

# ANTIABORTION CIVIL REMEDIES AND UNWED FATHERHOOD AS GENETIC ENTITLEMENT

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## ABSTRACT

*Antiabortion civil remedy laws in effect in five states grant putative fathers the right to sue abortion providers for wrongful death regardless of their relationship to the gestating parent. While these laws represent an important new development in the movement to restrict the abortion right, they also expand parental recognition of unwed fathers. Constitutional law requires that unwed fathers who seek to assert parental rights must establish that they possess both biological connection and a relationship with their child or the gestating parent—what has come to be known as “biology-plus.” However, antiabortion civil remedy laws vest parental recognition and rights in putative unwed fathers without the necessity of meeting the constitutionally required biology-plus-relationship standard. In so doing, these laws recognize legal parentage for unwed fathers by legislative fiat in a way that is inconsistent with constitutional law norms. This Article argues that civil remedy laws reflect a turn towards genetic essentialism because they replace the current biology-plus standard with biology alone as the defining marker of parentage. The laws do more work than merely establishing fetal personhood; rather, they represent a turn towards patriarchy through the genetic entitlement of fatherhood.*

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## INTRODUCTION

Restrictive abortion laws in at least eight states include provisions that allow putative fathers<sup>1</sup> to sue abortion providers for wrongful death for violating the antiabortion statute.<sup>2</sup> Critically, while three of the states require that the putative father be the spouse of the abortion patient, five of these laws extend rights to putative fathers to sue abortion providers *regardless of their relationship to the abortion patient*.<sup>3</sup> In addition, laws currently pending or enjoined in several states require a putative father's consent for abortion and allow fathers to seek injunctions to block the abortion procedure regardless of their relationship to the gestating parent.<sup>4</sup> Civil remedy statutes that compensate putative fathers for wrongful death in the context of a consensual abortion procedure are a vehicle for establishing fetal personhood in an ongoing campaign to insert fetal personhood into a broad range of statutes.<sup>5</sup> While these civil remedy laws represent an

1. See Dara E. Purvis, *Expectant Fathers, Abortion, and Embryos*, 43 J.L., MED. & ETHICS 330, 332 (2015) (discussing 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; Purvis prefers the term "expectational father" to refer to putative fathers in the context of abortion); Jones v. Smith, 278 So. 2d 339, 340 (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).

2. See *infra* note 21 and accompanying text.

3. Three of the eight 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. HB1032, Act 45, Arkansas Unborn Child Protection from Dismemberment Abortion Act; ARK. CODE ANN. § 20-16-1804(a)(1)(B) (2021) ("spouse"); IDAHO CODE § 18-613(3)(a) (2020) ("[t]he father of the aborted fetus, if married to the mother of the aborted fetus at the time of the partial-birth abortion"); KAN. STAT. ANN. § 65-6703(g)(1) (2020) ("[T]he father, if married to the woman at the time of the abortion"); KAN. STAT. ANN. § 65-6721(d)(1) (2020) (same). However, five of the states provide a civil remedy to a putative father of the fetus without respect to his relationship to the abortion patient. See ALA. CODE § 26-23B-7(a) (2021) (the woman "or the father of the unborn child"); NEB. REV. STAT. § 28-3,109 (2021) (same); OKLA. STAT. ANN. tit. 12, § 1053(F)(3) (2020) ("parent . . . of the deceased unborn person"); WIS. STAT. § 53.107(5)(a)(2) (2021) ("father of the aborted unborn child").

4. See *discussion infra* notes 29–35 and accompanying text.

5. 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 M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1000 (1999) (noting that antiabortion activists have sought to "reverse *Roe* by having fetuses recognized as full persons under the law," including personhood constitutional amendments, and by engaging in "ongoing efforts to insinuate the concept of fetal personhood into any and every statute, ordinance, and proclamation they could penetrate") (footnotes omitted).

emerging threat to the abortion right based on the fathers' rights rationale, the laws also significantly expand parental recognition of unwed fathers.

There is an irony in thinking about antiabortion civil remedy laws in the context of a symposium on nonmarriage. Efforts to expand the recognition of parentage outside of formal marriage has largely been a progressive undertaking.<sup>6</sup> Indeed, the Republican party has adopted marriage promotion as an important part of its policy agenda.<sup>7</sup> Therefore, it is ironic that the slippage from a marital and functional/social definition of parentage should happen by the fiat of Republican legislators. Civil remedy antiabortion laws have transformed the definition of legal parentage beyond the historical bright line developed in constitutional case law of marriage *and* the functional forms of biology-plus and replaced it with a new bright line of parental recognition based on biological connection alone. In an effort to establish a toehold in fetal personhood, the party that has long championed marriage has dispensed with it and in its wake reasserted the hierarchy of men's control over women and children.

Under constitutional law, unwed fathers do not gain parental rights through biology alone.<sup>8</sup> Instead, unwed fathers who seek to establish

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6. See, e.g., Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) (describing how marriage equality has contributed to intentional and functional conception of parenthood for all families both inside and outside of marriage); Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 474–75 (2017) [hereinafter Hendricks, *Fathers and Feminism*] (describing that the expansion of parental recognition outside of marriage for unwed fathers has been a “progressive proposal”); Martha Albertson Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031, 1036 (2001) (describing that the project of reconstituting paternal rights and responsibilities outside of marriage “has flourished in the context of equality rhetoric in family law reform”).

7. Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 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”); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC, April 1993, 47, 77, <https://www.theatlantic.com/magazine/archive/1993/04/dan-quayle-was-right/307015/> [<https://perma.cc/DZM7-TX57>] (arguing that the rising rate of divorce and out-of-wedlock birth are the “central cause of many of our most vexing social problems” including “poverty, crime, and declining school performance”); Charles Murray, *The Coming White Underclass*, AM. ENTER. INST. (Oct. 29, 1993), <https://www.aei.org/articles/the-coming-white-underclass/> (stating that “illegitimacy is the single most important social problem of our time” and stressing the need to stigmatize single parenthood through social policy); Israel Ortega, Commentary, *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/HC6N-YCWT>] (describing the social ills that flow from single parent “broken families”). 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; Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7103, 120 Stat. 138 (2006) (codified as amended at 42 U.S.C. § 603(a)(2)).

8. Modern versions of the Uniform Parentage Act allow genetic fathers to establish parentage through a Voluntary Acknowledgement of Parentage. Article 3, section 301 of the UPA provides that a genetic father may establish parentage of a child through the procedure of a Voluntary

parental recognition must do more to “grasp[] th[e] opportunity”<sup>9</sup> to develop a parental relationship with children born outside of marital relationships, what has become known as the biology-plus relationship requirement.<sup>10</sup> However, it would be nearly impossible for an unwed father to establish the traditional biology-plus factors for a pregnancy terminated through a consensual abortion. 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, neither of which is applicable in the context of a pregnancy terminated through abortion.<sup>11</sup> Thus, the overlay of fetal personhood attempts to both reshape the abortion decision as one involving parentage rather than bodily autonomy *and* recast the unwed putative father as a parent. The statutes provide that damages may be sought by “the father of the unborn child” or the “father of the aborted unborn child,” but do not require that he be the spouse of the abortion patient.<sup>12</sup> This Article argues

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Acknowledgement of Paternity (VAP). As the comments of the section 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. UNIF. PARENTAGE ACT art. 3 cmt. (UNIF. L. COMM’N 2017). However, VAPs are filed after birth and are not applicable to a pregnancy terminated through a consensual abortion procedure.

9. *Lehr v. Robertson*, 463 U.S. 248, 262 (1982).

10. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 280–86 (2020) (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); Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 387, 405–06 (2012) (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); Malinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817, 819 (2017) (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”); *Lehr*, 463 U.S. at 260 (holding that unwed fathers do not acquire parental rights based solely on biology, but rather the law requires a “relationship[] more enduring” before parental recognition will be bestowed upon an unwed father (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (emphasis omitted))). The “holding out” provisions of the Uniform Parentage Act reflect the biology-plus standards that have developed in case law. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017) (providing that an individual is “presumed to be a parent” if they resided in the same home as the child for the first two years and held the child out as their own).

11. *See* Murray, *supra* note 10, at 400–02 (describing that the *Stanley* Court recognized Peter Stanley as a father not solely because he was a biological father but because he acted like a marital father); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 443–44 (2007) [hereinafter Hendricks, *Essentially a Mother*]; 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—to qualify as a father, the man must establish a social relationship with the child); 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).

12. *See* ALA. CODE § 26-23B-7(a) (2021) (the woman “or the father of the unborn child”); NEB. REV. STAT. § 28-3,109 (2021) (same); OKLA. STAT. tit. 12, § 1053(F)(3) (2020) (“parent . . . of the

that through legislative fiat, these laws are quietly replacing the current constitutionally required biology-plus standard with biology alone as the defining marker of parentage. They are doing more work than merely establishing fetal personhood; instead, these laws represent a turn towards patriarchy through the genetic entitlement of fatherhood.<sup>13</sup>

A wrongful death cause of action is a statutorily created right. Thus, a wrongful death claim only exists where the state has provided such a cause of action through statute.<sup>14</sup> The cause of action is designed to compensate specifically identified beneficiaries who suffer loss as the result of someone's tortious conduct that results in death.<sup>15</sup> Antiabortion civil remedy statutes name putative fathers as beneficiaries who are entitled to compensation for the death of the aborted "unborn child."<sup>16</sup> 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.<sup>17</sup> Damages in wrongful death of a child are designed to compensate a parent for the lost parent-child *relationship*, what is known as loss of filial consortium.<sup>18</sup> Thus, granting civil damages to a putative father in the context of abortion recognizes him as having a parental interest that is compensable

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deceased unborn person"); WIS. STAT. § 253.107(5)(a)(2) (2021) ("father of the aborted unborn person"). By contrast, three of the 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* ARK. CODE ANN. § 20-16-1804(a)(1)(B) (2021) ("spouse"); IDAHO CODE § 18-613(3)(a) (2021) ("[t]he father of the aborted fetus, if married to the mother of the aborted fetus at time of partial-birth abortion"); KAN. STAT. ANN. § 65-6703(g)(1) (2021) ("[T]he father, if married to the woman at the time of the abortion"); KAN. STAT. ANN. § 65-6721 (2021) (same).

13. Professor Jennifer Hendricks defines the term "genetic entitlement" as "the principle of giving automatic, full parental rights to fathers based on genetics alone." *See* Hendricks, *Fathers and Feminism*, *supra* note 6, at 475.

14. *See* VICTOR SCHWARTZ, JOHN WADE & WILLIAM L. PROSSER, *TORTS: CASES AND MATERIALS* 593 (13th ed. 2015).

15. *Id.*

16. OKLA. STAT. tit. 12, § 1053(F)(3) (2020) ("parent or grandparent of the deceased unborn person" unless they coerced the mother to abort); KAN. STAT. ANN. § 65-6721(d)(1) ("parents or custodial guardian[s] of the woman" if she is under the age of eighteen); KAN. STAT. ANN. § 65-6703(g)(1) (same); IDAHO CODE § 18-613(3)(a) ("father of the aborted fetus, if married to the mother" or maternal grandparents if the mother is under the age of eighteen at the time of the abortion); ARK. CODE ANN. § 20-16-1804 (parents or legal guardians of a woman who was a minor at the time of the abortion).

17. *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. 981 (2019).

18. *Hancock v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 54 S.W.3d 234, 236, 236 n.2 (Tenn. 2001) (noting that thirty-two states allow recovery for "loss of consortium" 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 they survived, while the cause of action "survives" the death of the plaintiff; SCHWARTZ et al., *supra* note 14 (describing that in a survival statute, the cause of action the decedent would have had survives the death of either party).

when lost, even when a pregnancy has been terminated through a consensual abortion procedure. By its very nature, a wrongful death claim in this context is one that is related to parentage. The harms that are recognized in a wrongful death cause of action are harms that result 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. These provisions are creating, by legislative fiat, new rules in establishing legal parentage for unwed fathers that violate longstanding constitutional law precedent that have cabined the rights of unwed fathers within marital relationships or biology-plus-connections.

This Article proceeds in three parts. Part I surveys the antiabortion civil remedy laws. Part II examines the ways that these antiabortion civil remedies disrupt traditional constitutional law rules regarding the rights of unwed fathers. Specifically, constitutional recognition of the parental rights of unwed fathers requires something more than mere genetic connection alone—unwed fathers must establish biological connection plus a relationship with the child or the pregnant parent to be recognized as a legal parent of children born outside of marriage. Part III argues that these laws replace the biology-plus standard with a new bright-line rule of biology alone. In so doing, they represent a turn toward genetic essentialism in establishing paternal recognition and rights. While Supreme Court precedents have required more than mere biology to anchor the rights of unwed fathers, these laws permit fathers to recover civil damages as fathers based purely on genetic ties to the fetus and in direct conflict with the decisional autonomy of the gestating parent. It concludes that this turn toward genetic essentialism reflects a retrenchment of patriarchy, or the rule of fathers.<sup>19</sup>

## I. ANTIABORTION CIVIL REMEDY LAWS

The first iterations of civil remedy statutes were designed to allow the woman who underwent the abortion procedure to sue her provider for violations of laws regulating abortion in the state.<sup>20</sup> However, beginning in 2011, state legislatures began including putative fathers in antiabortion civil remedy statutes based on model National Right to Life Committee (NRLC)

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19. See 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 (2015) (describing that “patriarchy” literally originally meant the rule of the father over his wife and children).

20. See generally Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 *TEMP. L. REV.* 123, 126–27 (2007).

legislation. Currently, eight states have antiabortion civil remedy laws that allow putative fathers to sue abortion providers for damages: Alabama, Arkansas, Idaho, Kansas, Montana, Nebraska, Oklahoma, and Wisconsin.<sup>21</sup> Three of these states' laws—Arkansas, Idaho, and Kansas—provide that only a father who is married to the abortion patient may sue a provider under the statute.<sup>22</sup> Critically, five of the state's laws—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. These statutes provide that damages may be sought by “the father of the unborn child” or the “father of the aborted unborn person,” for example, but do not require that he be the spouse of the abortion patient.<sup>23</sup> Thus, the laws grant remedies to the putative father as a stand-alone right that does not require that he have a marital relationship with the woman who underwent the abortion procedure.

With the exception of Oklahoma, the nearly-identical laws in Alabama, Montana, Nebraska, and Wisconsin are based on the NRLC's model “Unborn Child Protection from Dismemberment Abortion Act.”<sup>24</sup> Oklahoma's “Unborn Person Wrongful Death Act” grants putative fathers a cause of action against providers for failure to comply with informed

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21. See ALA. CODE § 26-23B-7(a), (b) (2021); (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)(3) (2021) (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) (2020) (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”); KAN. STAT. ANN. § 65-6703(g)(1) (2020) (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) (2021) (providing the father of the unborn child with actual and punitive damages against an abortion provider); NEB. REV. STAT. § 28-3,109 (2021); OKLA. STAT. tit. 12, § 1053(B), (F)(3) (2020) (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); WIS. STAT. § 253.107(5)(a)(2) (2021) (permitting the “father of the aborted unborn child” to sue a provider for “personal injury and emotional and psychological distress”).

22. Three of the eight 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. ARK. CODE ANN. § 20-16-1804(a)(1)(B) (“spouse”); IDAHO CODE § 18-613(3)(a) (“[t]he father of the aborted fetus, if married to the mother at the time of the partial-birth abortion”); KAN. STAT. ANN. § 65-6703(g)(1) (“the father, if married to the woman at the time of the abortion”); KAN. STAT. ANN. § 65-6721(d)(1) (same).

23. See ALA. CODE § 26-23B-7(a) (the woman “or the father of the unborn child”); NEB. REV. STAT. § 28-3,109 (2021) (same); OKLA. STAT. tit. 12, § 12-1053(F)(3) (“parent . . . of the deceased unborn person”); WIS. STAT. § 253.107(5)(a)(2) (“father of the aborted unborn child”).

24. See NAT'L RIGHT TO LIFE COMM., INC., DISMEMBERMENT ABORTION BANS (2021), <http://www.nrlc.org/uploads/stateleg/StateLawsDismembermentAbortionBans.pdf> [<https://perma.cc/8XFH-KQUN>].

consent requirements.<sup>25</sup> In addition, laws that are pending, being challenged in court, or successfully enjoined in four states require written informed consent of putative fathers and permit putative fathers to seek an injunction to block abortions but do not require that the father be married to the woman seeking abortion.<sup>26</sup>

In 2011, the Nebraska legislature passed the Pain-Capable Unborn Child Protection Act, which was also based on model NRLC legislation, that allowed putative fathers to seek tort damages against abortion providers who violated the ban.<sup>27</sup> The Act provides that “[a]ny woman upon whom an abortion has been performed . . . or the father of the unborn child” may sue the abortion provider for actual damages and attorney’s fees for performing an abortion in violation of the twenty-week ban.<sup>28</sup> Since that time, three more states—Alabama, Montana, and Wisconsin—have passed nearly identical antiabortion civil remedy statutes that allow putative unwed fathers to sue abortion providers; these statutes are also modeled after the NRLC legislation and are based on the so-called “pain capable fetus” rationale.<sup>29</sup> Wisconsin’s Pain-Capable Unborn Child Protection Act, for example, permits the “father of [an] aborted unborn child” to sue a provider for “personal injury and emotional and psychological distress.”<sup>30</sup> Oklahoma’s Unborn Person Wrongful Death Act, 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, mental pain and anguish suffered by the decedent, pecuniary loss

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25. OKLA. STAT. tit. 12, § 1053(F)(2), (3).

26. H.B. 1181, 2022 Leg., Reg. Sess. (N.H. 2022) (currently introduced bill allows “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., 2nd Reg. Sess. (Mo. 2014) (“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) (providing that “[n]o abortion shall be performed in this state without the written informed consent of the father of the baby,” and that a “[p]regnant woman seeking to abort her pregnancy shall be required . . . to provide in writing the identity of the father of the baby to the physician”); S.B. 494, 112th Gen. Assemb., Reg. Sess. 2021–2022 (Tenn. 2021) (providing that the father of an unborn child may petition the court for injunctive relief which relief “[s]hall prohibit the respondent from seeking or obtaining an abortion,” and 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, and if the parties are unmarried, the petitioner must execute a voluntary acknowledgement of paternity). *But see* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 68–69 (1976) (striking down spousal consent for abortion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (striking down spousal notification for abortion).

27. NEB. REV. STAT. § 28-3,109.

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

29. ALA. CODE § 26-23B-7(a) (2021) (the woman “or the father of the unborn child”); MONT. CODE ANN. § 50-20-6205(1) (2021) (providing the father of the unborn child with actual and punitive damages against an abortion provider); WIS. STAT. § 253.107(5)(a) (2021) (permitting the “father of the unborn child” to sue a provider for “personal injury and emotional and psychological distress”).

30. WIS. STAT. § 253.107(5)(a).

of the survivors, grief and loss of companionship of the children and parents of the decedent, as well as punitive or exemplary damages against persons who proximately caused the wrongful death.<sup>31</sup>

Extending tort remedies in the context of abortion is but one example of the concerted effort underway in recent years to restrict abortion by expanding fathers' rights. States hostile to abortion have also passed legislation that requires written consent of putative fathers and allows putative fathers to seek injunctions against abortion providers to block the abortion procedure despite clear Supreme Court precedents.<sup>32</sup> These laws extend recognition to putative fathers to exercise parental rights regardless of their relationship to the abortion patient. In 2014, Missouri legislators introduced a bill requiring written notarized consent of the father of the fetus before an abortion can be performed.<sup>33</sup> Tennessee lawmakers introduced a law to allow a biological father to petition the court to seek an injunction to prohibit a pregnant person from seeking an abortion where there is "reasonable probability" that the pregnant person will seek an abortion prior to giving birth.<sup>34</sup> Ohio state legislators sponsored a bill in the 2009–10 legislative session that required a doctor to secure written informed consent from the father of a fetus before terminating a pregnancy.<sup>35</sup> And in 2017, Oklahoma lawmakers introduced legislation that provided that "[n]o abortion shall be performed . . . without the written informed consent of the father of the baby" and required the woman seeking abortion to provide in writing the identity of the father of the fetus.<sup>36</sup> The New Hampshire

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31. OKLA. STAT. tit. 12, § 12-1053(B), (F)(3) (2020).

32. See *supra* note 26 and accompanying text; see also Purvis, *supra* note 1, at 333 (describing consistent sporadic attempts to enact consent laws in abortion despite clear precedence of *Danforth* and *Casey*).

33. H.B. 2206, 97th Gen. Assemb., 2nd Reg. Sess. (Mo. 2014) ("No abortion shall be performed or induced unless and until the father of the unborn child provides written, notarized consent to the abortion . . .").

34. S.B. 494, 112th Gen. Assemb., Reg. Sess. 2021–2022 (Tenn. 2021) (providing that the father of an unborn child may petition the court for injunctive relief which relief "[s]hall prohibit the respondent from seeking or obtaining an abortion," and 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; if the parties are unmarried, the petitioner must execute a voluntary acknowledgement of paternity).

35. See Purvis, *supra* note 1, at 333; H.B. 252, 128th Gen. Assemb., 2009–2010 Reg. Sess. (Ohio 2009).

36. H.B. 1441, 56th Leg., 1st Sess. (Okla. 2017) (providing that "[n]o abortion shall be performed in this state without the written informed consent of the father of the baby," and that a "[p]regnant woman seeking to abort her pregnancy shall be required, at her expense, to provide in writing the identity of the father of the baby to the physician"). Many of these antiabortion laws are clearly unconstitutional. The six-week "heartbeat" ban in the Ohio law and the recent Texas law both violate Supreme Court precedent which provides that, while states may regulate the abortion procedure before viability, states may not ban abortion outright. See *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (U.S. May 17, 2021) (No. 19-1392). The Supreme Court has held that

legislature is the latest state to introduce such a law. Introduced in January 2022, the currently pending bill allows “the biological father of an unborn child” to petition the court for an injunction prohibiting the biological mother from having an abortion.<sup>37</sup> While each of the laws has been blocked by federal courts or is in the process of being challenged, they may be permitted to take effect in the future depending on the outcome of *Dobbs v. Jackson Women’s Health Organization*, a case currently pending before the Supreme Court challenging Mississippi’s fifteen-week abortion ban.<sup>38</sup>

The civil remedy antiabortion wrongful death provisions seek to compensate parents for the loss of a child. As described earlier, the damages provisions in these statutes are specifically designed to compensate parents for the loss of society, comfort, and companionship of children who have died.<sup>39</sup> For example, Oklahoma’s Unborn Person Wrongful Death Act allows a putative father to sue an abortion provider for wrongful death and to recover damages including for “mental pain and anguish suffered by the decedent,” and “*grief and loss of companionship*.”<sup>40</sup> Kansas’s statute, for example, allows putative fathers to sue a provider for “psychological and physical” injuries that result from the abortion in violation of the statute.<sup>41</sup> Wisconsin’s statute permits “the father of the aborted unborn child” to seek civil damages “for personal injury and emotional and psychological distress” against the abortion provider.<sup>42</sup> The laws have drawn from the NRLC model legislation that provides potential fathers with civil penalty damages for wrongful death, regardless of marital status, and to the *spouse* for injunctive relief.<sup>43</sup> The laws are sweeping unwed fathers into a statutory

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spousal consent and notification provisions for abortion are unconstitutional and the state cannot delegate to a spouse the ability to veto or prevent an abortion. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976) (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”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–88 (1992) (holding that spousal notification laws for abortion are unconstitutional).

37. H.B. 1181, 2022 Leg., Reg. Sess. (N.H. 2022).

38. *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (U.S. May 17, 2021) (No. 19-1392).

39. 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 *Lens*, *supra* note 17, at 981.

40. OKLA. STAT. tit. 12, § 1053(B) (2020) (emphasis added).

41. KAN. STAT. ANN. § 65-6703(g)(2)(A) (2020) (providing that relief shall include “[m]oney damages for all injuries, psychological and physical, occasioned by the violation of this section”).

42. WIS. STAT. § 253.107(5)(a) (2021).

43. ARK. CODE ANN. §§ 20-16-1401 to 1410 (2021); GA. CODE ANN. §§ 16-12-140, 31-9B-1 (2020); GA. CODE ANN. §§ 141, 31-9B-2 to -3, *held unconstitutional* by *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297 (N.D. Ga. 2020), *appeal filed*, No. 20-13024, 2020 WL 6158872 (11th Cir. Oct. 19, 2020); IDAHO CODE §§ 18-501 to 504, 506, 508 to 510 (2020); IDAHO CODE §§ 18-505, 507 *held unconstitutional* by *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015), *aff’g sub nom* *McCormack v. Heideman*, 900 F.Supp.2d 1128 (2013); IOWA CODE §§ 146B.1 to

scheme designed to compensate *parents*. 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 parents, and putative fathers are being recognized as parents by these laws without any standard for establishing the necessary prerequisites that normally attend the recognition of parental rights of unwed fathers under constitutional law.<sup>44</sup> The laws conscript parental recognition by extending compensation for parental harms to unwed putative fathers.

## II. UNWED FATHERS' RIGHTS AND CONSTITUTIONAL LAW

This section examines antiabortion civil remedy laws in the context of constitutional law precedents related to parental recognition and rights of unwed fathers. It explores the historic treatment of fathers, from possessing a property right in their children, to revisions in the law that acknowledge the rights of unwed fathers who establish a relationship with their child or the pregnant woman. It concludes that providing a cause of action for denied fatherhood in isolation of marital status or a supportive relationship with the pregnant person represents a significant expansion of the constitutional recognition of unwed fatherhood. It argues that antiabortion civil remedy laws reflect a turn towards genetic essentialism because they vest parental recognition and rights in unwed putative fathers without the necessity of meeting the constitutionally required biology-plus relationship standard. In so doing, they allow putative fathers to exercise parental rights and decisionmaking without the marriage or social relationship that has

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.3 (2021); KAN. STAT. ANN. §§ 65-6722 to -6725 (2020); KY. REV. STAT. ANN. §§ 311.710, .715, .723 to .725, .727 to .728 (2021); LA. STAT. ANN. § 40:1061.1.1 (2021); MONT. CODE ANN. § 50-20-605(1) (2021); NEB. REV. STAT. §§ 28-3,101 to 3,111 (2021); OKLA. STAT. tit. 63, §§ 1-745.1 to .11 (2020); W. VA. CODE §§ 16-2M-1 to -7 (2020); WIS. STAT. §§ 253.10, 253.107.

44. Indeed, these laws permit any person who steps forward and claims to be a father to do so, presumably including a rapist or a third party who poses a threat to the gestating parent's physical or emotional well-being. This issue lies at the center of advocacy efforts to strip the ability of fathers to assert parental rights over children conceived through rape. *See, e.g.,* 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, 965 (2021) (noting that forty-nine states now have some form of restrictions in place to terminate the parental rights of those who have conceived a child through rape, but that victim protection remains inadequate); 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"); *Shepherd v. Clemens*, 752 A.2d 533, 540 (Del. 2000) (describing that New Jersey, Wisconsin, Nevada, and Oklahoma are a few of the states that have provisions "either terminating the parental rights of the father who conceived a child as a result of a sexual assault, denying custody or visitation to the father, or eliminating the father's right to notice of the impending adoption of the child" (footnote omitted)).

historically functioned to establish parental recognition under constitutional law.

Historically, children were treated in law as property of their parents, and specifically of their fathers, rather than as persons with legal rights.<sup>45</sup> Critically, the power of a father to exercise rights over his children depended upon his marital status to the birth mother, as marriage has historically played a central role in defining men's relationship to their children.<sup>46</sup> The common law of coverture<sup>47</sup> provided that men had full legal rights and responsibilities only over children born in marriage, while children born outside of marriage were the sole legal responsibility of women.<sup>48</sup> Under English common law, men had no legal connection to children born outside of marriage and a child born out of wedlock was considered *filius nullius* or "the [child] of no one."<sup>49</sup> "By the end of the eighteenth century, unwed

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45. See, e.g., Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1043 (1992) (noting that "[t]he notion of the child as property is at least as ancient as the Greek and Judeo Christian traditions identifying man as the procreative force"); Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 651–52 (2014) (tracing the origins of the legal recognition of children as property from ancient English law that permitted fathers to kill or enslave children, to current scholarly analogies of children as property).

46. Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67–69 (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 v. Robertson*, 463 U.S. 248, 256–57 (1982) ("The institution of marriage has played a critical role . . . in defining the legal entitlements of family members . . . ." (footnote omitted)); MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 6–7 (1994) (describing that fathers had absolute authority of custody and control over only their legitimate children).

47. 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 (3rd ed. 1768) (footnote omitted).

48. See 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). For analysis of the different treatment of nonmarital mothers and fathers, see, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 997 (1984) (describing the Supreme Court's analysis reveals that "it considers fatherhood solely in terms of 'opportunity,' and motherhood in terms of 'unshakeable responsibility,' [which] reinforces stereotypes and perpetuates male irresponsibility"); Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1587–88 (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 decisionmaking authority based on her disproportionate physical and emotional investment in the child"); Purvis, *supra* note 45, at 647 (describing the different treatment of unwed mothers who are uniformly identified as legal parents, and unwed fathers who must satisfy specific procedural requirements to assert paternity but who will be liable for child support based on genetic connection alone); Kristin Collins, Note, *When Fathers' Rights Are Mother's Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1672 (2000) (describing illegitimacy laws as designed to extend legal rights and responsibilities of fathers only to their marital offspring).

49. See Seymore, *supra* note 10, at 822 (citation omitted) (describing the critical role of marriage in establishing a father's rights over children).

mothers had the right to custody of their nonmarital children,” but unwed fathers were not permitted custody of children born out of wedlock.<sup>50</sup>

The bright-line rule that fathers could only exercise rights over children born within marriage remained in effect until the Supreme Court took up the issue in 1972 in *Stanley v. Illinois*.<sup>51</sup> Until the *Stanley* decision, unwed fathers had no legally recognized relationship with their children. For example, they had no right to notice of a child’s impending adoption, no right to veto an adoption, and had no way to exercise rights over their children, even children they lived with and supported.<sup>52</sup> In the *Stanley* case, Joan and Peter Stanley lived together for eighteen years but were unmarried. Upon Joan’s death, the couples’ three children were removed from the home and placed with court-appointed guardians because, under Illinois law, the children of unwed fathers automatically became wards of the State.<sup>53</sup> In striking down the law, the Supreme Court held that the presumption that *wed* fathers and *unwed mothers* are fit to raise their children, while unwed fathers are presumed unfit and not even deserving of a hearing to establish parental fitness, violates equal protection guaranteed by the Fourteenth Amendment.<sup>54</sup> 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,” and “that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male’s often casual encounter.”<sup>55</sup> The holding in *Stanley* was clarified by subsequent cases involving unwed fathers’ rights to veto adoption: while biology was a necessary first step to establishing parental recognition, the unwed father had to prove that he also actively raised his children.<sup>56</sup>

In the wake of the *Stanley* decision, the Court decided two adoption cases that developed the standard for determining when an unwed biological father is entitled to notice and the right to veto an adoption, what has come to be known as the “biology-plus” or “biology-plus-relationship”

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50. *Id.*

51. 405 U.S. 645 (1972).

52. *See* Seymore, *supra* note 10, at 822.

53. *Stanley*, 405 U.S. at 646.

54. *Id.* 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”)

55. *Id.* at 665 (Burger, C.J., dissenting). *See* Murray, *supra* note 10, 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” (emphasis omitted)).

56. *See* Hendricks, *Essentially a Mother*, *supra* note 11, at 437 (describing that in *Stanley*, biology was important for establishing parentage “but the Court also required a relationship with the children and a history of caring for them”).

standard.<sup>57</sup> The cases sought to distinguish the type of biological father in *Stanley* who had maintained a relationship with his child, and unwed biological fathers who had no relationship with their child or, as in Chief Justice Burger's description, "exhibit no interest in the child or its welfare."<sup>58</sup> In *Quilloin v. Walcott*,<sup>59</sup> the Court upheld the constitutionality of a Georgia statute that authorized the adoption of a child by her stepparent over the objection of the girl's unwed biological father. The Georgia law provides 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.<sup>60</sup> By contrast, only the consent of the mother is required in an adoption of an "illegitimate" child.<sup>61</sup> Only unwed biological fathers who marry the child's mother or legitimate the child through a court order can exercise parental rights to veto adoption.<sup>62</sup> Here the biological unwed father had failed to legitimate the child and had not supported the child in eleven years and was therefore barred from vetoing the adoption.<sup>63</sup>

In *Lehr v. Robertson*,<sup>64</sup> the Court held that New York's putative father registry had sufficiently protected the rights of an unwed biological father to notice of a pending adoption. The child's mother had remarried, and her husband sought to adopt his stepdaughter when she was two years old. 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. 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

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57. See NeJaime, *supra* note 10, at 280–86; Murray, *supra* note 10, 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); Seymore, *supra* note 10, at 819 (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"); Serena Mayeri, *Foundling Fathers: (Non-) Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2315 (2016) (describing that *Stanley* advanced a functional definition of family that relied on touchstones of marriage to establish fatherhood). The "holding out" provisions of the Uniform Parentage Act reflect the biology-plus standards that have developed in case law. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017) (providing that an individual is "presumed to be a parent" if they resided in the same home as the child for the first two years and held the child out as their own).

58. *Stanley*, 405 U.S. at 665 (Burger, C.J., dissenting).

59. 434 U.S. 246 (1978).

60. *Id.* at 248.

61. *Id.* (citing GA. CODE ANN. §§ 74-403(3) (1975)).

62. *Id.* at 248–49.

63. *Id.* at 249.

64. 463 U.S. 248 (1983).

under the due process clause.”<sup>65</sup> In short, “[p]arental rights do not spring full-blown from the biological connection between parent and child” and “require relationships more enduring.”<sup>66</sup> The biology-plus standard for unwed fathers reflects the value that parentage is established through social relationships of care and nurture. While, historically, marriage stood in as the proxy of social relationships, in the wake of *Stanley* and its progeny, the Court came to recognize other forms of marriage-like social relationships that could function to establish legal parentage.<sup>67</sup> Thus, the bright-line rule of marriage was replaced by a functional approach in which an unwed father’s actions could serve as a proxy for marriage if his actions toward his children were sufficiently marriage-like.<sup>68</sup> To be sure, many states have moved 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 often replaced relationship with procedural requirements.<sup>69</sup> 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 vehicle of fetal personhood has been used to back into recognition of unwed fatherhood, instead of addressing this specifically via statute.

Antiabortion civil remedy statutes grant parental recognition to unwed putative fathers in a way that is in sharp contrast to constitutional legal precedent for establishing legal parentage for unwed fathers. The civil remedy provisions allow unwed putative fathers to exercise the benefits that flow from parental recognition—the ability to sue for damages from the lost

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65. *Id.* at 261 (citation omitted). 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 6, at 483–84; Hendricks, *Essentially a Mother*, *supra* note 11, at 443–44; Forman, *supra* note 11, at 977–78 (describing that Supreme Court cases require an unwed father to possess both genetic connection and a social relationship with the child); Dolgin, *supra* note 11, at 650, 671 (describing that a man must establish a marriage or marriage-like relationship with the mother to be recognized as a legal father).

66. *Lehr*, 463 U.S. at 260 (emphasis omitted) (quoting *Caban v. Mohammed*, 411 U.S. 380, 397 (1979)).

67. *See NeJaime*, *supra* note 10, at 280; Murray, *supra* note 10, at 400–12 (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).

68. Murray, *supra* note 10, at 400–12; Hendricks, *Essentially a Mother*, *supra* note 11, at 443–44; Forman, *supra* note 11, at 977–78; Dolgin, *supra* note 11, at 650, 671.

69. Hendricks, *Fathers and Feminism*, *supra* note 6, at 488–90 (discussing the ways that states are recognizing unwed fathers’ rights based on genetic essentialism in various contexts); 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” (footnote omitted)); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 468 (1996) (noting that the statutes and cases of many states protect the claims of unwed fathers “to a far greater extent than the Supreme Court has said is constitutionally necessary”).

parent-child relationship—regardless of their relationship to the birth parent. Through statutory fiat, these laws establish parental recognition of putative fathers without regard for the constitutional law rules that identify parentage for unwed fathers. The power granted to putative fathers in this context goes beyond being recognized for having sustained a compensable loss, but also includes the ability to wield a veto power over the decisionmaking of the gestating parent through the threat of exposing her in court in a lawsuit aimed at a provider.<sup>70</sup> Thus, these laws both redefine parental recognition of unwed fathers *and* grant them rights of decisionmaking with respect to the fetus without any of the concomitant safeguards inherent in the biology-plus-relationship inquiry that are designed to extend recognition and rights only to fathers who have a connection that is deeper than mere biology. The protection and promotion of marital fatherhood in policy and case law is in sharp contrast to the broad sweep of parental authority granted to unwed fathers in antiabortion civil remedy provisions. The civil remedy provisions grant rights to unwed fathers as a stand-alone right based on genetic tie only, disconnecting this right from the social context of parenting and a supportive relationship with the mother.

### III. FATHERHOOD AS GENETIC ENTITLEMENT

Antiabortion wrongful death causes of action represents a shift in the recognition of fatherhood toward biological essentialism and away from current constitutional law principles that anchor parental recognition to social relationships. In short, they prioritize biological connection over the biology-plus factors that take into consideration the social context of parenting and reproduction. When these laws are seen within the context of the historical recognition and rights of fathers, and from the marital presumption to biology-plus-conduct, it reveals that these laws represent a significant departure in the construction of unwed fatherhood. Under these

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70. *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring in the judgment) (noting that “[i]t 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) (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 Privacy Rule in the Health Insurance Portability and Accountability Act or (HIPAA), Pub. L. No. 104-191, 100 Stat. 2548 (1996) (codified as amended in scattered sections of U.S.C., privacy-related portions codified at 45 CFR Subparts A and E of Part 164). 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/C9YC-VC4J>] (describing that the Texas law allows strangers to reveal private patient information in reporting in violation of HIPAA rules).

laws, there is a new bright-line test for establishing legal parentage for unwed fathers: biology.

Patriarchy is defined as the rule of fathers and, as described earlier, was reflected in legal entitlements for fathers that gave men complete control over children born within a marriage; coverture gave fathers complete legal authority over both their wives and children.<sup>71</sup> Critically, fathers could only exercise control over *marital* children. Marriage served as the proxy for the type of social relationship that is reflected in the biology-plus analysis that gives rise to parental recognition. The current civil remedy laws go much further; they grant parental recognition and rights to people in complete isolation of—and, in fact, in opposition to—a relationship with the gestating parent. Civil remedy antiabortion laws recognize harms to putative fathers that are separate from *both* marital entitlement *and* functional parenthood. This is not a marriage-like claim—it is a claim to parentage based purely on biological connection.

A genetic essentialist definition of parenthood is one that is necessarily rooted in and perpetuates patriarchy.<sup>72</sup> Feminist scholars such as Professor Jennifer Hendricks have argued that the biology-plus-relationship test applied to unwed fathers is consistent with equal protection doctrine because it seeks to provide substantive equality to men with respect to genetic children that approximates the caretaking invested by gestational mothers.<sup>73</sup> Supreme Court precedent provides that men with genetic ties alone are not similarly situated to women who have gestated and given birth, and the biology-plus-relationship test accommodates men’s biological limitations for purposes of equal protection.<sup>74</sup> Defining parenthood through genetic connection, without more on the part of the father to establish legal parenthood, does not put men and women on equal footing but rather

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71. See *supra* notes 44–49 and accompanying text. 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.” BLACKSTONE, *supra* note 47, at 430 (footnote omitted).

72. See, e.g., Hendricks, *Fathers and Feminism*, *supra* note 6, at 479, 495 (arguing that genetic entitlement is inconsistent with Supreme Court precedent and is based upon and perpetuates patriarchy, stating that “[g]enetic essentialism is the modern mask of a long-extant patriarchal ideology of reproduction”).

73. Hendricks, *Essentially a Mother*, *supra* note 11, at 471–72 (describing that at the time of birth the gestating mother has already met the biology-plus criteria based on the labor and risk involved in gestating); Hendricks, *Fathers and Feminism*, *supra* note 6, at 496–97.

74. Hendricks, *Essentially a Mother*, *supra* note 11, at 471–72 (describing that the gestating mother has met both biology and the affirmative acts required of parenting and building a relationship by the fact of gestating and giving birth); Hendricks, *Fathers and Feminism*, *supra* note 6, at 496–97; Davis, *supra* note 48, at 73–74, 104 (arguing that biology plus relationship is not consistent with equal protection but rather creates an unequal system that is akin to “male coverture”); Shanley, *supra* note 46, at 82 (describing that at birth the relationship of the biological father and mother to the child is neither biologically nor socially symmetrical because the mother has gestated the child for which there is not a “precise male analogue”).

discounts the labor and risk involved in gestation as nothing more than proof of genetic parenthood.<sup>75</sup> As Professor Hendricks has described, “disregarding gestation in the definition of parenthood is, literally patriarchal; it is the ‘law of the father.’”<sup>76</sup>

Antiabortion wrongful death causes of action establish affirmative legal recognition for the relationship with the unborn child *in isolation of* a marital relationship, or any relationship to the gestational parent, and in direct conflict with the rights and bodily autonomy of the gestational parent. These laws must be recognized not only for their obvious potential to disrupt the constitutional right to reproductive autonomy, but also for what they represent in the legal recognition of unwed fathers. These laws function to reestablish parental rights based on genetic essentialism. The antiabortion civil remedy laws construct parentage based solely on the biological relationship itself, in isolation of all other factors relevant in constitutional law that construct unwed fatherhood. It is the genetic connection that gives rise to the legal entitlement to monetary damages for the lost father-child relationship. It is biology alone that gives rise to the legal interest and defines fatherhood itself.

#### CONCLUSION

Laws that recognize a father’s right to sue in wrongful death regardless of his relationship to the birth parent are founded upon a genetic-essentialist definition of parenthood, one that is disconnected from the social context of reproduction and, critically, one that is in conflict with the gestating parent’s decision to terminate a pregnancy. Wrongful death statutes that grant sweeping recognition and legal rights to unwed fathers regardless of their relationship to the pregnant woman run contrary to constitutional law rules that require something more than a genetic connection to gain rights as a nonmarital father. These laws function to expand the rights and authority of fathers outside of marital entitlement or supportive relationships with the gestating parent. As constitutional law shifts away from marital and genetic constructions of parentage to granting parental recognition based on responsibility and relationships, these laws reassert the authority of fathers based on genetics alone and are unmoored from norms of biology-plus-conduct. These laws represent a significant retrenchment in the law of patriarchy.

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75. Hendricks, *Essentially a Mother*, *supra* note 11, at 472 (describing the gestational mother as the “initial constitutional parent” because she has met the biology-plus standard by the act of gestating and giving birth); Hendricks, *Fathers and Feminism*, *supra* note 6, at 496–97.

76. Hendricks, *Fathers and Feminism*, *supra* note 6, at 499 (quoting BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* 34–41 (1989)).