Intentional Parenthood, Contingent Fetal Personhood, and the Right to Reproductive Self-Determination

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INTENTIONAL PARENTHOOD, CONTINGENT FETAL PERSONHOOD, AND THE RIGHT TO REPRODUCTIVE SELF-DETERMINATION

By Laura Hermer∗

This Article argues that intent should govern legal parenthood, regardless of the method of conception, the person’s biological or genetic relationship to the resulting embryo/fetus, or the person’s gender. This proposition is not new. This Article adds to scholarly discourse by extending the concept: Intent should not just determine parenthood, but also fetal rights. When a pregnant person establishes their procreational intent (or lack thereof) prior to birth, then both the existence (or lack thereof) of legal protections for the embryo/fetus and the gestator’s rights and duties (or lack thereof) should flow from this intent. Non-gestating gamete contributors would do the same, to different legal effect.

Establishing intent-based parenthood would end automatic legal parenthood. It would also clearly condition most legal rights that a fetus might enjoy on its gestator’s intent, and support other rights on the intent of other gamete-contributors. The article proposes a normative framework for the conceptions of legal parenthood and legal fetal personhood under an intentional approach. It further offers some preliminary suggestions regarding how an intentional approach could solve some latent, thorny issues in bioethics, family law, and civil rights.

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INTRODUCTION

The Supreme Court eliminated elevated constitutional protection for abortion in *Dobbs v. Jackson Women’s Health*. In the process, the Court threw into question other reproductive and family-related rights that most believed to be settled. Many people, including those who have sought expanded reproductive rights and a more welcoming, just, safe, and supportive society to bring children into, are upset about this development. Given the current composition of the Supreme Court and federal judiciary, and the stronghold that Republicans have had over electoral maps and legislatures, the situation seems especially bleak.

Despite this, the upending of abortion’s constitutional scaffolding provides an ideal time to reconceptualize the law governing reproduction and parenthood. The Supreme Court’s decision in *Dobbs* provides an opportunity to jettison problem-ridden conceptions of bodily and


3. See, e.g., Robert A. Carp, Kenneth L. Manning, Lisa M. Holmes, & Ronald C. Stidham, *Judicial Process in America* 147 (12th ed., 2022) (“[I]n an interview with a Breitbart-hosted radio show, then-candidate Trump stated, ‘We’re going to have great judges, conservative, all picked by the Federalist Society.’” [Leonard] Leo, who founded the Society’s chapter at Cornell Law School in 1989, took a leave of absence from his position with the Federalist Society to advise President Trump on judicial appointments. In actuality, ‘advise’ is likely too soft a word to use in describing Leo’s role in the judicial selection process under President Trump. The Trump administration, as then-candidate Trump promised in the Breitbart interview, largely delegated the judicial selection process to Leo, not only for the three Supreme Court vacancies that arose during his tenure as president, but for appointments to the lower courts as well.”).

decisional autonomy that undergirded Roe v. Wade and Planned Parenthood v. Casey. A new framework could better accommodate individuals’ lived experiences, especially those of lower-income individuals and people of color who have suffered the most under the inequities wrought by our most recent legal paradigms.

In the unsettled aftermath of Dobbs, there is space to shift to a new and better-conceptualized legal paradigm for reproduction and parenthood. For too long, there has been a problematic divide between the legal treatment of parenthood resulting from “natural” versus “assisted” reproduction. Coital reproduction by married partners provides the presumptive norm for parenthood. Until recent decades, maternity was certain, and paternity was typically presumed. Outside of marriage, parental rights and duties did not exist, and a resulting child did not enjoy the legal rights of “legitimate” progeny. While the treatment of unwed parenthood has changed over time, many other facets of the traditional paradigm have remained intact, notwithstanding social and medical changes that have made unwed sex, contraception, and abortion normalized and easily accessible.

As reproductive medicine and technology have advanced, new methods of determining parenthood draw increasingly on the involved parties’ intent. This Article argues that each party’s respective intent should determine that party’s legal parenthood, regardless of the method of conception, the party’s biological or genetic relationship to the resulting embryo/fetus, or the party’s gender. This proposition is not new. Many others have advanced arguments that intention should play some overarching role in our determination of legal parental rights and/or duties.

7. See infra note 16 and accompanying text.
8. See infra notes 17–22 and accompanying text.
9. Id.
10. See infra Part I.
11. See infra notes 42–50 and accompanying text.
12. Except where specific precision is needed, “fetus” here is used to denote any unborn product of conception at any stage of gestation, and not just such products of conception from approximately the eighth week of pregnancy until birth.
13. See generally John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 Va. L. Rev. 405 (1983) (arguing that procreative liberty should include all reproductive options for particular categories of people, rather than merely the right to avoid reproduction, and that a large set of maternal obligations should arise once a woman has decided to keep a pregnancy); Marjorie Maguire Schultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297 (1990) (advancing the role of intent in procreation and parenthood as the law governing ART develops); Dara E. Purvis, Intended
This Article adds to scholarly discourse by extending the concept: Intent should not just determine parenthood, but also determine fetal rights. Where a pregnant person establishes their procreational intent (or lack thereof) prior to birth, then both the existence (or lack thereof) of legal protections for the embryo/fetus and the gestator’s rights and duties (or lack thereof) would flow from this intent. Non-gestating gamete contributors and, in some cases involving assisted reproductive technologies (ART), other relevant parties, would do the same, to different legal effect. Establishing intent-based parenthood would end automatic legal parenthood. It would also clearly condition most legal rights that a fetus might enjoy on its gestator’s intent, and support other rights on the intent of other gamete-contributors.

Part I of this Article will start with a brief historical overview of how we have determined legal parenthood in this country. In doing so, it will survey issues that have arisen with advancing reproductive medical technology. Next, Part II will examine some of the problems that have arisen through the interplay of our system of determining parenthood with changes in the use of medicine to advance or avoid reproduction. Finally, Part III will propose a normative framework for legal fetal personhood and legal parenthood under an intentional approach. It addresses the specific impact on gestators, non-gestating gamete providers, and the state. In the process, it preliminarily suggests how an intentional


14. Given the low (though rising) overall rate of transgender people in the population, one can probably assume that most people who can become pregnant and who give birth are women, and most people who contribute gametes through sexual intercourse and who cannot get pregnant are men. See, e.g., Jeffrey M. Jones, LGBT Identification in U.S. Ticks Up to 7.1%, GALLUP (Feb. 17, 2022), https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx [https://perma.cc/2CBL-FFQ6] (finding that 0.7% of people in the study sample identified as transgender). However, some transgender people can and do become pregnant. See, e.g., Heidi Moseson et al., Pregnancy Intentions and Outcomes Among Transgender, Nonbinary, and Gender-Expansive People Assigned Female or Intersex at Birth in the United States: Results from a National, Quantitative Survey, 22. INT’L J. TRANSGENDER HEALTH 30, 33, 36 (2021) (finding that 12% of the people in their transgender or intersex study sample had been pregnant, and 11% desired a future pregnancy). This essay will often refer to all these individuals in gender-neutral terms. Where the gendered experience of these people is specifically at issue, and when discussing research involving a specific gender, then I will specify the relevant gender.

15. Non-gestating gamete contributors may provide either ova or sperm, although of course in the context of coital reproduction, most non-gestating gamete contributors will be men and hence provide sperm. In some cases involving ART, intended parents may not contribute any genetic material, but would be included in this paradigm. This article will focus primarily on coital reproduction.
approach could solve some latent, thorny issues in bioethics, family law, and civil rights.

PART I: THE CONTEXT-DEPENDENT LEGAL DETERMINATION OF PARENTHOOD

For most of human history, coital reproduction has been the sole form of creating new human life. As detailed by William Blackstone and discussed by others, the legal rights and duties of both the parents and the child traditionally depended on the marital status of its mother. If born to a married woman, then the child enjoyed all the rights and duties that the law provided to other children of its gender, birth order, and station, whether or not the child was an actual product of the marriage or the result of an extramarital union. Maternity was biologically certain, and paternity was assumed in all but clearly impossible circumstances.

The legal treatment of parentage was part of a broader issue: In 18th and 19th century America and into the 20th century, marriage was one dimension on which the law afforded status to people. Outside of marriage, the “family,” with its legally and socially delineated rights and duties, did not exist. If a child was born out of wedlock, then under old American common law, they had no right of inheritance or support from their father.

16. Attempts at non-coital insemination of humans began in the 18th century, but were often unsuccessful and did not become more common until the 20th century, when legal issues were first raised. *See, e.g.*, I. MARION SIMS, CLINICAL NOTES ON UTERINE SURGERY 365 (1866) (writing with respect to non-coital insemination that, “[s]ome years ago, I made a series of this kind, and actually saw conception follow this process in one instance. Dr. George Harley, Professor, &c, in University College, London, informs me that he has repeatedly performed the experiment of injecting the semen into the cavity of the uterus, but with no result. I have given up the practice altogether, and do not expect to return to it again”). *See also* Willem Ombelet & Johan Van Robays, *History of Human Artificial Insemination*, 7 FACTS, VIEWS & VISION ObsGyn 1, 2–4 (2010); George P. Smith II, *Through a Test Tube Darksly: Artificial Insemination and the Law*, 67 Mich. L. Rev. 127, 129 (1968).

17. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *"444* (stating that all children born after wedlock are legitimate, and “that all children born before matrimony are bastards by our laws”).


19. *Id. at 2272 ("A jury ‘could not legally find against . . . legitimacy, except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father.”) (quoting Phillips v. Allen, 84 Mass. 453, 454 (1861)).

nor any corresponding duties to him. Only maternity could be certain, but maternity alone traditionally provided a child with nothing.

The harshness of the rule on the mother, the child—and, perhaps most of all, the public purse—led most states to eventually relent and require paternal support, at least where it was possible to establish paternity and obtain support. The steady increase in the rate of births by unmarried women starting in the mid-20th century may also have

21. See Richard Helmholz, Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law, 63 Va. L. Rev. 431, 447–48 (1977) (concluding that American courts originally failed to import the English duty of support for illegitimate children, although over time most states ultimately adopted such a rule); Note, Presumption of Legitimacy of a Child Born in Wedlock, 33 Harv. L. Rev. 306, 307 n.9 (1920) (“At common law, neither the father nor the mother had the duty to support bastard children.”). Compare Blackstone, supra note 17, at 458 (“The method in which the English law provides maintenance for [illegitimate children] is as follows. When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged: otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother, or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the oversees by direction of two justices may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child, till one month after her delivery: which indulgence is however very frequently a hardship upon parishes, by suffering the parents to escape”) (internal citation omitted). For a different perspective, see Note, Duty of an Illegitimate Child to Support Its Destitute Mother, 46 Yale L. J. 875 (1937) (remarking on a New York case that held that an illegitimate son had a duty to support his indigent mother, and observing that, at that time, seven states, including New York, had adopted the Uniform Illegitimacy Act).

22. Note, Presumption of Legitimacy of a Child Born in Wedlock, supra note 21, at 307 n.9. By the 19th century, women could get custody of their illegitimate children. See, e.g., Mary L. Shanley, Unwed Fathers’ Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy, 95 Colum. L. Rev. 60, 69 (1995) (“Although the nonmarital child could inherit from no one, poor laws assigned mothers financial responsibility for their offspring and gave them custodial rights as long as they kept the children off public support.”); Robinson v. Crenshaw, 2 Stew. & P. 276, 279–80 (1832) (“[T]he mother, in all such cases, is vested with a full discretion to make complaint, or not; and, after making the charge, to prosecute, or abandon it, at pleasure . . . . Though she is not directly to receive the money, she is, by the laws of nature and society, entitled to the custody, and, if able, bound for the maintenance of her children; and, as she is to be presumed able, the judgment, in the event of a recovery, would have been partially or wholly for her benefit: and, doubtless, the statute so intended it, and for that reason, confirmed the matter to her discretion.”).

23. See, e.g., A. Madorah Donahue, Children Born Out of Wedlock, 151 Annals Am. Acad. Pol. Soc. Sci. 162 (1930) (observing that “[c]hildren born out of wedlock form a considerable portion of the volume of the work of all health and social agencies touching child dependency, neglect, and delinquency.”); Note, Compensation for the Harmful Effects of Illegitimacy, 66 Colum. L. Rev. 127 (1966) (noting that, as of the time of the writing, “all fifty states have now adopted some form of legitimation provision,” and “almost every state” had legislation establishing a duty of support on fathers “without abrogating the mother’s common-law duty of support . . . .”).
contributed to this trend.  

Between 1940 and 1970, the percentage of births by unmarried women rose almost continuously, starting at four percent of all births in 1940 and reaching eleven percent in 1970. 

Supreme Court decisions in the 1970s, in conjunction with the promulgation of the Uniform Parentage Act in 1973, set a national course for classifying men as at least partial legal fathers, when they sired a child through sexual intercourse. 

In most jurisdictions today, there are few impediments to full legal parentage for biological parents who conceive a child through sexual intercourse.

While some couples conceived children, not all couples were fertile, and some of those, as now, doubtless wished they were. But infertility is difficult to track in the historical record. As an imperfect proxy for infertility, Elaine Tyler May studied childlessness in married women, finding that nine percent of married women born in the 1830s and 1840s


26. See, e.g., Gomez v. Perez, 409 U.S. 535, 537–38 (1973) (striking down a Texas law that established a duty of parental support only for children born within wedlock as denying equal protection for illegitimate children); Uniform Parentage Act § 2 (Nat’l Conf. of Comm’rs on Unif. State L. 1973) (making the marital status of the parents irrelevant to establishment of the parent/child relationship). See also Serena Mayeri, Marital Supremacy and the Constitution of the Nonmarital Family, 103 CAL. L. REV. 1277, 1340 (2015) (observing that the elimination of most distinctions between children born within and outside of marriage provided nonmarital families with potential access to government benefits and greater protection from legal disabilities such as children’s inability to inherit or obtain child support from fathers, as well as benefitted at least some parents of nonmarital children).

27. But see Dara Purvis, The Constitutionalization of Fatherhood, 69 CASE WES. RES. L. REV. 541, 585 (2019) (observing that while the 2017 UPA eliminates gender in its treatment of parents (to the extent it has been and ever will be taken up by states), some substantial discrepancies still exist in the constitutional treatment of unmarried fathers versus unmarried mothers that should be removed by reevaluating parentage statutes under the Equal Protection Clause and found “unconstitutional to the extent that they treat unsed fathers and mothers differently”).


29. See, e.g., Gayle Davis, The Palgrave Handbook of Infertility in History 1, 4 (Gayle Davis & Tracey Loughran, eds., 2017) (quoting Jill Allison in describing infertility in the historical record as “the presence of an absence”).

30. May, supra note 28, at 11–12 (There are, of course, other reasons that a married woman even in the unreliably-contracepted 19th and first half of the 20th centuries might be childless apart from infertility, so the statistics presented are only suggestive).
were childless. The percentage of childless, married women, aged forty to forty-four increased to ten percent in 1910, seventeen percent in 1940, and twenty percent in 1950, and dropped to fourteen percent in 1957. In 1990, only eleven percent of married women were childless. Clinical options for addressing infertility opened up in 1978 with the first successful birth from in vitro fertilization. Now, there are multiple different forms of assisted reproductive technologies (ART). In 2018, 203,119 ART procedures were performed in the United States, resulting in 73,831 deliveries and 81,478 infants.

Courts and legislatures addressing legal issues raised by ART inherited frameworks from traditional family law but quickly determined that these frameworks needed to be altered to account for new technologies. As others have discussed, early cases involving intrauterine or intracervical insemination with donor sperm raised novel legal issues. Salient questions included how to characterize the relationship of the husband and child when there was no genetic relation between the two, and what legal impact, if any, the wife’s role in the process would have on the marriage. Ultimately, most state legislatures determined that, where a

31. Id. at 11.
32. Id. at 12.
33. Id.
37. See *Child Conceived by A.I.D. Is Illegitimate but Consenting Husband Held Liable for Support*, 64 Colum. L. Rev. 376, 378–79 (1964) (discussing inconsistent approaches that courts, to date, had taken to determining the status of children conceived through insemination with donor sperm).
39. Smith, supra note 16, at 135–36 (noting that some early cases considered the wife’s insemination by another man’s sperm to be adulterous on the theory that it polluted the husband’s
husband consented to his wife's insemination with donor sperm, the consent functioned akin to legitimization.40 Consent thus rendered the husband the legal father of the resulting child—with all the rights and obligations entailed thereby, despite the lack of genetic connection.41

Novel methods of procreation created additional legal perplexities. The use of in vitro fertilization, genetic testing, frozen embryo transfers, and other assisted reproductive techniques developed over the last fifty years have allowed individuals to beget children to whom they have neither genetic nor gestational relation, but whom they nevertheless intend to parent.42 Typically, individuals in this situation must legally adopt the resulting child before parental rights and obligations attach to the relationship.43 Legal adoption requirements vary substantially from state to state.44 Even so, the most recent, 2017-version of the Uniform Parentage Act (UPA), presently adopted in substantial form by seven states,45 permits individuals creating children through ART to become parents simply by expressing their consent to the procedure(s) with the intent to...
be a parent.\textsuperscript{46} Such parents must also consent to the ART procedure,\textsuperscript{47} but their consent need not always be in writing. A comment to Section 704 of the UPA observes that “many parties do not consent in writing, even when the statute requires written consent and even when the evidence indicates that the parties intended that they would both be parents to the child.”\textsuperscript{48} In the absence of a written contract, clear and convincing evidence of an express agreement between the parties would provide requisite intent.\textsuperscript{49} Alternatively, evidence that the parties lived together and held themselves out as parents for the first two years of the child’s life would suffice.\textsuperscript{50}

In sum, different rules have developed over time for people becoming parents through sexual intercourse versus ART. In the case of heterosexual sexual intercourse, both gamete-contributing parties to the act typically become the legal parents of any child that may result, regardless of the parties’ intent or legal relationship to each other. Contrastingly, in the case of ART in jurisdictions following the 2017 UPA, each individual involved must intend for and consent to the child’s creation to become the child’s legal parent.

PART II: PROBLEMS CREATED BY IGNORING INTENT IN THE LEGAL ESTABLISHMENT OF PARENTHOOD

At the same time that many courts and legislatures were expanding the imposition of legal rights and duties of unmarried men who conceived through sexual intercourse, others were trying to make it harder for women to avoid parenthood through abortion.\textsuperscript{51} Contraceptive

\textsuperscript{46} Unif. Parentage Act § 703 (Unif. L. Comm’n 2017), https://www.uniformlaws.org/committees/community-home/librarydocuments/communitykey=c4f3d2d-4dzc-4be0-8256-22dd73af6bf8&LibraryFolderKey=&DefaultView= [https://perma.cc/C89L-6CWV] (“An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child”).

\textsuperscript{47} Id. §§ 703, 704. Note that, in most states that have not adopted article 7 of the 2017 version of the UPA, intent typically does not govern parenthood outside the context of matrimony, and sometimes does not govern even with respect to married same-sex couples. See Susan Hazeldean, Illegitimate Families 4–6 (Brooklyn L. Sch. Research Paper, Paper No. 727, 2023), http://ssrn.com/abstract=4390000 [https://perma.cc/4AYV-2KYL].


\textsuperscript{49} Unif. Parentage Act § 704(b)(1) cmt. (Unif. L. Comm’n 2017) (noting the imposition of “a high substantive bar” that must be surmounted in the absence of a written agreement).

\textsuperscript{50} Unif. Parentage Act § 704(b) (Unif. L. Comm’n 2017).

\textsuperscript{51} See, e.g., Mary Ziegler, Originalism Talk: A Legal History, 2014 BYU L. REV. 869, 898–900 (2015) (discussing some post-Roe efforts to offer fetal personhood or life amendments as well as efforts to redefine and narrow Roe); Reva B. Siegel, The Right’s Reasons: Constitutional Conflict and the Spread of
advances in the late 1950s and beyond made it increasingly easy for women to have an active sex life while avoiding unwanted pregnancy.\(^5\) Abortion became a legal option nationwide in 1973, providing a backstop where contraception failed or was not used.\(^5\)

After the Supreme Court decided *Roe v. Wade*, many states and sometimes the federal government sought to circumscribe the right of pregnant people to obtain an abortion. The Supreme Court’s decision in *Dobbs* rests on nearly fifty years of attempts to delegitimize abortion rights.\(^5\) Common practices included questioning a woman’s decisional capacity and autonomy,\(^5\) appealing to stereotypical notions of presumptively appropriate attitudes toward fetuses and childrearing,\(^5\) and

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\(^5\) See, e.g., Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (holding a provision requiring spousal consent for an abortion unconstitutional, as “cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy”) (internal quotations omitted); City of Akron v. Akron Cent. for Reprod. Health, Inc., 462 U.S. 416, 444, 449–50 (1983) (holding a provision in an ordinance unconstitutional where it required the provision of specific, non-medically-related information to a patient prior to an abortion as part of the informed consent process, noting that “it is fair to say that much of the information required is designed not to inform the woman’s consent but rather to persuade her to withhold it altogether,”) and holding unconstitutional a provision requiring a 24-hour waiting period, *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 762–63 (1986) (holding that the state may not mandate information intended to discourage abortion and that is not medical information relevant to the abortion decision, *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

\(^5\) See, e.g., *Thornburg*, 476 U.S. at 764 (holding unconstitutional a statutory provision requiring that physicians performing an abortion must tell the woman that the abortion may cause “detrimental physical and psychological effects which are not accurately foreseeable,” and that “[t]here are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion.”); Gonzales v. Carhart, 550 U.S. 124, 159–60 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems
implying equivalences between fetuses and infants. More recently, anti-abortion efforts have been paired with efforts to roll back access to contraception. The Trump administration, for example, shunted Title X family planning funds from organizations offering comprehensive family planning services to organizations that emphasize natural family planning and conception enhancement. It additionally promulgated rules to make it easier for employers to refuse to cover contraceptives if they had a religious or moral objection. Efforts like these make heterosexual, non-procreational sex more difficult and dangerous.

unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.” (citation omitted). For a lucid discussion of the history of these stereotypes, see Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STANFORD L. REV. 261, 324–31 (1992) (arguing that claims in favor of fetal personhood “in fact express[] a moral judgment about a relation between mother and child, and condemning women for violating the most fundamental conceptions of the maternal role”).

57. See, e.g., Planned Parenthood of Cent. Mo., 428 U.S. at 83 (holding unconstitutional a provision of a Missouri statute requiring a physician performing an abortion to exercise requisite care to preserve the life and health of the fetus); City of Akron, 462 U.S. at 451 (holding unconstitutional an ordinance provision criminalizing the failure to dispose of aborted fetal remains “in a humane and sanitary manner,” as the phrase “suggest[s] a possible intent to mandate some sort of ‘decent burial’ of an embryo at the earliest stages of formation”) (internal quotation omitted).

58. 42 C.F.R. §§ 59.2, 59.5 (2019) (defining “family planning” as including “a broad range of acceptable and effective family planning methods and services, which may range from choosing not to have sex to the use of other family planning methods and services to limit or enhance the likelihood of conception (including contraceptive methods and natural family planning or other fertility awareness-based methods) and the management of infertility, including information about or referrals for adoption” and providing requirements for a family planning project); see also Sarah McCammon, Trump Administration Announces Sweeping Changes to Federal Family Planning Program, NPR (Feb. 22, 2019), https://www.npr.org/2019/02/22/690544297/trump-administration-proposes-sweeping-changes-to-federal-family-planning-program [https://perma.cc/C328-X48J] (discussing Trump administration Title X rule that made “any organization that provides or refers patients for abortions . . . ineligible for Title X funding to cover STD prevention, cancer screenings and contraception”); Brittni Frederiksen, Ivette Gomez, & Alina Salganicoff, Rebuilding Title X: New Regulations for the Federal Family Planning Program, KAIER FAMILY FOUND. (Nov. 3, 2021), https://www.kff.org/womens-health-policy/issue-brief/rebuilding-title-x-new-regulations-for-the-federal-family-planning-program/ [https://perma.cc/6PS4-YVUU] (noting that, in the two years following the adoption of the rule, the rule accounted for 65% of the reduction in the number of clients served from 3.9 million to 1.5 million people). The Biden administration has since undone the rule. See id.

Laws governing abortion and ART predominantly concern the degree to which we respect the agency of competent adults to intentionally enter, or not enter, into relationships that entail both moral and legal rights and responsibilities. The decision to become a parent is a serious matter. It involves the creation of a relationship with a new human who has no capacity in any sense of the word to make a reciprocal choice, who needs complete and constant care for all their needs, and who enjoys a legal duty of care from their parent. While that legal duty continues during the child’s minority, the practical, emotional, and social commitment is lifelong. People considering either abortion or ART are, in both cases, contemplating decisions that concern the conception or termination of what may become a child. These are medical decisions impacting parenthood.

When people have sex, on the other hand, they usually are not considering medical care or parenthood at all. Sex mediates relationships in a wide range of ways, and people have sex for a wide range of reasons.\textsuperscript{60} One study surveying people on why they have sex unsurprisingly found that people most often have sex because they are physically attracted to their partner, because they want to show affection to their partner, and because sex is physically pleasurable, is fun, or feels good.\textsuperscript{61} But there are other reasons people have sex apart from the ones many of us might expect. For example, people sometimes have sex because they want to please their partner, accede to a partner’s expectations, make up after a fight, feel loved, or try out new sexual techniques.\textsuperscript{62} Notably, the study found that procreation was usually irrelevant as an impetus for sex.\textsuperscript{63} Only rarely do most people have sex with an intent to procreate.\textsuperscript{64}

Decisions concerning parenthood through sexual intercourse, when they are consciously made, typically happen not at the time of sex but rather at another time, often (but not always) when a person either seeks to secure and use contraception or does not do so.\textsuperscript{65} But contraception is not always easy to access or possible to use, sometimes requires the


\textsuperscript{61}. Id. at 481.

\textsuperscript{62}. Id.

\textsuperscript{63}. Id. at 483, 488 (finding “I wanted to have a child” among the 50 least common reasons that male study volunteers, who ranged from age 17–52 and were recruited from both the university and the community, engaged in sex in the past).

\textsuperscript{64}. Id.

\textsuperscript{65}. See, e.g., Lawrence B. Finer & Mia R. Zolna, \textit{Declines in Unintended Pregnancy in the United States: 2008–2011}, 374 New Eng. J. Med. 843, 850–51 (2016) (stating that “[t]he incidence of sexual activity tends not to change much among adults, and among women 18 to 19 years of age, the decline in the rate of unintended pregnancy occurred despite virtually no change over the course of the period studied in the percentage who reported ever having sex” and hypothesizing based on evidence that “[a] likely explanation for the decline in the rate of unintended pregnancy is a change in the frequency and type of contraceptive use over time”).
cooperation of others who are not always willing to provide it, and does not always work as intended. The groups least likely to have solid access to reliable contraception, know how to use it, or trust its effects, are often the ones most likely to experience unintended pregnancy: low-income women, young adults, and Black women. These groups are also disproportionately likely to obtain an abortion, either in relation to other demographic groups obtaining an abortion, or in relation to those giving birth.

66. See, e.g., Rebecca J. Kreitzer, Candis Watts Smith, Kellen A Kane, & Tracee M Saunders, Affordable but Inaccessible? Contraception Deserts in the US States, 46 J. HEALTH POL. POLICY & L. 277, 288, 299 (2021) (finding that “[t]he proportion of reproductive-age residents who would have difficulty attaining access to Title X resources ranges from a low of 17% in New York and California to just more than 50% in Indiana and Texas[,] where difficulty attaining access ranged from needing to drive more than 15 minutes to access contraception via a Title X-funded program in a metropolitan area to 60 minutes in an isolated community); Tiara C. Willie, Kamila A. Alexander, Amy Caplon, Trace S. Kershaw, Cara B. Safo, Rachel W. Galvao, Clair Kaplan, Abigail Caldwell, & Sarah K. Calabrese, Birth Control Sabotage as a Correlate of Women’s Sexual Health Risk: An Exploratory Study, 31 WOMEN’S HEALTH ISSUES 157, 160 (2021) (finding that one out of six women in their sample of 675 women reported birth control sabotage by sexual partners); Ann M. Moore, Lori Frohwirth, & Elizabeth Miller, Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States, 70 SOC. SCI. & MED. 1737 (2010) (providing a qualitative assessment of contraceptive sabotage and post-pregnancy coercion); Aparna Sundaram, Barbara Vaughan, Kathryn Kost, Akinrinola Bankole, Lawrence Finer, Susheela Singh, & James Trussell, Contraceptive Failure in the United States: Estimates from the 2006–2010 National Survey of Family Growth, 49 PERSP. ON SEXUAL & REPROD. HEALTH 7, 11 (2017) (finding withdrawal to have the highest 12-month failure rate (20%), followed by male condoms (13%), the birth control pill (7%), injectable (4%), and long-acting, reversible contraceptives (1%), with an overall probability of failure of 10%).

67. See, e.g., AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. NO. 615, ACCESS TO CONTRACEPTION, (Jan. 2015), https://www.acog.org/-/media/project/acog/acogorg/clinical/files /committee-opinion/articles/2015/01/access-to-contraception.pdf [https://perma.cc/2XGU-APJ4] (noting that “[t]he emphasis on abstinence-only education may have in part led to widespread misperceptions [in young people] of contraceptive effectiveness, mechanisms of action, and safety that can have an effect on contraceptive use and method selection” and that “low-income women face health system barriers to contraceptive access because they are more likely to be uninsured, a major risk factor for nonuse of prescription contraceptives”); Terri-ann Monique Thompson, Yves-Yvette Young, Tanya M. Bass, Stephanie Baker, Oriaku Njoku, Jessica Norwood, & Monica Simpson, Racism Runs Through It: Examining the Sexual and Reproductive Health Experience of Black Women in the South, 41 HEALTH AFFS. 195, 196, 198–200 (2022) (reporting that Black women often mistrust the medical system and finding that Black study participants living in predominantly Black neighborhoods or low income areas reported that reproductive services were often located elsewhere and could be both difficult and expensive to access. Neighborhood facilities “provided lower-quality care in comparison with more expensive hospitals or facilities.” Study participants reported that they felt their health care providers ignored their pain and were dismissive of them); Sundaram et al., supra note 66, at 11–12 (finding that younger women, Black women, and lower-income women had higher contraceptive failure rates).

68. Rachel K. Jones & Doris W. Chiu, Characteristics of Abortion Patients In Protected and Restricted States Accessing Clinic-Based Care 12 Months Prior to the Elimination of the Federal Constitutional Right to Abortion in the United States, 55 PERSP. ON SEXUAL & REPROD. HEALTH 80 (2023) (finding that people in their 20s constitute 60.4% of those obtaining abortions; 72.7% are poor or near-poor; and 33.4% are Black). See also Katherine Kortsmit, Antoinette T. Nguyen, Michele G. Mandel, Lisa M. Hollier, Stephanie Ramer, Jessica Rodenhizer, & Maura K. White, 72 MORBIDITY &
However, the laws governing parenthood do not consider these matters. There is a significant discrepancy in how state law treats parentage resulting from sexual reproduction as compared to parentage resulting from use of assisted reproductive technologies. As Melanie Jacobs and others have analogized in different contexts, those engaging in sexual intercourse are treated as having assumed the risk of reproduction through the process. If a child is conceived and born through sexual intercourse, the gamete-contributors are legally regarded as parents, regardless of the individuals’ respective intents. Conversely, intent is treated quite differently concerning a child conceived through ART. Under both the 2002 and 2017 Uniform Parentage Acts, for example, both the consent and intent of the person or people responsible for bringing about the creation of a new human being are typically prioritized. In some cases, a party’s consent and intent are controlling, not at the time a person or couple agreed to use ART to create embryos, but rather at a later time, after embryos are created but before they are used in a transfer that results in a pregnancy. Where the would-be parents later disagree about the procreative use of stored embryos in the absence of a controlling contractual provision, courts

MORTALITY Wkly. Rep. 1, 17, 19 (2023) (finding both that the ratio of abortions to births was highest in 2021 for those under 15 years of age, and diminished with age and that the ratio of abortions to births was highest for Blacks).

69. For a nuanced discussion of the legal treatment of parenthood in the context of coital versus assisted reproduction, see generally NeJaime, supra note 18.


71. Id. Jacobs, writing a decade before Dobbs and looking specifically at the issue of child support, considered this issue solely in the male context: “[I]f a man has sex with a woman, regardless of his intent not to conceive, he will be liable for child support if a child is born.” Id.

72. See, e.g., Kimberly M. Mutcherson, Procreative Pluralism, 30 BERKELEY J. GENDER L. & JUST. 22, 58 (“Unlike in coital reproduction where almost half of pregnancies that occur in a given year in the United States are unplanned, pregnancies created with assisted reproduction are pregnancies of intention.” (citation omitted)).

73. See, e.g., UNIF. PARENTAGE ACT § 703 (2002) (“A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.”); UNIF. PARENTAGE ACT § 703 (2017) (“An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of that child.”); UNIF. PARENTAGE ACT §§ 801, 807 (2002) (concerning intent and consent in gestational surrogacy contracts and the method of judicially confirming the parentage of the intended parents following the child’s birth); UNIF. PARENTAGE ACT §§ 804 & 809 (2017) (concerning intent and consent in gestational surrogacy contracts and providing that, upon the birth of the child, the intended parents are parents by operation of law and that neither the surrogate nor her spouse, if any, are the parents); UNIF. PARENTAGE ACT § 811 (2017) (providing means for an order of parentage “before, on, or after the birth of a child conceived by assisted reproduction under a gestational surrogacy agreement”).

74. See, e.g., UNIF. PARENTAGE ACT § 706(b) (2002) (providing a means of withdrawing consent for reproduction after the creation of an embryo but before its transfer); UNIF. PARENTAGE ACT § 707 (2017) (same).
typically consider the intent of the individual now seeking to avoid procreation, either by prioritizing that intent or balancing it in relation to other interests.\(^75\)

Legal treatment of parenthood through sexual reproduction is quite different than our treatment of most other sorts of relationships that entail legal rights and duties.\(^76\) Most civil legal relationships are entered into intentionally by participating parties: contracting for delivery of goods, engaging in a fiduciary relationship, marrying, or forming a business partnership. Parenthood through ART follows a similar paradigm in jurisdictions that have adopted relevant sections of the 2017 UPA.\(^77\)

Parenthood through sex need not work that way. Apart from the law governing the establishment of parental rights and duties following conception and birth from sex between unmarried individuals, tort law is one of the only other major areas of law that creates private legal obligations and rights between parties who in many cases never intended to interact, or did not intend to do so in the way that actually happened.\(^78\)

Compared to the legal treatment of relationships in other contexts, the law regarding the creation of the parent-child relationship through sexual reproduction is anomalous. The parent-child relationship, when wanted, can be one of the most formative and important ones we experience.\(^79\) Yet when unwanted, the law can treat the parties involved as if they are liable for damages incurred through the assumption of risk. Some states are taking this further post-Dobbs by doubling down on

\(^{75}\) See, e.g., Davis v. Davis, 842 S.W.2d 599, 604 (Tenn. 1992) (“Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.”); In re Marriage of Rooks, 429 P.3d 579, 593–94 (Colo. 2018) (listing a party’s desire to avoid procreation as one factor among several others to balance); Jocelyn P. v. Joshua P., 250 A.3d 373, 404–05 (Md. 2021) (same).

\(^{76}\) Consider, for example, the creation of rights and duties via contract, or in property transfers, or through entering into a principal/agent relationship. For one specific example, see, e.g., Jacobs, supra note 70, at 494–95, (contrasting the importance of intent to legal determination of fatherhood in the context of ART versus coital reproduction).

\(^{77}\) See supra notes 46–50 and associated text.

\(^{78}\) See, e.g., Courtney G. Joslin, Autonomy in the Family, 66 UCLA L. REV. 912, 920–21, 931 (2019) (noting that, at least outside the context of parentage, nonmarital intimate partners have been treated in most respects by the law as legal strangers); John C.P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 TEX. L. REV. 917, 918 (noting that tort law “defines duties to refrain from injuring (or to protect from injury) that are owed by certain persons to others: duties that, when breached, constitute wrongs to those others, as opposed to wrongs to the world[,]” and that, “precisely because torts are private wrongs, they provide the basis for a private response . . . . For a wrong to be a tort it must in principle generate for its victim a private right of action: a right to seek recourse through official channels against the wrongdoer”) (emphasis omitted).

\(^{79}\) See, e.g., Justin Christopher Coulson, Lindsay G. Oades, & Gerard J. Stoyles, Parents' Subjective Sense of Calling in Childrearing: Measurement, Development and Initial Findings, 7 J. POSITIVE PSYCH. 83, 90 (2011) (finding that “[p]arents’ sense of calling correlated positively with pleasure, importance, and satisfaction of parenting, and negatively with burden of parenting”).
imposing accidental, unintentional parenthood on people. Currently, people who unintentionally father a child have no legal means to avoid biological parenthood in the event of procreation where their partner brings the conception to term.\(^80\) Nor can they generally avoid legal parenthood, should the other parent keep the child and successfully seek either child support or cash welfare.\(^81\) Conversely, before Dobbs, people who can become pregnant had a constitutional right to abortion that at least theoretically allowed them to act on their intent to avoid legal parenthood even after conception.\(^82\) Post-Dobbs, however, all bets are off in many states.\(^83\)

Co-extensive with the post-Dobbs landscape is the ascendancy of what John Robertson called a “strict traditionalist” approach to reproduction.\(^84\) In treating all pregnancies as “gifts from God,” the strict

\(^80\) For example, custodial parents typically must identify the other biological parent of their child(ren) as a condition of obtaining cash welfare, and the federal government penalizes states for noncompliance. See, e.g., Jessica Tollesrump, Cong. Rsch. Serv., RS22380, Child Support Enforcement: Program Basics 5–6 (2023), https://sgp.fas.org/crs/misc/RS22380.pdf (https://perma.cc/EQN2-D3HX) (“TANF applicants and recipients are legally required to cooperate in establishing paternity or obtaining support payments, and may be penalized for noncooperation”); 42 U.S.C. § 609(8)(a) (providing for the reduction of federal TANF funds in states that fail to meet the specified paternity establishment percentages). Attempts to evade support may result in a variety of enforcement actions, including state criminal sanctions. Tollesrump, supra note 80, at 8.


\(^82\) See Roe v. Wade, 410 U.S. 113, 153 (1973) overruled by Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022); Planned Parenthood v. Casey, 505 U.S. 833, 886 (1992) overruled by Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022). Additionally, the other gamete provider had no right to stop them. See, e.g., Jones v. Smith, 278 S.2d 339, 344 (Fla. Dist. Ct. App., 4th Dist. 1973) (holding that, even if putative father had standing to pursue his claim to prevent woman from obtaining an abortion, “a woman has a fundamental right to determine whether or not to bear a child . . . and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.”) (internal citations omitted) (emphasis omitted); Rothenberger v. Doe, 374 A.2d 57, 58 (N.J. Ch. 1977) (holding that a woman’s right to an abortion “is not conditioned upon consent of the husband or natural father.”); Coleman v. Coleman, 471 A.2d 1115, 1120 (Md. 1984) (“Although a woman may not be constitutionally entitled to an “abortion on demand,” she is most definitely entitled, as a matter of right, to a medically induced abortion during the first trimester, notwithstanding the objections of the State or any other person, firm, corporation or association.”); Steinhoff v. Steinhoff, 531 N.Y. S.2d 78, 79 (Sup. Ct. 1988) (“The state and the husband cannot interfere with the right afforded the defendant wife by Roe v. Wade until viability. It necessarily follows that I cannot.”).


traditionalist approach prioritizes the right of a fetus to be gestated to term and be born.\textsuperscript{85} Fetal right to life becomes paramount. Abortion opponents espouse this view vociferously, using it to distinguish the right to an abortion from other privacy-based rights,\textsuperscript{86} advocate for exception-free criminal abortion bans,\textsuperscript{87} and argue for an acceptance of “natural,” biologically-based gender roles where the maternal reproductive capacity and submission to fetal needs are extolled.\textsuperscript{88}

One would think that abortion opponents who make such arguments would accordingly seek real solutions to support the health, finances, and education of people who give birth and their children so they can reach their fullest potential.\textsuperscript{89} But as others have amply noted, this is usually not the case.\textsuperscript{90} Naomi Cahn and June Carbone observe that “the states that restrict abortion rank among the worst in the country for

\begin{itemize}
    \item [85] Id. at 442–43; see also Erika Bachiochi & Rachel N. Morrison, Dobbs, Equality, and the Contested Meaning of Women’s Rights, TX REV. L. & POL. (forthcoming 2024) (pre-publication draft at 14–15), https://ssrn.com/abstract=4632976 [https://perma.cc/44LN-FX7P] (arguing that 19th century women’s rights activists “played an important role in their era’s widespread condemnation of abortion as the unjust killing of a vulnerable human being, even as they agitated for their full civil and political rights. Understanding the nature of their views bolsters the Dobbs Court’s conclusion that no one, before Roe v. Wade itself, thought the Fourteenth Amendment provided a positive right to abortion”).
    \item [86] Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228, 2258 (2022) (“What sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is something that both those decisions acknowledged: Abortion destroys what those decisions call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’”).
    \item [87] See, e.g., Idaho Republican Party Platform, Art. XIV, Sec. 3 (2022), https://idgop.org/wp-content/uploads/2022/08/2022-24-Idaho-Republican-Party-Platform-1.pdf [https://perma.cc/DQH9-ZA4X] (“We affirm that abortion is murder from the moment of fertilization. All children should be protected regardless of the circumstances of conception, including persons conceived in rape and incest. The federal judiciary played the tyrant in dozens of Supreme Court pro-abortion opinions since Roe v. Wade up to the Dobbs decision, and Idaho has the sovereign authority to defy the federal judiciary should they once again propose the fiction that abortion is a federal constitutional right. We support the criminalization of all murders by abortion within the state’s jurisdiction. We also support strengthening the Idaho Constitution’s declaration of the right to life for preborn children.”).
    \item [88] See, e.g., Erika Bachiochi, Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights, 54 HARV. J.L. & PUB. POL’Y 889, 943 (2011) (analogizing the relationship of a pregnant woman to her fetus as that of a trustee to a beneficiary).
    \item [89] See, e.g., Mary Ziegler, The Possibility of Compromise: Antiabortion Moderates After Roe v. Wade, 1973–1982, 87 CHICAGO-KENT L. REV. 571, 579, 583 (2012) (discussing the short-lived American Citizens Concerned for Life’s advocacy in the 1970s for “more medical assistance for the unwed mother and her baby, programs to keep pregnant girls in school, and… provision for daycare centers and training” (internal quotation omitted)).
\end{itemize}
the well-being of their children, while those that enable abortion access have higher levels of expenditures and child well-being.91 In many of the former states, Black women and low-income women disproportionately need abortion access.92 At the same time, Black women in those states have disproportionately low access to care, and may be less likely to be referred for abortion care despite wanting an abortion.93 Insufficient control of family planning restricts their control in charting most other aspects of their lives.94

The imposition of unwanted, unintended biological and legal parenthood on people is backward. It elevates the legal rights of the fetus—an entity that for most of pregnancy cannot survive ex-utero—over those of the person gestating it. In the process, it egregiously restricts the legal rights of the person—usually a woman—gestating the fetus, and makes that person subservient to the fetus’s needs, regardless of whether that person ever intended the pregnancy or wants to keep it.95

91. Naomi Cahn & June Carbone, Supporting Families in a Post-Dobbs World: Politics and the Winner-Take-All Economy, 101 N.C. L. REV. 1543, 1572 (2023). In their child well-being component, they include 16 indicators of economic, educational, health, and community well-being, including the share of children in poverty, reading and math proficiency, low birth weight, and teen births, among others,” while the total spending per child included “areas of economic support, education, health, and community/infrastructure (e.g., parks and libraries)” Id. at 1572, n.339 (quoting Isabel V. Sawhill & Morgan Welch, The End of Roe Will Create More Inequality of Opportunity for Children, BROOKINGS INST. (June 30, 2022), https://www.brookings.edu/blog/up-front/2022/06/30/the-end-of-roe-will-create-more-inequality-of-opportunity-for-children [https://perma.cc/8T5G-2DCZ]).


93. See id.; see also Kristen Nobel, Alina A. Luke, & Whitney S. Rice, Racial Disparities in Pregnancy Options, Counseling, and Referral in the US South, 58 HEALTH SERVS. RES. 9, 12 (2023) (finding that, among the study participants, Black participants had a higher likelihood of wanting an abortion referral yet not receiving one).

94. See, e.g., DIANA GREENE FOSTER, THE TURNAWAY STUDY 174-77 (2020) (discussing changes and restrictions in the life plans of women who sought an abortion too late and had to give birth).

95. For evidence of this, consider the district court’s decision in Texas v. Becerra, 623 F. Supp. 3d 696, 731–33 (N.D. Tex. 2022). There, the court rejected guidance on the Emergency Medical Treatment and Active Labor Act (EMTALA) from the federal Department of Health and Human Services. The guidance provided in relevant part that EMTALA preempts state law prohibiting abortions when a patient presenting to the emergency department requires an abortion to stabilize her condition within the meaning of the law. See CTR. FOR CLINICAL STANDARDS & QUALITY, CTRS. FOR MEDICARE & MEDICAID SERVS., QSO-22-22-HOSPITALS, REINFORCEMENT OF EMTALA OBLIGATIONS SPECIFIC TO PATIENTS WHO ARE PREGNANT OR ARE EXPERIENCING PREGNANCY LOSS (revised Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/J7M5-K5GD]. The district court noted that EMTALA ‘defines ‘emergency medical condition’ to include conditions that ‘place[e] the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy.’ § 1395dd(e)(1)(A)(i) (emphasis added).” Becerra, 623 F. Supp. 3d at 726. It then interpreted that statement to mean that health care providers subject to EMTALA have duties to both the pregnant person and the fetus. It stated that,
Failure to respect an unwillingly pregnant person’s decision not to become a parent is insulting and damagingly paternalistic, and it fetishizes the fetus while failing to protect it. The pregnant person, the fetus they are carrying, and any other children they already have are more likely to experience significant increases in adversity, poverty, inadequate care and attention, neglect, abuse, and failure to make and achieve lifetime goals, among other ills. These headwinds often persist from one generation to the next. This is certainly the case with teen parenthood. Older women with mistimed or unplanned pregnancies also suffer from the imposition of unwanted, unintended, and
of the person and their family’s future prospects. Women of color and low-income women are especially at risk for unwanted or mistimed pregnancies. Robust state and federal social supports can help ameliorate some of these dangers, but as discussed in more detail in Part III, the states most likely to force people to carry unwanted pregnancies to term are precisely those with the most meager social supports and the strongest political opposition to improving them.

PART III: INTENTIONAL PARENTHOOD AND CONTINGENT FETAL PERSONHOOD

In the early days of American common law contraception and abortion were more limited and less reliable. Now, there is no need for an

100. See Ellen Wiebe et al., Delayed Motherhood, 58 CANADIAN FAMILY PHYSICIAN e588, e592–93 (2012), https://www.cfp.ca/content/cfp/58/10/e588.full.pdf [https://perma.cc/9NBL-AHYX] (finding that women age 33 and older were more likely to cite their age or physical health, or that they finished their families, than younger women seeking abortions); Sarah Miller et al., The Economic Effects of Being Denied an Abortion 14, 25, 35–37 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26662, 2020) (examining the credit ratings of a cohort of women denied an abortion versus those who received one, where “estimates are ... more representative of older women since younger women are less likely to have established credit records during the pre-period in order to be included in this analysis”).

101. For a recent example, one need look no further than the case of a Texas woman whose now ex-husband is suing three of her friends for having allegedly helped her obtain a medication abortion in 2022. The woman allegedly texted her friends that “I know either way he will use it against me ... [i]f I told him before, which I’m not, he would use it as a way to try to stay with me. And after the fact, I know he will try to act like he has some right to the decision.” Eleanor Klibanoff, Three Texas Women Are Sued for Wrongful Death After Allegedly Helping Friend Obtain Abortion Medication, TEXAS TRIBUNE (Mar. 10, 2023), https://www.texastribune.org/2023/03/10/texas-abortion-lawsuit/ [https://perma.cc/9MUW-Y9VU].

102. See, e.g., WILLIAM D. MOasher ET AL., INTENDED AND UNINTENDED BIRTHS IN THE UNITED STATES: 1982 – 2010 (U.S. Dept’t of Health & Hum. Serv. 2012), https://stacks.cdc.gov/view/cdc/12393/cdc_12393_DS1.pdf [https://perma.cc/NV4W-JRKS] (finding that between 2006 and 2010, 22% of births to non-Hispanic whites were unplanned or mistimed, as compared to 54% of births to Hispanics and 35% to non-Hispanic Blacks).


unwillingly pregnant person to have to carry a pregnancy to term, given the safe and easy medical and surgical means to avoid this outcome. Insufficiently protected heterosexual sex leading to a viable pregnancy, in the absence of any desire on the part of the pregnant person to keep the pregnancy, should not be a sufficient ground for creating a parent-child relationship. People commonly change aspects of their biological conditions. People undergo cosmetic alterations such as dying their hair or getting a tattoo or plastic surgery. They have medical or surgical alterations for natural disease processes such as diabetes, prostate cancer or heart disease. Most people consider these modifications to be beneficial: They allow for greater control over their existence, rather than allowing nature to take its course. This same element of control can, and should, extend to family formation. People in the United States have used medical means for hundreds of years to avoid or end unwanted or medically inadvisable pregnancies. Medical means have

105. Katherine Schaeffer & Shradha Dinesh, 32% of Americans Have a Tattoo, Including 22% Who Have More Than One, PEW RSCH. CTR. (Aug. 15, 2023), https://www.pewresearch.org/short-reads/2023/08/15/32-of-americans-have-a-tattoo-including-22-who-have-more-than-one/ (https://perma.cc/DB3Q-WR4Q) (finding that 41% of Americans age 18-29 had at least one tattoo, and 46% of those age 30-49).


107. CBDS. FOR DISEASE CONTROL & PREVENTION, NATIONAL DIABETES STATISTICS REPORT (2021), https://www.cdc.gov/diabetes/data/statistics-report/index.html [https://perma.cc/JAX3-P9SB] (finding that 11.6% of American adults have diabetes, 8.9% of whom had been diagnosed. Of the latter, 78.8% reported having a regular source of diabetes care).

108. Steve Kemper, Defining the Landscape of Prostate Cancer Treatment, CENTERPOINT MAG., Spring/Summer 2022, at 5, https://files-profile.medicine.yale.edu/documents/2aad130b-4d56-47ad-99be-410c47882c1 [https://perma.cc/29JV-A22L] (stating that more than 95% of prostatectomies in the United States are performed using robotic laparoscopic surgery).

109. Salim S. Virani et al., Heart Disease and Stroke Statistics — 2020 Update: A Report from the American Heart Association, 141 CIRCULATION e139, e579 (2021) (estimating that, in 2014, “480[,]000 percutaneous transluminal coronary angioplasties, 371[,]000 inpatient bypass procedures, 1[,]016[,]000 inpatient diagnostic cardiac catheterizations, 86[,]000 carotid endarterectomies, and 351[,]000 pacemaker procedures were performed for inpatients in the United States”) (internal citation omitted).


111. See, e.g., LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 133–34 (1997) (observing that, by the 1930s, many abortions were performed safely by physicians in settings similar to other health
been more recently used to create pregnancies where coital reproduction is difficult or impossible. In keeping with these practices, states should retire their outdated notions of automatic, accidental parenthood as a result of sexual intercourse in favor of a different standard, one based on the intent of each of the parties involved in the pregnancy, no matter how that pregnancy is achieved.

Toward that end, the fetus’s legal status should turn not on conception or birth but rather on the intent of the parties involved in bringing the fetus into being. Generally, a fetus that is intended and wanted by the parties who brought it into being, whether through sex or ART, would enjoy the legal protections extended to fetuses in the jurisdiction in which its gestator resides. A fetus conceived through coitus that is unwanted by its gestator, on the other hand, would have no legal status, and could be aborted.

Before going further, a note about the term “intent” is warranted. In health statistics and medical literature, the “intendedness” of a pregnancy is often gauged by asking research subjects about their desire to become pregnant before the pregnancy occurred, and then classifying the pregnancy as either “intended” prior to conception, “mistimed,” or “unwanted” based on the response. The sense of “intent” used here includes this sense, both with respect to coital pregnancies and those achieved through ART. It is more expansive, however, in that the requisite intent could also be either formed or shed after conception but prior to birth. For example, a person might not have intended to conceive a pregnancy prior to conception, but after learning of the pregnancy, decide to keep it. Such a pregnancy becomes intended after the fact. Conversely, a person might initially have intended to conceive a pregnancy, but, post-conception, have second thoughts. In such a case, the person would have a window of time prior to birth to opt out of legal parenthood as discussed in more detail below. If acting as a surrogate or in certain other cases, a pregnant person might not intend to become a legal parent at all but nevertheless intend to gestate the pregnancy through birth, if successful, and either give the resulting child to the child’s intended parents or put the child up for adoption. Conceivably, some pregnant

care settings, at least one “birth control club” existed in New Jersey that entitled the approximately 800 members to regular examinations and to abortions for a further fee when needed, and that the use of birth control gained substantial legitimacy.

112. See generally Meaghan Jain & Manvinder Singh, Assisted Reproductive Technology (ART) Techniques, STATPEARS (2022) (discussing different methods of ART); see also supra note 16 and associated text.

people may not establish any clear intent regarding the pregnancy at all. These people would become a legal parent upon birth unless they give the infant up for adoption.

Consider the implications of an intentional parenthood policy in the context of sexual reproduction. Most immediately, when a pregnant person does not intend to become a parent, they would have the right to terminate their pregnancy. That right could be technically unlimited in any respect, just as it is in several states. But in practice, medical care providers in those states rarely perform abortions post-viability. The rate of post-viability abortion in those states is only slightly higher than in other states where the law restricts post-viability abortions to situations where the life or health of the pregnant person is at stake, or where the fetus has a condition that is incompatible with life.

Intentional parenthood does not strictly require that abortion be permitted at any stage of gestation for any reason. A state could arguably restrict abortions to earlier stages of pregnancy and remain consistent with the general principle of intentional parenthood. To keep intentionality intact rather than rendering it a merely theoretical concept, however, abortions would need to remain available at least through twenty or more weeks’ gestation. Most people who do not want to keep their pregnancies terminate them within the first thirteen weeks of

114. See Katherine Kortsmiit, Antoinette T. Nguyen, Michele G. Mandel, Elizabeth Clark, Lisa M. Hollier, Jessica Rodenhizer, & Maura K. Whiteman, Abortion Surveillance – United States, 2020, 71 MORBIDITY & MORTALITY WEEKLY REPT. tbl.14 (2022), https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm [https://perma.cc/FFN2-KSH6] (finding that 0.9% of abortions were performed at or after 21 weeks’ gestation in the United States).

115. See id. Given the small percentage of abortions that take place then, one could argue, for example, that restricting abortion after 23-weeks’ gestation with limited exceptions would give nearly everyone who would want an abortion sufficient time to make that decision.
gestation. Earlier abortions are safer, easier to effectuate, and can be done before the pregnancy becomes apparent to others. Only about seven percent of abortions are performed between fourteen and twenty weeks’ gestation, and only about one percent thereafter. As for these later terminations, studies have showed that some pregnant women realize only belatedly that they are pregnant, or have other reasons for not seeking an abortion until later in their pregnancy. For some, conditions like irregular menstrual cycles or higher body/mass indices can mask a pregnancy. For others, domestic conflict and violence, state-level abortion restrictions, inexperience in reproductive matters, and general indecision about whether to have an abortion can delay the process. These individuals should have no lesser right to choose whether to become a parent than any other.

A. Implications for Pregnant People

A switch to an intentional parenthood model would not necessarily require any change from what most pregnant people do today. If a pregnant person wished to remain pregnant and become a parent, they would do all the things they currently do. Similarly, if they did not want

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119. Id. (finding that 93.1% of abortions in 2020 took place at or before 13 weeks’ gestation, with the large majority (80.9%) taking place at or before 9 weeks).

120. See, e.g., Cynthia C. Harper, Jillian T Henderson, & Philip D Darney, Abortion in the United States, 26 ANN. REV. PUB. HEALTH 501, 505 (2005) (reporting that one study “estimated the relative risk of abortion-related mortality at higher gestations compared with abortions at 8 weeks or less. The relative risk was 14.7 at 13–15 weeks gestation, 29.5 at 16–20 weeks, and 76.6 at 20+ weeks (95% CI 32.5, 180.8).”).

121. Diana Greene Foster & Katrina Kimport, Who Seeks Abortions at or After 20 Weeks?, 45 PERSPS. ON SEXUAL & REPROD. HEALTH 210, 210 (2013).

122. Foster & Kimport, supra note 121, at 215–16. See also Matthew B. Barry, CONG. RSCS RSVR., R45161, ABORTION AT OR AFTER 20 WEEKS’ GESTATION: FREQUENTLY ASKED QUESTIONS 4 (Apr. 30, 2018), https://crsreports.congress.gov/product/pdf/R/R45161 (“A woman might experience a delay in seeking or receiving an abortion for a variety of reasons, such as late recognition of pregnancy, inability to obtain transportation, and difficulty in raising the necessary funds (e.g., for medical services, transportation and hotel costs, and child care)” (citing the Turnaway Study)).

123. See, e.g., Diana G. Foster et al., Predictors of Delay in Each Step Leading to an Abortion, 77 CONTRACEPTION 289, 290 (2008) (finding that “having a body mass index in the obese range” and “[b]eing unsure of the date of the last menstrual period” were both associated with delay in recognizing pregnancy and thus in taking a pregnancy test).

124. Foster & Kimport, supra note 121, at 215–17; see also Barry, supra note 122, at 5.

to continue with their pregnancy, they could abort it or, as only a minuscule number of people currently choose to do, opt to continue the pregnancy and give the resulting baby up for adoption.\footnote{See, e.g., Kalea Benner, Legalized Orphans: Parental Relinquishment to Child Welfare (July 2009) (Ph.D. dissertation, University of Missouri-Columbia) (on file with author), https://pdfs.semanticscholar.org/279e/flee6fe631a485dab5abbdec67e632f62692.pdf [https://perma.cc/4PV3-FFRM] (finding that, out of 798,580 children in alternative care in 2006, only 51,984 had been voluntarily relinquished by their parents); see also CHILD WELFARE INFORMATION GATEWAY, VOLUNTARY RELINQUISHMENT FOR ADOPTION (2005), https://www.childwelfare.gov/pubPDFs/s_place.pdf [https://perma.cc/9K3P-3UQP] (estimating that, if 1995 statistics held true in 2003, then only about 14,000 children were voluntarily relinquished for adoption that year); DEPT OF HEALTH AND HUM. SERV., THE AFCARS REPORT (2022), (finding that out of the 206,812 children entering foster care in 2021, only 1,789 were there because of relinquishment); Kortsmit et al., supra note 68, at 4 (the CDC estimates that 625,978 abortions occurred in 2021, the most recent year for which statistics are available).} Those carrying a pregnancy as a surrogate would similarly continue their pregnancies under most circumstances and give the resulting child or children, if any, to the intended parent(s).

In a small fraction of cases involving coital pregnancies, an intentional parenthood model would yield a different result. Specifically, where the other gamete-contributor did not know about the pregnancy, and where the pregnant person wanted the other gamete-contributor to be involved in the intended child’s life, an intentional parenthood framework would differ from the current mode. As discussed in Part II, current law imposes legal parenthood on people who become fathers through coital reproduction, whether or not they intended to sire a child.\footnote{See supra notes 80–81 and associated text.} For these individuals, a mere genetic tie currently provides the gestator with a basis to assert a claim for child support against the other gamete-contributor, regardless of that person’s interest in becoming a parent. An intentional parenthood framework, however, would allow the other gamete-provider to accept or reject parental rights and responsibilities before birth, just as the gestator could choose to continue the pregnancy or abort it. Under an intentional parenthood framework, the pregnant person would need to notify the other gamete-contributor of the pregnancy if, and only if, they wanted the other gamete-contributor to have a parental relationship with the child-to-be.\footnote{Currently, cash welfare programs like Temporary Aid to Needy Families require custodial parents seeking assistance to identify the non-custodial parent for the purpose of obtaining child support, and reduce or eliminate their benefits for failing to do so. See supra notes 80–81 and associated text. This requirement would need to be amended or eliminated under the framework provided in this article.} This notice would need to take place sufficiently far in advance of the birth for the other
gamete-provider to have a reasonable amount of time to decide whether they, too, want to become a legal parent of the intended child. In most cases, notice would happen naturally, as part of the relationship between the parents-to-be. But occasionally—for example, if the pregnancy occurred in a relationship that was ending, or that was abusive, or as a result of a casual encounter—the pregnant person might prefer not to inform the other gamete-contributor. In such a case, a pregnant person could potentially avoid the awkwardness, disruption, or danger of having the other parent in their family’s lives by not informing them of the pregnancy. At the same time, they would lose any right to assert a claim for support against the other gamete-provider.

Making parenthood intentional and non-automatic for non-gestational gamete providers, and fetal personhood contingent on the intention of the gestator, could help rebalance the power between people who can become pregnant and their sexual partners in two ways. First, it would clearly establish a right to abortion for at least a reasonable period during the pregnancy without any interference from the state. Pregnant people would be fully autonomous in their decision. Pregnant people could include their partner, family, friends, and any other trusted person in their decision-making. Or they could include only their health care provider. Second, it would allow gestators to continue their pregnancy and give birth without the requirement of creating a legal tie between themselves and the other gamete-contributor for the duration of the resulting child’s minority. Power dynamics within heterosexual intimate relationships often do not favor women. This should not be surprising in a society in which gender disparities that harm women continue to exist in other

129. If there is any question regarding the identity of the other parent, the pregnant person could give notice to each potential parent whom the pregnant person chooses to notify, and a decision could be held in abeyance until after the birth and a genetic test to determine parentage. Implications regarding the rights and duties of the other parent are discussed below, in section B.

130. See, e.g., Paul Hemez & Chanell Washington, Percentage and Number of Children Living with Two Parents Has Dropped Since 1968, U.S. CENSUS BUREAU (Apr. 12, 2021), https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html (reporting that 70% of children under 18 lived with two parents in 2020, while 21% lived only with their mother and 4.5% lived only with their father).

131. While some gestating parents choose not to inform the other gamete-contributor of their parenthood today, it is unclear how common this is.

132. One need only look as far as the Covid-19 pandemic to see this. See, e.g., Allison Dunatchik, Kathleen Gerson, Jennifer Glass, Jerry A. Jacobs, & Haley Stritzel, Gender, Parenting, and the Rise of Remote Work During the Pandemic: Implications for Domestic Inequality in the United States, 35 GENDER & SOCY 194, 202 (2021) (76% of women were responsible for children’s home learning in couples where neither partner worked from home).
contexts, such as workplaces and electoral politics. The Centers for Disease Control and Prevention found in its 2016-2017 National Intimate and Sexual Violence Survey that nearly fifty percent of the women surveyed reported experiencing intimate partner violence. Intimate partner violence can encompass physical harm, emotional violence, financial control, and efforts to isolate and render the abused partner vulnerable. It also includes reproductive coercion, defined as “behavior that interferes with the autonomous decision-making of a woman, with regards to reproductive health.” Such reproductive coercion can involve birth control sabotage, pregnancy coercion, and abortion coercion, among other matters. Of course, making parenthood contingent on gestator intent would not solve the problem of intimate partner violence. But it would at least give pregnant people more agency. An intentional model for legal parenthood could alleviate pressure to abort that a non-gestating partner might otherwise exert by placing the decision to keep or abort a pregnancy solely under the purview of the pregnant person. The reduction of this pressure could help individuals in fragile or destructive relationships to make better decisions for themselves and those they care about.


138. Id.

139. Id. According to one study, “Aggregate estimates across studies suggest lifetime histories of reproductive coercion are reported by 17-45% of Hispanic women, 16-37% of African American women, 11-29% of multiracial women, 7-18% of Asian/Pacific Islander women, and 7-19% of white women.” Morgan E. PettyJohn, Taylor A. Reid, Elizabeth Miller, Katherine W. Bogen, & Heather L. McCauley, Reproductive Coercion, Intimate Partner Violence, and Pregnancy Risk Among Adolescent Women with a History of Foster Care Involvement, 120 CHILD YOUTH SERV. REV. 1, 4 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7945984/pdf/nihms-1648089.pdf. [https://perma.cc/8YR8-B4LM] (internal citation omitted).
In addition, intentional parenthood would likely have salutary effects on the state’s treatment of pregnant people by recalibrating the balance of power between people who can become pregnant and the state. Presently, some states cite a parens patriae interest in fetal welfare to criminalize or otherwise seek to control people’s actions during pregnancy. Conduct that could subject a pregnant person to the attention of the criminal justice system includes anything from drug or alcohol use to falling down a flight of stairs or getting into a fight, or even just miscarrying a fetus. Yet research suggests that pregnant women are more likely to obtain prenatal care in states where they do not risk criminalization or detention if they use illicit or intoxicating substances during pregnancy. It also suggests that pregnancy outcomes are better in states with more liberal access to contraception and abortion and more generous health care and financial support of families and children.

If a state wanted to influence women and others to keep their pregnancies under an intentional parenthood framework, it would be more effective to use carrots, not sticks. This is because, under such a framework, a state would have no legal basis to exert any parens patriae interest on a fetus’s behalf if the gestating individual did not intend to continue

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140. See, e.g., Michele Goodwin, The New Jane Crow, 53 CONN. L. REV. 543, 563–64 (2021) (detailing the ways in which “[R]ules of reproductive etiquette shape social expectations of what is legally and constitutionally owed, not to pregnant women, but to fetuses.”).


142. See, e.g., Kevin Hayes, Did Christine Taylor Take Abortion into Her Own Hands?, CBS NEWS (Mar. 2, 2010), https://www.cbsnews.com/news/did-christine-taylor-take-abortion-into-her-own-hands/ [https://perma.cc/R268-M7W5] (reporting that a pregnant woman who visited the emergency room after an altercation with her husband and subsequent fall down the stairs “said something to medical personnel that they believed meant she had intended to harm the fetus with the fall[,]” leading to her arrest and detention).

143. Farah Stockman, Manslaughter Charge Dropped Against Alabama Woman Who Was Shot While Pregnant, N.Y. TIMES (July 3, 2019), https://perma.cc/Z8E6-AzetV (reporting that pregnant woman who was shot after starting a fight, losing her fetus as a result, was initially charged with manslaughter).

144. See, e.g., Julie Carr Smyth, A Black Woman Was Criminally Charged After a Miscarriage, It Shows the Perils of Pregnancy Post-Roe, AP NEWS (Dec. 16, 2023), https://apnews.com/article/ohio-miscarriage-prosecution-brittany-watts-b8090abfb5994b8a23457b8606f127ce [https://perma.cc/T5ML-XUW2] (reporting that a woman who unsuccessfully sought care over several days at a hospital while miscarrying later gave birth to the already-dead fetus on a toilet and was subsequently charged with felony abuse of a corpse).

145. See, e.g., Angélica Meinhofer, Allison Witman, Johanna Catherine Maclean, & Yuhua Bao, Prenatal Substance Use Policies and Newborn Health, 31 HEALTH ECON. 1452, 1464 (2022) (finding, inter alia, that punitive prenatal substance use policies are likely to have a harmful effect on neonatal health, and that policies emphasizing treatment are more likely to result in maternal receipt of prenatal care).

146. See Cahn & Carbone, supra note 91, at 1574.
the pregnancy. Knowing this, states might find it more effective to support pregnant people by helping them continue their pregnancies and raise their children. For example, a state could offer financial support for those in need, subsidize childcare, or invest in effective public education. It could use positive means to encourage two-parent families rather than possibly forcing pregnant people of insufficient means to stay in undesirable relationships solely for financial reasons.

B. Implications for Non-Gestating Gamete Providers

Intentional parenthood would substantially change the agency of non-gestating gamete providers. In the (likely) large majority of cases in which they are aware of the pregnancy, the non-gestating party would be able to choose whether to become a legal parent. Non-gestating gamete contributors who do not wish to become a legal parent could opt out. This might occur via contract prior to conception, for example, where a person donates or sells gametes for procreation intended by a third party. It could also occur post-conception, where conception was an unintended and undesired consequence of sexual intercourse. In such a case, the non-gestating gamete provider should have a sufficiently long period—for example, at least three months—to decide whether they intend to assume the legal rights and duties of parenthood, should the pregnancy result in the birth of a living child. Presumably, in most cases, this decision would be made in some discussion with the gestating parent, just as most prospective parents currently discuss their pregnancies.147 Allowing non-gestating gamete providers to disavow their legal parental duties may have significant ramifications on family support and poverty.148 But this assumes that most non-custodial parents who owe child support actually pay it. The data suggest many do not. According to a 2020 U.S. Census Bureau report, twenty-six percent of children lived in “custodial parent” families in 2020.149 Fewer than half of custodial parents received the full amount of child support.

147. Many people know this from personal experience. While there do not appear to be any studies directly on point, some data suggests such a finding. See, e.g., Anjani Chandra, Gladys M. Martinez, William D. Mosher, Joyce C. Abma, & Jo Jones, Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth 59 tbl.24 (U.S. Dept. Health & Hum. Serv. 2005), https://www.cdc.gov/nchs/data/sr_23/sr23 _025.pdf [https://perma.cc/HEB9-XPG3] (in a survey of mothers, noting that, among married or cohabiting couples, the birth intent of the mother or father was unknown in fewer than 3.1% and 4.1% of cases, respectively, and that among never married, not cohabiting couples, the birth intent of one or both parents was unknown in fewer than 6.9% of cases).
148. See supra note 80.
owed by the non-custodial parent in 2017. More than a quarter of custodial parents received no payment at all. At least in some cases, it would be helpful for prospective gestating parents to know a prospective non-gestating parent’s intent prior to a child’s birth, so that they can plan accordingly.

Potential non-gestating gamete providers who want a legal relationship with the children they may sire can help assure this outcome by demonstrating in advance the value that they could add to a child’s life and the likelihood that they would help, or at least would not hinder or harm, the gestating parent in raising a child. They may be incentivized not to abuse their partner, physically or emotionally. They might participate more equitably in childcare. Men still spend far less time on average caring for children than women do. If non-gestating gamete contributors want to be taken seriously as prospective parents, it will be up to them to demonstrate their value in this regard to their sexual partner(s).

Some may object that this system would treat non-gestating gamete providers differently than gestating ones and, thus, would be inequitable. However, this disparate treatment is a consequence of the inequitable impact of childbearing and childrearing on gestating (as compared to non-gestating) parents. Ideally, this unequal treatment would be unnecessary—but much about the current state of gender relations, norms, and stereotypes must change for this to be the case. Indeed, as the next section examines, a discussion about such disparate treatment between gestating and non-gestating parents critically implicates the role of the state.

150. Id. at 4 fig. 1.
151. Id.
152. See supra note 135 and associated text. See also Katy B. Koshamannil, Valerie A. Lewis, Julia D. Interrante, Phoebe L. Chastain, & Lindsay Admon, Screening for and Experiences of Intimate Partner Violence in the United States Before, During, and After Pregnancy, 2016–2019, 113 AM. J. PUB. HEALTH 297, 299–300 (2023) (noting that, according to the Pregnant Risk Assessment Monitoring System, approximately 3.5% of pregnant women report being physically battered during pregnancy, although accurate and current data is missing in part because of underreporting).
153. See, e.g., Ariane Pailhé, Anne Solaz, & Maria Stanfors, The Great Convergence: Gender and Unpaid Work in Europe and the United States, 47 POP. & DEVELOPMENT REV. 181, 203 tbl.5 (2021) (finding that U.S. working-age mothers spent an average of 114 minutes per day on childcare, as compared to 62 minutes for U.S. working-age fathers); Lyn Craig & Killian Mullen, Parenthood, Gender, and Work-Family Time, 72 J. MARRIAGE & FAM. 1344, 1353 (2020) (U.S. fathers spent 1.3 hours per workday on childcare, as compared to 3.6 for mothers); Gema Zamarro & María Prados, Gender Differences in Couples’ Division of Childcare, Work and Mental Health During COVID-19, 17 REV. ECON. HOUSEHOLD 11, 18 (2021) (finding that 33.15% of surveyed, working U.S. women reported being the sole caretaker of children during the covid-19 pandemic while school was closed, as compared to 10.51% of men).
C. Implications for the State’s Interest in Fetal Life

Similar to Justice Alito’s underlying argument in the Dobbs majority opinion, anti-abortion advocates often point to the life of the fetus to justify forcing unwillingly pregnant people to continue their pregnancies. But, as many have argued over many decades, such a practice has no basis in the law. Nowhere else does United States law require a person to use their own body to support the life of another person. In fact, many would likely regard the prospect of the state requiring such intrusions as disturbing, if not dystopian. Consider, for example, the court’s horror at the prospect of using the power of the state to compel the defendant to provide bone marrow to the plaintiff to save the latter’s life in McFall v. Shimp. If we were legally consistent in abortion law as in McFall and elsewhere, then the state’s interest in fetal life should be null up until either the point of birth, or at the earliest, when a fetus could likely survive outside the uterus without medical life support, generally around thirty-seven weeks’ gestation, once the lungs are sufficiently well-developed to breathe without support.

155. Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2243 (2022); Ellen Francis, ‘Not Her Body, Not Her Choice’: Indiana Lawmakers on Abortion Ban, WASH. POST (Aug. 6, 2022), https://www.washingtonpost.com/nation/2022/08/06/indiana-abortion-ban-vote-quotes/ (perma.cc/XK82-Y7Q3) (statement of Rep. John Jacob) (“The body inside of the mom’s body is not her body. Let me repeat that: The body inside of the mom’s body is not her body. Not her body, not her choice . . . . Trying to end all abortion is not forced birth, but rather it is trying to end murdering children . . . .”).

156. See, e.g., Lawrence J. Nelson, Brian P. Buggy, & Carol J. Weil, Forced Medical Treatment of Pregnant Women: ‘Compelling Each to Live as Seems Good to the Rest’, 37 HASTINGS L. J. 703, 755 (1986) (“If our society will not compel someone to undergo a bodily invasion such as organ or tissue transplantation for the benefit of another, how can society view pregnant women refusing treatment any differently? The basic values at stake are the same: the freedom to choose one’s own destiny and to maintain one’s bodily integrity.”); Radhika Rao, Property, Privacy, and the Human Body, 80 BOS. UNIV. L. REV. 359, 393–94 (2000) (“In the early cases, courts often allowed forced blood transfusions and even authorized major surgery over a woman’s objections in order to save the life of the fetus. More recent cases, however, suggest that such court orders may violate a pregnant woman’s right to bodily privacy.”) (citation omitted). But see Marjorie M. Schultz, Abortion and Maternal-Fetal Conflict: Broadening Our Concerns, 1 S. CAL. REV. L. & WOMEN’S STUD. 79, 88 (1992) (recognizing the absence of a duty to rescue in other contexts, but noting that “no other circumstance squarely parallels the situation of gestation”).

157. See, e.g., Michele Goodwin, If Embryos and Fetuses Have Rights, 11 L. & ETHICS OF HUM. RTS. 189, 212–16 (2007) (finding in the few cases considering the issue that courts do not obligate one person to provide a portion of their body for the benefit of a third person).

158. McFall v. Shimp, 10 Pa. D & C.3d 90, 92 (C.P. Allegheny Cnty. 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.”) (first emphasis added).

While it may have been a necessary compromise at the time Roe was decided, giving the state a compelling interest in viable fetal life is a primary place where the Roe Court went wrong.\(^{160}\) The Casey Court’s assertion that the state could burden abortion rights, albeit not “unduly,” in the interest of asserting its interest in fetal life, went even further off-track.\(^{161}\) States and advocates used this interest over time to expand the nature of the state’s interest and, in so doing, normalize at least some partial notion of fetal personhood.\(^{162}\) Over the last several decades, such a normalization has become commonplace in both abortion restrictions and in attempts to endow fetuses (and those acting in their ostensible interests) with certain legal rights and remedies.\(^{163}\) At present, at least fourteen states use the term “unborn child” to refer to products of human conception at any stage post-fertilization when discussing those rights and remedies in statute.\(^{164}\) Of these fourteen states, some states have pushed the notion of fetal personhood even further. Georgia, for example, has ascribed legal personhood to unborn, human products of conception, albeit only when implanted in a uterus.\(^{165}\) The law includes only products of conception that are “carried in the womb,” thus excluding in vitro embryos.\(^{166}\) But this begs the question: What is it about implantation in a uterus that changes an in vitro embryo from quasi-property to legal


\(^{162}\) See, e.g., Linda C. Fentiman, The New “Fetal Protection”: The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children, 84 DENV. U. L. REV. 537, 544–47 (2006) (arguing that the purpose of both the state option to cover fetuses through the State Children’s Health Insurance Program and the characterization of fetuses as “unborn children” in the federal Unborn Victims of Violence Act were to “establish the legal principle that fetuses are children, with all the rights that accrue to that status[,]” most notably including the right to life).


\(^{164}\) E.g., ALA. CODE § 26-22-H-3(7) (2023); ARK. CODE ANN. § 5-1-102(13)(B)(i)(a) (2023); ARIZ. REV. STAT. ANN. § 36-2151(16) (2023); KAN. STAT. ANN. § 65-6732(c)(2) (West 2023); LA. STAT. ANN. § 14:211 (2023); MISS. CODE ANN. 41-41-105(g) (West 2023); MO. ANN. STAT. § 188.015(10) (West 2023); MONT. CODE ANN. § 50-20-303(4) (West 2023); N.D. CENT. CODE ANN. § 14-02.1-02(15) (West 2023); ORE. STAT. ANN. §§ 631-731, 731-1 (West 2023); S.C. CODE ANN. §§ 44-41-320(11) (2023); TENN. CODE ANN. §§ 39-15-219(b)(7) (West 2023); TEX. HEALTH & SAFETY CODE ANN. § 171.0619 (West 2023); WIS. STAT. ANN. § 48.0219 (West 2023).

\(^{165}\) See GA. CODE ANN. §§ 1-2-1(b), 1-2-6, & 1-2-8 (2022).

\(^{166}\) GA. STAT. ANN. § 1-2-1(e)(2) (2022). Henry Greely observes that earlier versions of personhood bills and amendments failed to pass in other states, likely in part because of the effect they would have had on ART, given that they did not expressly exclude in vitro embryos. Henry Greely, The Death of Roe and the Future of Ex Vivo Embryos, 9 J.L. & BIOSCIENCES 1, 13-14 (2022).
person?\textsuperscript{167} It is difficult to imagine how the location of a zygote, blastocyst, or embryo fundamentally alters its nature.\textsuperscript{168} If the moment of conception is the operative moment, as Georgia and some other state legislatures expressly state,\textsuperscript{169} then what difference does it make whether that conception occurs in a petri dish versus in a fallopian tube? Why should implantation be relevant? This is especially true given our technical ability to “gestate” a living embryo in vitro for longer than the current rule-imposed hard stop at fourteen days—a facility that will likely only increase if experimentation is deemed ethical and ultimately conducted.\textsuperscript{170}

A few issues could account for making a legal distinction between implanted embryos and in vitro embryos. One is the greater contingency of in vitro embryos versus ones growing in utero.\textsuperscript{171} Only the most genetically “fit” fraction of embryos conceived in vitro are typically chosen for implantation, and only about a third of that smaller fraction result in a

\textsuperscript{167} See, e.g., Robert L. Stenger, \textit{Embryos, Fetuses, and Babies: Treated as Persons and Treated with Respect}, 2 J. HEALTH & BIOMEDICAL L. 33, 58 (2020) (discussing what the American Fertility Society (now the American Society for Reproductive Medicine) called the “most widely-held view” from the Tennessee case of Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) that in vitro embryos are “neither person nor property,” but rather “an interim category that entitles them to special respect because of their potential for human life”). But see LePage v. Center for Reproductive Medicine, No. SC-2022-0515, 2024 WL 656591, at *6 (Ala. Feb. 16, 2024) (holding that frozen embryos are “children” for the purpose of Alabama’s Wrongful Death of a Minor Act).

\textsuperscript{168} See, e.g., Megan Molteni, \textit{Most Advanced Lab-Grown Human Embryos Prompt a Pressing Question: Are They Getting Too Real?}, STAT NEWS (Dec. 2, 2021), https://www.statnews.com/2021/12/02/lab-grown-human-embryos-prompt-question-are-they-getting-too-real/ [https://perma.cc/9L2T-UBTV] (noting, in the context of experimentation using synthetic embryos, that “[a]t some point we have to ask, ‘when does an embryo model become so good that it functionally becomes an embryo?’ said Hyun. ‘And for me, that question starts to get raised here.”); Jessica Hamzelou, \textit{Synthetic Embryos Have Been Implanted into Monkey Wombs}, MIT TECH. REV. (Apr. 6, 2023), https://www.technologyreview.com/2023/04/06/107112/synthetic-embryos-have-been-implanted-into-monkey-wombs/ [https://perma.cc/HE4T-7LOV] (reporting that, “[w]hen researchers put these ‘synthetic embryos’ into the uteruses of adult monkeys, some showed the initial signs of pregnancy”).

\textsuperscript{169} See, e.g., ALA. CODE § 26-23A-3(10) (defining “unborn child” as “[t]he offspring of any human person from conception until birth”); ARIZ. REV. STAT. 1-219 (providing rights to “unborn children,” defined as “the offspring of human beings from conception until birth” (referencing ARIZ. REV. STAT. § 26-2151[16]); MO. REV. STAT. § 1.205 (stating a legislative finding that, inter alia, “[t]he life of each human being begins at conception”).


successful birth.\footnote{Soc'y for Assisted Reprod. Tech., Final National Summary Report (2020), https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?reportingYear=2020 [https://perma.cc/X9XA-FDUA].} While one might argue that the process of genetic screening should be considered impermissibly eugenic or problematic due to embryo destruction, at least one older Pew survey found that many people differentiate morally between abortion, embryonic stem cell research, and IVF, with IVF finding the least moral condemnation.\footnote{See Pew Rsch. Ctr., Abortion Viewed in Moral Terms: Fewer See Stem Cell Research and IVF as Moral Issues 2 (Aug. 15, 2013), https://www.pewresearch.org/wp-content/uploads/sites/7/2013/08/Morality-of-abortion-8-15-for-pdf.pdf [https://perma.cc/K8QJ-DTZ7] (finding that while 49% of Americans surveyed found abortion morally objectionable, only 22% found embryonic stem cell research morally objectionable and 12% found in-vitro fertilization morally objectionable).} Indeed, several attempts to amend state constitutions to recognize fetal personhood appear to have failed because of concerns about the impact that such amendments would have on the use of ART in the state.\footnote{Nina Martin, North Dakota Abortion Amendment Fails, PROPUBLICA (Nov. 5, 2014), https://www.propublica.org/article/north-dakota-abortion-amendment-fails [https://perma.cc/ZP8Y-87VJ] (noting similar failures in Colorado and, earlier, in Mississippi, and that “opponents had spent weeks warning that Measure 1’s vagueness and broadness — ‘any stage of life’— could have serious unintended consequences. The state’s three in vitro fertilization (IVF) doctors said the amendment would force them to shut their Fargo clinic. Reproductive health advocates warned of new barriers to care for rape victims and women suffering pregnancy emergencies. Those concerned with end-of-life care raised the possibility that the amendment would confuse doctors and families, undermining living wills, advance directives, and do-not-resuscitate orders.”).} Another possibility is that legislatures are less concerned about fetal personhood per se, and more concerned about regulating the persons carrying those fetuses.\footnote{See, e.g., Janet L. Yellen, The History of Women’s Work and Wages and How It Has Created Success for Us All, BROOKINGS GENDER EQUALITY SERIES (May 2020), https://www.brookings.edu/articles/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/ [https://perma.cc/A2M9-JDFM] (noting that while most women did not expect to spend a substantial portion of their lives in the workforce in the years following World War II, “in the 1970s the majority of young women more commonly expected that they would spend a substantial portion of their lives in the labor force, and they prepared for it, increasing their educational attainment and taking courses...”).} Over the last sixty years, women have made substantial strides in education and the workforce, despite enduring persistent, though slowly shrinking, inequities in domestic responsibilities and concordant gendered assumptions by employers.\footnote{See, e.g., Jordan Smith, Oklahoma Lawmakers Want Men to Approve All Abortions, THE INTERCEPT (Feb. 13, 2017, 8:23 AM), https://theintercept.com/2017/02/13/oklahoma-lawmakers-want-men-to-approve-all-abortions/ [https://perma.cc/22J3-VKWM] (statement of state representative Justin Humphrey) (“I believe one of the breakdowns in our society is that we have excluded the man out of all of these types of decisions. ... They understand that they feel like that is their body,” he said of women. “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.”).} Laws
prohibiting gender discrimination in education and employment, and litigation to enforce these laws, were critical to these advances.\textsuperscript{177} Equally necessary was the advent of reliable contraceptives and legal access to abortion.\textsuperscript{178} With better control over their fertility, women were able to delay childbearing until they could finish their education and establish a career.\textsuperscript{179} Without such control, laws prohibiting gender discrimination in public spheres would offer only theoretical protection to anyone who could become pregnant.\textsuperscript{180} Restricting abortion access while simultaneously equalizing the status of the fetus with the person carrying it renders equal protection meaningless in the context of sex.\textsuperscript{181} Anyone capable of becoming pregnant would be subjugated to their fetus upon conception and implantation.

Anti-abortion advocates have, to a significant extent, succeeded in convincing many people that they should think of fetuses as entities worthy of full legal and moral personhood, and, at least prior to Dobbs, made it politically awkward to claim otherwise.\textsuperscript{182} But the matter of the fetus's

and college majors that better equipped them for careers as opposed to just jobs," and that, between 1970 and 2020, labor force participation for women rose from 50\% (for single women) or 40\% (for married women) to 76\% (for women overall); See also A Look at Women's Education and Earnings Since the 1970s, BUREAU LAB. STATS. (Dec. 27, 2017), https://www.bls.gov/opub/ted/2017/a-look-at-womens-education-and-earnings-since-the-1970s.htm [https://perma.cc/9KJR-DJ5Y].


\textsuperscript{180} See, e.g., Lisa Intrabartola, The Economic Consequences of Restricting Abortion Rights, RUTGERS TODAY (May 4, 2022), https://www.rutgers.edu/news/economic-consequences-restricting-abortion-rights [https://perma.cc/SAT7-2G25] (interviewing Prof. Yana Rodgers, who found in a series of studies that “[w]omen who are denied an abortion because of restrictive laws not only are less likely to be employed full time, they are also more likely to live in poverty and to require public assistance compared to women who obtain abortions”).


\textsuperscript{182} See, e.g., Yusra Murad, Conflict on Fetal Rights Lies at the Heart of America’s Abortion Debate, MORNING CONSULT, MORNING CONSULT [June 20, 2019], https://morningconsult.com/2019/06/20/conflict-on-fetal-rights-lies-at-the-heart-of-americas-abortion-debate/ [https://perma.cc/P399-MJWH] (finding that 25\% of all adults and 50\% of Republican women believe that fetuses should have “full rights of a human being at conception”); Besheer Mohamed & Hannah Hartig, America's Abortion Quandary,
legal status needs to be squarely and publicly addressed. As discussed above, this status should be wholly contingent on the pregnant person’s intentions concerning it. If the pregnant person wants to bring the fetus to term, then all legal protections for the fetus in utero should flow from that intent alone. These protections could vary. For example, where a pregnant person intends to gestate their fetus to term, a state may develop statutes that criminalize the reckless or intentional causation of a fetus’s death. They may allow for wrongful death claims in the event of third-party negligence resulting in fetal demise. Alternatively, statutes may endow wholesale legal personhood to an unborn fetus. But, where the pregnant person does not want their pregnancy to continue and eventually come to term, then no one—whether the state, a purported, non-parental representative for the fetus, or anyone else—should have any rights with respect to its existence. In this case, the pregnant person would have the right to terminate their pregnancy if desired. In other words, a fetus’s legal status should necessarily and wholly be contingent on whether the gestator intends to continue their pregnancy and give birth.

The above framework would represent a substantial change from some of the actions taken in states to aggressively restrict abortion. At the time of writing, fourteen states ban abortion altogether. Seven others either have a ban that is temporarily enjoined pending litigation, or have a prohibition on abortions after either six or twelve weeks’ gestation. In Tennessee’s 2023 legislative session, divisions among Republicans initially prevented the legislature from revising its abortion ban to clarify the circumstances under which an abortion could be provided. The Tennessee ban originally lacked any exceptions and

Pew Rsch. Ctr. (May 6, 2022), https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/05/FP_05.06.22_abortion_views_fullreport.pdf (finding that 56% of respondents said that the statement “human life begins at conception, so a fetus is a person with rights” describes their views either extremely, very, or somewhat well).

183. Arguably, such an endowment for wanted fetuses could supported in part by research examining parental perception of such fetuses. See, e.g., Greer Donley & Jill Weber Lens, Abortion, Pregnancy Loss, and Subjective Fetal Personhood, 75 Vand. L. Rev. 1649, 1691–92 (2022) (noting that the “social construction of pregnancy is subjective and variable, not biological or innate: ‘[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’”).

184. State Health Facts Abortion Policy Tracker, Kaiset Family Found., https://www.kff.org/other/state-indicator/abortion-policy-tracker/?currentTimeframe=0&sortModel=%7B%22sortColumn%22:%22Location%22,%22sortOrder%22:%22asc%22,%22sort%22:%22%7D (last updated Nov. 2, 2023).

185. Id.

provided only an affirmative defense to a physician charged with providing an abortion to a pregnant person to “prevent [their] death” or “prevent serious risk of substantial and irreversible impairment of a major bodily function . . . .” Violation of the law as amended is a felony, punishable by three to fifteen years in prison and a fine of up to $10,000. Other states, such as Idaho and North Dakota, have similar bans that, in their original form, provided only a limited affirmative defense to a person charged. Oklahoma’s law provides an exception only “to save the life of a pregnant woman in the case of a medical emergency.” Courts in the three latter states have respectively indicated that the relevant state statute violates the federal Emergency Medical Treatment and Active Labor Act, is likely to be unconstitutional, or is unconstitutional to the extent that the state ban may inhibit physicians from providing an abortion to a pregnant person to save their life.

Republican legislators who expressed a lack of interest in amending the bill to clarify language regarding when a physician may lawfully perform an abortion.


190. 63 O.S. Supp. 2022, § 1-731.4(B)(1). The law defines “medical emergency” as “a condition which cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself.” 63 O.S. Supp. 2022, § 1-731.4(A)(2).

191. United States v. Idaho, 623 F.Supp.3d 1096, 1109 (D. Idaho 2022) (“[W]here federal law requires the provision of care and state law criminalizes that very care, it is impossible to comply with both laws. Full stop.”); Wrigley v. Romanick, 988 N.W.2d 231, 242 (N.D. 2023) (“After review of North Dakota’s history and traditions, and the plain language of article I, section 1 of the North Dakota Constitution, it is clear the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health.”); Okalama Call for Reproductive Justice v. Drummond, 536 P.3d 1123, 1131 (Okla. 2023) (“We read this section of law to require a woman to be in actual and present danger in order for her to obtain a medically necessary abortion. We know of no other law that requires one to wait until there is an actual medical emergency in order to receive treatment when the harmful condition is known or probable to occur in the future. Requiring one to wait until there is a medical emergency would further endanger the life of the pregnant woman and does not serve a compelling state interest. We hold this section of law . . . cannot meet the test of strict scrutiny and is therefore void and unenforceable.”).
The Oklahoma Supreme Court held that its constitution protects the right of pregnant people to terminate their pregnancies only where they need to do so to preserve their own life. It cited both the state’s due process clause, as well as the Oklahoma bill of rights, which provides for “the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.” With this ruling, pregnant people in Oklahoma are denied the full extent of those rights. Without a reasonable right to terminate unwanted pregnancies, pregnant people cannot determine the course of their own existence, whether that concerns their happiness, education, career, or otherwise. The same is true in all other states that prohibit abortion.

States like Texas, South Dakota, and Tennessee claim to be pursuing these actions for the benefit of fetuses. As others have amply shown, these claims belie the states’ actual practices. Maternal and fetal health are intertwined, yet most of the states that ban abortion or that seek to do so rank low among all states in preventing poor maternal and birth outcomes, and in supporting lower-income pregnant people through food, housing, and other support. Once fetuses are born and become

192. 526 P.3d at 1130.
194. See, e.g., Paxton Defends SB8, Saving Thousands of Lives in the Process, OFF. ATT’Y GEN. (Feb. 28, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-defends-sb8-saving-thousands-lives-process [https://perma.cc/X7L2-EWGF] (asserting that “Attorney General Ken Paxton has fought off multiple challenges to Texas Senate Bill 8 (SB8), which has saved approximately 17,000 newborn lives since it went into effect on September 1, 2021.”); Mychael Schnell, South Dakota Republicans Block Noem Abortion Ban, THE HILL (Feb. 3, 2022, 2:25 PM), https://thehill.com/homenews/state-watch/592715-south-dakota-republicans-block-noem-abortion-ban/ [https://perma.cc/2GBF-M6SQ] (responding to the refusal of state Republicans to take up an SB 8-lookalike bill out of concerns about current litigation, South Dakota Governor Kristi Noem said that “South Dakota deserved to have a hearing on a bill to protect the heartbeats of unborn children. We can hear heartbeats at six weeks, but I’m disappointed this bill was not granted even one hearing.”); Veronica Stracqualursi & Caroline Kelly, Tennessee Lawmakers Pass Fetal Heartbeat Abortion Bill Bashed by Governor, CNN POLITICS (June 19, 2020, 7:52 PM), https://www.cnn.com/2020/06/19/politics/tennessee-abortion-heartbeat-bill/index.html [https://perma.cc/8YRD-PKKB] (reporting Tennessee Governor Bill Lee as saying that “[o]ne of the most important things we can do to be pro-family is to protect the rights of the most vulnerable in our state, and there is none more vulnerable than the unborn”).
infants and children, these states fare little better. Eleven of the thirteen states that ban abortion, ostensibly on the premise of protecting fetal life, have higher than average infant mortality rates.¹⁹⁷ The six lowest-ranking states all prohibit abortion.¹⁹⁸ In Texas, Louisiana, and Mississippi, only four out of every hundred families living below the poverty line got TANF in 2019–2020.¹⁹⁹ In Alabama, only seven out of hundred did, and in Oklahoma, only eight did.²⁰⁰ Thirteen of the fourteen states that currently ban abortion also rank in the bottom half of teacher salaries and in school spending per enrolled K-12 student.²⁰¹

These states should afford their populations the freedom to make their own decisions regarding their lives and families without adding unnecessary governmental fetters. As discussed above, concern for fetal life and maternal health might best be demonstrated by facilitating and expanding access to needed services. They could require paid parental leave and structure the benefit to incentivize non-gestating gamete providers to take equal time off. They could require equal pay for equal work. They could take intimate partner violence seriously by making protective orders easier to obtain and prioritizing zealous enforcement of those orders. They could retain existing laws permitting gestating parents who intend to keep their pregnancies to sue on behalf of their fetuses to enforce their rights, where relevant. And they could amend any existing laws to prohibit anyone other than the gestating parent from suing on behalf of a fetus, except where the gestating parent has died or is legally incompetent.

CONCLUSION

It is time to bring the legal treatment of people who conceive coitally in line with our treatment of other parents. In all cases, intent should guide the assignment of legal rights and duties. Doing so would prioritize the needs and interests of the gamete-providers. In the process, it would help

¹⁹⁷. See Infant Mortality Rates by State, supra note 196 (for the year 2020).
¹⁹⁸. See id.
ensure that children brought into the world were intended and therefore wanted. This is important, as evidence suggests that infants who are wanted are better situated to lead successful, healthy lives.  

A shift to an intentional parenthood framework raises some additional issues. State rather than federal law would need to be changed, necessitating multiple campaigns. Publicization of new laws would ideally be done in conjunction with evidence-based and comprehensive sex education, paired with access to reliable contraceptives, and knowledge of how to choose between them and use them effectively. Significant geographic, racial, and economic barriers exist regarding all three, and such obstacles must be addressed. Finally, questions regarding the interest of the state and potential parents would also need attention. Despite these limitations, rectifying the present misorientation of the legal treatment of parenthood and fetuses requires a significant shift. An intentional parenthood model creates a pathway to improving reproductive futures. This model has significant merit and deserves pursuit.

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202. See, e.g., Kathryn Kost & Laura Lindberg, Pregnancy Intentions, Maternal Behaviors, and Infant Health: Investigating Relationships with New Measures and Propensity Score Analysis, 52 DEMOGRAPHY 83 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4734627/ (finding that wanted births in the study population were more likely than unwanted births to receive timely prenatal care, be breast-fed, and to not be low weight at birth); Diana Greene Foster, Sarah E. Raifman, Jessica D. Gipson, Corinne H. Rocca, & M. Antonia Biggs, Effects of Carrying an Unwanted Pregnancy to Term on Women’s Existing Children, 205 J. PEDIATRICS 183, 185–86 (2019) (finding that existing children of women who were granted a wanted abortion were less likely to receive assistance from a nutritional welfare program, less likely to live below the federal poverty level, and more likely to have enough money to pay for basic necessities than existing children of women who were denied a wanted abortion).

203. See, e.g., Kelli Stidham Hall, Jessica McDermott Sales, Kelli A. Komro, & John Santelli, The State of Sex Education in the United States, 58 J. ADOLESCENT HEALTH 595, 595 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5426905/pdf/nihms859587.pdf (discussing some of the effects of the “highly diverse ‘patchwork’ of sex education laws and practices”); Whitney S. Rice, Subarsi Narasimhan, Anna Newton-Levinson, Johanna Pringle, Sara K. Redd, & Dabney P. Evans, “Post-Roe” Abortion Policy Context Heightens the Imperative for Multilevel, Comprehensive, Integrated Health Education, 49 HEALTH EDUC. & BEHAV. 913, 914 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC614421/ (disciting Diana Greene Foster, Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States, 108 AM. J. PUB. HEALTH 407 (2018)) (noting that, in addition to the wide variety of state requirements that disproportionately impact lower-income students and students of color, “states that have and are likely to ban abortion post-Roe also limit or restrict access to comprehensive SRH [sexual and reproductive health] education—the combined implications of which have far-reaching consequences for health and well-being, including the potential to increase the likelihood of unwanted or mistimed pregnancies and of negative outcomes from forced pregnancies such as greater economic insecurity”); AM. COLLEGE OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. NO. 615 ACCESS TO CONTRACEPTION (2016, aff’d 2022), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2015/01/access-to-contraception (disciting legal, legislative, financial, societal, and medical barriers to effective contraceptive access and use); Katy B. Kozhimannil, Removing Barriers to Contraceptive Access, AM. J. MANAGED CARE (Apr. 7, 2016), https://www.ajmc.com/view/removing-barriers-to-contraceptive-access (disciting barriers to accessing a comprehensive spectrum of contraceptives).