal life over the woman's rights. For instance, the Heritage Foundation's founding president, Paul Weyrich, stated: "I believe that if you have to choose between new life and existing life, you should choose new life. The person who has had an opportunity to live at least has been given that gift by God and should make way for new life on earth."[86] Of course, in no jurisdiction can the organs of a medically brain-dead individual be harvested without the explicit consent of that person, much less over that person's explicit, written instructions to the contrary,[87] despite the fact that such an action might allow the continuation of an organ recipient's life.[88]

86. Editorial, *supra* note 48.

87. *See* Sheldon Zink et al., *Presumed vs Expressed Consent in the US and Internationally*, 7 ETHICS J. AM. MED. ASS'N 610, 613 (2005) (describing how the United States is unlikely to adopt a presumed consent model of organ donation due to the fact that autonomy and the right of patients to make their own medical decisions are priorities in American medicine); Emily Denham Morris, *The Organ Trail: Express Versus Presumed Consent as Paths to Blaze in Solving a Critical Shortage*, 90 KY. L.J. 1125, 1126 (2001) ("[I]n the United States the ultimate decision about whether to become an organ and tissue donor still rests with the individual and/or his or her family."); Meredith M. Havekost, Note, *The Waiting Game: How States Can Solve the Organ-Donation Crisis*, 72 VAND. L. REV. 691, 708 (2019) (explaining that under the United States' "opt-in" or "explicit-consent" donor system, an individual must voluntarily and explicitly consent in order to be an organ donor).

88. This apparent contradiction with the invalidation of pregnant people's advance directives is an example of what Susan Bordo refers to as the creation of fetal "super-subjects," entitled to rights that already-existing individuals would not be entitled to. *See* BORDO, *supra* note 7, at 88 ("Very simply put, that construction is one in which pregnant women are not subjects at all (neither under the law nor in the zeitgeist) while fetuses are super-subjects. It is as though the subjectivity of the pregnant body were siphoned from it and emptied into fetal life.").

Interestingly, in recent first-of-its-kind litigation, a group of women successfully sued to have Idaho's invalidation of pregnant women's advance directives declared unconstitutional.[89] The federal district court ruled that Idaho's law, which allowed for total invalidation of a pregnant person's advance directive regardless of explicit expressed intent or fetal viability, violated the "constitutional right of a competent person to refuse unwanted lifesaving medical treatment,"[90] and the First Amendment right to be free from compulsion "to express the State's message in their directive."[91] The court did, however, leave room for the invalidation of a pregnant person's advance directive in "exceptional circumstances" that the court did not find in that case.[92] It is unclear whether similar litigation will be undertaken in other jurisdictions.

C. Civil Commitment of Pregnant People

Although a less common approach, a handful of states also have passed laws allowing the state to use civil commitment to detain pregnant women who either have, or have been suspected of, abusing drugs or alcohol.[93] Civil commitment generally allows, via court order, the involuntary placement of an individual

89. *Almerico*, 532 F. Supp. 3d at 1004 (concluding that Idaho Code section 39-4510(1)'s requirement that an incapacitated woman's advance directive contain a pregnancy exclusion violated the First, Fifth, and Fourteenth Amendments).

90. *Id.* at 1002.

91. *Id.* at 1003.

92. *Id.* at 1002 n.2 ("[C]onsider a case where a pregnant woman past her due date falls into a persistent vegetative state after an accident. In this exceptional circumstance, would a state be justified in removing a full-term fetus through a cesarean section procedure immediately prior to removing the mother's life-support? Is that the exceptional circumstance when a state's interest in potential human life overrides a woman's right to refuse lifesaving medical treatment? These are difficult questions that do not need to be answered in this decision and the Court expresses no opinion thereon." (citations omitted)).

93. April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 158–59 (2007). In addition to the statutory schemes that provide for civil commitment, pregnant people have been forcibly or coercively detained in other circumstances, as well, including as a means to prevent them from accessing abortion or to compel them to seek or undergo medical treatment. *See id.* at 148.

into an institution.[94] Such laws are based not only on a determination of mental illness, however, but a "social and legal judgment" that there is a serious risk that the individual will harm themselves or others.[95] The Supreme Court has referred to civil commitment as a "massive curtailment of liberty."[96] And in some ways, civil commitment poses more danger to liberty than a criminal prosecution, as the procedural protections of the criminal justice system do not always apply, and, unlike criminal sentences, civil commitment allows for involuntary detention not for a set period of time but for the duration of the supposed risk of harm (for pregnant people, theoretically, the entirety of the pregnancy).[97] Importantly, the use of civil commitment laws for pregnant people is uniformly opposed by relevant medical communities, including the American College of Obstetricians and Gynecologists[98] and the American Medical Association.[99]

States that allow the civil commitment of pregnant people are doing so through the lens of fetal personhood because they are defining the fetus as the "other" for purposes of determining that commitment is necessary in order to avoid harm to others. While the Minnesota and South Dakota statutes imply this without explicitly stating it, Wisconsin's statute refers specifically to

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94. Generally, civilly committed individuals are placed in a hospital or inpatient treatment center, but many state laws contemplate that if such institutions are not available, jail is an acceptable alternative. *See, e.g.*, ALASKA STAT. § 47.30.705(a) (2023); MISS. CODE ANN. § 41-21-67(4) (2024); S.D. CODIFIED LAWS § 27A-10-3 (2023); WYO. STAT. ANN. § 25-10-109(d) (2023).

95. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

96. *Id.*

97. John W. Kydd, *Abandoning Our Children: Mothers, Alcohol and Drugs*, 69 DENV. U. L. REV. 359, 400 (1992) ("Criminal sanctions fix the period of jail time. Civil commitment allows the addict to be retained in custody until she is no longer a threat to her fetus. If the danger persists, the abuser can be recommitted.").

98. *See* Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician–Gynecologist*, 117 OBSTETRICS & GYNECOLOGY 200 (2011) (stating that the use of the legal system, including through involuntary commitment, to address alcohol and substance abuse of pregnant people is inappropriate).

99. *See* Helene M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990) (discussing the negative implications of incarcerating or detaining pregnant women).

an "unborn child" who is "alleged to be in need of protection or services."[100]

Civil commitment laws that apply to pregnant people are not restricted to viable pregnancies or by other limitations normally placed on such aggressive state deprivations of liberty. For instance, Minnesota's civil commitment law normally only permits involuntary commitment of a "chemically dependent person" if such an individual is "incapable of self-management" and there is a "substantial likelihood of physical harm to self or others," which is determined through evidence of a previous attempt at inflicting harm, serious physical problems, or a failure to obtain basic life necessities, such as food or shelter.[101] Minnesota's civil commitment statute, however, allows the involuntary commitment of a pregnant person without *any* of this additional evidence, therefore allowing involuntary commitment only on a finding that during the course of the pregnancy, the pregnant person has engaged in "habitual or excessive use, for a nonmedical purpose, of any of the following substances or their derivatives: opium, cocaine, heroin, phencyclidine, methamphetamine, amphetamine, tetrahydrocannabinol, or alcohol."[102] Under a plain reading of this statute, a pregnant person in her first trimester could be involuntarily institutionalized in Minnesota for the length of her pregnancy merely for drinking a glass of wine several nights a week, without any additional evidence that she or her pregnancy might be imperiled.

Following the *Dobbs* decision overturning the constitutional right to abortion, it is likely that arguments in favor of civil commitment schemes will gain steam as an allegedly woman-friendly alternative to outright criminalization. In an article for *The Stream*, an online Christian publication, the two authors argue against widespread criminalization of women who seek abortions in part because such a position would be "political suicide."[103] Instead, the authors advocate that women who seek

100. WIS. STAT. § 48.133 (2023).

101. MINN. STAT. § 253B.02, subdiv. 2 (2023).

102. *Id.*

103. Jason Jones & John Zmirak, *Once the Law Protects Unborn Kids, Should We Seek Legal Penalties for Women Who Abort Them?*, THE STREAM (May 11, 2022), https://stream.org/once-the-law-protects-unborn-kids-should-we-seek-legal-penalties-for-women-who-abort-them [https://perma.cc/764M-N8BG].

abortions should be legally required to endure "a short but mandatory psychiatric custody, and mandated counseling."[104] Thus, the time is now for advocates to argue that such laws do not align with their intended purposes, are contrary to the constitutional protections afforded to all people,[105] and have unintentional and negative consequences for women's physical safety.

II. THE MAKING OF THE REPRODUCTIVE VESSEL

Each of the laws discussed above reflects an underlying assumption that a fetus is a full, legal person. Such an assumption does not, on its face, say anything about the personhood of the pregnant person. But in this Part, we argue that fetal personhood laws necessarily result in a loss of the pregnant person's very humanity—her objectification as a reproductive vessel.

First, a brief discussion about the associations between pregnancy and gender is warranted. Without question, not all people who become pregnant identify as women *and* not all women of reproductive age will (or can) become pregnant. But our analysis is not tied to the physical fact of pregnancy as we do not argue that it is only actually pregnant people who are being objectified. Instead, we argue that it is the *perceived potential for pregnancy* that results in objectification. In many ways, both the legal system and our shared culture treats all women of reproductive age as *potentially* pregnant.[106] This potential for pregnancy comes along with the potential for objectification even if

104. *Id.*

105. *E.g.*, George J. Annas, *Pregnant Women as Fetal Containers*, 16 HASTINGS CTR. REP. 13, 14 (1986) ("Effectively monitoring compliance would require confining pregnant women to an environment in which eating, exercise, drug use, and sexual intercourse could be controlled. . . . [S]uch massive invasions of privacy can only be justified by treating pregnant women during their pregnancy as nonpersons.").

106. *See* Rebecca Ruiz, *CDC Tells Millions of Women to Stop Drinking, Just in Case They Get Pregnant,* MASHABLE (Feb. 3, 2016), https://mashable.com/archive/cdc-pregnancy-alcohol#Z3qAZGd0rEqp [https://perma.cc/8CEY-GNBM] (discussing the recent CDC guidance that all women of reproductive age should abstain from drinking alcohol, implying that "[w]omen should consider themselves first a vessel for human life"); Beth A. Burkstrand-Reid, *From Sex for Pleasure to Sex for Parenthood: How the Law Manufactures Mothers*, 65 HASTINGS L.J. 211, 214–15 (2013) (arguing that, socially and legally, any woman considering having sex is increasingly defined as a "mother").

no pregnancy occurs or is even possible.[107] At the risk of being crass, an oven is still an oven whether or not there is currently a bun inside. The possibility of future objectification can result in preemptive objectification.

The following Sections explore each step of our basic argument. First, if fetuses are full, legal people, and the law cannot comprehend "two physical bodies" that "occupy the same place at the same time,"[108] then the potentially pregnant person must not truly *be* a person—but something else.[109] Next, if potentially pregnant people are not fully human—not legal *subjects*—then they are instead *objects* or reproductive vessels. Then, if potentially pregnant people are objectified as reproductive vessels, they become vulnerable to the same types of violence that all dehumanized and objectified people have been subject to across time and history.[110] In the final Section, we include the results of our novel empirical analysis to show that fetal personhood laws are in fact associated with statistically significant increases in violence towards potentially pregnant people. While there is certainly more than one potential theory for why this association exists, we rely on the theoretical arguments that precede this evidence to conclude that the underlying mechanism that animates this association is the relationship between fetal personhood and the objectification of women as reproductive vessels.

107. *See* discussion *infra* Part II.B (noting that there is some nuance in how individuals think about the potential for pregnancy versus the fact of pregnancy).

108. *In re* Gunn, 32 P. 470, 485 (Kan. 1893).

109. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 64–65 (1988) ("When Hobbes, Ackerman, Dworkin, Rawls and the rest of the liberal tradition describe the natural human predicament as one of natural equality and mutual antagonism, and describe human beings as inevitably separate and mutually self-interested [they] definitionally exclud[e] pregnant women and breast-feeding mothers from the species . . . .").

110. Kelly E. Maier, *Pregnant Women: Fetal Containers or People with Rights?*, 4 AFFILIA 8, 13 (1989) ("Women's lack of reproductive self-determination is one of the material conditions of women's inequality and leads directly to . . . the abuse of women and children." (quoting Kathleen Lahey, *Women, Reproduction, and The State (The Law)*, B.C. L. CONF. (Nov. 1987))).

A. THE TWO-PEOPLE-IN-ONE-BODY PROBLEM

Individuals have rights.[111] Rights are individual.[112] Sometimes two individual's rights conflict and the legal system must adjudicate which individual's rights will prevail.[113] But there is no prevailing conception in American legal thought of two rights-holders contained in a single physical body;[114] instead the body

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111. *E.g.*, Sally Sheldon & Stephen Wilkinson, *Conjoined Twins: The Legality and Ethics of Sacrifice*, 5 MED. L. REV. 149, 151 (1997) ("[L]aw and ethics have developed along a model of physically separate, individual human beings with competing needs and interests and it is the individual which often provides our basic unit in considering the ethical and legal rights and wrongs. The ordinary meaning of 'individual' itself emphasises physical separateness . . . ."); *see also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 216 (1990) ("[R]ights analysis treats each individual as a separate unit, related only to the state rather than to a group or to social bonds.").

112. *E.g.*, JO BRIDGEMAN & SUSAN MILLNS, FEMINIST PERSPECTIVES ON LAW 33 (1998) ("Rights discourse is inherently individualistic. The presentation of rights as possessed by individuals forces those individuals into an adversarial process in which one right is pitted in opposition to another in order to determine which presents the strongest claim."); *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that equal protection rights are to the individual rather than to the group); *see also* Flake v. Greensboro News Co., 195 S.E. 55, 62 (N.C. 1938) ("Strictly speaking, there are no property rights. All rights are individual. A person has a right to the possession, control, use, and disposition of property. This right is as personal as the right to individual liberty, free speech, or any other like right possessed by a citizen."); *cf.* N.J. Div. of Youth & Fam. Servs. v. R.L.D., No. A-3255-08T4, 2009 WL 3489002, at *5 (N.J. Super. Ct. App. Div. Oct. 29, 2009) (per curiam) ("Parental rights are individual in nature . . . .").

113. ALAN HYDE, BODIES OF LAW 86 (1997) ("The possibility of 'balancing' and 'competing interests' exists in normal American rights discourse . . . whether the individual right is denominated one of liberty, privacy, or property.").

114. *See* West, *supra* note 109, at 1 ("[V]irtually all modern American legal theorists, like most modern moral and political philosophers, either explicitly or implicitly embrace what I will call the 'separation thesis' about what it means to be a human being: a 'human being,' whatever else he is, is physically separate from all other human beings. I am one human being and you are another, and that distinction between you and me is central to the meaning of the phrase 'human being.'"); ROTH, *supra* note 5, at 189 ("Two equal rights-bearing subjects cannot exist in one body."). Of course, there *are* legal and political theories that are *not* based on the inviolability of the human body or on the fundamental autonomy of the individual. *See* Munro, *supra* note 16, at 460 (discussing the work of critical theorists for whom the individualism and abstraction dominant in the liberal construction of the rights bearing subject is problematic). But it is fair to say that despite decades of interesting theoretical work to develop alternative

in the American legal imagination is inviolably singular.[115] So self-evident is this construction of the body in legal thought and analysis that its assumption often goes completely unspoken.[116] But in the few instances in which a court has been forced to make a statement, the surety in the singularity of a human body is absolute.[117] According to the American legal tradition, the human body is bounded, physically distinct and separate from

frameworks, these conceptions have not, to date, ever been ascendent or controlling. *See* Alison Diduck, *Legislating Ideologies of Motherhood*, 2 SOC. & L. STUD. 461, 470–71 (1993) ("It is clear that contemporary rights thinking takes different forms; there is more than one way to conceive of rights. It seems equally clear, however, that notwithstanding the tensions, abstract, autonomous, liberal rights continue to dominate in law."). And the critique of liberalism as inherently individualistic and incapable of addressing pregnancy has, itself, been critiqued as overly simplistic. *See* Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1203–06 (1992) (arguing that feminist thinkers have "caricatured" liberalism's focus on the individual, autonomous actor and suggesting overlaps in feminist and liberal thought); *see also* Howard Schweber, *Legal Epistemologies*, 75 MD. L. REV. 210, 211 (2015) ("[T]he language of traditional, negative, liberal 'rights' provides a perfectly adequate basis for criticizing those outcomes [that are inconsistent with liberal norms] even if something called 'fetal rights' were to be added to the discursive mix.").

115. *See* M.Q. Bratton & S.B. Chetwynd, *One into Two Will Not Go: Conceptualising Conjoined Twins*, 30 J. MED. ETHICS 279, 281 (2004) ("The only model the courts seem to have for thinking about people and their best interests, is that of physically distinct individuals."); Curran v. Bosze, 566 N.E.2d 1319, 1326 (Ill. 1990) (discussing bodies as "the foundation of self-determination and inviolability of the person"). This is even true of some foundational feminist thought. *See* ANDREA DWORKIN, INTERCOURSE 122 (1987) ("A human being has a body that is inviolate; and when it is violated, it is abused.").

116. HYDE, *supra* note 113, at 90 ("[R]emarkably, the inviolable body is constructed largely in silence, as an 'of course,' taken-for-granted feature of bodies.").

117. *See supra* note 115 and accompanying text.

other individuals' bodies.[118] According to jurists, such a conception accords with our conception of politics,[119] philosophy, and even science—which denies the possibility of two bodies in the same space.[120] Moreover, the right to control our own singular, inviolable body is often regarded as the preeminent right, from which other rights flow.[121]

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118. Bratton & Chetwynd, *supra* note 115, at 281 ("The model of 'one brain, one body' accords with the strong emphasis in the Western ethical and legal tradition on personal sovereignty. The ethical principle of autonomy is usually translated into negative terms as a right of non-interference, a right regulated—for example, by laws prohibiting non-consensual touching. Within this paradigm, the notion of individuality is linked to a separate body and anything else seems to be unimaginable, or at the very least, implausible. Physical separateness seems to be the indispensable condition for a life of dignity."); *see also* McFall v. Shimp, 10 Pa. D. & C.3d 90, 92 (Ct. Com. Pl. 1978) ("For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence.").

119. Michael Thomson, *Reproductivity, the Workplace and the Gendering of the Body (Politic)*, 14 LAW & LITERATURE 565, 583 (2002) ("The bounded, impermeable male body becomes a prerequisite for public participation, with this 'essentialized invulnerable . . . body' a general referent for both public policy and law." (alteration in original) (quoting Cynthia R. Daniels, *Between Fathers and Fetuses: The Social Construction of Male Reproduction and the Politics of Fetal Harm*, 22 SIGNS 579, 609 (1997))).

120. *Cf.* Currie's Adm'rs v. Mut. Assurance Soc'y, 14 Va. 315, 342 (1809) ("One of two consequences must flow from such a state of things; either that the old corporate body continues to exist in its original form and a new one is created out of it, consisting in part of the same members, comprehending the same property, and for the same general objects, which is as absurd as the position in physics, that two bodies can occupy the same space . . . .").

121. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891) ("To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass, and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."); McRae v. Califano, 491 F. Supp. 630, 742 (E.D.N.Y. 1980) ("A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, *nearly allied to her right to be* . . . ." (emphasis added)); Adrienne LaFrance, *Liberty No More*, ATLANTIC (May 7, 2022), https://www.theatlantic.com/ideas/archive/2022/05/roe-overturned-bodily-autonomy-american-constitution/629780 [https://perma.cc/64FR-K7T8] ("What, then, must it mean to be in possession of a body in America? This is, we are told, a

Of course, this ignores the material reality of the pregnant body.[122] Even if one rejects the assertion that a pregnant body contains two *people*, it is undeniably true that it at least contains the body of one person and one *potential* future person.[123] This places the pregnant body at odds with the assumed singular, inviolable body that is the foundational unit of individual rights within American law.[124] There is no direct parallel in classical

land of tremendous abundance, of self-reliance, of liberty, and of invention. The promise America makes to its people, the covenant that we Americans can feel in our bones and in our blood and in our beating hearts, is the guarantee that we are free."). One of the few rights articulated in the original text of the Constitution, the right of habeas corpus, reflects how our understanding of rights and personhood is located in the physical body. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

122. *See* West, *supra* note 109, at 2 ("Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly 'connected' to another human life when pregnant."); Thomson, *supra* note 119, at 577 (noting the "pregnant body's positioning outside of individualistic models of the self" that makes women different from men); CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS 139 (1993) ("Whereas the good citizen enters politics to defend individual self-interest, the pregnant woman represents the interdependence of human life and the difficulty, even impossibility, of distinguishing self from other.").

123. *Cf.* Morris, *supra* note 4, at 55–56 ("Mired in a binary tradition, the law historically has had difficulties shaping a jurisprudence around the pregnant woman. Pregnant women pose a conundrum for the legal system which sees all of its subjects as individual persons. The pregnant woman, however, is something different: not one person, not exactly two, but something in between." (footnote omitted)).

124. The exclusion of pregnancy specifically, and dependency generally, from legal thought has been noted and challenged by generations of feminist thinkers. For a discussion of feminist theories, see generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (discussing disparities in psychological and literary analysis of women's experiences, including pregnancy); MARILYN FRENCH, BEYOND POWER: ON WOMEN, MEN, AND MORALS (1985) (discussing the effects of patriarchy on women and the world); West, *supra* note 109, at 66 ("We need to show that community, nurturance, responsibility, and the ethic of care are values at least as worthy of protection as autonomy, self-reliance, and individualism. . . . [T]he refusal of the legal system to protect those values has weakened [our] community . . . ."); Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 5–6 (1996) (arguing that political theory and family law should recognize that, in addition to being individuals, people are also enshrined in "relationships of interdependency and mutual responsibility"); MARTHA ALBERTSON FINEMAN,

legal thought to the necessarily codependent relationship between a pregnant person and the fetus she carries.[125] As a result, it is not difficult to see how legal theorists would decide that one of the two bodies contained in the pregnant body must not be, in fact, a person at all.[126] In fact, throughout much of American legal history, that was the assumption made by the law—specifically, that the *person* was the pregnant person.[127] For example, in *Dietrich v. Inhabitants of Northampton*,[128] decided in 1884, Justice Oliver Wendell Holmes, Jr., rejected the claim of a woman who had delivered prematurely after slipping on a public sidewalk and sued the town in order to secure recompense for the subsequent death of the child.[129] He did so on the theory that "the unborn child was a part of the mother at the time of the injury," and thus only harm to her was compensable.[130] This approach was followed by many courts,[131] and it was not until the

THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (discussing feminism and the family, the overemphasis of self-reliance in American policy, and the inevitably of dependence each person faces at various stages of life).

125. Tuerkheimer, *supra* note 14, at 705 ("The relationship between a pregnant woman and her developing fetus is unique; its intimate nature is qualitatively different from that which characterizes the closeness of two fully formed human beings.").

126. *See* West, *supra* note 109, at 3 ("If by 'human beings' legal theorists mean women as well as men, then the 'separation thesis' is clearly false. If, alternatively, by 'human beings' they mean those for whom the separation thesis is true, then women are not human beings. It's not hard to guess which is meant.").

127. *See* Kilmon v. State, 905 A.2d 306, 310 (Md. 2006) (reviewing the English law of the eighteenth century and determining that, according to both Edward Coke and Matthew Hale—two authors of oft-cited commentaries on the law of that time—death of an in utero fetus was not legally cognizable).

128. 138 Mass. 14 (1884).

129. *Id.* at 14 (affirming the lower court's ruling that the mother does not have a cause of action for the death of the fetus because that fetus is not a person).

130. *Id.* at 17.

131. *E.g.*, Allaire v. St. Luke's Hosp., 56 N.E. 638, 640 (Ill. 1900) ("That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed."), *overruled by* Amann v. Faidy, 114 N.E.2d 412 (Ill. 1953); Prescott v. Robinson, 69 A. 522, 523 (N.H. 1908) ("[A] fœtus is deemed to constitute a part of the mother's person . . . ."); Lipps v. Milwaukee Elec. Ry. & Light Co., 159 N.W. 916, 917 (Wis. 1916) ("Since a nonviable child cannot exist separate from its mother, it must . . . be regarded as a part of its mother . . . ."); Kine v. Zuckerman, 4 Pa. D. & C. 227, 227 (Ct. Com. Pl. 1924) ("There is no doubt that at early common law an injury to an unborn child was looked upon as an injury to the mother exclusively.").

mid-1940s that courts even *began* to sustain some suits for in utero injuries—and then only by children born alive and in lawsuits against third parties.[132] It was not until the mid-twentieth century that courts started to more fully "repudiate the theory of the [*Dietrich*] case to the effect that a viable foetus is part of its mother and has no separate existence apart from her body."[133] Even then, the *Dietrich* approach survived in many jurisdictions at least until the 1970s.[134] And even where it did not, the almost universal common law "born alive" rule meant that even *if* a fetus was a separate *body*, it was not necessarily a person with *rights* until it had survived through birth.[135]

While it has been entirely normalized in contemporary political and legal discourse, the idea that fetuses in utero are independent legal rights-holders is actually a striking deviation from the prevailing frameworks in use until the very recent past.[136] Many courts have noted that the inclusion of fetuses as legal persons would constitute a departure from the accepted common law standards that have prevailed since the founding of the country.[137]

In the years between *Roe* and *Dobbs*, the humanity of the fetus in legal thought has been somewhat in limbo, with laws

132. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946) ("[A] child, if born alive and *viable* should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.").

133. Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557, 558 (Del. Super. Ct. 1956) (collecting cases in opposition to, and in support of, the *Dietrich* approach); *see also* Wolfe v. Isbell, 280 So. 2d 758, 760–61 (Ala. 1973) (rejecting the common law *Dietrich* approach).

134. Womack v. Buchhorn, 187 N.W.2d 218, 220 (Mich. 1971) (noting that twenty-seven American jurisdictions allowed recovery for prenatal injury).

135. RESTATEMENT (SECOND) OF TORTS § 869(1) (AM. L. INST. 1979) ("One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive."). At least as of 2009, eighteen states retained some version of the born alive rule. *See* State v. Lamy, 969 A.2d 451, 457 (N.H. 2009).

136. ROTH, *supra* note 5, at 185 ("The legal construction of fetuses as independent third parties is a significant political innovation and a striking new emphasis in the history of Anglo-American law."); Editorial, *supra* note 48 ("[Criminalizing pregnant women for their actions] illuminate[s] a deep shift in American society, away from a centuries-long tradition in Western law and toward the embrace of a relatively new concept: that a fetus in the womb has the same rights as a fully formed person.").

137. *See* Fleming & Roth, *supra* note 44, at 37 (citing numerous cases breaking from common law tradition by recognizing fetal legal personhood).

and judicial decisions reflecting both a belief in, and a rejection of, the concept of fetal personhood.[138] But as Part I reflects, there are a number of laws passed in the post-*Roe* era (and even more in the post-*Casey* period) that *do* reflect the idea that an in utero fetus is an individual rights holder—a person.[139] If the law cannot contemplate two people in one body, and the law increasingly reflects a belief in the full legal personhood of the fetus, the only available conclusion is that the pregnant person is *not* a person, but something else.[140] Indeed, her very physical violability, as evidenced by the pregnancy, is an indication of her non-personness.[141] If only one person can be present in a body, it is the legally unintelligible pregnant person who becomes an object in modern legal thought—a reproductive vessel.[142]

The two-people-in-one-body problem described is importantly different than the maternal-fetal conflict that is often

138. Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars [https://perma.cc/F6WF-PMN6] (reflecting on Laurence Tribe's description of abortion as a "clash of absolutes" and how instead the American legal system had been "splitting the difference" between the interest of the fetus and pregnant person).

139. Jennifer Henricks, *What to Expect When You're Expecting: Fetal Protection Laws That Strip Away the Constitutional Rights of Pregnant Women*, 35 B.C. J.L. & SOC. JUST. 117, 130 (2015) ("As states have transitioned from the common law approach, in which rights attach only to fetuses born alive, to the modern approach of enacting new statutes or pursuing statutory interpretations that protect fetuses, fetal rights have continued to increase.").

140. *See* Fleming & Roth, *supra* note 44, at 1 ("Fetal personhood and pregnant people's personhood cannot coexist: fetal personhood 'fundamentally change[s] the legal rights and status of all pregnant women' and forces them to 'forfeit' their own personhood once fetal persons have taken up residence inside their bodies." (alteration in original) (quoting Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force Women to Forfeit Theirs*, MS. MAG. (Apr. 15, 2021), https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant [https://perma.cc/WCX6-ED8E])).

141. *Cf.* Margaret Jane Radin, Comment, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 345 (1991) ("The person is a subject, a moral agent, autonomous and self-governing. An object is a non-person, not treated as a self-governing moral agent.").

142. *See, e.g.*, June Carbone & Naomi Cahn, *The Court's Morality Play: The Punishment Lens, Sex, and Abortion*, 96 S. CAL. L. REV. 1101, 1150 (2024) ("Indeed, in the years since *Roe*, antiabortion activists have made the fetus the issue—with the impact on the person forced to give birth disappearing from view.").

thought (by both critics and advocates of fetal personhood) to be at the heart of the conflict over fetal personhood.[143] That conflict presupposes two rights-holders, two people, whose rights are at least theoretically in tension with one another.[144] Indeed, the actual operation of fetal personhood laws undermines any claim that a "clash of rights" is occurring. It is a well-worn legal axiom that one person is not legally obligated to come to the aid of another even if it would cost them almost nothing to do so.[145] And yet, fetal personhood laws are routinely used to do just that: legally obligate an entire class of people (pregnant people) to give up the most personal of rights—their bodily and reproductive autonomy and integrity, including their right to refuse medical treatment—in the service of fetal rights.[146] Importantly, it is not that pregnant people's rights are *balanced* against those of the fetus, it is as if those rights *entirely disappear*. Quite simply, this is not the sort of requirement we have of other fully individuated, rights-holding human beings. It is as if, for pregnant people, these supposedly fundamental rights no longer exist.[147]

143. *See, e.g.*, ROTH, *supra* note 5, at 3 ("First, proponents of fetal rights oppose them rhetorically to women's rights, constructing a contest of equal antagonists with only one possible winner."); Munro, *supra* note 16, at 472 ("[Feminist theorists] have expressed concern not only regarding the legal tendency to conceive of mother and foetus as separate entities but also regarding the accompanying tendency to conceive of the relationship between them as one of conflict." (citation omitted)).

144. *See* Henricks, *supra* note 139, at 124 ("[T]he modern conflict has been over finding the right balance between mother and fetus, namely how much control a pregnant woman should have over decisions she makes during her pregnancy."). Interestingly, this supposed "conflict" is rare—although the reasons for that might themselves reflect troubling cultural norms about motherhood. *See* Jamie R. Abrams, *The Illusion of Autonomy in Women's Medical Decision-Making*, 42 FLA. ST. U. L. REV. 17, 28–31 (2014) (noting both the absence of conflict in most decisions regarding childbirth and the concerning tendency to convert that "standard" experience into a legal standard within tort law).

145. *See* Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1571–73 (1979) (discussing the "law of samaritanism," which ordinarily does not require one individual to devote her body to save the life of another, in the context of abortion restrictions).

146. *See, e.g.,* ROTH, *supra* note 5, at 192 ("In principle, the state cannot justify restricting the freedom, choices, and opportunities of an entire class of people in order to benefit (possibly) another class, that of potential and actual fetuses.").

147. *Cf.* Christine A. Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1, 5 (1987) (noting that feminist law reform efforts are useful in "demonstrat[ing] the hypocrisy of the legal system" because if "such efforts

B. THE REPRODUCTIVE VESSEL

Objectification, at its most basic, refers to the process by which a person is perceived as a non-human object instead of as human,[148] viewing a person as a something, not a someone.[149] As Martha Nussbaum writes in her essay on objectification, however, objectification is a "slippery" and "multiple" concept.[150] She identified no less than seven "notions" involved in the idea of objectification, including instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and denial of subjectivity.[151] Nussbaum concludes that not every instance of objectification includes each of these features, and that some types of objectification are inherently more problematic than others—namely instrumentality (treating a person as primarily a tool for the objectifier's use)[152] and the concomitant denial of

are clearly grounded in the purported availability of fundamental rights for all" and yet fail to protect women, then they are useful in exposing the legal system as "a naked system of power and domination").

148. Nathan A. Heflick & Jamie L. Goldenberg, *Seeing Eye to Body: The Literal Objectification of Women*, 23 CURRENT DIRECTIONS PSYCH. SCI. 225, 225 (2014) (defining objectification as "any outcome in which a person is perceived as, or behaves, objectlike, relative to humanlike"); Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFFS. 249, 251 (1995) (defining objectification as broadly "the seeing and/or treating of someone as an object"). Of course, there can be endless variations in what that "non-human object" might be: a virus, a germ, a machine, or a non-human animal. *See* Tuure Väyrynen & Sari Laari-Salmela, *Men, Mammals, or Machines? Dehumanization Embedded in Organizational Practices*, 147 J. BUS. ETHICS 95, 97 (2018) (comparing the characteristics of "animalistic dehumanization" and "mechanistic dehumanization").

149. ANDREA DWORKIN, LIFE AND DEATH 126 (1997) (describing the process of dehumanization and objectification of women in pornography).

150. Nussbaum, *supra* note 148, at 251.

151. *Id.* at 257. Rae Langton has suggested three more features of objectification should be added to Nussbaum's list: reduction to body, reduction to appearance, and silencing. RAE LANGTON, SEXUAL SOLIPSISM: PHILOSOPHICAL ESSAYS ON PORNOGRAPHY AND OBJECTIFICATION 228–29 (2009).

152. Nussbaum, *supra* note 148, at 265 ("The lesson seems to be that there is something especially problematic about instrumentalizing human beings, something that involves denying what is fundamental to them as human beings, namely, the status of being ends in themselves."). Nussbaum goes on to argue, however, that context of the relationship is important in understanding the morality of the objectification—differentiating between viewing something primarily or merely as an instrument, versus primarily viewing them as human and occasionally as an instrument or tool. *Id.*

autonomy and subjectivity that accompanies such instrumentalization.[153]

Certainly, there is ample evidence that women have been objectified across cultures and history. Catharine MacKinnon and Andrea Dworkin have both famously asserted that there is widespread objectification of women and have connected this objectification to the violence towards women depicted in pornography.[154] Although most of the literature focuses on the sexual objectification of women, there is a "characteristic mode of instrumentalization and use" that "lie[s] behind the male denial of autonomy to women."[155] Feminist theorists have long explored the basis for, and the effects of, the objectification of women.[156]

The specific objectification of women's bodies as reproductive vessels, too, has deep historical and cross-cultural roots.[157] Religious texts and traditions often contain images of women as reproductive vessels,[158] and such ideas are contained in political

153. *Id.* at 266 (noting that certain types of instrumentalization are linked, in Kantian thought, to a denial of both autonomy and subjectivity).

154. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 148–50 (1987) (laying out the idea that pornography's objectification of women reflects a sexual reality); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, *in* FEMINISM AND PORNOGRAPHY 19, 30 (Drucilla Cornell ed., 2000) (discussing pornography as sexually explicit subordination of women and identifying subordination as objectification).

155. Nussbaum, *supra* note 148, at 270.

156. *See id.* at 249; West, *supra* note 109, at 60 ("In sum, the Rule of Law does not recognize the danger of invasion, nor does it recognize the individual's need for, much less entitlement to, individuation and independence from the intrusion which heterosexual penetration and fetal invasion entails. The material consequence of this lack of recognition in the real world is that women are *objectified*—regarded as creatures who can't be harmed." (alteration in original)).

157. The objectification of women as sexual objects, too, has deep historical and cultural roots. This phenomenon is, of course, both related and distinct from their objectification as reproductive vessels. And pregnant bodies can be objectified in multiple ways simultaneously. *See generally* Olivia Donati Beech et al., *A Systematic Literature Review Exploring Objectification and Motherhood*, 44 PSYCH. WOMEN Q. 521 (2020) (discussing simultaneous objectifications of mothers).

158. *See* Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescriptions: Religious Imagery of Woman as "Fetal Container" in the Law*, 10 J.L. & RELIGION 73, 74 (1993) ("An important aspect of Christian religious symbolism has been the view of women as fetal containers or vessels for reproduction . . . ."); Elana Bloomfield, *Conceiving Motherhood: The Jewish Female Body in Israeli Reproductive Practices*, 10 INTERSECTIONS 227 (2009) (describing Jewish thought on the reproductive capacity of the female body).

thought, as well.[159] Philosophical inquiry—at least of the type that was allowed or recorded until the very recent past—disregards entirely the subjectivity of the pregnant person.[160] Aristotle believed that the female role in reproduction was simply the "source of raw material" and the "workplace" which the male uses to actively craft human life.[161] Versions of this worldview held sway for thousands of years, as the dominance of the theory of animalculism throughout the 1700s and early 1800s shows.[162] This theory placed the entirety of the human form, albeit in miniature, inside the male sperm.[163] The egg was "simply a temporary abiding place for the spermatic animalcule that provided it with food, shelter, and warmth."[164] Some early Greek and Roman physicians even believed that women had no active role in *childbirth*, believing instead it was the fetus who initiated and completed its own successful expulsion.[165]

Feminist thinkers have noted and bemoaned this objectification of the pregnant person and the process of reproduction. In *The Second Sex*, Simone de Beauvoir describes the experience of pregnancy with characteristic distaste:

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159. *See* Žarana Papić, *Women in Serbia: Post-Communism, War, and Nationalist Mutations*, *in* GENDER POLITICS IN THE WESTERN BALKANS 153, 163 (Sabrina P. Ramet ed., 1999) (describing the Serbian "nationalist body politics" as "using and abusing Serbian women's bodies as incubators"). Dr. Fathi Arafat, head of the Palestinian Red Crescent Society and brother of Yasser Arafat, once stated that "[o]ur women have a very important job in the Palestinian struggle—they are commando producers!" Christine Dugas, *Women in the PLO: Rifles, Fatigues, but No Veils*, CHRISTIAN SCI. MONITOR (July 31, 1981), https://www.csmonitor.com/1981/0731/073132.html [https://perma.cc/S7M3-8JWF].

160. Iris Marion Young, *Pregnant Embodiment: Subjectivity and Alienation*, 9 J. MED. & PHIL. 45, 45 (1984) ("We should not be surprised to learn that discourse on pregnancy omits subjectivity, for the specific experience of women has been absent from most of our culture's discourse about human experience and history.").

161. *See* Nancy Tuana, *The Weaker Seed: The Sexist Bias of Reproductive Theory*, 3 HYPATIA (SPECIAL ISSUE) 35, 38 (1988). Aristotle "echoes the word of Aeschylus' Apollo, '[t]he woman you call the mother of the child/is not the parent, just a nurse to the seed,/ the new-sown seed that grows and swells inside her.'" *Id.* at 39 (alteration in original).

162. *Id.* at 51–56.

163. *Id.* at 52.

164. *Id.* at 53.

165. Sarah Scullin, *"She's Only a 4" The Objectification of Birthing Bodies*, EIDOLON (Dec. 12, 2016), https://eidolon.pub/shes-only-a-4-f534333fb298 [https://perma.cc/DE5M-4LY6].

> The transcendence of an artisan or a man of action is driven by a subjectivity, but for the future mother the opposition between subject and object disappears; she and this child who swells in her form an ambivalent couple that life submerges; snared by nature, she is plant and animal, a collection of colloids, an incubator, an egg; she . . . provokes sniggers from young men because she is a human being, consciousness and freedom, who has become a passive instrument of life.[166]

The legal system, too, has sometimes reflected a belief that women are, at least in part, reproductive vessels. Gendered labor regulation from the early twentieth century was permitted because of the necessity of keeping women's reproductive capacity "healthy" in order to "preserve the strength and vigor of the race."[167] The Supreme Court, in the 1937 case *Breedlove v. Suttles*, exempted women from a poll tax "[i]n view of burdens necessarily borne by them for the preservation of the race."[168] Prior to the passage of the Pregnancy Discrimination Act in 1978, employers often excluded women from certain types of employment out of fear that it was incompatible with their primary role as a gestator.[169]

But as the statutes discussed above reflect,[170] such views are not consigned to the distant past. The image of pregnant-person-as-incubator is perhaps most starkly reflected in the laws that direct medical personnel to expressly disregard the advance directive of a pregnant person in the event of her illness or incapacitation.[171] Forced medical interventions on pregnant people, too, reflect the idea that pregnant people are valued by the state

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166. SIMONE DE BEAUVOIR, THE SECOND SEX 538–39 (Constance Borde & Sheila Malovany-Chevallier trans., Alfred A. Knopf 2010) (1949).

167. Muller v. Oregon, 208 U.S. 412, 421 (1908); *see* Peach, *supra* note 158, at 80 ("The 'naturalized' religious imagery of woman as fetal container first appeared in judicial decision-making enacted in the nineteenth and early twentieth centuries, which upheld the constitutionality of protective labor legislation concerning women.").

168. 302 U.S. 277, 282 (1937), *overruled by* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

169. Thomson, *supra* note 119, at 570 ("[T]hrough a range of corporate policies and state legislation and regulation, pregnant women and women of reproductive capacity have long been excluded from a range of toxic workplaces, generally those that have historically been defined by a male workforce.").

170. *Supra* Part I.

171. *Supra* Part I.B; *see also* Dara E. Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 391 (2017) ("Most states even refuse to enforce the woman's wishes not to be placed on life support expressed in a written advance directive or living will if she is pregnant . . . .").

not as people, but entirely through their functional role as gestators.[172] Even when medical interventions are not forced, the prevalence in medicine of techniques designed to ease the fetus's passage through the birth canal (at the expense of birthing people's physical or mental wellbeing) reflects the continuing salience of the idea that pregnant people are not fully human, but merely necessary containers for fetal development that can be ignored, harmed, or discarded as necessary.[173] The unique treatment of pregnant people by state criminal codes—criminalizing behavior such as drug use or attempted suicide that is not criminalized for non-pregnant people—reveals how pregnant bodies are conceived of by the state as the site of a particular *function* and not of fully realized personhood.[174] And, of course, laws that criminalize abortion quite literally conscript women into the role of unwilling gestator in service of the state's own ends.[175]

Comments from public figures also reflect the conception of pregnant people as reproductive vessels. Virginia State Senator Steve Martin, in a letter he posted on Facebook, referred to pregnant people as "hosts," stating "once a child does exist in your womb, I'm not going to assume a right to kill it just because the child's host (some refer to them as mothers) doesn't want it."[176] Congressperson Madison Cawthorn, in arguing against abortion

172. *See id.* at 397 ("Not only are women pressured and sometimes coerced by their doctors to deliver by c-section, particularly if past deliveries were also by c-section, but the state has repeatedly either punished women for refusing to have a c-section if the baby is arguably harmed by that decision, or actually ordered women to undergo the procedure.").

173. *See* Scullin, *supra* note 165 (describing how physicians and nurses routinely take actions during childbirth, such as inducing too early, that are harmful to the pregnant person because they favor the well-being of the child).

174. *See* Purvis, *supra* note 171, at 379–91 (describing criminal sanctions for prenatal drug use, increased tort liability for pregnant women, and the treatment of self-harm during pregnancy as child abuse).

175. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.").

176. Clare Kim, *Virginia Republican Labels Pregnant Women as 'Hosts,'* MSNBC (Feb. 24, 2014), https://www.msnbc.com/the-last-word/state-sen-calls-pregnant-women-hosts-msna273671 [https://perma.cc/983T-PD2V].

rights, referred to women as "earthen vessels."[177] Former Speaker of the Florida House of Representatives Jose Oliva referred to pregnant women as "host bodies" in an interview on *CBS News*.[178] Sometimes these comments reflect the idea that women are people *until* they become pregnant, at which point they become something less than a full human, as reflected in Oklahoma Representative Justin Humphrey's statements in an interview with *The Intercept*:

> I understand that they feel like that is their body . . . . I feel like it is a separate — what I call them is, is you're a "host." And you know when you enter into a relationship you're going to be that host and so, you know, if you pre-know that then take all precautions and don't get pregnant . . . . So that's where I'm at. I'm like, hey, your body is your body and be responsible with it. But after you're irresponsible then don't claim, well, I can just go and do this with another body, when you're the host and you invited that in.[179]

Other comments, however, reflect the belief that women are reproductive vessels regardless of whether they are currently pregnant or not. For instance, Senator Josh Hawley, in attempting to define "woman" in an interview with a *HuffPost* reporter, replied by equating "womanhood" entirely with reproductive function: "Someone who can give birth to a child, a mother, is a woman. Someone who has a uterus is a woman. It doesn't seem that complicated to me."[180] Or as another example, a viral tweet

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177. Chelsea Steiner, *Madison Cawthorn Calls Women "Earthen Vessels" in Unhinged Rant About Abortion*, THE MARY SUE (Dec. 4, 2021), https://www.themarysue.com/madison-cawthorn-earthen-vessels-abortion [https://perma.cc/K9T3-TJ7K]. His phrasing likely comes from the King James translation of the Bible, referring to the "light of God" that exists in all human bodies: "But we have this treasure in earthen vessels, that the excellency of the power may be of God, and not of us." 2 *Corinthians* 4:7 (King James).

178. CBS Miami, *WEB EXTRA: Incoming Florida House Speaker Jose Oliva on Abortion*, YOUTUBE (Feb. 28, 2019), https://www.youtube.com/watch?v=aze74Qkff8U. Speaker Oliva does go on to say that the "host body" has rights that needs to be balanced with the fetal rights and that his use of "host body" is intended to balance the use of "fetus" by pro-abortion rights advocates. *Id.*

179. Lisa Ryan, *Oklahoma Anti-Abortion Lawmaker Says Women Are Merely 'Hosts*,' THE CUT (Feb. 13, 2017), https://www.thecut.com/2017/02/oklahoma-anti-abortion-lawmaker-says-women-are-hosts.html [https://perma.cc/X6L6-2CAY].

180. Monica Hesse, *Republicans Thought Defining a 'Woman' Is Easy. Then They Tried.*, WASH. POST (Apr. 6, 2022), https://www.washingtonpost.com/lifestyle/2022/04/06/republican-woman-definitions [https://perma.cc/5QFC-KA5T]. Senator Hawley seemed stumped by the follow-up question, which pressed him to say whether a woman whose uterus was removed via a hysterectomy was still a woman, replying, "Yeah. Well, I don't know, would they?" *Id.*

from Lori Alexander, an author who writes about "biblical womanhood,"[181] states, "[l]ook at your bodies, women! Breasts, ovaries, and a womb. God created you for the magnificent job of creating and nourishing new life! What can be more important than this?!?!"[182] These comments reflect the idea that women are always *potentially* pregnant—that their primary or sole function is that of reproductive vessel. Such a belief aligns with the results of our empirical analysis, which shows that rates of violence against all women of reproductive age increase whether or not they are actually pregnant.[183] If women are viewed primarily as current or future reproductive vessels, objectification and violence doesn't necessarily attach to an actual pregnancy, but instead to the potential for pregnancy.

Politicians and public figures are not necessarily the source of the idea that women are reproductive vessels; these ideas have hold in the popular imagination, as well.[184] The enduring tendency for strangers to touch pregnant people's stomachs reflects a belief that the pregnant person is no longer entitled to the physical boundaries of other humans—her body has become public property. Pregnant women are routinely referred to as "mom" instead of by their own names in a variety of healthcare settings. It is incredibly common to refer to pregnant people as having a "bun in the oven" of course, implying that the pregnant person is the "oven." At least in such a construction the fetus, too, is objectified as the "bun," but in other examples it is solely the pregnant

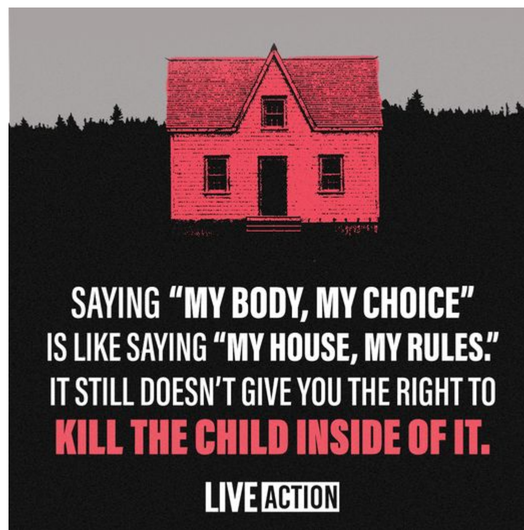
181. *About Me*, THE TRANSFORMED WIFE, https://thetransformedwife.com/about-2 [https://perma.cc/AMZ5-8UQS].

182. The Transformed Wife 🦋 (@godlywomanhood), X (formerly TWITTER) (July 30, 2019), https://mobile.twitter.com/godlywomanhood/status/1156189060689534976 [https://perma.cc/NZA3-HT4T].

183. *See infra* Part II.D.

184. One case in Maryland reflects both the paramount importance given to women's reproductive function and the essentialization of women as reproductive producers. After a male police officer applied for parental leave, the civilian employee charged with determining his eligibility states that "God made women to have babies and, unless [the male officer] could have a baby, there is no way [he] could be primary care [giver]" unless his wife were "in a coma or dead." Knussman v. Maryland, 272 F.3d 625, 629–30 (4th Cir. 2001). The dystopian novel *The Handmaid's Tale* is perhaps the most well-known cultural touchpoint. In that story, women are forced to bear children against their will for the powerful men in society. One handmaid describes her role thusly: "We are two-legged wombs, that's all: sacred vessels, ambulatory chalices." MARGARET ATWOOD, THE HANDMAID'S TALE 136 (1986).

person who is objectified.[185] Former *Food Network* host and food writer Josh Denny equated women's bodies with houses when he tweeted: "You shouldn't get to murder a baby because you're it's landlord any more than you can murder your tenants or houseguests."[186] In this construction, the fetus is a human "baby" while it is unclear whether the pregnant person is a landlord, a house, or both. A popular anti-abortion meme circulated on social media similarly compares a pregnant person to a "house" while maintaining that a fetus is still a "child":



Anti-abortion "meme."[187]

There have also been pro-life advocates who compare abortion to slavery, equating the bodies of people who seek abortion not with slaveholders but with *plantations*.[188] And even when

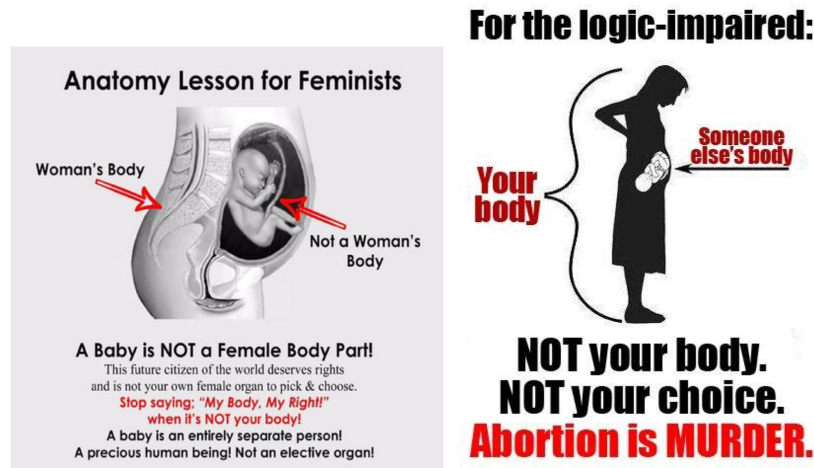
185. *See generally* Katy Steinmetz, *It's Time to Rethink the Demeaning Ways We Describe Pregnancy*, TIME (May 11, 2019), https://time.com/5587321/knocked-up-pregnant-synonyms [https://perma.cc/R8YS-EYH5] (listing other common phrases used to describe pregnancy and pregnant people).

186. Josh Denny (@JoshDenny), X (formerly TWITTER) (Sept. 1, 2021), https://twitter.com/JoshDenny/status/1433064486223503367 [https://perma.cc/DQ8J-NJ2Z].

187. Live Action (@liveactionorg), INSTAGRAM (June 21, 2022), https://www.instagram.com/p/CfEw9mBrszP [https://perma.cc/Z7PH-B7SA].

188. Elizabeth Dias, *Inside the Extreme Effort to Punish Women for Abortion*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/

the pregnant person isn't explicitly objectified, the images used often reflect more nuanced degradations of her humanity. For instance, consider two similar anti-abortion memes:



Two anti-abortion "memes" side-by-side.[189]

In the two images above, the pregnant person is depicted as a human body—or at least part of one. But in one, she is reduced to only the part of her body that contains her reproductive organs, and, in the other, her body is little more than an outline, shaded and indistinct. The body of the fetus in both examples, on the other hand, is drawn in much greater detail, with distinctly human features. The humanity of the fetus is clear in both, while the pregnant person is depicted as nothing more than the physical surroundings of the fetus.

abortion-abolitionists.html [https://perma.cc/Z9FF-AACU] ("'There were people arguing against the abolitionists at the time,' he said. 'They were saying, "Well, sure, it's wrong. But, if you don't want a slave, don't get one." You know, so everything was sort of, "That's their plantation, their choice."'" (quoting Jeff Durbin, Phoenix pastor and founder of the "abortion abolition" group End Abortion Now)).

189. Ryan Visconti (@ryanvisconti), INSTAGRAM (Jan. 10, 2024), https://www.instagram.com/ryanvisconti/p/C16ayyvLLdj [https://perma.cc/CM76-MEKD]; Kifetew-Yahoo, *When One Simply Picture Says It All*, APPEAL FOR PURITY (Oct. 23, 2016), http://appealforpurity.org/2016/10/23/when-one-simple-picture-says-it-all [https://perma.cc/P9S9-XCFV].

In other examples, the body of the pregnant person is sidestepped entirely by simply erasing it from the picture, as these popular memes illustrate:

Two additional anti-abortion "memes."[190]

190. Live Action, FACEBOOK (May 22, 2022), https://www.facebook.com/photo.php?fbid=375620041270888&set=pb.100064686851503.-2207520000&type=3 [https://perma.cc/3FU7-DB9Y]; AHAGear (@AHAgear), PINTEREST, https://www.pinterest.com/pin/126100858296284424 [https://perma.cc/V8FQ-8WKF].

This type of image also appears in politics, as this picture of House Representative Vicky Hartzler showcases:

House Representative Vicky Hartzler speaking at outdoor podium.[191]

In these images, the pregnant person is erased entirely—her womb a disembodied shape, only salient because it houses the real subject of the message—the fetus.[192] And far from being rare, these types of images are exceedingly commonplace in the marketplace of "pro-life" ideas.

191. Associated Press, *House Approves Republican Bill Banning Most Late-Term Abortions*, L.A. TIMES (May 13, 2015), https://www.latimes.com/nation/nationnow/la-na-nn-house-antiabortion-bill-passes-20150513-story.html [https://perma.cc/5LDZ-HZC2].

192. Interestingly, some pro-life advocates have also critiqued the utilization of these types of images, as they believe establishing personhood for the fetus likewise requires the rejection of equating personhood with fundamental autonomy. *See* Erika Bachiochi, Opinion, *What Makes a Fetus a Person?*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/fetal-personhood-constitution.html [https://perma.cc/83WK-K5SH] ("Making this constitutional case [of fetal personhood] will require rejecting the concept that a rights-bearing person is fundamentally self-owning and autonomous. . . . Pro-lifers sometimes respond in a way that accepts, rather than challenges, the idea that people are autonomous. They can depict the fetus as floating alone, independent from her mother.").

The conception of women as reproductive vessels is not limited to one political party or even a particular stance on reproductive rights. Self-described liberal X (formerly Twitter) user Snark Queen Bee tweeted a comment equating women to waffle makers, stating "DO NOT PUT THE BATTER IN THE BABY MAKER IF YOU DON'T WANT A WAFFLE. Period."[193] And feminist thinkers have long problematized the pro-choice language advocating for a women's right to "control their own bodies," as reflecting the idea that the body is somehow separate from the self—an object to be controlled as opposed to the physical embodiment of a human being.[194]

Science and medicine too can objectify the pregnant person as merely a container for fetal development. The development of sonogram technology has enabled us to see the fetus, and indeed to create a picture of it divorced from the physical reality of the body in which it is physically situated.[195] Scientific papers will discuss the "fetal environment" in lieu of discussing the *person* that constitutes that environment—the pregnant person.[196] And healthcare workers routinely describe birthing bodies with objectifying language, for instance, focusing on the dilation of the cervix as the only relevant metric.[197] This objectifying language and treatment can be even more heightened in the context of gestational surrogacy, where the pregnant person has no genetic

193. Snark Queen Bee (@SnarkQueenBee), X (formerly TWITTER) (May 21, 2022), https://x.com/snarkqueenbee/status/1528208860124618752?s=61&t=Ed7lztG9dZ2uOQcDEhwpUA [https://perma.cc/3JF3-8RYZ].

194. Wendi Hadd, *A Womb with a View: Women as Mothers and the Discourse of the Body*, 36 BERKELEY J. SOCIO. 165, 168 (1991) (arguing to change the narrative from control over bodies to the right to determine what happens to *self*).

195. Diduck, *supra* note 114, at 471 ("The dominant construction of pregnancy, assisted by medical technology which allows us to see and photograph a foetus without seeing the woman of whom it is a part, combined with a discourse of rights which celebrates the individual and *his* boundaries from other individuals thus forms the framework within which foetal protection arguments are made." (alteration in original) (citation omitted)).

196. *See* ROTH, *supra* note 5, at 7; *see also* Morris, *supra* note 4, at 95 n.205 (describing the use of the term "maternal environment" in modern obstetrical practice to describe pregnant people).

197. *See* Scullin, *supra* note 165 ("Birthing bodies are reduced to numbers (literally; it's not uncommon to hear birth attendants communicating in a quantified shorthand: 'She's a 7,' 'She's only a 4') and all agency is stripped from the woman as her role, and her uterus, is reduced to the size of her baby hole.").

link to, and does not plan to parent, any child that results from the pregnancy.[198]

With all of this religious, historical, and cultural force, it is unsurprising that this concept of women as reproductive vessels also influences the law and legal decisionmakers.[199] In the Alabama Supreme Court case *Ex parte Ankrom*,[200] Justice Parker interpreted the Alabama Chemical Endangerment Act, which prohibits "exposing a child to an environment in which he or she . . . [k]nowingly, recklessly, or intentionally causes or permits a child to be exposed to, ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia," to apply to pregnant women who ingest drugs.[201] Justice Parker reasoned that the "environment" referenced in the statute referred, "simply to a person's surroundings, to the situation in which a person lives his or her life," and that, "for an unborn child, the mother's womb is an essential part of its physical circumstances."[202] Of course, taken from the perspective of the fetus, this reasoning has some logic. But in no other circumstance is a human person—who is themselves the supposed holder of rights—described purely as an "environment" or "surroundings."[203]

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198. M.M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 J. MED. ETHICS 171 (2009) (arguing that relinquishment by surrogate mothers necessarily objectifies them); Peach, *supra* note 158, at 92 (discussing the objectification of surrogates as "fetal containers").

199. *See, e.g.*, Peach, *supra* note 158, at 73 ("[T]he religiously-grounded image of woman as fetal container has persisted in legal doctrine, especially in laws concerning employment discrimination, abortion, and, most recently, fetal protection policies and surrogate motherhood contracts.").

200. 152 So. 3d 397 (Ala. 2013).

201. *Id.* at 407–08, 421 (footnote omitted).

202. *Id.* at 416.

203. The Alabama Supreme Court has recently reaffirmed its interpretation that embryos and fetuses are "children" for purposes of Alabama law. *See* LePage v. Ctr. for Reprod. Med., No. SC-2022-0515, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024). While that case dealt with plaintiffs who claimed that the destruction of their cryopreserved embryos constituted the wrongful death of a minor under state law, the court once again used objectifying language to refer to pregnant people. Justice Mitchell, writing for the court, described the case as being about "unborn children who are located outside of a biological uterus" Or who are not "contained within a biological womb." This phrasing, similar to that used in *Ankrom,* obscures the humanity of the pregnant person—focusing completely on the humanity of the embryo "regardless of its location." *Id.* at *1; *see* *Ankrom*, 152 So. 3d at 416.

A concurring opinion in a D.C. Court of Appeals case concerning a forced Cesarean section reflects the pregnant-person-as-prison metaphor, stating that the pregnant person is "a member of a unique category" because "the viable unborn child is literally captive within the mother's body."[204] And the recent opinion in the abortion rights case *Dobbs v. Jackson Women's Health Organization*[205] also elides the humanity of pregnant people in a number of ways. For example, despite the majority opinion's "hosannas to every organ a fetus grows"[206] it spares "not a word for those of us who must actively give of ourselves to make them,"[207] thus undercutting the fundamental humanity of pregnant people by ignoring or obscuring potential harms to them while simultaneously highlighting the humanity of the fetus.[208] The majority opinion also refers obliquely in a footnote to the lack of a "domestic supply of infants,"[209] turning unwillingly pregnant people into no more than suppliers.

The objectifying treatment of pregnant people as reproductive vessels is self-reinforcing, as well. The more that the legal system does not respect pregnant people's rights in the same manner as other human being's, the firmer the cultural understanding of pregnant people as somehow less than fully embodied legal persons becomes.[210] These cultural trends inform the

204. *In re* A.C., 573 A.2d 1235, 1256 (D.C. 1990); *see also Coercive and Punitive Governmental Responses to Women's Conduct During Pregnancy*, ACLU (Sept. 30, 1997), https://www.aclu.org/other/coercive-and-punitive-governmental-responses-womens-conduct-during-pregnancy [https://perma.cc/J3U4-G6AX] (detailing the case of T.B., an Illinois woman who resisted a Cesarean section, and the appointed Public Guardian who described the fetus as "a real life being kept prisoner in its mother's womb").

205. 597 U.S. 215 (2022).

206. Irin Carmon, *I, Too, Have a Human Form: In Justice Alito's Opinion, the Pregnant Body Is Erased*, N.Y. MAG.: INTELLIGENCER (May 19, 2022), https://nymag.com/intelligencer/2022/05/roe-v-wade-draft-opinion-pregnant-body-erased.html [https://perma.cc/Y9PJ-56NY].

207. *Id.*

208. The Court in *Dobbs* reiterates, at length, the Petitioner's arguments about the development of fetal life, including when the "unborn human being's heart begins beating," and when "[h]air, fingernails, and toenails . . . begin to form." 597 U.S. at 233 (alteration in original) (quoting MISS. CODE ANN. § 41-41-191(2)(b)(i) (2024)).

209. *Id.* at 259 n.46.

210. *See* BORDO, *supra* note 7, at 94 (noting that to deprive women of reproductive autonomy is to "mount an assault on her personal integrity and autonomy (the essence of personhood in our culture) and to treat her merely as a

types of laws that we analyze in this Article and those laws—and the political discourse that surrounds their passage and enforcement—further entrenches the idea of women as reproductive vessels. As always, law and culture mutually constitute each other.[211] For this reason, it is not necessary for an individual to be aware of the particular statutory scheme under which he acts in order to tell a compelling story about how the law affects his behavior. It is enough that individuals exist within the cultural and political discourse that is affected by legal regimes (which are, in turn, affected by culture and politics). If the law supports and reinforces objectifying ideas about women and people capable of pregnancy, these messages affect behavior and attitudes at a population level.[212]

In the face of the law's continuing inability to incorporate appropriately nuanced frameworks to regulate the two-in-one pregnant body, it becomes difficult for both pregnant person and fetus to be treated by the law as fully human. As the concept of fetal personhood has increasingly been embedded in legal thought and frameworks, the fetus has claimed that full humanity, and in so doing, has necessarily resulted in the dehumanization and objectification of anyone who is perceived as having the potential to become pregnant. As the empirical analysis of this Article demonstrates,[213] and the following Section explores in more detail, what will result from such objectification is depressingly easy to guess.

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pregnant *res extensa*, material incubator of fetal subjectivity"). This tracks the more general trend of the objectification of a person or group of people being the basis for a subsequent decision that such objectification is warranted and natural. *See infra* note 216 and accompanying text.

211. *See* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMANS. 35, 45–57 (2001) (discussing the interplay between law and culture and their mutual constitution of each other).

212. Peach, *supra* note 158, at 93 ("[T]he way that the law portrays or depicts women will have an influence in shaping social values and attitudes, even apart from its direct impact on the treatment of women."); Morris, *supra* note 4, at 54 ("Law itself is both a language system and a power system, in which society's power relations are expressed through the language of law in cases and statutes. Legal reality is created in the courts and the legislatures, where language is the process by which experience is abstracted and turned into legal doctrine. Law is the authorized discourse of the State, and can create, dismantle, or reinforce social hierarchies depending on the prevailing ideology." (footnote omitted)).

213. *Infra* Part II.D.

C. OBJECTIFICATION AND VIOLENCE

Even absent the empirical evidence explored in the next Section, there would be strong reasons to believe that the objectification of potentially pregnant people as reproductive vessels would meaningfully increase violence towards them. Indeed, there is remarkably consistent evidence across history and cultures that the objectification and dehumanization of a group is a strong predictor of violence against them.[214]

As explained above, one type of objectification that is inherently problematic is "instrumentality," or treating a person as primarily a tool for another's use.[215] The real-world danger of this type of objectification, of course, is the assumption that the objectifier has some power to enforce this perception: to *actually use* the objectified individual as a tool or to allow or encourage others to do so.[216] This objectifying power has the potential to increase violence towards the objectified in two ways: (1) directly, through insisting that the objectified perform some task or function that is contrary to their wellbeing; and (2) indirectly, through removing whatever moral or societal stigma would otherwise attach to violence towards humans (but not things). An example of the latter might be the extreme violence towards the Jews in Nazi Germany,[217] and an example of both types of objectifying violence would be the treatment of Black people in the

214. *E.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY 310 (2d ed. 2017) ("The social justice approach to liberty recognizes the connection between the dehumanization of the individual and the subordination of the group.").

215. *See supra* notes 152–53 and accompanying text.

216. Sally Haslanger, *On Being Objective and Being Objectified*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 209, 228 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002) ("[O]bjectification is assumed to be a relation of domination where one also has the power to enforce one's view."). Haslanger goes on to argue that the more insidious danger is that objectification is then naturalized by those in power—creating a false narrative that the objectified group inherently reflects the thing-like qualities that the objectifier insists they do. *Id.* at 228–29.

217. Tracey Martin, *Propaganda: How Germany Convinced the Masses*, 13 HIST. MAKING 91, 99 (2020) (describing Nazi propaganda that depicted Jews as puppet masters and as devious, controlling octopuses); Jennifer Hansen, *The Art and Science of Reading Faces: Strategies of Racist Cinema in the Third Reich*, 28 SHOFAR 80, 90 (2009) (describing a film that equated Jews with rats, flies, and disease). The rejection of this type of objectification has formed the basis of some of our most established jurisprudential ideas. *See* McFall v. Shimp, 10 Pa. D. & C.3d 90, 92 (1978) ("For a society which respects the rights

United States under the system of chattel slavery.[218] The enslaved person was forced to act as a tool, a means to achieve the ends of the slaveholder, instead of an end in and of themselves. And as a result of this objectification, the moral stigma associated with violence towards another human was reduced or eliminated entirely.

Of course, objectification and violence exist on a spectrum. The modern deprivations of rights experienced by pregnant people cannot be *directly* equated to the wholesale deprivation of rights and basic humanity that some people experienced in the Holocaust or under the American system of chattel slavery.[219] It is possible for an individual to be objectified in certain contexts but not in others.[220] Nevertheless, it not conceptually difficult to

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of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.").

218. To justify the enslavement of Africans, American slaveowners maintained that enslaved people were "animalistic subhumans" that could be trained and domesticated. Reginald Oh, *Black Citizenship, Dehumanization, and the Fourteenth Amendment*, 12 CONLAWNOW 157, 159 (2021). In Nussbaum's typology of objectification, slavery is "instrumental"—treating humans as "a tool for one's own purposes"—and thus denying both the enslaved person's autonomy and subjectivity. Nussbaum, *supra* note 148, at 264 ("[I]t is easy to see how the thing like treatment of persons inherent in the institution led, as it so often did, to the feeling that one had a right to use the body of that slave in whatever way one wished."). Additionally, enslaved women were viewed as reproductive vessels that could increase their owner's profits by birthing more enslaved people. Dominique R. Wilson, Note, *Sexual Exploitation of Black Women from the Years 1619-2020*, 10 J. RACE, GENDER, & ETHNICITY 122, 123 (2021).

219. Reproductive justice scholars such as Michele Goodwin, however, persuasively argue against "forced reproduction" through invocation of the reconstruction amendments and the rejection of slavery contained in them. Michele Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html [https://perma.cc/72CH-ZW8C].

220. *See* Carolyn McLeod, Mere and Partial Means: The Full Range of the Objectification of Women 14–15 (2003) (unpublished manuscript), https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1347&context=philosophypub [https://perma.cc/95WC-KWGA] (arguing for the possibility that there are degrees of objectification and using the example of the objectification of the assisted reproductive technology patient who is both objectified for her reproductive capacity and afforded humanity and agency as an individual).

see how objectification at any scale would pave the way for objectified groups to experience increased rates of violence, as their abusers recognize them as less than fully human.

Although mostly focused on the sexual objectification of women, there is a robust literature linking the objectification of women and girls with increases in gender-based violence. Study participants who dehumanize women score higher on a range of potentially violent behaviors, including their propensity for rape and sexual harassment.[221] Recent studies show that sexually objectifying women even leads to increased *non-sexual* aggression towards them, as well.[222] This association between the objectification of women and increased violence towards them have been replicated in a variety of scenarios,[223] leading some scholars to argue that addressing objectification is a critical first step in reducing violence against women.[224]

While there is less research directly testing the relationship between the objectification of pregnant people and gender-based violence, there is already evidence in the social science literature that pregnancy is the site of objectification. In a meta-study on objectification and motherhood, there was consistent evidence of objectification (evidenced through the denial of human nature or

221. Casey L. Bevens & Steve Loughnan, *Insights into Men's Sexual Aggression Toward Women: Dehumanization and Objectification*, 81 SEX ROLES 713, 725 (2019).

222. Eduardo A. Vasquez et al., *The Sexual Objectification of Girls and Aggression Towards Them in Gang and Non-Gang Affiliated Youth*, 23 PSYCH., CRIME & L. 459, 467–69 (2017).

223. *E.g.*, Rita C. Seabrook et al., *Less than Human? Media Use, Objectification of Women, and Men's Acceptance of Sexual Aggression*, 9 PSYCH. VIOLENCE 536, 536–37, 541–42 (2019) (collecting literature and finding new associations between media consumption, objectification, and propensity for violence); Sarah J. Gervais & Sarah Eagan, *Sexual Objectification: The Common Thread Connecting Myriad Forms of Sexual Violence Against Women*, 87 AM. J. ORTHOPSYCHIATRY 226 (2017) (linking sexual objectification to violence against women in several circumstances including sexual assault on college campuses, workplace harassment, and human trafficking).

224. Gervais & Eagan, *supra* note 223, at 230 ("[W]e see objectification of women as a first step toward committing violence against them. When people are regarded as objects and not as fully human, they are less likely to be considered equals, deserving of the full range of human rights, including moral concern, dignity, and respect.").

human-relevant traits) of pregnant people.[225] And we already know that the problem of violence towards pregnant people, too, is a serious and pervasive one. A study conducted in a thirty-state area revealed that "3.2% of pregnant women . . . had been pushed, hit, slapped, kicked, choked, or physically hurt in some other way during their most recent pregnancy."[226] That number rises to nearly 7% for teenagers who are pregnant[227] and 15% of those with mistimed or unwanted pregnancies.[228] While social scientists are divided about whether pregnancy itself is the catalyst for new violence,[229] research firmly supports the finding that pregnancy is often a catalyst for the severity of violence to increase.[230] The leading cause of death among pregnant women is homicide, and, in the majority of cases, such murders appear to be perpetrated by a known individual, often the woman's romantic partner.[231] Pregnancy alone results in a 16% increase in the risk of being murdered[232] and is three-fold higher among Black women.[233] Intimate partner violence is "more common for pregnant women than gestational diabetes or preeclampsia —

225. Beech at al., *supra* note 157, at 533 ("Mothers and motherhood appear to be consistently subjected to objectification processes, be it at their hand or the hands of others . . . .").

226. Christian A. Chisholm et al., *Intimate Partner Violence and Pregnancy: Epidemiology and Impact*, 217 AM. J. OBSTETRICS & GYNECOLOGY 141, 142 (2017).

227. *Id.*

228. *Intimate Partner Violence During Pregnancy*, WORLD HEALTH ORG. 3 (2011), https://apps.who.int/iris/bitstream/handle/10665/70764/WHO_RHR_11.35_eng.pdf [https://perma.cc/WH4N-XCC8].

229. *See WHO Multi-Country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses*, WORLD HEALTH ORG. 16–17 (2005), https://iris.who.int/bitstream/handle/10665/43310/9241593512_eng.pdf?sequence=1 [https://perma.cc/JP5R-ZB6S] (investigating the role between pre-pregnancy violence towards women and violence during pregnancy).

230. Tamara L. Taillieu & Douglas A. Brownridge, *Violence Against Pregnant Women: Prevalence, Patterns, Risk Factors, Theories, and Directions for Future Research*, 15 AGGRESSION & VIOLENT BEHAV. 14, 22–23 (2010) (finding that for pregnant people with a history of abuse and those without a history of abuse both experienced increased severity of violence when they became pregnant).

231. Maeve Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States, 2018–2019*, 138 OBSTETRICS & GYNECOLOGY 762, 766 (2021).

232. *Id.* at 762.

233. *Id.* at 766.

conditions for which pregnant women are routinely screened."[234] And even when intimate partner violence does not result in maternal or fetal death, it is associated with a host of negative health outcomes for both the pregnant person and the fetus, including preterm labor and delivery, delayed entry into prenatal care, and low birth weight.[235] Violence during pregnancy has often not been adequately addressed by criminal law, which can underestimate or obscure the unique harm that a pregnant victim of violence endures.[236] Pregnancy also makes pregnant people particularly vulnerable physically, psychologically, and often financially.[237]

In the wake of the *Dobbs* opinion, it is clear that private violence associated with pregnancy and reproductive choices will likely increase. These behaviors, often called "reproductive coercion," include a variety of behaviors that "involve[] exerting power and control over reproduction through interference with contraception, pregnancy pressure, and pregnancy coercion."[238] As reported to the website *Jezebel*, the National Domestic Violence Hotline has seen a 99% increase in calls from people who report some type of reproductive coercion in the period since the *Dobbs* opinion.[239] These include reports of women whose partners were intercepting birth control pills or "weaponiz[ing] their states' abortion laws," by "wrongfully tell[ing] a victim that if

234. Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 HOUS. J. HEALTH L. & POL'Y 63, 65 (2009) (quoting *The Facts on Health Care and Domestic Violence*, FAM. VIOLENCE PREVENTION FUND 2, https://www.futureswithoutviolence.org/userfiles/file/HealthCare/health_care.pdf [https://perma.cc/3FHM-RGM6]).

235. *Id.* at 70–71.

236. *See generally* Tuerkheimer*, supra* note 14, at 677–86 (reviewing traditional criminal law responses to violence against pregnant women).

237. *Id.* at 674 ("What distinguishes pregnant victims from other domestic violence victims is a unique vulnerability that derives from the status of pregnancy.").

238. Kathleen C. Basile et al., *Rape-Related Pregnancy and Association with Reproductive Coercion in the U.S.*, 55 AM. J. PREVENTIVE MED. 770, 771 (2018); *see also* A. Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275, 280 (2015) (describing reproductive coercion as a variety of behaviors intended to "control and regulate autonomous and informed decision-making regarding whether and when to become pregnant, or whether to maintain or terminate an existing pregnancy").

239. Kylie Cheung, *Domestic Violence Hotline Reports 99% Increase in Calls Post-*Roe, JEZEBEL (July 14, 2023), https://jezebel.com/domestic-violence-hotline-reports-99-increase-in-calls-1850641660 [https://perma.cc/R7HX-LFTC].

they do access abortion, they themselves could go to jail, or they'll report them to the police."[240] And as pregnant people are already at increased risk to be murdered by intimate partners, those who seek out abortion against their partner's wishes are particularly vulnerable. In May 2023, a woman was murdered by her partner upon her return to Texas following her travel to Colorado to seek an abortion against his wishes.[241]

While all intimate partner violence may reflect an objectification of the battered person to some extent,[242] pregnancy and even perceived reproductive capacity has the potential to greatly exacerbate such objectification, as it makes a person's body the site of an identifiable *function*—gestation—different from the daily functions of all other non-pregnant humans. Fetal personhood laws, for the reasons discussed herein, only exacerbate this objectification through focusing on the humanity of the fetus, thus obscuring or delegitimizing the humanity of the pregnant person. As our analysis below shows, fetal personhood laws are thus unsurprisingly associated with an increase in violence towards women.

D. THE EMPIRICAL RELATIONSHIP BETWEEN FETAL PERSONHOOD LAWS AND VIOLENCE AGAINST WOMEN

To explore the relationship between the laws discussed above and violence against women, we conducted a data-driven approach to examine changes in both intimate partner violence (IPV) and violence against women (VAW) more generally. In the first Subsection, we describe in detail the datasets we analyzed and provide clear definitions of IPV and VAW. In the second Subsection, we explore these datasets and consider the implications such laws have for women. In doing so, we are particularly mindful of how these laws may interact with *Dobbs* to potentially impact women's safety in the coming years when access to abortion

240. *Id.*

241. *See* Betsy Reed, *Texas Man Kills Girlfriend After She Had an Abortion in Colorado*, GUARDIAN (May 12, 2023), https://www.theguardian.com/us-news/2023/may/12/texas-woman-killed-boyfriend-abortion [https://perma.cc/EB9D-PSEB].

242. Melissa R. Jonnson et al., *The Role of Objectification in the Victimization and Perpetration of Intimate Partner Violence*, 33 VIOLENCE & VICTIMS 23, 33 (2018) ("Males with a history of severe, primary IPV perpetration demonstrated significantly higher levels of objectification of the other sex . . . .").

looks very different than it has in the past.[243] Before delving into the data, it is worth noting that our goal here is *not* to engage in a complicated exercise of causal inference with complex statistical models. While future work may consider doing so when more post-*Dobbs* data becomes available, our intent with respect to the data exploration at this moment is more straightforward: to explore what has happened to women's safety over the last several decades in areas of the country with different legal approaches to fetal personhood. This initial exploration can help us understand the implications of fetal personhood more broadly and provide insight into the potential ramifications of *Dobbs* going forward.

The primary data source we considered is the Uniform Crime Reporting Program, specifically the Supplementary Homicide Reports, as compiled by Jacob Kaplan.[244] These datasets are based on information collected by the Federal Bureau of Investigation (FBI) and include details on homicides throughout the United States between 1976 and 2020. Program coordinators associated with the Uniform Crime Reporting Program collect detailed information on criminal homicides reported to the police. More specifically, the following types of homicides are reported: murders, non-negligent killings (also called non-negligent manslaughter), and justifiable homicides. Each program coordinator then provides information on these homicides either directly to the FBI or to a state program that then reports the data.

For each homicide, the dataset reports the age, sex, race, and ethnicity of both the victim and offender. It also reports additional circumstances surrounding the incident and the relationship (if applicable) between the victim and offender. Based on the available information we define a homicide VAW if the victim of the homicide was coded as female in the dataset. While this is admittedly a broad definition, it allows us to examine the general relationship between various laws and violence against

243. *See supra* notes 238–41 and accompanying text. The objectifying potential of abortion regulations in the post-*Dobbs* period will itself be an important avenue for future thought and research.

244. *Jacob Kaplan's Concatenated Files: Uniform Crime Reporting (UCR) Program Data: Supplementary Homicide Reports, 1976-2020*, UNIV. OF MICH. (Sept. 22, 2021), https://doi.org/10.3886/E100699V11. It should be noted that no dataset is perfect, but this dataset provides the best available insight into IPV and VAW.

women at a general level. Next, we define a homicide as IPV if the victim was coded as female[245] and had one of the following relationships to the offender as coded in the dataset: girlfriend, wife, ex-wife, or common-law wife. As with our definition of VAW, this approach may not perfectly capture existing definitions of IPV, but it represents the best available representation of IPV in the dataset we examine. To restrict our analysis to the association between fetal personhood, objectification of potentially pregnant people, and IPV/VAW, we only consider individuals coded as female and of reproductive age: between eighteen and forty-nine.[246]

Using homicide data has both benefits and drawbacks for purposes of our project. The benefit of using homicide data is that it is an objective and consistent metric when comparing across jurisdictions. This ameliorates concerns about the inability to compare rates of violence against women across jurisdictions because of any combination of a failure to report, a failure to collect data, or differences in how data is coded or reported. The drawback of using homicide data is, of course, that it significantly *undercounts* actual rates of violence against women—instead only capturing the most severe forms of violence that result in death.

As detailed below, our analysis focuses on VAW and IPV at the state level between 1976 and 2020. To obtain an accurate representation of VAW and IPV, we calculate rates of VAW and IPV in each state in each year of our analysis. We rely on population data from the National Cancer Institute's Surveillance, Epidemiology, and End Results Program.[247] This data includes total state population and allows us to isolate the female population of each state between 1976 and 2020. Using this population information, we calculated the rate of VAW as the number of homicides where the victim was female per million females in

245. Obviously, IPV does not require that the victim be female, but we limit our analysis to IPV with female victims because our goal is to estimate the effect of various laws on violence against women as vessels.

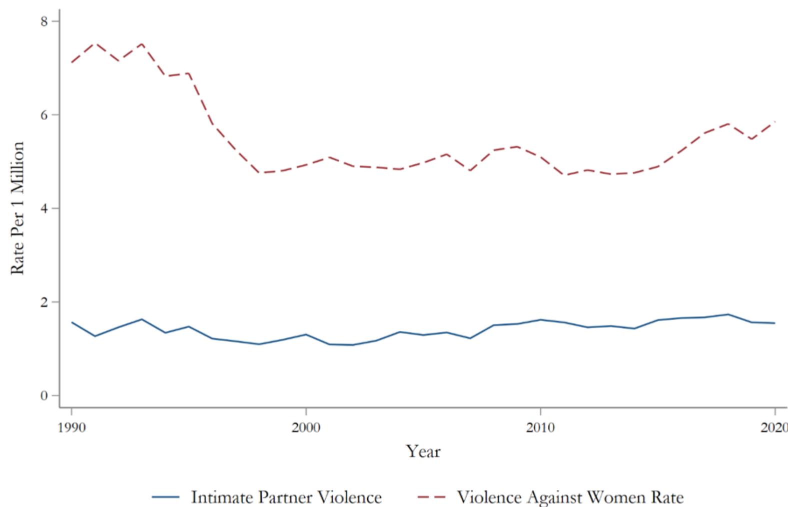
246. While women younger than eighteen and older than forty-nine can become pregnant, we sought to restrict our analysis to what is considered childbearing years to isolate our analysis to the impact of various laws stemming from fetal personhood from other potential confounding factors.

247. *U.S. Population Data*, NAT'L CANCER INST.: SURVEILLANCE, EPIDEMIOLOGY, & END RESULTS PROGRAM, https://seer.cancer.gov/data-software/uspopulations.html [https://perma.cc/H9BJ-JBGE].

the state. We similarly calculated the rate of IPV as the number of homicides qualifying as IPV under our definition per million females in the state.

Figures 1 and 2 provide a general overview of VAW and IPV in the United States over time. Figure 1 reports the rate of IPV (solid line) and VAW (dashed line) in each of the years we consider. In general, while the rate of IPV has been more consistent across time, the rate of VAW declined sharply in the 1990s and continued a slower decline throughout the first two decades of the new millennium. More recently, however, the rate of VAW has seen a small uptick, reversing its previous trend.

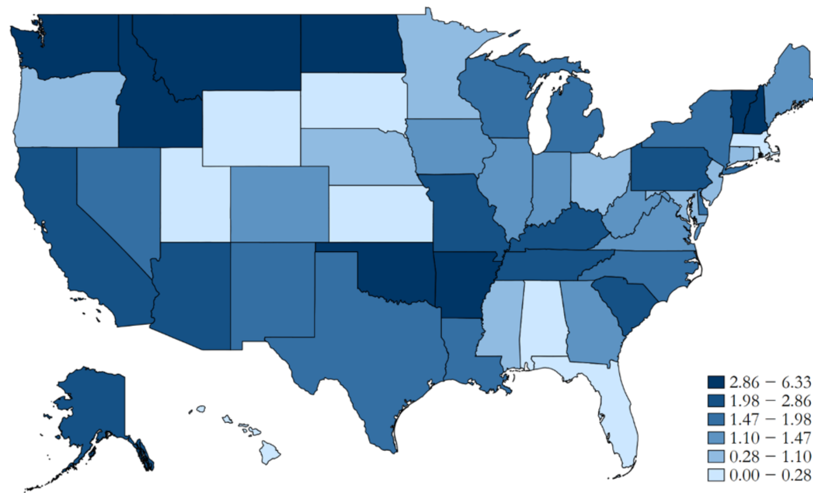
Figure 1. Trends in Intimate Partner Violence and Violence Against Women



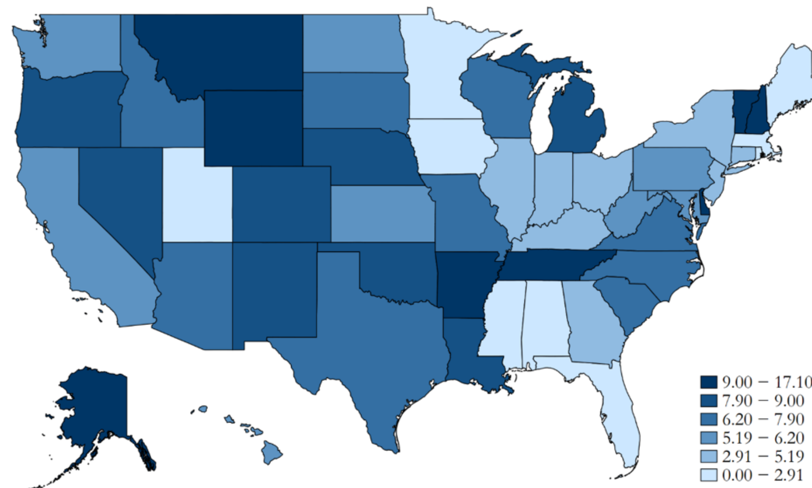
While Figure 1 provides important information in trends over time across the United States, Figure 2 provides more granular information at the state level. Specifically, it reports the rates of IPV (Panel A) and VAW (Panel B) in every state in 2019. While our datasets include information after 2019, the COVID-19 pandemic may have meaningfully changed rates of both IPV and VAW for reasons not necessarily related to the subject of our interests in this Article. Accordingly, we present state information in 2019 to best capture the women's safety environment

prior to the COVID-19 pandemic. In general, states in the central South and upper Midwest tend to have higher rates of both IPV and VAW. Western and northeastern states tend to have lower rates of IPV and VAW.

Figure 2. Intimate Partner Violence and Violence Against Women in 2019
Panel A: Rate of Intimate Partner Violence Per 1 Million



Panel B: Rate of Violence Against Women
Per 1 Million



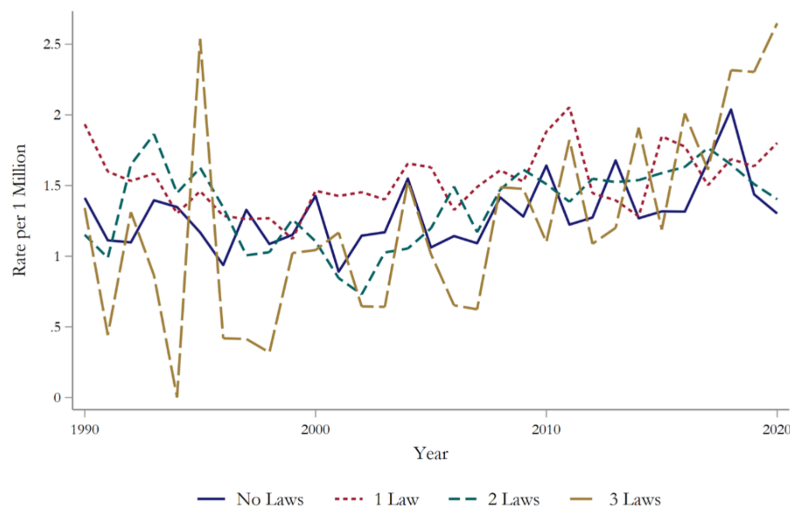
The goal of our data analysis is to explore the relationship between the various fetal personhood laws described above and different measures of violence towards women. Obviously, any law that encourages or facilitates violence against women is problematic in its own right, and that consideration weighs heavily in our examination of the data here. However, that is not the only issue we seek to address. To the extent that fetal personhood laws objectify women and thus encourage or facilitate violence against women, the explosion of these laws post-*Dobbs* will have serious implications for women beyond the denial of abortion. These laws have the potential to fundamentally change society's view of women, which, in turn, has potentially serious implications for women's safety.

Figure 3 reports trends in IPV across states that have enacted various laws that reflect fetal personhood. Specifically, we grouped states (by year) into four categories: (1) those that have enacted none of the laws described above, (2) those that have enacted one of the laws described above, (3) those that have enacted two of the laws described above, and (4) those that have enacted three of the laws described above. Panel A reports the rate of IPV per 1 million women between 1990 and 2020. Consistent with the evidence reported above, the overall rate of IPV has been rel-

atively stable over that time period. However, the level of stability and the overall trend of IPV is not consistent across different groups of states. States with none of the laws described above saw a slight uptick between the late 1990s and the early 2010s, but they saw roughly the same rate of IPV in 2020 as in 1990 because of a later decrease in IPV. States with one or two of the laws described above followed roughly the same pattern. States with all three laws, however, do not appear to follow that pattern. These states have seen more changes in the rate of IPV, as demonstrated by the larger swings in the line representing these states. These states saw a similar uptick in IPV as states with fewer laws, but unlike those states, states with all three laws saw their IPV rates continue to grow through 2020. Panel B better captures these trends by presenting a linear fit of all data points for each group of states between 1990 and 2020. As that panel makes clear, the rate of IPV in states with all three laws increased more rapidly than states with fewer of these laws. While Figure 3 does not necessarily support a causal claim between these laws and IPV, the trends reveal a troubling pattern consistent with the reproductive objectification framework outlined above.

Figure 3. Trends in Intimate Partner Violence Among States with Different Laws

Panel A: Rate of Intimate Partner Violence



Panel B: Linear Fit of the Rate of Intimate Partner Violence

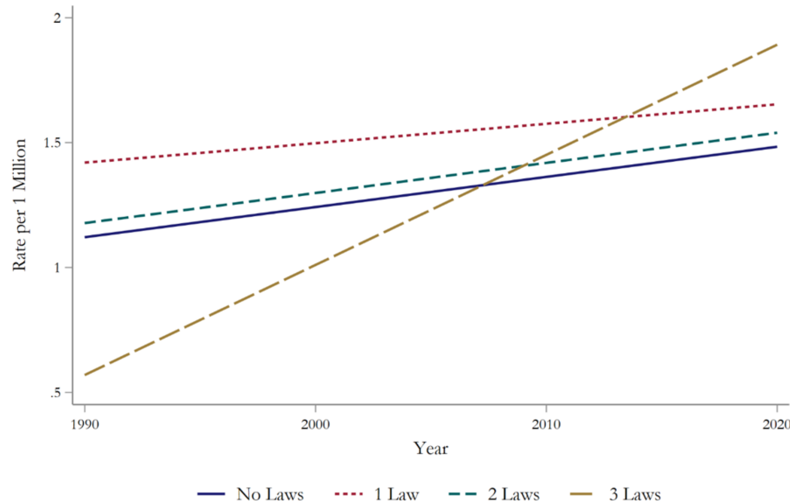
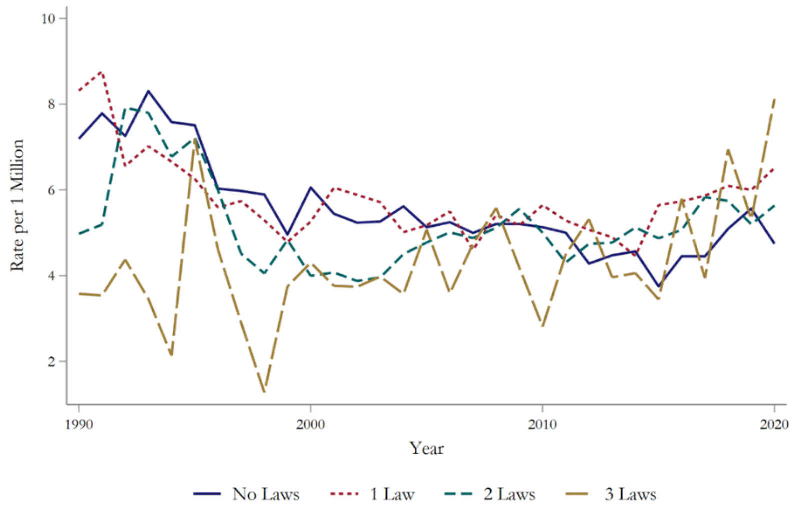
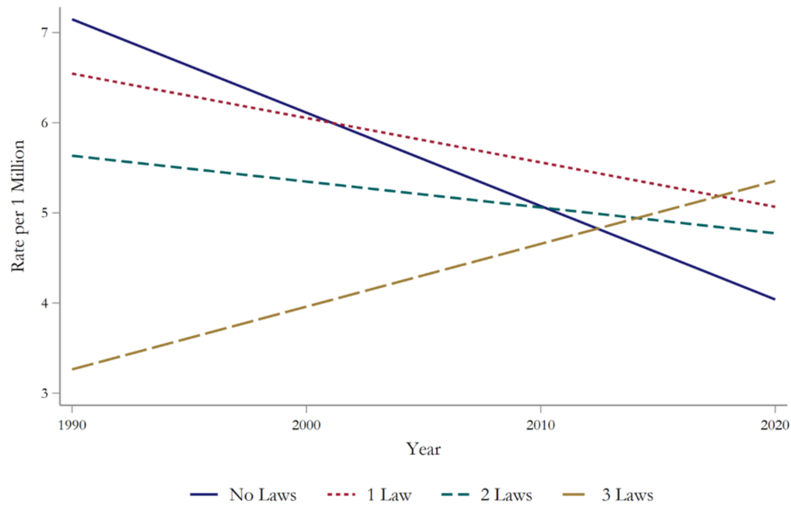


Figure 4 reports the rate of VAW per 1 million women between 1990 and 2020. Again, consistent with the overall trend in VAW reported above, Panel A demonstrates that the rate of VAW fell generally in the 1990s before stabilizing in the 2000s and increasing somewhat approaching the 2020s. As with the patterns across states with different numbers of laws seen in Figure 3, different groups of states saw somewhat different patterns in VAW between 1990 and 2020. States with none, one, or two of the laws discussed above generally saw a decrease early in the thirty-year period followed by a slight uptick later in the period. States with all three laws, however, experienced a more erratic pattern in the 1990s. While they saw a similar stabilization as other groups of states in the 2000s and early 2010s, these states saw a more pronounced increase in VAW as they approached 2020. Panel B reports the linear fit of all data points across all four groups of states. States with none of the three laws we consider saw the fastest decrease in VAW between 1990 and 2020, while states with all three laws were the only group of states that saw an increase in VAW over this period. As with Figure 3, Figure 4 does not present evidence that necessarily demonstrates causality, but it elucidates troubling trends that are consistent with the discussion above and that warrant deeper investigation in future work.

Figure 4. Trends in Violence Against Among States
with Different Laws
Panel A: Rate of Violence Against Women



Panel B: Linear Fit of the Rate of Violence Against Women



Importantly, the empirical analysis does not reflect only the expected blue state/red state geographical differences in attitudes towards women or other cultural trends that might be used to explain why certain jurisdictions have higher rates of gender-based violence. Many "blue" states have one or more laws that reflect fetal personhood and some "red" states do not. For example, Minnesota[248] and North Dakota[249] each have all three types of laws, while Mississippi[250] and California[251] both have only one of the types of laws analyzed here. This variation in state law makes the associations discovered here more compelling, as it does not perfectly track expectations based on political climate generally.

In general, the laws we examine suggest fetal personhood may indeed relate to rates of gender-based violence. Importantly, our empirical analysis provides little support for the argument that feticide laws are effective at reducing rates of violence against women—a claim that is often relied upon to urge their passage.[252] If this claim has any empirical support, future work should work hard to find it. Given this argument's relevance and the non-obviousness of its validity based on the rates we consider here, evidence of its validity should be key to the continuation of these laws. Without that evidence, however, this argument appears, at best, to be pretense.

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Importantly, it is clear that pregnant people who are objectified as reproductive vessels will not only be subject to potential increases in *private* violence, as captured by this empirical analysis. They are also likely to be subject to increased *state* violence, as well. A state that treats its pregnant citizens as incubators through laws invalidating their advance directives will likely

248. MINN. STAT. § 609.266 (2024); MINN. STAT. § 253B.02 (2024); MINN. STAT. § 145C.10 (2024).

249. N.D. CENT. CODE § 23-06.5-09(5) (2023); N.D. CENT. CODE § 12.1-17.1-01 (2023); N.D. CENT. CODE § 50-25.1-18 (2023).

250. MISS. CODE ANN. § 97-3-37 (2024).

251. CAL. PENAL CODE § 187 (2024).

252. *See supra* notes 64–66 and accompanying text (discussing the rationale behind feticide laws).

also be emboldened to insist on other types of forced medical interventions.[253] A state that criminalizes prenatal drug use will be just as likely to prosecute, punish, or detain women for other "unhealthy" behaviors.[254] This is not merely hypothetical, as some of these trends have been occurring for decades. Instead of offering pregnant people additional protection from the state, feticide laws have been a growing source of the criminal prosecution of pregnant people themselves.[255] The objectification of women as fetal containers has the potential to start a self-reinforcing loop in which, once associated with objects, those with the perceived potential for pregnancy are legally devalued and this devaluation results in even less respect for their full legal personhood.

Of course, there are those who advocate for fetal personhood who would legitimately bemoan these laws necessary connection to increased risks of violence towards women (although they might allow it as a necessary sacrifice). But, unfortunately, it is clear that at least some proponents of fetal personhood also believe that women should be subordinated and that such subordination is desirable and reflective of the natural or spiritual

253. *See generally* Elizabeth Kukura, *Obstetric Violence,* 106 GEO. L.J. 721 (2018) (describing various types of obstetric violence and the failure of law and policy to effectively address the problem).

254. Editorial, *supra* note 48 ("[In the face of full fetal personhood,] [e]very health decision facing a pregnant woman that might affect the fetus would be up for scrutiny by prosecutors, the courts and expectant fathers. A pregnant woman would cease to exist as an autonomous person."); Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle over Reproductive Rights*, TIME (June 28, 2022), https://time.com/6191886/fetal-personhood-laws-roe-abortion [https://perma.cc/J9HP-UKFG] ("Fetal personhood laws could also have major implications for pregnant people. If a fetus is legally considered a person, then child endangerment laws can apply. A state could potentially say pregnant people can only eat certain foods, or punish a pregnant person who is seen drinking, or compel someone to have a cesarean section they are refusing . . . ." (quoting Professor Rebecca Kluchin)).

255. Tuerkheimer, *supra* note 14, at 694 ("Fetal-protective legislation in any guise—including laws that purport to protect fetuses from violence during pregnancy—further this end, more or less circuitously. Once fetuses are granted status as persons/children/victims, pregnant women become subject to control by the full panoply of laws already in place to protect the rights of persons/children/victims. Women who fail to conform to the maternal ideal—typically, the most marginalized members of society—have been the primary targets of state intervention on behalf of the fetus.").

ideal.[256] It is outside the scope of this Article to catalogue all the arguments concerning whether the increase in violence towards women that occurs as a result of endowing fetuses with full personhood is inevitable, desirable, avoidable, or the basis to abandon the project of fetal personhood altogether. But the reality of this connection between fetal personhood, objectification, and violence must be recognized if a comprehensive conversation about the effects of fetal personhood is to be honestly achieved.

CONCLUSION

Objections to fetal personhood laws are often premised on the fear that any "maternal-fetal conflict" will result in a diminution of pregnant people's rights.[257] What this Article explores is an even more chilling possibility. Instead of a conflict of rights between two rights-holders in which one's rights must sometimes give way to another, it is a world in which all people with the perceived capacity to become pregnant have ceased being treated as fully autonomous, individual rights-holders at all. Through the creation of fetal personhood and the inability of the law to incorporate the possibility of two rights-holders in a single physical body, those perceived as capable of pregnancy will be reduced to little more than an object, a vessel. And when viewed as merely a vessel, they will be subject to an increase in the rate and severity of violence they experience—both from their intimates and from a state emboldened to impose its own view of their worth as merely a conduit for the fetus they carry.

256. ROTH, *supra* note 5, at 194–96 (discussing how the effort to codify fetal rights is reflective of a desire for women's subordination).

257. Of course, feminist theorists have long suspected that the framework of the maternal-fetal conflict does not adequately describe the stakes for women in general and for pregnant people specifically. *See* BORDO, *supra* note 7, at 72 ("[T]he current terms of the abortion debate—as a contest between fetal claims to personhood and women's right to choose—are limited and misleading. . . . [T]he current battle over reproductive control emerges as an assault on the personhood of *women*.").