

CONCERN OR CALCULATION: AN EXAMINATION OF STATE LAW MANDATING THE BURIAL OR CREMATION OF A FETUS

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I. INTRODUCTION

It was a kitchen table, coat-hanger abortion. It took maybe six minutes. I got on the kitchen table. I think my stepmother gave me a drink of brandy or something, and she said, “Now this may hurt a little bit.” She held my hand and this woman stuck a piece of coat hanger into my vagina. And then my stepmother said, “Okay, now get dressed.” And what you were supposed to do was leave that in there until you started to abort. I remember walking out with this coat hanger between my legs.

That evening I started bleeding and I think I was feeling cramps. I got up very early in the morning and went to the bathroom, and there was just this passage of blood and a clot that was slightly bigger than the clots I usually passed during my menstrual period. I realized that that was the fetus. The next month my period came on time.¹

Before to the 1973 landmark decision in *Roe v. Wade*,² women like Lila went through demeaning, illegal, and often dangerous lengths to obtain abortions. Countless women died as a result.³

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1. Claire Landsbaum, *4 Women on Having Abortions Before They Were Legal*, THE CUT (Nov. 29, 2016), <https://www.thecut.com/2016/11/4-women-on-getting-an-abortion-before-roe-v-wade.html> (recounting excerpts from a book originally published in 1988, *Back Rooms: Voices From the Illegal Abortion Era*, written by Ellen Messer and Kathryn May); see also Stephanie Hallett, *8 Stories that Show What Abortion was Like Before Roe v. Wade*, MS. MAGAZINE: BLOG (Jan. 19, 2016), <http://msmagazine.com/blog/2016/01/19/8-stories-that-show-what-abortion-was-like-before-roe-v-wade/> (relaying personal stories of woman having abortions before abortion was legalized in 1973).

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, GUTTMACHER INST. (Mar. 1, 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> (“Estimates of the number of illegal abortions in the 1950s and 1960s ranged from 200,000 to 1.2 million per year. One analysis, extrapolating from data from North

However, the *Roe* decision granted hope to many that the days of unsafe, illegal abortions were through.

The Supreme Court recognized in *Roe* that abortion was encompassed in the constitutional right to privacy but left states the authority to regulate the circumstances of when and how abortions were to be performed.⁴ Almost immediately after *Roe* granted women the right to choose, anti-choice policymakers began enacting state laws to chip away at it.⁵

One of the newest ways state lawmakers are chipping away at a woman's right to choose is by enacting statutes that require medical facilities to bury or cremate fetal remains that result from abortions.⁶ For example, Indiana enacted legislation declaring any fetal remains under 20 weeks to be "human remains" and in need of a death certificate.⁷ This type of legislation has been almost entirely drafted and promoted by anti-abortion groups as part of a calculated agenda advancing the recognition of fetuses as persons under the law.⁸

This Comment analyzes state laws regulating the disposition of fetal tissue. Part II explores the history and development of statutes regulating the disposition of fetal remains. Part III argues that the anti-choice movement played a substantial role in enacting these laws and using them as part of a larger agenda to change the legal status of a fetus, a woman's right to make choices for her own body, and, ultimately, to have the law mandate that life begins at conception. This Comment concludes that because the broad implications of these laws were not considered before they were enacted, fetal disposition provisions that have been crafted under the guise of concern for fetal dignity and public health and safety were actually promoted as part

Carolina, concluded that an estimated 829,000 illegal or self-induced abortions occurred in 1967.").

4. Elizabeth Kimball Key, *The Forced Choice of Dignified Disposal: Government Mandate of Internment or Cremation of Fetal Remains*, 51 U.C. DAVIS L. REV. 305, 308 (2017).

5. *Id.*

6. See Rebecca Grant, *The Latest Anti-Abortion Trend? Mandatory Funerals for Fetuses*, THE NATION (Oct. 11, 2016), <https://www.thenation.com/article/the-latest-anti-abortion-trend-mandatory-funerals-for-fetuses/>; see also Tanya Marsh, *Mandatory Funerals for Fetal Remains: "Politics and Dealing with Reality Are Two Different Things"*, FUNERAL L. BLOG (Oct. 13, 2016), <http://funerallaw.typepad.com/blog/2016/10/mandatory-funerals-for-fetal-remains-politics-and-dealing-with-reality-are-two-different-things.html>; Liam Stack, *Texas Will Require Burial of Aborted Fetuses*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/us/texas-burial-aborted-fetuses.html>; Alexandra Zavis, *The Latest Battlefield in the Abortion Wars: Some States Want to Require Burial or Cremation for Fetuses*, L.A. TIMES (Jan. 23, 2017, 3:00 AM), <http://www.latimes.com/nation/la-na-aborted-fetus-burial-2017-story.html>.

7. IND. CODE § 16-34-2-3(c).

8. Emma Green, *State-Mandated Mourning for Aborted Fetuses*, THE ATLANTIC (May 14, 2016), <https://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688/>.

of the anti-choice movement's strategic and deliberate effort to restrict access to abortion and create even more unnecessary obstacles for abortion providers.

II. DEVELOPMENT OF STATE LAWS REGULATING THE DISPOSITION OF FETAL REMAINS

Lawmakers are focused on enacting state mandates to regulate the disposition of fetal tissue, not just because the Supreme Court allocated to states the authority to regulate abortion, but also because it is primarily within the purview of the states to regulate the disposal of medical waste.⁹ With no consistent federal standard for disposing fetal remains, the United States medical profession has historically disposed of fetal tissue along with medical or pathological waste through incineration, autoclaving, and other disposal methods determined largely outside the political system.¹⁰ Traditionally, states have refrained from intervening in the disposition of a fetus under 20 weeks uterogestation.¹¹ Rather, the medical facility or the woman whose body the tissue was removed from could dispose of the remains without government intrusion or regulation. However, state mandates on “dignified” fetal disposition have drawn arbitrary lines, seemingly with little concern to anything besides moving the line of “personhood” closer to conception.

In 2016, an incredibly doctored video purported to be evidence of Planned Parenthood selling fetal tissue was widely circulated, spurring public outrage and encouraging the implementation of fetal disposition legislation.¹² By the time it came to light that the video was heavily edited, the damage was already done.¹³ Many state legislatures quickly enacted laws regulating the disposition of fetal remains,¹⁴ joining Arkansas and Georgia, which already had

9. Key, *supra* note 4, at 312.

10. *Id.* at 313–14; see Rick Callahan, *Indiana Fetal Remains Bill Puts Spotlight on Fetal Disposal*, WISH-TV (Feb. 21, 2016, 3:45 PM), <http://wishtv.com/2016/02/21/indiana-fetal-remains-bill-puts-spotlight-on-fetal-disposal/>; Emily Crockett, *The Bizarre New Allegations About Planned Parenthood and Landfills, Explained*, VOX (Dec. 15, 2015, 1:20 PM), <http://www.vox.com/2015/12/15/10220438/planned-parenthood-ohio-landfills>; S.E. Smith, *Fetal Remains Laws Will Be the Pro-Choice Battle of 2016*, BUSTLE (Jan. 22, 2016), <https://www.bustle.com/articles/136652-fetal-remains-laws-will-be-the-pro-choice-battle-of-2016>.

11. Marsh, *supra* note 6.

12. Danielle Kurtzleben, *Planned Parenthood Investigations Find No Fetal Tissue Sale*, NPR (Jan. 28, 2016, 12:47 PM), <https://www.npr.org/2016/01/28/464594826/in-wake-of-videos-planned-parenthood-investigations-find-no-fetal-tissue-sales>.

13. Zavis, *supra* note 6.

14. In 2016, Indiana, Louisiana, Mississippi, Missouri, Nebraska, Ohio, South Carolina, Tennessee, Texas, Virginia, and Wisconsin considered enacting fetal disposal laws. See H.B. 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016); H.B. 618, 2016 Leg., Reg. Sess. (La. 2016); S.B. 2115, 2016 Leg., Reg. Sess. (Miss. 2016); H.B. 147, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2016); Legis. B. 990, 104th Leg., 2d Sess. (Neb. 2016); H.B. 417, 131st Gen. Assemb., Reg. Sess. (Ohio

restrictive fetal disposition laws at the time of the video.¹⁵ In total, in 2016, 28 states “introduced legislation relating to the disposition of fetal remains. Nine of these bills have passed; of these nine, five are in effect and four are being legally challenged.”¹⁶

California, Georgia, Indiana, Michigan, Minnesota, North Carolina, South Dakota, and Tennessee have passed laws dictating the method of disposition for fetal remains. California requires burial or incineration¹⁷ for “a recognizable dead human fetus of less than 20 weeks uterogestation.”¹⁸ Georgia requires “cremation, interment, or other manner approved of by the commissioner of public health for aborted fetuses.”¹⁹ Indiana requires aborted and miscarried fetuses to be cremated or interred.²⁰ Michigan requires burial or cremation for fetal tissue of more than 10 weeks uterogestation,²¹ and Minnesota requires burial or cremation for “the remains of the dead offspring of a human being that has reached a stage of development so that there are cartilaginous structures, fetal or skeletal parts after an abortion or miscarriage.”²² North Carolina requires the burial or cremation for a “recognizable fetus.”²³ South Dakota requires burial, cremation, or incineration as medical waste, but the fetal tissue must be separated from other tissue.²⁴ Notably, South Dakota’s statute states that “the gestational age specified by this section may not be considered a factor in determining when life begins.”²⁵ Tennessee

2016); H.B. 4759, 121st Leg., Reg. Sess. (S.C. 2016); H.B. 2577, 109th Leg., Gen. Sess. (Tenn. 2016); 41 Tex. Reg. 7659, 7664 (2016); H.B. 970, 2016 Leg., Gen. Sess. (Va. 2016); S.B. 260, 2016 Leg., Gen. Sess. (Wis. 2015).

15. See ARK. CODE ANN. §§ 20-17-801, 20-17-802 (2017); GA. CODE ANN. § 16-12-141.1 (2017).

16. Grant, *supra* note 6.

17. Incineration is not the same as cremation. “The difference between incineration and cremation is not facially apparent. According to the Cremation Association of North America, cremation is ‘the mechanical and/or thermal or other dissolution process that reduces human remains to bone fragments.’ Similarly, the Environmental Protection Agency defines incineration as ‘the process of burning hazardous materials at temperatures high enough to destroy contaminants.’ Evidenced by their respective definitions, both processes employ high temperatures to combust organic material. Cremation, however, often functions as a funeral or post-funeral rite, thereby implicating religious traditions and deeply held personal beliefs. During the cremation process, a corpse is placed in an individual container and burned for two to three hours with identification of the remains carefully monitored throughout. The resulting bones and fragments are pulverized in a cremulator and poured into a plastic container or urn. Conversely, medical waste management companies incinerate medical waste in large, indiscrete quantities. Medical incineration combustion rates vary from 75 to 6,500 pounds per hour.” Key, *supra* note 4, at 316.

18. CAL. HEALTH & SAFETY CODE § 7054.3 (West 2018).

19. GA. CODE ANN. § 16-12-141.1 (2017).

20. IND. CODE § 16-34-3-4 (2016).

21. MICH. COMP. LAWS § 333.2803(4) (2013).

22. MINN. STAT. § 145.1621 (1987).

23. N.C. GEN. STAT. § 130A-131.10 (2015).

24. S.D. CODIFIED LAWS §§ 34-25-32.3 to 34-25-32.7 (2018).

25. S.D. CODIFIED LAWS § 34-25-32.1 (2018).

requires the mother of the fetus to fill out the final disposition form regardless of gestational age.²⁶

While most of the states have pursued a legislative route to enacting fetal-remains mandates, Texas took a stealthier approach:

Four days after the Supreme Court ruled on *Whole Woman's Health v. Hellerstedt*, Texas's Department of State Health Services (DSHS) quietly proposed new rules that would prohibit abortion providers from disposing of fetal remains in sanitary landfills and require burial and cremation. The DSHS did not adhere to the regular process for writing new regulations or make a formal announcement about its actions. Instead, it published the rules directly in the Texas Register, initiating the 30-day period for public comment, on the Friday before the long Fourth of July weekend.²⁷

In Ohio, companion bills were proposed—SB 254 and HB 417.²⁸ In effect, these bills redefined “‘humane’ disposition of fetal remains to mean burial or cremation.”²⁹ The proposed bills require women “to determine the mode of disposition in writing or sign that ‘right’ away to the clinic, and abortion facilities would be required to pay the costs. Violators of these provisions would be guilty of a first-degree misdemeanor.”³⁰

III. STATE LAWMAKERS ARE ENACTING LEGISLATION AS A DELIBERATE ATTACK ON WOMEN'S FUNDAMENTAL RIGHT TO ACCESS SAFE AND LEGAL ABORTION

Fetal disposition laws are another barrier enacted by anti-choice policymakers in a thinly veiled attempt to ban abortion through any means necessary. Through examining specific state statutes and their paths to enactment, it is clear that anti-abortion groups are promoting laws intended to restrict abortion and a woman's right to have agency over her own body.

State lawmakers have blatantly promoted the ideas and language of anti-abortion groups through the use of their materials in crafting legislation created to rollback women's access to abortion.³¹ Many lawmakers do not even try to conceal the strong anti-choice sentiment being promoted by the laws they are supporting.³² For example, when signing Indiana HEA 1337 into law, former Indian Governor Mike Pence called the law a “comprehensive

26. TENN. CODE ANN. § 68-3-506 (2016).

27. Grant, *supra* note 6.

28. *Id.*; see also *Commentary Addresses Fetal-Remains Legislation, the 'New Front in the Attack on Abortion'*, WOMEN'S HEALTH POL'Y REP. (Oct. 13, 2016), <http://www.womenshealthpolicyreport.org/articles/commentary-delves-into.html?referrer=https://www.google.com/>.

29. Grant, *supra* note 6.

30. *Id.*

31. *See id.*

32. Grant, *supra* note 6.

pro-life measure” and praised it for “ensur[ing] the dignified final treatment of the unborn.”³³ Similarly, a spokesperson for Texas Governor Greg Abbott stated that Texas’s “proposed rule changes affirm the value and dignity of all life.”³⁴ Governor Abbott also cited the regulation in a fundraising email sent to his supporters in which he said, “Texas is working to ‘turn the tides’ against the abortion industry in the state and protect the ‘rights of the unborn.’”³⁵ Additionally, he stated, “I believe it is imperative to establish higher standards that reflect our respect for the sanctity of life.”³⁶ While proponents of fetal disposition laws rely on “dignity” as a justification,³⁷ lawmakers’ statements, rhetoric from the anti-abortion movement, and the impracticalities of implementation demonstrate the fallibility of fetal disposition regulations and the underlying goal of abortion opponents: having a fetus recognized as a “person” under the law.

A. *Fetal Disposition Laws as a Path to “Personhood”*

The concept of “personhood” is key to understanding the significance of fetal disposition laws in the greater abortion debate. Even though “the Supreme Court rejected Texas’s claim that a ‘fetus is a “person” within the language and meaning of [the Constitution]” in *Roe v. Wade*,³⁸ the debate over personhood has not subsided. Advocates on both sides debate “the extent to which a fetus constitutes a person under the Fourteenth Amendment.”³⁹ Pro-choice advocates worry that fetal rights would be prioritized over a mother’s

33. Governor Pence Statement on HEA 1337, IN.GOV (Mar. 24, 2016), <https://calendar.in.gov/site/gov/event/governor-pence-statement-on-hea-1337/>; see also Greg Margason, *Gov. Pence Signs Controversial Abortion Restriction Bill into Law*, FOX 59 (Mar. 24, 2016, 5:09 PM), <http://fox59.com/2016/03/24/gov-pence-signs-controversial-abortion-restriction-bill-into-law/>.

34. See Hannah Wise, *New Texas Rules Would Require Fetal Tissue to Be Cremated or Buried*, DALL. NEWS (July 6, 2016), <http://www.dallasnews.com/news/politics/2016/07/06/new-texas-rule-require-fetal-tissueto-cremated-buried>.

35. Alexa Ura, *Abbott Fundraising Off Rule to Bury or Cremate Fetal Remains*, TEX. TRIB. (July 21, 2016), <https://www.texastribune.org/2016/07/21/abbott-stakes-claim-rule-bury-or-cremate-fetal-rem/>.

36. *Id.*

37. See Grant, *supra* note 6.

38. Key, *supra* note 4, at 323 (quoting *Roe v. Wade*, 410 U.S. 113, 157 (1973)).

39. Key, *supra* note 4, at 320; see also Matt Osborne, *‘Humane’ Fetus Disposal Laws: The New Attack On Abortion Rights*, BREITBART UNMASKED (Dec. 15, 2015), <http://www.breitbartunmasked.com/2015/12/15/humane-fetus-disposal-laws-the-new-attack-on-abortion-rights/> (describing fetal disposition laws as a “perfectly logical extension of the ‘personhood’ propaganda”); Ian Tuttle, *Pence Mockery Syndrome*, NAT’L REV. (Apr. 8, 2016, 10:14 PM), <http://www.nationalreview.com/article/433879/mike-pence-abortion-law> (“Since it’s possible that the ‘product of conception’ might be a person, women should be discouraged from making a decision about it lightly.”).

right to privacy if a fetus is categorized as a person.⁴⁰ Notably, fetal personhood “serves as the ideological underpinning of antichoice legislation” and “[f]etal disposal laws appear to be predicated on this very concept.”⁴¹ In the passage of Indiana’s HEA 1337, a hearing was held before the House Standing Committee on Public Policy, during which the bill author, Representative Casey Cox, said the law provided reasonable measures, which “support the policies of Indiana in promoting life and respecting the dignity of our fellow human beings.”⁴² Notably, Representative Cox used “human beings” to refer to unborn fetuses in his statement before the committee but never once seemed to display concern for the women who suffer the loss of a pregnancy. Anti-choice lawmakers have used fetal disposition provisions to focus on definitions, labels, and categories without providing a valid reason for their enactment. While lawmakers may display public concern for the “dignity in disposition,” in reality these laws reflect the agenda of the anti-abortion movement in having a fetus recognized as a person and do nothing to promote dignity. A law that protects the dignity of humans would be one that protects the rights of all citizens to exercise their own medical knowledge and self-care.

The codified fetal disposition laws reflect the clear policy goals of the anti-abortion movement as illustrated by a report listing the “five main considerations for changes in fetal disposal laws.”⁴³ One is requiring either cremation or burial and including “a requirement to individually cremate or bury the remains of each fetus, at every age.”⁴⁴ Additionally, there is a focus on keeping the individual remains separate during storage, transport, and in final disposition⁴⁵ and discussion about “ensuring that human fetuses are explicitly included as ‘human being’ or ‘human body’ in the disposition statutes already applied to other deceased human beings, instead of being considered medical or pathological waste.”⁴⁶

Furthermore, the report specifically promotes the issuance of “fetal death certificates.”⁴⁷ And with the enactment of fetal disposition laws, death certificates are often issued for fetal remains

40. Key, *supra* note 4, at 320; *see also* Osborne, *supra* note 39; Tuttle, *supra* note 39.

41. Key, *supra* note 4, at 320; *see also* Osborne, *supra* note 39; Tuttle, *supra* note 39.

42. *Hearing on House Bill 1337 Before the H. Comm. on Pub. Policy*, 2016 Leg., 119th Sess. (Ind. Jan. 27, 2016, 9:00 AM), (statement of Rep. Casey Cox, Author of HB 1337, at 1:14:50), https://iga.in.gov/information/archives/2016/video/committee_public_policy_1600/.

43. Krisi Burton Brown, *Fetal Disposition: The Abuses and the Law*, CHARLOTTE LOZIER INST. 13 (Dec. 2016), https://lozierinstitute.org/wp-content/uploads/2016/12/ARS_FetalDisposition_final.pdf.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

as these laws frequently require death certificates for remains to receive a burial transit form to be transported for cremation or interment.⁴⁸ Significantly, there is no connection between the requirement of a burial transit permit and any state interest, particularly a concern for dignity. This requirement is directly out of the anti-abortion playbook and sets a dangerous precedent because issuing a death certificate often requires a birth certificate.⁴⁹ And a birth certificate by its very name requires a birth, which raises even more complications into the debate surrounding when life begins. Though no state is able to legally declare fetuses to be a person while “alive” in utero, apparently in death, they can.⁵⁰

Policymakers are unabashedly attempting to have fetal remains recognized as human remains—even arguing “that it is a ‘biological fact’ that embryonic fetal tissue is a ‘human being.’”⁵¹ One of the most troubling aspects about this argument is that it was not an anti-choice or religious group making the argument, but a representative of the State. Obviously, the goals in enacting the legislation go far beyond the promotion of “dignified disposition”—they are a resolute step by the anti-abortion movement “toward recognizing fetuses as humans.”⁵² “The most important impact of this law is taking another step toward recognizing fetuses as humans . . . That’s a philosophical goal of the law. It doesn’t have to do anything else except sit on the books and start to impact the way people think about it.”⁵³

B. Fetal Disposition Laws are Unconstitutional Under Hellerstedt Because They Target Abortion Providers and are Unduly Burdensome

Because fetal disposition provisions lack a legitimate state interest and medical purpose, target health care facilities and abortion providers, and present a substantial obstacle to women seeking abortions, they are unconstitutional under the undue burden test. “[A] statute is unconstitutional if it places ‘a substantial obstacle in the path of a woman’s choice,’ even if enacted in furtherance of a valid state interest”⁵⁴—which is notably absent in fetal disposition provisions.⁵⁵ An undue burden is imposed when “unnecessary health

48. IND. CODE § 16-34-3-4 (2018).

49. See, e.g., *Per Indiana Code 16-37-1-10 & 11, 11.5C: Requirements for Birth & Death Certificates*, IN.GOV, https://www.in.gov/isdh/files/vr_id_reqs.pdf (last visited Jan. 29, 2018), see also AMERICAN UNITED FOR LIFE, DEFENDING LIFE 292–300 (2018 ed.) (providing model legislation to lawmakers for crafting anti-choice legislation).

50. Green, *supra* note 8.

51. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859, 871 (S.D. Ind. 2017).

52. Green, *supra* note 8 (quoting Tanya Marsh, Professor of Law at Wake Forest University).

53. *Id.*

54. Key, *supra* note 4, at 326 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

55. See *Planned Parenthood of Ind. & Ky., Inc.*, 265 F. Supp. 3d at 871.

regulations have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.”⁵⁶ Under this standard, when regulations have “either an impermissible purpose, or an impermissible effect” they are invalid.⁵⁷

The Supreme Court used the undue burden test to hold “targeted regulation of abortion providers” (“TRAP laws”) unconstitutional in *Whole Woman’s Health v. Hellerstedt*.⁵⁸ The decision made the undue burden test far more effective than previously thought and was “far less deferential to the claims of fact made by legislators.”⁵⁹ Rather than accept the legislature’s assertions that the requirements promoted health, “the Court demanded real evidence of the effects and benefits achieved from abortion laws.”⁶⁰

Similar to TRAP laws, fetal disposition laws almost exclusively implicate health care facilities that provide abortion procedures. The laws do not regulate the disposition for fetal tissue not passing through a medical facility, such as when a woman miscarries at home. Targeting is clear, for example, with a requirement that “any facility performing an abortion” must “inform the mother in writing that, since abortion involves the death of a human being, she must consent to the method of disposal for her child’s body,” and only provide for individual burial or cremation.⁶¹ This is the case in both Indiana and Louisiana where the law does not regulate the disposition of fetal remains that occur from an abortion or miscarriage that takes place outside of an abortion clinic or health care facility.⁶² This shows a lack of concern on the part of the lawmakers for the reasons they supplied for the enactment of the laws in the first place—“dignity” and the promotion of health and safety.⁶³ In reality, the enactment of fetal disposition provisions will force abortion providers to shut down—restricting access even further in many parts of the country.⁶⁴ Also, the health and safety arguments⁶⁵ lack merit as fetal remains have been regularly disposed of in the same manner as other human medical and pathological waste with no health and safety

56. *Planned Parenthood of Se. Pa.*, 505 U.S. at 878.

57. Leah M. Litman, *Response: Potential Life in the Doctrine*, 95 TEXAS L. REV. ONLINE EDITION 204, 205 (2017), <https://texaslawreview.org/wp-content/uploads/2018/01/Litman-Vol95-SeeAlso.pdf>.

58. 136 S. Ct. 2292, 2318 (2016).

59. Mary Ziegler, *Facing Facts: The New Era of Abortion Conflict After Whole Woman’s Health*, 52 WAKE FOREST L. REV. 1231, 1273 (2017).

60. *Id.* at 1274.

61. Brown, *supra* note 43, at 13.

62. See IND. CODE § 16-34-3-4 (2018); IND. CODE § 16-21-11-6 (2018); LA. STAT. ANN. § 40:1061.25 (2019).

63. See Grant, *supra* note 6.

64. Zavis, *supra* note 6; see also *Abortion Access*, NARAL PRO-CHOICE AM., <https://www.prochoiceamerica.org/issue/abortion-access/> (last visited Mar. 2, 2018).

65. See, e.g., H.B. 815, 2016 Leg., Reg. Sess. (La. 2016).

consequences at least since 1973.⁶⁶ Hospitals and other medical facilities deal with the disposition of pathological materials on a daily basis. There is no rational reason why fetal material should be treated differently than other human pathological material, such as organs and tissue removed during surgery. Significantly, both the World Health Organization and the International Committee of the Red Cross define pathological waste to include fetal remains.⁶⁷ Just as in the promulgation of TRAP laws, the goal of the lawmakers in enacting fetal disposition provisions has nothing to do with concern for the public, women, or health and safety. Fetal disposition laws reflect calculation on the part of the anti-choice movement to create another hurdle for health care providers who perform abortions, which translates to increased access issues for women seeking abortions.

C. Other Issues with Fetal Disposition Laws: Impractical, Unrealistic, and Illogical Requirements that Raise Access Concerns

Laws and regulations forcing specific disposition for fetal remains are impractical, unnecessary, and serve no legitimate purpose. “[T]he addition of non-medical ritual’ to a medical procedure” has been criticized by pro-choice proponents, who have also “called the new rules ‘a thinly veiled attempt to shame [women] who have abortions and make it harder for the doctors who provide them.’”⁶⁸ Fetal disposition regulations are medically unnecessary.⁶⁹ Any health and safety argument is nullified by the fact that these provisions often allow women who have miscarried to assume responsibility for disposal of the fetal remains.⁷⁰ However, the law does not mandate any particular disposal method for the women even though the fetal material poses the same risk to health and safety regardless of who is in possession of the remains.⁷¹

Furthermore, the logistics of implementing these laws have not been considered. In a hearing on Indiana’s HEA 1337, the representative who introduced the Bill discussed one of the provisions that needed to be removed after a discussion he had with a health

66. Heather D. Boonstra, *Fetal Tissue Research: A Weapon and a Casualty in the War Against Abortion*, GUTTMACHER INST. (Feb. 9, 2016), <https://www.guttmacher.org/gpr/2016/fetal-tissue-research-weapon-and-casualty-war-against-abortion>.

67. WORLD HEALTH ORG., SAFE MANAGEMENT OF WASTES FROM HEALTH-CARE ACTIVITIES 4 (Yves Chartier et al. eds., 2d ed. 2014), http://www.searo.who.int/srilanka/documents/safe_management_of_wastes_from_healthcare_activities.pdf; INT’L COMM. RED CROSS, MEDICAL WASTE MANAGEMENT 13, 100 (2011), <https://www.icrc.org/eng/assets/files/publications/icrc-002-4032.pdf>.

68. Stack, *supra* note 6.

69. Zavis, *supra* note 6.

70. See, e.g., IND. CODE § 16-21-11-4 (2018).

71. H. Enrolled Act 1337, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016).

care facility.⁷² Prior to this hearing, there had been a requirement that the disposition of fetal tissue take place within ten days. However, it soon came to light that the authors of the HB 1337 had not discussed the practicalities and logistics of the provisions of the Bill with health care facilities to determine their reasonableness, and apparently the ten-day requirement was too burdensome and needed to be removed from the law.⁷³ The timing of this amendment raised serious concerns about the legitimacy of the provisions promulgated by this same representative, which are now in HEA 1337. If the provisions were not drafted in collaboration with local health care facilities, which have the expertise necessary to determine effective procedures, concerns are raised about who determined the specific requirements.

Another implementation concern that has been overlooked is that there may not be crematoriums or funeral homes able and willing to work with abortion providers.⁷⁴ The funeral industry is not equipped to deal with remains as small as fetal tissue, some of which is the size of a prune.⁷⁵ However, the implementation issues for the funeral industry—similarly to the medical facilities—was not a concern of legislators enacting fetal disposition provisions. In Texas, “there was only one funeral provider licensed and willing to bury fetal remains in the entire state . . . and that provider had no experience with fetal tissue.”⁷⁶ Nor had that provider “experienced the controversy that would likely arise once it became known that it was in the fetal burial business.”⁷⁷ Furthermore, there is no scientific, medical, or other rational reason for requiring aborted and miscarried fetal material to be treated differently from other types of human pathological waste.

Additionally, these provisions are an added expense on health care facilities, medical waste companies, abortion providers, and ultimately the women seeking abortions.⁷⁸ Fetal disposition provisions have become another barrier for women with low economic status—increasing the access issues that already make it tremendously burdensome to afford a safe and legal abortion. “For many women, the cost of abortion services is already prohibitively high, especially in states with just a few, scattered clinics and mandatory waiting periods.”⁷⁹ In mandating cremation or interment

72. *Hearing on House Bill 1337 Before the H. Comm. on Pub. Policy*, 119th Leg., 2d Reg. Sess. (Ind. Jan. 27, 2016, 9:00 AM) (statement of Rep. Casey Cox, Author of HB 1337, at 1:05:00), https://iga.in.gov/information/archives/2016/video/committee_public_policy_1600/.

73. *Id.*

74. Green, *supra* note 8.

75. Grant, *supra* note 6.

76. John A. Robertson, *Fetal Burial is Dead (for now)*, HARV. L.: BILL OF HEALTH (Feb. 21, 2017), <http://blogs.harvard.edu/billofhealth/2017/02/21/fetal-burial-is-dead-for-now/>.

77. *Id.*

78. Grant, *supra* note 6; *see also* Zavis, *supra* note 6.

79. Grant, *supra* note 6.

of fetal tissue, the cost would likely be transferred to the woman undergoing the procedure either through higher upfront costs or in a separate payment: Indiana HEA 1337's "most ghoulish piece of symbolism is the requirement that women pay for the cremation or interment of the aborted fetus—a provision that also adds to the cost of the procedure, which is already prohibitive for many."⁸⁰

Moreover, fetal disposition provisions raise privacy concerns. Death certificates are a matter of public record. Requiring death certificates for fetal tissue "puts women in jeopardy and limits access to safe and legal abortion care" by linking the women who have had abortions forever with publicly available legal documents.⁸¹

Fetal disposition provisions are impractical, unnecessary, and illogical. They serve no legitimate purpose, and in fact, raise practical concerns regarding implementation, preparedness, and access. One of the most impactful consequences of these laws is the purposeful step taken by the anti-choice movement in having fetuses recognized as "persons" under the law.

IV. CONCLUSION

How a person deals with the loss or termination of a pregnancy is a deeply philosophical, religious, and legal question that is currently being decided by state policymakers. Through legislation regulating the disposition of fetal remains, policymakers are attempting to change the way the law recognizes an unborn fetus, a woman's right to make choices for her own body, and ultimately, to underhandedly have politicians determine that life begins at conception.

While fetal disposition laws were promoted under the guise of concern for fetal dignity and public health and safety, it was not difficult to uncover that they were actually crafted as part of a strategic and deliberate effort by the anti-choice movement to restrict access to abortion and further obliterate a woman's right to choose "whether to bear or beget a child."⁸² However, these laws also have broader implications and "are a frankly clumsy attempt to deal with a profoundly philosophical and moral question that deserves serious consideration."⁸³

"[T]he years before *Roe* offer something of a cautionary tale."⁸⁴ Lila's story excerpted in the introduction about her experience undergoing an illegal abortion with a coat hanger is not so far in the past that it cannot become a reality again. Even without the

80. Nora Caplan-Bricker, *Even Republicans Disagree with Indiana's Extreme New Abortion Bill*, SLATE (Mar. 15, 2016, 3:49 PM), http://www.slate.com/blogs/xx_factor/2016/03/15/indiana_s_hb_1337_abortion_bill_is_so_extreme_even_republicans_don_t_like.html.

81. Grant, *supra* note 6.

82. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

83. Marsh, *supra* note 6.

84. Gold, *supra* note 3.

overruling of *Roe*, women’s “rights have been eroded to such a degree that [their] ability to get a safe, legal abortion remains in grave peril.”⁸⁵ But with the new onslaught of state mandates directed at restricting a woman’s right to choose whether or not to have a child, there is a legitimate fear that *Roe v. Wade* will be overturned and the days of women seeking illegal abortions will come around again. With the increased regulations and arbitrary restrictions state lawmakers are placing on women seeking abortions and the physicians that provide them, access issues should be at the forefront of the debate.

The past where women like Lila had to go through a tremendously difficult, demoralizing, and dangerous process in order to make the decision that was best for them and their family feels closer than ever. If state lawmakers continue to ignore the Supreme Court’s clear granting of access to legal and safe abortions, we could be on a path that forces many women back into the same dangerous, demeaning, and inhumane situations as before *Roe v. Wade*.

85. NARAL PRO-CHOICE AM., *ROE V. WADE AND THE RIGHT TO CHOOSE* 1, 5 (2017), <https://www.prochoiceamerica.org/wp-content/uploads/2016/12/1.-Roe-v.-Wade-and-the-Right-to-Choose.pdf>.