TO BURY OR TO CREMATE? FORCED FETAL DISPOSITION IN A MOTHER'S WORLD

*Kenneth J. Schwalbert, Jr.**

I. INTRODUCTION

Losing a child is too unbearable to think about. So many people lose children to natural causes, unexplained circumstances, and other terrible or unforeseen situations. Many mothers lose children to miscarriages; in fact, about 30% of pregnancies result in miscarriage.[1] Not only are individuals who are suffering through the heartbreaking experience associated with the end of a pregnancy due to abortion or miscarriage struggling to process their own emotions, but some are also faced with horrific legal requirements dictating how they may or may not dispose of the remains of their lost child.[2] Shouldn't that choice be left to the parents who lost the child? One would think.

Fetal death remains a subject of constant debate in American

---

*Candidate for Juris Doctor 2024; Editor in Chief, *University of Louisville Law Review,* Vol. 62.; Associate Degree of Applied Science in Funeral Service, Mid-America College of Funeral Service; Bachelor of Science in Mortuary Science, Southern Illinois University; Graduate of the Fountain National Academy of Professional Embalming Skills. Certified Funeral Service Practitioner (CFSP). Licensed Funeral Director and Embalmer in Indiana and Kentucky. I thank my grandparents and my sister, who taught me that I could accomplish anything I put my mind to. Thank you to three teachers whose inspiration helped me get to this point in my life, Clarry D. Hubbard, Tonya M. Thompson, and Lauren M. Budrow. Among my colleagues, thanks to Hannah DePoy Hayden (Senior Notes Editor, *University of Louisville Law Review*, Vol. 61) and Sarah Hall (Notes Editor, *University of Louisville Law Review*, Vol. 61) for all the guidance and support they provided to me as a First Year Member writing this Note. Lastly, I want to dedicate this Note to my law school professor and mentor, Professor Leslie Wells Abramson, who helped me with editing and continues to provide invaluable wisdom about life and the law. As John Hart Ely dedicated in his book Democracy and Distrust, "You don't need many heroes if you choose carefully."

[1] Gabriela Weigel, Laurie Sobel & Alina Salganicoff, *Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws*, KFF (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/.

[2] *See* IND. CODE ANN. § 16-34-3-2; TENN. CODE ANN. § 39-15-219; TEX. HEALTH & SAFETY CODE ANN. § 241.010.

society—from the decision of *Roe v. Wade*[3] up to the recent decision of *Dobbs v. Jackson Women's Health Organization*[4], the shocking case overturning fifty-years of abortion access. While abortion has been in the headlines for decades, there has been less emphasis on *what happens* to the fetus after death.[5] In 2019, the United States Supreme Court addressed this issue in the case *Box v. Planned Parenthood of Indiana & Kentucky, Incorporated*.[6] In *Box*, the Court upheld an Indiana statute that required aborted or miscarried fetuses to be either cremated or buried, but did not allow for incineration with pathological and medical waste.[7]

The upheld Indiana statute is one of many throughout the country. Texas, Arkansas, Ohio, Georgia, Florida, and Tennessee join Indiana in an effort to control fetal disposition.[8] The issue now is if other states will follow and enact fetal death statutes in a post-*Dobbs*[9] world. The adoption of fetal death statutes is problematic—a lack of state interests and the resulting undue burden regarding fetal funerals are just two examples—and with more states likely to adopt such statutes in the future, many unanswered questions loom on the horizon.[10]

This Note discusses how troubling the adoption of fetal death statutes is for those in the aforementioned states. Looking at these statutes will reveal the issues presented in them, including the lack of state interest and imposition of an undue burden on mothers.[11] In order to have this necessary dialogue, Part II examines precedent surrounding both the rights of the mother and the state.[12] *Roe* established the valid state interest argument concerning an aborted fetus, then *Planned Parenthood v. Casey* tightened *Roe* on when a state could claim an interest on the fetus.[13] Not only did *Casey* look at state interest, but the court also applied the undue burden test to the abortion regulations.[14] Under *Casey*'s standard, states could not place a

---

[3] *See* Roe v. Wade, 410 U.S.113, 116 (1973).

[4] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[5] *Cf. Roe*, 410 U.S. at 116 (refraining from discussion of what happens to the body of a fetus after death); *see also* Dobbs, 142 S. Ct. at 2240.

[6] Box v. Planned Parenthood of Ind. & Ky., Inc.,139 S. Ct. 1780, 1781 (2019).

[7] *Id.* at 1782; *See* discussion *infra* Part II, Section C (explaining incineration with pathological and medical waste).

[8] IND. CODE ANN. §16-34-3-2; TEX. HEALTH & SAFETY CODE ANN. § 697.004; ARK. CODE ANN. § 20-17-801; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. § 16-12-141.1; OHIO REV. CODE ANN. § 3726.02 (LexisNexis through 2022 Legis. Sess.); LA. STAT. ANN. § 40:52; TENN. CODE ANN. § 39-15-219.

[9] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (noting there is *no* constitutional right to abortion).

[10] *See generally* IND. CODE ANN. § 16-34-3-4; § 697.004; § 383.33625; §16-12-141.1; OHIO REV. CODE ANN. § 3726.09.

[11] *See, e.g.*, §16-34-3-2; § 697.004; § 20-17-801; § 383.33625; § 16-12-141.1; § 3726.02; § 40:52; § 39-15-219.

[12] *See* discussion *infra* Part II, Sections A–C.

[13] Roe v. Wade, 410 U.S. 113, 150 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992).

[14] *Casey*, 505 U.S. at 874.

substantial obstacle in the path of a woman seeking an abortion before fetal viability.[15] Following *Casey*, states began adopting fetal death statutes as a way for the state to claim an interest in aborted and miscarried fetuses.[16] Instead of allowing the grieving mother to choose how to dispose of the remains of her child, the states impose a two-way ultimatum—bury or cremate.[17] Along with the troubling state interest claim, fetal death statutes impose an undue burden on the mother[18] in a limited timeframe and even require the mother to *pay* for the services.[19] Part III then examines the states that have enacted fetal death statutes and the nuanced rules regarding miscarriage or abortion. Lastly, assuming the Supreme Court continues to find a valid state interest and no undue burden present in these statutes, Part IV of this Note proposes language for a model statute for grieving parents.

II. BACKGROUND

Over the course of many years, the United States Supreme Court has established precedent for reproductive rights and women seeking an abortion.[20] Moreover, as these precedents developed, so did the rights defined by the states. The historical precedent concerning reproductive rights for mothers and the states' rights are necessary to understand how fetal death statutes are unconstitutional.

The Development of Reproductive Rights and the Undue Burden

The undue burden test imposes a standard where the state cannot enact legislation that creates an undue burden on the mother.[21] The test was a result of precedent concerning privacy, abortion, reproductive rights, and state interests.[22]

---

[15] *Id.* at 846.

[16] *Id. See also* Erin Heger, *Here's Why Fetal Burial Legislation is Surging in the States*, REWIRE NEWS GRP. (Dec. 2, 2019), https://rewirenewsgroup.com/2019/12/02/heres-why-fetal-burial-legislation-is-surging-in-the-states/ (discussing why states are passing fetal burial laws).

[17] *See* IND. CODE ANN. § 16-34-3-2; TEX. HEALTH & SAFETY CODE ANN. § 697.004; ARK. CODE ANN. § 20-17-801; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. § 16-12-141.1; OHIO REV. CODE ANN. § 3726.02; LA. STAT. ANN. § 40:52; TENN. CODE ANN. § 39-15-219.

[18] *See* Brianna M. Vinci, *Fetal Funerals: An Unconstitutional Attempt to Undermine Abortion Rights,* 90 TEMP. L. REV. ONLINE 1, 46 (2018); Elizabeth Kimball Key, *The Forced Choice of Dignified Disposal: Government Mandate of Interment or Cremation of Fetal Remains*, 51 U.C. DAVIS L. REV. 305, 329–31 (2017).

[19] *See* IND. CODE ANN. § 16-34-3-2; TENN. CODE ANN. § 39-15-219; TEX. HEALTH & SAFETY CODE § 241.010**;** GA. CODE ANN. § 16-12-141.1.

[20] *See e.g.*, Griswold v. Connecticut, 381 U.S. 479, 506–07 (1965); Roe v. Wade, 410 U.S. 113, 166 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992).

[21] *Casey*, 505 U.S. at 877.

[22] *Id.* at 851.

The Right to Privacy

The right to privacy established in *Griswold v. Connecticut*,[23] where the Court held that the penumbra of the Constitution includes a right to privacy, was a major development for reproductive rights.[24] The privacy identified in *Griswold* derives from the Due Process Clause and applies to, among other things, a person's use of contraceptives.[25] Justice William O. Douglas, writing for the Court, stated that just like a marriage has a right to privacy, so do those who use contraceptives.[26] A few years later, the Court would similarly explore the constitutional right to an abortion under the right to privacy in *Roe v. Wade*.[27]

State Interest and Roe v. Wade

Roe was the bedrock of reproductive rights in the United States until the Supreme Court decided *Dobbs* in 2022.[28] At the center of *Roe*, the Court held that the Texas criminal statute, which only allowed for abortions in lifesaving situations, was a violation of the Due Process Clause and the right to privacy described by *Griswold*.[29] Accordingly, *Roe* established a constitutional right to an abortion and established a foundation of due process for birthing individuals.[30] It took a few years for the case to become a political "hot potato" in the 1980s.[31] Divisions would then quickly follow between all political parties—those for abortion access and those who appalled it.[32] Even the drafter of *Roe*'s majority opinion, Justice Harry A. Blackmun, was both revered and reviled for the rest of his life after drafting the decision.[33] For half a century, *Roe* would remain the standard for reproductive rights.[34]

---

[23] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
[24] *Id.* at 483.
[25] *Id.* at 485.
[26] *Id.*
[27] Roe v. Wade, 410 U.S. 113, 154 (1973).
[28] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).
[29] *Roe*, 410 U.S. at 164; *Griswold*, 381 U.S. at 479.
[30] *Roe*, 410 U.S. at 164.
[31] Deepa Shivaram, *The Movement Against Abortion Rights Is Nearing Its Apex. But It Began Way Before Roe*, NPR (May 4, 2022), https://www.npr.org/2022/05/04/1096154028/the-movement-against-abortion-rights-is-nearing-its-apex-but-it-began-way-before (discussing how political leaders, such as President Reagan, won elections based on the anti-abortion movement).
[32] *Id.*
[33] Linda Greenhouse, *The Supreme Court: The Legacy; Justice Blackmun's Journey: From Liberal to Moderate*, N.Y. TIMES (Apr. 7, 1994), https://www.nytimes.com/1994/04/07/us/supreme-court-legacy-justice-blackmun-s-journey-moderate-liberal.html (discussing the hate mail that Justice Harry Blackmun received the rest of his life for writing the *Roe* opinion).
[34] *Roe*, 410 U.S. at 166; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

> The Undue Burden Test and Planned Parenthood v. Casey
> An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.[35]

The undue burden test established in *Casey* became the standard test for the Court to determine whether a state regulation infringed on a mother's constitutional right to an abortion.[36] The undue burden was a result that came out of the trimester framework established in *Roe*.[37] When *Casey* came to the Court, many people did not know if *Roe* would last.[38]

In 1992, Americans saw a change in this landscape, albeit slight.[39] When Justice Sandra Day O'Connor joined the Supreme Court, anti-abortion activists assumed that having a woman on the high court could put an end to the debate once and for all.[40] Much to their surprise and chagrin, she became the Justice who would save constitutional abortion in *Planned Parenthood v. Casey*.[41] The *Casey* court took *Roe*'s original framework and added more parameters.[42] *Casey* replaced *Roe*'*s* trimester structure that allowed states to claim an interest once the fetus reached viability and applied the undue burden test to the right to abortion.[43]

Notably, the undue burden test is used to measure whether legislation violates the Due Process Clause of the Fourteenth Amendment. To some extent, this test has existed in American jurisprudence since 1946 and extended to abortion access in *Casey*.[44] The undue burden test established in *Casey*

---

[35] Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992).

[36] *Id.* at 874.

[37] *Roe*, 410 U.S. at 163–65 (The Court held that a trimester framework would govern when a state could claim and interest in the fetal life. Under the first trimester, the mother had the sole decision to terminate the pregnancy. After the first trimester, the state could implement "regulations" but could not prohibit abortions. After the second trimester when the fetus became viable, the state could prohibit abortions because of the interest in potential life. However, the state could not prohibit abortions at this point if an abortion was necessary to protect the health or life of the mother.).

[38] *See* Robert Barnes, *The Last Time the Supreme Court Was Invited to Overturn Roe v. Wade, A Surprising Majority Was Unwilling*, THE WASHINGTON POST (May 29, 2019), https://www.washingtonpost.com/politics/courts_law/the-last-time-the-supreme-court-was-invited-to-overturn-roe-v-wade-a-surprising-majority-was-unwilling/2019/05/29/2cd37b30-7b39-11e9-8bb7-0fc796cf2ec0_story.html.

[39] *Casey*, 505 U.S. at 901.

[40] Linda Greenhouse, *Sandra Day O'Connor and the Reconsideration of Roe v. Wade*, PBS (Sept. 10, 2021), https://www.pbs.org/wgbh/americanexperience/features/sandra-day-oconnor-and-reconsideration-roe-v-wade/#:~:text=She%20said%20at%20one%20point,a%20rock%20Republican%20conservative%20judge (discussing Justice O'Connor's view of abortion and skepticism of Roe v. Wade).

[41] *Casey*, 505 U.S. at 843.

[42] *See generally id.* at 874 (discussing the state interest and undue burden parameters).

[43] *Id.* at 873–74.

[44] *See generally* Morgan v. Virginia, 328 U.S. 373 (1946) (A case involving an African American woman (Morgan) who was traveling on a bus. The bus driver told the passenger to move seats in accordance with Virginia

survives today, even post-*Dobbs*.[45]

The Evolution of Compelling State Interest in Abortion Cases

The levels of scrutiny are important to constitutional law. Generally, the Court has identified three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review.[46] Of these three tiers, strict scrutiny is the hardest test for the state government to pass.[47] The Court has applied strict scrutiny in cases that evaluate discrimination based on race, national origin, U.S. citizenship status, and the inference of fundamental rights (the right to vote, the right to travel, the right to privacy, and freedom of speech).[48]

To satisfy strict scrutiny, the state legislator must have a compelling state interest.[49] As mentioned,[50] state interest was applied early on in the reproductive discussion. In *Roe*, the Court determined that strict scrutiny maintains the balance between the states and the abortion seeker.[51] The Court also held that "legislative enactments involving abortion would have to be narrowly drawn to express the state interest at stake."[52] The Court rejected the state's argument that there was a state interest as, decades before *Roe*, many courts held that the fetus was not considered a human under criminal or civil law.[53] Therefore, a compelling state interest was irrelevant to any legislation relating to a fetus.[54] The states not being able to claim a state interest was due largely to the fact that the fetus could not survive or have life on its own outside of the mother.[55]

Casey changed the scope of a compelling state interest, finding that, while there is a constitutional right to an abortion, the state may impose restrictions after the fetus becomes viable to protect potential life.[56] Fast-

---

law, and she refused. The Virginia state court upheld Morgan's conviction, and the Supreme Court reversed, finding that the Virginia statute placed an undue burden on interstate commerce). *See also Casey*, 505 U.S. at 874.

[45] *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2272–75 (2022) (The majority did not overrule the undue burden standard. The decision of the Court only overruled *Casey's* application of the undue burden *as it relates* to abortion regulations. The undue burden test, otherwise, survives); s*ee also Casey*, 505 U.S. at 874 (discussing the applicability of the undue burden test to abortion restrictions).

[46] Cornell Law School, *Rational Basis Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test#:~:text=There%20are%20three%20judicial%20review,and%20the%20strict%20scrutiny%20test (last visited Aug. 1, 2023).

[47] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 588–89 (6th ed. Aspen Pub. 2019).

[48] *Id.* at 589.

[49] Bernal v. Fainter, 467 U.S. 216, 227 (1984).

[50] *See supra* notes 28–34 and accompanying text.

[51] *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

[52] *Id.*

[53] *Id.* at 162–63 (holding that the state interest is invalid because there is no fetal viability)..

[54] *See generally id.*

[55] *Id.* at 163.

[56] Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992).

forward to *Dobbs*, where the majority held that: "a law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'"[57] The Court further stated, "It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[58] Thus, the Court determined that the states should be able to regulate abortion *because* there is a valid state interest in the fetus.[59] Some states will take up their own restrictions, while others will continue to allow abortion. Still, fetal death statutes apply not just to aborted fetuses—but to all fetuses.

Fetal Death Statutes

Fetal death is an interesting and heartbreaking experience. Some things in life do not prepare people for loss. That could be the loss of a parent, friend, and yes, even a child. I have lost a parent, but not a child. As a funeral director, I have served many families that experienced the death of a child. It's an awful situation for all, and there really is no way to describe the emotions that parents experience, even from my outsider's perspective. I have seen the toll that mothers and fathers go through from losing a child and just how crucial getting from "point A to point B" can be during that time. Current fetal death disposition laws provide an additional obstacle to this process.[60]

There are really three types of disposition that can occur, give or take. These options are burial, cremation, and incineration.[61] Cremation and incineration are *extremely* similar. The Cremation Association of North American defines cremation as: "[T]he mechanical, thermal, or other dissolution process that reduces human remains to bone fragments. Cremation also includes processing and pulverization of the bone fragments into pieces that are usually no more than one-eight inch in size."[62] The most common is flame-based cremation in which the deceased remains are placed in a chamber and burned between 1,400 and 1,600 degrees Fahrenheit.[63] The Merriam-Webster definition of incinerate is "to cause to burn to ashes."[64]

---

[57] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[58] *Id.*

[59] *Id.*

[60] Vinci, *supra* note 19, at 46.

[61] *Life File: Options for Body Disposition*, DEATH WITH DIGNITY, https://deathwithdignity.org/resources/body-disposition/ (last visited July 13, 2023).

[62] *Cremation Process*, CREMATION ASS'N OF NORTH AMERICA, https://www.cremationassociation.org/page/CremationProcess (last visited Oct. 30, 2022).

[63] *Id.*

[64] *Incinerate*, MERIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incinerate (last visited Oct. 30, 2022).

From the two definitions, the only real element missing from the dictionary definition is the pulverization that occurs during the cremation process.[65] Thus, incineration is the same as cremation.

Burial, on the other hand, is much different. When the burial of a fetus or deceased human being is involved the cost can dramatically increase.[66] Even the website of the largest funeral provider in the world says that cremation is usually a less expensive option.[67] Burials primarily involve two things when concerning a fetus. One is a casket or burial container, and the other is an outer burial container, commonly misdescribed as a "vault."[68] Both can increase the cost of services beyond that of a cremation.[69] Recently, an article was published that said the average cost for a fetal or stillborn funeral started at $3,000.[70] The same statistics showed that the average cost for burial of fetal or stillborn remains is between $900 and $1,500.[71]

Some states permit the cremation, incineration, or burial of fetal remains.[72] These states also allow the fetal remains to be incinerated with pathological waste.[73] However, several other states prohibit the incineration of fetal remains with pathological waste altogether.[74]

In 2019, the concept of fetal death statutes was brought to the national forefront.[75] In *Box*, Planned Parenthood challenged an Indiana law that stated that infectious and pathological waste did not include fetal remains, along with a state statute that prohibited fetal remains from being incinerated with other medical by-products.[76] Planned Parenthood argued the statute was unconstitutional because the state had no interest in the disposition of fetal remains.[77] On appeal, the Seventh Circuit agreed that no state interest was found because the Indiana statute was meant to apply to potential life.[78] Moreover, the court held that under this view, Indiana could

---

[65] *Id.; see supra* note 62.

[66] *How Much Does Cremation Cost vs. Burial?,* DIGNITY MEMORIAL, https://www.dignitymemorial.com/costs/cremation-vs-burial (last visited Aug. 2, 2023) (a service provided by Service Corporation International (SCI), the world's largest funeral provider, headquartered in Houston, Texas).

[67] *Id.*

[68] *See id.*

[69] *Id.*

[70] Sam Tetrault, *Guide to Infant or Stillbirth Funeral Costs & Burial Assistance*, CAKE (Jan. 17, 2023), https://www.joincake.com/blog/infant-funeral-costs/. *See* discussion *infra* Part IV, Section C.

[71] Tetrault, *supra* note 70.

[72] *See, e.g.*, MICH. COMP. LAWS ANN. § 333.2836 ("All fetal remains resulting from abortions shall be disposed of by interment or cremation as those terms are defined in section 2…or by incineration by a person."); S.D. CODIFIED LAWS § 34-25-32.4 (2022) ("Any hospital, clinic, or medical facility…shall arrange for the disposal of the remains by cremation, interment by burial, or by incineration in a medical waste incinerator.").

[73] MICH. COMP. LAWS ANN. § 333.2836; S.D. CODIFIED LAWS § 34-25-32.4

[74] *See* discussion *infra* Part III, Section A.

[75] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019).

[76] *Id.*

[77] *Id.*

[78] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 308 (7th

not claim a valid state interest because there was no potential for human life.[79] The Supreme Court ultimately reversed, finding the law constitutional because Indiana did have a valid state interest under Court precedent.[80]

Despite the finding that a state does have a valid state interest in the final disposition of a fetus, it does not detract from the enormous weight that is put on mothers and parents during this time.[81] Examining the statutes of the states that have implemented these regulations illustrates the legal obstacles mothers are faced with when a fetus dies.

III. AN OVERVIEW OF STATE FETAL DEATH STATUTES

Now that the history of the undue burden and state interest tests have been discussed, the real problem facing mothers must be examined: the fetal death statutes. Examining the fetal death statutes of the selected states shows the similarities and peculiarities between them.

States That Have Fetal Death Statutes

Currently, seven states, including Indiana, Texas, Georgia, Tennessee, Ohio, Florida, and Arkansas have fetal death disposition statutes.[82] Do fetal remains qualify as infectious or pathological waste under these statutes? In some states the answer is definitively "no," and in remaining states it is unclear.[83] Indiana defines infectious waste as "waste that epidemiologic evidence indicates as capable of transmitting a serious communicable disease."[84] Moreover, Indiana defines pathological waste to include: (1) tissues, (2) organs, (3) body parts, and (4) blood or body fluids in liquid or semiliquid form.[85] While the statutes in Tennessee, Ohio, and Florida do not declare that an aborted or miscarried fetus is either "infectious" or "pathological" waste,[86] it can be inferred from the nature of the other statutes that fetal remains do not fall into these two categories.[87] The Indiana

---

Cir. 2018).

[79] *Id.*

[80] *Box*, 130 S. Ct. at 1782 ("This Court has already acknowledged that a State has a 'legitimate interest in proper disposal of fetal remains'") (quoting Akron v. Akron Center for Reproductive Health, Inc. 462 U.S.416, 452 (1983))).

[81] *See* IND. CODE ANN. § 16-34-3-2; TEX. HEALTH & SAFETY CODE ANN. § 697.004; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. § 16-12-141.1; OHIO REV. CODE ANN. § 3726.02; LA. STAT. ANN. § 40:52; TENN. CODE ANN. § 39-15-219.

[82] *See* IND. CODE ANN. § 16-34-3-2; TEX. HEALTH & SAFETY CODE ANN. § 697.004; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. § 16-12-141.1; OHIO REV. CODE ANN. § 3726.02; TENN. CODE ANN. § 39-15-219.

[83] *See supra* notes 75–77 (this is the question that sparked the controversy in *Box*, 130 S. Ct. at 1780).

[84] IND. CODE ANN. § 16-41-16-4.

[85] *Id.*

[86] *See* TENN. CODE ANN. § 39-15-219**;** OHIO REV. CODE ANN. § 3726.02**;** FLA STAT. ANN. § 383.33625**.**

[87] *See* TEX. HEALTH & SAFETY CODE ANN. § 241.010; ARK. CODE ANN. § 20-17-801; GA. CODE ANN. § 16-

Code defines infectious waste and includes that "the term does not include an aborted fetus or a miscarried fetus."[88] Further, the Indiana Code clarifies that an aborted or miscarried fetus does not classify as pathological waste.[89]

The form of disposition regarding the fetus in each of these states is laid out by statute. All the states allow for cremation and burial of fetal remains.[90] One striking caveat to the disposition process is that the Indiana statute allows for simultaneous cremation.[91] Simultaneous cremation is where there are remains of multiple fetuses being cremated at one time.[92] Simultaneous cremation could lead to the complete mix-up of remains.[93] If there are multiple cremations taking place at one time, it is very possible that the ashes of one fetus could be misplaced or mistakenly given to the wrong family.

Similar to the form of disposition, the state statutes also determine *who* makes the decision concerning the final disposition. Indiana, Florida, Georgia, Ohio, Tennessee, Arkansas and Texas all give rights to the mother to determine the form of disposition.[94]

Some of the state statutes are very specific regarding the disposition of the fetus, while others are rather broad. Texas's statute, for example, states that the disposition of the fetal remains should be consistent with that of dead human remains.[95] It specifies that any fetus under 350 grams should be disposed of in this manner according to law.[96] Texas's statute is very specific compared to the Louisiana statute. Louisiana's statute is far less concerned with the fetus, and more emphasis is placed on the disposition requirements.[97] The statute states that no disposition, whether fetal or human remains, is permitted without a burial transit permit.[98] While Texas's statute places very clear lines on what is required concerning fetal death, Louisiana is more

---

12-141.1.

[88] IND. CODE ANN. § 16-41-16-4.

[89] § 16-41-16-5.

[90] *See* § 16-34-3-2; TEX. HEALTH & SAFETY CODE ANN. § 697.004; ARK. CODE ANN. § 20-17-801; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. § 16-12-141.1; OHIO REV. CODE ANN. § 3726.02; LA. STAT. ANN. § 40:52; TENN. CODE ANN. § 39-15-219.

[91] IND. CODE ANN. § 16-34-3-4(a).

[92] *Id.*

[93] *Compare Can Two People's Remains Get Mixed Up During Cremation Services?*, CREMATION SOC'Y OF TENN. (Aug 23, 2021), https://www.cremationsocietyoftn.com/can-two-peoples-remains-get-mixed-up-during-cremation-services/.

[94] IND. CODE ANN. § 16-34-3-2; TENN. CODE ANN. § 39-15-219; TEX. HEALTH & SAFETY CODE ANN. § 241.010; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. § 16-12-141.1; OHIO REV. CODE ANN. § 3716.03.

[95] TEX. HEALTH & SAFETY CODE ANN. § 697.004.

[96] TEX. HEALTH & SAFETY CODE ANN. § 241.010.

[97] LA. STAT. ANN. § 40:52.

[98] *Id.* (A burial transit permit is the documentation used when deceased individuals are transported from the place of death. Generally, the burial transit permit is also retained by the place of final rest, whether it be a cemetery or a crematory).

concerned about the paperwork documenting the disposition.[99]

The last area of interest regarding fetal death statutes is the payment of services regarding the disposition. Most of the statutes require that the mother pay for the fetal death services *if* she chooses not to use the healthcare or abortion facility for the disposition.[100] Interestingly, the statutes do not say *who pays* for the services if the mother chooses to use the healthcare or abortion facility. For example, the Indiana statute states that if the mother is to take custody of the remains, she is to pay for the services.[101] The Ohio statute states that the abortion facility is to pay for the final disposition.[102] The Ohio statute says nothing about the event of a miscarriage.[103] One would think that if the state imposes the situation on the mother that the state would be the one to provide relief on this issue. As mentioned earlier, funerals are not cheap.[104]

IV. ANALYSIS

Since the Supreme Court adopted the undue burden standard for abortion cases and cases dealing with the fetus, this standard should be extended to review state fetal death statutes. Further, if states are allowed to claim a valid interest in the fetal remains, they must do so in a way that does not create a substantial obstacle in the path of the mother. Part A discusses the issues with state interest, Part B examines the undue burden standard's three-part test and how current fetal death statutes create an undue burden, Part C describes the issues surrounding payment for disposition, and Part D introduces the current First Amendment argument regarding the statutes taking place in Indiana.

A. The Problem with State Interest

The Supreme Court has held that states can claim a valid interest in the fetus.[105] However, the state cannot enact laws that further their interest in the fetus that in effect create an undue burden on mothers.[106]

1. The Problem with the "State Interest" Argument

---

[99] *See* TEX. HEALTH & SAFETY CODE ANN. § 697.004; LA. STAT. ANN. § 40:52.

[100] *See generally* IND. CODE ANN. § 16-34-3-4; TEX. HEALTH & SAFETY CODE ANN. § 697.004; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. §16-12-141.1; OHIO REV. CODE ANN. § 3726.09.

[101] § 16-34-3-4.

[102] OHIO REV. CODE ANN. § 3726.09.

[103] *Id.*

[104] Tetrault, *supra* note 70.

[105] Gonzales v. Carhart, 550 U.S. 124, 145 (2007)

[106] Whole Women's Health v. Hellersted, 579 U.S. 582, 607 (2016).

Whole Women's Health v. Hellersted established the most recent view of what constitutes a valid state interest.[107] The Court said, "[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[108] In *Box*, the respondent, Planned Parenthood, made no argument about undue burden or state interest.[109] The respondents relied only on the argument that there was not a fundamental right and that the fetal disposition law needed to pass the test of rational basis review.[110]

Under rational basis review, the courts "lowest" level of scrutiny, the government has to prove the law is rationally related to a legitimate government interest.[111] The Court in *Box* agreed that the Indiana law was rationally related to a legitimate interest.[112] The Court, however, said that *Box* would not affect the undue burden cases, the standard traditionally used to determine abortion and other fetal concerns.[113]

Rational basis review is far too weak to use in relation to fetal death statutes. Not only is it the lowest level of scrutiny the Supreme Court applies, but it really has no defining guidelines.[114] As the court admitted in *Box*, "[T]he state need not have drawn 'the perfect line,' as long as 'the line actually drawn [is] a rational' one."[115] The court essentially held that even if the claim of government interest is not specifically articulated, the fact that the government has articulated *its* interest is enough.

Before reaching the Supreme Court, the Seventh Circuit Court of Appeal's ruling in in *Box* found that the law was unconstitutional because there was no legitimate state interest in the fetus.[116] The court found that the fetus had no constitutional relevance because there was no possibility of life—either for an aborted fetus or a miscarriage.[117] At the trial court level, the District Court opined that there could be no state interest in fetal remains because the law did not recognize a fetus the same as a deceased human being.[118] Both the trial and appellate court's arguments are more logical as to

---

[107] *Id.*
[108] *Id.*
[109] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1781, 1781 (2019).
[110] *Id.*
[111] *Id.* at 1782.
[112] *Id.*
[113] *Id.*
[114] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).
[115] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1781, 1782 (2019).
[116] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 302 (7th Cir. 2018).
[117] *See id.* at 305–06.
[118] Planned Parenthood of Ind. & Ky. v. Commissioner, 194 F. Supp. 3d 818, 832 (S.D. Ind. 2016).

why there is no legitimate state interest than the Supreme Court's opinion. Since *Roe,* many people began to view the fetus as a human.[119] Moreover, the fetal personhood movement gained traction when the Supreme Court decided *Gonzales v. Carhart*.[120] In *Gonzales*, the Supreme Court held that the state had an interest in fetal life.[121] The case concerned the Partial-Birth Abortion Ban Act of 2003.[122] In the opinion, Justice Kennedy wrote that:

> Where [a state] has a rational basis to act, and it does not impose an undue burden, the state may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life to the unborn.[123]

The language of Justice Kennedy's opinion insinuated that states can claim an interest in the fetus and promoted what became the "fetal personhood movement."[124]

Gonzalez, however, is inconsistent with many past rulings of the Supreme Court.[125] For many years, the Court held that a fetus was not a person and, therefore, was not entitled to be treated the same as a live or a deceased human being.[126] Thus, states were not able to claim an interest in fetal remains no matter what standard the courts used to evaluate the states' activity.

The remaining question that the state interest argument fails to answer is: what about the interest of the mother and the burdens that fetal death requirements place on her? So much case language concerns the states' interest and the fetus's interest, but not the mother's interest.

Undue Burden Imposed on Mothers

Fetal death statutes impose an undue burden on mothers. Outside of abortions, fetal death still occurs. So much of the everyday discussion

---

[119] *See* Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights*, TIME (June 28, 2022), https://time.com/6191886/fetal-personhood-laws-roe-abortion/.

[120] Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (stating that the state has an interest in fetal life).

[121] *Id.*

[122] *Id.* at 132.

[123] *Id.* at 158.

[124] *See* Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, THE NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars.

[125] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162–63 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992).

[126] *See Casey*, 505 U.S. at 845; *Roe*, 410 U.S. at 163.

surrounds "abortion" that it seems as though abortion is the only way a fetus dies, or a pregnancy ends early. That, however, is not the case. Miscarriages make up a vast majority of the fetal deaths in the country.[127] In fact, 10–15 of every 100 pregnancies end in a miscarriage.[128]

Even though the *Box* respondents did not argue that Indiana's legislation imposed an undue burden on women, it would have been the best argument and the route for the respondents to take.[129] Erwin Chemerinsky lays out the best way in which the undue burden standard should be measured.[130] Chemerinsky writes:

> [T]he undue burden test combines three distinct questions into one inquiry. When the Supreme Court considers cases involving individual liberties, there are four issues: is there a fundamental right; is the right infringed; is the infringement justified by a sufficient purpose; are the means sufficiently related to the end sought? The undue burden test combines the latter three questions.[131]

Under these statutes, there is an assumption that the mother has the right to decide the disposition of the fetus.[132] Chemerinsky's first element is met because the mother choosing the form of disposition has a fundamental right. The rest of the test, however, fails on the part of the state, and each of these three prongs will be discussed in turn.

Is the Right Infringed?

The mother's choice is infringed by having to choose a form of disposition, thereby creating a substantial obstacle for the mother.[133] Imagine being informed that the child you were carrying resulted in a miscarriage. The hospital staff ushers in paperwork demanding that you choose what happens next—cremation or burial?—all within a limited amount of time.

The next of kin's ability to choose what happens to the remains of a deceased person is a practice that is traceable to the early days of American

---

[127] *Miscarriage*, MARCH OF DIMES, https://www.marchofdimes.org/find-support/topics/miscarriage-loss-grief/miscarriage (last visited Jan. 18, 2023).

[128] *Id.*

[129] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1781, 1781 (2019).

[130] Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1219 (2017).

[131] *Id.*

[132] IND. CODE ANN. § 16-34-3-2; TENN. CODE ANN. § 39-15-219; TEX. HEALTH & SAFETY CODE § 241.010; GA. CODE ANN. § 16-12-141.1.

[133] *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

funeral practices.[134] Although this practice is *traditional* in American funeral practice, courts have held that disposition of a fetus is different from a deceased human being.[135] Thus, courts gave power to the states by allowing them to claim an interest in the fetus and enact fetal death statutes.[136]

When a human dies, next of kin face the same decisions about disposition, but not in the manner that the fetal death statutes require. Along with burial and cremation, an individual (or their next of kin) can designate whether they want to donate their body to science (i.e., for medical dissection) for further study, be disposed of through alkaline hydrolysis, and so on.[137] In contrast, the mother of a fetus can only choose between burial or cremation.[138] Incineration under fetal death laws is prohibited, thus imposing a "this-or-that" choice on a mother and greatly infringing her right to choose a form of disposition.[139]

Is the Infringement Justified by a Sufficient Purpose?

This question relates back to the issue[140] about whether the state actually *has* an interest in the fetus and disposition. The Supreme Court in *Gonzalez* held that states have an interest in the fetus,[141] but the Court decided that the state has an interest under the undue burden standard. *Box* affirmed only that Indiana had satisfied a rational basis review.[142] Noting the analysis above,[143] the Court said that the legitimate stated interest needed to be rational.[144]

Under a stricter standard, like the undue burden, it is unlikely a state interest showing could succeed. After all, what interest does a state have in fetal remains? With a deceased human, the disposition must occur in order to rid the community and the earth of disease and sickness.[145] However, with a fetus, the state's concern seems to be less clear. Sicknesses and disease are not the focus of the disposition required for the fetal remains.[146] A mother designating the hospital to take care of disposition or incineration would

---

[134] Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 992–95 (1999).
[135] *See* Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (discussing fetal death and the state's interest).
[136] *See* discussion *supra* Part IV, Section A.1.
[137] *Life File: Options For Body Disposition*, *supra* note 62.
[138] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1781, 1781 (2019).
[139] *Id.*
[140] *See* discussion *supra* Part IV, Section A.1.
[141] Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (stating that the state has an interest in fetal life).
[142] *Box*, 139 S. Ct. at 1782.
[143] *See* discussion *supra* Part IV, Section A.1.
[144] *Id.*
[145] Tanya D. Marsh, *Ebola, Embalming, and The Dead: Controlling The Spread of Infectious Diseases*, 4 WAKE FOREST L. REV. ONLINE 43, 44 (2014).
[146] *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 304 (7th Cir. 2018).

achieve the same goal as other forms of human disposition. By limiting the options for mothers concerning final disposition, states have infringed on the rights of mothers under the undue burden standard.

Are the Means Sufficiently Related to the End Sought?

The final part of the undue burden test requires that the government prove that it cannot attain the goal by any less restrictive legislation.[147] The government has the burden of showing there was no other less restrictive means to achieve the interest.[148] The state's legislation has to be reasonable and sufficient to the end result (i.e. what the statute mandates for citizens).[149] The state's interest in the fetus and the mother's burden do not achieve the same goal; therefore, they are not sufficiently related. The means by which the state *claims* an interest in the fetus is disproportional to the hardships for the mother. States allow the mother to choose what *type* of disposition, but deprive her of any financial relief.[150] Further, the statutes do not say *who pays* for the disposition; if the mother decides to take custody of the remains and chooses a funeral home, *she is responsible* for the cost.[151] It seems unfair for the state to claim an interest in the fetus, but then delegate to the mother the responsibility for the costs associated with promotion of the state's interest. Moreover, it appears that statutory alternatives are more restrictive than necessary. Why not allow the hospital or healthcare facility to take custody of the remains for the mother? If the healthcare facility was allowed to dispose of the remains in its normal fashion it would remove further hardship from the mother. The structure and lack of transparency regarding the payment of the disposition method, coupled with the insensitivity the state provides, prove the means are not sufficiently related to the ends sought. Under the undue burden standard laid out by Chemerinsky, the state fails in its interest regarding the fetus.[152] The state has infringed on the mother's fundamental right, the state has not offered a sufficient purpose for the infringement, and the laws the state has in place are not reasonable and sufficient to the end sought.[153] Therefore, the state fails to satisfy the undue burden standard.[154] Fetal death laws should not be upheld.

---

[147] *See* Planned Parenthood v. Casey, 505 U.S. 833, 878–79 (1992).
[148] *Id.* at 879.
[149] *Id.* at 878.
[150] IND. CODE ANN. § 16-34-3-2; TENN. CODE ANN. § 39-15-219; TEX. HEALTH & SAFETY CODE ANN. § 241.010; GA. CODE ANN. § 16-12-141.1.
[151] § 16-34-3-2; § 39-15-219; § 241.010; § 16-12-141.1.
[152] Chemerinsky & Goodwin, *supra* note 132.
[153] *Id.*
[154] *See id.*

The Problem of Cost and the "Substantial Obstacle"

The final area for discussion builds off the last prong of Chemerinsky's test.[155] The cost surrounding the final disposition of the fetus not only fails that last prong,[156] but also it creates a substantial obstacle for the mother.[157] Funerals are expensive and a large financial undertaking. The average cost of a stillborn funeral today is around $3,000—an amount that is by no means insubstantial.[158] The average funeral cost amount covers the funeral services and the cremation, but not the other costs that *come with* a funeral.[159] These costs involve the burial fees (opening/closing the grave), a container or a casket for the fetus, and the purchase of the cemetery property.[160] What starts at an average cost of $3,000 may increase to almost $5,000 once these factors are considered. Funeral homes, cremation societies, and cemeteries are not performing these services for free. Especially for women who miscarry in their twenties and teens, the disposition costs are prohibitive and establish an undue burden.[161]

Courts have held that increased costs can determine whether a substantial obstacle exists.[162] In *Planned Parenthood Ariz. Inc. v. Humble*, the Ninth Circuit stated: A significant increase in the cost of [abortion] or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women.[163]

While the Ninth Circuit's holding relates to an abortion case, it is no different from miscarriage costs. While abortion cases established the undue burden test, that same test should apply to fetal disposition cases and states consistently fail that test. The cost that the state forces the mother to incur is significant, and it affects large numbers of women.[164] Moreover, the ambiguity of the statutes creates uncertainty about *who* pays, if the mother uses the hospital or healthcare facility for the final disposition.[165] Until these statutes specify that the state will bear the cost of the disposition, they are likely unconstitutional. Essentially, what the states are saying is, "We're sorry for your loss, here is your choice, and here is the bill." The situation is

---

[155] *Id.* (analyzing the question "are the means sufficiently related to the end sought?").
[156] *Id.*
[157] *See* Key, *supra* note 18, at 329–33; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992).
[158] Tetrault, *supra* note 70.
[159] *Id.*
[160] *Id.*
[161] *See generally* Key, *supra* note 18, at 341.
[162] *See Casey*, 505 U.S. at 991; Planned Parenthood Ariz., Inc., v. Humble, 753 F.3d 905, 915–16 (2014).
[163] Planned Parenthood Ariz., Inc., v. Humble, 753 F.3d 905, 915 (citing Tucson Woman's Clinic v. Eden, 379 F.3d 531, 541 (9th Cir. 2004)).
[164] *Id.*
[165] *See generally* IND. CODE ANN. § 16-34-3-4; TEX. HEALTH & SAFETY CODE ANN. § 697.004; FLA. STAT. ANN. § 383.33625; GA. CODE ANN. §16-12-141.1; OHIO REV. CODE ANN. § 3726.09.

unfortunate and should not be tolerated under the *Casey* and Ninth Circuit standards.[166]

The Free Speech Argument and Current Developments

In late 2022, the Southern District of Indiana barred forced burial or cremation for fetal remains and tissue.[167] The applicable laws were identical to the *Box* case.[168] The court held that the law was unconstitutional and violated the Free Speech and Religion Clauses of the Constitution[169] because many religions do not believe that a fetus deserves the same treatment as a human being.[170] Therefore, the judge concluded the law directly conflicts with Supreme Court precedent.[171]

Soon after, the Seventh Circuit upheld Indiana's law requiring fetal remains to be buried or cremated.[172] The Seventh Circuit chastised the Indiana Southern District Court for trying to block the statute in the first place.[173] No oral arguments were held, and the court issued a five-page opinion stating:

> The district court could have provided full relief to these four plaintiffs by enjoining the application of the statute [fetal death] to them but instead it barred multiple state officials from applying these laws to *anyone* [174]. . . The district court's needlessly broad injunction treats the statute as invalid across the board (that is, on its face rather than as applied), which effectively countermands the Supreme Court's decision for the entire population of Indiana.[175]

Judge Easterbrook countered the argument that the fetus is not considered human by stating that dogs, cats and other pets, although not persons, are

---

[166] *See Casey*, 505 U.S. at 991; *Humble*, 753 F.3d at 905.

[167] Johnny Magdaleno, *Judge Blocks Indiana Abortion Law Requiring Burial, Cremation Of Fetal Tissue,* INDIANAPOLIS STAR (Sept. 28, 2022), https://www.indystar.com/story/news/2022/09/28/indiana-abortion-law-fetal-burial-cremation-blocked-federal-judge/69523090007/.

[168] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019).

[169] Magdaleno, *supra* note 168; *see also* U.S. CONST. amend. I.

[170] Magdaleno, *supra* note 168.

[171] *Id.*

[172] Marilyn Odendahl, *Exasperated 7th Circuit Reverses Block On Indiana's Fetal Disposition Law*, THE IND. LAW. (Nov. 29, 2022), https://www.theindianalawyer.com/articles/exasperated-7th-circuit-reverses-block-on-indianas-fetal-disposition-law#:~:text=The%20Indiana%20Southern%20District%20Court%20found%20Indiana%27s%20fetal%20disposition%20law,Court%20of%20the%20United%20States.

[173] *Id. See also* Doe v. Rokita, 54 F.4th 518, 519 (7th Cir. 2022).

[174] *Rokita*, 54 5.4th at 519.

[175] *Id.*

cremated and buried.[176] Of course, the Seventh Circuit's rationale is greatly flawed. Within that logic —yes—any animal can be buried or cremated. The difference is that Indiana is *not* requiring, by statute, that owners of dogs, cats, and other pets be buried or cremated.[177] In fact, in Indiana, you can leave your pet with the veterinary hospital and allow them to dispose of the remains.[178] This often includes incineration by a funeral provider with *multiple* pets in the cremation chamber at a time.[179]

The Attorney General hailed the Seventh Circuit's holding statement stating: "The bodies of unborn babies are more than mere medical waste to be tossed out with the trash. They are human beings who deserve the dignity of cremation or burial. The appellate court's decision is a win for basic decency."[180]

While this debate will go on, what is most important is that changes must be made. The proper standard that fetal death laws should be viewed under is the undue burden standard. If the proper standard of review is used, the state's argument *fails* because it creates a substantial obstacle in the path of the mother. Courts should look at applying the undue burden standard and re-evaluate their precedent surrounding it.

V. RESOLUTION

Not only does the Supreme Court need to adopt the undue burden standard for fetal disposition laws, but model state statutes must be adopted. As mentioned in Part III, the inconsistency of the statutes that the seven states have in place leads to unfair consequences on the mother.[181] Questions of payment, the manner of disposition, and final determination need to be unified. The proposed model statute is:

The Disposition of Fetal Remains as a Result of Miscarriage or Abortion

(A) In the event of a miscarriage or abortion, disposal of fetal remains must occur in a manner consistent with state funeral laws.
(B) The fetal remains shall be disposed of by one of the following options under state law: burial, cremation, or incineration.

---

[176] *Id.* at 520.

[177] IND. CODE ANN. § 15-17-11-20.

[178] *End-of-life Services*, ANIMAL HUMANE SOC'Y, https://www.animalhumanesociety.org/resource/end-life-services (last visited July 13, 2023).

[179] *Id.*

[180] Whitney Downard, *Fetal Remains Law Upheld On Appeal*, IND. CAP. CHRON. (Nov. 29, 2022), https://indianacapitalchronicle.com/briefs/fetal-remains-law-upheld-on-appeal/#:~:text="The%20bodies%20of%20unborn%20babies,a%20win%20for%20basic%20decency.".

[181] *See* discussion *supra* Part III (discussing fetal death statutes of the different states).

The Right to Choose and Perform Disposition of Fetal Remains

(A) Prior to final disposition of fetal remains, the mother of the fetus must notify the healthcare facility, the abortion provider, or both of the method she has selected.
(B) The mother may take custody of the fetus and select a funeral provider other than a healthcare facility or abortion provider.
(C) The healthcare facility and abortion provider must not act to dispose of fetal remains until the mother gives it specific direction concerning disposition.

Payment of Services State-Mandatory Final Disposition of Fetal Remains

(A) Unless governed by Statute 3(B) of this Code, the healthcare facility, abortion provider, or both must pay for the internment, cremation, or incineration of the fetal remains under Statute 1(B) of this Code, if the mother chooses to use the services provided by the healthcare facility, abortion provider, or both.
(B) If the mother chooses a funeral provider other than the healthcare facility or abortion provider, the state must pay for the internment, cremation, or incineration of fetal remains under Statute 1(B) of this Code.
(C) If the mother chooses her funeral provider, the state is not responsible for paying secondary costs associated with: (a) visitation; (b) funeral services; (c) memorial items; (d) funeral home service charge; (e) any additional staff charges.

Definitions

(A) Abortion. The termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus such as:
(a) spontaneous expulsion of a human fetus during the first twelve weeks of gestation
(b) induced expulsion of a human fetus.[182]
(B) Abortion Provider. A facility or individual that engages in performing abortions as defined by Section 4 (A) above.[183]
(C) Cremation. The mechanical, thermal, or other dissolution process that

---

[182] *Abortion*, MERIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abortion (last visited July 12, 2023).
[183] *ACOG Guide to Language and Abortion*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, https://www.acog.org/contact/media-center/abortion-language-guide (last visited Sept. 3, 2023).

reduces human remains to bone fragments. This process also includes the processing and pulverization of the bone fragments into pieces that are usually no more than one-eighth inch in size.[184]

(D) Fetal Remains. Dead remains or part of a dead fetus that has reached a stage of development that, upon visual inspection of the fetus or part of the fetus, the head, torso, or extremities appear to be supported by skeletal or cartilaginous structures.[185]

(E) Funeral Provider. A facility that engages, schedules, and directs the burial, cremation, or alternative service for a dead human body.[186]

(F) Healthcare Facility. A place that services related to health care. These facilities include, but are not limited to hospitals, clinics, outpatient care services, and specialized care centers.[187]

(G) Incineration. To reduce an element or living thing to ash by intense burning.[188]

(H) Infectious Waste. Waste that can cause infectious diseases in others.[189]

(I) Miscarriage. The spontaneous loss of a pregnancy before the 20th week.[190]

Annotations to the Model Statutes

By adopting Statute 1, the state places limits on the disposition of fetal remains. The form of disposition must follow state funeral laws, and the mother has three final disposition options. Further, because cremation and burial are so similar, either option is allowed.[191] While the state may ban the incineration of the fetus with pathological and infectious waste, it does not completely ban the method of disposition by incineration.

Statute 2 establishes that only the mother can select the method for disposing of fetal remains. The healthcare and abortion facility must follow her wishes, as long as her wishes would comply with the state funeral laws. States may establish that the mother has exclusive decision-making control

---

[184] *See Cremation Process*, *supra* note 62.

[185] *Fetal remains*, LAW INSIDER, https://www.lawinsider.com/dictionary/fetal-remains#:~:text=Fetal%20remains%20means%20a%20dead,by%20skeletal%20or%20cartilaginous%20structures (last visited Sept. 3, 2023).

[186] *Funeral provider*, LAW INSIDER, https://www.lawinsider.com/dictionary/funeral-provider (last visited Sept. 3, 2023).

[187] *Defining Healthcare Facilities and Healthcare-associated Legionnaires' Disease*, CDC, https://www.cdc.gov/legionella/health-depts/healthcare-resources/healthcare-facilities.html (last visited Sept. 3, 2023).

[188] *See Incinerate*, *supra* note 64.

[189] *Health-care waste*, WORLD HEALTH ORGANIZATION, https://www.who.int/news-room/fact-sheets/detail/health-care-waste (last visited Sept. 3, 2023).

[190] *Miscarriage*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298 (last visited July 12, 2023).

[191] *See* discussion *supra* Part II, Section C (noting the definition of cremation an incineration and the similarities of both).

regarding final disposition. The sensitivity of a miscarriage or an abortion gives the mother control of how to proceed during this emotional situation.

Statute 3 is the most crucial part that is missing from current statutory schemes. Part 3(A) establishes that the healthcare provider, abortion facility, or both, pays for the final disposition that the mother chooses. This relates back to the state interest argument and undue burden that states place on the mother requiring her to pay for the disposition.[192]

Part 3(B) requires the state to pay services if the mother chooses her own funeral provider. This is fair, because the state is claiming an interest in the fetus and is mandating a form of final disposition, and pertains to the cremation, incineration, or burial charges. With burial charges, the provider pays only for the cost of the container and the burial itself. Because fetal remains are likely too undeveloped for embalming, the healthcare provider, abortion facility, or both, pays only for the cost of the container and the burial.

Part 3(C) establishes that the state is not responsible for a funeral home's extra charges. The list is non-exhaustive but reiterates that the only charges that the provider must pay is the burial and the container.

The model statute incorporates the state's interest in the fetus and the mother. State legislatures must have lengthy conversations with lawyers and social service organizations to devise a funding plan for the needed financial assistance. The mother's interest is a part of the discussion, if states with fetal death statutes want to applaud the Seventh Circuit's ruling claiming that fetuses are more than medical waste and deserve the dignity of burial or cremation. If the state requires the mother to select a form of fetal disposition, it must pay the key costs.

Statute 4 provides the necessary definition relating to fetal death, the methods of final disposition, and waste. Several of these definitions were taken from the standard definition of the word.[193] States that adopt the model statutes must add this section as well.

These four model statutes provide the proper framework relating to the mother's interest, the state's interest, and the fetus. Moreover, these statutes fill in the gaps that are currently present in enacted fetal death statutes. The statutes provide answers to the *choice* and *cost*—balancing the state's and mother's interests.

CONCLUSION

The current fetal disposition laws are impractical because the statutes do not adequately balance the factors necessary to avoid an undue burden on

---

[192] *See* discussion *supra* Part IV, Section C (discussing the undue burden placed by increased costs).

[193] *Abortion*, *supra* note 187; *Cremation Process*, *supra* note 63; *Incinerate*, *supra* note 64; *Id.*

mothers. Moreover, the statutes fail to specify the mother's right to determine the form of disposition and *who* bears the cost associated with final disposition. Much of this Note focuses on the constitutionality of the statutes and that courts should change their standard of review and adopt the undue burden standard when evaluating state fetal death statutes. Current statutes also must be rewritten.

Finally, the model statute. If states are to enact fetal death laws, they must be uniform. The model statute achieves this uniformity and answers the questions that current fetal death laws leave unanswered. The mother must have the right to determine the method of disposition. States must pay for disposition if the mother chooses to use a healthcare or abortion facility. States also must rewrite their laws in order to emphasize the interest of the mother and to provide information that is currently unaddressed.

Having a miscarriage is perhaps the most emotional situation a mother can go through. For years she will think about the "what ifs," the person the child would have grown up to be, and how life would be different. It is a heavy burden to bear. The current fetal death laws should not be allowed to make this already turbulent time worse.