



Fetal Value & the Pregnant Person's Right

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INTRODUCTION

Mary Ziegler's masterfully comprehensive new book, *Personhood: The New Civil War over Reproduction*, details the history of the fetal personhood movement. Fetal personhood is now synonymous with abortion criminalization. The anti-abortion movement has thus long pushed for fetal personhood, and the abortion rights movement has thus long opposed it.

As Ziegler details, fetal personhood has a "hold on American imagination,"¹ and has possibly taken on mythical power. That power often obscures the fact that there are two separate claims inherent to the now-common "fetal personhood" idea: 1) that a fetus is a person; and 2) that this person has rights.²

This Essay seeks to accentuate the difference between these two often conflated claims. Laws can recognize that the fetus has value, perhaps a

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¹ MARY ZIEGLER, *PERSONHOOD*, at xvii (2025).

² *Id.* at viii.

value comparable to a living person, but not also create fetal rights. Wrongful death laws, for example, fit this description. The only “rights” the measures create are for the pregnant person, and opposition to them is to the detriment of the pregnant person.

Distinguishing the two parts of “fetal personhood” also helps accentuate the pregnant person, another goal of this essay. The fetal personhood movement presumes a maternal-fetal conflict, ignoring how many pregnant people want live childbirth and don’t get it. Pregnant people in this country, especially Black women, are far too often denied the live childbirth they desire. If abortion is racial discrimination, as many fetal personhood advocates argue, so too is state inaction on stillbirth (pregnancy loss after twenty weeks) prevention.

I. RECOGNIZING VALUE VERSUS CREATING RIGHTS

Again, there are two parts to fetal personhood — person, and then with rights. The person first part is worth pause, especially from my perspective as a legal scholar who studies pregnancy loss. What is it that the pregnant person is growing in their body? If born alive, the baby will undoubtedly be a person. Is it also a person before then? To answer this question, it seems appropriate to consider what pregnant people feel is growing inside of them.³ The answers will vary; some may say they’re just “pregnant,” some may say it’s their “baby,” and some may answer with their baby’s name.⁴ Some may even say a person. “[A]lthough a woman and possibly her partner might view their fetus as a person during pregnancy, this judgment does not occur at any one point in time and varies among pregnant women.”⁵ Some never will,⁶ but some might.

³ See Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1676-84, 1691-93 (2022) (emphasizing the pregnant person’s personal, subjective understanding of their specific pregnancy).

⁴ *Id.* at 1676-77.

⁵ Denise Côté-Arsenault & Mary-T. B. Dombeck, *Maternal Assignment of Fetal Personhood to a Previous Pregnancy Loss: Relationship to Anxiety in the Current Pregnancy*, 22 HEALTH CARE FOR WOMEN INT’L 649, 651 (2001); see also *id.* at 660 (describing personhood not as biological but a “complex sociocultural phenomenon”).

⁶ See LINDA LAYNE, *MOTHERHOOD LOST* 241 (2003); Donley & Lens, *supra* note 3, at 1692.

And thus, efforts to deny that a fetus is a person can run counter to many people's experiences in pregnancy — hurting the credibility of those efforts.

But “person” does not also necessarily mean rights. Even if a pregnant person thinks of their fetus as a person, they are not thinking of “due process rights.” Nor should they. In the U.S. system, being a person does not automatically confer rights; to the contrary, numerous people (children, felons, for example) do not have certain rights, and some nonpeople (corporations, for example) do have rights. And the rights people do have are subject to other people's rights.

A closer look at commonly referred to “fetal personhood” measures reveals that most recognize fetal value, including a value similar to that of a person, but they do not create fetal rights. This separation and clarification can help focus opposition efforts and ensure pregnant people and people who have experienced pregnancy loss are not deprived of benefits in the meantime. To be clear, my intent is not to minimize concerns about the threats posed by fetal personhood. My intent is to bring more focus to what those threats are, and to illuminate the downsides of too broad an opposition.

For example, wrongful death laws applied to tortious fetal death are labeled “fetal personhood.” These laws allow parents to sue for the wrongful death of their unborn child if killed tortiously.⁷ These laws recognize that, to the parent, the death of an unborn child is similar enough to the death of a living child such that the two should be treated the same.⁸ Wrongful death laws do not create any fetal rights; not a cause of action for the fetus, nor anything else for the fetus. These laws could deter tortiously caused fetal death (a benefit that also inures to the pregnant person), but that does not amount to a fetal right. These

⁷ The problem with these laws is that they could misvalue the parent's experience, forcing her to sue for wrongful death of her child when she experienced her injury as something less than that (i.e. a pregnancy loss). An ideal system would allow the plaintiff to define their injury. See Dov Fox & Jill Wieber Lens, *Valuing Reproductive Loss*, 112 GEO. L.J. 61, 90 (2023).

⁸ See *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833 (Iowa 1983) (“What is involved here is a right of recovery given to a parent,” and “the parent's loss certainly does not vanish because the deprivation occurred prior to birth.”); Jill Wieber Lens, *Criminalization of Stillbirth*, 111 IOWA L. REV. (forthcoming 2026) (discussing the role of bereaved parents in the application of wrongful death law to tortiously fetal death).

laws could also deter abortion but are overwhelmingly inapplicable against the pregnant person and/or to lawful abortion.⁹ Moreover, any deterrence would not be because of fetal rights. As *Roe* recognized, the only right created by wrongful death laws is for the parent.¹⁰ The laws create a statutory right to a cause of action for the parents.

Similarly, fetal homicide laws, another “fetal personhood” measure, recognize that the intentional killing of a fetus is similar enough to the killing of a living person and should be treated the same.¹¹ Again, like with wrongful death laws, fetal homicide laws do not create any fetal rights. Homicide laws do not create rights to not be killed; they hopefully deter homicide, a benefit, but not a right. When applied to fetal death, these laws could also deter abortion; but again, they are inapplicable as against the pregnant person or for a legal abortion.¹² Any benefit to the fetus applies equally to the pregnant person as it is impossible to kill the fetus without something also happening to the pregnant person; these laws would not exist but for the pregnant person.

Post-*Dobbs*, antiabortion advocates have stepped up their calls for prenatal child support and prenatal tax deductions. Both measures, in fact, were proposed within the fetal personhood “New North Star” after *Dobbs*.¹³ Both measures treat unborn children similarly to living children. More on point though, is that they treat people who are pregnant similarly to how they treat parents of living children. But again, no fetal rights are created — just as child support laws and child tax credits do not create any rights for children. The practical effect of these measures is supplemental income to the pregnant person. They benefit the pregnant person, arguably much more so than they benefit the fetus.¹⁴ If any rights are created, it is for the pregnant person.

⁹ Lens, *supra* note 8, at 53-54, 59-60.

¹⁰ See *Roe v. Wade*, 410 U.S. 113, 161-62 (1973) (“Such an action, however, would appear to be one to vindicate the parents’ interest.”).

¹¹ See Lens, *supra* note 8, at 53-54, 59-60.

¹² See *id.*

¹³ See ZIEGLER, *supra* note 1, at 206.

¹⁴ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 960 (1979) (“[C]ourts do not supervise child-support expenditures once a payment has been made.”).

Why then are these measures so quickly labeled “fetal personhood” — and opposed by those who support abortion rights? Surely this is about more than language. People concerned with fetal personhood seem equally concerned whether the state law explicitly defines person to include fetus within its homicide laws or has a separate law for fetal homicide.

If it is not language, is “fetal personhood” determined by motivations? It is true that many advocating for fetal personhood laws have antiabortion motivations. Things are immediately different when someone who supports abortion rights suggests the measure. For example, Connecticut state representative Aimee Berger-Girvalo is a known supporter of abortion rights and no one publicly questioned whether she was trying to create fetal personhood when she introduced a state income tax credit for stillbirth.¹⁵ (It’s the largest state income tax credit for stillbirth in the country and was effective the exact same day as Connecticut’s first-in-the-nation abortion provider shield law.¹⁶) But some Connecticut lawmakers may have been trying to create “fetal personhood” when they voted for that tax credit. The reality is that most of these laws likely had some anti-abortion motivation and some motivation having nothing to do with abortion.

Even if measures merely recognize fetal value as opposed to creating fetal rights, they still seem dangerous because of the slippery slope — that every legal treatment of a fetus as a person is a step toward the Supreme Court recognizing “person” in the Fourteenth Amendment to include the unborn. Advancing that slippery slope has specifically been an antiabortion strategy for decades.¹⁷ These more modern legal reforms would seem not relevant to a Supreme Court seemingly more interested in originalism and history and tradition, but the slippery slope still seems dangerous for reproductive autonomy.

But there are also consequences of fearing that slippery slope. For example, opposing a bill to apply Florida’s “fetal personhood” wrongful death law to tortiously caused unborn child death¹⁸ does not restore or

¹⁵ See JILL WIEBER LENS, STILLBIRTH & THE LAW 178 (2025).

¹⁶ See *id.*

¹⁷ See Donley & Lens, *supra* note 3, at 1654.

¹⁸ See Ana Goñi-Lessan, *Florida Civil Lawsuit Bill Could Create ‘Fetal Personhood,’ Worrying Some Activists*, TALLAHASSEE DEMOCRAT (Feb. 15, 2024, 6:39 PM),

strengthen abortion rights in Florida. It does, however, deny parents who experienced their tortious pregnancy loss as the death of their child the possibility of suing for the death of their child.

None of this is to say that some “fetal personhood” measures are not dangerous. Some do more than recognize fetal value; some create fetal rights. Those measures include recent efforts to apply the Emergency Medical Treatment and Labor Act to the unborn child, appoint guardians ad litem for the fetus, and create survivorship causes of actions (a statutorily created cause of action for a person killed tortiously).¹⁹ These create fetal rights, which can actually threaten a pregnant person’s rights, a scenario that’s vividly clear from the EMTALA litigation.²⁰

Fetal rights are dangerous — and unpopular.²¹ But most “fetal personhood” measures do not create fetal rights. They instead recognize that the fetus can have value, an idea it is difficult to credibly deny. Moreover, focusing opposition on fetal rights is needed to ensure that the abortion rights movement does not accidentally oppose measures that could help the pregnant person.

II. THE PREGNANT PERSON’S RIGHT TO LIVE BIRTH

Many pregnant people who desire their babies could use that help. The antiabortion fetal personhood movement presumes a maternal-fetal conflict, almost inexplicably ignoring the many pregnant people in the U.S. who want their babies to be born alive but don’t get that result.

<https://www.tallahassee.com/story/news/politics/2024/02/15/bill-this-session-could-create-fetal-personhood-in-florida/72620169007/> [<https://perma.cc/4QCC-A34W>].

¹⁹ See DAN B. DOBBS, *LAW OF REMEDIES* 672 (2d ed. 1993) (survivorship claims “provide for the survival of whatever action the deceased himself would have had if he had lived” with recoverable damages usually limited to whatever damages the deceased suffered between the time of injury and the time of death, including lost wages, medical expenses, or pain and suffering).

²⁰ See *Texas v. Becerra*, 89 F.4th 529, 545 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 139 (2024) (finding that EMTALA and its right to stabilizing medical treatment due to an emergency medical condition does not apply to pregnant women and abortions).

²¹ See Lake Rsch. Partners, *Survey of Public’s Awareness of “Fetal Personhood” and Messaging Against It*, PREGNANCY JUSTICE (Apr. 7, 2025), <https://www.pregnancyjusticeus.org/wp-content/uploads/2025/04/Fetal-Personhood-Messaging.pdf> [<https://perma.cc/8LQZ-PF35>].

Black women are at much greater risk of being denied live childbirth in the U.S.²² If abortion is racial discrimination as many fetal personhood advocates argue, so too is state inaction on stillbirth (pregnancy loss after twenty weeks) prevention.

Although the abortion debate depicts pregnancy as a binary, ending in either abortion or live childbirth, that's not really how things work.²³ As many as seventy percent of fertilized eggs do not get to live childbirth.²⁴ Many fertilized eggs "die" as they do not implant in the womb. And then there's pregnancy loss. Up to twenty-five percent of known pregnancies "die" in miscarriage, most within the first twelve weeks of pregnancy but some in later miscarriage (before twenty weeks).²⁵ Others die after twenty weeks but before birth; this is called stillbirth and it happens in about 1 in 175 births, translating to over 20,000 stillbirths a year in the U.S.²⁶ Some of these stillbirths are even at term (after thirty-seven weeks).²⁷

(Separately, keep these statistics in mind when the fetal personhood movement accentuates a fetus's right to "life." For seventy percent of embryos, "life" is exclusively in the womb.²⁸ And banning abortion in the name of this right to won't change this. To the contrary, it will likely increase the number of stillbirths.²⁹)

The risk of pregnancy not ending with live childbirth is even greater for marginalized persons. Black women face double the rate of late miscarriage (ten-to-twenty weeks) and double the risk of stillbirth

²² See *infra* notes 30–32 and accompanying text.

²³ LENS, *supra* note 15, at 158–61.

²⁴ LARA FREIDENFELDS, THE MYTH OF THE PERFECT PREGNANCY 186 (2020).

²⁵ See *Symptoms & Signs of Miscarriage*, AM. PREGNANCY ASSOC., <https://americanpregnancy.org/pregnancy-complications/miscarriage/> (last visited Aug. 15, 2025) [<https://perma.cc/PD56-VNHT>].

²⁶ See Am. Coll. of Obstetricians & Gynecologists & Soc'y for Maternal-Fetal Med., *Obstetric Care Consensus: Management of Stillbirth*, 135 OBSTETRICS & GYNECOLOGY e110, e122 (2020). But see *Data and Statistics on Stillbirth*, CDC (May 9, 2025), <https://www.cdc.gov/stillbirth/data-research/index.html> [<https://perma.cc/36XG-H882>] (stating the risk of stillbirth is 1 in 175 births).

²⁷ See Elizabeth C.W. Gregory, Claudia P. Valenzuela & Donna L. Hoyert, *Fetal Mortality: United States, 2020*, 71 NAT'L VITAL STAT. REP. 1, 14 (2022).

²⁸ See LENS, *supra* note 15, at 176.

²⁹ *Id.* at 166–67.

compared to white women.³⁰ Women of lesser incomes similarly face double the risk compared to wealthier women.³¹ The racial disparity in stillbirth rate has existed as long as the United States has gathered data on stillbirths, over a century.³²

Despite the fatalism that surrounds it, not all pregnancy loss is currently unpreventable. It is indisputable that some stillbirths are preventable. Unlike preimplantation losses and miscarriages, stillbirths overwhelmingly are not due to chromosomal abnormalities.³³ Demonstrating the possibility of prevention is the fact that other high-income countries have better stillbirth rates than the U.S. and are successfully working to reduce their already-lower rates.³⁴ Moreover, studies specific to the U.S. show that about one quarter of stillbirths in the U.S. are preventable, including about half of stillbirths after term (thirty-seven weeks).³⁵ The racial disparity itself also demonstrates preventability as racism, and not race, explains that disparity.

Ziegler's book masterfully explains how many in the fetal personhood movement looked to the civil rights movement as a model, and more recently leaned into the idea of abortion legality as modern-day eugenics, given that Black women disproportionately utilized abortion

³⁰ See Sudeshna Mukherjee, Digna R. Velez Edwards, Donna D. Baird, David A. Savitz & Katherine E. Hartmann, Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study, 177 AM. J. EPIDEMIOLOGY 1271, 1273, 1277 (2013); Marian Willinger, Chia-Wen Ko & Uma M. Reddy, Racial Disparities in Stillbirth Risk Across Gestation in the United States, 201 AM. J. OBSTETRICS & GYNECOLOGY 469.e1, 469.e6 (2009).

³¹ Olof Stephansson, Paul W. Dickman, Anna LV. Johansson & Sven Cnattingius, The Influence of Socioeconomic Status on Stillbirth Risk in Sweden, 30 INT'L J. EPIDEMIOLOGY 1296, 1299 (2001).

³² Carol J. Rowland Hogue & Robert M. Silver, Racial and Ethnic Disparities in United States: Stillbirth Rates: Trends, Risk Factors, and Research Needs, 35 SEMINARS IN PERINATOLOGY 221, 221-22 (2011).

³³ See Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1088-89 (2021).

³⁴ See *id.* at 1087-88.

³⁵ See Jessica M. Page, Vanessa Thorsten, Uma M. Reddy, Donald J. Dudley, Carol J. Rowland Hogue, George R. Saade, Halit Pinar, Corette B. Parker, Deborah Conway, Barbara J. Stoll, Donald Coustan, Radek Bukowski, Michael W. Varner, Robert L. Goldenberg, Karen Gibbins & Robert M. Silver, Potentially Preventable Stillbirth in a Diverse U.S. Cohort, 131 OBSTETRICS & GYNECOLOGY 336, 339-40 (2018).

care pre-*Dobbs*. For example, some antiabortion groups responded to the Black Lives Matter movement after the killing of George Floyd by claiming that abortion is the “most dangerous form of racial discrimination.”³⁶ Anti-abortion leaders argued that systemic racism was a lesser concern than the racism driving abortion; “[a] dead child doesn’t need an education” or “a safe environment” because “[w]ithout life, nothing else matters.”³⁷ Similarly, Students for Life held a “Black Preborn Lives Matter” emphasizing that disproportionately high abortion rates in communities of color show that the devaluation of Black Americans starts in the womb.³⁸

I was struck by how easily these sentiments apply equally to stillbirth. Black preborn babies are twice as likely to be stillborn as white preborn babies. Is lack of attention to preventable stillbirths not the exact same supposed devaluation? Standard of care in the United States is additional medical care when the risk of stillbirth is known to be double the general risk, but not so when that doubled risk relates to race.³⁹

One could counter that the devaluation caused by abortion is worse given its intentionality versus the omissive lack of interest in stillbirth prevention. But abortion legality was the same omissive devaluation. This idea of “modern-day eugenics” wasn’t state action forcing Black women to have abortions; it was state inaction allowing Black women to have abortions.⁴⁰ Similarly, it’s state inaction devaluing Black babies through a lack of interest in stillbirth prevention.

The fetal personhood movement likes to focus on a baby’s right to be born (alive). But what also about the pregnant person’s right for that baby to be born?

CONCLUSION

The abortion debate has become so charged in the U.S. that it seems to have lost the capacity for nuance and context. This also applies to any

³⁶ ZIEGLER, *supra* note 1, at 192.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See* LENS, *supra* note 15, at 50-51.

⁴⁰ *See* Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 937-38 (2007) (distinguishing historical eugenics movements as being based on state control).

ideas of “fetal personhood,” a phrase that is used regularly both positively by the antiabortion side and negatively by the abortion rights side, yet rarely ever defined or dissected.

But not much about pregnancy and abortion is simple, including ideas of “fetal personhood.” Laws can recognize fetal value without creating fetal rights. And despite the “fetal personhood” label, what these laws often do is create rights or empower the pregnant person. Context and nuance within the abortion debate are, at this point, extremely difficult. But they are also likely to resonate with a broader audience.