THE FATHERS' VETO AND FATHERHOOD AS PROPERTY*

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Over the last twenty-five years, state legislators have been quietly adding civil remedy provisions to antiabortion legislation to supplement, and in the case of Texas's Senate Bill 8, to completely replace the traditional criminal and administrative enforcement mechanisms of restrictive abortion legislation. Laws currently in effect in at least eight states permit fathers to sue abortion providers for civil damages for wrongful death and emotional distress for alleged harms that result from the abortion procedure. Several state legislatures have introduced laws—although to date all have been enjoined or are being challenged—that require women seeking an abortion to get signed consent of the father. As these laws gain traction, abortion opponents have advanced a new narrative of abortion: regret for lost fatherhood.

While civil remedy antiabortion provisions are an attempt to establish fetal personhood, what may be less obvious is their potential to shift the regulation of women's reproductive autonomy from the state to private actors, specifically to fathers. This Article explores these previously unexamined civil remedy provisions to reveal the ways that they function as a veto over women's reproductive decision-making and place women's constitutional rights in the hands of private actors through the pretextual vehicle of parentage. Granting a putative father the right to sue in wrongful death recognizes him as having a parental interest that is compensable when lost, even when a pregnancy has been terminated through a consensual abortion procedure. While the nominal purpose of these laws is to compensate putative fathers in tort, these laws in fact have a much broader sweep: to recast abortion as an issue of parentage and to extend

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the power of fathers over their genetic offspring and, by extension, their pregnant sexual partners, both through monetary compensation and veto power over abortion. In short, antiabortion civil remedy laws forge a property interest in genetic fatherhood.

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INTRODUCTION

On September 1, 2021, Texas's "heartbeat" bill, Senate Bill 8 ("SB8"),[1] took effect when the Supreme Court declined to take action to block the law in a pre-enforcement challenge brought by abortion providers in the state.[2] In December, the Court granted limited redress to providers to challenge the

1. Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws 1 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (2021)).

2. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (denying providers' pre-enforcement request for declaratory and injunctive relief and allowing Texas's SB8 to take effect on September 1, 2021).

statute but left the law in effect.[3] The law, which prohibits abortions at six weeks,[4] is notable because it provides that the ban "shall be enforced *exclusively* through . . . private civil actions"[5] and no enforcement may be undertaken by an officer of the state or local government.[6] Over the last twenty-five years, state legislators have been quietly adding civil remedies provisions to antiabortion legislation. Currently, restrictive abortion laws in at least eight states include provisions that allow putative fathers[7] to sue abortion providers for wrongful death for violating the antiabortion statute.[8] The provisions are

3. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535–36 (2021) (permitting abortion providers' pre-enforcement challenge to proceed only against officials with disciplinary authority over medical licenses but dismissing the pre-enforcement challenge against all other defendants).

4. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.204 (Westlaw through end of the 2021 Reg. and Called Sesss. of the 87th Leg.). The law prohibits abortion once cardiac activity can be detected, which usually occurs around six weeks of pregnancy. Sarah McCammon & Lauren Hodges, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True*, NPR (Mar. 1, 2022), https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months [https://perma.cc/3HF8-TVSB].

5. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (Westlaw) (emphasis added).

6. *Id.* § 171.208(a) (Westlaw) (authorizing *any person* other than an officer of the state or local government to sue an abortion provider who provides care in violation of the six-week ban, any person who aids or abets the performance of abortion, including paying for or reimbursing the cost through insurance, or any person who intends to provide or help someone obtain an abortion in violation of the ban); *see also id.* § 171.208(b)(1)–(3) (Westlaw) (providing that civil enforcement relief includes $10,000 monetary damages, injunctive relief to prevent the defendant from future violations of the law, costs, and attorney's fees). *But see id.* § 171.208(j) (Westlaw) (preventing a person who impregnated an abortion patient through rape, sexual assault, or incest from bringing civil action).

7. *See* Dara E. Purvis, *Expectant Fathers, Abortion, and Embryos*, 43 J.L. MED. & ETHICS 330, 332 (2015) [hereinafter Purvis, *Expectant Fathers*] (discussing author's preference of term "expectant father" over putative father in the context of abortion due to the difficulty of terminology in referring to fathers in the abortion context, noting that "putative father" has been used by scholars and the court to refer to men with a hypothetical genetic connection to a developing fetus yet to be born); *see also* Jones v. Smith, 278 So. 2d 339, 339 (Fla. Dist. Ct. App. 1973) (using the term "potential putative father" to describe an unwed father seeking to enjoin his pregnant girlfriend from seeking an abortion).

8. *See, e.g.*, ALA. CODE § 26-23B-7(a)–(b) (Westlaw through Act 2022-422 of the 2022 Reg. and First Spec. Sesss.) (allowing damages to "the father of the unborn child" against any person who performed an abortion in violation of the law); ARK. CODE ANN. § 20-16-1804(a)–(b) (LEXIS through all acts of the Third Extra. Sess. (2022)) (providing the spouse "[m]onetary damages for psychological and physical injuries associated with the dismemberment abortion . . . [and] [s]tatutory damages equal to three (3) times the cost of the dismemberment abortion"); IDAHO CODE § 18-613(3)(a)–(b) (LEXIS through all legislation from the 2022 Reg. Sess.) (providing money damages to the father of the aborted fetus, if married to the woman who underwent the abortion procedure at the time of the abortion, "for all mental and physical injuries suffered by the plaintiff as result of the abortion . . . equal to three (3) times the cost of performing the abortion procedure"); KAN. STAT. ANN. § 65-6703(g)(1) (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022) (providing a cause of action against an abortion provider to "the father, if married to the woman at the time of the abortion"); MONT. CODE ANN. § 50-20-605(1) (Westlaw through the 2021 Sess. of the Mont. Leg.) (providing the father of the unborn child with actual and punitive damages against an abortion provider); NEB. REV. STAT. § 28-3,109 (2022); OKLA. STAT. tit. 12, § 1053(B), (F)(2)–(3) (Westlaw through legislation of the Second Reg. Sess. of the 58th Leg. (2022)) (permitting a parent of the

patterned after model legislation drafted by the National Right to Life Committee[9] and are intended to establish fetal personhood: damages may be sought by the father of the "deceased unborn person,"[10] "the father of the unborn child,"[11] or the "father of the aborted unborn child,"[12] for example.[13]

In addition to wrongful death civil remedy statutes, SB8-style civil bounty legislation is also on the rise with at least half a dozen states having signaled their intention to pass antiabortion private civil enforcement laws modeled after Texas's SB8.[14] Idaho is the first state to pass such a private civil enforcement six-week abortion ban, which allows family members, including putative fathers of "preborn children," to sue abortion providers for violating the state's

"deceased unborn person" to sue the provider for wrongful death, including "medical and burial expenses" (does not apply to cost of an abortion), loss of consortium and grief of surviving spouse, mental pain and anguish suffered by the decedent, pecuniary loss of the survivors, grief and loss of companionship of the children and parents of the decedent, and punitive or exemplary damages against person who proximately caused the wrongful death); TENN. CODE ANN. § 63-6-1106 (LEXIS through the 2022 Reg. Sess.) (effective Jan. 1, 2023) (providing a cause of action for civil damages by a spouse against a provider of an abortion inducing drug in violation of Tennessee law); WIS. STAT. § 253.107(5)(a)(2) (2020) (permitting the "father of the aborted unborn child" to sue a provider for "personal injury and emotional and psychological distress").

9. The National Right to Life Committee is the most well-known antiabortion organization, established in 1968 to serve as an umbrella organization for state-level affiliates and designed to forge a single strategy and message for what had previously been a fragmented movement. *See* MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 33 (2015); NAT'L RIGHT TO LIFE, www.nrlc.org [https://perma.cc/3D3S-KXU6].

10. OKLA. STAT. tit. 12, § 1053(F)(3) (Westlaw).

11. ALA. CODE § 26-23B-7(a) (Westlaw); NEB. REV. STAT. § 28-3,109(1).

12. WIS. STAT. § 253.107(5)(a)(2); *see also* OKLA. STAT. tit. 12, § 1053(F)(3) (Westlaw) (using the phrase "parent . . . of the deceased unborn person").

13. Some states require that the father be married to the woman at the time that the abortion was performed to be able to sue the abortion provider. *See, e.g.*, ARK. CODE ANN. § 20-16-1804(a)(1)(B) (2021) (LEXIS) (allowing a civil action to be maintained by the "spouse . . . of the woman"); IDAHO CODE § 18-613(3)(a) (LEXIS) (allowing "[t]he father of the aborted fetus, if married to the mother at time of partial-birth abortion" to bring civil action); KAN. STAT. ANN. §§ 65-6703(g)(1), 65-6721(d)(1) (Westlaw) (allowing the "father, if married to woman at time of abortion," to bring civil action).

14. *See, e.g.*, Meryl Kornfield, Caroline Anders & Audra Heinrichs, *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit*, WASH. POST (Sept. 3, 2021, 8:08 PM), https://www.washingtonpost.com/nation/2021/09/03/texas-abortion-ban-states/ [https://perma.cc/LVH4-ZMB3 (dark archive)] (describing that Republican leaders in Arkansas, Florida, South Carolina, South Dakota, Kentucky, and Louisiana have indicated that they will try to copy the Texas legislation); Daniel Politi, *At Least Seven GOP-Controlled States Look To Mimic Texas Anti-abortion Law*, SLATE (Sept. 5, 2021, 8:33 AM), https://slate.com/news-and-politics/2021/09/republican-states-seek-mimic-texas-abortion-law.html [https://perma.cc/P4YA-M5QL] (describing that as many as a quarter of states are expected to introduce SB8-style abortion restrictions). The National Association of Christian Lawmakers issued model legislation of the SB8-style Heartbeat Act in July 2021 for state lawmakers to follow. *See* Mya Jaradat, *These Christian Lawmakers Are on the Offensive Against Abortion*, DESERET NEWS (July 20, 2021, 3:00 PM), https://www.deseret.com/2021/7/20/22583625/these-christian-lawmakers-are-on-the-offensive-against-abortion-rights-texas-heartbeat-bill-abortion [https://perma.cc/C869-LN57].

restrictive abortion law.[15] The laws are designed to supplement—and in the case of Texas's SB8, to completely replace—the traditional criminal and administrative enforcement mechanisms of restrictive abortion legislation.[16] While Texas's private cause of action against abortion providers is designed to make it more difficult to challenge the law in court,[17] it represents only the broadest of the antiabortion civil remedy statutes passed in a decades-long strategy to shift enforcement of restrictive abortion regulations from the state to private citizens.

Even though *Roe v. Wade*[18] has been overturned and states are now able to ban abortion outright without needing to use the procedural loophole of civil enforcement, there are several reasons that civil remedy statutes are likely to remain part of restrictive abortion laws.[19] First, civil remedies require a lower standard of proof—the preponderance of the evidence standard—and therefore civil remedies make it easier to sue abortion providers in court. The lower standard of proof coupled with steep civil damage awards—$20,000 in the new

15. An Act Relating to the Fetal Heartbeat Preborn Child Protection Act, ch. 152, sec. 6, § 18-8707(1)–(1)(A), 2022 Idaho Sess. Laws 532, 534–35 (codified at IDAHO CODE § 18-8807(1)–(1)(a) (2022)) (explaining that "the father of the preborn child . . . may maintain an action for . . . [a]ll damages from the medical professional[]" who performs an abortion in violation of the statute). The civil remedies provision also allows the abortion patient, the grandparents, aunts, uncles, and siblings of the "preborn child" to sue the abortion provider for damages. *Id.*

16. *See* Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 126–27 (2007) (suggesting that these laws are using "'private' rights of action to make an end-run around public values and to disguise 'public' governmental regulation"); Caitlin Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 756 (2006) (arguing that allowing state legislatures to circumvent the judicial process through "shrewd legislation drafting" permits a form of government in which "state government is equal or superior in authority to the federal government, and one in which the legislative branch is virtually unchecked by the judicial branch"). For a discussion of the use of private enforcement to avoid governmental accountability, see generally Gillian E. Metzger, *Privatization As Delegation*, 103 COLUM. L. REV. 1367 (2003), discussing how privatizing governmental programs may impermissibly delegate government powers to private agencies, and Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003), addressing the privatization of governmental programs to religiously affiliated organizations.

17. By providing that private enforcement is the *only* enforcement mechanism for the law and by specifically prohibiting the state's attorney general and other state officials from initiating enforcement of the law, Texas legislators sought to neutralize potential pre-enforcement challenges to the law through the traditional means of seeking an injunction against state officials from enforcing the law since arguably none of the state's officials are appropriate defendants. *See* Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries To Upend the Legal System with Its Abortion Law*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html [https://perma.cc/P6Rf-X4F4 (dark archive)] (observing that "enlisting private citizens to enforce the restriction makes it very difficult, procedurally, to challenge the bill's constitutionality in court" and describing the law as a "deeply cynical" strategy with no other purpose than to make it more difficult to challenge abortion bans in court).

18. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

19. *See Dobbs*, 142 S. Ct. at 2242–43.

Idaho law,[20] $10,000 under Texas's SB8[21]—create a civil "bounty" designed to deter abortion providers from providing *any* abortion care for fear of violating the statute.[22] These civil damages laws have been described as "self-executing" tort damages because they are designed to prevent individuals and entities from engaging in legally protected conduct for fear of triggering liability.[23] Another reason that states may continue to use private civil enforcement now that *Roe* has been overturned is that the civil remedies deputize private citizens who can more effectively surveille the activities of pregnant partners, friends, coworkers, and family members, thereby increasing both the detection and enforcement of abortion restrictions. Surveillance by private citizens does not need to meet the higher burdens imposed by the Constitution that regulate searches by state actors. In an era of widespread access to safe and effective medication abortion through online pharmacies and across permeable state borders, the granular surveillance by private citizens offered by civil remedies may be a more effective way to detect and enforce restrictive abortion laws.[24]

While civil remedy provisions are part of an antiabortion agenda to establish fetal personhood,[25] what may be less obvious is their potential to recast the abortion right from a right of bodily autonomy to a right to parental recognition that allows genetic fathers to veto abortion and be compensated through civil remedies for lost fatherhood. The power granted to putative

20. IDAHO CODE § 18-8807(1)(b) (LEXIS through all legislation from the 2022 Reg. Sess.) (providing for "statutory damages in an amount not less than twenty thousand dollars" for each violation of the statute).

21. Texas Heartbeat Act, ch. 62, § 171.208(b)(2), 2021 Tex. Gen. Laws 1, 7–8 (codified at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (2021)) (providing that if a claimant prevails under the provision, they are entitled to "statutory damages in an amount of not less than $10,000" for each abortion performed in violation of the statute).

22. *See* Manian, *supra* note 16, at 126–27 (describing how the steep civil damages effectively stop abortion providers from engaging in constitutional behavior for fear of steep liability).

23. *Id.* (describing these tort remedies as strict liability in tort and "self-executing" because no one is willing to risk challenging them for fear of the severe damages that may be levied for infringement).

24. *See, e.g.*, Gabriella Borter, *U.S. States Unsure How To Halt Online Sales of Abortion Pills amid Clinic Crackdown*, REUTERS (June 27, 2019, 6:05 AM), https://www.reuters.com/article/us-usa-abortion-pills-idUSKCN1TS1AB [https://perma.cc/4PT8-CKPK] (describing that U.S. women are increasingly turning to abortion pills obtained through foreign online suppliers "and the states say there is little they can do to stop it").

25. *See* Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 335 (1999); *see also* Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1000 (1999) (noting that antiabortion activities have sought to "reverse *Roe* by having fetuses recognized as full persons under the law," including personhood constitutional amendments and "ongoing efforts to insinuate the concept of fetal personhood into any and every statute, ordinance, and proclamation they could penetrate"). *See generally* Johnathan F. Will, Glenn Cohen & Eli Y. Adashi, *Personhood Seeking New Life with Republican Control*, 93 IND. L.J. 499 (2018) (tracing the historical trajectory of antiabortion strategy of personhood movement and its implications for abortion and reproductive health services more broadly).

fathers in these civil remedy laws goes beyond being recognized for having sustained a compensable loss, but includes the ability to wield a veto power over the decision-making of the gestating parent by the threat of exposing them in court in a lawsuit aimed at a provider.[26] Through statutory fiat, these laws establish parental recognition of putative fathers in the context of a consensual abortion and extends the right to veto abortion based on genetic entitlement alone.[27] Antiabortion civil remedy laws that allow fathers to sue abortion providers shift the regulation of women's reproductive autonomy from the state to private actors, specifically to fathers, through the pretextual vehicle of parentage. At least five civil remedy laws currently in effect allow a putative father to sue for wrongful death regardless of his relationship to the abortion patient.[28] This raises the specter of recognizing legal parentage of unwed fathers *and* granting them rights of decision-making with respect to the fetus without any of the concomitant safeguards inherent in the constitutional biology-plus-relationship inquiry designed to limit recognition and rights to unwed fathers who have a connection that is deeper than mere biology.[29] While the nominal purpose of these laws is to compensate putative fathers in tort, these laws in fact

26. Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (noting that "it is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny"); CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA 51 (2017) [hereinafter SANGER, ABOUT ABORTION] (describing abortion privacy and the interrelationship between the right to make the abortion decision and to keep the decision private). It is also important to note that these laws raise serious questions about patient privacy guaranteed under the Health Insurance Portability and Accountability Act ("HIPAA"). When a putative father seeks to sue an abortion provider, the third party would need to be privy to the personal medical information of patients including their name, date of service, and birth date. *See* Jennifer Conti, *I'm an Ob-Gyn, and Texas' Anti-abortion Law Makes Even Less Sense than You Think*, YAHOO! LIFE (Sept. 3, 2021), https://www.yahoo.com/lifestyle/im-ob-gyn-texas-anti-194426600.html [https://perma.cc/WHH8-WSY6] (describing that the Texas law allows strangers to reveal private patient information in reporting in violation of HIPAA rules).

27. Professor Jennifer Hendricks defines the term "genetic entitlement" as "the principle of giving automatic, full parental rights to fathers based on genetics alone." Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 475 (2017) [hereinafter Hendricks, *Fathers and Feminism*].

28. *See, e.g.*, ALA. CODE § 26-23B-7(a) (Westlaw through through Act 2022-442 of the 2022 Reg. and First Spec. Sesss.) (allowing the woman "or the father of the unborn child" to maintain an action for damages); NEB. REV. STAT. § 28-3,109(1) (2022) ("[T]he father of the unborn child . . . may maintain an action."); OKLA. STAT. ANN. tit. 12, § 1053(f)(3) (Westlaw through legislation of the Second Reg. Sess. of the 58th Leg. (2022)) ("A parent . . . of the deceased unborn person is entitled to maintain an action."); WIS. STAT. § 253.107(5)(a)(2) (2020) (allowing the "father of the aborted unborn child" to bring a claim for damages); MONT. CODE ANN. § 50-20-605(1) (Westlaw through the 2021 Sess. of the Mont. Leg.) ("[T]he father of the unborn child who was the subject of the abortion may maintain an action . . . for actual and punitive damages."). Other statutes provide that the father must be married to the woman at the time that the abortion was performed to be able to sue the abortion provider. *See supra* note 13.

29. *See infra* Section III.C. *See generally* Yvonne Lindgren, *Antiabortion Civil Remedies and Unwed Fatherhood As Genetic Entitlement*, 99 WASH. U. L. REV. 2015 (2022) (discussing in depth the potential of antiabortion civil remedy laws to expand the parental rights and recognition of unwed fathers).

have a much broader sweep: to recast abortion as an issue of parentage and to extend the power of fathers over their genetic offspring and, by extension, their pregnant sexual partners, both through monetary compensation and veto power over abortion. In short, antiabortion civil remedy laws forge a property interest in genetic fatherhood, casting both the fetus and the body of the pregnant partner as property under the putative father's control.

The first iteration of antiabortion civil remedy statutes permitted women[30] who underwent an abortion procedure to sue their provider for wrongful death for harms to themselves and to their "unborn child."[31] The laws reflected two emerging antiabortion strategies: the recognition of fetal personhood and the woman-protective antiabortion narrative that claims that women who undergo the procedure will come to regret their decision and suffer harmful emotional and physical consequences.[32] However, in the last eleven years, a new victim has been identified by antiabortion civil remedy statutes: putative fathers. These laws permit putative fathers to sue abortion providers on their own behalf or as a representative of the fetus' estate for wrongful death for violation of various abortion restrictions, including informed consent, twenty-week "fetal pain" bans, and partial-birth bans, to name a few.[33] Other states have gone further to introduce laws—although to date, none are in effect—that allow putative fathers, regardless of their relationship to the patient, to seek an injunction to block the abortion procedure.[34]

As these laws gain traction, a new narrative of regret for lost fatherhood has been advanced by abortion opponents.[35] The renewed emphasis on the rights of fathers in the abortion context represents one dimension of a shifting

30. In this Article, the terms "women," "mothers," and "fathers" are used because these terms are used by the relevant statutes. This author acknowledges, however, that these terms fail to include LGBTQ+ families and exclude trans men and other gender nonconforming people who may seek abortion-related healthcare and may even have more difficulty accessing affirming and compassionate reproductive healthcare than ciswomen seeking abortions. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 954–57 (2019).

31. *See infra* Section I.C.

32. *See id.*

33. *See infra* Section I.A.

34. H.B. 1181, 2022 Leg., 2022 Sess. (N.H. 2022) (failing to pass, the bill provided the "biological father of an unborn child to petition the court for an injunction prohibiting the biological mother from having an abortion"); H.B. 2206, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014) (failing to pass, the bill providing that "no abortion shall be performed or induced unless and until the father of the unborn child provides written, notarized consent to the abortion"); H.B. 1441 56th Leg., 1st Sess. (Okla. 2017) (failing to pass, the bill provided that "no abortion shall be performed in this state without the written informed consent of the father of the fetus . . . [and a] pregnant woman seeking to abort shall be required to provide, in writing, the identity of the father of the fetus to the physician"); S.B. 494, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (failing to pass, the bill provided that the father of an unborn child may petition the court for injunctive relief, which "[s]hall prohibit the respondent from seeking or obtaining an abortion," and that the court shall conduct a hearing to determine paternity and that there is reasonable probability that the respondent will seek an abortion).

35. *See infra* Section II.D.

antiabortion strategy that was on display at oral arguments in December of 2021 in the *Dobbs v. Jackson Women's Health Organization*[36] case: that an unplanned pregnancy will not impact a woman's career and educational goals if there is a means for her to easily relinquish parental rights to her newborn.[37] While Justice Barrett's pointed questions in oral arguments in *Dobbs* addressed safe-haven laws[38]—laws that permit parents to drop newborns at fire and police stations without fear of legal consequences—the same argument is made in advancing the rights of putative fathers to override the abortion right.[39]

This Article proceeds in three parts. Part I describes the current antiabortion civil remedy laws and their relationship to wrongful death which is a cause of action designed to compensate parents for the lost parent-child relationship. This section also examines the first iteration of these laws that provided civil remedies to the abortion patients themselves under the woman-protective antiabortion rationale. Part II situates these laws within the historic context of the fathers' rights and marriage promotion movements of the 1970s and 1980s that gave rise to the fathers' rights antiabortion strategy. Those movements sought to reassert the power of fathers in the traditional patriarchal family during a time in which marriage was in decline and men were losing the rights that had traditionally attached to their role in marriage. Part III excavates how these laws are part of a surgent movement to privilege a narrative of abortion as parentage instead of a right of bodily autonomy, a move that shifts the discourse from the body of the pregnant person to the rights of the putative father. This section argues that such laws dramatically expand the rights of fathers generally as well as the recognition of unwed fathers because the laws recognize unwed fathers as parents without the constitutional law prerequisite of establishing the social relationship of parenthood reflected in biology-plus to anchor paternal recognition. Instead, legislative fiat has reshaped parental recognition through genetic entitlement. The section concludes that these laws establish a property right in fatherhood itself by compensating men for the loss of an inchoate interest in fatherhood without the birth of a child. The genetic entitlement of fatherhood—the right to veto abortion to protect one's interest in fatherhood, and the right to sue providers for its loss—is more closely akin to a property claim than to a parentage claim. It is a property right to genetic offspring, even inchoate genetic offspring. It is fatherhood as a property right.

36. 142 S. Ct. 2228 (2022).

37. *See* Transcript of Oral Argument at 56–57, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

38. After stating that "*Roe* and *Casey* emphasize the burdens of parenting," Justice Barrett asked the attorney representing the Mississippi clinic, "Why don't the safe haven laws take care of that problem?" *Id.* at 56.

39. *See infra* Section III.A.

I. CURRENT LEGISLATION AND THE HISTORY OF ANTIABORTION CIVIL REMEDIES

This part begins with a survey of the various types of antiabortion civil remedy laws currently in effect. The first are wrongful death causes of action that are patterned after the National Right to Life Committee ("NRLC") model legislation that recognizes civil remedies for putative fathers for damages that flow from the abortion procedure.[40] Next are SB8-style six-week abortion bans that are enforceable exclusively through civil remedy provisions brought by specifically identified family members, including putative fathers.[41] Fourteen states allow third parties, including putative fathers, to represent the fetal estate to bring survival causes of action against abortion providers.[42] Finally, beginning in 2017 several states introduced laws, though none were successfully enacted, that allowed putative fathers to seek injunctions to stop an abortion or required pregnant people to get signed consent from putative fathers before seeking an abortion.[43] Next, the part sets forth the trajectory of antiabortion civil remedy laws, examining the first wave of this type of legislation—animated by fetal personhood and woman-protective antiabortion rationales—that sought to offer a civil remedy to women for alleged harms from abortion.[44] As will be described, civil remedies for putative fathers grew out of a new narrative that men's harms from abortion flow from their essential roles as the head of a traditional family. Critically, the shift from woman-protective to father-protective antiabortion strategy had the effect of putting parentage—and not a woman's experience of carrying and giving birth—front and center.

A. *Wrongful Death and the Current Antiabortion Civil Remedy Statutes*

By its very nature, a wrongful death claim in the context of abortion recasts abortion as an issue that is related to parentage rather than bodily autonomy. A wrongful death cause of action is a statutorily created right that only exists where the state has provided such a cause of action by statute.[45] Beneficiaries

40. *See infra* Section I.A.

41. *See infra* notes 68–79 and accompanying text.

42. *See infra* notes 80–86 and accompanying text.

43. *See infra* notes 87–91 and accompanying text.

44. *See* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 106–07, 174 (2020) [hereinafter ZIEGLER, ABORTION AND THE LAW] (describing pro-life attorney Harold Cassidy's litigation strategy to establish both fetal personhood and abortion regret syndrome, and his formation of the Culture of Life Leadership Coalition, a group of antiabortion lawyers working to litigate cases on behalf of women suing abortion providers for wrongful death and emotional trauma from the procedure); Sarah Blustain, *The Man Who Loved Women Too Much*, MOTHER JONES (Jan.–Feb. 2011), https://www.motherjones.com/politics/2011/01/harold-cassidy-abortion-laws/ [https://perma.cc/N2TP-7RFG] (profiling Harold Cassidy and his litigation strategy to represent women suing their abortion providers).

45. *See* VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 593 (13th ed. 2015).

named in a wrongful death statute are compensated for the damages they suffer due to the death of a third person as the result of someone's tortious conduct.[46] In the case of antiabortion civil remedy statutes, putative fathers are identified as beneficiaries who are entitled to compensation for the death of the aborted "unborn child."[47] When a wrongful death cause of action involves the death of a child, it is specifically designed to compensate parents for the loss of society, comfort, and companionship of children who have died as the result of another's tortious conduct.[48] It is the lost parent-child *relationship* that is being compensated in wrongful death, also known as loss of filial consortium.[49] Thus, granting civil damages to a putative father in the context of abortion recognizes him as having a parental interest that is compensable when lost, even when a pregnancy has been terminated through a consensual abortion procedure. The types of harms that are being compensated in these statutes flow from the lost parent-child relationship: loss of filial consortium and emotional pain and suffering. Thus, civil remedy provisions recognize a legal claim in putative fathers that flows from their lost fatherhood and is disconnected from and in opposition to the abortion patient.

While the earliest antiabortion civil remedy provisions granted the abortion patient herself the right to sue providers,[50] beginning in 2010 state legislatures began to include putative fathers in antiabortion civil remedy

46. *Id.*

47. *See* ARK. CODE ANN. § 20-16-1804(b)(1)(B) (LEXIS through all acts of the Third Extra. Sess. (2022)) (stating a civil action may be brought by the "father of the aborted fetus, if married to the mother of the aborted fetus at the time of the partial-birth abortion"); IDAHO CODE § 18-613(3)(a) (LEXIS through all legislation from the 2022 Reg. Sess.) (stating a cause of action may be maintained by "[t]he father of the unborn child, if the father is married to the woman at the time the dismemberment abortion was performed"); KAN. STAT. ANN. §§ 65-6703(g)(1), 65-6721(d)(1) (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022) (stating that "the father, if married to the woman at the time of the abortion . . . may in a civil action obtain appropriate relief" if an abortion is performed after fetal viability); OKLA. STAT. tit. 12, § 1053(F)(3) (Westlaw through legislation of the Second Reg. Sess. of the 58th Leg. (2022)) ("A parent or grandparent of the deceased unborn person is entitled to maintain an action against the physician who caused the death of an unborn person . . . .").

48. *See, e.g.*, Selders v. Armentrout, 207 N.W.2d 686, 689 (Neb. 1973) (holding that the measure of damages for wrongful death of minor children should include the loss of the society, comfort, and companionship of the child and not solely the child's economic value to the family); *see also* Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955, 981 (2019).

49. Hancock v. Chattanooga-Hamilton Cnty. Hosp. Auth., 54 S.W.3d 234, 237 n.2 (Tenn. 2001) (noting that thirty-two states allow recovery for "loss of companionship" or filial consortium of a family member). By contrast, a survival statute allows a representative of a decedent's estate to bring causes of action that the decedent would have had, had that person survived, while the cause of action "survives" the death of the plaintiff. SCHWARTZ ET AL., *supra* note 45, at 593 (describing that in a survival statute, the cause of action the decedent would have had survives the death of either party).

50. *See infra* Section I.C.

statutes based upon NRLC model legislation.[51] In 2010, Nebraska's legislature enacted the Pain-Capable Unborn Child Protection Act.[52] The law prohibits abortion at twenty weeks postfertilization and provides that the father of an "unborn child," who was the subject of an abortion in violation of the law, may maintain a cause of action against the provider for actual damages.[53] Since that time, at least seven other states have passed antiabortion civil remedy laws that allow putative fathers to sue abortion providers for damages: Alabama, Arkansas, Idaho, Kansas, Montana, Oklahoma, and Wisconsin.[54] Arkansas, Idaho, and Kansas provide that only a father who is married to the abortion patient may sue a provider under the statute, whereas Alabama, Montana, Nebraska, Oklahoma, and Wisconsin provide a civil remedy to a putative father of the fetus without respect to his relationship to the abortion patient.[55]

The laws have similar features, designed to recognize and compensate putative fathers for their loss due to the abortion procedure. A Wisconsin

51. *See, e.g.*, NAT'L RIGHT TO LIFE COMM., PAIN CAPABLE UNBORN CHILD PROTECTION ACT FACT SHEET (Jan. 25, 2022), https://www.nrlc.org/uploads/stateleg/PCUCPAfactsheet.pdf [https://perma.cc/4D5A-UHQB] (listing twenty-four states that have passed laws based on the NRLC Model "Pain Capable Unborn Children Protection Act," at least half of which included the model act's civil remedy provisions).

52. Pain-Capable Unborn Child Protection Act, vol. II, 2010 Neb. Laws 874 (codified at NEB. REV. STAT. §§ 28-3,102–3,111 (2010)).

53. NEB. REV. STAT. § 28-3,109(1) (2022).

54. *See* Alabama Pain-Capable Unborn Child Protection Act, ch. 22, § 8(a)–(b), 2011 Ala. Laws 1784, 1793–94 (codified at ALA. CODE § 26-23B-7(a)–(b) (2012)) (allowing damages to "the father of the unborn child" against any person who performed an abortion in violation of the law); Arkansas Unborn Child Protection from Dismemberment Abortion Act, ch. 16, § 20-16-1804(b)(3), 2017 Ark. Acts 124, 129 (codified at ARK. CODE ANN. § 20-16-1804(b)(3) (2017)) (providing the spouse "[m]onetary damages for psychological injuries and physical injuries associated with the dismemberment abortion . . . and [s]tatutory damages equal to three (3) times the cost of the dismemberment abortion"); IDAHO CODE § 18-613(3)(a)–(b) (LEXIS through all legislation from the 2022 Reg. Sess.) (providing money damages to the father of the aborted fetus, if married to the woman who underwent the abortion procedure at the time of the abortion, "for all mental and physical injuries suffered by the plaintiff as a result of the abortion . . . equal to three (3) times the cost of performing the abortion procedure"); Act of Apr. 12, 2011, ch. 44, § 4, 2011 Kan. Sess. Laws 598, 605 (codified as amended at KAN. STAT. ANN. § 65-6703(g)(1) (2011)) (providing a cause of action against an abortion provider to "the father, if married to the woman at the time of the abortion"); Montana Pain-Capable Unborn Child Protection Act, ch. 307, § 5(1), 2021 Mont. Laws 981, 983 (codified at MONT. CODE ANN. § 50-20-605(1) (2022)) (providing the father of the unborn child with actual and punitive damages against an abortion provider); Unborn Person Wrongful Death Act, ch. 149, § 2, 2020 Okla. Sess. Laws 503, 505–06 (codified at OKLA. STAT. tit. 12, § 1053(B), (F)(3) (2021)) (permitting a parent of the "deceased unborn person" to sue the provider for wrongful death including "[m]edical and burial expenses" (does not apply to cost of an abortion), "loss of consortium and the grief of the surviving spouse," "mental pain and anguish suffered by the decedent," "pecuniary loss to the survivors," "grief and loss of companionship of the children and parents of the decedent," and "punitive or exemplary damages" against the person who proximately caused the wrongful death); Act of July 20, 2015, § 7(5), 2015 Wis. Sess. Laws 718, 720 (codified at WIS. STAT. § 253.107(5)(a)(2) (2016)) (permitting the "father of the aborted unborn child" to sue a provider for "personal injury and emotional and psychological distress").

55. *See supra* notes 13, 28 and accompanying text.

statute passed in 2015 bans abortions beginning at twenty weeks or more gestation under the "fetal pain" rationale,[56] and in addition to criminal penalties,[57] the law provides that "the father of the aborted unborn child" may seek civil damages "for personal injury and emotional and psychological distress against the person who performs . . . an abortion in violation of [the] section," as well as punitive damages.[58] Oklahoma's Unborn Person Wrongful Death Act,[59] which went into effect in 2020, allows the parent of a "deceased unborn person" to sue an abortion provider for wrongful death and to recover damages for medical and burial expenses, loss of consortium and grief of surviving spouse, mental pain and anguish suffered by the decedent, pecuniary loss of the survivors, grief and loss of companionship of the children and parents of the decedent, as well as punitive or exemplary damages against a person who proximately caused the wrongful death.[60] Civil remedies have also been included in the new crop of so-called "fetal heartbeat"[61] bills that banned early abortion procedures in anticipation of *Roe v. Wade* being overturned.[62] A "fetal

56. Act of July 20, 2015 § 7(3), 2015 Wis. Sess. Laws at 720.

57. WIS. STAT. § 253.107(4) (2022) (stating that a person who violates the law is guilty of a Class I felony).

58. *Id.* § 253.107(5)(a)(2), (5)(b). Similarly, Kansas's statute, for example, allows putative fathers to sue a provider for "money damages for all psychological and physical injuries; statutory damages equal to three times the cost of the abortion; and reasonable attorney fees" for providing an abortion after the twenty-two weeks. KAN. STAT. ANN. § 65-6703(c)(2), (g)(1)–(2) (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022). Arkansas's statute permits the potential father of the "unborn child" to seek damages for psychological and physical injuries as well as statutory damages equal to three times the cost of the abortion procedure. ARK. CODE ANN. § 20-16-1804(b)(1)(B), (b)(3)(A)–(B) (LEXIS through all acts of the Third Extra. Sess. (2022)) (preliminary injunction granted in Hopkins v. Jegley, 267 F. Supp. 3d 1024, 1111 (E.D. Ark. 2017)). Idaho similarly provides for civil remedies beyond traditional state enforcement provisions to allow marital fathers to sue for damages for mental and physical injuries suffered as a result of their wife undergoing a prohibited partial-birth abortion and for money damages equal to three times the cost of the abortion procedure. IDAHO CODE § 18-613(2)–(3) (LEXIS through all legislation from the 2022 Reg. Sess.) (defining a partial-birth abortion as an abortion in which the physician deliberately vaginally delivers a living fetus until the head has emerged and then through an overt act causes fetal demise).

59. Unborn Person Wrongful Death § 1053(B), 2020 Okla. Sess. Laws at 504.

60. *Id.*

61. While called a "heartbeat" bill, the term is a misnomer, as at six weeks, the cells that produce the activity described in Texas's SB8 as a "heartbeat" is in fact electrical impulses because the cells have not yet formed a "heart." *See* Complaint at 22, Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595 (2021) (No. 1:21-CV-616-RP) (describing that "the term 'heartbeat' in S.B.8 thus covers not just a 'heartbeat' in the lay sense, but also early cardiac activity—more accurately, electrical impulses—present before full development of the cardiovascular system").

62. Currently, eight states have passed six-week abortion bans under the "fetal heartbeat" rationale, with Texas's SB8 taking effect first, and several other states' bans taking effect thirty days after *Dobbs*. *See* Mary Kekatos, *More States Ban Abortion This Week as Several 'Trigger Laws' Go into Effect*, ABC NEWS (Aug. 25, 2022), https://abcnews.go.com/US/states-ban-abortion-week-trigger-laws-effect/story?id=88837365 [https://perma.cc/4X74-R9DG]; *State Bans on Abortion Throughout Pregnancy*,

heartbeat" bill passed by Ohio in 2019 provides for civil compensatory and exemplary damages to *any person* who sustains injury, death, or loss to person or property as the result of the violation of the informed consent requirements of the state's six-week abortion ban.[63] The law, twice enjoined by federal court orders,[64] prohibits abortion where a fetal heartbeat has been detected, except to prevent the mother's death or bodily impairment.[65]

The civil remedy antiabortion provisions recast abortion through the lens of parentage because they allow fathers to seek damages to compensate them for the loss of society, comfort, and companionship of children, recasting the abortion procedure as akin to a child who has died and thereby giving rise to a cause of action for wrongful death.[66] The laws have drawn from the NRLC model legislation that provides potential fathers with civil penalty damages for wrongful death, regardless of marital status.[67] What is more, the damages in these wrongful death claims are designed to compensate for the lost parent-child *relationship*, or lost filial consortium. These are harms that are uniquely tied to parentage. The laws are sweeping putative fathers into a statutory scheme designed to compensate *parents* and are thereby recasting abortion as an issue related to parentage instead of bodily autonomy. The laws conscript parental recognition in the context of abortion by extending compensation for parental harms to putative fathers.

GUTTMACHER INST. (Sept. 24, 2022), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [https://perma.cc/AGL8-WBPC]. At least twenty-one states had "trigger" laws on the books that intended to ban or severely restrict abortion once *Roe v. Wade* was overturned. *See* Becky Sullivan, *21 States Poised To Ban or Severely Restrict Abortion if* Roe v. Wade *Is Overturned*, NPR NEWS (Dec. 2, 2021, 6:18 PM), https://www.npr.org/2021/12/02/1061015753/abortion-roe-v-wade-trigger-laws-mississippi-jacksons-womens-health-organization [https://perma.cc/2EBT-BZHW].

63. *See* Prohibit Abortion if Detectable Heartbeat, § 1(H)(1), 2019–2020 Ohio Sess. Laws 1, 4 (codified as amended at OHIO REV. CODE ANN. § 2317.56 (2022)) (emphasis added).

64. The law was initially enjoined in 2019 when the court issued an injunction. Preterm-Cleveland v. Yost, 394 F. Supp. 3d 796, 798 (2019) (S.D. Ohio 2019). In July 2022, after *Roe v. Wade* was overturned, the 2019 injunction was lifted. Preterm-Cleveland v. Yost, No. 1:19-CV-00360, 2022 WL 2290526, at *1–2 (S.D. Ohio June 24, 2022). As this Article goes to print, the law has again been enjoined. Preterm-Cleveland v. Yost, No. A2203203, 2022 WL 4283155, at *12 (Ohio Com. Pl. Sept. 14, 2022); Preterm-Cleveland v. Yost, No. A2203203, 2022 WL 16137799, at *1, 21 (Ohio Com. Pl. Oct. 12, 2022).

65. OHIO REV. CODE ANN. § 2919.195(A) (LEXIS through File 132 of the 134th (2021–2022) Gen. Assemb.; acts signed as of July 29, 2022).

66. *See, e.g.*, Selders v. Armentrout, 207 N.W.2d 686, 688–89 (Neb. 1973) (holding that the measure of damages for wrongful death of minor children should include the loss of the society, comfort, and companionship of the child and not solely the child's economic value to the family); *see* Lens, *supra* note 48, at 981.

67. *See supra* note 51 and accompanying text.

B. *Civil "Bounties," Injunctive Relief, and Fathers as Representatives of Fetal Estates*

Another form of antiabortion civil remedy law is exemplified by Texas's "heartbeat act," SB8, a six-week abortion ban exclusively enforceable through civil statutory remedies, which took effect on September 1, 2021.[68] The law is not a wrongful death statute, meaning it is not intended to compensate the named beneficiary for the pain and suffering and loss of filial consortium as the result of their relationship to the aborted fetus. Rather, the law provides statutory damages—in the case of SB8 in the amount of $10,000—in suits against an abortion provider who performs an abortion in violation of the statute.[69] The law is designed to incentivize private citizens to enforce the law—a type of civil bounty—and thereby shifts abortion regulation to private enforcement. The civil bounty provision makes the law difficult to challenge[70] because it provides that the ban "shall be enforced *exclusively* through . . . private civil actions" and no enforcement may be undertaken by an officer of the state or local government.[71] And indeed, the Supreme Court refused to enjoin the clearly unconstitutional law in a pre-enforcement challenge[72] and has offered abortion providers only limited redress to challenge the law while allowing it to remain in effect.[73]

In March 2022, Idaho passed a six-week abortion ban with a civil remedy provision modeled after Texas's SB8.[74] While Texas's law permits *any* person to sue an abortion provider for statutory damages, Idaho's law provides that only named family members—including grandparents, aunts, uncles, siblings, and the father—of the "preborn" child can sue under the civil remedy provision.[75] The Idaho law permits family members to sue abortion providers for civil damages of $20,000 for violating the six-week ban and, like the Texas law, provides that the six-week ban is exclusively enforced through the private civil causes of action.[76] In May 2022, Oklahoma's governor signed into law an SB8-style privately enforced abortion ban that is the most restrictive in the

68. Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws 1 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (2021)).

69. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b) (Westlaw through the end of the 2021 Reg. and Called Sesss. of the 87th Leg.).

70. *See supra* note 17.

71. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (Westlaw) (emphasis added).

72. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

73. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535–36 (2021).

74. An Act Relating to the Fetal Heartbeat Preborn Child Protection Act, ch. 152, sec. 6, § 18-8807(1)–(1)(a), Idaho Sess. Laws 532, 534 (codified at IDAHO CODE § 18-8807(1)–(1)(a) (2022)).

75. IDAHO CODE § 18-8807(1)(b) (LEXIS through all legislation from the 2022 Reg. Sess.) (providing for statutory damages of not less than $20,000).

76. *Id*. § 18-8807(6) (LEXIS) (providing that "the requirements of this section shall be enforced exclusively through the private civil causes of action described").

nation, banning abortion from fertilization.[77] Ohio's legislature introduced their own SB8-style bill on November 2, 2021,[78] and at least half a dozen other states have signaled that they will introduce their own SB8-style civil bounty laws.[79]

In an emerging related issue, fourteen states currently allow a representative of the *fetal* estate to sue for wrongful death separate and apart from a claim by the parents.[80] These fetal estate laws are another avenue for

77. Oklahoma Heartbeat Act, sec. 8, § 1-745.38 (codified at OKLA. STAT. tit. 63, § 1-745.38 (2022)) (providing that the act shall be enforced exclusively through private civil action); § 1-745.39(A) (providing that "[a]ny person, other than the state, its political subdivisions, and any officer or employee of a state or local governmental entity in this state, may bring a civil action against any [abortion provider]" and that statutory damages will be no less than $10,000).

78. H.B. 480, 134th Gen. Assemb., Reg. Sess. (Ohio 2021). Section 2919.084(A) of the bill allows any person to sue an abortion provider, and § 2919.085(A)(2) grants statutory damages of not less than $10,000 for providing abortions in violation of the law.

79. *See supra* note 14 and accompanying text.

80. *See* Erika L. Amarante & Laura Ann P. Keller, *Dramatically Different Thresholds: Wrongful Death Before Birth*, FOR DEF., May 2019, at 30, 34 (noting that "in many states in which a fetus can bring a wrongful death suit any time after conception, there are approximately 24 weeks during which the fetus can simultaneously be legally terminated and also bring a wrongful death lawsuit"). Currently, fourteen states allow an embryo, or fetus, to maintain a wrongful death action any time after fertilization. Of these states, the majority have done so through legislative changes. *See* ALASKA STAT. §§ 09.55.585(a), 11.81.900(b)(66) (LEXIS through 2022 legislation, Chapters 1–40) (permitting a wrongful death cause of action for an "unborn child" and defining "unborn child" as "a member of the species Homo sapiens, at any stage of development, who is carried in the womb"); ARK. CODE ANN. §§ 16-62-102(a), 5-1-102(13)(B)(i)(b) (LEXIS through all acts of the Third Extra. Sess. (2022)) (defining an unborn child as the "offspring of human beings from conception until birth"); 740 ILL. COMP. STAT. § 180/2.2 (Westlaw through P.A. 102-1102 of the 2022 Reg. Sess.) (stating that "[t]he state of gestation or development of a human being . . . at death, shall not foreclose maintenance of any cause of action . . . arising from the death of a human being caused by wrongful act, neglect or default"); KAN. STAT. ANN. § 60-1901(b)–(c) (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022) (stating that "the term 'person' includes an unborn child," and defining "unborn child" as "a living organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth"); LA. CIV. CODE ANN. art. 26 (Westlaw through the 2022 First Extra. and Reg. Sesss.) (stating that "[a]n unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception" and "[i]f the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death"); MICH. COMP. LAWS § 600.2922(a)(1) (2022) (broadening wrongful death claims to individuals who commit a wrongful or negligent act against a pregnant individual that results in "physical injury to or death of the embryo or fetus"); MO. REV. STAT. §§ 537.080(1), 1.205(3)(2)–(3) (Westlaw through WID 37 of the 2022 Second Reg. Sess. of the 101st Gen. Assemb.) (broadening the rights of unborn children to apply "from the moment of conception until birth," and noting that unborn children have equal rights to any other person); NEB. REV. STAT. § 30-809(1) (2022) (including "an unborn child in utero at any stage of gestation" in the wrongful death statute); OKLA. STAT. tit. 63, § 1-730 (Westlaw through legislation of the Second Reg. Sess. of the 58th Leg. (2022)) (permitting wrongful death of an unborn child and defining unborn child as "offspring of human beings from the moment of conception"); OKLA. STAT. tit. 12, § 1053 (F)(1) (Westlaw through legislation of the Second Reg. Sess. of the 58th Legis. (2022)); S.D. CODIFIED LAWS § 21-5-1 (Westlaw through laws of the 2022 Reg. Sess.) (permitting a wrongful death cause of action for an "unborn child"); TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (Westlaw through the end of the 2021 Reg. and Called Sessions of the 87th Leg.) (defining "individual" in a wrongful death action as "an unborn child at every stage

fathers to sue abortion providers or the gestational parent by opening an estate on behalf of the fetus.[81] In 2019, an Alabama probate judge granted a man's petition to represent the estate of an embryo that was aborted at six weeks gestation.[82] The suit was a wrongful death action against the provider and the manufacturer of the pills used in the medication abortion procedure.[83] The plaintiff told the press that he sued because he "wanted to be a father to his child."[84] The lawsuit was filed just months after Alabama approved a state constitutional amendment recognizing the rights of the unborn.[85] The Supreme Court of Alabama dismissed the father's action because his brief failed to comply with Alabama's briefing rules.[86]

Finally, several states have unsuccessfully attempted to extend fathers' rights in the context of abortion by introducing legislation, although to date none has passed, allowing a putative father to sue for injunctive relief to stop an abortion or requiring the abortion provider to obtain the putative father's

of gestation"); VA. CODE ANN. §§ 8.01-50(B), 32.1-249 (LEXIS through Chapter 2 of the 2022 Spec. Sess.) (permitting a cause of action for fetal death and defining "fetal death" as a death prior to expulsion from the mother "regardless of the duration of pregnancy"). Two states, Alabama and West Virginia, have created similar rules through case law, which allow wrongful death causes of action for unborn, nonviable fetuses. *See* Mack v. Carmack, 79 So. 3d 597, 611 (Ala. 2011) (holding that since the legislature amended the homicide statute to include a fetus at any stage of development, it would be "incongruous" if the civil law did not reflect similar rights for a fetus at the same stage of development); Farley v. Sarti, 466 S.E.2d 522, 532 (W. Va. 1995) (holding that for tort actions, a nonviable fetus who dies in utero should be treated the same as a fetus who is born alive). Six states do not allow any unborn fetuses to bring wrongful death causes of actions. *See* Rosales v. Ne. Cmty. Clinic, No. B276465, 2018 WL 1633068, at *2 (Cal. Ct. App. Apr. 5, 2018) ("California's wrongful death statute does not recognize a claim for the wrongful death of a fetus."); Stern v. Miller, 348 So. 2d 303, 307–08 (Fla. 1977) (holding that only the legislature could expand the wrongful death cause of action to include an unborn fetus in its definition of a "person"); Dunn v. Rose Way, Inc., 333 N.W.2d 830, 831 (Iowa 1983) (excluding an unborn child from the definition of "person"); Shaw v. Jendzejec, 717 A.2d 367, 371 (Me. 1998) (noting that the live-birth rule was the product of statutory interpretation, and despite applying the live-birth rule ten years earlier, the legislature had done nothing to change it); Giardina v. Bennett, 545 A.2d 139, 143–46 (N.J. 1988) (interpreting the definition of "person" under the Wrongful Death Act as not including an unborn child and calling upon the legislature to address the statute if that was not how it intended for the statute to be interpreted); Endresz v. Friedberg, 248 N.E.2d 901, 906–07 (N.Y. 1969) (declining to extend the wrongful death statute to include an action for a stillborn fetus).

81. *See* Amarante & Keller, *supra* note 80, at 30–31.

82. *See* Magers v. Ala. Women's Ctr. Reprod. Alts., LLC, 325 So. 3d 788, 789 (Ala. 2020); Kim Chandler, *Wrongful-Death Lawsuit Filed on Behalf of Aborted Embryo*, AP NEWS (Mar. 8, 2019), https://apnews.com/article/451bf70f668f4c7a9323e169a57df687 [https://perma.cc/DM2L-2XML].

83. Chandler, *supra* note 82.

84. *Id.*

85. *Id.*

86. *See Magers*, 325 So. 3d at 789–90 (noting that appellant's brief had only one sentence, which argued that under Alabama law an unborn child is a legal person, and therefore, the estate of a child killed by abortion can sue the abortion provider for wrongful death). Appellant's brief failed to comply with Alabama's Rules of Appellate Procedure, which require that an appellant fully set forth the arguments, contentions, and statutory support for their position. *Id.*

informed consent prior to performing the abortion.[87] One such law introduced in New Hampshire allowed "the biological father of an unborn child to petition the court for an injunction prohibiting the biological mother from having an abortion."[88] Thus, the law allows putative fathers to seek injunctive relief in civil court to override the pregnant person's rights of bodily autonomy. A bill introduced in Tennessee allows the father of an "unborn child" to petition the court for injunctive relief, which "shall prohibit the respondent from seeking or obtaining an abortion."[89] The Tennessee bill provided that the court shall conduct a hearing where the putative father must prove that he is the biological father of the unborn child and that there is reasonable probability that the respondent will seek an abortion.[90] If the parties are unmarried, the petitioner must execute a voluntary acknowledgement of paternity.[91]

These civil remedy laws—wrongful death provisions, proposed laws for injunctive relief for fathers to block abortion, and laws that allow fathers to sue as a representative of the fetal estate—recast abortion as a contested area of parentage in which putative fathers exercise decision-making and seek compensation that flows from their genetic connection as the "father" of the fetus. This shift does more work than merely extending recognition of fetal personhood, rather it anchors acknowledgment of the rights of fathers in the context of abortion, both through compensation and by granting the right to veto abortions. The shifting narrative of parentage in the abortion context has been addressed by scholars in the context of prenatal end of life decision-making and stillbirth of a wanted pregnancy.[92] Professor Greer Donley has argued that the question of parental rights in the abortion context must be based on the status of the gestating parent, not the personhood status of the fetus.[93] Thus, the right of parental decision-making is involved when a gestating parent chooses to terminate a *wanted* pregnancy due to fetal anomaly, but is incongruous in the context of abortion because abortion does not raise issues of

87. *See supra* note 34 and accompanying text.

88. H.B. 1181, 2022 Leg., 2022 Sess. (N.H. 2022).

89. S.B. 494, 112th Gen. Assemb., Reg. Sess., § 1(a)–(e) (Tenn. 2021).

90. *Id.* § 1(c)(1)–(3).

91. *Id.*

92. *See* Greer Donley, *Parental Autonomy over Prenatal End-of-Life Decisions*, 105 MINN. L. REV. 175, 235–39 (2020) [hereinafter Donley, *Parental Autonomy*] (arguing that the question of parental rights in the abortion context is based on the status of the gestating parent, not the personhood status of the fetus; thus, the right of parental decision-making is involved when a gestating parent chooses to terminate a *wanted* pregnancy due to fetal anomaly); Lens, *supra* note 48, at 1009–10 (noting the parental rights of the gestating parent are engaged in wrongful death causes of action in stillbirth cases, which vindicate the rights of parents without creating personhood status for the fetus); Carol Sanger, *"The Birth of Death": Stillborn Birth Certificates and the Problem for Law*, 100 CALIF. L. REV. 269, 311 (2012) [hereinafter Sanger, *Birth of Death*] (describing the differences in the context of wanted versus unwanted pregnancies, in respecting the desires of gestating parents).

93. Donley, *Parental Autonomy*, *supra* note 92, at 235–39.

parentage.[94] Professor Jill Wieber Lens has described that in wrongful death cases involving stillbirth, the rights of parents are vindicated without creating personhood status for the fetus.[95] Antiabortion civil remedy law seeks to extend parental rights to putative fathers in the context of consensual abortion procedures, thus erasing the critical distinction of wanted versus unwanted pregnancies in respecting the desires of gestating parents.[96]

C. *The First Wave: Tort Claims for Mothers and "Unborn Children"*

The earliest antiabortion civil remedies statutes provided a cause of action for women who had undergone the abortion procedure to sue abortion providers for their own harms and harms to their "unborn child." One of the first statutes, Louisiana's Act 825[97] that passed in 1997, gives women who obtain an abortion a civil cause of action against their abortion provider for having performed the abortion, providing that "[a]ny person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion" and consent to the abortion is not a defense.[98] Act 825 defines "damages" as including all damages that are recoverable in intentional tort, negligence, survival, or wrongful death, and waives the state's cap on damages for medical malpractice,[99] thereby raising the potential for unlimited damages for harms imposed by the abortion itself to either the mother *or the fetus*.[100]

94. *See id.*

95. Lens, *supra* note 48, at 1009–10.

96. *See* Sanger, *Birth of Death*, *supra* note 92, at 311.

97. Act 825, vol. II, 1997 La. Acts 1365 (codified at LA. STAT. ANN. § 9:2800.12 (2022)). For further discussion of the strategy behind Louisiana's Act 825 and other antiabortion civil remedy statutes, see Jennifer L. Achilles, *Using Tort Law To Circumvent* Roe v. Wade *and Other Pesky Due Process Decisions: An Examination of Louisiana's Act 825*, 78 TUL. L. REV. 853 (2004); Borgmann, *supra* note 16; and Manian, *supra* note 16.

98. Act 825 § 1(A), (C)(1), 1997 La. Acts at 1365–64 (providing that if the mother signed a consent form prior to the abortion, damages may be limited but not negated). Other states have enacted or proposed similar legislation. *See, e.g.*, OKLA. STAT. tit. 63, § 1-740 (Westlaw through legislation of the Second Reg. Sess. of the 58th Leg. (2022)) (providing that "[a]ny person who performs an abortion on a minor without parental consent or knowledge shall be liable for the cost of any subsequent medical treatment such minor might require because of the abortion"); S.B. 26, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) (providing that a woman who had an abortion can sue the provider for all damages resulting from the woman's emotional distress and that signing a consent form could limit but not negate damages).

99. Act 825 § 1(B)(2), (C)(2), 1997 La. Acts at 1365–64.

100. *See* Okpalobi v. Foster, 244 F.3d 405, 423–24 (5th Cir. 2001) (finding defendant state officials were not proper parties under the reasoning of *Ex parte Young*, 209 U.S. 123 (1908)); Women's Health Clinic v. State, 2002 CA 0016 p. 6–8 (La. App. 1 Cir. 5/10/02), 825 So. 2d 1208, 1212–13 (holding the doctors and patients also could not challenge the Louisiana law in state court because they lacked standing to sue for pre-enforcement of a private tort law because there was no case or controversy); *see also* Manian, *supra* note 16, at 126 (noting that parties cannot seek pre-enforcement relief for private tort causes of action that infringe constitutional rights leaving these laws unchallengeable in *any* court); Nova Health Sys. v. Gandy, 416 F.3d 1149, 1153 (10th Cir. 2005) (holding that plaintiff lacked standing

These laws have been described as "self-executing" tort statutes because they create strict liability for providers with the potential for severe damages that de facto prevent individuals and entities from engaging in constitutionally protected conduct for fear of triggering liability for violating the statute.[101]

Wrongful death causes of action for women who have had an abortion reflect the development of two intertwined strands in the antiabortion movement: fetal personhood and the woman-protective antiabortion rationale. In the years after *Roe v. Wade*, pro-life organizations were unsuccessful in their efforts to pass fetal personhood legislation at the federal level[102] and developed a new strategy to attack legal access to abortion based on an argument that abortion harms women.[103] Describing the harm as "abortion syndrome,"[104] antiabortion activists gathered stories and narratives of women who claimed that they were harmed by abortion, including "suicide attempts, sexual promiscuity, eating disorders, and drug and alcohol abuse."[105] Drawing upon "scientific" research and the testimonials of women who had undergone the procedure and later claimed to regret their abortions, abortion opponents

for pre-enforcement challenge and could not bring the lawsuit); Hope Clinic v. Ryan, 249 F.3d 603, 606 (7th Cir. 2001) (holding plaintiff medical clinic lacked standing in pre-enforcement challenge to the constitutionality of civil cause of action for abortion).

101. *See* Borgmann, *supra* note 16, at 756–57, 776 (arguing for suing public officials for declaratory judgment to satisfy standing in a pre-enforcement challenge to unconstitutional private cause of action tort remedy); Manian, *supra* note 16, at 132–33 (describing these tort remedies as strict liability in tort and "self-executing" because no one is willing to risk challenging them for fear of the severe damages that may be levied for infringement); Stephen N. Scaife, *The Imperfect but Necessary Lawsuit: Why Suing State Judges Is Necessary To Ensure That Statutes Creating a Private Cause of Action Are Constitutional*, 52 U. RICH. L. REV. 495, 495–96 (2018) (arguing for the importance of pre-enforcement challenges against state judges to challenge unconstitutional private rights of action).

102. *See* Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 749–50 (2018) [hereinafter Ziegler, *Some Form of Punishment*] (describing the unsuccessful attempts of pro-life groups to pass federal fetal personhood amendments defining an unborn child as a person from the moment of conception).

103. *See* KARISSA HAUGEBERG, WOMEN AGAINST ABORTION: INSIDE THE LARGEST MORAL REFORM MOVEMENT OF THE TWENTIETH CENTURY 40–45 (2017) (describing the "invention of postabortion syndrome"); ZIEGLER, ABORTION AND THE LAW, *supra* note 44, at 173–75 (describing the founding of Operation Outcry designed to substantiate the claim that abortion harms women); Ziegler, *Some Form of Punishment*, *supra* note 102, at 749–50 (describing the reasons and influences that caused mainstream pro-life organizations in the mid- to late-1980s, after unsuccessful attempts to introduce fetal personhood legislation in Congress, to change tactic to stress woman-protective arguments while continuing to stress fetal personhood with support of laws that criminalized drug use during pregnancy, for example).

104. HAUGEBERG, *supra* note 103, at 40.

105. *Id.* at 40, 41 (describing how antiabortion tracts detail that when a woman becomes pregnant, "the body machinery gears up to produce a child" and any thwarting of this natural process, such as an abortion, "upsets the body ecology and scars the psyche of the would-be mother" (citation omitted)).

sought to require onerous informed consent scripts that warned women of abortion's alleged harms.[106]

The woman-protective antiabortion narrative intertwines with the fetal personhood rationale by claiming that women who have abortions suffer psychological harm when they realize they have terminated a life of a human being.[107] This rationale is prevalent in South Dakota's legislative efforts. For example, in 2011, a South Dakota woman-protective antiabortion bill referred to abortion as "the decision of a pregnant mother considering termination of her relationship with her child by an abortion."[108] Similarly, a 2005 bill passed by the South Dakota legislature reasoned that because "by having an abortion, her existing relationship [with her child] and her existing constitutional rights with regards to that relationship will be terminated," a doctor must advise the pregnant woman of all associated medical risks, including "[d]epression and related psychological distress" and "[i]ncreased risk of suicide ideation and suicide."[109] A separate 2006 abortion bill stated that its purpose was "to fully protect the rights, interests, and health of the pregnant mother . . . and the mother's fundamental natural intrinsic right to a relationship with her child."[110]

106. *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closing: When "Protecting Health" Obstructs Choices*, 125 YALE L.J. 1428, 1444–50 (2019); Linda Greenhouse, *Why Courts Shouldn't Ignore the Facts About Abortion Rights*, N.Y. TIMES (Feb. 27, 2016), https://www.nytimes.com/2016/02/28/opinion/sunday/why-courts-shouldnt-ignore-the-facts-about-abortion-rights.html [https://perma.cc/R5RA-ERB9 (staff-uploaded, dark archive)].

107. *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1011–12 [hereinafter Siegel, *Politics of Abortion*] (describing the woman-protective rationale that undergirds South Dakota restrictive abortion legislation).

108. Act of March 22, 2011, ch. 161, 2011 S.D. Sess. Laws 299, 299 (codified at S.D. CODIFIED LAWS §§ 34-23A-54 to -61 (2011)). On June 30, 2011 a federal district court issued an injunction against enforcement of the Act. Planned Parenthood v. Daugaard, 799 F. Supp. 2d 1048, 1077 (D.S.D. 2011); *see* Reva B. Siegel, *The Rights Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Arguments*, 57 DUKE L.J. 1641, 1648–49 (2008) (discussing the woman-protective rationale that animated South Dakota's bill and reflected in the bill's legislative history); Siegel, *Politics of Abortion*, *supra* note 107, at 1029 (describing the South Dakota bill and how the woman-protective rationale was developed when fetal protective arguments for restricting abortion failed to persuade voters and legislators).

109. Act of Mar. 16, 2005, ch. 186, §§ 7(1)(d), (7)(1)(e)(i)–(ii), 2005 S.D. Sess. Laws 356, 358–59 (codified as amended at S.D. CODIFIED LAWS § 34-23A-10.1 (2021)) (providing that abortion "will terminate the life of a whole, separate, unique, living human being" and that the mental and physical health risks of abortion include depression and suicide ideation). Although the bill was temporarily halted by a preliminary injunction, the preliminary injunction was later vacated. *See* Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 738 (8th Cir. 2008) (en banc) (granting preliminary injunction of House Bill 1166); Planned Parenthood Minn. v. Rounds, 686 F.3d 889, 906 (8th Cir. 2012) (vacating preliminary injunction because "[o]n its face, the suicide advisory present[ed] neither an undue burden on abortion rights nor a violation of physicians' free speech rights").

110. Women's Health and Human Life Protection Act, ch. 119 §§ 1, 4, 2006 S.D. Sess. Laws 171, 171–72 (repealed) (banning abortion except to save the life of the pregnant woman). The Act was repealed by a state-wide referendum on November 7, 2006. Veronica English, Danielle Hamm,

In *Gonzales v. Carhart*,[111] the Supreme Court adopted the woman-protective rationale when it upheld a ban on intact dilation and evacuation ("D & E") abortion procedures.[112] The Court's opinion reflected the description of "post-abortion syndrome" presented by affidavits of Sandra Cano and 180 women in an amicus brief submitted by an antiabortion organization, the Justice Foundation.[113] Drawing from the amicus brief, the Court echoed the claim that abortion harms women by breaking the bond between mother and child:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[114]

While acknowledging that it lacks scientific "data" upon which to base its decision, the Court's opinion nevertheless sets forth the narrative that abortion harms women based on a description that calls upon fetal personhood.[115] The Court described that a mother would come to regret her choice to terminate her

Caroline Harrison, Julian Sheather & Ann Sommerville, *South Dakota Vote Against Abortion Ban*, 33 J. MED. ETHICS 123, 123 (2007); *see also* Siegel, *Politics of Abortion*, *supra* note 107, at 992–93 (analyzing how "the state's claimed interest in protecting women from abortion . . . rest[s] on gender stereotypes about women's capacity and women's roles").

111. 550 U.S. 124 (2007).

112. *Id.* at 159–60.

113. *See id.*; Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, & 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 19–20, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380). An attorney and president of the Justice Foundation, an antiabortion organization, described that the Supreme Court "appeared to listen to real women, instead of being captured by the abortion industry." Allan E. Parker, Jr., *From the Wake of* Gonzales v. Carhart, 32 VT. L. REV. 657, 657 (2008).

114. *Carhart*, 550 U.S at 159 (citation omitted). It is important to note that the Court's reliance on the psychological harm of abortion and regret arise not specifically from the intact D & E procedure, the most common procedure for a second-trimester abortion, but from the abortion itself, and therefore has wider implications extending beyond the intact D & E context to abortion more generally. *See* Chris Guthrie, Carhart*, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 879–81 (2008) (arguing that states will use the psychology of regret from the *Carhart* decision to justify wide-ranging constraints on abortion rights generally).

115. Abortion regret that forms the basis of the woman-protective antiabortion ideology has not been backed by mainstream scientific findings. *See, e.g.*, M. Antonia Biggs, Ushma D. Upadhyay, Charles E. McCulloch & Diana G. Foster, *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 JAMA PSYCHIATRY 169, 170, 177 (2017); MARK APPELBAUM, LINDA BECKMAN, MANY ANN DUTTON, BRENDA MAJOR, NANCY FELIPE RUSSO & CAROLYN WEST, APA, ABORTION AND MENTAL HEALTH 885 (2009), https://www.apa.org/pubs/journals/features/amp-64-9-863.pdf [https://perma.cc/P7KN-UGL5] (finding no evidence sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion); Vignetta E. Charles, Chelsea B. Polis, Srinivas K. Sridhara & Robert W. Blum, *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 CONTRACEPTION 436, 436 (2008) (finding that studies suggest "few, if any, differences between women who had abortions and their respective comparison groups," while "studies with the most flawed methodology" found negative effects).

pregnancy "with grief more anguished and sorrow more profound."[116] The Court's description of the woman-protective rationale is steeped in language that reflects fetal personhood, and indeed the harm to the patient flows from the regret of terminating the life of "a child assuming the human form."[117]

II. PATRIARCHAL FATHERHOOD AND THE NEW ANTIABORTION STRATEGY

While early antiabortion wrongful death cases and statutes sought to compensate women, in the 1990s, antiabortion organizations began to shift focus to the harm that abortion causes men. This part situates the civil remedy antiabortion laws within the larger historical context of the fathers' rights movement to reveal the ways that current civil remedy laws are tied to a movement to reestablish the power of men over the reproductive lives of women through the vehicle of patriarchal fatherhood. At the same time, antiabortion researchers began collecting testimonials from men to argue that men suffer emotional harm from abortion. Together these two narratives forged the fathers' rights antiabortion strategy that has dominated opposition to abortion for decades and is reflected in the civil remedy statutes.

A. *The Fathers' Rights Movement and the Return to the Rule of Fathers*

Two movements were influential in shaping the conservative policy agenda to advance fathers' rights during the 1980s and 1990s. In response to rising divorce rates in the 1970s and 1980s, a conservative marriage promotion movement sought to reestablish the primacy of marriage, developing policies to reward and incentivize marital reproduction while regulating and pathologizing nonmarital procreation.[118] At the same time, rising divorce rates galvanized the fathers' rights movement that sought to reform child custody laws to secure

116. *Carhart*, 550 U.S. at 159–63 (concluding that because women may not understand the full extent of their choice until later and would come to regret their decision, the answer was to ban the procedure outright rather than to require informed consent to the procedure).

117. *Id.* at 160; *see* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. 277, 280 (discussing the ways that the woman-protective rationale continues to influence the Supreme Court's recent abortion jurisprudence in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020)).

118. Marriage-promotion and "responsible fatherhood" policies rewarding marital fatherhood negatively impacted communities of color and communities living in poverty that generally have lower rates of marriage and higher rates of reproduction outside of marriage. *See, e.g.*, Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 380–84 (2011) (discussing how marriage promotion policies disadvantage and pathologized unmarried parenting in poor communities that are disproportionately of color). For more on the "gap" in marriage between middle-class and poor communities, see JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2016), for a discussion of the causes of the marriage gap between income and education levels.

legal recognition of the father-child relationship.[119] Fathers' rights advocates also seized on emerging feminist constitutional equality arguments that challenged sex-based stereotypes of the natural superiority of mothers as caregivers at a time when women sought to enter the workforce and higher education in record numbers.[120] Both the fathers' rights and the marriage promotion movements advanced arguments that revived historic constructions of fatherhood in an effort to reestablish the authority of men during a time when the formal structure of marriage was declining.[121]

The 1970s and 1980s saw a significant increase in divorce rates.[122] Historically, the institution of coverture, in which married women's legal identity was assumed by her husband, meant that men exercised complete authority within marriage.[123] The rising divorce rates eroded men's authority in the home and patriarchal legal doctrines that had supported men's authority in marriage.[124] As Professor Deborah Dinner describes in her history of the fathers' rights movement, in the 1970s and early 1980s men's rights groups began to challenge laws such as no-fault divorce and alimony that they believed served as substitutes for the male breadwinner role and undermined marriage.[125] The

119. *See* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 86–87 (2016) (describing the goal of the fathers' rights movement in reforming child custody laws favoring maternal caregivers and arguing instead for laws that support the father-child relationship).

120. *See id.*; Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2307–09 (2016) (describing that in the early 1970s fathers seized upon the emerging constitutional equality principles to challenge the legal inferiority of unmarried fathers).

121. Dinner, *supra* note 119, at 87 ("The history of the fathers' rights movement is at once a liberation narrative and a story about the preservation of patriarchy within the family . . . ."); Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 2 STAN. J. C.R. & C.L. 269, 282–83 (2009) (describing that marriage promotion efforts of the religious Right "advocate patriarchal family structures . . . where men serve as authority figures in the [marital] family").

122. *See* Dinner, *supra* note 119, at 90 (describing that the divorce rate climbed precipitously, from 1960, which saw just over two divorces per 1,000 marriages, to 1970 with 3.5 divorces per 1,000 marriages).

123. Coverture was adopted from English common law and provided that "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage" and "is incorporated and consolidated into that of the husband." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *430 (n.d.).

124. *See* Dinner, *supra* note 119, at 88; GERDA LERNER, THE CREATION OF PATRIARCHY 239 (1986) (defining "patriarchy" as the "manifestation and institutionalization of male dominance over women and children"); MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 3-4 (2015) [hereinafter MURRAY & LUKER, REPRODUCTIVE RIGHTS] (describing that "patriarchy" literally means the rule of the father over his wife and children); ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 40 (1977) (describing that "[p]atriarchy is the power of the fathers . . . in which the female is everywhere subsumed under the male").

125. *See* Dinner, *supra* note 119, at 90–91; *see also* Mary Ziegler, *Men's Reproductive Rights: A Legal History*, 47 PEPP. L. REV. 665, 678 (2020) [hereinafter Ziegler, *Men's Reproductive Rights*] (describing

movement sought to reestablish men's rights as fathers within the traditional marital family.[126] The men's rights movement to reestablish the traditional family relied on a patriarchal view of marriage based on differentiated gender roles and a gender hierarchy.[127] The movement also argued that policies that enabled divorce "unjustly benefit[ed] women and depriv[ed] men of their natural entitlements."[128] As one leader of the movement described, "[t]he father who is the head of a household is . . . the chief provider and defender of homes . . . [and] is rightly the symbol of authority."[129] The movement, which viewed fatherless families as the source of social ills, argued that paternal authority in the home was essential for child rearing.[130] Advocates for the men's rights movement, which later formed the foundation of the fathers' rights movement, argued for custody rights for fathers based on arguments about the social importance of fathers' patriarchal authority.[131]

If the men's rights movement sought policies to stem the rise of divorce rates, the fathers' rights movement sought to preserve the rights of fathers in the event of divorce.[132] One of the main goals of the fathers' rights movement was to challenge custody rules that favored mothers, arguing that such presumptions rested on gendered stereotypes.[133] To counter gendered assumptions about childrearing, advocates argued that fathers had a profound emotional connection to their children. As one group described, "The right to be a father to our children is very precious to us and we suffer terribly from the loss of the most intimate creation we may ever experience."[134] In urging legislators to adopt joint custody statutes to replace older laws with maternal preference, advocates described the pain fathers experienced from losing their children to divorce, calling for legal reform to ensure fathers' rights to an

that abortion opponents argued that abortion rights threatened men's procreative rights and threatened the traditional family).

126. *See* Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 679–80 (describing that abortion opponents argued that abortion undermined men's traditional masculine role, their right to father children, protect and provide for children, and to assume their traditional role in marriage).

127. *See* Dinner, *supra* note 119, at 88–89.

128. *Id.* at 88.

129. CHARLES V. METZ, DIVORCE AND CUSTODY FOR MEN: A GUIDE AND PRIMER DESIGNED EXCLUSIVELY TO HELP MEN WIN JUST SETTLEMENTS 103–04 (1968).

130. Dinner, *supra* note 119, at 93 (describing that fathers' rights theorists argued that the importance of paternal authority to child development justified extending custody rights to fathers at divorce); *see, e.g.*, STANLEY ROSENBLATT, THE DIVORCE RACKET 53 (1969) ("[T]he incidence of homosexuality in boys brought up in a household devoid of a man is appallingly high and it is extremely important for a boy to be able to identify with a father figure.").

131. Dinner, *supra* note 119, at 94.

132. *Id.* at 105 (noting that the fathers' rights movement evolved from the men's rights movement, but "in lieu of saving traditional marriage, it endeavored to improve men's socioeconomic status after divorce").

133. *See id.* at 80–81.

134. *Id.* at 113 (quoting a press release by MEN International).

emotional relationship unique to parenting.[135] Advocates' efforts were successful, and by 1989, a majority of states had replaced maternal preference with some form of presumption for joint custody.[136]

B. *Marriage Promotion and the New Patriarchy*

Social conservatives outside of the fathers' rights movement also decried rising divorce rates and attributed the decline to the rise of the welfare state.[137] Many social ills were ascribed to divorce and unwed parenthood, and in the mid-1990s, conservatives on the right began a marriage promotion and responsible fatherhood campaign.[138] Conservatives called for a return to

135. *Id.* at 124–25.

136. *Id.* at 134–35 (noting that by 1989, thirty-three states had enacted statutes recognizing joint custody).

137. Conservatives argued that welfare served as a "father-substitute" and contributed to the decline of marriage and rise in unwed births because women no longer needed to rely on a husband for financial support when they could rely on the state. *See* Dinner, *supra* note 119, at 96–97 (describing the men's and fathers' rights activists' "backlash against maternalist welfare policies").

138. *See generally* CYNTHIA R. DANIELS, LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA (1998) (describing how "fatherlessness" emerged as a perceived threat to social and familial stability); DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY (1996) (arguing the decline of the "overall quality of life" is in part due to the "erosion of personal relationships" and that to "make progress toward a more just and humane society" the response should be the "reestablishment of fatherhood and marriages"); Charles Murray, *The Coming White Underclass*, AM. ENTER. INST. (Oct. 29, 1993), https://www.aei.org/articles/the-coming-white-underclass/ [https://perma.cc/5H3U-XH6S] (arguing "illegitimacy is the single most important social problem of our time" and stressing the need to stigmatize single parenthood through social policy); Israel Ortega, *The High Cost of Broken Families*, HERITAGE FOUND. (May 21, 2008), https://www.heritage.org/marriage-and-family/commentary/the-high-cost-broken-families [https://perma.cc/2ENG-CZAH] (describing the social ills that flow from single parent "broken families"); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATL., Apr. 1993, at 47, 77 https://www.theatlantic.com/magazine/archive/1993/04/dan-quayle-was-right/307015/ [https://perma.cc/BQ7M-5UJD] (arguing that the rising rate of divorce and out-of-wedlock birth are the "central cause of our most vexing social problems" including "poverty, crime, and declining school performance"); NAT'L RESPONSIBLE FATHERHOOD CLEARINGHOUSE, http://www.fatherhood.gov [https://perma.cc/K835-YD2W] (describing resources for fathers, including "an online platform for fatherhood practitioners to engage in dialogue around topics relevant to responsible fatherhood"). However, blaming divorce and unwed parenthood for society's problem has been widely criticized. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION AND THE MEANING OF LIBERTY 222–25 (1999) (addressing the myth perpetuated by conservative welfare reform that out-of-wedlock childbirth causes poverty and that marriage is the solution); MURRAY & LUKER, REPRODUCTIVE RIGHTS, *supra* note 124, at 107 (arguing that there has been "rhetorical slippage" whereby teen parenthood is being blamed for poverty instead of poverty being blamed for teen parenthood); JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 286 (2007) (arguing that a "family values" agenda reinforces "the racially motivated stereotypes of 'poor ghetto'" and that in fact, "poverty, unemployment, low wages, and lack of human and social capital are the major causes of single parenthood and marital instability, teen pregnancy, and stunted child development"); Martha Albertson Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531, 554 (2000) ("The problem with society is not that marriage is in trouble. The real crisis

marriage defined by traditional gendered roles of the breadwinner and homemaker ideal, harnessing law and policy to promote marriage and discourage and punish reproduction outside of marriage.[139] The call for marriage promotion and responsible fatherhood focused attention on Black nonmarital childbearing as the source of crime, poverty, unemployment, and social decline, becoming the argument for social policies that pathologized and regulated families living in poverty, which are disproportionately families of color.[140] The "gap" in marriage between middle-class and poor communities meant that the punitive legal reforms disproportionately impacted communities of color.[141] Thus, marriage promotion and "responsible fatherhood" policies that rewarded marital fatherhood also served to disadvantage and pathologize unmarried parenting in poor communities, particularly communities of color, that have lower rates of marriage and higher rates of reproduction outside of marriage.[142]

Marriage promotion and responsible fatherhood sought to tie declining marriage rates and nonmarital birth with social decline, crime, and

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is that we expect marriage to be able to compensate for the inequality created by our other institutions.").

139. *See generally* DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 54–55 (1995) (arguing for a bio-evolutionary model in which women were naturally designed to care for children); DANIELS, *supra* note 138 (describing how "fatherlessness" emerged as a perceived threat to social and familial stability); POPENOE, *supra* note 138, at 12 (noting that "most men and women are not predisposed" to even "temporarily" take on the "behavior and attitudes of the other sex," and so "fatherless children" are at a "distinct psychological disadvantage").

140. *See, e.g.*, WILLIAM J. BENNETT, THE BROKEN HEARTH: REVERSING THE MORAL COLLAPSE OF THE AMERICAN FAMILY 82 (2001) (describing the "staggering" nonmarital birthrate among Black teen mothers and describing marriage among the population of teen mothers as "virtually a forgotten institution"); DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29–30 (1965) (describing Black mother-headed households as the source of a "tangle of pathology"); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980, at 133 (1984) (arguing that the high poverty rate among Blacks in the 1970s could be explained by "the increasing prevalence of a certain type of family—a young mother with children and no husband present"). *But see* ROBERTS, *supra* note 138, at 217–25 (describing welfare reform as pathologizing and seeking to curtail and punish Black women's reproduction based on the myth that welfare induces nonmarital birth and welfare dependency).

141. *See* KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 148–50 (2007) (describing that low-income women report that while they value marriage, they frequently do not marry the fathers of their children because the men do not offer a minimum level of economic stability).

142. *See* MURRAY & LUKER, REPRODUCTIVE RIGHTS, *supra* note 124, at 107–108 (describing that "the rhetoric of welfare reform holds poor mothers responsible for two social problems: the proliferation of teen pregnancies and nonmarital births, and the escalation of crime in poor urban communities"); ROBERTS, *supra* note 138, at 217–25; Maldonado, *supra* note 118, at 368–69 (describing that conservative policymakers advanced an image of nonmarital births as being attributable to African American unwed mothers who are dependent on public assistance, lazy "welfare queens" who bore more children to increase public assistance payments).

intergenerational welfare dependency.[143] For example, the so-called welfare reform bill of 1996, the Personal Responsibility and Work Opportunity Act[144] ("PRWORA"), provided in part that "marriage is the foundation of a successful society" and out-of-wedlock birth is responsible for the rise in children receiving public assistance.[145] The welfare reform legislation included an "illegitimacy bonus" for states that showed the greatest decline in nonmarital births and rates of abortion.[146] Conservative critics argued that public assistance "incentivized" nonmarital procreation and led to intergenerational welfare dependence and families headed by single mothers.[147]

In 2002, President George W. Bush made the promotion of "healthy marriage" and "responsible fatherhood" a policy priority in his administration.[148] That year, funds were specifically earmarked for promotion of marriage and "responsible fatherhood" campaigns in the reauthorization of PRWORA.[149] Like the fathers' rights movement, the marriage promotion and responsible fatherhood agenda linked healthy child development with the presence of a father to raise and guide children to ensure social and family stability.[150] President Bush selected Wade Horn to head the marriage initiative for responsible fatherhood.[151] Horn had been a founding board member of

143. *See, e.g.*, JENNIFER A. MARSHALL, BARBARA WHITEHEAD, ROBERT LERMAN & WADE HORN, HERITAGE FOUND., THE COLLAPSE OF MARRIAGE AND THE RISE OF WELFARE DEPENDENCE (2006), https://www.heritage.org/poverty-and-inequality/report/the-collapse-marriage-and-the-rise-welfare-dependence [https://perma.cc/ZK5C-FGTU] (describing that "poverty is linked to lifestyle issues like fatherlessness, unwed childbearing, and the loss of a culture of work").

144. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 8, 21, 25, 34, and 42 U.S.C.).

145. *Id.* § 101(1), (5)(C), 110 Stat. at 2110 ("The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women.").

146. *See* Sanders Korenman, Ted Joyce, Robert Kaestner & Jennifer Walper, *What Did the "Illegitimacy Bonus" Reward?* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10699, 2006).

147. *See* MURRAY & LUKER, REPRODUCTIVE RIGHTS, *supra* note 124, at 107 (noting that welfare reform created "rhetorical slippage" by identifying unwed pregnancy as the root cause of poverty despite empirical evidence that it is poverty that causes out-of-wedlock births); Maldonado, *supra* note 118, at 368–69 (describing the Moynihan Report that argued that declining education and wages among the African-American community was the result of the "family structure of lower class African Americans" who experienced high rates of nonmarital births).

148. *See, e.g.*, Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2145 (2007).

149. *Id.* at 2145–46. In early 2006 Congress passed a bill that not only reauthorized the federal welfare reform legislation of 1996, but also appropriated an annual $150 million in federal money for five years to marriage promotion efforts by the states. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7103, 120 Stat. 4, 138 (2006) (codified as amended at 42 U.S.C. § 603(a)(2) (2006)).

150. Dinner, *supra* note 119, at 151; *see also* Maldonado, *supra* note 118, at 367–68, 372 (noting that African American men are often stereotyped as "absent fathers" and that fatherlessness has been linked to social ills based on the assumption that children who grow up without a father suffer emotional and behavioral problems and engage in delinquent behavior).

151. *See* McClain, *supra* note 148, at 2145.

Marriage Savers and president of the National Fatherhood Initiative.[152] In 2012, the Family Leader, a conservative Christian group, asked Republican candidates running for congressional office to sign a "Marriage Vow" that purported to reestablish America's greatness by recommitting to the marital family.[153] The Vow provided in part that marriage "protects innocent children, vulnerable women, the rights of fathers, the stability of families, and the liberties of all American citizens under our republican form of government."[154] The Republican candidates who sign the form attest to their commitment to uphold the institution of marriage and recognition that out-of-wedlock birth is the "prime sociological indicator for poverty, pathology, and prison."[155]

The fathers' rights movement and marriage promotion campaigns worked in tandem to drive a renaissance of fatherhood that sought to assert male authority in the family, what Professor Kaaryn Gustafson has termed the "new patriarchy." As she describes, during the 1980s and 1990s "patriarchy . . . made an ideological comeback."[156] Conservative scholars and religious leaders at the time warned that there was a "masculinity crisis" that was the result of the economic success of the women's movement and rising divorce rates.[157] In response, groups such as the Promise Keepers and the Million Man March of 1995 came to represent the Christian-centered marriage promotion and responsible fatherhood movements.[158] Conservative social scientists and

152. *See* Bill Berkowitz, *Wade Horn Cashes Out*, CRISIS FAM. CTS. (Apr. 25, 2007), https://abatteredmother.wordpress.com/2011/04/14/wade-horn-cashes-out/ [https://perma.cc/6ZN2-527N]; Robert Pear, *Human Services Nominee's Focus on Married Fatherhood Draws Both Praise and Fire*, N.Y. TIMES (June 7, 2001), https://www.nytimes.com/2001/06/07/us/human-services-nominee-s-focus-on-married-fatherhood-draws-both-praise-and-fire.html [https://perma.cc/QB3J-59XQ].

153. THE FAMILY LEADER, THE MARRIAGE VOW: A DECLARATION OF DEPENDENCE UPON MARRIAGE AND FAMILY, https://www.towleroad.com/wp-content/uploads/2011/07/the-family-leader-presidential-pledge.pdf [https://perma.cc/X5YV-HHG2].

154. *Id.*

155. *Id.*

156. Gustafson, *supra* note 121, at 281–83 (describing that the marriage promotion efforts of the religious right "advocate patriarchal family structures . . . where men serve as authority figures in the [marital] family").

157. *Id.* at 281; *see* ROBERT BLY, IRON JOHN: A BOOK ABOUT MEN 221 (1991) (arguing that single-mother families leave boys without the male mentorship and rituals of adulthood to develop into fulfilled men); Ronald F. Levant, *The Masculinity Crisis*, 5 J. MEN'S STUD. 221, 223 (1997).

158. JEAN HARDISTY, POL. RSCH. ASSOCS. & WOMEN OF COLOR RES. CTR., PUSHED TO THE ALTAR: THE RIGHT WING ROOTS OF MARRIAGE PROMOTION 1, 14–25 (2008) (detailing the influence of leaders of the religious Right in building the patriarchal marriage movement and in shaping government pro-marriage policies); Jonathan P. Hicks, *Answering the March's Call; More Community Involvement by Black Men*, N.Y. TIMES (Dec. 29, 1995), https://www.nytimes.com/1995/12/29/nyregion/answering-the-march-s-call-more-community-involvement-by-black-men.html [https://perma.cc/9RKM-XT3X (dark archive)] (describing the Million Man March in Washington, D.C.); Gustafson, *supra* note 121, at 291 (describing that the marriage promotion and responsible fatherhood movements were driven by religiously based organizations with the result that "the boundary between politics and religion is fuzzy when it comes

members of the Christian-right worked together to advance a traditional hierarchical view of the family, with fathers exercising ultimate authority and women and children in subordinate roles.[159] The religious-based marriage promotion movement advocated for traditional family structures with clear gendered division of labor where men serve as the authority figure in the family.[160]

C. *Fathers' Rights and the Antiabortion Strategy*

During the 1980s and 1990s, fathers' rights were also being advanced on another front: abortion. As this section will describe, abortion opponents began to advance a strategy drawn from the fathers' rights movement to restrict abortion.[161] Specifically, pro-life attorneys drafted legislation and launched a litigation strategy to assert fathers' rights to seek injunctive relief to prevent their partners from obtaining abortions and requiring spousal consent for abortion.[162] Although largely unsuccessful, the arguments underpinning the

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to the federal marriage promotion funding" and much of the "federal grant money from the Healthy Marriage and Fatherhood Initiative grants is flowing to faith-based organizations"). *See generally* Levant, *supra* note 157 (discussing the Promise Keepers rallies and movements).

159. Gustafson, *supra* note 121, at 282 (describing conservative social scientists and members of the political right working together to valorize gendered hierarchy in the home and reinforce traditional roles of fathers and husbands); *see* Steven L. Nock, *The Family and Hierarchy*, 50 J. MARRIAGE & FAM. 957, 958–63 (1988) (arguing that "the children of one-parent families are likely to achieve less as adults to the extent that they lack sufficient exposure to hierarchical models of authority relations in their families" and therefore have difficulty submitting to authority in school settings).

160. Gustafson, *supra* note 121, at 283; *see* W. BRADFORD WILCOX, SOFT PATRIARCHS, NEW MEN: HOW CHRISTIANITY SHAPES FATHERS AND HUSBANDS 1, 57 (2004) (describing the Promise Keepers as a call for men to reclaim their roles as leaders within their families, and stating that "[t]he divinely sanctioned gender order in the family has two central components: patriarchal authority and a division of family labor based on the separate spheres ideology").

161. Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 688–89 (describing that in the early 1980s men's rights activists who had primarily focused on reforming divorce laws began speaking out in support of men seeking to block abortion); *see* Dinner, *supra* note 119, at 87–121 (describing the transformation of the men's rights activism from opposing child support obligations and embracing traditional marriage to demanding sex-neutral application of laws related to child custody and men's reproductive rights).

162. *See* Glen Elsasser, *Court Won't Hear Father's Abortion Appeal*, CHI. TRIB. (Nov. 15, 1988, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1988-11-15-8802160348-story.html [https://perma.cc/D82M-TBDG (dark archive)] (noting that in 1988, Jim Bopp brought sixteen fathers' rights cases to enjoin abortion and handed out at least fifty handbooks to other attorneys); Martha Brannigan, *Suits Argue Fathers' Rights in Abortion: One Plaintiff Has Petitioned Supreme Court*, WALL ST. J., Aug. 23, 1988, at 29; Ziegler, *Some Form of Punishment*, *supra* note 102, at 765 (discussing the spousal notification campaign); *see, e.g.*, Coe v. Gerstein, 376 F. Supp. 695, 695 (S.D. Fla. 1973) (involving a successful challenge to a Florida law that required *inter alia* written spousal consent before an abortion); Jones v. Smith, 278 So. 2d 339, 339 (Fla. Dist. Ct. App. 1973) (involving an unmarried father suing to enjoin his former girlfriend from obtaining an abortion); Doe v. Doe, 314 N.E.2d 128, 128 (Mass. 1974) (involving the right of an unwed father to enjoin his former girlfriend from terminating her pregnancy). For a discussion of the legislative and litigation strategies to assert men's reproductive rights, see

fathers' rights antiabortion strategy continue to influence thinking about abortion today, especially with respect to "reasons-based" antiabortion arguments.

With respect to spousal consent for abortion laws, courts have consistently held that because pregnancy requires women to engage in the labor of gestation and childbirth, the decision-making rights of gestational parents in the abortion decision must take precedence over the father's significant interest in the fetal life.[163] The Supreme Court addressed the role of fathers in the context of abortion in 1976 in *Planned Parenthood of Central Missouri v. Danforth*[164] when it examined whether a Missouri statute requiring doctors to seek a husband's consent for an abortion was constitutional.[165] An amicus brief filed by Americans United for Life ("AUL") argued that men should have the right to weigh in on the abortion decision because of their changing role in the family in which they have assumed increased caregiving and responsibility for childrearing and the emotional bonds they share with their unborn children.[166] AUL's brief addressed men's rights in spousal consent laws based on men's roles as parents, arguing that formal equality and men's equal roles in childrearing mean that fathers suffer psychological and social harm as the result of abortion and their reproductive rights should be recognized.[167] The Court rejected the argument, noting instead that "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[168] As summarized by the court in *Poe v. Gerstien*[169] when it affirmed the unconstitutionality of Florida's spousal consent requirement, "The common law recognized no rights of the father in the fetus, and neither the criminal law nor

Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 680–83, 686, describing the efforts of Americans United for Life to draft laws designed to protect men's procreative rights, such as spousal consent laws and litigation brought by unmarried putative fathers to block their partners' abortions.

163. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 19–20, 48–49 (2004) (arguing that pregnancy places women in a unique position that should be recognized with unique legal status at birth); Jessica Feinberg, *Parent Zero*, 55 U.C. DAVIS L. REV. 2271, 2297 (2022) (calling for individuals who give birth, described as the initial legal parent or "parent zero," to have a significant degree of choice to determine a child's second legal parent).

164. 428 U.S. 52 (1976).

165. *Id.* at 58. The statute in question required spousal consent unless the pregnant woman's life was at risk. *Id.*

166. Brief for Dr. Eugene Diamond and Americans United for Life, Inc. as Amici Curiae Supporting Appellees in 74-1151 and Appellants in 74-1419, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419).

167. *Id.*

168. *Danforth*, 428 U.S. at 71.

169. 517 F.2d 787 (5th Cir. 1975).

tort law has been particularly concerned with protecting the father's interest in the fetus."[170]

In the years after *Roe*, in addition to legislative efforts to enforce spousal consent laws, both married and unmarried men brought lawsuits seeking to enjoin their partners from obtaining abortions.[171] This litigation strategy asserts fathers' rights, regardless of marital status, to veto abortion by casting the abortion right as one related to parental decision-making rather than bodily autonomy.[172] Through this litigation strategy, antiabortion activists sought to reframe abortion as an issue of parentage rather than as an individual right of privacy and bodily autonomy.[173] Proponents of the strategy argued that men's reproductive right to veto abortion flowed from their role as fathers in traditional families to protect and provide for their children.[174] Consistent with the judicial response to spousal consent laws, courts repeatedly rejected these arguments asserting that fathers have a right to make decisions for a previable fetus against the right of bodily autonomy of the gestational parent. As one court summarized, in addition to constituting an "unauthorized and

170. *Id.* at 795; *see also* Coe v. Gerstein, 376 F. Supp. 695, 695 (S.D. Fla. 1974); *see, e.g.*, Matthew R. Pahl, *It Takes Two, Baby: Fathers, the Tort of Conversion, and Its Application to the Abortion of Pre-Viability Fetuses*, 24 WHITTIER L. REV. 221, 222 (2002) (likening a fetus to property and calling for recognizing a cause of action for lost fatherhood under the tort of conversion); Purvis, *Expectant Fathers*, *supra* note 7, at 333 (explaining that advocates of the "male abortion" perceive it as a "mirroring option" to abortion that allows men to terminate their parental rights after paying "appropriate fees" for a male abortion); Mary A. Totz, *What's Good for the Goose Is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. L. REV. 141, 177 (1994) (arguing that a man should be relieved of child support obligations if after notification of the pregnancy he pays the pregnant woman appropriate fees equal to the cost of an abortion).

171. *See* Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 680–83 (describing cases brought by unmarried putative fathers to block their partners' abortions); Jones v. Smith, 278 So. 2d 339, 339 (Fla. Dist. Ct. App. 1973) (involving an unmarried father suing to enjoin his former girlfriend from obtaining an abortion); Doe v. Doe, 314 N.E.2d 128, 128 (Mass. 1974) (involving the right of an estranged husband to enjoin his wife from terminating her pregnancy).

172. In *Danforth*, the Supreme Court struck down spousal consent laws, holding that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." 428 U.S. 52, 68–69 (1976). The Court reasoned that when men and women disagree on the abortion decision, the decision ultimately rests with the woman because, "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Id.* at 71. In an effort to distinguish their cases from *Danforth*, primarily unmarried male plaintiffs argued that *Danforth*, which involved suits by the state, did not address suits between private parties. Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 686, 690 (describing that the men were primarily white, low-income, and unmarried and sought to distinguish their cases from the *Danforth* case, along with seeking to distinguish *Danforth* as related to cases brought by the state that did not address suits between private parties).

173. Antiabortion advocate John Noonan decried that "the person seeking an abortion has become by federal fiat an anonymous, rootless individual without spouse, parents, or family." Mary Ziegler, *Abortion and the Constitutional Right (Not) To Procreate*, 48 U. RICH. L. REV. 1263, 1274 (citing *Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rts. of the H. Judiciary Comm.*, 94th Cong. 70 (1976) (statement of John Noonan)).

174. Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 679.

unconstitutional state interference," granting an injunction preventing a pregnant woman from having an abortion raises serious issues of enforcement if the injunction was granted because "the only possible way that the court could enforce such an injunction would be to confine."[175]

One strategy used by putative fathers suing to block abortion via injunction has been to cast pregnant women seeking abortion as bad mothers and cast men in the role of parents in a child custody dispute.[176] For example, in a 1973 case, *Jones v. Smith*,[177] the court denied injunctive relief for an unwed father who sought to enjoin his partner from obtaining an abortion.[178] The putative father relied on a series of arguments including parental unfitness and abandonment, which would grant the putative father the right to take custody of the fetus and exercise custodial rights of decision-making.[179] The court rejected the father's claim, concluding that any interest of the natural father is "subservient to the health of the pregnant woman and the potentiality of human life."[180] In a 1984 case, *Coleman v. Coleman*,[181] the father argued, unsuccessfully, that as a father he had an obligation to defend his child, quoting William Blackstone that "'[t]he duty of parents to provide for the *maintenance* of their children is a principle of natural law. . . . By begetting . . . [the children, the parents] have entered into a voluntary obligation . . . [to preserve the life] they have bestowed, . . . [a]nd thus the children will have the perfect *right* of receiving maintenance from their parents.'"[182]

In other cases, the putative fathers presented evidence and arguments that framed the contest as one of parentage by positioning the father's claim "that he would be a responsible father who is capable and would adequately support the child"[183] against the woman's claim of bodily autonomy and decisional privacy. In *Doe v. Doe*,[184] the court rejected the father's claims of common law and statutory rights to block the abortion.[185] Justice Reardon's dissent in *Doe*, however, described the mother's interest as temporary and argued that it ended

175. Rothenberger v. Doe, 374 A.2d 57, 59 (N.J. Super. Ct. Ch. Div. 1977).

176. *See* Ziegler, *Some Form of Punishment*, *supra* note 102, at 765 (discussing how the NRLC wanted to portray women who sought abortion as selfish and shallow and reinvigorated the campaign for spousal notification by portraying men as victims of women who failed to consult them).

177. 278 So. 2d 339 (Fla. Dist. Ct. App. 1973).

178. *Id.* at 339.

179. *Id.* at 343.

180. *Id.* at 341.

181. 471 A.2d 1115 (1984) (citation omitted).

182. *Id.* at 1118.

183. Conn v. Conn, 525 N.E.2d 612, 615 (Ind. Ct. App. 1988); *see also* Steinhoff v. Steinhoff, 531 N.Y.S.2d 78, 79 (Sup. Ct. 1988) (denying husband's application for an order restraining any hospital from performing an abortion on wife based on his argument that he is "ready, willing and able to care for the child in the event of a live birth").

184. 314 N.E.2d 128 (Mass. 1974).

185. *Id.* at 128.

at birth because "[t]he husband stood ready to assume at birth the responsibility for the care and raising of his child" and to defray all medical costs of the birth.[186] The dissent acknowledged the discomfort of pregnancy but argued that on the other side of the scale weighed "the universal bond of affection and devotion between father and child" and drew a parallel between the mother's experience of gestation and the father's, noting that "[a]s in the case of the mother, the period of gestation is for the father one of anxiety, anticipation, and growth in feeling for the unborn child."[187] The dissenting justices in *Doe* reflected the fathers' rights arguments that framed the abortion right as one that involved competing claims of parentage rather than of bodily autonomy.

In the late 1980s and early 1990s, pro-life lawyers across the country sought to bring fathers' rights cases to establish putative fathers' rights to enjoin abortion based on a new argument that courts should balance the father's interest with the woman's *reason* for seeking abortion. In 1988, attorney James Bopp, who served as general counsel of the NRLC, drafted and circulated a handbook called the "Fathers' Rights Litigation Kit," designed for fathers and attorneys who wanted to bring their own fathers' rights cases seeking injunctive relief to block abortions.[188] In that year alone, Bopp filed sixteen fathers' rights cases challenging abortion.[189] Bopp's litigation strategy suffered numerous setbacks, including the Supreme Court declining to review one of Bopp's fathers' rights cases on appeal, *Conn v. Conn*,[190] in which a husband sought to block his wife's abortion.[191] Then, over time, Bopp and his partner, Coleson, shifted their fathers' rights argument from focusing on preserving traditional families to weighing the competing reasons for seeking parentage versus seeking to avoid parentage through abortion.[192] As Bopp described, he and his partner were "asking the court to find that there should be a balancing of the interests of the father against those of the mother on a case-by-case basis."[193] Thus, arguments in their cases pivoted to examine whether the woman had a legitimate reason to avoid parenthood, such as seeking education or health

186. *Id.* at 135–39 (Reardon, J., dissenting). Justice Hennessey's partial dissent argued that the father's rights were dominant because the woman's health was not a factor, and the woman simply did not want the child because she doubted her ability to raise care for two children as a single parent. By contrast, the husband was "willing to assume custody, and care for the child" and his willingness to do so "required forbearance by the wife." *Id.* at 133–35 (Hennessey, J., dissenting in part).

187. *Id.* at 137 (Reardon, J., dissenting) (citing DR. SPOCK, BABY AND CHILD CARE 28–31 (1968)).

188. Brannigan, *supra* note 162, at 29; *see* Elsasser, *supra* note 162 (noting that in 1988, Bopp brought sixteen fathers' rights cases to enjoin abortion and handed out at least fifty handbooks to other attorneys); Ziegler, *Some Form of Punishment*, *supra* note 102, at 765.

189. Elsasser, *supra* note 162.

190. 526 N.E.2d 958 (Ind.) (mem.), *cert denied*, 488 U.S. 955 (1988).

191. *Id.* at 958; *see* Elsasser, *supra* note 162.

192. Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 694–96.

193. *Id.* at 696 (quoting Brannigan, *supra* note 162, at 1).

concerns, and argued that those reasons were neutralized by a father willing to step forward and relieve the woman of her parenting burden. In the reason-based abortion analysis of one of their briefs, Bopp and Coleson used language that has become salient in reason-based abortion bans,[194] describing that mothers may seek abortion for any reason at all, from gender selection to revenge or blackmail, or some other "frivolous" reason, without any consideration of the father's interests.[195]

The majority in *Dobbs* embraced the reason-based rationale for banning abortion, describing that states may ban or restrict abortion based on legitimate interests, including "the prevention of discrimination on the basis of race, sex, or disability."[196] Professor Melissa Murray has argued that reason-based abortion bans like these, and their concomitant eugenics arguments, were developed to provide constitutionally-permissible grounds upon which *Roe v. Wade* could be overturned based on equal protection.[197] Both Justices Amy Coney Barrett and Clarence Thomas have espoused the view that reason-based abortion bans prevent eugenics.[198] In his concurring opinion denying certiorari

194. *See infra* notes 197–204 and accompanying text.

195. Ziegler, *Men's Reproductive Rights*, *supra* note 125, at 698. Restricting the abortion right based on arguments that women seeking abortion are selfish or frivolous is not new to the twentieth century. *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 1800-1900, at 108 (1978) (describing how antiabortion campaigns of the late nineteenth century decried the rising incidence of abortion attributable to the "growing self-indulgence among American women").

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

197. *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2029–30 (2021) (describing that eugenics and equal protection arguments are designed to provide constitutionally permissible grounds for overturning *Roe*); *see also* Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 273, 276 (2020) (arguing that Justice Thomas's *Box* concurrence distorts history and tries to "weaponize" disability rights against abortion); Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATL. (May 20, 2019), https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-againstabortion/590455/ [https://perma.cc/TUY9-E48W (dark archive)]. For further critiques of Justice Thomas's concurring opinion equating abortion with eugenics, see Mary Ziegler, *Bad Effects: The Misuses of History in* Box v. Planned Parenthood, 105 CORNELL L. REV. 165, 196–202 (2020), and Joanna L. Grossman & Lawrence M. Friedman, *Junk Science, Junk Law: Eugenics and the Struggle over Abortion Rights*, VERDICT (June 25, 2019), https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenics-and-the-struggle-over-abortion-rights [https://perma.cc/QY6E-DYNG].

198. *See* Box v. Planned Parenthood of Ind. & Ky. Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring) (per curiam) (stating that when a woman aborts based on a fetus's gender, disability, or race, she is engaging in eugenics); Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Barrett, J., dissenting) (dissenting from the denial of en banc review arguing that the law allows people to "[use] abortion to promote eugenic goals"); *see also* Little Rock Family Plan. Servs. v. Rutledge, 984 F.3d 682, 694 (8th Cir. 2021) (Shepherd, J., concurring) (framing the reason-based bans as antieugenics statutes); Preterm-Cleveland v. McCloud, 994 F.3d 512, 536, 547, 549–50 (6th Cir. 2021) (en banc) (Sutton, J., concurring) (Griffin, J., concurring) (Bush, J., concurring) (arguing the prohibition on termination of pregnancies on the basis of Down syndrome is an antieugenics statute and further a compelling state interest).

in *Box v. Planned Parenthood of Indiana and Kentucky*,[199] Justice Thomas argued that reason-based bans "promote a State's compelling interest in preventing an abortion from becoming a tool of modern-day eugenics."[200] Justice Thomas concluded that the abortion right did not require the state to permit "eugenic abortions."[201] Currently, eleven states ban abortion when the abortion is sought for reasons such as sex-selection,[202] race,[203] or genetic anomaly of the fetus.[204] Reason-based bans and the Court's embrace of the reason-based rationale in *Dobbs* reflect the success of the the fathers' rights litigation strategy in legitimizing the argument that a pregnant woman's decision to terminate a pregnancy should be evaluated for legitimacy on a case-by-case basis.

D. *The New Patriarchy and Men's Post-Abortion Syndrome*

The latest iteration of the fathers' rights antiabortion strategy has been an effort to gain recognition of men's post-abortion syndrome. As described earlier, the woman-protective antiabortion rationale first advanced in the 1980s

199. 139 S. Ct. 1780 (2019).

200. *Id.* at 1783 (Thomas, J., concurring) (denying certiorari).

201. *Id.* at 1792–93.

202. Arizona, Arkansas, Kansas, Mississippi, Missouri, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Tennessee prohibit sex-selective abortion. ARIZ. REV. STAT. ANN. § 13-3603.02 (Westlaw through legislation effective Sept. 24, 2022 of the Second Reg. Sess. of the 55th Leg.); ARK. CODE ANN. § 20-16-1904 (LEXIS through all acts of the Third Extra. Sess. (2022)); KAN. STAT. ANN. § 65-6726 (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kansas Leg. effective on July 1, 2022); MISS. CODE ANN. § 41-41-407 (LEXIS through 2022 Reg. Sess. legislation signed by the Governor and effective upon passage through Apr. 26, 2022, not including changes and corrections made by the J. Legis. Comm. on Compilation, Revision and Publication of Legislation); MO. ANN. STAT. § 188.038 (Westlaw through WID 37 of the 2022 Second Reg. Sess. of the 101st Gen. Assemb.); N.C. GEN. STAT. § 90-21.121 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE § 14-02.1-04.1 (LEXIS through the end of the 67th Legis. Assemb. Spec. 2021 Sess.); OKLA. STAT. tit. 63, § 1-731.2 (Westlaw with legislation of the Second Reg. Sess. of the 58th Leg. (2022)); 18 PA. STAT. AND CONS. STAT. ANN. § 3204 (Westlaw through 2022 Reg. Sess. Act 96); S.D. CODIFIED LAWS § 34-23A-64 (Westlaw through laws of the 2022 Reg. Sess.); TENN. CODE ANN. § 39-15-217 (LEXIS through the 2022 Reg. Sess.).

203. ARIZ. REV. STAT. ANN. § 13-3603.02 (Westlaw); MISS. CODE ANN. § 41-41-407 (LEXIS); MO. REV. STAT. § 188.038 (Westlaw); TENN. CODE ANN. § 39-15-217 (LEXIS).

204. MISS. CODE ANN. § 41-41-407 (LEXIS); MO. REV. STAT. § 188.038 (Westlaw); N.D. CENT. CODE § 14-02.1-04.1 (LEXIS); TENN. CODE ANN. § 39-15-217 (LEXIS); *see Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Aug. 1, 2022), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [https://perma.cc/XF2X-PKXU]; Sital Kalantry, *Do Reason-Based Abortion Bans Prevent Eugenics?*, 107 CORNELL L. REV. 1, 1–2 (2022) (noting that the bans apply as soon as the sex or genetic anomaly can be detected, which is often well before the point of viability); Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J.L. & HEALTH 121, 134 (2015) (describing that the laws also have the potential to ban abortion even in cases when a fetus is unlikely to survive after birth); Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 MICH. J. GENDER & L. 291, 303 (2013).

argues that women come to regret abortion because it violates their inherent nature as mothers.[205] A similar narrative has been developing since 2000, claiming that abortion also harms *men's* emotional well-being.[206] Proponents of this narrative refer to these harms as men's post-abortion syndrome. In 2007, abortion opponents held the first conference to establish men's postabortion syndrome, "Men and Abortion: Reclaiming Fatherhood," in San Francisco.[207] Since that time, the narrative of men's post-abortion syndrome has gained traction.[208] However, there has been scant research on men's reactions after abortion, and the research that has been conducted reveals that men's response to abortion is similar to women's—the most commonly expressed emotion is relief.[209] Further, the only data collected about this syndrome comes from research on men participating in post-abortion support groups[210] and research conducted by Catherine T. Coyle, codirector of the Alliance for Post-Abortion Research and Training. Even though Coyle's research has been called into question by other researchers,[211] it continues to be widely cited by authors and websites addressing men's post-abortion syndrome and has spawned support groups and pro-life therapists focused on healing men's post-abortion trauma.[212]

205. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 355–56 (1992) [hereinafter Siegel, *Reasoning from the Body*] (describing state regulation premised on "empirical generalizations and normative assumptions about the 'roles of men and women,' especially the assumption that women are merely, primarily, or essentially mothers, persons 'destined solely for the home and the rearing of the family'" (citation omitted)); *see also* SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT 4–9 (2013) (describing that across Western political thought, women are always viewed as mothers or potential mothers).

206. *See* Vincent M. Rue, *"The Hollow Men": Male Grief and Trauma Following Abortion*, U.S. CONF. CATH. BISHOPS, https://www.usccb.org/committees/pro-life-activities/hollow-men-male-grief-trauma-following-abortion [https://perma.cc/F87R-6DDA].

207. Catherine Coyle, *Men and Abortion: Reclaiming Fatherhood*, MEN & ABORTION NETWORK (Dec. 1, 2007), https://www.menandabortion.net/index.php/2007/12/01/men-and-abortion-reclaiming-fatherhood/ [https://perma.cc/Y4Q5-DGDX].

208. *See* Rue, *supra* note 206 (describing media response to the impact of abortion on men); KEVIN BURKE, TEARS OF THE FISHERMAN: RECOVERY FOR MEN WOUNDED BY ABORTION 43–44 (2017).

209. *See* Malinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817, 840–41 (2017) (describing the research on men's post-abortion experiences, including a Swedish study that was the most comprehensive finding that most participants felt relief).

210. *The Men Who Feel Left Out of the US Abortion Debate*, BBC NEWS (Aug. 28, 2019), https://www.bbc.com/news/world-us-canada-49240582 [https://perma.cc/3QSK-WHEB] (describing that few studies have been done on men's reactions to abortion, and that existing data comes from post-abortive support groups which are self-selecting).

211. *See, e.g.*, Julia R. Steinberg & Lawrence B. Finer, *Coleman, Cole, Shuping, and Rue Make False Statements and Draw Erroneous Conclusions in Analyses of Abortion and Mental Health Using the National Comorbidity Survey*, 46 J. PSYCHIATRIC RSCH. 407, 407 (2012) (describing that the abortion syndrome research could not be replicated and noting that the authors of the study admitted that they had used incorrect weights in their analyses).

212. *See, e.g.*, *Kevin Burke, MSS, LSW*, RACHEL'S VINEYARD, https://www.rachelsvineyard.org/aboutus/kevin.aspx [https://perma.cc/E8VP-TXSK] (including

Men's post-abortion syndrome parallels the arguments advanced in the fathers' rights antiabortion strategy by shifting the focus of abortion from the pregnant person's right to bodily autonomy and focusing instead on the harms of a putative father's lost opportunity and "right" to parent. Post-abortion syndrome rests on the argument that abortion harms men because it necessarily disrupts their inherent nature to be fathers. As one antiabortion activist and member of a men's post-abortion support group described, "Men regret lost fatherhood, as men are inherently called to be fathers."[213] Post-abortion syndrome is described by antiabortion groups as causing depression, substance abuse, and suicidal ideation in men that can last a lifetime.[214] A pamphlet citing Coyle's research describes the adverse effects men experience after abortion, including "[a]dverse psychological and behavioral effects [that] may elevate the risk for withdrawn, antagonistic, or aggressive partner-directed behavior."[215] Similar to the woman-protective antiabortion groups, fathers' rights antiabortion groups call for robust pre-abortion counseling for men to protect their mental and emotional health.[216]

Like the narrative of women's post-abortion syndrome, men's abortion regret is closely tied to normative values about masculinity and men's traditional roles as providers and protectors. For example, in a pamphlet entitled *The Hollow Men: Male Grief and Trauma Following Abortion*, one section entitled "Risks to Masculinity and Relationships" describes one harm of abortion: a push further into "anxious masculinity," a term coined by antiabortion researchers to describe the emotional reaction of men in withdrawing and experiencing anger and isolation after an abortion because of their grief and shame.[217] Researchers have claimed that men's post-abortion syndrome may cause sexual dysfunction in men, including increased

testimonials of men and describing support groups and retreats for men offered in forty-nine states and seventy countries); BURKE, *supra* note 208, at 8–15.

213. *The Men Who Feel Left Out of the US Abortion Debate*, *supra* note 210.

214. *Id.* (quoting one man in a support group stating, "I didn't know how I was going to survive; I wasn't going to jump off a bridge, but I probably would have drank myself to death. I've thought about what happened every day for the last 32 years"); Catherine T. Coyle & Vincent M. Rue, *Men's Mental Health and Abortion: A Review of the Research*, LIFE & LEARNING XXVII 261, 267–70 (2017) (describing that men experience grief, guilt, depression, anxiety, feelings of repressed emotions, helplessness, voicelessness, powerlessness, post-traumatic stress, anger, and relationship problems after an abortion).

215. Rue, *supra* note 206.

216. Catherine T. Coyle, Priscilla K. Coleman & Vincent M. Rue, *Inadequate Preabortion Counseling and Decision Conflict As Predictors of Subsequent Relationship Difficulties and Psychological Stress in Men and Women*, 16 TRAUMATOLOGY 1, 8 (2010); Catherine T. Coyle & Robert D. Enright, *Forgiveness Intervention with Postabortion Men*, 65 J. CONSULTING & CLINICAL PSYCH. 1042, 1045 (1997); Robert A. Gordon, *Efficacy of a Group Crisis-Counseling Program for Men Who Accompany Women Seeking Abortions*, 6 AM. J. CMTY. PSYCH. 239, 246 (1978).

217. Rue, *supra* note 206 (describing the "considerable price" men pay for abortion as men being "pushed further into 'anxious masculinity'").

engagement in casual sex, impotence, and homosexuality after abortion.[218] Post-abortion syndrome proponents also draw parallels to masculine types of emotional trauma, with one man in a support group likening post-abortion syndrome to the mental and emotional anguish of "battlefield post-traumatic stress disorder (PTSD)."[219] The narrative of post-abortion syndrome argues that abortion harms men because it goes against their natural role as protector and provider. As the primary researcher supporting post-abortion syndrome, Coyle, states, "Men's guilt is related to a number of perceived failures, including failure to protect their partners, failure to protect children they have created, and failure to live up to one's moral code or to masculine expectations."[220] In the words of one testimonial, "Men are meant to be protectors, so there is a sense of failure—failing to protect the mother and the unborn child, failing to be responsible. There is incredible guilt and shame . . . ."[221] Another antiabortion activist suffering from post-abortion syndrome described his experience as "[t]he greatest injustice in this country today is that a man cannot protect his unborn child from abortion [because] men protecting our children is part of our responsibility."[222] These narratives reinforce the exact type of patriarchal fatherhood advanced by men's rights groups.

Men's post-abortion syndrome is another example of how antiabortion organizations in the 1990s began to forge a narrative that abortion harms men and disrupts the natural order of patriarchal fatherhood. This historical context reveals the ways that current antiabortion civil remedy laws are tied to a large movement to reestablish the power of men over the reproductive lives of women through the vehicle of patriarchal fatherhood. With this historical background, the next section argues that while the nominal purpose of civil remedy antiabortion laws is to compensate putative fathers in tort, the laws in fact represent a much broader threat to the abortion right: to expand fathers' rights by reframing abortion as an issue of parentage rather than an issue of bodily autonomy.[223] Laws granting parental rights to putative fathers override the "parental" decision-making of the pregnant person regardless of the putative father's relationship with her. In this way, antiabortion civil remedy laws have the potential to undermine the bodily autonomy of pregnant people. Moreover,

218. Coyle & Rue, *supra* note 214, at 272; Priscilla K. Coleman, Maria Spence & Catherine T. Coyle, *Abortion and the Sexual Lives of Men and Women: Is Casual Sexual Behavior More Appealing and More Common After Abortion?*, 8 INT'L J. CLINICAL & HEALTH PSYCH. 77, 87 (2008); Arden Rothstein, *Abortion: A Dyadic Perspective*, 47 AM. J. ORTHOPSYCHIATRY 111, 116 (1977); Joseph Berger, *The Psychotherapeutic Treatment of Male Homosexuality*, 48 AM. J. PSYCHOTHERAPY 251, 256 (1994).

219. *The Men Who Feel Left Out of the US Abortion Debate*, *supra* note 210; Coyle & Rue, *supra* note 214, at 268–69 (describing men's post-abortion syndrome as PTSD with flashbacks and intrusive images).

220. Coyle & Rue, *supra* note 214, at 272.

221. *The Men Who Feel Left Out of the US Abortion Debate*, *supra* note 210.

222. *Id.*

223. *See supra* note 92 and accompanying text.

the laws violate both family law and constitutional law norms by simultaneously restricting the constitutional abortion right and expanding the rights of fathers based on genetic essentialism that push the boundaries of family law.

III. THE FATHERS' VETO AND THE RETURN TO THE RULE OF FATHERS

There is a parallel between the rise of the fathers' rights movement in the 1970s and 1980s and the resurgence of the fathers' rights antiabortion strategy in today's civil remedy laws: as in the earlier period, marital fatherhood is experiencing a steep decline. Today four-in-ten births are to women who are single or living with a nonmarital partner,[224] and in 2019 marriage rates in the United States reached their lowest point since 1900.[225] This part considers the implications of granting parental rights to putative fathers in antiabortion civil remedy laws. First, it argues that these laws function as a veto that shifts control over reproductive rights from the state to fathers in the role of private civil claimants. Next, this part argues that providing a cause of action for denied fatherhood expands the recognition of unwed fathers in a way that is tied to genetics and separated from marital and functional parentage. It concludes that civil remedy laws grant fathers a property right over their genetic offspring by granting them the right to enforce their interests in fetal life through civil causes of action.

A. *The Abortion Right as a Unitary Right of Bodily Integrity, Not Parentage*

The *Dobbs* majority opinion argued that the abortion right was no longer necessary because adoption and safe haven laws,[226] that is, laws that allow people to leave newborns at safe locations like fire stations without fear of legal consequences, allow women who are forced to carry a pregnancy to term can be relieved of the burden of parenting and thus still be able to fully participate in

224. PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 21 (Dec. 17, 2015), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf [https://perma.cc/H7P3-65MK] (noting that in 1960, just five percent of all births occurred outside of marriage).

225. *See* SALLY C. CURTIN & PAUL D. SUTTON, NAT'L CTR. FOR HEALTH STATS., MARRIAGE RATES IN THE UNITED STATES, 1900–2018, at 1 (Apr. 2020), https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.pdf [https://perma.cc/39D6-3ZX9] (describing that while marriage rates steadily declined from 1982 to 2009, they stabilized between 2009 to 2017); NAT'L VITAL STATS. SYS., CTRS. FOR DISEASE CONTROL & PREVENTION, PROVISIONAL NUMBER OF MARRIAGES AND MARRIAGE RATE: UNITED STATES, 2000-2019 fig. 1, https://www.cdc.gov/nchs/data/dvs/national-marriage-divorce-rates-00-19.pdf [https://perma.cc/TPY3-HNGL] (demonstrating that marriage rates steadily declined from 1982 to 2009, stabilized between 2009 and 2017, and fell from 6.5 per 1,000 population in 2018 to 6.1 in 2019—the lowest marriage rate recorded since 1900).

226. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258–59 (2022).

work and public life.[227] In Justice Barrett's questioning during oral arguments she explained that the availability of safe haven laws means that an unwanted pregnancy no longer raises the specter of forcing a woman to give up her education and career in the wake of an unplanned pregnancy that she is forced to carry to term.[228] She asked,

> [B]oth *Roe* and *Casey* emphasize the burdens of parenting, and . . . the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy. Why don't the safe haven laws take care of that problem?[229]

Justice Barrett's questioning and the majority opinion in *Dobbs* shift the central concern of the abortion right from the right to bodily autonomy to the right to freedom from unwanted parentage. While nominally about adoption and safe haven laws, the argument reveals that the antiabortion movement's strategy to assert fathers' rights to veto abortion has gained purchase after decades of laying strategic groundwork. While safe haven laws involve state agencies and nameless adoptive parents taking the newborn to raise, Justice Barrett's questions parallel the antiabortion argument that *fathers* should have the right to relieve the pregnant woman of the burden of parenthood by stepping forward and agreeing to assume parental duties.

Recasting the abortion right as an issue of parentage, as reflected in the safe haven argument, posits that so long as there is a person willing to assume parental responsibility, women do not need access to abortion. Under this reasoning, it is not the indignity of being conscripted into an unwanted pregnancy and the risks of pregnancy and childbirth that are salient, but the unwanted responsibilities of day-to-day parentage. The dissent addressed this aspect of the majority's claim about availability of adoption and safe haven laws, describing that "[w]hether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose."[230] When abortion is recast as a concern over parentage instead of bodily autonomy, the rights of putative fathers can be advanced to restrict pregnant people's right to access abortion. Moreover, allowing putative fathers to step forward and assert parental rights, regardless of their relationship to the

227. *See* Dana Goldstein, *Drop Box for Babies: Conservatives Promote a Way To Give Up Newborns Anonymously*, N.Y. TIMES (Aug. 6, 2022), https://www.nytimes.com/2022/08/06/us/roe-safe-haven-laws-newborns.html [https://perma.cc/4ZJG-UR52 (dark archive)].

228. *See* Transcript of Oral Argument at 56, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

229. *Id.*

230. Dobbs, 142 S. Ct. at 2339 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

mother and with no exception for rape and incest, forces women to parent with men who may be a threat to their mental and physical health and safety.[231]

Feminist scholars have decried that the abortion right has been an incomplete right, one that straddles the pregnant person and their doctor, for example.[232] Civil remedy laws pose a similar threat: they shift decisional autonomy from the gestating parent to the putative father. The adoption and safe haven arguments in the *Dobbs* majority opinion fails to consider the pregnant person's right to bodily autonomy, but focuses instead on whether a means of terminating unwanted parental obligations was available. Indeed, the fetal personhood debate narrowly defines the abortion issue as a maternal-fetal conflict.[233] However, abortion is about the right to bodily autonomy *and* about

231. This issue lies at the center of advocacy efforts to strip fathers of their ability to assert parental rights over children conceived through rape. *See, e.g.*, Mary M. Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the Supreme Court and Thirty-Four States*, 24 MICH. J. GENDER & L. 53, 63 (2017) (describing that several states have adopted provisions that terminate the parental rights of the father, deny him custody or visitation rights, or eliminate the notice requirement); Melanie Dostis, *Mommy, Baby, and Rapist Makes Three? Amid Abortion Bans, the Pressing Need for a Nationwide Lower Standard To Strip Parental Rights, Regardless of a Rape Conviction*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 963, 971–72 (2021) (noting that forty-nine states now have some form of restrictions in place to terminate the parental rights when the child was conceived through rape, but that victim protection remains inadequate); Shepherd v. Clemens, 752 A.2d 533, 540 (Del. 2000) (describing Nevada, New Jersey, Oklahoma, and Wisconsin's provisions either terminating the parental rights of the father when the child was conceived through sexual assault, denying him custody or visitation, or eliminating his right to notice of the impending adoption of the child).

232. Professor Reva Siegel, for example, has argued that the decision in *Roe v. Wade* straddled the women's rights and the medical models of abortion rights, giving only "confused expression" to women as constitutional rights holders in the abortion decision and offering greater protection to doctors' rights to make medical decisions. *See* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims That Engendered* Roe, 90 B.U. L. REV. 1875, 1897 (2010); *see also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 45 (1992) (arguing that the medical model, which emphasized the role of doctors in the abortion decision, reinforced the traditional role of women as dependent and not in control of their destiny); Susan Frelich Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in "Private" Reproductive Decisions*, 63 WASH. U. L.Q. 183, 197–201 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1200 (1992) ("The idea of the woman in control of her destiny and her place in society was less prominent in the *Roe* decision itself, which coupled with the rights of the pregnant woman the free exercise of her physician's medical judgment. The *Roe* decision might have been less of a storm center had it . . . homed in more precisely on the women's equality dimension of the issue . . . ." (citations omitted)); Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 42 (2008); Siegel, *Reasoning from the Body*, *supra* note 205, at 273–79.

233. *See* Jamie R. Abrams, *The Polarization of Reproductive Rights and Parental Decision-Making*, 44 FLA. ST. U. L. REV. 1281, 1302–03 (2017) (arguing against the dichotomy between parental and abortion decision-making because women make abortion decisions after considering their own needs and the needs of their families and existing children); Donley, *Parental Autonomy*, *supra* note 92, at 246–47 (arguing that the abortion decision in the case of fetal anomaly is a parenting decision that should receive the same deference as the right of parents to make medical decisions for medically fragile newborns); Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 373 (1995) (arguing that abortion is a "mothering decision" because abortion and all procreative decision-making is about mothering in its broadest terms).

maternal decision-making.[234] Approximately sixty percent of people who have abortions are already parenting.[235] A major reason people seek abortion is because an additional child would strain the family's resources to care for existing children.[236] Research has revealed that existing children of women who are denied wanted abortions have lower child development scores and are more likely to live below the federal poverty line than children whose mothers received wanted abortions.[237] Further, allowing a putative father to restrict abortion access based on the parental rights narrative fails to acknowledge that restricting a woman's access to abortion forces her to bear children and become a biological mother.[238] Thus, the dichotomy between pregnant person's rights of bodily autonomy and fathers exercising rights related to parentage is a false one. On both sides of the balance, women are either making a decision to avoid biological parentage or being conscripted into biological parentage.[239]

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234. *Id.*

235. Diana Greene Foster, Sarah E. Raifman, Jessica D. Gipson, Corinne H. Rocca & M. Antonia Biggs, *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. PEDIATRICS 183, 183 (Feb. 1, 2019) (stating that approximately sixty percent of women in the United States who have abortions are already mothers).

236. *See* M. Antonia Biggs, Heather Gould & Diana Greene Foster, *Understanding Why Women Seek Abortions in the U.S.*, 13 BMC WOMEN'S HEALTH, July 2013, at 1, 6 (describing that twenty-nine percent of women seeking abortions cite the needs of existing children as the reason for seeking an abortion); Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions, Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL REPROD. HEALTH 110, 113 (2005) (describing that approximately one-third of women who seek abortion do so because of parenting responsibilities for existing children). The Turn Away study found that denying a wanted abortion has negative developmental and socioeconomic impacts on their existing children. Foster et al., *supra* note 235, at 183 ("Approximately one-third of women seeking an abortion say that their reason for wanting to terminate the pregnancy is to care for children they already have.").

237. *See* Foster et al., *supra* note 235, at 186 tbl.I.

238. *See* Hanigsberg, *supra* note 233, at 373 (noting that even when a woman has an abortion, she is making a mothering decision because she is deciding not to become a biological mother).

239. This concept has been explored by numerous theorists. *See, e.g.*, *id.* at 388 (arguing that denial of abortion "enforces the kind of split that will undermine a woman's sense of self because her womb and body are no longer *hers* to control but instead have been turned over to the jurisdiction of courts and legislatures"); Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 350 (1991) (noting that when a woman who has decided not to carry a pregnancy to term is denied access to an abortion, the state has made a bodily intrusion such that it has conscripted her into pregnancy and "entered [her] body, seized control, and established an adversarial relationship between the woman and her womb"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 790 (1989) (arguing that "anti-abortion laws exert power productively over a woman's body and, through the uses to which her body is put, forcefully re-shape and redirect her life"); Siegel, *Reasoning from the Body*, *supra* note 205, at 350 (describing that restricting access to abortion is "state action compelling pregnancy and motherhood"); Abrams, *supra* note 233, at 1302–03 (2017) (arguing against the dichotomy between parental and abortion decision-making); Donley, *Parental Autonomy*, *supra* note 92, at 246–47 (arguing that the abortion decision in the case of fetal anomaly is a parenting decision).

B. *The Fathers' Veto: Transferring Reproductive Control from the State to Fathers*

As described earlier, there are several types of civil remedy laws gaining traction that have the effect of granting rights to putative fathers in the abortion context—from wrongful death provisions in antiabortion statutes to civil "bounty" private enforcement statutes and laws that allow putative fathers to sue on behalf of the fetal estate. This section will describe how these laws that allow putative fathers to sue an abortion provider in court can function as a veto through the threat of exposing a woman's abortion in open court. The threat of exposure implicit in wrongful death and civil enforcement laws allows men to effectively override abortion decision-making based on their status as a parent. Critically, the functional effect of civil remedy laws is that men have veto power over women's abortion decisions, in addition to financial remuneration in the form of damages.

Decisional privacy and informational privacy are integrally linked; the right to make an abortion decision depends on the ability to keep the decision private.[240] As the concurrence noted in *Bellotti v. Baird*,[241] a case involving the right of minors to access abortion, "it is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny."[242] Pregnant women may choose to forgo the abortion procedure on the mere threat of public exposure posed by a putative father's ability to bring a wrongful death lawsuit against an abortion provider. These laws place power in the hands of men to control women's decision-making about abortion.

The threat of being publicly identified as having had an abortion—whether through court documents or by the process of deduction[243]—may result in severe consequences for women beyond shame and humiliation, including negative impacts on their work, family relationships, and education.[244] Indeed, abortion opponents have long relied on outing and shaming women seeking abortion care as an effective deterrent, for example, by posting videos online of women entering abortion clinics, holding up signs with the names of patients

240. *See supra* note 26.

241. 443 U.S. 622 (1979)

242. *Id.* at 655 (Stevens, J. concurring); *see also* SANGER, ABOUT ABORTION, *supra* note 26, at 154–84, 187–88 (describing that the Supreme Court has recognized the power of exposure on abortion decisions in cases striking down spousal notification laws and providing judicial bypass in cases involving minors and parental consent); Alice Clapman, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts To Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1549–50 (2003).

243. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 441 (2009) [hereinafter Sanger, *Decisional Dignity*] (describing "revelation through appeal" where a petitioner's identity is susceptible to discovery because of the amount of factual detail in the record, despite the use of the "Jane Doe" alias); Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 929 (7th Cir. 2004) (describing that releasing even redacted medical records could allow people to "put two and two together" and "out" abortion patients).

244. *See generally* SANGER, ABOUT ABORTION, *supra* note 26 (describing the risks of public exposure of abortion).

seeking care at clinics, and contacting a patient's parents and employers to notify them of the abortion.[245] There are parallels between the deterring effect of these public shaming tactics and today's antiabortion civil remedies and judicial bypass rules.[246] Although the judicial bypass process was allegedly implemented to protect minors from negative emotional consequences of abortion, empirical research has shown that the process actually causes harm to minors, causing feelings of shame and humiliation.[247] Indeed, antiabortion lawmakers have attempted to thwart minors from seeking abortion by increasing the threat of public shaming in the judicial bypass procedure, such as by requiring the fetus to have an attorney, requiring the district attorney to cross-examine the minor, and allowing judges to require minors to disclose their identity to any person the judge feels "needs to know" that the minor sought judicial bypass for an abortion.[248] As one study observed, minors seeking judicial bypass express concern that if their male partners discover the pregnancy, they may threaten to disclose the pregnancy to parents and others in an attempt to prevent an abortion from taking place.[249] The experience of judicial bypass reveals how the threat of exposing a pregnant person's abortion—by the male partner, anyone opposed to abortion, or by the court itself—is an effective tool used by abortion opponents to control reproductive decisions of people who seek to terminate a pregnancy.

245. *See* Clapman, *supra* note 242, at 1545–46; *see also* Doe v. Mills, 536 N.W.2d 824, 829 (Mich. Ct. App. 1995) (holding that antiabortion protesters who held up placards with patients' names obtained from the clinic dumpster had violated patients' privacy rights).

246. *See* Carol Sanger, *Talking About Abortion*, 25 SOC. & LEGAL STUD. 651, 663 (2016) (describing that anxiety associated with the "risk of public exposure" in judicial bypass hearings may cause young women to reconsider their decision); Sanger, *Decisional Dignity*, *supra* note 243, at 471–73 (describing that the humiliation experienced by young women in the judicial bypass process is designed to deter them from seeking abortion).

247. *See, e.g.*, Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, *Young Women's Experiences Obtaining Judicial Bypass for Abortion in Texas*, 64 J. ADOLESCENT HEALTH 20, 20 (2019) (concluding that the judicial bypass process "functions as a form of punishment that allows state actors to humiliate adolescents"). *See generally* Sanger, *Decisional Dignity*, *supra* note 243 (describing that the humiliation experienced by young women in the judicial bypass process is designed to deter them from seeking abortion).

248. *See* Jenny Kutner, *The War on Women Is War on Teenage Girls: How Judicial Bypass Laws Shame Pregnant Minors and Threaten Personal Safety*, SALON (Oct. 9, 2014, 3:42 PM), salon.com/2014/10/09/the_war_on_women_is_a_war_on_teenage_girls_how_judicial_bypass_laws_shame_pregnant_minors_and_threaten_personal_safety/ [perma.cc/G3KJ-XFHD] (describing laws designed to increase shame for minors seeking bypass, such as a 2014 Alabama law requiring a lawyer to be appointed for the fetus and to be involved in the case, requiring district attorneys to cross-examine minors seeking judicial bypass, and authorizing judges to disclose the minor's identity to any person who "needs to know" of the abortion).

249. Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obrant & Susan Hays, *Adolescents Obtaining Abortion Without Parental Consent: Their Reasons and Experiences of Social Support*, 52 PERSPS. ON SEXUAL & REPROD. HEALTH 15, 20 (2020) (describing the threat of disclosure by a male partner as a means of deterring the pregnant minor from seeking abortion).

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Further, abortion stigma is well-documented.[250] In a case involving a request by Attorney General John Ashcroft for release of patient medical records by abortion clinics, a federal court described the importance of confidentiality in the abortion procedure, even in cases where the patient herself is not a party:

> American history discloses that the abortion decision is one of the most controversial decisions in modern life, with opprobrium ready to be visited by many upon the woman who so decides and the doctor who engages in the medical procedure. An emotionally charged decision will be rendered more so if the confidential medical records are released to the public, *however redacted for use in public litigation in which the patient is not even a party*.[251]

Even though pregnant people themselves are not being sued, lawsuits against abortion providers have the potential to expose women's medical information and personal and intimate details of women's lives and medical care in open court. For example, statutes that allow fathers to sue abortion providers for violating antiabortion regulations would require, at a minimum, that the woman's medical files be subpoenaed and entered into evidence as proof that the procedure took place. Thus, wrongful death civil remedy statutes may serve as an effective abortion deterrent by threatening exposure of the procedure after the fact. As Justice Blackmun described, "A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly."[252] While laws that permit fathers to sue in wrongful death compensate men for abortions after the fact and do not directly enjoin the abortion, the threat of such a suit is an effective means of discouraging women from seeking abortion.

Threatening to disclose an abortion procedure to prevent a woman from seeking an abortion is a recognized form of reproductive coercion used by batterers to control their partner's reproductive decision-making.[253]

250. *See, e.g.*, Kate Cockrill & Adina Nack, *"I'm Not That Type of Person": Managing the Stigma of Having an Abortion*, 34 DEVIANT BEHAV. 973, 987–88 (2013); Katrina Kimport, Kira Foster & Tracy A. Weitz, *Social Sources of Women's Emotional Difficulty After Abortion: Lessons from Women's Abortion Narratives*, 43 PERSPS. SEXUAL & REPROD. HEALTH 103, 107 (2011).

251. Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *6 (N.D. Ill. Feb. 6, 2004) (emphasis added).

252. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986).

253. *See* Karen Trister Grace & Jocelyn C. Anderson, *Reproductive Coercion: A Systematic Review*, 19 TRAUMA VIOLENCE ABUSE 371, 371–72 (2018) (describing reproductive coercion as one of many forms of power and control exercised by an abusive partner). The Supreme Court addressed this issue in considering spousal notification laws, stating, "Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure

Reproductive coercion occurs when a woman's partner uses intimidation, threats, or violence to enforce their reproductive intentions over the woman's intentions.[254] The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[255] in invalidating Pennsylvania's spousal notification law, stated, "Many [domestic violence survivors] may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or *the disclosure of the abortion to family and friends*."[256] The Court described the district court findings that abusive partners may threaten to "publicize [a woman's] intent to have an abortion to family, friends or acquaintances" as a means of coercing and controlling their partners.[257] Civil remedy statutes raise the very domestic violence concerns expressed by the Court in *Casey*. The threat of suing an abortion provider in court may be used by abusers to coerce and control their victims into not seeking abortion to avoid public exposure. Civil remedy laws carry the legitimate threat of having a woman's abortion procedure scrutinized in public court, raising the serious risk of public shame even though the pregnant woman herself is not a party to a lawsuit.

C. *Expanding Parental Recognition of Unwed Fathers*

Antiabortion civil remedy laws grant putative fathers the right to sue providers for wrongful death as the "parent . . . of the deceased unborn

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of the abortion to family and friends." Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 888 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (describing the district court findings that abusive partners may threaten to "publicize . . . intent to have an abortion to family, friends or acquaintances").

254. Reproductive coercion can take many forms, including birth control sabotage, pregnancy coercion through forced sex without contraception, threatening violence, or controlling the outcome of pregnancy by refusing to allow a partner to seek abortion by withholding money for or transportation to the procedure. *See, e.g.*, Cari Jo Clark, Jay Silverman, Inaam A. Khalaf, Basem Abu Ra'ad, Zeinab Abu Al Sha'ar, Abdullah Abu Al Ata & Anwar Batieha, *Intimate Partner Violence and Interference with Women's Efforts To Avoid Pregnancy in Jordan*, 39 STUD. FAM. PLANNING 123, 127–28 (2008); Ann M. Moore, Lori Frohwirth & Elizabeth Miller, *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. MED. 1737, 1742–43 (2010); Elizabeth Miller, Beth Jordan, Rebecca Levenson & Jay G. Silverman, *Reproductive Coercion: Connecting the Dots Between Partner Violence and Unintended Pregnancy*, 81 CONTRACEPTION 457, 457 (2010).

255. 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

256. *Id.* at 893 (emphasis added).

257. *Id.* at 888 (describing the district court's findings that abusive partners may "threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children").

person."[258] Laws in at least four states that provide wrongful death and other tort remedies to putative fathers, and the currently enjoined laws that provide fathers' rights to seek injunctions to block abortions, do so without regard to the relationship between the putative father and the gestational parent.[259] These laws grant parental recognition to unwed fathers in a way that is inconsistent with longstanding constitutional law principles regarding parental recognition.[260] As Professor Douglas NeJaime has described, when considering the rights of unwed fathers, the court must first resolve the question of parental recognition, that is who is a legal parent, before considering whether they can exercise parental rights, or parental decision-making.[261] Civil remedy antiabortion statutes extend parental rights (decision-making power) to fathers who do not meet the constitutional standards of legal parents (parental recognition) because they extend parental rights to fathers *regardless of their relationship to the pregnant person*.

While biological connection continues to play a significant role in establishing paternal recognition,[262] beginning with *Stanley v. Illinois*[263] in 1972, the Supreme Court began to develop modern legal principles that circumscribe the rights of unwed fathers in ways that require more than mere biological connection—what has come to be known as the biology-plus-relationship analysis of the rights of unwed fathers.[264] As the Supreme Court has described, men do not acquire parental rights based on biology alone, but rather the law requires a "relationship[] more enduring" for an unwed father to be granted

258. OKLA. STAT. tit. 12, § 1053(2) (Westlaw through legislation of the Second Reg. Sess. of the 58th Leg. (2022)).

259. *See supra* note 28 and accompanying text.

260. For further discussion of the impact of civil remedy laws on the recognition of unwed fatherhood, see Yvonne Lindgren, Symposium, *Antiabortion Civil Remedies and Unwed Fatherhood As Genetic Entitlement*, 99 WASH. U. L. REV. 2015 (2022).

261. Douglas NeJaime, *The Constitution of Parenthood*, 72 STANFORD L. REV. 261, 279–90 (2020); *see also* Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 314 (2017) (distinguishing between which adults qualify as parents such that they "possess *Meyer/Pierce/Troxel*-type rights").

262. *See* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2017) (providing that a genetic father may establish parentage of a child through the procedure of a Voluntary Acknowledgement of Paternity ("VAP")). As the comments of article 3 provide, VAPs have become the most common way for genetic fathers to establish paternity for children born outside of marriage and who therefore do not fall within the marital presumption. *See id.* art. 3 cmt. However, VAPs are filed after birth and are therefore not applicable to a pregnancy terminated through a consensual abortion procedure. *See id.* § 301.

263. 405 U.S. 645 (1972).

264. *See* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 400–02 (2012) [hereinafter Murray, *New Illegitimacy*] (describing that the Court recognized Peter Stanley as a father not solely because he was a biological father but because he acted like a marital father); NeJaime, *supra* note 261, at 280 (describing that for unwed fathers, biological paternity alone was not sufficient to establish constitutional rights as a parent—a biological father must also *act like a father* for paternal recognition).

parental recognition.[265] The unwed father must "grasp the opportunity" to develop a relationship with his child before his parental rights will be recognized.[266] The biology-plus standard is designed to recognize parental relationships between the putative father and child and marriage-like relationships of support between the biological father and the gestating parent,[267] neither of which is applicable in the context of a pregnancy terminated through abortion.

Thus, by legislative decree these civil remedy laws recast the abortion decision as one involving parentage *and* recognize unwed putative fathers as parents in ways that violate the constitutional standard of biology-plus-relationship for unwed fathers. This section considers the legal construction of the parental rights of unwed fathers and argues that civil remedy laws that grant putative fathers the right to sue abortion providers for wrongful death and to represent the fetal estate in survivor claims *regardless of his relationship to the pregnant person* represent an expansion of the rights of unwed fathers over their children. In this way biological essentialism is prioritized over the social context of parenting and reproduction.[268]

Historically, the power of fathers over their children was absolute.[269] However, the power of a father to exercise rights over his children depended upon his marital status to the birth mother, and marriage has historically played

265. Lehr v. Robertson, 463 U.S. 248, 260 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979)).

266. *Id.* at 262.

267. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 650, 671 (1993) (describing that a man must establish a marriage or marriage-like relationship with the mother to be recognized as a legal father); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 977–78 (1994) (describing that the cases from *Stanley* to *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), reveal that biological connection is not enough and to qualify as a father the man must establish a social relationship with the child); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 443–44 (2007) [hereinafter Hendricks, *Essentially a Mother*]; Murray, *New Illegitimacy*, *supra* note 264, at 400–02.

268. It is important to note that biological essentialism reflects more than mere genetic connection, it is also socially constructed and reflects both race and class. *See* Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 210–11 (1995) (describing how genetic essentialism reflected in law "is not determined by biology," rather "it systematically varies in a way that promotes racist and patriarchal norms").

269. *See, e.g.*, Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 651–52 (2014) [hereinafter Purvis, *Origin of Parental Rights*] (tracing the origins of the legal recognition of children as property from ancient English law, which permitted fathers to kill or enslave children, to current scholarly analogies of children as property); Barbara Bennett Woodhouse, *Who Owns the Child:* Meyer *and* Pierce *and the Child As Property*, 33 WM. & MARY L. REV. 995, 1037 (1992) (describing that "the father's power over his household, like that of a God or King, was absolute"). The rights of the *paterfamilias* under Roman law viewed children as the property of their fathers, and a man held absolute power over his wife and children, with the power to sell and even to kill his children. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 65–68 (1st ed. 1976); BLACKSTONE, *supra* note 123, at *452 (describing that under the Roman law, fathers were given the power of death over his children on the principle that "he who gave had also the power of taking away").

a central role in defining men's relationships to their children.[270] William Blackstone states that English common law departed from Roman law in that fathers could only exercise rights over children born during marriage and could not legitimate them after the fact by marrying the mother, as was permissible under Roman law.[271] Men had full legal rights and responsibilities only over children born in marriage, while children born outside of marriage were considered *filius nullius* or "the child of no one."[272] By the end of the eighteen century, unwed mothers had the right to custody of their nonmarital children, but unwed fathers were not permitted custody of children born out of wedlock.[273] In the mid-nineteenth century, in response to women's rights activism, legislatures began to replace common law rules with statutes that granted equal custody rights to husbands and wives.[274]

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270. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY 6–7 (1994) (describing that fathers had absolute authority of custody and control over only their legitimate children); Mayeri, *supra* note 120, at 2295 ("[T]raditionally, fathers had few rights or responsibilities over their nonmarital children."); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender Neutrality and the Preservation of Patriarchy*, 95 COLUM. L. REV. 60, 66–70 (1995) (noting that under common law men had complete authority over children born within marriage and no legal relationship at all to children sired out of wedlock); *Lehr*, 463 U.S. at 256–57 ("The institution of marriage has played a critical role . . . in defining the legal entitlements of family members.").

271. BLACKSTONE, *supra* note 123, at *454–55 (describing a bastard as "one that is not only begotten, but born out of lawful matrimony" and describing the main function of marriage to ensure inheritance and to prevent "the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man").

272. *See* Seymore, *supra* note 209, at 822 (describing the critical role of marriage in establishing a father's rights over children); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003) (describing how over time the law recognized parental rights of unmarried mothers over their children but not of unmarried fathers). Several authors have discussed the different treatment of nonmarital mothers and fathers. *See, e.g.*, Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1588 (1998) (arguing that in the wake of *Stanley* and its progeny, the law should divest biological unwed fathers of veto authority in adoptions and grant mothers "complete decision-making authority based on her disproportionate physical and emotional investment in the child"); Kristin Collins, Note, *When Father's Rights Are Mother's Duties: The Failure of Equal Protection in* Miller v. Alberight, 109 YALE L.J. 1669, 1672 (2000) (describing how illegitimacy laws are designed to extend legal rights and responsibilities of fathers only to their marital offspring); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 997 (1984) (describing how the Supreme Court's analysis reveals that "it considers fatherhood solely in terms of 'opportunity,' and motherhood in terms of 'unshakeable responsibility,' . . . reinforc[ing] stereotypes and perpetuat[ing] male irresponsibility"); Purvis, *Origin of Parental Rights*, *supra* note 269, at 663–64 (describing the differing treatment of unwed mothers, who are uniformly identified as legal parents, and unwed fathers who must satisfy specific procedural requirements to assert paternity but will be liable for child support based on genetic connection alone).

273. *See* Seymore, *supra* note 209, at 822 (describing the critical role of marriage in establishing a father's rights over children).

274. Shanley, *supra* note 270, at 69; *see* Cathy J. Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695, 696 (1978) (describing that by the early twentieth century the "tender years" presumption favored mothers as the custodians of marital children under the age of seven);

The rule that fathers could only exercise rights over children born within marriage remained in effect until 1972 when the Supreme Court decided *Stanley v. Illinois*. Before the *Stanley* decision, unwed fathers had no legally recognized relationship with their children, including no right to notice of a child's impending adoption, no right to veto an adoption, and no way to exercise rights over their children, even children they lived with and supported.[275] In *Stanley*, the Supreme Court held that presuming unwed fathers were unfit and undeserving of a hearing to establish parental fitness violated equal protection guaranteed by the Fourteenth Amendment because both *wed* fathers and *unwed mothers* are presumed fit to raise their children.[276] In the wake of the *Stanley* decision, the Court decided two adoption cases that established the standard for determining when an unwed biological father is entitled to notice and the right to veto an adoption: the "biology-plus-relationship" standard.[277] The adoption cases sought to distinguish the biological father in *Stanley*, who had maintained a relationship with his child, from unwed biological fathers who have no

Woodhouse, *supra* note 269, at 1039 (describing that as rules of coverture were replaced by the recognition of women's legal identity, so too the notion of children as paternal property subject to paternal whim became obsolete and children became subjects of public concern); Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986) (rejecting the tender years presumption as relying on outdated stereotypes). The tender years doctrine was replaced by the "best interest of the child" standard which placed the needs of the child as paramount in the custody inquiry and did not favor either parent. *See* UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. L. COMM'N 1974) (listing the factors used in best interest determinations).

275. *See* SUSAN FRELICH APPLETON & D. KELLY WEISBERG, FAMILIES UNDER CONSTRUCTION: PARENTAGE, ADOPTION, AND ASSISTED REPRODUCTION 9–11, 19, 105–10 (2d ed. 2021) (describing how before the *Stanley* case, an unwed father had no right to notice of or to veto a child's pending adoption and no way to secure parental rights, even when the father had lived with and supported the child); NeJaime, *supra* note 261, at 281–82 (describing that historically, legal fatherhood flowed from marriage, not biology; thus, "[p]arenthood was a legal and social arrangement, not simply a biological fact").

276. 405 U.S. at 649 (resting the decision on procedural due process and equal protection grounds and noting that, as an unwed father, Peter Stanley was deprived of a hearing that would be provided "to all other parents whose custody of their children is challenged"). Chief Justice Burger's dissent in *Stanley* highlights the traditional central importance of marital fatherhood, arguing that the Illinois statute is justified in its treatment of unwed fathers, "on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child that the bonds resulting from the male's often casual encounter." *Id.* at 665 (Burger, C.J., dissenting); *see* Murray, *New Illegitimacy*, *supra* note 264, at 402 (arguing that *Stanley* was implicitly animated by marital norms because that Court recognized that Peter Stanley "had not only behaved like a father; he had behaved like a husband").

277. *See* Mayeri, *supra* note 120, at 2315 (describing that *Stanley* advanced a functional definition of family that relied on touchstones of marriage to establish fatherhood); Murray, *New Illegitimacy*, *supra* note 264, at 405–06 (describing that the Court did not protect biological fatherhood per se, but rather the Court protected "a particular kind of father" who undertook to act like a marital father in living with and supporting his children and their mother); NeJaime, *supra* note 261, at 280–86 (noting that biological connection is the starting point of the constitutional inquiry but is not sufficient to establish legal parentage without the parent also acting like a father); Seymore, *supra* note 209 (describing that while a mother is a legal parent by reason of biological connection, a biological father is not a legal parent, "unless he takes affirmative steps to grasp fatherhood").

relationship with their child or—in Chief Justice Burger's words—"exhibit no interest in the child or its welfare."[278]

In *Quillion v. Walcott*,[279] the Court upheld the constitutionality of a Georgia statute that only required the consent of the mother in an adoption of an "illegitimate" child under the statute.[280] The case involved the adoption of a child by her stepparent over the objection of the girl's unwed biological father.[281] The Georgia law provided that a child born *in wedlock* cannot be adopted without the consent of the father, even when the child's parents are divorced or separated.[282] Under the Georgia law, only unwed biological fathers who marry the child's mother or legitimate the child through a court order were permitted to exercise parental rights to veto adoption.[283] Here, the biological unwed father had failed to legitimate the child and had not supported the child for eleven years, and therefore was barred from vetoing the adoption.[284] In *Lehr v. Robertson*,[285] the Court held that New York's putative father registry sufficiently protected the right of unwed biological fathers to notice of a pending adoption.[286] The Court held that only when an unwed father "demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child'" does he gain "substantial protection under the Due Process clause."[287] In short, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[288] Thus, when establishing parental recognition

278. 405 U.S. at 665 (Burger, C.J., dissenting).

279. 434 U.S. 246 (1978).

280. *Id.* at 256.

281. *Id.* at 247.

282. *Id.* at 248.

283. *Id.* at 248–49.

284. *Id.* at 249.

285. 463 U.S. 248 (1983).

286. *Id.* at 263–65. The child's mother had remarried, and her husband sought to adopt his stepdaughter when she was two years old. *Id.* at 250. Mr. Lehr had not registered with the putative father registry, had not established paternity through other available avenues like being named on the child's birth certificate, had not lived with, supported, or held the child out as his own, and had rarely seen his daughter in the two years since her birth. *Id.* at 250–51.

287. *Id.* at 248. Professor Jennifer Hendricks has argued that the "*Lehr* regime" should be narrowly construed to provide that parental rights do not attach to the father until he establishes a relationship with the child, and until that time, his interest is only an "inchoate interest" in a potential relationship that is entitled to due process but has not risen to a fundamental right. Hendricks, *Fathers and Feminism*, *supra* note 27, at 483; *see also* Mark Strasser, *The Often-Illusory Protections of "Biology Plus:" On the Supreme Court's Parental Rights Jurisprudence*, 13 TEX. J. C.L. & C.R. 31, 32 (2007); Hendricks, *Essentially a Mother*, *supra* note 267, at 443–44.

288. *Lehr*, 463 U.S. at 260 (quoting Cuban v. Mohammed, 411 U.S. 380, 397 (1979)). Professor Melissa Murray has observed the centrality of marriage in constructing fatherhood in each of these decisions, with the Court embracing Peter Stanley as a father while denying the claims of both Quillion and Lehr in favor of a stepfather in an in-tact marital family. Murray, *New Illegitimacy*, *supra* note 264,

for unwed fathers, biological connection is only the starting point of the constitutional inquiry; an unwed father must also establish that he has undertaken to act like a father by supporting the mother and child.[289]

Every state recognizes some form of the marital presumption whereby a husband is presumed to be the father of a child born to his wife during marriage.[290] The role of marriage is so foundational to defining parental rights of fathers that in *Michael H. v. Gerald D.*,[291] the Supreme Court upheld the marital presumption of fatherhood even when the nonmarital father presented DNA evidence that proved with 98.07% probability that he, not the man the woman was married to at the time of conception, was the biological father.[292] In the plurality opinion that is arguably the highwater mark of deference to marital fatherhood, the Court rejected the unwed biological father's assertion of paternity in favor of legal recognition of the husband based on the "historic respect—indeed sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[293] The

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at 404–05 (describing that in each of these cases, the Court defers to the rights of marital fathers because of the Court's underlying concern with illegitimacy). The Supreme Court addressed the requirement that unwed fathers prove biology plus a parental relationship in the context of citizenship in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), upholding the more onerous requirement for unwed fathers and noting that the automatic citizenship granted to children born to unwed mothers flows from the fact that the relationship is verified by the birth itself. *Id.* at 62–64. Unwed fathers, by contrast, do not have the same opportunity to establish "the real, everyday ties that provide a connection between child and citizen parent" because a father may not even be aware that a child was conceived. *Id.* at 65; *see also* Collins, *supra* note 272, at 1672 (describing that cases like *Nguyen* reflect common law principles that date back to coverture in which "men had full legal rights and responsibilities regarding children born in marriage, while women had full legal rights and responsibilities regarding children born out of marriage"). For an excellent discussion of the Supreme Court's analysis with respect to citizenship and immigration privileges of nonmarital fathers and their children, see Mayeri, *supra* note 120, at 2328.

289. NeJaime, *supra* note 261, at 280–86 (noting that parental recognition for unwed fathers requires establishing both a biological connection and an "undertaking the work of family").

290. UNIF. PARENTAGE ACT § 204(a) (NAT'L CONF. OF COMM'RS OF UNIF. STATE L. 2017); Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 248 (2019) (describing that since the nation's inception, the marital presumption has provided automatic at-birth legal parentage to gestating parent and their spouse). The marital presumption remains the most common way of establishing parentage of the husband. *See* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1659 (2015); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2363–69 (2017); Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2038 (2016).

291. 491 U.S. 110 (1989) (plurality opinion).

292. *Id.* at 124 (describing that the presumption is one that has historic roots in the common law and providing that the presumption can only be rebutted by proof of the husband's impotence or sterility or absence at the time of conception). Note, however, that lower courts have not found the plurality opinion persuasive or binding with respect to recognition of unmarried fathers' rights. *See, e.g.*, *In re* Adoption of B.G.S., 556 So. 2d 545, 549 n.2 (La. 1990) (limiting the holding of *Michael H.* to the "extreme factual situation" in the case and noting that other opinions reveal that the courts examine biology plus factors in determining the rights of unwed fathers); State *ex rel.* Roy Allen S. v. Stone, 474 S.E.2d 554, 561–62 (W. Va. 1996) (declining to follow *Michael H.* as a plurality opinion with a majority agreeing only in the holding with no clear consensus on the analysis).

293. *Michael H.*, 491 U.S. at 123.

Court describes that the presumption of legitimacy that was fundamental to common law favors the rights of *marital* fathers over unwed fathers because of "the aversion to declaring children illegitimate" and promotion of the state's interest in protecting the "peace and tranquility" of marital families.[294]

Other areas of adoption law reflect similar values regarding the legal recognition of marital fathers and biological mothers, as well as the less robust legal recognition of the rights of unwed fathers. For example, adoption law allows fathers, but not biological mothers, to relinquish parental rights prior to birth.[295] In newborn adoption cases, unwed fathers who have not relinquished parental rights may nevertheless have their parental rights terminated for failure to take advantage of the opportunity to support the birth mother both financially and emotionally during pregnancy.[296] An unwed father's failure to support the birth mother during pregnancy and his callous behavior toward her or the news of the pregnancy have been held to be sufficient to establish "abandonment" by the biological father to terminate his right to veto an adoption.[297] Courts have prevented unwed biological fathers from blocking newborn adoptions even in cases where the father's failure to support the pregnant parent is the result of fraud.[298] To be sure, many states have moved

294. *Id.* at 125; *see* Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1620 (1990) (describing that *Michael H.* sought to write a particular "Ozzie and Harriet" vision of white middle-class theories of the family into constitutional doctrine that is hypocritical and fails to account for the broad array of families including extended families, unmarried cohabitation, and single-headed families).

295. UNIF. ADOPTION ACT § 2-404(a) cmt. (UNIF. L. COMM'N 1994) ("This section is consistent with the rule in every State that a birth parent's consent or relinquishment is not valid or final until sometime after the child is born. Many States provide that a valid consent may not be executed until at least 12, 24, 48, or, more typically, 72 hours after the child is born."); JUDITH AREEN, MARC SPINDELMAN, PHILOMILA TSOUKALA & SOLANGEL MALDONADO, FAMILY LAW: CASES AND MATERIALS 628 (7th ed. 2019) (noting that while relinquishment may not be executed before the child is born, in some states this specification applies only to the biological mother, while biological fathers may consent before or after the child's birth); Seymore, *supra* note 209, at 853 (discussing that "[a]doption law does not allow mothers to relinquish parental rights prior to the birth of the child" because the "law recognizes that the baby may not seem real to the mother until after the child is born").

296. *See* Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 361 (1996) (noting that fathers cannot attempt to block adoptions if they have failed to take advantage of the opportunity to become a responsible parent and may have their legal ties to their biological child severed by the court); Seymore, *supra* note 209, at 851; *In re* Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995) (finding that unwed father's emotional abuse of during pregnancy was evidence of pre-birth abandonment and warranted the termination of father's right to veto the child's adoption).

297. *See* Seymore, *supra* note 209, at 851–54 (2017) (describing that an unwed father can fail to acquire parental rights based solely on his failure to support the mother financially and emotionally during pregnancy).

298. *See* Hollinger, *supra* note 296, at 361 (noting that "thwarted" fathers who have been prevented from functioning as parents due to the misdeeds of others may be prevented from blocking a proposed

beyond the Supreme Court's formulation of biology-plus-relationship through statutes and case law that confer parental rights to unwed fathers based on biology alone and have only limited the rights of unwed fathers only in cases where there was a marital stepfather waiting to adopt the child. States have also frequently replaced the biology-plus-relationship inquiry with procedural requirements such as putative father registries and voluntary acknowledgment of paternity procedures.[299] However, those legislative decisions and cases directly addressed the question of how to construct parentage for unwed fathers. In the civil remedy antiabortion statutes, the parental recognition of unwed fatherhood has been backed into through the vehicle of fetal personhood instead of addressed specifically by statute.

Antiabortion civil remedy statutes that allow unwed fathers to seek wrongful death damages as a parent and veto abortions regardless of their relationship to the gestating parent attach parental rights to unwed fathers based on biology alone, independent of marital status or a supportive relationship with the pregnant person. This is inconsistent with constitutional law requirements that extend parental recognition to those who can establish both biological connection and the exercise of parental duties.[300] Civil remedy

adoption if it is in the best interest of the child); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 762–66 (1999); Seymore, *supra* note 209, at 850 (describing that lower courts have interpreted Supreme Court precedent to provide that an unwed father cannot veto the mother's adoption placement even if his reason for failure to grasp fatherhood is because he did not know his partner was pregnant); *In re* Baby Girl U., 638 N.Y.S.2d 253, 253 (App. Div. 1996) (holding father is not entitled to veto adoption even though mother fraudulently concealed child's birth); Robert O. v. Russell K., 604 N.E.2d 99, 100–01 (N.Y. 1992) (finding that the father failed to timely grasp his opportunity to be a parent even though he did not know his fiancé gave birth to his child until ten months after the adoption and immediately took legal steps after discovering she had given the child up); *In re* Adoption of A.A.T., 196 P.3d 1180, 1195–96 (Kan. 2008) (finding that the father failed to act even though he had doubts about the truthfulness of the mother when she claimed she underwent an abortion); *In re* A.S.B., 688 N.E.2d 1215, 1218–19 (Ill. App. Ct. 1997) (finding that the father did not seize opportunity to parent when he did nothing to demonstrate interest in the child despite evidence presented he had been told that he was not the father). *But see* Adoption of Kelsey S., 823 P.2d 1216, 1220–36 (Cal. 1992) (en banc) (holding that "thwarted" unwed father who had been prevented from seeing newborn due to birth mother and court order was legally entitled to block pending adoption over birth mother's objection).

299. *See* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1322 (2005) (describing that "many states now confer parental status on the basis of biology alone"); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 468 (noting that the statutes and cases of many states protect the claims of unwed fathers "to a far greater extent that the Supreme Court has said is constitutionally necessary"); Hendricks, *Fathers and Feminism*, *supra* note 27, at 488–90 (discussing the ways that states are recognizing unwed fathers' rights based on genetic essentialism in various contexts).

300. *See, e.g.*, Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 910–13 (2006) (describing family law's move away from the "marital/genetic/patriarchal model" of fatherhood to a model of "social fatherhood" based on a man's demonstrated acts of nurture toward the child and willingness to cooperatively parent with the birth

provisions grant parental rights to unwed fathers as a stand-alone right, without first requiring the necessary elements for parental recognition. Thus, these laws extend parental rights to unwed putative fathers, disconnected from gestation or the social context of parenting and a supportive relationship with the pregnant person, and allow their paternal authority to *override* that of the pregnant person based solely on genetic entitlement.

D. *Genetic Entitlement and Fatherhood as Property*

Patriarchy is defined as the rule of fathers and has been reflected throughout history in legal rights of fathers to complete control over their wives and children born within a marriage.[301] A wrongful death cause of action entitles men to sue for compensation for lost fatherhood in ways that resonate with ancient concepts of fathers' property rights over their genetic offspring. Circa 211 A.D., Emperor Septimius Severus ruled that a woman must obtain the consent of her husband before aborting a fetus, and that she should be exiled for inducing abortion without his consent because she has deprived him of his

mother); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187–95 (2016) (describing how same-sex marriage was enabled by and enables the construction of parentage from biology and marriage to considerations of function and intention). The shift toward an intentional and functional approach to constructing parentage also recognizes that these factors identify parents who are able to address children's best interest because they focus on the social construction of families rather than on claims that flow from biology alone. *See, e.g.*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 920–27 (1984); John Lawrence Hill, *What Does It Mean To Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 372–81 (1991); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 279–80 (1991); Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 288–96 (1993); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 395–405 (2008); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 468–71 (1990); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 202–03 (2007); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 317–18; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 674–75 (2002). Family law's trend towards recognition of functional parenthood over genetic or marital parenthood is reflected, for example, in the alternatives for establishing parentage beyond marriage and biology, including *de facto* parents, parenthood by estoppel, and presumed parentage. *See* Dowd, *supra* note 300, at 915 (describing presumed fatherhood and the "holding out" standard of Uniform Parentage Act § 204 as an example of family law's move toward recognizing social fatherhood); AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(ii)–(iv) (2002); UNIF. PARENTAGE ACT § 204(a)(1)–(2) (UNIF. L. COMM'N, amended 2017).

301. *See* LERNER, *supra* note 124, at 239 (defining "patriarchy" as the "manifestation and institutionalization of male dominance over women and children"); MURRAY & LUKER, REPRODUCTIVE RIGHTS, *supra* note 124, at 3–4 (describing that "patriarchy" literally means the rule of the father over his wife . . . and children"); RICH, *supra* note 124, at 57 ("Patriarchy is the power of the fathers . . . in which the female is everywhere subsumed under the male.").

children.[302] It was not that abortion itself was criminalized, but that abortion without the consent of the father violated the father's right to his children. In a speech delivered in 66 A.D., Cicero refers to a woman sentenced to death for having aborted a pregnancy, which "destroyed the hope of the father, the memory of his name, the supply of his race, the heir of his family, a citizen intended for the use of the republic."[303] Under this historic frame, women's reproductive autonomy is under the control of her husband because the child she carries is his heir and he possesses a property interest in their children, even unborn children.

The rights of the *paterfamilias* under Roman law viewed children as the property of their fathers, and a man held absolute power over his wife and children, with the power to sell and even to kill his children.[304] Under English common law, fathers' rights over their legitimate children were described as a property right because throughout the nineteenth century, a child's father was compensated as the injured party when a child's health or physical person was injured or damaged.[305] A father's rights over his children were so complete that he could convey his parental rights to a third person during his lifetime and could name someone other than the mother as the child's guardian upon his death without the mother's consent.[306]

Civil remedy provisions reflect similar property rights in putative fathers because they recognize an inchoate interest in genetic offspring lost through a consensual abortion procedure. While early civil remedy laws sought to compensate the abortion patient herself for injuries from the abortion procedure, these laws go well beyond, and grant fathers the right to enforce their rights through civil causes of action for harms that conflict with the abortion patient's bodily autonomy. A wrongful death cause of action in this context recognizes a right to sue for harm extrinsic to the patient herself. Rather, it recognizes harm to putative fathers based solely on their genetic tie

302. *See* JOHN M. RIDDLE, CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE 63 (1992).

303. *Oration for Aulus Cluentius Habitus by Marcus Tullius Cicero*, SOC'Y FOR ANCIENT LANGUAGES (Feb. 10, 2005, 6:14 PM), https://web.archive.org/web/20060601183921/http://www.uah.edu/student_life/organizations/SAL/texts/latin/classical/cicero/procluentio1e.html [https://perma.cc/8YSW-UGSU].

304. BLACKSTONE, *supra* note 123, at *452; NICHOLAS, *supra* note 269, at 65–68.

305. *See* BLACKSTONE, *supra* note 123, at *452 (noting that when a child was injured by a third party, compensation was paid to the father); O'Brien v. City of Philadelphia, 64 A. 551, 551 (Pa. 1906) (discussing how the law redressed seduction of daughter as injury to father); Selders v. Armentrout, 207 N.W.2d 686, 687–89 (Neb. 1973) (noting that the traditional measure of damages for wrongful death of a child was the "monetary value of the contributions and services which the parents could reasonably have expected" was developed during a time when children "were generally regarded as an economic asset to parents").

306. MASON, *supra* note 270, at 18–19; Shanley, *supra* note 270, at 68; Hernandez v. Thomas, 39 So. 641, 644 (Fla. 1905) (explaining that the father alone has the power of testamentary disposition of children's guardianship upon his death).

to the aborted fetus. In five states the civil remedy laws go further than the historic rights of *marital* fathers in their children because they compensate fathers regardless of their relationship to the gestational parent. Thus, these laws compensate putative fathers for the loss of an inchoate interest in their genetic offspring based on genetics alone, unmoored from marital and functional relationships.[307]

As described earlier, the abortion right is a unitary right that cannot be bifurcated between the putative father and the gestating parent. These laws are designed to reassert the authority of patriarchal fatherhood, both within and outside of the marital structure. A genetic essentialist definition of parenthood is one that is necessarily rooted in and perpetuates patriarchy.[308] As Professor Jennifer Hendricks has argued, "[D]isregarding gestation in the definition of parenthood is, literally, patriarchal; it is the 'law of the father.'"[309] Within the current constitutional scheme of parentage, in the period before birth, gestational mothers function as the sole constitutional parent because only they possess both biology and a relationship.[310] Through legislative decree, however, these laws recognize an interest held by genetic fathers that exceeds the constitutional construction of parentage. If the legal fiction of fetal personhood and the framing of abortion as a parental decision-making right are to be accepted, then the gestational mother exclusively should be able to exercise parental rights in this context since her bodily autonomy and parental rights are integrally intertwined.[311]

Wrongful death lawsuits are designed to compensate parents for the lost parent-child relationship. Damages in the antiabortion civil remedy statutes,

307. A future project will examine how these laws are also contrary to tort law principles. Critically, in tort law most jurisdictions provide that only fathers who establish paternity before the death of the child born out of wedlock may bring a wrongful death cause of action. Further, several states, including both Texas and Nebraska, do not recognize a wrongful death cause of action for stillbirth, and it is nearly impossible for fathers to sue under traditional negligence because there is no duty owed by the physician. It is also difficult to establish damages unless the father was in the physical proximity to witness the fetal death. *See* Lens, *supra* note 48, at 987–88.

308. *See, e.g.*, Hendricks, *Fathers and Feminism*, *supra* note 27, at 479 (arguing that genetic entitlement is inconsistent with Supreme Court precedent and is based upon and perpetuates patriarchy); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 34–41 (1989); Shanley, *supra* note 270, at 67–68. For an example of a critique of genetic-based construction of parenthood, see, e.g., Katharine T. Bartlett, *Re-expressing Parenthood*, 98 YALE L.J. 293, 295 (1988), calling for a definition of parental status based on responsibility and connection instead of on "rights" that flow from genetics.

309. Hendricks, *Fathers and Feminism*, *supra* note 27, at 499; ROTHMAN, *supra* note 308, at 34–41.

310. Hendricks, *Fathers and Feminism*, *supra* note 27, at 476 (arguing that at the time of birth, the birth mother is the only "constitutional parent" because she is the only parent with both biology and an established relationship).

311. While it is beyond the scope of this Article, tort law in many states, including both Texas and Nebraska, does not recognize a wrongful death cause of action for fathers for stillbirth, and it is nearly impossible for fathers to sue under traditional negligence because there is no duty owed to the father by the physician. *See* Lens, *supra* note 48, at 987–88.

however, are not designed to compensate fathers for the loss of an *existing* parent-child relationship, as in a traditional cause of action for wrongful death of a child. Rather, it is the genetic connection that gives rise to the legal entitlement to monetary damages for a lost inchoate father-child relationship. This is not a claim that flows from the loss of an existing parent-child relationship, but rather it is a claim that recognizes a legally cognizable interest in fatherhood itself. It recognizes that the loss of fatherhood, even if never realized through the birth of a child, is an enforceable claim. Thus antiabortion wrongful death statutes give rise to compensation when fatherhood is lost through consensual abortion.[312] The right to fatherhood enforced by these laws is best conceptualized as a property interest because the laws create an affirmative legal right to sue for lost fatherhood *in isolation of* any of the elements that define legal parentage. This is not a parental claim because the markers necessary to establish parental recognition are absent. Instead, it is the genetic tie to a fetus alone that gives rise to the right to sue for the loss. The genetic entitlement to fatherhood, the right to veto abortion to protect one's interest in fatherhood, and the right to sue providers for the loss of fatherhood, are more closely akin to a property claims than to a parentage claims. It is a property right to sue for lost genetic offspring, even inchoate genetic offspring. It is a property right to sue to enforce an interest in lost fatherhood.

CONCLUSION

Civil tort remedies that grant putative fathers the right to sue abortion providers shift enforcement of abortion restrictions from the state to private actors in the role of tort claimants. Antiabortion civil remedy laws effectively function as a veto over the abortion decision because, as the Supreme Court has observed, the ability to keep the abortion procedure confidential is an integral aspect of decisional autonomy. Indeed, civil remedy laws, while nominally directed toward providers, function as the type of notification and consent laws that the Supreme Court struck down in *Danforth* and *Casey*. Civil remedies raise the potential for the very types of harms for pregnant people in violent intimate relationships that the Supreme Court identified when it struck down spousal consent and notification laws.[313] Moreover, these civil remedy laws are not simply an attempt to characterize the interest of putative fathers in the abortion context as "parental," but go further to anchor the rights of putative fathers through genetic essentialism. As family law shifts to increasingly recognize functional and intent-based parentage, civil remedy laws reassert the authority

312. *See supra* note 92 and accompanying text.

313. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 889 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

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of men over women's reproduction through the vehicle of fatherhood and distill their rights based on genetics alone, unmoored from family law norms of both marriage and biology-plus conduct.

The purpose and function of civil remedy laws violate both constitutional and family law principles, and these remedies should be stricken from abortion statutes. Civil remedies that recognize monetary damages for lost fatherhood in the context of abortion and based solely on genetics establish a monetary interest in fatherhood itself. In short, civil remedy laws expand fathers' rights because they represent fatherhood as a property interest that is compensable when lost, even when a pregnancy has been terminated through a consensual abortion procedure. Antiabortion civil remedy laws represent a significant revision of the abortion right and expand legal concepts of fatherhood, establishing fatherhood as a property right.