

# **DOES FEAR OF IMMIGRATION TRUMP LOVE FOR FETAL LIFE? HOW TRUMP’S POLICIES QUIETLY ENDANGER MIGRANT FETUSES IN SPITE OF THE ADMINISTRATION’S PRO-LIFE AGENDA**

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“The essential function of government is to protect the most vulnerable among us, those who don’t have a voice.” – Governor Michael DeWine, while advocating for the adoption of an abortion ban in Ohio.

INTRODUCTION

In September 2017, a minor crossed the border into the United States alone, without her parents or any other family members.<sup>1</sup> Because she entered the country surreptitiously, she was apprehended immediately.<sup>2</sup> The

1. See Findings of Fact in Support of Amended Temp. Restraining Order at 1, *Garza v. Hargan*, 304 F. Supp. 3d 145 (D.D.C. Mar. 30, 2018) (No. 17-cv-02122) [hereinafter *Garza Findings of Fact*].  
2. *Id.*

Office of Refugee Resettlement (ORR), the agency responsible for unaccompanied migrant children, sent her to a shelter.<sup>3</sup> She was seventeen years old at the time, and also eight weeks pregnant.<sup>4</sup> After discovering her pregnancy, she decided to have an abortion, “presumably in light of her dire circumstances.”<sup>5</sup> Eventually, Jane Doe received an abortion, but not without a battle that made its way to the Supreme Court.<sup>6</sup>

Because Texas, the state where she was being sheltered, required parental consent for minors to receive an abortion, she sought out and received a judicial bypass of Texas’s parental notification and consent requirements and found a requisite guardian to transport her to the facility where she received the procedure.<sup>7</sup> Still, she was denied an abortion. ORR refused to allow her to leave the shelter to complete the procedure because of a directive that federally funded shelters could not take “any action that facilitates” abortions without the ORR director’s approval; transportation would constitute facilitation.<sup>8</sup> The government also attempted to dissuade her from obtaining an abortion using other tactics. First, they required her to undergo counseling from a religiously affiliated pregnancy center.<sup>9</sup> Next, they required her to view a sonogram of the fetus.<sup>10</sup> In addition, ORR attempted to force Jane Doe to notify her parents of her decision to have an abortion, even after receiving a judicial bypass for the parental consent requirement, despite the fact that Jane Doe had been abused by her parents.<sup>11</sup>

In the same year the federal government fought to prevent seventeen-year-old Jane Doe from terminating her pregnancy, another woman sat in custody at the border. Like Jane Doe, she was also pregnant.<sup>12</sup> Unlike Jane Doe, she wished to become a mother.<sup>13</sup> Under the Obama administration, she, like other pregnant asylum-seekers, would have been paroled into the country while awaiting adjudication of her asylum claims.<sup>14</sup> However, she was instead held in immigration detention.<sup>15</sup> Teresa was thirty-one years old and four months pregnant when she was detained.<sup>16</sup> She repeatedly notified

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3. *Id.*

4. *Garza v. Hargan*, 874 F.3d 735, 743 (D.C. Cir. 2017) (Henderson, J., dissenting), *vacated sub nom.*, *Azar v. Garza*, 138 S. Ct. 1790 (2018).

5. *Id.* at 736 (Millett, C.J., concurring).

6. *See Azar v. Garza*, 138 S. Ct. 1790 (2018).

7. *See Garza Findings of Fact*, *supra* note 1, at 1.

8. *Id.* at 2.

9. *Id.*

10. *Id.*

11. Plaintiff’s Memorandum in Support of her Application for a Temp. Restraining Order at 8, *Garza v. Hargan*, 304 F. Supp. 3d 145 (D.D.C. Mar. 30, 2018) (No. 17-cv-02122).

12. Complaint from Women’s Refugee Comm’n et al., to Cameron Quinn, Officer for Civil Rights & Civil Liberties, Dep’t of Homeland Sec., John Roth, Inspector General, Dep’t of Homeland Sec. (updated Nov. 13, 2017), <https://www.womensrefugeecommission.org/research-resources/joint-complaint-ice-detention-treatment-of-pregnant-women/> [hereinafter *WRC Complaint*].

13. *Id.* at 8.

14. *See infra* Part II.A.

15. *See WRC Complaint*, *supra* note 12.

16. *Id.* at 8.

officers that she was excessively bleeding and in pain.<sup>17</sup> Her numerous requests for medical assistance and access to a hospital went unfulfilled.<sup>18</sup> After several days, medical staff confirmed her miscarriage.<sup>19</sup>

Why are some fetuses protected while others are not? What accounts for the tolerance of fetal harm in some situations but not in others? This Note explores the legislative and executive landscape that controls the reproductive destinies of those like seventeen-year-old Jane Doe seeking an abortion, and thirty-one-year-old Teresa, hoping to give birth to a child. Furthermore, this Note analyzes a variety of laws and policies issued during the Trump presidency that relate to the health and protection of fetuses.

To begin, Part I explores pro-life laws, supported by the Trump administration, centered around fetal personhood. These laws include abortion bans and restrictions, regulations around discarding fetal tissue, and other legal sanctions imposed on mothers for acts relating to the health of fetuses—including criminalization for unintended fetal death. Part II analyzes policies implemented by the Trump administration which inconspicuously endanger fetuses and run afoul of pro-life principles. Specifically, Part II discusses the fetal harms related to a 2017 policy calling for the detention of pregnant migrants while awaiting adjudication, and the 2018 Migrant Protection Protocols (MPP)—known as the “Remain in Mexico” policy—which places migrants in Mexican border cities while awaiting their asylum and immigration hearings. While many policies arguably contradict pro-life ideals, such as limiting statutory asylum eligibility, family separation, or the detention of children, this Note narrowly focuses on legislation impacting fetuses exclusively, as fetal life is at the center of the present pro-life/pro-choice debate.

Part III compares the pro-life legislation in Part I with the policies in Part II. As argued below, the key tenets of the pro-life legislative scheme are violated by immigration policies adopted by the Trump administration. Rather, federal policies, at minimum, deprioritize the health of fetuses unilaterally. Part III also considers the underlying rationale of policies that cause fetal harm in the immigration context and argues that the adoption of these harmful policies is unwarranted even under the policies’ proffered goals.

Part IV explores potential difficulties in advocating for pregnant migrants. This Part asks how advocates can seek justice for pregnant migrants without undermining the legal scaffolding which makes abortion legal. The Sixth, Eighth, and Fifth Amendments largely fail to protect noncitizens from harsh

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17. *Id.* at 8–9.

18. *Id.*

19. *Id.* at 9. Unfortunately, this anecdote is strikingly similar to that of Rubia Morales-Alfaro, another pregnant migrant held in the same detention facility within the same year. Ms. Morales filed a suit in January 2020 against the federal government and CoreCivic Inc., the entity managing the facility, claiming she suffered a miscarriage as a result of harsh conditions and neglect while detained. Ms. Morales reports she was denied medical care, left bleeding excessively for five days, and only given medical attention after collapsing in a food line. *See Morales-Alfaro v. U.S. Dep’t of Homeland Sec.*, No.: 20cv82-LAB (BGS), 2020 WL 248968, at \*1 (S.D. Cal. Jan. 15, 2020).

conditions in immigration detention facilities and in programs such as MPP. Based on the punitive motivations behind these immigration policies, it is time to rethink the legal fiction categorizing immigration policies as “civil” despite allowing detention, deportation, and exclusion of migrants with minimal constitutional guardrails.

# I. FETAL PERSONHOOD REIMAGINED AND EMBOLDENED DURING THE TRUMP PRESIDENCY

Fetal personhood, or the argument that a fetus is a person and thus holds rights,<sup>20</sup> is not a new concept in America. The District Attorney in *Roe v. Wade* set forth this argument,<sup>21</sup> and many who oppose abortion have long held that they are doing so to protect unborn life.<sup>22</sup> However, since 2016, laws advocating for fetal personhood have increased in frequency and force, and the country is experiencing a pro-life ideological resurgence.<sup>23</sup> This Part chronicles pro-life laws and acts emerging during the Trump presidency, including aggressive abortion regulations, laws requiring burials and cremation for fetal remains, and unprecedented criminal charges against mothers for prenatal injuries.

## A. *Background: Legal Decisions and Political Changes Setting the Stage for the Modern Pro-Life Regulatory Wave*

The legal relevance of fetal personhood dates back to the trimester framework set forth in *Roe v. Wade*.<sup>24</sup> There, the Court balanced a mother’s right to privacy and the state’s interest in the life of the fetus.<sup>25</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the undue burden framework legitimized the state’s interest in protecting the health of the fetus “from the outset of pregnancy,” which opened the door to expand the scope

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20. Brendan F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 120–21 (2013) (“[A]pplying personhood to the law is a basic constitutional question; whether prenatal humans qualify as constitutional persons is determinative of any constitutional protections they may have, including the rights to life, liberty, and property, and . . . equal protection. . . .”).

21. Brief for Appellee at 31, *Roe v. Wade*, 410 U.S. 113 (U.S. 1971), 1971 WL 134281, at \*31 (“It is our task . . . to show how clearly and conclusively modern science . . . establishes the humanity of the unborn child.”).

22. *Id.* at 29–30 (“The proponents of liberalization of abortion laws speak of the fetus as ‘a blob of protoplasm’ and feel it has no right to life until it has reached a certain stage of development. On the other hand, the opponents of liberalization maintain the fetus is human from the time of conception, and so interruption of pregnancy cannot be justified from the time of fertilization.” (internal citations omitted)).

23. See *infra* Part I.

24. *Roe v. Wade*, 410 U.S. 113, 114 (1973) (“Though the State cannot override [the right to privacy], it has legitimate interests in protecting both the pregnant woman’s health and the potentiality of human life, each of which interests grows and reaches a ‘compelling’ point at various stages of the woman’s approach to term.”).

25. See *id.*

of the fetal personhood argument.<sup>26</sup> In *Gonzalez v. Carhart*, the Court emphasized the state's interest in promoting the "respect for life, including life of the unborn"<sup>27</sup> while upholding the Partial Birth Abortion Ban Act of 2003.<sup>28</sup> Scholars have argued that this case marked a turning point for the fetal personhood movement, prompting states to pass laws protecting fetuses on the premise that fetuses are unborn human beings.<sup>29</sup> To be sure, legislatures have proposed or passed a variety of laws evoking the concept of fetal personhood since *Roe* was decided. Aside from just abortion restrictions, thirty-eight states have passed laws criminalizing fetal homicide,<sup>30</sup> others have passed chemical endangerment laws or otherwise attempted to criminalize the use of drugs or alcohol by pregnant women,<sup>31</sup> and others provided civil causes of action for fetal harm.<sup>32</sup>

President Trump's election led to a resurgence of pro-life regulation at both the state and federal levels.<sup>33</sup> One explanation for this is Trump's emphatic support of the pro-life movement, including the former President's own language expressing his belief in fetal personhood. Consider his statements at the 2020 March for Life:

[D]uring my first week in office . . . we issued a landmark pro-life rule to govern the use of Title X taxpayer funding. I notified Congress that I

26. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."); see also *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) ("More importantly, in *Casey* we discarded the trimester framework. . . ." (internal citations omitted)).

27. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("[T]he 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 of the unborn.").

28. 18 U.S.C. § 1531, known as the "Partial Birth Abortion Ban Act of 2003" prohibits what is known by medical communities as "dilation and evacuation." It is a surgical procedure removing an intact fetus from the uterus and is used after the first trimester of pregnancy. See AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, SECOND-TRIMESTER ABORTION (2013).

29. Hailey Cleek, *Borders Across Bodies: Assessing the Balance of Expanding Chip Coverage at the Expense of Advancing Fetal Personhood*, 34 BERKELEY J. GENDER L. & JUST. 1, 22 (2019) (citing Bernice Bird, *Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability Among Fetal Pain and Fetal Homicide Laws*, 25 HASTINGS WOMEN'S L.J. 39 (2014) (describing the evolution of fetal personhood within the Court and the role of *Gonzalez*, 550 U.S. 124, in expanding the definition)).

30. *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2018), <https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

31. See ALA. CODE 1975 § 26-15-3.2(a)(1) (criminalizing "knowingly, recklessly, or intentionally" causing a child to ingest or inhale controlled substances); see also Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALBANY L. REV. 999, 1006 (1999) ("[I]n 1990 . . . [e]ight states considered, but failed to pass, legislation that would make it a crime to be addicted and to give birth.").

32. See *Tort Law – Prenatal Injuries – Supreme Court of Illinois Refuses to Recognize Cause of Action Brought by Fetus Against Its Mother for Unintentional Infliction of Prenatal Injuries*. – Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988), 103 HARV. L. REV. 823, 825 n.20 (1990) ("Although only one other jurisdiction thus far has explicitly considered the issue of a fetus' right to sue for prenatal injuries resulting from its mother's negligence during pregnancy . . . almost all United States courts agree that a fetus, subsequently born alive, may bring suits against a third party." (internal citation omitted)).

33. See *infra* Parts I.B, C.

would veto any legislation that weakens pro-life policies or that encourages the destruction of human life. At the United Nations, I made clear that global bureaucrats have no business attacking the sovereignty of nations that protect innocent life. Unborn children have never had a stronger defender in the White House.<sup>34</sup>

Former Vice President Mike Pence made similar comments, stating, “I don’t know if I’ve had a higher honor than the day I cast the tiebreaking vote to allow states in America to defund Planned Parenthood. And President Trump signed the bill.”<sup>35</sup>

Another possible explanation for the modern trend of pro-life legislation is that Trump fulfilled his campaign promise to “[appoint] pro-life judges.”<sup>36</sup> In 2017 and 2018, respectively, Trump nominated both Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court, creating a conservative majority on the bench, thus making a departure from *Roe* more likely—a reality that may serve to reinvigorate anti-abortion activists.<sup>37</sup> These newly appointed conservative justices swiftly opened the door to a constitutional standard more lenient to states seeking to regulate abortions.<sup>38</sup> Following the passing of Justice Ruth Bader Ginsburg in 2020, Trump bolstered the conservative majority by appointing Justice Amy Coney Barrett, a known pro-life advocate, to the bench.<sup>39</sup>

Aside from Supreme Court nominees, Trump also appointed 150 federal judges in district and circuit courts, of which many, if not all, are pro-life.<sup>40</sup> As this Part discusses, it is against this governmental backdrop that the fetal personhood movement has expanded, using legislation and fortified moral rhetoric to strengthen its condemnation of fetal harm.

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34. TRUMP WHITE HOUSE, REMARKS BY PRESIDENT TRUMP AT THE 47TH ANNUAL MARCH FOR LIFE (Jan. 24, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-47th-annual-march-life/>.

35. TRUMP WHITE HOUSE, REMARKS BY VICE PRESIDENT PENCE AT CONCERNED WOMEN FOR AMERICA’S 40TH ANNIVERSARY CELEBRATION (Sept. 13, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-vice-president-pence-concerned-women-americas-40th-anniversary-celebration/>.

36. *Full transcript: Third 2016 presidential debate*, POLITICO (Oct. 20, 2016), (“I am pro-life and I will be appointing pro-life judges.”), <https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063>.

37. *See Judge Kavanaugh’s Judicial Record on the Right to Abortion*, CTR. FOR REPROD. RTS., <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/factsheets/Judge-Kavanaugh-Judicial-Record-on-the-Right-to-Abortion2.pdf> (last visited Feb. 21, 2020).

38. In 2020, Justices Gorsuch and Kavanaugh voted to eliminate consideration of the actual health benefits to women when deciding whether a medically justified abortion regulation is constitutional. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2153–54 (2020) (Alito, J., dissenting).

39. Sarah McCammon, *A Look at Amy Coney Barrett’s Record on Abortion Rights*, NPR (Sept. 28, 2020), <https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights>.

40. *See* PLANNED PARENTHOOD, TRACKING TRUMP: FEDERAL JUDGES (2020), <https://www.plannedparenthoodaction.org/tracking-trump/policy/federal-judges>.



## B. *Abortion Bans by States and Federal Governments During the Trump Presidency*

### 1. *State Bans and Restrictions*

Anti-abortion statutes introduced by state legislatures during the Trump presidency were pervasive. For example, an unprecedented percentage of proposed abortion restrictions in 2019 were abortion bans—as opposed to other, more flexible regulations introduced in previous years—“signaling a substantial shift in tactics at the state level.”<sup>41</sup> These bans were also highly aggressive.<sup>42</sup>

For example, an Alabama law passed in 2019—one of the harshest anti-abortion laws the country has seen since *Roe*—banned abortion at any time during pregnancy.<sup>43</sup> Where states are not pushing outright bans, they are passing hostile laws to regulate abortion providers out of existence.<sup>44</sup>

This is notable because, according to the Supreme Court, abortion is legal until viability—commonly at twenty-four to forty-eight weeks of gestation. Yet restrictions introduced since 2016 ban abortion at increasingly early points in gestation, particularly in the first trimester. Since 2018, at least seven states—Iowa, Kentucky, Ohio, Georgia, Louisiana, Mississippi, and Missouri—passed laws prohibiting abortion after the detection of a fetal pulse, also known as “heartbeat bills.”<sup>45</sup> Because a fetal pulse may be detected as early as six to eight weeks of pregnancy—before many women know they are pregnant—these bills operate as *de facto* abortion bans.<sup>46</sup> Nine

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41. Elizabeth Nash, *Unprecedented Wave of Abortion Bans is an Urgent Call to Action*, GUTTMACHER INST. (May 22, 2019) (“Between January 1, 2019 and May 20, 2019, 378 abortion restrictions have been introduced across the nation, and 40% of them have been abortion bans. It is not unusual to see hundreds of abortion restrictions introduced every year, but this high proportion of proposed bans is unprecedented, signaling a substantial shift in tactics at the state level.”), <https://www.guttmacher.org/article/2019/05/unprecedented-wave-abortion-bans-urgent-call-action>.

42. *In 2019, 17 states enacted some type of abortion restriction, while 9 states protected or expanded abortion access*, GUTTMACHER INST. (Dec. 20, 2019), <https://www.guttmacher.org/infographic/2019/2019-17-states-enacted-some-type-abortion-restriction-while-9-states-protected-or-expanded-abortion-access>.

43. See ALA. CODE 1975 § 26-23H-2 (banning abortion at any time during pregnancy with no rape or incest exceptions); see also 2016 Fla. S.B. 1718 (NS) (outright abortion ban introduced by former Senator Greg Evers).

44. See American Civil Liberties Union, TRAP FAQ FACT SHEET (Jan. 18, 2019), [https://www.aclu.org/files/assets/TRAP\\_FAQ\\_FactSheet.pdf](https://www.aclu.org/files/assets/TRAP_FAQ_FactSheet.pdf).

45. See IOWA STAT. ANN. § 146C.2 (“[A] physician shall not perform an abortion unless the physician has first . . . tested the pregnant woman as specified in this subsection, to determine if a fetal heartbeat is detectable.”); KY. REV. STAT. ANN. § 311.7705 (“[N]o person shall intentionally perform [an abortion] before determining . . . whether the unborn human individual the pregnant woman is carrying has a detectable fetal heartbeat.”); MISS. CODE ANN. § 41-41-34.1 (prohibiting abortion of an “unborn human individual with a detectable fetal heartbeat”); VERNON’S ANN. MO. STAT. § 188.056 (banning abortion at eight weeks or later, which is also when a heartbeat may be detected); OHIO REV. CODE § 2919.195(A) (“[N]o person shall . . . perform or induce an abortion . . . [where a] fetal heartbeat has been detected.”); H.B. 481 § 4(b), Gen. Assemb., Reg. Sess. (Ga. 2019) (“No abortion is authorized or shall be performed if an unborn child has been determined . . . to have a detectable heartbeat.”); S.B. 184 (NS), Reg. Sess. (La. 2019) (prohibiting an abortion “of an unborn human being with a detectable heartbeat” introduced by Louisiana Senator John Milkovich in 2019);.

46. See ACOG Opposes Fetal Heartbeat Legislation Restricting Women’s Legal Right to Abortion, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Jan. 18, 2017), <https://www.acog.org/news/news-releases/2017/01/acog-opposes-fetal-heartbeat-legislation-restricting-womens-legal-right-to-abortion>



other states have introduced or enacted six-week abortion bans in 2019, including Florida, Illinois, Maryland, Minnesota, New York, South Carolina, Tennessee, Texas, and West Virginia.<sup>47</sup> Other states have similarly adopted bans prior to the point of viability set forth in *Roe*. Second-trimester bans have been adopted in Arkansas, banning abortion after twelve weeks post fertilization,<sup>48</sup> and Utah at eighteen weeks.<sup>49</sup> Many of these bills were swiftly enjoined under *Roe* and *Casey* for placing an undue burden on abortion access.<sup>50</sup> Even so, states continue to pass laws banning abortion early in pregnancy.

Aside from banning abortion earlier in pregnancy, several state laws passed since 2016 lack exceptions and include harsh sentences. The Alabama law banning abortion at any point in pregnancy<sup>51</sup> included no exceptions for cases of rape and incest, and the bill included a criminal sanction, namely jail time not less than ten years, and up to ninety-nine years for doctors who perform abortions.<sup>52</sup> Alabama is not alone in passing abortion bans punishable by imprisonment.<sup>53</sup> Notably, the Alabama ban prioritizes protecting a fetus or embryo—even in the first day or week of pregnancy—over giving women and girls who have been raped the option to terminate a pregnancy resulting from that assault, despite the risks associated with conceiving children through incest. Three other states have similarly omitted exceptions for rape or incest in their abortion bans since 2016.<sup>54</sup>

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("Women often are unaware they are pregnant prior to six weeks LMP, and surgical abortion before six weeks may be difficult or impossible.").

47. See Elizabeth Nash, *A Surge in Bans on Abortion as Early as Six Weeks, Before Most People Know They are Pregnant*, GUTTMACHER INST. (updated May 30, 2019), <https://www.guttmacher.org/article/2019/03/surge-bans-abortion-early-six-weeks-most-people-know-they-are-pregnant>.

48. ARK. CODE ANN. § 20-16-1304 (West 2013).

49. See H.B. 136, Gen. Sess. (Utah 2019), (eighteen-week abortion ban passed by Utah Legislature); see also K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html>.

50. See, e.g., Jackson Women's Health Org. v. Currier, No. 3:18-CV-171-CWR-FKB, 2018 WL 1567867 (S.D. Miss. Mar. 20, 2018) (blocking a fifteen-week abortion ban in Mississippi as unconstitutional); Robinson v. Marshall, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (enjoining the outright abortion ban in Alabama for likelihood of success on the merits of a constitutional violation); SisterSong Women of Color Reprod. Justice Collective v. Kemp, 410 F. Supp. 3d 1327, 1343 (N.D. Ga. 2019) (granting plaintiff's preliminary injunction, enjoining a Georgia fetal heartbeat ban).

51. Codified in ALA. CODE 1975 § 26-23H-2.

52. *Id.* at § 26-23H-6 (defining a violation of abortion laws as a Class A felony); ALA. CODE 1975 § 13A-5-6 (a)(1) ("Sentences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor . . . [f]or a Class A felony, for life or not more than 99 years or less than 10 years.").

53. Georgia H.B. 481 also included a punishment of imprisonment of one to ten years for a violation. See § 4 H.B. 481; GA. CODE ANN., § 16-12-140 (West 2020).

54. See, e.g., S.B. 2116 § 1(e), Reg. Sess. (Miss. 2019) ("Any person . . . guilty of performing an abortion after the detection of a fetal heartbeat, [is] punishable as provided in Section 41-41-39."); MISS. CODE ANN. § 41-41-39 (West 2021) (allowing punishment for abortion ban violations by a fine of \$1,000, imprisonment in jail for up to six months, or both in Mississippi); S.B. 184 (NS), Reg. Sess. (La. 2019) ("Whoever violates this Section [banning abortions post fetal heartbeat] . . . shall be subject to the penalties provided in R.S. 40:1061.29."); LA. REV. STAT. ANN. § 40:1061.29(A) (West 2020) (providing punishment of a fine or imprisonment up to two years, or both for an abortion ban violation in Louisiana); OHIO REV. CODE ANN. § 2919.195 (West 2020) (defining performance of an abortion after the detection of a fetal heartbeat as a fifth-degree felony); OHIO REV. CODE ANN. § 2929.14(5) (West 2020) (instructing the prison term for fifth-degree felonies as "a definite term of" six to twelve months).

The absence of these exceptions is an important marker of changing tides in the pro-life camp, representing a distinctly radical approach to abortion bans compared to those in recent years prior to 2016. Since Ronald Reagan took the position of providing exceptions for rape and incest, those in the pro-life movement had become more willing to allow for exceptions to abortion bans in these circumstances.<sup>55</sup> Even the most conservative politicians have accepted exceptions for rape and incest,<sup>56</sup> and failing to include them has led to the demise of anti-abortion legislation in the past, even in pro-life states.<sup>57</sup> The general consensus was that at least some exception for rape should be allowed.<sup>58</sup> The resurfacing of bans without these exceptions in 2019, alongside debates of their legitimacy, is a noticeable and extreme shift.<sup>59</sup> Rape victims forced to carry a pregnancy are more likely to suffer from Post-Traumatic Stress Disorder (PTSD), to seek unsafe and illegal means of procuring abortions, and to experience a greater violation to their humanity from denying their access to an abortion.<sup>60</sup>

State regulations—including abortion bans, statutes without exceptions for rape and incest, and laws with harsh sentences for violations prioritize fetuses at increasingly high costs for the health and well-being of women—demonstrate that fetal personhood was emboldened by states during Trump’s presidency.

## 2. Federal Abortion Legislation and Policy

Though abortion regulations are largely left to the purview of states, the federal government has also adopted certain anti-choice measures in recent years—i.e., legislation and policies that restrict access to abortion. First, the Department of Homeland Security (DHS) has implemented policies to

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55. See Mary Ziegler, *The End of the Rape and Incest Exception*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/opinion/abortion-rape-incest-exception.html>; see also J. Allison Strickland, *Rape Exceptions in Post-Webster Antiabortion Legislation: A Practical Analysis*, 26 COLUM. J.L. & SOC. PROBS. 163 (1992).

56. See Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 581–82 (2009) (analyzing the stances of conservative politicians including Senator John McCain, George W. Bush, and Sarah Palin, who have all expressed a willingness to deviate from a staunch life-at-conception approach in cases of rape, incest, and sometimes other situations).

57. See Pons, *supra* note 20, at 136–37 (discussing an abortion ban in South Dakota omitting exceptions in the case of rape and incest defeated by referendum).

58. See Strickland, *supra* note 55, at 172 (“Survey after survey indicate an overwhelming level of public support for the legal availability of abortion in cases of rape.”); see also Borgmann, *supra* note 56, at 601 (comparing the abstract stance of pro-life advocates to difficulties in actually stomaching harsh abortion bans without exceptions in cases such as rape and incest).

59. See e.g., Alia E. Dastagir, *Rape and incest account for hardly any abortions. So why are they now a focus*, USA TODAY (May 24, 2019), <https://www.usatoday.com/story/news/nation/2019/05/24/rape-and-incest-account-few-abortions-so-why-all-attention/1211175001/>; *Rape and incest exceptions stripped from South Carolina bill banning most abortions*, CBS NEWS (Oct. 23, 2019), <https://www.cbsnews.com/news/rape-and-incest-exceptions-stripped-from-south-carolina-bill-banning-most-abortions/>; Sarah McCammon, *Anti-Abortion-Rights Groups Push GOP To Rethink Rape And Incest Exceptions*, NPR (May 22, 2019), <https://www.npr.org/2019/05/22/725634053/anti-abortion-rights-groups-push-gop-to-rethink-rape-and-incest-exceptions>.

60. Strickland, *supra* note 55, at 173–76.

prevent underage migrants, such as the plaintiff in *Azar v. Garza*, from accessing abortions.<sup>61</sup> The policy at issue in that case, adopted by ORR, does not allow personnel to take any action facilitating an abortion without direct approval from the ORR director.<sup>62</sup> ORR also adopted a policy forcing underage migrants to notify their parents of their decision to seek an abortion, even when their parents were reportedly abusive.<sup>63</sup>

In 2019, the federal government also passed Fed. Reg. 23,170, a rule issued by the Department of Health and Human Services, which allowed healthcare institutions to deny patients information and treatment based on personal religious or moral beliefs.<sup>64</sup> This meant, for example, that a medical employee could refuse to transfer a patient to an operating room for an emergency abortion. Though a district judge in the Southern District of New York later struck down this regulation,<sup>65</sup> it exemplified federal sympathies with pro-life ideals.

### C. *Other Statutes: Forced Sonograms, Biased Counseling, Fetal Cremation Requirements, and Unprecedented Charges Against Pregnant Women for Prenatal Harm*

During Trump's four years as President, states also passed a wide array of other regulations relating to abortion and fetal life. This includes regulations requiring women to view sonograms, listen to fetal auscultations, and undergo biased counseling before they may procure an abortion.

Since 2016, several states have passed statutes requiring that a sonogram be performed on a woman or girl who is pregnant, and also requiring her to listen to the fetal tone, or heartbeat, before she may have an abortion.<sup>66</sup> In some states, the physician or professional must continue the exercise even if the pregnant woman asks for it to stop, closes her eyes, or tries to plug her

61. *Azar v. Garza*, 138 S. Ct. 1790 (2018).

62. *Id.* at 1791 (“[The] ORR policy prohibits shelter personnel from ‘taking any action that facilitates an abortion without direction and approval from the Director of ORR.’” (internal citations omitted)).

63. See *Garza v. Hargan*, No. 17-CV-02122 (TSC), 2017 WL 4707287, at \*1 (D.D.C. Oct. 18, 2017), *order vacated in part by Garza v. Hargan*, No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct. 20, 2017) (discussing the government's attempts to force disclosure of plaintiff's abortion); see also Plaintiff's Reply in Further Support of Plaintiff's Application for a Temp. Restraining Order & Motion for a Preliminary Injunction, *Garza v. Hargan*, No. 17-cv-02122-TSC, 2017 WL 8776645 (D.D.C. Oct. 18, 2017) (discussing the government's attempts to disclose plaintiff's decision about her abortion in spite of their abusive history).

64. 45 C.F.R. § 88.1, 84 Fed. Reg. 23170-01 (2019).

65. See *New York v. United States Dep't of Health & Human Servs.*, No. 19 CIV. 4676 (PAE), 2019 WL 3531960 (S.D.N.Y. Aug. 2, 2019).

66. See e.g., ARIZ. REV. STAT. § 36-2156(A)(1) (2012) (requiring a sonogram and fetal tone monitor); ARK. CODE § 20-16-1303 (2015) (preventing abortions unless a physician tests the woman for a fetal heartbeat); IND. CODE § 16-34-2-1.1 (2017) (requiring the woman view a sonogram and listen to the fetal tone before an abortion is performed); KY. REV. STAT. § 311.727 (2017) (requiring an ultrasound, a description of the image, and that the woman play the fetal tone); LA. REV. STAT. § 40:1061.10 (2015) (necessitating an ultrasound, descriptions, and an audible fetal tone before the abortion); MISS. CODE § 41-41-34 (1) (a)–(c) (2013) (requiring a fetal ultrasound and auscultation of fetal heart tone, and an offer to hear and see it); TEX. HEALTH & SAFETY CODE § 171.012 (2003) (requiring an ultrasound and audible fetal heartbeat, if present).

ears during the exercise.<sup>67</sup> These statutes and regulations have been promulgated in spite of First Amendment concerns asserted by doctors and abortion providers.<sup>68</sup> These sonogram procedures are often paired with laws forcing doctors to provide specific information to a woman before she can consent to an abortion.<sup>69</sup> This counseling includes informing a woman of risks associated with abortion—risks that have been contested by the medical community<sup>70</sup>—such as links between abortion and PTSD, future infertility, and breast cancer.<sup>71</sup> Notably, in four states, legislation forces doctors to tell the woman the fetus can feel pain in the second trimester before she may consent to an abortion,<sup>72</sup> an assertion also negated by doctors.<sup>73</sup> In Missouri, a doctor is forced to inform the woman that “pain receptors on the unborn child’s skin develop around his or her mouth at around seven to eight weeks gestational age.”<sup>74</sup> Due to a combination of pre- and post-Trump statutes, both the counseling and forced sonogram requirements often come equipped with waiting periods, requiring that women wait between eighteen and seventy-two hours after the exercise to have the abortion performed or induced.<sup>75</sup>

Some laws also call for the symbolic protection of fetuses. Prior to Trump’s election in 2016, the Indiana Legislature passed H.B. 1337, which

67. See, e.g., Ky. Rev. Stat. § 311.727 (2017) (allowing the pregnant woman only to avert her eyes during the sonogram exercise); LA. REV. STAT. § 1061.10 (2015) (requiring the physician to make the sonogram visible and make a fetal tone audible, if present, allowing the woman only to look away or not listen); TEX. HEALTH & SAFETY CODE § 171.012(4) (2003) (mandating a sonogram be performed, description read, and a fetal tone made audible with no allowances for a woman to opt out).

68. See *EMW Women’s Surgical Ctr., v. Beshear*, 283 F. Supp. 3d 629, 632 (W.D. Ky. 2017), *rev’d and remanded*, 920 F.3d 421 (6th Cir. 2019) (“Plaintiffs challenge the constitutionality of [the forced sonogram bill] primarily arguing that the law violates their rights under the First Amendment by compelling ideological speech.”).

69. See, e.g., ARIZ. REV. STAT. § 36-2156(A)(1) (2012); ARK. CODE § 20-16-1703(b)(1) (2017); IND. CODE § 16-34-2-1.1 (2017); KY. REV. STAT. § 311.725 (2017); LA. REV. STAT. § 40:1061.17 (2017); MISS. CODE § 41-41-33(1)(a) (1996); MO. REV. STAT. § 188.027 (2010); S.D. CODIFIED LAWS § 34-23A-10.1 (2017); TENN. CODE § 39-15-202 (2015); TEX. HEALTH & SAFETY CODE § 171.012(b) (2003); WIS. STAT. § 253.10 (2013).

70. See e.g., American College of Obstetricians and Gynecologists, COMMITTEE OPINION: INDUCED ABORTION AND BREAST CANCER, 1 (June 2009), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2009/06/induced-abortion-and-breast-cancer-risk.pdf>.

71. See *Mandatory Counseling for Abortion*, GUTTMACHER INSTITUTE (Jan. 2020), <https://www.guttmacher.org/evidence-you-can-use/mandatory-counseling-abortion>.

72. ARK. CODE § 20-16-1703(b)(1) (2017) (requiring doctors to inform a woman that “an unborn child at twenty weeks gestation . . . is fully capable of feeling pain” and offering her an anesthetic for the fetus to minimize the pain); IND. CODE § 16-34-2-1.1 (2017) (“[A] fetus can feel pain at or before twenty weeks.”); LA. REV. STAT. § 40:1061.17 (2017) (dictating that the doctor must inform the woman that the child can feel pain); MO. ANN. STAT. § 188.027 (asserting that fetal pain can be experienced at six to eight weeks).

73. *Pain of the Unborn: Hearing Before the Subcomm. on the Constitution of the Comm. of the Judiciary*, Serial No. 109-57, (2005) (Prepared Statement of the American College of Obstetricians and Gynecologists) (denying any “legitimate scientific data or information that supports the statement that a fetus experiences pain at 20 weeks’ gestation”).

74. Notably, this statute was adopted before Trump’s presidency, but echoes the sentiment of recently passed counseling requirements. MO. ANN. STAT. § 188.027 (2010).

75. See e.g., LA. REV. STAT. § 40:1061.10 (2015) (seventy-two hours); MO. REV. STAT. § 188.027 (2010) (seventy-two hours); ARIZ. REV. STAT. § 36-2156(A)(1) (2012) (twenty-four hours); TEX. HEALTH & SAFETY CODE § 171.012 (2003) (twenty-four hours); IND. CODE § 16-34-2-1.1(2017) (eighteen-hours); KY. REV. STAT. § 311.725 (2017) (twenty-four hours).

then-Governor Mike Pence signed into law. The law required that a miscarried or aborted fetus be interred or cremated and included verification requirements.<sup>76</sup> In 2019, the Supreme Court upheld Indiana's fetal remains disposal requirement.<sup>77</sup> A Texas law passed in 2017, which was invalidated by a district court,<sup>78</sup> went even further, requiring burial or cremation even for embryos.<sup>79</sup> While laws such as these do nothing to directly protect fetuses from being aborted, they provide logistical difficulties for abortion clinics, hindering access. They also serve to reinforce the humanity of fetuses.

Punishment for prenatal harm, even when the pregnant woman has no harmful intent, expanded during the Trump presidency. In 2019, unprecedented criminal charges were brought against a pregnant woman for the acts of a third party who ended her pregnancy. Marshaë Jones was five months pregnant when she was involved in a fight and was shot in the stomach five times, causing the loss of her fetus.<sup>80</sup> Jones, not the shooter,<sup>81</sup> was charged with manslaughter<sup>82</sup> under the theory that Jones intentionally caused the death of her unborn child by initiating a fight while pregnant.<sup>83</sup> The charges were eventually dropped due to prosecutorial discretion of the District Attorney, but not before a Jefferson County grand jury, a group of eighteen individuals from the area,<sup>84</sup> indicted her for the manslaughter charge.<sup>85</sup>

Although the motion to dismiss called the legal theory “novel,”<sup>86</sup> there is *some* basis for the charge as Alabama recently amended its state constitution to recognize the “sanctity of unborn life and the rights of unborn children.”<sup>87</sup> Such amendments to state constitutions reflect the general emboldening of pro-life ideals that emerged under and were supported by the Trump administration.

## II. IN SPITE OF THE MODERN PRO-LIFE REGIME, THE TRUMP ADMINISTRATION'S IMMIGRATION POLICIES HAVE CAUSED FETAL HARM

While the fetal personhood movement condemns fetal harm in most contexts relating to motherhood and abortion, two policies adopted by the Trump

76. IND. CODE ANN. § 16-34-3-4 (2020).

77. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019).

78. *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018).

79. TEX. HEALTH & SAFETY CODE ANN. § 697.004 (2017).

80. Mot. to Dismiss at 1–3, *Alabama v. Jones*, No. 68-CC-2019-000719.00 (Cir. Ct. of Jefferson Cnty., Ala.), [http://webpubcontent.raycommmedia.com/wbrc/PDF/Motion\\_to\\_Dismiss\\_Jones.pdf](http://webpubcontent.raycommmedia.com/wbrc/PDF/Motion_to_Dismiss_Jones.pdf) [hereinafter *Jones Motion to Dismiss*].

81. *Id.* at 1 n.1.

82. Jones was charged with manslaughter under Ala. Code § 13A-6-3 (6) (1987).

83. *Id.* at 2–3.

84. *Grand Jury*, DISTRICT ATTORNEY 10TH CIR., <https://www.jeffcoda.org/grand-jury.php> (last visited Jan. 21, 2021).

85. Bill Hutchinson, *Prosecutor will drop charges against Marshaë Jones, who lost pregnancy when shot in Alabama*, ABC NEWS (July 3, 2019), <https://abcnews.go.com/US/decision-expected-charges-marshaë-jones-lost-pregnancy-shot/story?id=64085034>.

86. See Jones Motion to Dismiss, *supra* note 80, at 1.

87. ALA. CONST. art. I, § 36.06.

administration pose severe danger to fetuses. A range of countervailing concerns may explain the choices to tolerate fetal harm in these contexts. However, these policies reflect, at least, a clear choice to deprioritize fetal protection. Notably, Trump and DHS agencies do not even mention fetuses or fetal personhood as a consideration at all in their rationale.

First, a policy adopted by Immigration and Customs Enforcement (ICE) in 2017 ended the presumption of paroling pregnant asylum-seekers and noncitizens eligible for detention into the United States while awaiting immigration hearings.<sup>88</sup> Second, the Migrant Protection Protocols (MPP), commonly known as the “Remain in Mexico” policy, eliminated the practice of detaining asylum-seekers and instead leaves asylum-seekers in border cities in Mexico while awaiting adjudication, opening them up to risk of harm.<sup>89</sup> Pregnant women are not categorically excluded from this policy. Both of these policies run afoul of the principles established by the modern pro-life legislation scheme.

#### A. *The 2017 ICE Policy Eliminating Humanitarian Parole for Pregnant Detainees and the Increase in Miscarriages by Women in DHS Detention*

##### 1. *Background of the Policy Change*

In December 2017, ICE eliminated an Obama-era policy that presumptively released pregnant women from immigration detention.<sup>90</sup> The previous policy instructed that pregnant women should not be detained unless detention was mandatory under the law, or when “extraordinary circumstances” warranted detention.<sup>91</sup> The Immigration and Nationality Act (INA) limits mandatory detention to those deportable or excludable for criminal

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88. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE DIRECTIVE NUMBER 11032.3 (Dec. 14, 2017), [https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2\\_IdentificationMonitoringPregnantDetainees.pdf](https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf); see also Sarah Pierce, *Immigration-Related Policy Changes in the First Two Years of the Trump Administration*, MIGRATION POL’Y INST. (May 2019), <https://www.migrationpolicy.org/research/immigration-policy-changes-two-years-trump-administration> (“ICE ended an Obama-era policy that ordered the agency to generally release pregnant women from federal custody.”); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FAQs: IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES, <https://www.ice.gov/faqs-identification-and-monitoring-pregnant-detainees#wcm-survey-target-id> (last updated Mar. 29, 2018) (“ICE has ended the presumption of release for all pregnant detainees.”).

89. Kirstjen Neilson, U.S. DEPARTMENT OF HOMELAND SECURITY, POLICY GUIDELINES FOR IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (Jan. 25, 2019), <https://www.dhs.gov/publication/policy-guidance-implementation-migrant-protection-protocols>.

90. See ICE DIRECTIVE NUMBER 11032.3, *supra* note 88.

91. Exec. Assistant Dir. Thomas Homan, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES, 2 (Aug. 15, 2016), [https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2\\_IdentificationMonitoringPregnantDetainees.pdf](https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf) (“If a pregnant detainee is not subject to mandatory detention, or is otherwise eligible for parole . . . the FOD shall ensure she is not detained or . . . released from detention unless the FOD determines that ‘extraordinary circumstances’ warrant detention.” (citing Memorandum from Jeh Charles Johnson, Sec’y of Homeland Security, POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS (Nov. 20, 2014)).



convictions or under terroristic charges or national security threats.<sup>92</sup> Additionally, pregnant women who were detained would “be re-evaluated regularly to determine if continued detention is warranted” and appropriate care would be monitored regularly to ensure health and well-being.<sup>93</sup> Even in cases where pregnant women were subject to mandatory detention, the policy required officers to consult with the Office of the Principal Legal Advisor (OPLA) before making a custody determination, indicating a preference for an alternative to detention.<sup>94</sup> Further, custody of a pregnant detainee was monitored on a weekly basis to evaluate if continued detention was necessary.<sup>95</sup> Summarily, detention of an expectant mother was avoided, if possible.

The new order terminated this presumption of release from detention for expectant mothers. The rationale provided by ICE for the policy change was a desire to better align with former president Trump’s Executive Order (EO) 13768.<sup>96</sup> This order, titled “Enhancing Public Safety in the Interior of the United States,”<sup>97</sup> broadened the focus of immigration enforcement and eliminated, for the most part, prioritizing specific sects of the eleven million undocumented people within the United States as targets for deportation and exclusion.<sup>98</sup> Since the government only has the resources to remove about four percent of the eleven million undocumented population per year, the change in policy randomizes who may be targeted by DHS agencies and thus may be seen as a harsher approach to immigration efforts.<sup>99</sup> ICE does not include a rationale to support the detention of pregnant women specifically, and rather states that the order “directs ICE to enforce the immigration laws

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92. See Immigration and Nationality Act (INA) § 236(c) (requiring the Attorney General to take into custody any noncitizen who is excludable or deportable under INA §§ 212(a)(2), 212(a)(2)(A)(ii)–(iii), 237(a)(2)(A)(i), or 212(a)(3)(B), which are the statutes covering crimes of moral turpitude, aggravated felonies, controlled substances and firearm offenses, and terrorist acts). Mandatory detention is also required for asylum-seekers who have passed a credible fear interview, but the INA allows greater discretion for the Attorney General to grant such migrants humanitarian parole compared to those covered under § 236(c). See INA §§ 235(b)(1)(B)(ii), 212(d)(5)(A).

93. See Homan, *supra* note 91, at 1.

94. *Id.* at 4.

95. *Id.*

96. FAQs: IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES, *supra* note 88.

97. Exec. Order No. 13,768, 82 C.F.R. § 8799 (2017) [hereinafter EO 13768].

98. Under Obama, DHS took a tiered, prioritized approach to removing undocumented people from the interior of the United States. This prioritization focused on removing those with serious criminal violations, national security threats, and repeated immigration offenses. Trump vastly expanded the focus of enforcement efforts. The tiered approach was eliminated, and instead, targets of enforcement expanded to include (1) migrants inadmissible or deportable under all criminal grounds in the INA, (2) migrants charged, not just convicted, of criminal offenses, (3) those who engaged in fraud and misrepresentation to any governmental agency—instead of just for immigration benefits—thus including anyone who used fake social security documents to gain work in the United States within the scope of enforcement, and (4) those who received public benefits. Compare Jeh Johnson, PRIORITIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS, DEPARTMENT OF HOMELAND SECURITY (Nov. 20, 2014), with EO 13768, *supra* note 97.

99. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 769, 73 (American Casebook Series, 8 ed. 2019) (citing Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement, on Civil Immigration Enforcement (June 30, 2010)).



of the United States against all removable aliens”—a general goal of enforcing immigration laws against anyone and everyone possible.<sup>100</sup>

## 2. *The Risks Posed to Fetuses While Pregnant Migrants Are in DHS Detention*

This directive to ramp up enforcement of immigration laws and its resulting changes in presumption for prosecutorial decisions has serious consequences for pregnant detainees' fetuses. While the updated policy still allows for the evaluation of detention decisions on a case-by-case basis, the shift in assumption has led to an increase in detentions of pregnant women. The number of detentions of pregnant women by DHS—either in ICE or CBP custody—increased from 1,150 in 2017, to 2,098 in 2018.<sup>101</sup> In March of 2020, a report by the United States Government Accountability Office (GAO) found that ICE detained pregnant women over 4,600 times between 2016 and 2018.<sup>102</sup> This increase in the scope of pregnant detentions is important because of the risks posed to the health of pregnant women and their fetuses while detained. Conditions while in DHS detention have long raised concerns for advocates and concerns are intensifying.<sup>103</sup>

There are some barriers to a truly comprehensive understanding of the impacts of the ICE policy and detention for expectant mothers. The nature of immigration law, particularly the plenary power doctrine, makes litigation for detained noncitizens who have not been admitted to the United States difficult.<sup>104</sup> Additionally, there is a lack of access to counsel for those detained,

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100. FAQs: IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES, *supra* note 88 (“The policy has been updated to better align with the President’s Executive Order (EO) 13768 Enhancing Public Safety in the Interior of the United States, which directs ICE to enforce the immigration laws of the United States against all removable aliens.”).

101. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT ARRESTS, DETENTIONS AND REMOVALS, AND ISSUES RELATED TO SELECTED POPULATIONS (Dec. 2019), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/fd42c373-ec7d-4257-823d-bf79fa9be66e/note/84690b38-8596-4686-af94-e51234f095b4.pdf> [hereinafter GAO Report].

102. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION CARE OF PREGNANT WOMEN IN DHS FACILITIES 15 (Mar. 2020), <https://www.gao.gov/assets/710/706272.pdf>.

103. *See e.g.*, Letter from the Am. Civil Liberties Union et al., to Thomas D. Homan, Deputy Dir. & Senior Official Performing the Duties of the Dir., U.S. Immigration & Customs Enforcement (Apr. 11, 2018), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/ICE%20sign-on%20letter%20FINAL%204.11.18.pdf>; Emily Kassie, *Detained: How the United States created the largest immigrant detention system in the world*, THE MARSHALL PROJECT (Sept. 24, 2019), <https://www.themarshallproject.org/2019/09/24/detained>.

104. Under the current immigration doctrine, noncitizens generally have no cognizable substantive right to enter or remain in the United States, and exclusion or deportation of noncitizens is viewed as a matter of allowance by the federal government. Thus, noncitizens at the border have few constitutional protections and are not always able to assert the rights they do have. *See Wong Wing v. United States*, 163 U.S. 228, 236 (1896) (differentiating between deportation and punishment, finding the federal government has plenary power to deport or exclude noncitizens at will); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (finding that even a returning lawful permanent resident of twenty-five years is owed no procedural or substantive due process and may be excluded from the country without a hearing, even when that exclusion results in lifetime confinement); *see also* Alexa Rollins, *Patrolling Pregnant Immigrant Detainees’ Bodies*, 2019 U. CHI. LEGAL F. 551, 553 (2019) (arguing for the expansion of the Kingsley standard for § 1983 claims to the immigration context to provide migrants more protection).

shrouding insight into a holistic understanding of conditions.<sup>105</sup> However, concerns of unsafe conditions are supported by ample anecdotal accounts from those in custody and statistical reports, citing both insufficient ICE safety protocols and a failure to follow protocols that are in place. Complaints have been filed on behalf of pregnant women who have suffered from a lack of medical care and poor treatment while detained.<sup>106</sup> In January 2020, a suit was filed against the federal government on behalf of one such woman who suffered a miscarriage after days of medical neglect while in DHS detention, alleging constitutional, procedural, and international human rights violations.<sup>107</sup> Importantly, media companies also report that miscarriages by women held in ICE and CBP detention have nearly doubled since 2018.<sup>108</sup>

According to independent evaluations of conditions in ICE detention, conditions for pregnant women, including access to medical care, fall below the acceptable standards of safety for pregnant women recognized by national medical associations and ICE.<sup>109</sup> The 2011 Operations Manual, ICE Performance-Based National Detention Standards (PBNDS) sets basic standards for the care of pregnant women in detention. PBNDS requires pregnancy screenings, “close medical supervision” for pregnant detainees, access to prenatal and specialized care, and comprehensive counseling “inclusive of but not limited to: nutrition, exercise, complications of pregnancy, prenatal vitamins, labor and delivery, abortion services, and parental skills education.”<sup>110</sup> PBNDS also requires referrals to specialized care in cases of high-risk pregnancies and requires identifications of any special needs like that of diet, housing, and even need of additional pillows.<sup>111</sup>

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105. Immigrants are not afforded counsel or all of the protections generally provided in criminal proceedings by the Fifth and Sixth Amendments. *See Wong Wing*, 163 U.S. at 228; INA § 240 (providing counsel to immigrants, but not at the government’s expense); § 235(b)(1)(A) (expedited removal hearings which provide no counsel protections). Immigration attorneys have also reported impediments when communicating with detainees awaiting adjudication at the border. *See Bianca Steward, et al., Tent court hearings for migrants ramp up in Texas as lawyers decry lack of access*, NBC NEWS (Sept. 16, 2019, 5:41 PM), <https://www.nbcnews.com/news/latino/tent-court-hearings-migrants-ramp-texas-lawyers-decry-lack-access-n1054991> (ACLU lawyer Rochelle Garza reported being shut out of tent courts in Brownsville, Texas).

106. *WRC Complaint*, *supra* note 12.

107. *Id.*

108. Scott Bixby, *Immigrant Miscarriages in ICE Detention Have Nearly Doubled Under Trump*, DAILY BEAST (Mar. 2, 2019 4:36 AM), <https://www.thedailybeast.com/immigrant-miscarriages-in-ice-detention-have-nearly-doubled-under-trump>.

109. *WRC Complaint*, *supra* note 12, at 1 (“We are gravely concerned with the agency’s failure to abide by its own policy against detaining pregnant women.”); *see also Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Nov. 2011), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females>.

110. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (2011, rev. Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf> [hereinafter PBNDS].

111. *Id.*

According to the American College of Obstetricians and Gynecologists (ACOG), pregnant women should have access to regular obstetric care for the duration of their pregnancy, emergency visits that are available twenty-four hours a day, and should follow the guidelines recommended by the ACOG.<sup>112</sup> Although women are meant to receive medical care throughout pregnancy, unfortunately, this is not a reality for some women in DHS detention centers.

As explained in a complaint filed by the American Civil Liberties Union (ACLU), the Women's Refugee Commission (WRC), and several other human rights groups, there have been many instances where pregnant women faced serious delays in receiving medical attention in custody—if it is received at all—even in cases of emergencies.<sup>113</sup> Monica, a migrant held in detention, reported bleeding profusely for hours, asking for help from detention officers, before a physician confirmed she miscarried.<sup>114</sup> Teresa, a migrant in a holding cell at San Ysidro, was four months pregnant when she began bleeding in her cell. She notified staff and requested assistance but was still denied release while awaiting adjudication. Several days later, her miscarriage was confirmed.<sup>115</sup> Media outlets have reported similar stories, including that of “E,” a woman held in ICE custody, who reported bleeding in her cell for eight days as she miscarried during the fourth month of pregnancy before any sort of medical attention was provided.<sup>116</sup> Several other news outlets,<sup>117</sup> nonprofit organizations,<sup>118</sup> and a GAO report,<sup>119</sup> unfortunately, corroborated these reports.

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112. *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, AM. COLL. OF OBSTETRICIANS AND GYNCOLOGISTS (Nov. 2011), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females> [hereinafter ACOG Health Care for Pregnant Women].

113. *WRC Complaint*, *supra* note 12.

114. *Id.* at 10.

115. *Id.* at 8.

116. Rollins, *supra* note 104.

117. See, e.g., Maria Sacchetti, *Pregnant immigration detainees spiked 52 percent under Trump Administration*, THE WASHINGTON POST (Dec. 5, 2019), [https://www.washingtonpost.com/immigration/pregnant-immigration-detainees-spiked-52-percent-under-trump-administration/2019/12/05/610ed714-16bb-11ea-8406-df3c54b3253e\\_story.html](https://www.washingtonpost.com/immigration/pregnant-immigration-detainees-spiked-52-percent-under-trump-administration/2019/12/05/610ed714-16bb-11ea-8406-df3c54b3253e_story.html); Opheli Garcia Lawler, *Nearly 30 Women Have Miscarried While Detained by ICE Since 2017*, THE CUT (Mar. 4, 2019), <https://www.thecut.com/2019/03/nearly-30-women-miscarried-while-detained-by-ice-since-2017.html>; Mihir Zaveri, *Woman Delivers Stillborn Baby While in ICE Custody*, THE NEW YORK TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/us/mother-birth-ice-custody.html>; Marie Solis, *28 Women Have Miscarried in ICE Custody in the Last Two Years*, VICE (Mar. 5, 2019), [https://www.vice.com/en\\_us/article/yw8egw/ice-detention-miscarriages-honduran-woman-stillbirth](https://www.vice.com/en_us/article/yw8egw/ice-detention-miscarriages-honduran-woman-stillbirth); Nicole Einbinder, *Migrant miscarriages in ICE detention centers have almost doubled during President Trump's first two years in office*, INSIDER (Mar. 4, 2019, 12:32 PM), <https://www.insider.com/migrant-miscarriages-have-almost-doubled-in-ice-detention2019-3>.

118. See, e.g., Nora Ellmann, *Immigration Detention is Dangerous for Women's Health and Rights*, CENTER FOR AMERICAN PROGRESS (Oct. 21, 2019, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2019/10/21/475997/immigration-detention-dangerous-womens-health-rights/>.

119. GAO Report, *supra* note 101, at 29–30 (“Attorneys from an[ ] NGO we met with provided anecdotes of cases of pregnant detainees who experienced medical challenges, including miscarriages while in [ICE custody]. Our analysis of ICE data shows that the number of detentions of pregnant women varied, but increased overall from 1380 in calendar year 2016 to 2098 in calendar year 2018.”).

Additionally, shackling pregnant women is condemned by ICE's own policy and by outside committees of obstetricians and gynecologists, but reports regarding use of the practice continue to emerge. The ACOG refers to shackling on a woman suffering even common symptoms of early pregnancy, such as nausea and vomiting, as "cruel and inhumane."<sup>120</sup> They go on to report that shackling has other dangers, such as preventing women from breaking a fall and protecting the fetus, preventing prompt and vital diagnosis in cases of vaginal bleeding and hypertensive disease, which can result in maternal death and the interference of normal labor and delivery.<sup>121</sup> The PBNDS expressly condemns the use of shackling except for rare cases, such as if the detainee poses an imminent physical risk to herself or others.<sup>122</sup> When restraints are needed, the PBNDS forbids restraint on the stomach area, in facedown positions, four-point restraints, or while the pregnant person is on their back.<sup>123</sup>

In 2018, a media outlet broke the story reporting the experience of several pregnant women who had been shackled around the stomach—in addition to other reports of abuse and neglect—while detained by DHS.<sup>124</sup> In the article, three women arrived at the San Ysidro Port of Entry and sought asylum. These three women each told their separate, but similar stories while detained. One woman, Morales, was taken into custody in December 2017.<sup>125</sup> She reported that immigration officers "pushed her to the ground and 'threw her around.'"<sup>126</sup> Despite telling them she was pregnant, this continued. She was shackled around her hands, legs, and belly while in custody and while being transported from holding centers at the border into longer-term detention.<sup>127</sup> A nurse who worked with pregnant detainees claimed that women were "almost always" shackled around their hands and feet, and sometimes stomachs.<sup>128</sup> Staff reported seeing two women shackled within a few hours of giving birth, and all three of the women in the report suffered miscarriages.<sup>129</sup> The use of shackles is familiar to DHS agencies, as the regular practice of shackling migrants in courtrooms, even those without any reasonable suspicion of danger or escape, is being litigated.<sup>130</sup>

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120. See ACOG Health Care for Pregnant Women, *supra* note 112.

121. *Id.*

122. PBNDS, *supra* note 110, at 211.

123. *Id.* at 204.

124. See Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried In Immigration Detention And Didn't Get The Care They Needed*, BUZZFEED (July 9, 2018, 2:44 PM), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Order Denying Mot. to Dismiss & Granting Mot. to Certify Class, *Abadia-Peixoto v. U.S. Dept. of Homeland Sec.*, No. C 11-4001 RS (N.D. Cal. Dec. 23, 2011), [http://lccr.com/wp-content/uploads/Case\\_Doc\\_12.23.11\\_Shackling\\_and\\_Class\\_Cert\\_Order.pdf](http://lccr.com/wp-content/uploads/Case_Doc_12.23.11_Shackling_and_Class_Cert_Order.pdf).

In response to this shackling, abuse, and medical negligence, Senators Dianne Feinstein (D-CA) and Patty Murray (D-WA) introduced S. 3225, the “Stop Shackling and Detaining Pregnant Women Act,” in July of 2018.<sup>131</sup> The bill received support from twenty co-sponsors, including current and former Democratic presidential candidates, Senators Kamala Harris, Elizabeth Warren, Bernie Sanders, Cory Booker, and Kirsten Gillibrand, along with seventeen social justice organizations.<sup>132</sup> The bill was introduced but was not passed in 2018. In 2019, the bill was reintroduced<sup>133</sup> after an article published by the Washington Post reported a woman in ICE custody whose pregnancy ended in a stillbirth after she went into premature labor.<sup>134</sup> The bill calls for the 2017 policy of detaining pregnant women to end and prohibits the restraint of pregnant detainees during labor, transportation, or during postpartum recovery.<sup>135</sup> It includes limited exceptions in cases where the woman presents an immediate and serious threat of hurting others or if there is a credible risk of escape.<sup>136</sup> The bill also requires that if a doctor, nurse, or other health professional requests the restraint not be used, it be removed.<sup>137</sup> As of 2020, Congress has passed no such bill, and not one pro-life politician has signed on as a sponsor.<sup>138</sup>

Aside from deviations from accepted protocol, even where protocols are followed, detention poses risks to pregnant women and their fetuses and creates an environment that is not hospitable for healthy gestation. One particular concern is the unique stress often felt by pregnant women in immigration detention because of the nature of their adjudications. Many women who are detained are seeking asylum in the United States. For an asylum claim to be successful, the migrant must prove that she is fleeing persecution on account of one of five protected grounds, including race, religion, nationality, membership in a particular social group, or political opinion.<sup>139</sup> For a migrant at the border subject to expedited removal proceedings, as is the reality faced by many asylum-seekers, she must first convince an asylum officer of her credible fear of persecution, and then an immigration judge of her persecution

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131. Stop Shackling and Detaining Pregnant Women Act, S. 3225 115th Cong. (2017–2018).

132. Emily Birnbaum, *Dems to propose legislation to prevent ICE from shackling pregnant women*, THE HILL (Jul. 17, 2018), <https://thehill.com/homenews/senate/397536-dems-to-propose-legislation-to-prevent-ice-from-shackling-pregnant-women>.

133. Stop Shackling and Detaining Pregnant Women Act, S. 648 116th Cong. (2019).

134. *Feinstein, Murray Reintroduce Bill to Stop Trump Administration from Detaining and Shackling Pregnant Women*, COMMITTEE ON THE JUDICIARY (Mar. 5, 2019), <https://www.judiciary.senate.gov/press/dem/releases/feinstein-murray-reintroduce-bill-to-stop-trump-administration-from-detaining-and-shackling-pregnant-women> [hereinafter Feinstein, Murray Reintroduce Bill].

135. *Id.*

136. *Id.*

137. *Id.*; S. 3225, 115th Cong. §§ 3(a)(1)–(2).

138. S. 3225, 115th Cong., <https://www.congress.gov/bill/115th-congress/senate-bill/3225/cosponsors?searchResultViewType=expanded&KWICView=false> (discussing the cosponsors of the bill).

139. INA § 208(b)(1)(A) (providing the Attorney General discretion to grant asylum for those who meet the definition of refugee); see also INA § 101(a)(42) (outlining the definition of a refugee as one who faces fear of persecution on the basis of five protected classes).

claim.<sup>140</sup> This may entail repeatedly describing vivid experiences of sexual abuse, violence, and other horrific attacks.<sup>141</sup> Thus, pregnant women are required to relive such trauma, often while being isolated from any friends, family, or counsel, and while enduring the aforementioned conditions of detention. The conditions in DHS detention, at best, place an incredible amount of stress on a woman during pregnancy, if not directly endanger the health and safety of the fetus.

Detention also imposes other physical risks to pregnant women. Detained women are regularly exposed to diseases, such as the flu and diarrhea.<sup>142</sup> Detention centers also often lack meal options that exasperate nausea which is common in the first trimester and may cause malnutrition,<sup>143</sup> which is especially harmful during pregnancy.<sup>144</sup> Transfers between facilities can require long bus trips with limited access to food and bathrooms. One such trip lasted twenty-three hours and led to a pregnant woman's hospitalization from exhaustion and dehydration.<sup>145</sup> These reasons explain why the prior policy assumed parole for pregnant women.

Notably, COVID-19 has exacerbated these harms and health risks. The disease spread rampantly throughout prisons and detention centers around the country because of close quarters and the lack of protective equipment.<sup>146</sup> Additionally, ICE facilities are failing to meet their own standards for health and hygiene and ignoring best practices for the prevention of spreading the disease.<sup>147</sup> Detainees report an inability to maintain social distance, a lack of proper protective equipment, and a fear of death in the facilities.<sup>148</sup> Pregnant migrants detained because of Trump's policy against humanitarian asylum face an increased threat of harm, as pregnant women are considered at-risk for severe complications if COVID-19 is contracted.<sup>149</sup>

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140. INA § 235(b)(1)(B)(v) (stating that if a migrant expresses fear of persecution, she will be given an interview where a DHS official will determine if her claim is credible, and if found credible, she will be forwarded to an immigration judge for a full § 240 hearing on the merits); *see also* INA § 240(c) (placing the burden of proof on migrants for admissibility).

141. One migrant indicated that "being detained and preparing for a credible fear [interview] has also been very stressful for me, which I feel is dangerous for my baby. In order to prepare for my credible fear interview . . . I have had to discuss my history of sexual abuse and domestic violence in detail.") WRC Complaint, *supra* note 12, at 6.

142. *Id.* at 5–6. These risks have become all the more apparent during the COVID-19 pandemic.

143. *Id.* at 10–11.

144. *See* ACOG Health Care for Pregnant Women, *supra* note 112.

145. WRC Complaint, *supra* note 12, at 11–12.

146. *See* William D. Lopez et al., *Preventing the Spread of COVID-19 in Immigration Detention Centers Requires the Release of Detainees*, AM. PUB. HEALTH ASS'N (Dec. 16, 2020), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2020.305968>.

147. *See* Letter from Project South et al., to Joseph V. Cuffari, Inspector Gen., U.S. Dep't of Homeland Sec., et al. (Sept. 14, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf> [hereinafter *Project South Complaint*].

148. *See id.*; Seth Freed Wessler, 'I Can't Do Anything': Doctor Detained By ICE Waits for Coronavirus Outbreak To Hit, HUFFPOST (Apr. 9, 2020, 11:32 AM), [https://www.huffpost.com/entry/coronavirus-fear-in-immigrant-detention\\_n\\_5e8dd8b0c5b6e1d10a6cfa87](https://www.huffpost.com/entry/coronavirus-fear-in-immigrant-detention_n_5e8dd8b0c5b6e1d10a6cfa87).

149. *See* Pregnancy, Breastfeeding, and Caring for Newborns, CTR. FOR DISEASE CONTROL & PREVENTION (Dec. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html>.



### 3. *Other Reproductive Harms in ICE Detention: Nonconsensual Hysterectomies and Sterilization*

Aside from harms to pregnant women and their fetuses occurring in ICE detention, reports of stark gynecological abuse against migrant women emerged in 2020, exemplifying an alarming assault on the reproductive autonomy of migrants. Ms. Dawn Wooten, a licensed nurse employed by Irwin County Detention Center (ICDC), an ICE facility in Ocilla, Georgia, came forward to expose abuses occurring in the facility through a whistleblower complaint filed with DHS.<sup>150</sup> Among the allegations of unsafe conditions during the COVID-19 pandemic, she reported an alarmingly high rate of hysterectomies performed in the facility by the resident gynecologist; these procedures were medically unnecessary and performed without consent.<sup>151</sup> The doctor, later identified as Dr. Mahendra Amin,<sup>152</sup> was referred to as “the uterus collector.”<sup>153</sup>

One detained immigrant told Project South, the organization supporting Ms. Wooten in filing her complaint, that she personally had spoken with “five different women detained at ICDC between October and December 2019 who had a hysterectomy done.”<sup>154</sup> She went on, “it was like they’re experimenting with our bodies.”<sup>155</sup> Ms. Wooten also expressed serious skepticism toward the need for performing hysterectomies with such high frequency, wondering how “everybody’s uterus . . . [was] that bad.”<sup>156</sup>

Following the release of the whistleblower complaint, several women, including Yanira Yesenia Oldaker, came forward to tell their stories on the record, reporting nonconsensual gynecological procedures they endured in the Irwin County Detention Center.<sup>157</sup> More than fifty women came forward to report their similar experiences of being pressured to undergo unnecessary hysterectomies in Irwin County Detention Center.<sup>158</sup>

In December 2020, counsel filed a class-action lawsuit with fourteen named plaintiffs on behalf of themselves and those similarly situated, i.e., women who received nonconsensual gynecological treatment from Dr. Amin while detained.<sup>159</sup> The complaint sought release from detention, alongside

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150. *Project South Complaint*, *supra* note 147 at 1–2.

151. *Id.* at 18.

152. John Washington & José Olivares, *Number of Women Alleging Misconduct by ICE Gynecologist Nearly Triples*, THE INTERCEPT (Oct. 27, 2020), <https://theintercept.com/2020/10/27/ice-irwin-women-hysterectomies-senate/>.

153. *Project South Complaint*, *supra* note 147, at 19.

154. *Id.* at 18.

155. *Id.*

156. *Id.*

157. *Oldaker v. Giles*, No. 7:20-cv-00224 (M.D. Ga. Nov. 9, 2020); Memorandum of Law in Support of Motion to Permit Parties to Proceed under Seal at 2–3, *Oldaker v. Giles*, No. 7:20-cv-00224 WLS-MSH (M.D. Ga. Nov. 9, 2020).

158. *See* Washington & Olivares, *supra* note 152.

159. Consol. Amended Petition for Writ of Habeas Corpus & Class Action Complaint for Declaratory & Injunctive Relief & for Damages at 1–2, *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020) [hereinafter *Oldaker Consolidated Amended Petition and Complaint*].



declaratory and injunctive relief for the plaintiffs.<sup>160</sup> The submitted declarations show a harrowing pattern of abuse and neglect. Women who sought medical treatment, including treatment for unrelated ailments, were sent to Dr. Amin for gynecological treatment.<sup>161</sup> Dr. Amin would subsequently perform nonconsensual Pap smears, often aggressively and painfully; the complaint accounts women crying out in pain, asking Dr. Amin to stop, which he refused to do.<sup>162</sup> Next, Dr. Amin would routinely state that each woman was at severe risk for ovarian cysts.<sup>163</sup> The women were pressured into receiving Depo shots—a long-term form of birth control injected into women’s bloodstreams, disabling them from becoming pregnant<sup>164</sup>—and then coerced into receiving surgical procedures.<sup>165</sup> Women were unaware of what procedures were being performed on them and discussed waking up from surgery and learning that additional procedures had been performed on them without their consent—at times involving removals of, or changes to, their uteruses.<sup>166</sup>

For example, one woman who sought treatment for a hernia was sent to Dr. Amin; he reportedly could not treat her for the hernia, but performed a Pap smear on her, which felt “like sandpaper inside of her.”<sup>167</sup> He told her he found a cyst and that she was at risk of cancer.<sup>168</sup> The woman, whose father died from cancer, became immediately fearful and confused.<sup>169</sup> Dr. Amin next pressured her into receiving a Depo shot and into undergoing surgery in order to protect her from cancer.<sup>170</sup> It was only after she underwent the surgical procedure that she learned her uterus had been “cut or burned.”<sup>171</sup> Another woman who encountered Dr. Amin, Ms. Ndonga, similarly did not understand what happened to her during her surgery until counsel explained it to her fifteen months later; she spent those months in fear that she had been sterilized against her will and would never be able to bear children.<sup>172</sup>

An independent medical team conducted an analysis of the medical reports of those detained in Irwin County Detention Center and came to a conclusion that corroborated these women’s experiences. The independent report found

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160. *Id.*

161. *Id.* at 46 (discussing Jane Doe #5, who sought treatment for a hernia, but instead was sent to Dr. Amin for a gynecological exam).

162. *Id.* at 11.

163. *Id.* at 46, 50, 54, 58, 62, 64, 73, 77, 83, 85, 87, 93 (explaining how numerous petitioners were told they had cysts on their ovaries requiring Depo shots or surgery).

164. *See id.* at 46, 50, 54, 64, 87 (reporting by petitioners Jane Doe #5, Jane Doe #6, Jane Doe #8, Ms. Floriano Navarro, and Ms. Huag that they were coerced into receiving a Depo shot as treatment by Dr. Amin).

165. *See id.* at 9, 47, 92 (discussing Jane Doe #5 and Jane Doe #28, who report having been pressured into receiving surgeries in order to protect from allegedly harmful cysts or tumors by Dr. Amin).

166. *See id.* at 47 (explaining how, prior to surgery, Jane Doe #5 knew of only three procedures that were to be performed, but woke up to learn six had been performed).

167. *Id.* at 46.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 47.

172. *Id.* at 69.

that procedures performed were medically unnecessary, that risks from cysts and similar conditions were overstated, and that women underwent procedures with vastly deficient levels of consent.<sup>173</sup>

Aside from the abuse inflicted by Dr. Amin, women in the Irwin County Detention Center faced further injustice after stepping forward to share their stories—ranging from apathy to retaliation. In an initial response to the whistleblower complaint, ICE spokesperson Lindsay Williams said, “in general, anonymous, unproven allegations, made without any fact-checkable specifics, should be treated with the appropriate skepticism they deserve.”<sup>174</sup> After an investigation into the reports was launched, Ms. Oldaker and several other women who came forward to account the harms they endured were met with orders of deportation and other retaliatory actions.<sup>175</sup> Counsel on behalf of Ms. Oldaker and other detainees at ICDC intervened through various avenues to prevent the women from being removed from the country while their adjudications were pending, and at least until a full investigation could occur.<sup>176</sup>

Though it is possible that Dr. Amin was a rogue actor with a variety of personal motivations for performing mass hysterectomies, the response by DHS officials and Republican legislators reflects a sense of apathy toward disabling the reproductive capacity of migrant women. In response to the retaliatory deportations, Democratic Senators Jeff Merkley and Richard Blumenthal, and Democratic House Representatives Pramila Jayapal and Alexandria Ocasio-Cortez called on ICE, DHS, DOJ, and the FBI for assurances that material witnesses of the alleged medical abuses at Irwin would not be deported and advocated for assurances that victims would be able to testify.<sup>177</sup> Over thirty Democratic Senators and seventy-five Congresspeople signed on to the letter, without support from Republican legislators.<sup>178</sup> Notably, Republican Senators who refused to sign included those with staunch pro-life views.

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173. *Executive Summary of Findings by the Independent Medical Review Team Regarding Medical Abuse Allegations at the Irwin County Detention Center* 1–2, SCRIBD (Oct. 21, 2020), <https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-Irwin-Detention-Center>.

174. See Rafael Bernal, *Whistleblower complaint alleges widespread abuse on migrant detainees*, THE HILL (Sept. 15, 2020, 12:07 PM), <https://thehill.com/latino/516488-whistleblower-complaint-alleges-widespread-abuse-on-migrant-detainees>.

175. Memorandum of Law in Support of Emergency Motion for Temp. Restraining Order & Petition for Writs of Habeas Corpus Ad Testificandum at 4, *Oldaker v. Giles*, No. 7:20-cv-00224 (M.D. Ga. Nov. 9, 2020).

176. *See id.*

177. See Letter from Jeffrey Merkley, U.S. Sen. of Oregon, et al., to Tony Pham, Senior Off. Performing Duties of Dir., U.S. Dep’t of Homeland Sec., et al. (Nov. 19, 2020), <https://www.merkley.senate.gov/download/irwin-ice-ltr-2020>.

178. Press Release, Jeff Merkley, Merkley, Blumenthal, Jayapal, Ocasio-Cortez Demand Trump Administration Halt Deportations of Victims of Medical Malpractice by ICE Doctor (Nov. 19, 2020), <https://www.merkley.senate.gov/news/press-releases/merkley-blumenthal-jayapal-ocasio-cortez-demand-trump-administration-halt-deportations-of-victims-of-medical-malpractice-by-ice-doctor-2020>.

B. *The Migrant Protection Protocols, or “Remain in Mexico” Policy, Endangers Pregnant Migrants and Their Fetuses*

1. *Inclusion of Pregnant Women in the Migrant Protection Protocols Policy*

A 2019 policy adopted by the Trump administration, the Migrant Protection Protocols (MPP) (“Remain in Mexico” policy), places asylum-seekers in towns along the Mexican border while awaiting adjudication of their immigration claims.<sup>179</sup> The Remain in Mexico policy applies to noncitizens arriving in the United States who are not clearly admissible and who are placed in removal proceedings under INA § 240.<sup>180</sup> There are few exceptions from the program.<sup>181</sup> Conditions for those in MPP have concerned human rights groups, with reports of migrants lacking basic needs such as food and shelter, and being subjected to acts of violence such as rape, kidnapping, and murder.<sup>182</sup>

There are explicit categorical exceptions for migrants who fear returning to Mexico, unaccompanied children, and those subject to expedited removal.<sup>183</sup> Although individuals from vulnerable populations may be excluded on a case-by-case basis, there is no categorical exception for pregnant women.<sup>184</sup> One DHS official stated, “[p]regnancy may not be observable or disclosed and may not in and of itself disqualify an individual from participating in the program,” rather, “agents and officers would consider pregnancy, when other associated factors exist, to determine eligibility for the program.”<sup>185</sup>

In practice, the term “vulnerable population” is applied inconsistently.<sup>186</sup> Attorneys have found pregnant women who should be exempt may still be

179. U.S. DEP’T OF HOMELAND SEC., MIGRANT PROTECTION PROTOCOLS (2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [hereinafter Migrant Protection Protocols].

180. *Id.*

181. *Id.*

182. See Eleanor Acer et al., *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, HUM. RTS. FIRST 1–6 (Oct. 2019), <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf> [hereinafter Human Rights First].

183. Migrant Protection Protocols, *supra* note 179; see also *Policies Affecting Asylum Seekers at the Border*, AM. IMMIGR. COUNCIL, 3 (2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/policies\\_affecting\\_asylum\\_seekers\\_at\\_the\\_border.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf) (providing exceptions for unaccompanied children, nationals of Mexico, “special circumstances” including “known physical/mental health issues,” and “individuals with criminal records or history of violence”).

184. Migrant Protection Protocols, *supra* note 179. “Unaccompanied alien children and aliens in expedited removal proceedings will not be subject to MPP. Other individuals from vulnerable populations may be excluded on a case-by-case basis.” *Id.*

185. Robert Moore, *Fate of pregnant women at border sparks congresswoman’s outrage*, BORDERZINE (June 19, 2019), <https://borderzine.com/2019/06/fate-of-pregnant-women-at-border-sparks-congresswomans-outrage/>.

186. See *‘We Can’t Help You Here’ – US Returns of Asylum Seekers to Mexico*, HUM. RTS. WATCH (July 2, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico> (indicating that at least thirteen pregnant women are held in Ciudad Juarez, Tijuana under the MPP program).

held in border cities while awaiting asylum.<sup>187</sup> By June 2019, six months after the implementation of the policy, at least thirteen pregnant women were held at one of the MPP cities in Mexico.<sup>188</sup> By September, the ACLU conducted interviews with eighteen pregnant women in MPP, who ranged from 2.5 to 8 months pregnant.<sup>189</sup> For example, reports indicate a woman experiencing contractions and a woman who ultimately gave birth in a tent in Matamoros were included in MPP.<sup>190</sup> In September 2019, the Texas chapter of the ACLU filed a complaint urging DHS to commit to adopting a presumption that pregnant women should be excluded from MPP.<sup>191</sup> No such change has occurred.

## 2. *Dangerous Conditions for Pregnant Women Placed in MPP*

The MPP process and Mexican cities used for MPP (Tijuana, Tamaulipas, Nuevo Laredo, and Ciudad Juarez) are home to conditions that are especially harmful to pregnant women and their fetuses who are in vulnerable physical conditions and require specialized care.<sup>192</sup> This includes abuse while in CBP custody before being sent to border cities, lack of access to medical care in Mexico, inadequate access to food and water, becoming targets for violence, and a lack of housing or other forms of shelter. Both the violence and lack of resources are exasperated by the backlog in immigration courts, making wait times for a hearing on the asylum claim months or years in which asylees must manage to survive.<sup>193</sup>

The violence impacts everyone in MPP, but it is especially concerning for pregnant women who may be more vulnerable to violence.<sup>194</sup> Tijuana—one of the MPP cities—was rated as the most violent city in the world in 2018.<sup>195</sup> In *Innovation Law Lab v. Nielsen*, plaintiffs challenged the government's authority to implement the policy.<sup>196</sup> Notably, in the complaint for injunctive

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187. See Joel Rose, 'Vulnerable' Migrants Should Be Exempt From 'Remain in Mexico,' But Many Are Not, NPR (July 17, 2019, 12:18 PM), <https://www.npr.org/2019/07/17/742271139/vulnerable-migrants-should-be-exempt-from-remain-in-mexico-but-many-are-not>.

188. *Id.*; see also *US sends pregnant migrant having contractions back to Mexico*, THE GUARDIAN (Sept. 6, 2019), <https://www.theguardian.com/us-news/2019/sep/06/us-immigration-pregnant-woman-mexico-trump-policy>.

189. Letter from the Am. Civ. Liberties Union, to Joseph Cuffari, Inspector Gen., U.S. Dep't of Homeland Sec., et al. (Sept. 26, 2019), [https://www.aclutx.org/sites/default/files/aclu\\_oig\\_complaint\\_preg\\_mpp.pdf](https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf) [hereinafter *ACLU Complaint*].

190. See, e.g., Acer et al., *supra* note 182, at 8.

191. *ACLU Complaint*, *supra* note 189, at 1.

192. See ACOG Health Care for Pregnant Women, *supra* note 112; see also PBNDs, *supra* note 110, at 211 (discussing the unique medical needs of pregnant people).

193. *Immigration Court Backlog Tool*, TRAC IMMIGRATION (2020), [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/) (current EOIR backlog is over one million cases).

194. *ACLU Complaint*, *supra*, note 189, at 1. "While the MPP policy violates the rights of all subjected to it, the adverse effects of this policy [are] particularly acute among vulnerable populations, such as pregnant women." *Id.*

195. See *Las 50 ciudades más violentas del mundo 2018*, SEGURIDAD, JUSTICIA Y PAZ (Mar. 12, 2019), <http://seguridadjusticiaypaz.org.mx/files/estudio.pdf>; see also Kate Linthicum, *Five of the six most violent cities in the world are in Mexico*, report says, L.A. TIMES (Mar. 14, 2019), <https://www.latimes.com/world/la-fg-mexico-tijuana-violence-20190314-story.html>.

196. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019).

relief, plaintiffs wrote, “asylum seekers in Mexico face a heightened risk of kidnapping, disappearance, trafficking, sexual assault, and murder, among other harms.”<sup>197</sup> Since the adoption of MPP, Human Rights First has reported three hundred and forty-three cases involving rape, kidnapping, and violent assault of asylum seekers in the MPP program.<sup>198</sup> A report by the United States Immigration Policy Center (USIPC) found that a quarter of asylum-seekers subjected to MPP were threatened with physical violence, with half of those threats coming to fruition including beatings, extortion, kidnappings, and robberies.<sup>199</sup> Multiple media companies further corroborate the violent targeting of migrants subject to MPP.<sup>200</sup> For example, in 2018, two teenagers subject to MPP were stabbed and strangled to death.<sup>201</sup>

A lack of financial resources further exacerbates these violent environments when asylum-seekers are in border towns awaiting adjudication. Unlike refugees, asylum-seekers do not receive aid or travel accommodations by the United States to make their journey.<sup>202</sup> The asylum-seekers who are subject to MPP have already passed a credible fear screening, meaning a DHS official has determined their chances of winning their claim to seek refuge are significant.<sup>203</sup> But for these people who are fleeing violence and persecution, they are not provided basic essentials including food, water, or shelter. Housing is not guaranteed in this situation, and asylum-seekers without resources may find themselves without a place to live. As a result, many are living in tents, relying solely on nonprofit organizations for sustenance,<sup>204</sup> and many report a lack of access to medical care.<sup>205</sup> According to the USIPC, one out of every three people face homelessness and discrimination under MPP.<sup>206</sup> The onset of COVID-19 has exacerbated these issues, putting

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197. Complaint for Declaratory & Injunctive Relief at 10, *Innovation Law Lab v. Nielson*, 366 F. Supp.3d 1110 (N.D. Cal. 2019).

198. Acer et al., *supra* note 182, at 4.

199. Tom K. Wong, *Seeking Asylum: Part 2*, US IMMIGR. POL’Y CTR. 4–5 (Oct. 29, 2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

200. See, e.g., Rick Jervis et al., *One deadly week reveals where the immigration crisis begins — and where it ends*, USA TODAY (Oct. 1, 2019), <https://www.usatoday.com/in-depth/news/2019/09/23/immigration-crisis-migrants-us-mexico-border/2022670001/>; Dera Lind, *Exclusive: Civil servants say they’re being used as pawns in a dangerous asylum program*, VOX (May 2, 2019, 11:20 AM), <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit>.

201. Casey Swegman, *What Survivors of Gender-Based Violence are Facing at the Border*, MS MAGAZINE, (Oct. 15, 2019), <https://msmagazine.com/2019/10/15/what-survivors-of-gender-based-violence-are-facing-at-the-border/>.

202. See INA § 207 (refugee is someone overseas who applies for relief in their home country or outside the United States; a certain number of people are granted refugee status per year); INA § 208 (asylees apply within America).

203. See INA § 235(b)(1)(B)(v).

204. See Jervis et al., *supra* note 200 (reporting rows of camping tents housing migrants subject to MPP in Reynosa, Mexico); see also *supra* note 199, at 10 (explaining that asylum-seekers subject to MPP lack access to adequate shelter and other humanitarian needs); see also *ACLU Complaint*, *supra* note 189, at 5 (discussing pregnant women in MPP relying solely on humanitarian aid by non-governmental organizations for food, water, and shelter).

205. See generally *Protecting Courageous Immigrant Women and Girls*, 1 MD. B.J., no. 3, 2019, at 59.

206. Wong, *supra* note 199, at 5.

migrants subject to MPP at increased risk of contracting the virus because they are homeless or sleeping in cramped and unsanitary shelters or encampments where social distancing is not possible.<sup>207</sup> This poses increased risks to pregnant women and their fetuses as research suggests pregnant women with COVID-19 are more likely to have a premature birth and to have their babies admitted to a neonatal unit.<sup>208</sup>

In addition to fears of violence and lack of adequate food and shelter, pregnant women face additional forms of harmful conditions in MPP. Some pregnant women in MPP have reported pressures from government officials to abort their children because of anti-immigrant sentiments from the Trump administration.<sup>209</sup> One woman, a migrant from Honduras who was eight months pregnant and returned to Matamoros, Mexico, managed to escape kidnapping and reached the United States seeking asylum.<sup>210</sup> While detained in CBP custody, she claimed that a CBP agent told her that she should abort her baby because “Trump didn’t want there to be any more pregnant people here.”<sup>211</sup> Another woman, an El Salvadorian migrant who was six months pregnant, claimed a CBP agent told her, “it was a shame they were pregnant because Trump had passed a law that pregnant women, that we no longer had any possibility of staying [in the U.S.] because they no longer wanted to give papers [citizenship] to children born there [in the U.S.] and that the best option was to abort.”<sup>212</sup>

### III. CONFLICTING STANDARDS OF TOLERABLE FETAL HARM: ANALYZING TRUMP’S POLICIES UNDER MODERN PRO-LIFE PRINCIPLES

The Alabama Constitution was amended in 2018 to declare the state’s commitment to protecting unborn life. The amendment was added to support “the sanctity of unborn life and the rights of unborn children, including the right to life,” and “ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.”<sup>213</sup> Would the Trump policies stand up to this standard? To answer that question, it is important to assess the context of each policy and the countervailing concerns they balance to understand why the deviation in fetal protection exists. Even accounting for the distinguishing features of the policies, inconsistencies emerge regarding fetal harm tolerated in pro-life laws compared to immigration policies. Viewing these trends together, a double standard emerges. While state

207. Letter from Human Rights First et. al, to Chad F. Wolf, Acting Sec’y U.S. Dep’t of Homeland Sec. (April 14, 2020), <https://www.humanrightsfirst.org/sites/default/files/LetterfromMPPServiceProvidersreCOVID19FINAL.pdf>.

208. *Pregnancy and COVID-19: What are the Risks?*, MAYO CLINIC (last visited Jan. 13 2021), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/pregnancy-and-covid-19/art-20482639#:~:text=It%20isn't%20yet,to%20a%20neonatal%20unit.>

209. *ACLU Complaint*, *supra* note 189, at 6–7.

210. *Id.* at 6.

211. *Id.*

212. *Id.* at 7.

213. ALA. CONST. art. I, § 36.06.



and federal pro-life legislation attempts to garner aggressive intolerance toward fetal harm at the hands of mothers in the context of abortion, the federal government is implementing policies allowing fetal harm to occur at the hands of agency actors, and particularly against immigrant mothers.

A. *ICE's 2017 Detention Policy Fails to Adequately Consider the Harm it Poses to Detained Women and Fetuses, and Does Not Offer a Rationale as to Why Those Harms are Necessary to Achieve its Goals*

To properly understand the potential legitimacy of shackling pregnant women and the other reports of medical neglect and harsh conditions, it is important to note that immigration detention centers are not criminal detention facilities. Their purpose is not to punish, deter, incapacitate, or rehabilitate—the four tenants of criminal detention. In fact, many women mentioned in Part II have committed no illegal act whatsoever, as traveling to the United States to seek refuge is explicitly permitted by law.<sup>214</sup> Asylum is statutorily granted by the INA on a discretionary basis, and a similar form of relief, withholding of removal, is mandatorily provided for by the INA.<sup>215</sup> Of recent detentions of pregnant women, the majority of those detained have no recorded criminal history.<sup>216</sup> Any attempts to validate the treatment of noncitizens in detention through the merits of deterrence or retribution are wholly unsupported by the legal doctrine allowing the DHS facilities to exist.

The basis of the distinction between detention for immigration purposes and criminal punishment dates back to the 1800s and is the bedrock for most of the American immigration law doctrine. In *Chae Chan Ping v. United States*, the Supreme Court used this distinction between criminal punishment and deportation to explain why the political branches have plenary power to deport noncitizens, even on grounds of race, disease, or class.<sup>217</sup> In *Fong Yue Ting v. United States*, the Court again differentiated between criminal punishment and deportation.<sup>218</sup> In *Wong Wing v. United States*, the Court reasoned further that deportation, and detention to effectuate deportation, are emphatically not punishment.<sup>219</sup> Since exclusion and deportation are not punishment, detention to facilitate both is civil, not criminal, in nature—meant only to enforce immigration laws more effectively.<sup>220</sup>

214. INA § 241(b)(3) (mandating *non-refoulment*); INA § 208 (allowing for discretionary asylum).

215. *Id.* at §208 (granting the discretion to give asylum to migrants who meet the definition of refugee); INA § 241(b)(3) (withholding removal; codifying international law).

216. See GAO Report, *supra* note 101, at 38.

217. See *Chae Chan Ping v. United States*, 130 U.S. 581, 606, 631 (1889).

218. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

219. *Wong Wing*, 163 U.S. at 236 (differentiating between imprisonment for hard labor and detention to effectuate deportation, and deportation itself).

220. *Id.* (“The order of deportation is not a punishment for crime. It is not a ‘banishment,’ in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country. . . .”); see also *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).



The “plenary power” doctrine, which rests on the punishment/not-punishment divide, was reaffirmed in *Trump v. Hawaii*, a case awarding a high level of deference to the President regarding travel bans from majority-Muslim countries.<sup>221</sup> As discussed further in Part IV, this distinction shields immigration law decisions from important constitutional protections.<sup>222</sup> If immigration laws were considered punishment, most aspects of immigration law would have to change, including permissible grounds for removing noncitizens,<sup>223</sup> exclusion of noncitizens, including longtime green-card holders,<sup>224</sup> and the structure of immigration hearings.<sup>225</sup>

Thus, deterrence, punishment, or retribution are not valid purposes for detaining pregnant women at the border or in other types of immigration-based detention centers. Aside from a rationale that might suggest detained women might actually deserve the conditions they endure as some sort of sanction, it is also unclear how detaining pregnant women is effective for enforcing the nation’s immigration laws and in protecting its interior—the goal of EO 13768.<sup>226</sup> While EO 13768’s purpose is to maintain the safety of the interior of the United States, 88.5% of pregnant women detained in 2017 and 2018 had no recorded criminal history or pending criminal charges of any type.<sup>227</sup> Further, seeking asylum is legal, and a human right, yet asylees are often detained; thus, many migrants are detained absent any immigration or criminal violation.<sup>228</sup>

ICE clarified that the purpose of the policy change was to remove a categorical exclusion to the “enforcement of the Nation’s immigration laws” for those who are pregnant.<sup>229</sup> There are no statistics cited to support the suggestion that detaining pregnant women specifically will ensure enforcement of the immigration laws, or any consideration of countervailing health concerns even regarding fetal health. There is also no limitation to who is impacted either, such as the prioritization of those who have committed serious crimes. Rather, “this policy would apply equally to pregnant detainees pursuing

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221. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

222. See *infra* Part IV.A.

223. For example, failure to notify DHS of an address change is grounds for deportation, even for longtime green card holders who have children and families in the United States. See Shaughnessy, *infra*, note 268. If assessed under the Eighth Amendment, statutes such as these would perhaps be in violation of the bar against cruel and unusual punishment. See *infra*, Part IV.A.

224. See *Shaughnessy*, 345 U.S. at 206 (finding it constitutional to exclude a twenty-five-year lawful permanent resident of Buffalo, New York at the border after he was denied access for undisclosed national security grounds following a visit to his mother undergoing surgery in a communist country, even though his exclusion resulted in indefinite detention as no other country would give him access).

225. See INA § 240 (providing no right to counsel without expense); § 235(b)(1) (providing for expedited removal hearings which utilize a severely truncated hearing process).

226. FAQs: IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES, *supra* note 88.

227. WRC Complaint, *supra* note 12, at 4.

228. Seeking asylum is a fundamental human right recognized by international humanitarian law and is not illegal. See *Human lives, Human rights*, UNITED NATIONS HIGH COMM’N FOR REFUGEES, <https://www.unhcr.org/en-au/human-lives-human-rights.html> (last visited Jan. 13, 2021). Still, migrants seeking asylum who have entered the country legally through a port of entry may be detained for the duration of their hearing. See INA § 235(b)(1)(B)(ii).

229. FAQs: IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES, *supra* note 88.

asylum and other forms of relief or protection from removal.”<sup>230</sup> The question of whether risking miscarriages for detained pregnant migrants is a fair price to pay for national security is a difficult—but necessary—policy question. However, it is not a question that the federal government is outwardly engaging with when setting its policy decisions, and certainly not one that fits within the pro-life movement’s emphatic defense of fetal personhood at all costs. While fetal personhood is centered as the utmost important interest in the context of abortion debates, it is notably absent in the government’s decision to adopt this detention policy and absent from the list of issues being addressed by pro-life legislatures.<sup>231</sup>

B. *The Inclusion of Pregnant Women in MPP is Ineffective and Unnecessary to Achieve its Proffered Goals*

At this point, the ultimate impact of the Remain in Mexico Policy on pregnant women and their fetuses is unclear—but as discussed above, the potential for fetal harm is abundant. In the modern pro-life context, fetuses are protected, sometimes even in cases of rape and incest, in spite of the abundant costs of forcing women to carry a pregnancy to term—at times even when the fetus is days or moments old. Is there a justification for leaving pregnant asylum-seekers in their second and third trimesters—sometimes carrying viable fetuses that could not legally be aborted—in violent cities such as Tijuana, Mexico without assurance of shelter, food, or medical care for months on end? DHS justified MPP under the following rationale:

Every month, tens of thousands of individuals arrive unlawfully at the Southern Border. MPP will reduce the number of aliens taking advantage of U.S. law and discourage false asylum claims. Aliens will not be permitted to disappear into the U.S. before a court issues a final decision on whether they will be admitted and provided protection under U.S. law. Instead, they will await a determination in Mexico and receive appropriate humanitarian protections there. This will allow DHS to more effectively assist legitimate asylum-seekers and individuals fleeing persecution, as migrants with non-meritorious or even fraudulent claims will no longer have an incentive for making the journey.<sup>232</sup>

Including pregnant women in MPP has a negligible impact on these goals. The government aims to disincentivize “non-meritorious, or even fraudulent

230. *See id.*

231. Concerns for fetal life are omitted from ICE’s reasoning in adopting the policy of ending humanitarian parole for pregnant migrants. *See id.* Additionally, pro-life legislatures failed to sign onto a bill attempting to protect pregnant migrants from harmful practices such as shackling. *See* Feinstein, Murray Reintroduce Bill, *supra* note 134.

232. Press Release, U.S. Dep’t of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [hereinafter MPP Press Release].

claims” of asylum in the United States. However, the MPP covers “aliens arriving in the U.S. on land from Mexico (including those apprehended along the border) who are not clearly admissible and who are placed in removal proceedings under INA § 240. . . . [U]naccompanied alien children and aliens in expedited removal proceedings will not be subject to MPP.”<sup>233</sup>

Importantly, *only those who have a credible claim for asylum* are subject to the Remain in Mexico policy. If a migrant did not have such a claim, she would be subject to expedited removal proceedings and would immediately be expelled from the country. The INA gives DHS agencies the authority to place migrants at the border in expedited removal proceedings.<sup>234</sup> Migrants subject to such proceedings are not entitled to the procedural protections afforded in usual § 240 removal hearings in front of an immigration judge, and instead can be removed without any sort of hearing or review.<sup>235</sup> INA § 235(b)(1)(A)(i) states that expedited removal applies to arriving noncitizens who are inadmissible under § 212(a)(6)(C), because of fraudulent documents or claims, or § 212(a)(7), due to a lack of documentation for entering the country.<sup>236</sup>

The exception from expedited removal, which applies to undocumented migrants, is listed in § 235(b)(1)(A)(i) and includes those seeking asylum under § 208. To escape expedited removal, migrants must undergo a credible fear interview conducted by a trained asylum officer.<sup>237</sup> The asylum officer then determines if the migrant has a “significant possibility, taking into account credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under § 208.”<sup>238</sup> If no credible fear is determined, the noncitizen is immediately removed.<sup>239</sup> Thus, to be included in MPP, there must be a “significant possibility” that the noncitizen is fleeing persecution. It is unclear how forcing migrants with such claims into the harsh conditions of MPP protocols deters fraudulent claims of asylum.

For pregnant women specifically, MPP’s benefits do not appear to outweigh the harms—especially if fetal harm is the humanitarian crisis pro-life lawmakers claim it is. MPP, overall, is justified as a deterrence mechanism to deal with the “tens of thousands of individuals [who] arrive unlawfully at the

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233. *Id.*

234. INA § 235(b).

235. INA § 240 (though still not equivalent to a normal trial, removal hearings include a right to counsel (not at the government’s expense), the ability to present evidence, and to call witnesses, among other protections).

236. INA §235(b)(1)(A)(i)–(iii) (Expedited removal also applies to “clause iii migrants,” those who have not been formally admitted entered the country and have been present for less than two years, in any part of the country.).

237. *Id.* at § 235(b)(1)(B)(ii); 8 C.F.R. § 235.3 (2017) (requiring that credible fear determinations be made by a DHS official trained in nonadversarial interview techniques).

238. *Id.* at § 235(b)(1)(B)(v).

239. *Id.* at § 235(b)(1)(B)(iii)(III) (allowing a truncated review process, if denied, that should occur within twenty-four hours, and not longer than seven days; denying a right to counsel, to present evidence, or call witnesses).

Southern Border” each month.<sup>240</sup> Carving out an explicit exception for pregnant asylees would have a minor impact on the stated harm to be solved, i.e., flooded borders. In 2018, 159,473 defensive asylum applications were received.<sup>241</sup> Of those claims, 81,838 were from migrants from El Salvador, Guatemala, and Honduras—countries most impacted by the Remain in Mexico policy.<sup>242</sup> Using the number of detentions of pregnant women reported in 2017 and 2018 as a metric,<sup>243</sup> pregnant women account for just 1.3% of the total number of asylum applications, and at most, 2.5% of those applications filed from Northern Triangle countries.<sup>244</sup> Even if MPP is legitimized as an effective deterrent for asylum-seekers, and appropriate means of dealing with the so-called massive numbers of migrants at the border—pregnant women account for such a small percentage that it is hard to see how their exemption from the program would hinder the overall goals in any way.

Additionally, the first benefit of MPP listed is preventing migrants from “disappear[ing] into the U.S. before a court issues a final decision on whether they will be admitted and provided protection under U.S. law.” With the 2017 policy, which detains pregnant women while awaiting adjudication, a pregnant woman’s ability to disappear into the United States while her asylum claim is heard is a nonissue and the MPP is unnecessary to achieve this goal. Assuming this policy was changed, the common alternative to detention or MPP is parole—the temporary allowance of a migrant in the country while a final decision on admission is adjudicated. Under the Obama administration, asylum-seekers were regularly paroled into the country under § 212(d)(5)(A), the INA provision giving the Attorney General discretion to provide humanitarian parole.<sup>245</sup> Assuming such a policy was reinstated, the necessity of MPP to prevent absentee migrants is seriously undermined by data on rates of court appearances by asylum-seekers. Extensive empirical research from 2018 analyzed appearance rates of migrants in immigration court from 2001 to 2016 and reported that the appearance rate of families seeking asylum who were paroled into the country was ninety-six percent.<sup>246</sup> While DOJ and DHS do not publish reports on the appearance of pregnant women specifically, this study strongly

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240. MPP Press Release, *supra* note 232.

241. Nadwa Mossaad, *Annual Flow Report, Refugees and Asylees: 2018*, U.S. DEP’T OF HOMELAND SEC. 7 (Oct. 2019), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees\\_asylees\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf).

242. *Id.*

243. In 2017, pregnant women accounted for 1,150 asylum applications and 2,098 applications in 2018. GAO Report, *supra* note 101, at 5.

244. This figure is likely larger than the actual number of pregnant migrants, since it represents the number of detentions of pregnant women in total, which includes some who are not seeking asylum and others who may be detained and released.

245. INA § 212(d)(5)(A) (allowing for humanitarian parole, giving the AG discretion to allow some people into the country while claims are adjudicated, although not counted as formally admitted into the country).

246. Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, AM. IMMIGR. COUNCIL 23 (Aug. 16, 2018), <https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention>.

validates parole as an effective alternative to applying the MPP—with all of its risks to fetuses—to pregnant women.

Additionally, the government offers no specific data to support the claim that pregnant women fail to report to court proceedings. At first glance, this is rational, as such a statistic is highly specific. However, if unborn life is as sacred and worthy of protection as pro-life legislators claim, why is there not any special consideration of the necessity of this program for pregnant migrants? Why did the government fail to offer any support for why pregnant women *specifically* must be included in the program? The government acknowledges the need for an exception to the Migrant Protection Protocols for vulnerable members of the population but still fails to categorically exempt pregnant women. Instead, DHS officers claim “[pregnancy] may not in and of itself disqualify an individual from participating in the program.”<sup>247</sup>

#### IV. DISCUSSION: HOW TO PROTECT PREGNANT MIGRANTS WITHOUT LEGITIMIZING FETAL PERSONHOOD

Arguments available to protect pregnant migrants on behalf of their unborn children run the risk of advancing fetal personhood and undermining abortion access. As Hailey Cleek argues, a similar concern is present in other forms of relief available for migrants, i.e., the state Children’s Health Insurance Program (CHIP).<sup>248</sup> This program provides healthcare for pregnant migrants by granting an exception to the general prohibition against government-funded healthcare for undocumented people in the name of protecting unborn children.<sup>249</sup> Cleek writes, “while the short-term goal of increasing access to pregnancy-related care for undocumented immigrants is admirable, utilization of fetal personhood arguments has potential to limit reproductive rights in other areas.”<sup>250</sup>

Parallel concerns are present when advocating for pregnant migrants detained by DHS and subject to MPP. If pregnant women were paroled into the country *specifically to protect their unborn children*, this would advance the same thinking that treats women as incubators for children instead of full human beings<sup>251</sup> and undermines their personal dignity.<sup>252</sup> Yet, legal arguments available to migrants are limited and rampant injustices are occurring. Instead of focusing on the need to protect fetuses, immigration advocates should argue for expanded constitutional protections for pregnant migrants—

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247. Moore, *supra* note 185.

248. See Cleek, *supra* note 29.

249. *Id.* at 4.

250. *Id.* at 3–4.

251. In 2017, Justin Humphrey called women hosts for fetuses while introducing a bill requiring women seeking abortion to get written permission from their sexual partners. See Jordan Smith, *Oklahoma Lawmakers Want Men to Approve all Abortions*, THE INTERCEPT (Feb. 13, 2017), <https://theintercept.com/2017/02/13/oklahoma-lawmakers-want-men-to-approve-all-abortions/>.

252. See Lois Shepherd, *Dignity and Autonomy After Washington v. Glucksberg: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL’Y 431, 443 (1998) (identifying the interconnection between making decisions about abortion and pregnancy with human dignity).

an argument that concentrates on protecting the migrant herself, not the fetus she is carrying. In light of the conditions in DHS detention centers and in programs such as MPP, courts must reassess the outdated belief that immigration sanctions are civil, and not criminal, and afford migrants expanded constitutional protections.<sup>253</sup>

A. *Noncitizens Lack Meaningful Constitutional Protections From the Harm They Endure While in DHS Detention and MPP*

As discussed in Part III, because of the mischaracterization of immigration consequences expressed in *Wong Wing*<sup>254</sup> and *Fong Yue Ting*,<sup>255</sup> detention effectuating the removal or exclusion of noncitizens—and the underlying decision to remove or exclude them—is not considered punishment. Because of the legal fiction that deportation and exclusion are merely civil sanctions, migrants lack meaningful constitutional protections that could prevent or mitigate the atrocities occurring in DHS detention and in programs such as MPP.

The Sixth Amendment right to counsel does not apply to immigration proceedings.<sup>256</sup> Even children facing the system may not have counsel provided for them.<sup>257</sup> If a noncitizen is lucky enough to be granted a hearing under INA § 240,<sup>258</sup> they are only given a hollow right to counsel at their own expense; counsel will not be provided for them.<sup>259</sup> For those who cannot afford a lawyer, this is no protection at all. In reality, this leaves the majority of noncitizens without representation in immigration proceedings.<sup>260</sup> Representation rates are especially low for detained migrants who are five times less likely to have counsel than non-detained migrants.<sup>261</sup> Access to counsel could, at a minimum, reduce the length of time migrants are exposed to harms of detention: detained migrants who have representation in custody hearings are four times as likely to be released.<sup>262</sup> Circumstances are even

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253. See *supra* Part II.A.

254. *Wong Wing*, 163 U.S. at 236. Here, the Court held that while Chinese noncitizens could not be forced to perform hard labor for sixty days without due process, their detention was a valid means to effectuate their deportation. *Id.* This holding rests on the distinction between criminal sanctions and immigration consequences. *Id.*

255. *Fong Yue Ting*, 149 U.S. at 704 (upholding the deportation of a Chinese noncitizen lawfully residing in California for failure to provide a credible witness, i.e., a non-Chinese witness, to prove he was present before 1880 because deportation is not considered punishment).

256. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGRATION COUNCIL (Sept. 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; see also U.S. CONST. amend. VI.

257. See, e.g., *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018).

258. Immigrants may instead be subject to an expedited removal process including a truncated hearing. See INA § 235(b)(1). Further in late 2020, Trump attempted to expand the class of migrants who receive expedited hearings in an executive order enjoined by a federal court. See *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 20-CV-09253-JD, 2021 WL 75756, at \*2 (N.D. Cal. Jan. 8, 2021).

259. See INA § 240(b)(4)(A) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”).

260. See Eagly & Shafer, *supra* note 256, at 5.

261. *Id.*

262. *Id.*



worse for those who are subject to MPP. Migrants who are allowed to wait in the United States are seven times more likely to find an attorney to represent them than those diverted to MPP,<sup>263</sup> and just 7.5% of individuals subject to MPP managed to hire a lawyer.<sup>264</sup> Predictably, an overwhelming majority of migrants subject to MPP are not afforded relief. Further, of the 42,012 MPP cases completed by December 2020, just 638 people were granted relief.<sup>265</sup>

Additionally, the Eighth Amendment's prohibition on cruel and unusual punishment does not apply to decisions to deport or exclude noncitizens.<sup>266</sup> If it did apply, perhaps the number of migrants subjected to mistreatment while effectuating their exclusion or removal might be reduced, and immigration laws would be more humane. To illustrate the potential for cruel immigration consequences, consider that the INA allows for deportation of noncitizens—even including longtime lawful permanent residents—for allegedly being addicted to drugs, even if not convicted.<sup>267</sup> Congress may update the INA to allow deportation or exclusion of noncitizens for almost any reason; deportation and exclusion are the prerogatives of the political branches.<sup>268</sup>

The aforementioned constitutional deficiencies are exacerbated by diluted due process protections afforded to noncitizens. The Court has not fully recognized a substantive right to enter or remain in the United States.<sup>269</sup> Unsurprisingly, a number of other deficiencies plague immigration hearings. For example, translation services during adjudications are alarmingly inadequate,<sup>270</sup> and migrants may be detained throughout the duration of their adjudication, even when court backlogs indicate detention will last for years

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263. *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRAC IMMIGRATION (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587/>.

264. *The "Migrant Protection Protocols"*, AM. IMMIGRATION COUNCIL, 1 (Jan. 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant\\_protection\\_protocols.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant_protection_protocols.pdf).

265. *Id.*

266. *See, e.g., Santelises v. Immigration and Naturalization Service*, 491 F.2d 1254, 1255–56 (2d Cir. 1974) (“It is settled that deportation, being a civil procedure, is not punishment and the cruel and unusual punishment clause of the Eighth Amendment accordingly is not applicable.”); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (writing that none of the nearly 400,000 individuals deported in 2010 enjoyed constitutional protections awarded to criminal defendants under the Eighth Amendment).

267. INA § 237(a)(2)(B)(ii) (“Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.”).

268. *See e.g., Chae Chan Ping*, 130 U.S. at 581 (standing for the general proposition that Congress has plenary power to exclude classes of aliens); *Trump v. Hawaii*, 138 S. Ct. at 2392 (recognizing ample power for the Chief Executive to impose limits on admissibility); *Shaughnessy*, 345 U.S. at 210 (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”).

269. *See e.g., Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963–64 (2020) (“[T]he Court long ago held that Congress is entitled to set the conditions for an alien’s lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause.”); *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (explaining that a court will grant a petition on due process grounds only if the proceeding is so fundamentally unfair that the alien was prevented from presenting his case).

270. *See e.g., Joseph Darius Jaafari, Immigration Courts Getting Lost in Translation*, THE MARSHALL PROJECT (Mar. 20, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation>; *see generally* Laura Abel, *Language Access in Immigration Courts*, BRENNAN CTR. FOR JUST. (2011).

on end.<sup>271</sup> The constitutional posture for those subject to MPP is especially precarious,<sup>272</sup> and the Fifth Amendment has not been used to cabin the brutality of MPP or police its egregious procedural deficiencies.<sup>273</sup>

B. *Modern Immigration Policies Are Punitive in Nature, and Should Trigger Constitutional Protections for Criminal Sanctions*

While the civil/criminal divide might have been appropriate when it was adopted in the 1800s,<sup>274</sup> the modern immigration scheme seriously undermines this assertion. Properly understood, DHS facilities and MPP programs operate as criminal entities that impose punishments and aim to deter specific acts—mimicking the contours of criminal punishment.<sup>275</sup>

In 2010, Justice Kennedy opened the door to the idea that immigration consequences are so intertwined with criminal punishment, additional constitutional protections should apply. In *Padilla v. Kentucky*, the Court held that the Sixth Amendment right to effective counsel requires attorneys to be accountable for informing their clients of immigration consequences resulting from criminal pleas.<sup>276</sup> The Court reasoned, “although removal proceedings are civil in nature . . . deportation is nevertheless intimately related to the criminal process.”<sup>277</sup> Although acknowledging deportation is not technically a criminal sanction, the Court was willing to take a contextual and realistic approach when deciding whether the Sixth Amendment applies to some immigration consequences based on their severity. If such a contextual-realist approach was taken regarding the recent state of immigration control, one must conclude it is a punitive system.

Former President Trump explicitly used Migrant Protection Protocols as a tool of deterrence for migrants seeking refuge in America. At first glance,

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271. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 842, 852 (2018) (finding that the INA could not plausibly be read as placing a six-month limit on the detention of migrants, rather, the most natural reading is that detention lasts until the noncitizen’s proceedings have concluded; the Court avoided the constitutional question of a Due Process violation).

272. Those considered knocking at the door of the country are often denied procedural or substantive protections. See, e.g., *Thuraissigiam*, 140 S. Ct. at 1963–64; *Shaughnessy*, 345 U.S. at 206 (excluding a lawful permanent resident who resided in the country for twenty-five years despite exclusion resulting in indefinite detention due to rejection of petitioner by other countries).

273. The procedures afforded those subject to MPP are alarming. For example, makeshift tent courts that are often closed off to the public and attorneys house adjudications, translation services are lacking, individuals are not given opportunities to present evidence, and attorneys are not allowed to have electronics at hearings. See Letter from Human Rights First et al., to Chad F. Wolf, Acting Sec’y U.S. Dep’t of Homeland Sec. et al., 6–7 (Feb. 21, 2020), <https://www.aila.org/advo-media/aila-correspondence/2020/advocates-express-concerns-and-request-written>.

274. See *Wong Wing*, *supra* note 254.

275. See *Bell v. Wolfish*, 441 U.S. 520, 538 (1979) (recognizing punishment, retribution, and deterrence as traditional aims of criminal or punitive confinement).

276. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). Recently, in a landmark decision, a New York federal judge also recognized expanded due process protections for migrants awaiting their immigration hearings during the COVID-19 pandemic, including a required master calendar hearing with ten days of detention. See *Vazquez Perez v. Decker*, No. 1:2018cv10683, 2020 WL 7028637 (S.D.N.Y. Nov. 30, 2020).

277. See *Padilla*, 599 U.S. at 365.

one wonders how “protection” is in the name of the policy at all. The theory is that by making the migration process so horrific, migrants will avoid the trip entirely. Trump stated that MPP aims to dissuade “migrants with non-meritorious or even fraudulent claims” from coming to the country.<sup>278</sup> Putting aside the question of effectiveness, this reasoning clearly indicates that unsafe conditions related to MPP are purposeful; violence and despair are used as tools to change behaviors—namely, seeking residence in America. This tactic mimics efforts taken through criminal sanctions to deter criminal behavior. To quote critics of the Trump administration’s policies: “the cruelty is the point.”<sup>279</sup>

Though immigration detention is theoretically civil, DHS detention centers are sufficiently harsh such that detention within one is *de facto* punishment. Conditions for migrants in detention are shameful. For example, detention cells are kept at such uncomfortable temperatures they are commonly known as *hieleras* (iceboxes).<sup>280</sup> Basic hygiene is lacking; in 2019, a DOJ lawyer argued they need not provide children in detention with soap or toothbrushes,<sup>281</sup> and in one ICE facility, women reported being forced to reuse stained underwear worn by other inmates.<sup>282</sup> Further, reports of sexual and physical abuse are rampant,<sup>283</sup> six children died in ICE custody in 2019,<sup>284</sup> and migrants report severe trauma from their experiences in these facilities.<sup>285</sup> Even those who are convicted of crimes through the due process of law, with all of the protections of the Constitution, should not be forced to endure these conditions, let alone migrants who are emphatically *not* being criminally sanctioned. Importantly, these circumstances of detention and subjection to MPP occurred alongside the increased criminalization of immigrants<sup>286</sup> and widespread anti-immigrant rhetoric.<sup>287</sup>

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278. Migrant Protection Protocols, *supra* note 179.

279. Adam Serwer, *Cruelty is the Point*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/>.

280. *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, HUM. RTS. WATCH (Feb. 28, 2019), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

281. *Are US Child Migrant Detainees Entitled to Soap and Beds?*, BBC NEWS (June 20, 2019), <https://www.bbc.com/news/world-us-canada-48710432>.

282. See Oldaker Consolidated Amended Petition and Complaint, *supra* note 159, at 52.

283. See MSNBC, *America’s Immigration Detention Facilities*, YOUTUBE (June 13, 2015), <https://www.youtube.com/watch?v=pG1q5joMIRg>.

284. Nicole Goodkind, *Trump Officials Acknowledge Sixth Migrant Child Death in U.S. Custody in 6 Months After None the Previous Decade*, NEWSWEEK (May 23, 2019), <https://www.newsweek.com/border-family-separation-child-death-democrats-investigate-1434591>.

285. See Kassie, *Detained*, *supra* note 103.

286. Colleen Muñoz, *Reevaluating the Adjudication of Crimes Involving Moral Turpitude*, 24 LEWIS & CLARK L. REV. 325, 330 (2020) (discussing the increase of efforts to bring immigrants into courts); Leisy Abrego, et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. ON MIGRATION AND HUMAN SECURITY 3 (2017) (identifying the increase in criminalization of immigrants since 1996, and particularly under former President Trump).

287. See e.g., Engy Abdelkader, *Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities*, 44 HARBINGER 76, 80 (2020) (discussing the rhetoric utilized by former president Trump against Latinx, African, Jewish, and Muslim immigrants, among others).

In light of these realities, it is an absolute legal fiction to suggest that Trump-era immigration control is anything but punitive. Imposing such conditions endured in DHS detention or under MPP on anyone, especially on those who are *not* serving sentences for particular crimes, eviscerates the meaning behind the Sixth and Eighth Amendments—and any belief in due process of law. It is not enough to say that with the change in administration, the need for constitutional protections has subsided. Trump might not be in office, but the structural deficiencies that allowed such inhumane policies remain. Until immigration control mechanisms become truly civil, in both purpose and practice, they must be abolished, or the government must afford immigrants protections that come with criminal sanctions.<sup>288</sup>

Expanding constitutional protections for migrants could mitigate massive injustices and protect pregnant migrants. Importantly this legal strategy affords protection without legitimizing arguments against abortion based on fetal personhood.

## V. CONCLUSION

Pro-life legislation during the Trump administration set forth an increasingly severe claim about the need to protect fetuses—specifically as this relates to restricting abortion access and regulating pregnant women. This legislation is quickly evolving, too. Abortion legislation during the Trump presidency was highly restrictive, protecting fetuses from the onset of pregnancy and with less consideration for countervailing issues.

But the same Administration did not hold true to the principles embedded in pro-life legislation when it came to pregnant migrants. Rather, women in DHS facilities suffer harm because of immigration policies that do little to actually protect the nation. Importantly, fetal harm was not even a consideration in adopting such policies, and pro-life politicians have denied opportunities to protect pregnant women and their fetuses. The result is harrowing; mass human rights abuses are reported, miscarriages in detention centers are rising, and women are suffering due to legislative and political choices that directly affect their reproductive health.

To account for the disparate response to fetal harm in both contexts, race and nationality cannot be ignored. Former President Trump expressed hostility toward immigrants from the onset of his presidential campaign, and while American fetuses are outwardly protected—immigrant fetuses are shown apathy. The sanctity of fetal life remains an unwavering value for pro-life policymakers, yet it seems this love is overshadowed by disdain for migrants.

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288. Further, the willingness to endure the inhumane conditions created by MPP warrants reconsideration in the belief that those seeking admission lack a cognizable life or liberty interest in entering the country.

Looking ahead, President Biden promises to “end these [detrimental] immigration policies, starting with Trump’s Migrant Protection Protocols.”<sup>289</sup> As of January 2021, Biden halted new enrollment of migrants in MPP.<sup>290</sup> Though President Biden has not specifically committed to reinstating humanitarian parole as it existed under former President Obama, he promises to end prolonged detention and to invest in alternatives such as nonprofit-led case management.<sup>291</sup> This is a start, but Trump’s reign from 2016 to 2020 revealed the severe lack of constraint on a Chief Executive who is viciously anti-immigrant. Without a constitutional backstop or revocation of power delegated to the executive branch by Congress, political pressure is the only actual protection for migrants, their families, and their fetuses. Immediately, immigration advocates must ensure Biden feels this pressure. Ultimately, the legal community must establish constitutional limits on the inhumane treatment of migrants that will withstand the next iteration of Donald Trump.

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289. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS, <https://joebiden.com/immigration/> (last visited Jan. 21, 2021).

290. Sara Rimer, *President Biden Reverses Some of Trump’s Anti-Immigration Policies. Now What?*, BU TODAY (Jan. 25, 2021), <https://www.bu.edu/articles/2021/biden-reverses-trumps-anti-immigration-policies/>.

291. *Id.* (promising to end “prolonged detention and reinvest in a case management program,” among other related commitments).