

Abortion “Trigger” Ban Statutes: Impacts on Plan B, Birth Control, and IVF Treatments

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Introduction

As federal protections for reproductive rights are imperiled with the Supreme Court’s pending decision in *Dobbs v. Jackson Women’s Health Organization*,¹ states prepare for the potential downfall of *Roe v. Wade*. One of the legislative initiatives that has been undertaken by several states is a statute creating a trigger ban on abortion, wherein the Supreme Court striking down *Roe* would immediately result in an automatic complete abortion ban statewide.² So far, twelve states³ have passed such trigger bans, and several other states are poised to follow and ban abortion entirely, should *Roe* be overturned.⁴ These trigger bans could have far-reaching, unintended (or perhaps completely intended) consequences not only for pregnant people, but also for those trying to prevent pregnancy through common methods such as birth control or the “morning after” pill.⁵ Additionally, the trigger bans may have significant impacts on those pursuing in vitro fertilization (IVF), as well as on the providers of such services.⁶ Ultimately, the trigger bans are an unconscionable attack on people’s most fundamental reproductive rights, sacrificed at the altar of a single-celled fertilized egg.

The Definition of Abortion

The distinguishing feature of these trigger bans is that they all ultimately define the beginning of pregnancy as the moment of fertilization.⁷ For example, the Arkansas trigger ban defines an “abortion” as “the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate the pregnancy of

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¹ *Dobbs v. Jackson Women’s Health Organization*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/case/scotus-mississippi-abortion-ban/> (last visited Feb. 24, 2022).

² Casey Parks, *Twelve states have abortion ‘trigger laws.’ What are they?*, WASH. POST (Dec. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/07/what-is-an-abortion-trigger-law/>.

³ These states are: Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and Utah.

⁴ Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here’s Which Ones and Why*, GUTTMACHER INS. (Oct. 28, 2021), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why>.

⁵ Julie Rovner, *Coming Abortion Fight Could Threaten Birth Control, Too*, KAISER HEALTH NEWS (Nov. 5, 2020), <https://khn.org/news/coming-abortion-fight-could-threaten-birth-control-too/>.

⁶ Margaret Marsh & Wanda Ronner, *Why new anti-abortion laws may make it harder to conceive*, WASH. POST (Aug. 15, 2019), <https://www.washingtonpost.com/outlook/2019/08/15/why-new-anti-abortion-laws-may-make-it-harder-conceive/>.

⁷ Kate Smith, *New abortion law: Abortion would automatically be illegal in these states if Roe v. Wade is overturned*, CBS NEWS (Apr. 22, 2019), <https://www.cbsnews.com/news/new-abortion-law-abortion-clinic-automatically-illegal-roe-v-wade-overturned-2019-04-22/>.

a woman.”⁸ The same statute defines pregnancy as the existence of an unborn child, which comes into being at the moment of fertilization.⁹

⁸ S. B. 6, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); *see also.*, H. R. 56, 66th Leg., Reg. Sess. (Idaho, 2021) (defining abortion as “the use or prescription of any instrument, medicine, drug, or any other substance or device to intentionally kill an unborn human being”), H. R. 148, 19th Gen. Assemb., Reg. Sess. (Ky. 2019) (defining abortion as “administer[ing] to, prescrib[ing] for, procur[ing] for, or sell[ing] to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being; or us[ing] or employ[ing] any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being”), La. Stat. Ann. § 40:1061 (West) (defining abortion as “administer[ing] to, prescrib[ing] for, procur[ing] for, or sell[ing] to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being; or us[ing] or employ[ing] any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being”), Miss. Code. Ann. § 41-41-191 (West) (defining abortion as “the use or prescription of an instrument, medicine, drug, or other substance or device with the intent to terminate a clinically diagnosable pregnancy for reasons other than to increase the probability of a live birth, to preserve the life or health of the unborn human being, to terminate an ectopic pregnancy, or to remove a dead unborn human being”), H. R. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019) (defining abortion as “the act of using or prescribing any instrument, device, medicine, drug, or any other 4 means or substance with the intent to destroy the life of an embryo or fetus in his or her mother’s womb; or (b) The intentional termination of the pregnancy of a mother by using or prescribing any instrument, device, medicine, drug, or other means or substance with an intention other than to 8 increase the probability of a live birth or to remove a dead unborn child”), N.D. Cent. Code Ann. § 14-02.1-02 (West) (defining abortion as “the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable intrauterine pregnancy of a woman, including the elimination of one or more unborn children in a multifetal pregnancy, with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to: a. Save the life or preserve the health of the unborn child; b. Remove a dead unborn child caused by spontaneous abortion; or c. Treat a woman for an ectopic pregnancy”), S.B. 195, 57th Leg., Reg. Sess. (Ok. 2019) (granting “unborn children” all the “rights, privileges, and immunities available to other persons, citizens, and residents of this state... from the moment of conception until birth”), H.R. 1249, 80th Leg. Assemb., Reg. Sess. (S.D. 2005) (criminalizing anyone who “administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion”), H. R. 1029, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (defining an abortion as “the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus”), H.R. 1280, 87th Leg., Reg. Sess. (Tx. 2021) (defining an abortion as “the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to: (A) save the life or preserve the health of an unborn child; (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or (C) remove an ectopic pregnancy”), H.R. 174, 63rd Legis., Gen. Sess. (Utah 2020) (defining abortion as “(i) the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum through a medical procedure carried out by a physician or through a substance used under the direction of a physician; (ii) the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician; or (iii) the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a

Potential Impacts on the “Plan B” Pill

Whether implantation of a fertilized embryo is necessary to classify that embryo as an “unborn child” is an important distinction because one of the ways in which Plan B—commonly referred to as the “morning after” pill—functions is by preventing a fertilized egg from implanting in the uterine lining.¹⁰ Because these statutes do not, by definition, require that the embryo be implanted in the uterine wall for the state to consider a person pregnant, the Plan B pill could technically be considered an abortifacient.¹¹ As such, drug stores would be in violation of the

physician or through a substance used under the direction of a physician. (b) "Abortion" does not include: (i) removal of a dead unborn child; (ii) removal of an ectopic pregnancy; or (iii) the killing or attempted killing of an unborn child without the consent of the pregnant woman, unless: (A) the killing or attempted killing is done through a medical procedure carried out by a physician or through a substance used under the direction of a physician; and (B) the physician is unable to obtain the consent due to a medical emergency”).

⁹ S. B. 6, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

¹⁰ *FDA's Decision Regarding Plan B: Questions and Answers*, FDA.org (June 19, 2020), [https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/fdas-decision-regarding-plan-b-questions-and-answers#:~:text=Plan%20B%20works%20like%20other,to%20the%20womb%20\(implantation\)\(last%20visited%20Feb.%2024,%202022\)\(hereinafter%20%20Food%20&%20Drug%20Admin.\)](https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/fdas-decision-regarding-plan-b-questions-and-answers#:~:text=Plan%20B%20works%20like%20other,to%20the%20womb%20(implantation)(last%20visited%20Feb.%2024,%202022)(hereinafter%20%20Food%20&%20Drug%20Admin.))

¹¹ See S. B. 6, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (defining an unborn child as “an individual organism of the species *Homo sapiens* from fertilization until live birth”), H. R. 56, 66th Leg., Reg. Sess. (Idaho, 2021) (defining an unborn human being as “the offspring of human beings from the moment of conception until either live birth or death, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus, whether conceived or located inside or outside the body of a human female” and conception as “fertilization of the ovum of a female individual by the sperm of a male individual”), H. R. 148, 19th Gen. Assemb., Reg. Sess. (Ky. 2019) (defining an unborn human being as “an individual living member of the species *homo sapiens* throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth” and fertilization as “that point in time when a male human sperm penetrates the zona pellucida of a female human ovum”), La. Stat. Ann. § 40:1061 (West) (defining an unborn human being as “an individual living member of the species, *homo sapiens*, throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth” and fertilization as “that point in time when a male human sperm penetrates the zona pellucida of a female human ovum”), Miss. Code. Ann. § 41-41-191 (West) (defining a human being as “an individual member of the species *Homo sapiens*, from and after the point of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus” and conception as “the fusion of human spermatozoon with a human ovum”), H. R. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019) (defining unborn child as “the offspring of human beings from the moment of conception” and conception as “the fertilization of the ovum of a female by a sperm of a male”), N.D. Cent. Code Ann. § 14-02.1-02 (West) (defining a human being as “an individual living member of the species of *homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation” and fertilization as “s the fusion of a human spermatozoon with a human ovum”), S.B. 195, 57th Leg., Reg. Sess. (Ok. 2019) (defining an unborn child as “the offspring of human beings from the moment of conception until birth at every stage of biological development”), H. R. 1029, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (defining an unborn child as “an individual living member of the species, *homo sapiens*, throughout the entire embryonic and fetal stages of the unborn child from fertilization until birth” and defining fertilization as “that point in time when a male human sperm penetrates the zona pellucida of a

law if they stocked the drug, despite the fact that Plan B is not currently considered an abortifacient by medical professionals.¹² Creating artificial barriers to Plan B would likely force many people to attempt to leave the state in order to obtain the drug, which is simply not an option available to all. Leaving the state could be costly, and, moreover, the time lapse created by travel could decrease the efficacy of the drug, which must be taken as soon as possible to assure maximum effectiveness.¹³

The Potential Future of Plan B

Despite medical consensus that Plan B is not an abortifacient,¹⁴ the legislative definition may cause the pill to become illegal to stock or obtain. Whether this was the legislature's intention in drafting the statute as they did is unclear. While contraceptives are not explicitly the intended targets of trigger bans, pro-life groups have stated their belief that Plan B is an abortifacient.¹⁵ This belief stems from the fact that the main ingredient of the drug is in the same chemical family as mifepristone, which is used as an abortifacient.¹⁶ Despite the extreme scientific dubiousness of the claim that having similar chemistry means that the chemicals have the same function, pro-lifers seem to have embraced the campaign against Plan B, claiming that it ends pregnancies.¹⁷ The statutory definition of pregnancy as beginning at fertilization rather than implantation seems too deliberately applicable to the rhetoric surrounding Plan B to not have been contemplated. Ultimately, regardless of legislative intent, the language of the trigger bans opens the possibility for the implementation of a prohibition on Plan B.

Potential Impacts on Birth Control

For similar reasons to Plan B, some forms of birth control could potentially be rendered illegal under trigger ban statutes. Some forms of hormonal birth control prevent a fertilized egg from implanting in the endometrial lining by thinning the

female human ovum”), H.R. 1280, 87th Leg., Reg. Sess. (Tx. 2021) (defining an unborn child as “an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development” and fertilization as “the point in time when a male human sperm penetrates the zona pellucida of a female human ovum”).

¹² *Morning-After Pill*, MAYO CLINIC (June 19, 2020), <https://www.mayoclinic.org/tests-procedures/morning-after-pill/about/pac-20394730#:~:text=Plan%20B%20One%2DStep%20contains,from%20implanting%20in%20the%20uterus>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Plan B is an Abortion Pill*, TEXAS RIGHT TO LIFE (Aug. 19, 2011), <https://texasrighttolife.com/plan-b-is-an-abortion-pill/>.

¹⁶ *Id.*

¹⁷ Tom McClusky, *56 Days of Life: #Plan B From Outer Space*, MARCH FOR LIFE (Nov. 26, 2013), <https://marchforlife.org/56-days-of-life-plan-b-from-outer-space/>.

lining of the uterus.¹⁸ As such, birth control of this type results in the inability of a fertilized egg to develop.¹⁹ Without implantation, the fertilized egg, which is already considered a pregnancy by the standards of the trigger ban, would be incapable of further survival. Thus, the forms of hormonal birth control which operate using this mechanism would probably become classified as abortifacients in states that have enacted these trigger bans, despite the fact that their purpose is clearly not abortion, but rather to prevent pregnancy in the first place.

Potential Impacts on Fertility Treatments Such as In Vitro Fertilization

Because in vitro fertilization presumes that embryos will be destroyed during the treatment process, it is possible that the procedure, even though it is undertaken with the purpose of creating children, could be deemed illegal in states that have enacted a trigger ban.²⁰ In the process of in vitro fertilization, eggs are collected from the ovaries, then fertilized outside the body in a laboratory.²¹ The fertilized eggs are then inserted back into the uterus in an attempt to create a viable pregnancy.²² Generally, it is standard practice that more than one fertilized egg is transferred during each procedure, with the understanding that it is likely that only one embryo will implant in the uterine lining and lead to a successful pregnancy.²³

Moreover, this method presupposes that one or more fertilized eggs will not be able to implant and will thereby be destroyed.²⁴ The trigger ban statutes, in defining a fertilized egg as a pregnancy, did not specifically state that the embryo needs to be in a human body to be considered the kind of pregnancy that the statute is protecting.²⁵ As such, the entire practice of in vitro fertilization could be seen as destroying “babies” and thereby causing “abortions” because there is always the significant possibility that all the embryos will not survive.²⁶ In fact, it would be dangerous to the person undergoing the procedure if all the embryos transferred to the uterus did implant.²⁷ However, the language of the trigger ban leaves no room for carve-outs regarding in vitro fertilization treatments, thereby potentially banning the procedure in states that have adopted trigger ban statutes.

¹⁸ Kara Robinson, *How Is Birth Control Different From an Abortion?*, WEBMD, <https://www.webmd.com/sex/birth-control/features/birth-control-vs-abortion#:~:text=The%20Birth%20Control%20Process&text=It%20stops%20ovulation%2C%20so%20you,the%20lining%20of%20your%20uterus> (last visited Feb. 24, 2022).

¹⁹ *Id.*

²⁰ Food & Drug Admin., *supra* note 10.

²¹ *In Vitro Fertilization (IVF)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> (last visited Feb. 24, 2022).

²² *Id.*

²³ *Id.*

²⁴ Food & Drug Admin., *supra* note 10.

²⁵ Smith, *supra* note 7.

²⁶ *The importance of 3 full cycles of IVF*, NAT'L INST. FOR HEALTH & CARE EXCELLENCE (Oct. 31, 2014), <https://www.nice.org.uk/news/blog/the-importance-of-3-full-cycles-of-ivf#:~:text=Most%20women%20typically%20see%20success,pregnancy%20to%2045%2D53%205>.

²⁷ McClusky, *supra* note 17.

The questionable status of in vitro fertilization as a result of trigger ban statutes may be intentional, as pro-life groups have decried in vitro fertilization methods for years, citing the fertilized eggs that do not ultimately implant.²⁸ According to them, the lives of the artificially fertilized eggs are “taken” when they fail to implant or are not implanted.²⁹ Thus, the trigger ban statutes could potentially prevent IVF from being performed.

Conclusion

Across the country unconscionably restrictive trigger bans on abortion have been passed in anticipation of the fall of *Roe*. The most obvious consequence of these statutes is the complete inability to obtain an abortion, even within the first trimester, and the resultant stripping of reproductive choice for those who do not wish to remain pregnant. However, the potential implications of these statutes are far wider reaching than the stated intention of the trigger bans. Using the definition of a “pregnancy” provided in the statute, access to Plan B, certain types of birth control, and even in vitro fertilization could be significantly restricted.

²⁸ Alexandra Hutzler, *Anti-Abortion Groups Take On IVF, Fertility Clinics Over Unused Embryos: 'They Are Still Alive'*, NEWSWEEK (Oct. 8, 2019), <https://www.newsweek.com/anti-abortion-groups-take-ivf-1463839>.

²⁹ *Id.*