WRONGFUL DEATH: A LOADED GUN OF FETAL PERSONHOOD AND INTIMATE INTIMIDATION

Katherine Fleming*

Abstract

In March 2023, Marcus Silva sued his ex-wife Brittni's friends for helping her self-manage an abortion. Represented by Jonathan Mitchell, the notorious architect of Texas's S.B. 8 anti-abortion law, Silva claimed that Brittni's friends committed murder and thus could be sued under Texas's wrongful death law. In response, the friends detailed Silva's verbal abuse, isolation, and coercive control of his ex-wife and accused him of weaponizing the legal system to continue harassing and intimidating Brittni even after their divorce.

Wrongful death law has been expanded in over forty states to allow recovery for wrongful death of a fetus. For decades it has lain about like a loaded gun—and has sometimes been used as one. Men have mobilized wrongful death and other civil claims against their former partners for behavior during pregnancy since shortly after Roe v. Wade*. Now Mitchell has seized on that preexisting strategy—more likely to succeed after* Dobbs v. Jackson Women's Health Organization*—and added a new twist: targeting intimate associates who help others obtain abortions. Fetal personhood might initially appear to be the animating goal, but the heart of the wrongful death strategy is intimidation, harassment, control of women, and erosion of social relationships.*

This Note explores what is old about the wrongful death strategy, what is new, and how to fight back. Part I surveys the pre-existing architecture of fetal personhood in wrongful death law. Part II opens with how men have used tort and other forms of civil law to harass their pregnant partners before. It then draws a parallel to the weaponization of feticide laws in pregnancy criminalization. Finally, it explores how the playbook of turning friends and family against each other echoes the playbooks of the Fugitive Slave Act, the drug war, and the family policing system. Part III discusses what is new: using wrongful death itself as the vehicle to turn people against each other. Part IV charts a path to resist the strategy through legislative advocacy and reproductive justice lawyering.

---

*J.D., Harvard Law School, 2024. I want to acknowledge Professor Michele Goodwin for encouraging me to write this Note and providing countless insights in her Spring 2023 course, Reproductive Rights and Justice, at Harvard Law School. I also want to thank the team at Pregnancy Justice, especially Emma Roth, who supervised my fetal personhood research during my Summer 2022 internship. In addition, I want to acknowledge the editorial team of the *Harvard Journal of Law & Gender*. Lastly, I want to thank Jim Fleming, Linda McClain, Sarah Fleming, Charlotte Reynders, Melissa Morgan, Ellie Samuels, and Simone Unwalla for their support and encouragement.

Table of Contents

Introduction

Has woman a right to herself?
—Letter from Lucy Stone to Antoinette Brown Blackwell, 1855[1]

On a summer day in 1988, Sharon Bonte, seven months pregnant, was crossing Elm Street in Manchester, New Hampshire when a car struck her.[2] Paramedics rushed her to the hospital, where she delivered her daughter, Stephanie, by emergency cesarean section the next day.[3] Stephanie was born with brain damage and cerebral palsy.[4] Sharon Bonte had her hands full caring for her newborn daughter. But soon she found herself defending a lawsuit too. Her husband, Andre Bonte, sued her on behalf of himself and Stephanie, claiming she was "negligent in failing to use reasonable care in crossing the street and failing to use a designated crosswalk."[5] The Supreme Court of New

[1] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 305 (1992) (quoting Letter from Lucy Stone to Antoinette Brown Blackwell (July 11, 1855)).
[2] Bonte v. Bonte, 616 A.2d 464, 464 (N.H. 1992).
[3] *Id.*
[4] *Id.*
[5] *Id.*

Hampshire held that "a child born alive has a cause of action in tort against his or her mother for the mother's negligent conduct that results in prenatal injury," as a pregnant woman owes a legal duty of care to her fetus.[6] The dissenting justices warned that the majority had created a legal duty like no other: it would "govern such details of a woman's life as her diet, sleep, exercise, sexual activity, work and living environment, and . . . nearly every aspect of her health care"—in short, "every waking and sleeping moment."[7]

Thus, just four months after *Planned Parenthood v. Casey* came down, the Supreme Court of New Hampshire flouted the U.S. Supreme Court's command that "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children."[8] The plurality in *Casey* found that Pennsylvania's spousal notification provision gave a husband a "troubling degree of authority over his wife" that "leads to consequences reminiscent of the common law," speculating thus:

> Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking.[9]

Or crossing the street. In *Bonte*, New Hampshire permitted a husband to use tort law in such a manner—as a vehicle to exercise dominion over his wife.

Three decades later, on a summer day in 2022, a woman named Brittni in Houston, Texas texted three of her friends that she had taken a pregnancy test at work and thrown it out in an outdoor trash can so that her husband, Marcus Silva, would not see.[10] They responded with advice about how to order medication abortion online from Aid Access in order to feign a "heavy period."[11] Her friends also warned her about her husband: "you need to remove yourself from him," as he might "snake his way into your head."[12] Brittni thanked her friends, telling them, "your help means the world to me. I'm [sic] so lucky to have y'all."[13] Little did these friends know that their text messages, along with a photo of them dressed in *The Handmaid's Tale* costumes,[14] would end up splayed across the pages of a legal petition. Silva read and photographed Brittni's texts, "rifled" through her purse, found a mifepristone pill, and put it

---

[6] *Id*. at 466.
[7] *Id*. at 467.
[8] Planned Parenthood v. Casey, 505 U.S. 833, 898 (1992).
[9] *Id*.
[10] Plaintiff's Original Petition at 7, Silva v. Noyola, No. 23-CV-0375 (Tex. Dist. Mar. 9, 2023).
[11] *Id*. at 3–6.
[12] *Id*. at 5–6.
[13] *Id*. at 5.
[14] *Id*. at 7.

back.[15] Two weeks after the abortion, he confronted her and threatened to have her thrown in jail if she did not give herself to him "mind body and soul [sic]" until their divorce was finalized.[16] Brittni felt "trapped" and forced to "do whatever he says," as he wielded the photographs over her head to prevent her from leaving.[17] Her friends explained that Silva, a "serial emotional abuser," was not interested in stopping the abortion.[18] Rather, he "wanted to obtain evidence he could use against her if she refused to stay under his control."[19]

Use it he did. In March 2023, after the couple's divorce was finalized, Marcus Silva sued his ex-wife's friends, arguing that "a person who assists a pregnant woman in obtaining a self-managed abortion has committed the crime of murder and can be sued for wrongful death."[20] He seeks over one million dollars in damages and an injunction blocking them from distributing medication abortion or assisting in self-managed abortions.[21] Silva is represented by Jonathan Mitchell, the infamous architect of Texas's Senate Bill 8 (S.B. 8) anti-abortion law.[22] S.B. 8 creates a vigilante enforcement mechanism in which private citizens can sue any person they suspect of aiding or abetting an abortion for a minimum of $10,000 in statutory damages per abortion, as well as court costs and attorneys' fees.[23] Although this suit is brought under wrongful death law rather than S.B. 8, it is brought with the same spirit of citizen-on-citizen harassment and policing.

The longer the lawsuit goes on, the more evidence emerges that its fundamental purpose is assertion of gendered control. The latest development is a fight over discovery, as Silva subpoenaed Brittni's text messages and personal records, thus dragging her into the lawsuit that is formally against her friends.[24] Brittni urged the court to deny the motion to compel production of those documents, invoking her right against self-incrimination.[25] She also called for dismissal of the case, which she described as "the latest abusive tactic in a long line of steps he has taken to harass and control" her.[26] She alleged that, after filing the lawsuit, Silva threatened to post intimate sexual videos

---

[15] Defendants/Counter-Plaintiffs Jackie Noyola's and Amy Carpenter's Original Answer and Counterclaims at 2, Silva v. Noyola, No. 23-CV-0375 (Tex. Dist. May 9, 2023).

[16] *Id*.

[17] *Id.*

[18] *Id*. at 1.

[19] *Id*. at 2.

[20] Plaintiff's Original Petition at 1, Silva v. Noyola, No. 23-CV-0375 (Tex. Dist. Mar. 9, 2023).

[21] *Id*. at 11.

[22] *Id*.

[23] Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. Times (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html [https://perma.cc/MD4L-ZZVH].

[24] Tessa Stuart, *Texan Suing Ex's BFFs Over Abortion Allegedly Promised to Drop Lawsuit for Sex*, Rolling Stone (Oct. 4, 2023), https://rollingstone.com/politics/politics-news/texan-suing-abortion-promised-drop-lawsuit-sex-1234839569/ [https://perma.cc/7BHT-8UPL].

[25] *Id*.

[26] *Id*.

of her on Pornhub, with links to her employer's Facebook, and email them to her family members and their professional and personal circles unless she did his laundry.[27] Brittni further alleges that he promised to drop the lawsuit in exchange for sex but went back on the agreement after she had sex with him.[28] By allegedly using a lawsuit to coerce his ex-wife into sex, Silva wields the law to force her into submission to his will—and into the traditional role of a wife under coverture: her husband's property, sexual subordinate, and maid.

This lawsuit marks the latest twist on a preexisting tactic of men deploying tort law against their former partners regarding abortion, pregnancy loss, and behavior during pregnancy. Mary Ziegler describes the suit as attempting to "start a personhood trend" in the states.[29] Similarly, Melissa Murray calls it a "backdoor way" to embed fetal personhood in law.[30] But using wrongful death is not so much taking the backdoor as walking in the front door that was left unlocked a long time ago. What makes the strategy so dangerous is how mainstream wrongful death is. It is not, for instance, an absurd law about fetuses counting as persons to meet carpool lane human occupancy requirements.[31] Wrongful death is an entrenched body of law that has been expanded, judicially and legislatively, in over forty states to allow recovery for wrongful death of a fetus. For decades it has lain about like "a loaded weapon"[32]—and has sometimes been used as one. Men have mobilized wrongful death, along with prenatal negligence and other civil claims, against their former partners for behavior during pregnancy, including abortion, since shortly after *Roe v. Wade*.[33] Now Jonathan Mitchell has seized on that preexisting strategy, which may be more likely to succeed in a post-*Dobbs* world, and added a new twist: targeting intimate associates who help others obtain abortions.

The wrongful death strategy illustrates why, while the focus understandably has been on *Dobbs*' criminal implications, we must be alert to its civil implications. Fetal personhood is embedded across civil law already and much unfolded unchecked under the *Roe* and *Casey* regime. Taking the long view of tort as a vehicle for fetal personhood shows how much the *Casey* principle—that a state should not give to a husband the kind of dominion a

---

[27] *Id*.

[28] *Id*.

[29] Mary Ziegler, *The Real End Goal of the Anti-Choice Texas Abortion Lawsuit*, Slate (Mar. 28, 2023), https://slate.com/news-and-politics/2023/03/personhood-laws-anti-choice-texas-abortion-lawsuit.html [https://perma.cc/5XCL-CGEX].

[30] *Strict Scrutiny: Is It Infringement If It's Funny? (with Senator Mazie Hirono)*, Crooked Media (Mar. 27, 2023), https://podcasts.apple.com/us/podcast/is-it-infringement-if-its-funny/id1469168641?i=1000606035429 [https://perma.cc/7GHS-TTSC].

[31] Caitlin Cruz, *Texas Republican Proposes Bill to Let Pregnant People Drive in the HOV Lane*, Jezebel (Oct. 15, 2021), https://jezebel.com/texas-republican-proposes-bill-to-let-pregnant-people-d-1847871298 [https://perma.cc/3XKJ-F6DN]; *see also* Timothy Bella, *Pregnant Woman Given HOV Ticket Argues Fetus is Passenger, Post-Roe*, Wash. Post (July 10, 2022), https://www.washingtonpost.com/nation/2022/07/09/texas-abortion-pregnant-woman-hov-bottone/ [https://perma.cc/H9HJ-GL22].

[32] Korematsu v. United States, 323 U.S. 214, 243–44 (1944) (Jackson, J., dissenting).

[33] 410 U.S. 113 (1973).

parent exercises over a child[34]—had already eroded before *Dobbs*. As *Bonte* illustrates, states "allow[ed] children and fathers alike to exert the kind of dominion over women that *Casey* decried."[35] After *Dobbs*, the already attenuated *Casey* barrier is gone. Then-Judge Samuel Alito of the Third Circuit would have upheld the spousal notification provision deemed unconstitutional in *Casey*.[36] *Dobbs*' originalism bakes in women's subordination and second-class citizenship as the reference point for constitutional interpretation,[37] making the moment ripe for men to assert claims of dominion over women.

Only by recognizing what is old, as well as what is new, can we understand the wrongful death strategy. Reva Siegel theorizes the dynamic of preservation-by-transformation: "status-enforcing state action evolves in form as it is contested."[38] Men's assertions of legal dominion over their partners shapeshift over time. Coverture no longer officially governs women but men like Marcus Silva attempt to resuscitate its spirit of male ownership over female partners. Private actors who bring such claims operate in tandem with state actors who intensify state surveillance and control of pregnancy and embed fetal personhood in law. Michele Goodwin lays out "Taxonomies of Legal Innovation" in states policing the womb and expanding fetal personhood.[39] The foundation for the wrongful death strategy is a prior wave of legal innovation: courts applied old laws and interpreted them in new ways, and legislatures amended old laws to expand existing remedies. While some actors may have been pushing for fetal personhood in a long game to undermine reproductive freedom, others were motivated by a reformist impulse to recognize reproductive harm in law.[40]

---

[34] Planned Parenthood v. Casey, 505 U.S. 833, 898 (1992).

[35] Pregnancy Justice, When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond 20 (2022) [hereinafter Pregnancy Justice, When Fetuses Gain Personhood].

[36] Planned Parenthood v. Casey, 947 F.2d 682, 725–27 (3d Cir. 1991) (Alito, J., concurring in part).

[37] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 375 (2022) (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) ("When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.").

[38] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1113 (1997).

[39] Michele Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood 30 (2020) ("(1) old laws are applied and interpreted in new ways; (2) old laws are slightly amended to expand existing prescriptions and sanctions; (3) new laws are applied in unintended ways against pregnant women; and (4) new laws are introduced that expressly create new prescriptions and sanctions").

[40] Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 Vand. L. Rev. 1649, 1687–88 (2022) ("The original motivation . . . had nothing to do with biology, personhood, or abortion. Instead, it was due to the strange outcome where a fetus injured in the womb could recover in tort after birth, but no claim existed for tortious fetal death; killing a fetus, despite being a graver injury, was not subject to recovery . . . [S]ome more recent legislative amendments . . . were motivated by anti-abortion strategy to accord full legal personhood to a fetus, especially if applied to miscarriage, but this was not the original purpose.").

We are now in a second wave of legal innovation. The edifice of fetal personhood in tort law, built in at least some instances to recognize reproductive harm to pregnant persons, is being weaponized against them. Jonathan Mitchell's strategy of using wrongful death to harass a former partner's friends is a novel twist, but the broader playbook is old. First, it echoes prior efforts by men to use wrongful death, prenatal negligence, and other forms of civil law to harass their former partners over abortion and behavior during pregnancy. Second, it echoes how aggressive prosecutors weaponize feticide laws—framed as protecting pregnant women—against pregnant and postpartum women themselves. Third, it echoes prior playbooks of turning people against each other and breaking families and communities apart: the Fugitive Slave Act, the drug war, and the family policing system. Jonathan Mitchell did not begin this wave of innovation, but it is now more likely to gain momentum, without the (already eroded) seawalls of *Roe* and *Casey*.

But we need not let this wrongful death wave drown us. Legislative advocacy should push for explicit clarification that wrongful death law cannot be weaponized against pregnant and postpartum people and that redress for reproductive negligence and harm does not establish legal personhood. Exceptions and caveats in statutes are not enough because, in the realm of pregnancy, lawlessness reigns. Pregnancy criminalization illustrates how rogue prosecutors charge women even when laws state that they cannot be charged.[41] Similarly, rogue actors like Silva and Mitchell may sue people no matter what the law says. Even so, exceptions can help because they provide tools to lawyers defending pregnant and postpartum persons. Reproductive justice advocates are working to train and support criminal defense attorneys to confront a rising tide of pregnancy criminalization after *Dobbs*.[42] We must not overlook the importance of equipping attorneys to combat the tide of civil suits as well.

This paper will discuss what is old about the wrongful death strategy, what is novel, what its goals are, and how to combat it. Part I surveys the pre-existing architecture of fetal personhood in wrongful death law. Part II

---

[41] *See* Sam Levin, *She Lost Her Child in a Home Birth. Prosecutors Charged Her with Murder*, The Guardian (Apr. 3, 2023), https://www.theguardian.com/us-news/2023/apr/03/pregnancy-birth-murder-charge-kelsey-carpenter-san-diego [https://perma.cc/L6GJ-VLNY] ("Prosecutors have continued to pursue the case despite the county medical examiner saying the manner of death was an 'accident'; medical experts testifying that the state's cause-of-death claims were not backed by scientific evidence; and the passage of a new California law explicitly prohibiting the criminalization of pregnancy loss."); Brief of National Advocates for Pregnant Women et al. as Amici Curiae in Support of Plaintiffs-Appellees Seeking Affirmance in Part and Reversal in Part at 8–9, Isaacson v. Brnovich, No. CV-21-01417-PHX-DLR (D. Ariz. July 11, 2022) (describing how, despite the provision in Missouri's personhood law that specifies that it does not create a cause of action against a woman "for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care," prosecutors continue to rely upon it to charge pregnant and postpartum women).

[42] *See, e.g.*, Pregnancy Justice, Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers (2022).

opens with how men have used tort and other forms of civil law to harass their pregnant partners before. It then draws a parallel to the weaponization of feticide laws in pregnancy criminalization. Finally, it explores how the playbook of turning friends and family against each other echoes the playbooks of the Fugitive Slave Act, the drug war, and the family policing system. Part III discusses what is new: using wrongful death itself as the vehicle to turn people against each other. It concludes that, while fetal personhood might appear to be the animating goal, the heart of the strategy is intimidation, harassment, and control of women and erosion of social relationships. Part IV charts a path to fight back through legislative advocacy and reproductive justice lawyering.

I. The Preexisting Architecture of Fetal Personhood in Wrongful Death Laws

The advent of fetal personhood in wrongful death law represented a radical break from the common law tradition. The common-law principle, as expressed by the Supreme Judicial Court of Massachusetts in the 1884 case *Dietrich v. Inhabitants of Northampton*, was that the fetus was "a part of the mother," so "any damage to it which was not too remote to be recovered for at all was recoverable by [the mother]."[43] But the longstanding *Dietrich* principle, or body part theory, no longer governs in most states. In over forty states, including Texas, wrongful death statutes have been judicially interpreted or legislatively amended to include fetal death, either by including a fetus within the statutory definition of "person" or creating a separate cause of action for a fetus.[44]

---

[43] 138 Mass. 14, 17 (Mass. 1884).

[44] *See* Mack v. Carmack, 79 So. 3d 597, 599–611 (Ala. 2011) (per curiam); Alaska Stat. Ann. § 09.55.585 (West); Summerfield v. Super. Court, 698 P.2d 712, 724 (Ariz. 1985) (en banc); Ark. Code Ann. § 16-62-102 (Supp. 2015); Hatala v. Markiewicz, 224 A.2d 406, 408 (Conn. Super. Ct. 1966); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557, 558 (Del. Super. Ct. 1956); Greater Se. Cmty. Hosp. v. Williams, 482 A.2d 394, 398 (D.C. 1984); Porter v. Lassiter, 87 S.E.2d 100, 102–03 (Ga. Ct. App. 1955); Castro v. Melchor, 366 P.3d 1058, 1065–66 (Haw. Ct. App. 2016), *aff'd*, 414 P.3d 53 (Haw. 2018); Volk v. Baldazo, 651 P.2d 11, 12, 15 (Idaho 1982); 740 Ill. Comp. Stat. Ann. 180 / 2.2 (West 2010); Ind. Code § 34-23-2-1(b)-(c) (2019); Dunn v. Rose Way, Inc., 333 N.W.2d 830, 833–34 (Iowa 1983) (en banc); Kan. Stat. Ann. § 60-1901(a)-(c) (Supp. 2015); Mitchell v. Couch, 285 S.W.2d 901, 904–06 (Ky. 1955); La. Civ. Code Ann. art. 26 (2010); State *ex rel.* Odham v. Sherman, 198 A.2d 71, 72–73 (Md. 1964); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916, 917 (Mass. 1975); Mich. Comp. Laws Ann. § 600.2922a(1) (West 2017); Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949); Miss. Code Ann. § 11-7-13 (2019); Connor v. Monkem Co., 898 S.W.2d 89, 92 (Mo. 1995) (en banc); Neb. Rev. Stat. § 30-809(1) (2019); White v. Yup, 458 P.2d 617, 623–24 (Nev. 1969); Poliquin v. Macdonald, 135 A.2d 249, 251 (N.H. 1957*);* Salazar v. St. Vincent Hosp., 619 P.2d 826, 830 (N.M. Ct. App. 1980); DiDonato v. Wortman, 358 S.E.2d 489, 490 (N.C. 1987); Hopkins v. McBane, 359 N.W.2d 862, 865 (N.D. 1984); Werling v. Sandy, 476 N.E.2d 1053, 1054 (Ohio 1985); Okla. Stat. Ann. tit. 12, § 1053F (West 2015); Libbee v. Permanente Clinic, 518 P.2d 636, 638 (Or. 1974) (en banc); Amadio v. Levin, 501 A.2d 1085, 1089 (Pa. 1985); Presley v. Newport Hosp., 365 A.2d 748, 756 (R.I. 1976) (Bevilacqua, C.J., concurring in part and dissenting in part); Fowler v. Woodward, 138 S.E.2d 42, 44–45 (S.C. 1964); S.D.

Looking at the two waves of innovation, then, reveals a peculiar dynamic. In the first wave, the shift from treating the fetus as part of the pregnant body to treating it as a separate being could be seen as an important stride toward recognizing the pain and distress of reproductive harm and pregnancy loss. Greer Donley and Jill Wieber Lens argue that wrongful death's conception of the fetus as "separate from the mother . . . reflects that most women feel the death of their stillborn baby is the death of a child, and something much graver than a broken leg."[45] They argue that tort provides a "model of recognizing subjective, relational fetal value that does not collapse into personhood-at-conception."[46] They contend that abortion rights advocates, whose devaluation of the fetus has alienated those who have experienced pregnancy loss, can learn from tort to acknowledge subjective fetal personhood without "ceding ground" to opponents.[47]

But the second wave of legal innovation weaponizes that tort model against the very people it is supposed to benefit. It is difficult, even dangerous, to have the kind of nuance a subjective fetal personhood framework requires when bomb throwers like Jonathan Mitchell (and literal bomb-throwers at clinics) are setting the legal agenda. If you give them an inch, they will take a mile and sue you for a million dollars in damages.

II. What Is Old

A How Men Have Used Tort Law Against Their Partners Before

Taking the long view reveals how men have mobilized negligence and wrongful death law against their partners before and how the strategy has evolved. In the 1980s in Arkansas, Sheryl Carpenter, eight-and-a-half months pregnant, died in a tragic car accident.[48] Her husband sued her estate on behalf of himself, their children, and the fetus, arguing that she "negligently caused the death of the fetus" by crashing into a bridge abutment.[49] The Supreme Court of Arkansas dismissed all the claims, citing "parental immunity doctrine," and dodged the question of whether "a viable fetus born dead is a 'person' who has a cause of action under the wrongful death statute."[50]

Codified Laws § 21-5-1 (1984); Tenn. Code Ann. 20-5-106(d) (1992); Tex. Civ. Prac. & Rem. Code Ann. § 71.003 (West 2008); Carranza v. U.S., 267 P.3d 912 (Utah 2011); Vaillancourt v. Med. Ctr. Hosp. of Vermont, 425 A.2d 92, 94 (Vt. 1980); Moen v. Hanson, 537 P.2d 266, 268 (Wash. 1975) (en banc); Farley v. Sartin, 466 S.E.2d 522, 535 (W. Va. 1995); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 112 (Wis. 1967); Pregnancy Justice, When Fetuses Gain Personhood, *supra* note 35, at 16; Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. Rev. 437, 448 (2020).

[45] Donley & Lens, *supra* note 40, at 1687.

[46] *Id*. at 1650.

[47] *Id*. at 1650, 1683.

[48] Carpenter v. Bishop, 720 S.W.2d 299, 299–300 (Ark. 1986).

[49] *Id*.

[50] *Id*.

In concurrence, Justice George Rose Smith predicted that parental immunity doctrine's "life expectancy is short," as the *Second Restatement of Torts* and more than half of the states had rejected it.[51] He argued, even so, that the case fell within the *Dietrich* principle, as the fetus was "completely dependent upon the mother when the accident occurred."[52] Justice Smith closed with a ringing condemnation of the legal strategy: "the theory that the mother's negligence somehow violated a duty she owed to them is repugnant to one's sensibilities. I do not believe that the law should countenance a cause of action as ignoble as this one."[53]

In 2003 in Wisconsin, Alicia Vander Meulen was injured in a car accident and experienced a stillbirth.[54] Shannon Tesar, who alleged he was "the father of her unborn child," argued that Vander Meulen's automobile insurer "should be liable for [her] negligence in the death of her fetus."[55] The trial court concluded that Vander Meulen did not owe a legal duty to her fetus and, even if she were found negligent, "public policy prevented liability," given the potential "slippery slope."[56] But the state appellate court allowed the cause of action to proceed, pointing out that a fetus is a person under Wisconsin's wrongful death statute and Wisconsin had abolished parental immunity.[57] The court reasoned that no public policy supports "disparate treatment" in which "the father of a one-day-old child or the child may sue the mother for damages . . . caused by the mother's post-birth negligence, but the father of a fetus injured one day from its estimated date of delivery may not sue its mother for damages caused by the mother's negligence."[58]

In 2019 in Alabama, Ryan Magers brought a wrongful death suit against an abortion clinic on behalf of an aborted fetus almost two years after his ex-girlfriend had an abortion.[59] An Alabama probate court judge granted Magers' petition to permit him to represent the estate of the fetus.[60] Magers' claim was ultimately dismissed on appeal for failure to comply with briefing rules,[61] but the strategy was here to stay. In 2020 in Arizona, Mario Villegas, inspired by Magers, brought a wrongful death action against an abortion clinic on behalf of "Baby Villegas" four years after his ex-wife had an abortion.[62] The president

---

[51] *Id*. at 300 (Smith, J., concurring).
[52] *Id*. at 301.
[53] *Id*.
[54] Tesar v. Anderson, 789 N.W.2d 351, 354 (Wis. App. 2010).
[55] *Id*.
[56] *Id*.
[57] *Id*. at 361.
[58] *Id*.
[59] EJ Dickson, *Alabama Court Awards Aborted Fetus the Right to Sue Abortion Clinic*, Rolling Stone (Mar. 6, 2019), https://www.rollingstone.com/culture/culture-news/abortion-court-sue-fetus-rights-alabama-804213/ [https://perma.cc/GB8Q-VL6L].
[60] *Id*.
[61] Magers v. Alabama Women's Ctr. Reprod. Alts., LLC, 325 So. 3d 788, 788–89 (Ala. 2020).
[62] Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic Over the Abortion She Had Four Years Ago*, ProPublica (July 15, 2022), https://www.propublica.org/article/arizona-abortion-father-lawsuit-wrongful-death [https://perma.cc/774R-SUEN].

of the Arizona chapter of the National Council of Jewish Women, Civia Tamarkin, called the suit "a trial balloon to see how far the attorney and the plaintiff can push the limits of the law, the limits of reason, the limits of science and medicine."[63] Villegas' ex-wife stated that he was "emotionally abusive," "wouldn't allow her to get a job or leave the house unless she was with him," "made fake social media profiles, hacked into her social media accounts and threatened to 'blackmail' her if she left him."[64] As Carliss Chatman pointed out, this story illustrates how civil remedies can be weaponized as "a mechanism for men to continue to abuse their former partners through the court system."[65] Chatman captures the core of the strategy powerfully: "It's another way to torture a woman."[66] Even when claims like these ultimately fail, the process itself becomes a form of punishment and abuse. But in a post-*Dobbs* world, with fetal personhood law and ideology on the rise, these claims may have a greater chance of success.

B. Men Seeking to Enjoin Their Former Partners from Obtaining Abortions

Men have also attempted to enjoin their partners from obtaining abortions.[67] One year after *Roe*, an estranged husband asserted a fundamental right under *Griswold v. Connecticut*[68] to prevent abortion of his "child."[69] The Supreme Judicial Court of Massachusetts rejected his argument because substantive due process precedents are "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens."[70] The wrongful death strategy, though, puts tort law in a man's hands as "a sword of government assistance to enable him to overturn the private decisions of his fellow citizens."[71]

C. The Parallel Feticide Playbook

The weaponization of wrongful death operates in parallel to the weaponization of feticide laws against pregnant and postpartum persons and will

---

[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *See, e.g.*, Doe v. Doe, 314 N.E.2d 128 (Mass. 1974); Rothenberger v. Doe, 374 A.2d 57 (N.J. Super. Ch. Div. 1977); Hagerstown Reprod. Health Services v. Fritz, 454 A.2d 846 (Md. 1983); Ead v. Hagerstown Reprod. Health Services, No. C-21-CV-21-000048, 2021 WL 4281310, at *1 n.5 (Md. Ct. Spec. App. Sept. 21, 2021).
[68] 381 U.S. 479 (1965).
[69] *Doe*, 314 N.E.2d at 130.
[70] *Id*. In the initial proceedings, though, one justice issued a restraining order to block the woman's abortion and appointed a guardian ad litem to represent the interests of the fetus. *Id*. at 129.
[71] *Id*. at 130.

likely draw upon that pre-existing playbook. Thirty-eight states have feticide laws,[72] in close parallel to the over forty states that recognize wrongful death claims for fetuses. Feticide, like wrongful death, is a readily exploited legal infrastructure, born of a protective impulse—at least in name—but constructing a dangerous architecture of fetal personhood. The "tried-and-true playbook" opens with abortion opponents "seizing upon a tragic case" in which a pregnant woman was victimized, sometimes by her abuser.[73] State legislators then expand the feticide law and increase its maximum penalty.[74] Prosecutors then weaponize that bulked-up law against women like Bei Bei Shuai, who attempted suicide while pregnant, and Purvi Patel, who self-managed an abortion.[75] Even after convictions are eventually overturned, weaponization continues. Prosecutors persist in arresting and charging pregnant and postpartum women who often lack adequate legal representation, as seven in ten women charged with crimes related to pregnancy cannot afford a lawyer.[76] While prosecutors use feticide laws against pregnant and postpartum people in the name of the state, the wrongful death strategy risks unraveling the social fabric even more because it recruits men as an arm of the state to punish and shame their former partners.

D. Prior Playbooks That Turn Intimate Associates on Each Other

In targeting intimate relationships and making it dangerous to help others, Mitchell's wrongful death strategy, like his S.B. 8 strategy, mirrors the preexisting playbooks developed in the Fugitive Slave Acts, the War on Drugs, and the family policing system to erode communal bonds and isolate vulnerable people. Snitching on people close to you is incentivized. Supporting and helping them is penalized.

1. *The Fugitive Slave Acts*

Michele Goodwin argues cogently that S.B. 8 is "history revisited," as it "empowers and legitimizes harassment and uses the tested tools of slavery."[77] Its vigilante structure resurrects the Fugitive Slave Acts, which recruited

---

[72] Pregnancy Justice, Who Do Fetal Homicide Laws Protect? An Analysis for a Post-Roe America 1 (2022).

[73] Editorial Board, *The Feticide Playbook, Explained*, N.Y. Times (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-murder-charge.html [https://perma.cc/5BCQ-CREJ].

[74] *Id*.

[75] *Id.*; Shuai v. State, 966 N.E.2d 619 (Ind. App. 2012); Patel v. State, 60 N.E.3d 1041 (Ind. App. 2016).

[76] *The Feticide Playbook*, *supra* note 73.

[77] Michele Goodwin, *The Texas Abortion Ban Is History Revisited*, Ms. Mag. (Sept. 1, 2021), https://msmagazine.com/2021/09/01/texas-abortion-ban-black-women-history-fugitive-slave-acts/ [https://perma.cc/Z77E-F4V8].

"private citizens to seek bounties on individuals who sought privacy, liberty and freedom from laws and social conditions that undermined their bodily autonomy."[78] The Fugitive Slave Act playbook created interpersonal surveillance that made it dangerous to confide in anyone or seek assistance. Like S.B. 8, the wrongful death strategy is "history revisited": it empowers private citizens like Marcus Silva to surveil and seek astronomical damage awards against fellow citizens. It too may chill efforts to seek or offer help, tearing the social fabric and making basic human decency, empathy, and friendship a liability.

2. *The Drug War*

The intimate reproductive snitching embodied in Marcus Silva suing his ex-wife's friends and bringing her self-managed abortion before the eyes of the state mirrors the intimate snitching that is fundamental to the Drug War. Informants are "the foot soldiers" in the war on drugs.[79] Alexandra Natapoff observes that "snitching" has "intimate dimensions, particularly when the government uses the informant deal to manipulate private relationships."[80] As Phyllis Goldfarb explains, "a major way that women have been caught in the crossfire of the drug war has been through heterosexual relationships with men engaged in drug activity," relationships that "put women at considerable risk of severe penalties."[81] When Jodie Israel refused to testify against her physically abusive husband regarding his marijuana business, she was "[c]onvicted of conspiracy to distribute marijuana and of spending money that her husband had earned from his trafficking business" and "received a sentence of more than eleven years."[82] After Dee-Ann Coffman provided assistance to her physically abusive husband's drug distribution organization, she was convicted of conspiracy and received an eighty-five year sentence.[83] Goldfarb describes a common "power dynamic of control, intimidation, and physical and sexual assault" in the intimate relationships that render women "casualties" of the drug war.[84] Women end up with such long sentences—often far longer than those of their male partners—because, given their relatively peripheral

[78] *Id.*; *see also Revoking Your Rights: The Ongoing Crisis in Abortion Care Access: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. (May 18, 2022) (testimony of Michele Bratcher Goodwin), https://docs.house.gov/meetings/JU/JU00/20220518/114770/HHRG-117-JU00-Wstate-GoodwinM-20220518.pdf [https://perma.cc/5PX7-AJ95].

[79] Sarah Stillman, *The Throwaways*, New Yorker (Sept. 3, 2012), https://www.newyorker.com/magazine/2012/09/03/the-throwaways [https://perma.cc/4XAE-XEVM].

[80] Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 4 (2009).

[81] Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. Gender Race & Just. 277, 280 (2002).

[82] *Id*. at 287–88.

[83] *Id*. at 288.

[84] *Id*. at 292.

involvement, they have fewer people to snitch on.[85] The state thus incentivizes snitching on associates and penalizes those who will not or cannot. Intimate relationships, often abusive and controlling ones, lie at the core of the strategy.

3. *The Family Policing System*

The playbook of targeting intimate associates also mirrors the family policing system, which recruits family and friends to surveil and report each other to the state, breaking intimate bonds and ripping families apart through child removal and termination of parental rights.[86] Courts in at least fourteen states have held that a man's failure to control his partner's behavior during pregnancy—often her substance use—is civil child abuse or neglect, culminating in some cases in permanent termination of his parental rights.[87] States thus "require men to physically control women" in a manner reminiscent of coverture.[88] One father, commanded by the state to halt his partner's substance use, protested: "I don't own her; she is not a pet."[89] Thus, even when men do not use law against their partners voluntarily, they are drafted into service as an arm of the state. The ascendance of fetal personhood law and ideology raises the concerning question of whether such a mechanism might be extended to pressure men to monitor their partners to ensure that they do not attempt to self-manage abortions.

III. What Is Novel—and What It Is All About

Why use wrongful death instead of S.B. 8? Leah Litman observes that wrongful death allows far broader reach of the vigilante harassment strategy because every state has a wrongful death law.[90] As Dahlia Lithwick and Mark Joseph Stern point out, Mitchell cannot use S.B. 8 because "it targets only those who aid or abet a *physician* licensed in Texas."[91]

S.B. 8 was a maneuver to evade judicial review and "nullify" *Roe*.[92] But, post-*Dobbs*, its lingering purpose is to erode intimate bonds, degrade social relations, and intimidate, isolate, harass, and shame pregnant people. The cruelty,

---

[85] *Id*. at 294.

[86] *See generally* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World (2022).

[87] Pregnancy Justice, Harming Fathers: How the Family Court System Forces Men to Regulate Pregnancy 1 (2022).

[88] *Id*. at 3.

[89] *Id*. at 2 (quoting In re B.H., No. B285600, 2018 BL 171776 (Cal. Ct. App. 2d Dist. May 15, 2018)).

[90] *Strict Scrutiny*, *supra* note 30.

[91] Dahlia Lithwick & Mark Joseph Stern, *Sued for Offering Friendship*, Slate (Mar. 15, 2023), https://slate.com/news-and-politics/2023/03/texas-lawsuit-suing-friends-explained.html [https://perma.cc/Y3ZG-DLD4].

[92] *Whole Woman's Health v. Jackson,* 595 U.S. 30, 62–73 (2021) (Sotomayor, J., concurring in part).

stigmatization, and fear are the point. Wrongful death extends S.B. 8's corrosive strategy to self-managed abortion, which is increasingly common post-*Dobbs*.[93] Pregnant people are already rightfully terrified of being turned in by those closest to them. A recent study on criminalization of self-managed abortion found that twenty-six percent of cases were "reported to law enforcement by acquaintances entrusted with information, such as friends, parents, or intimate partners."[94] The wrongful death strategy exploits and exacerbates this preexisting dynamic of pregnancy and abortion "snitching."

Isolating someone from their friends and family and chilling their ability to seek help is a core component of intimate partner violence.[95] The wrongful death strategy thus allows men to use law to echo and enact patterns of private abuse. It creates the exact dynamic the *Casey* Court found impermissible: "The women most affected…those who most reasonably fear the consequences of notifying their husbands that they are pregnant are in the gravest danger."[96]

Lithwick and Stern rightly argue that the suit's extralegal goals are "rooted in a brazenly misogynistic desire to let men manipulate the legal system to control women's bodies and keep them trapped in dangerous relationships."[97] It is "spousal abuse via lawsuit."[98] It aims to "isolate pregnant people through terror and surveillance," "ruin the lives" of anyone who attempts to assist a pregnant person, and "transform Texas—and, eventually, the rest of the country—into a surveillance state where friends and family are too frightened to discuss abortion for fear of being snitched upon and destroyed in court."[99]

This tactic of "spousal abuse via lawsuit"[100] is especially dangerous in a post-*Dobbs* and *New York State Rifle & Pistol Association v. Bruen*[101] world. One week before Marcus Silva filed his wrongful death suit, the Fifth Circuit held that a federal statute prohibiting possession of firearms by persons subject to domestic violence restraining orders violates the Second Amendment.[102]

---

[93] Carrie N. Baker, *Self-Managed Abortions Soar Post-Dobbs*, Ms. Mag. (Nov. 7, 2022), https://msmagazine.com/2022/11/07/abortion-pills-roe-v-wade-dobbs/ [perma.cc/Z77E-F4V8].

[94] Laura Huss et al., Self-Care, Criminalized: August 2022 Preliminary Findings 3 (2022).

[95] *See, e.g.*, Amera Mojahed et al., *Rapid Review on the Associations of Social and Geographical Isolation and Intimate Partner Violence: Implications for the Ongoing COVID-19 Pandemic*, 12 Frontiers in Psychiatry 1 (2021); Lisa Aronson Fontes, *How Domestic Abusers Groom and Isolate Their Victims*, Psych. Today (Feb. 19, 2019), https://www.psychologytoday.com/us/blog/invisible-chains/201902/how-domestic-abusers-groom-and-isolate-their-victims [https://perma.cc/6NYV-MGXV]; *Dynamics of Abuse*, Nat'l Coalition Against Domestic Violence, https://ncadv.org/dynamics-of-abuse [https://perma.cc/P8EL-ZHRV].

[96] Planned Parenthood v. Casey, 505 U.S. 833, 897 (1992).

[97] Lithwick & Stern, *supra* note 91.

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] 597 U.S. 1 (2022).

[102] United States v. Rahimi, 61 F. 4th 443, 448 (5th Cir. 2023); *see also* William Melhado, *Federal Judge in Texas Rules That Disarming Those Under Protective Orders Violates Their Second Amendment Rights*, Tex. Tribune (Nov. 14, 2022), https://www.

On average, seventy U.S. women are killed each month by intimate partners with guns.[103] One hundred twenty-seven Texas women were shot to death by male partners in 2021.[104] The U.S. has the highest maternal mortality rate in the developed world, with Texas among the deadliest states.[105] What *Dobbs* and *Bruen* mean for women, then, is second-class citizenship and higher risk of death, whether from coerced birth or at the hand of an abuser wielding a gun.

IV. How to Fight Back

A. Legislative Advocacy

State legislatures should amend wrongful death laws to state explicitly that a fetus is not a legal "person" and the statutes cannot be utilized against pregnant persons, or those who assist them, for abortion or behavior during pregnancy. Colorado's civil and criminal laws regarding offenses against pregnant women clarify: "Nothing in this part . . . shall be construed to confer the status of 'person' upon a human embryo, fetus, or unborn child at any stage of development prior to live birth."[106] They expressly exclude pregnant persons and medical providers from liability or prosecution.[107] Such exceptions will not stop harassing lawsuits entirely because the harassment is the point. But they add tools to the arsenal of reproductive justice attorneys to combat the "[r]ule of [l]awlessness"[108] that governs the realm of pregnancy.

State legislatures and Congress should also push for reforms to protect intimate data from surveillance and subpoena.[109] It is important for people to know how to protect themselves as much as they can—for example, by

---

texastribune.org/2022/11/14/texas-judge-domestic-abusers-second-amendment/ [perma.cc/8EHB-VNW9].

[103] Roxanna Asgarian, *Appeals Court Ruling Says Alleged Domestic Abusers Have a Constitutional Right to Keep Their Guns*, Tex. Tribune (Feb 9, 2023), https://www.texastribune.org/2023/02/09/guns-domestic-abuse-second-amendment/ [perma.cc/BJ4J-5UAV].

[104] *Id*.

[105] Elizabeth Chuck, *Texas Has the Highest Maternal Mortality Rate in the Developed World. Why?*, NBC (Aug. 12, 2017), https://www.nbcnews.com/news/us-news/texas-has-highest-maternal-mortality-rate-developed-world-why-n791671 [perma.cc/8EFV-AFQM].

[106] Colo. Rev. Stat. Ann. § 13-21-1204 (West); Colo. Rev. Stat. Ann. § 18-3.5-110 (West).

[107] Colo. Rev. Stat. Ann. § 13-21-1206 (West); Colo. Rev. Stat. Ann. § 18-3.5-102 (West).

[108] *Positively Dreadful: Rule of Lawlessness (with Dahlia Lithwick)*, Crooked Media (Oct. 7, 2022), https://crooked.com/podcast/rule-of-lawlessness/ [https://perma.cc/79KU-P6JP]; *see also* Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the* Dobbs *Decision*, Slate (June 27, 2022), https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html [https://perma.cc/L6GA-76EA].

[109] *See, e.g.*, Hayley Tsukayama & India McKinney, *Pass the 'My Body, My Data' Act*, Elec. Frontier Found. (June 21, 2022), https://www.eff.org/deeplinks/2022/06/pass-my-body-my-data-act [https://perma.cc/XHZ4-SXB6]; Danielle Keats Citron, *The End of* Roe *Means We Need a New Civil Right to Privacy*, Slate (June 27, 2022), https://slate.

following the Digital Defense Fund's "Guide to Abortion Privacy."[110] But there is only so much any individual can do, and telling people not to communicate with anyone about their pregnancy or abortion risks isolating them even further and cutting them off from help and support. The onus must be on companies and their systemic practices of data storage and retention and response to subpoenas.

B. Reproductive Rights and Justice Lawyering

Reproductive justice lawyers need to build up their legal toolkits to address the civil implications of *Dobbs* as well as the criminal ones. Fetal personhood is not some hypothetical future dystopia. It is pervasive in preexisting law.[111] Legal arguments against fetal personhood abound, as I have discussed in greater detail elsewhere.[112] The following are a select few.

1. *Constitutional Arguments*

Constitutional arguments against fetal personhood include (a) that it represents a break from common law history and tradition; (b) that it violates equal protection for women; and (c) that it violates religious liberty by imposing one religious and philosophical view of when life begins.

a. *Common Law History and Tradition*

Applying *Dobbs*' "history and tradition" originalism, state case law shows "consensus" that fetal personhood is not deeply rooted in history and tradition.[113] Many state courts have characterized fetal personhood as a clear *break* from common law,[114] including in the context of wrongful death.[115]

---

com/technology/2022/06/end-roe-civil-right-intimate-privacy-data.html [https://perma.cc/J24E-9EMY] (discussing Health and Location Data Protection Act).

[110] *Keep Your Abortion Private & Secure*, Digital Def. Fund, https://digitaldefensefund.org/ddf-guides/abortion-privacy [https://perma.cc/VM36-M6HC].

[111] Pregnancy Justice, When Fetuses Gain Personhood, *supra* note 35, at 3–4.

[112] *See id.* at 37–45, where a more complete explication of argument strategies with helpful citations is provided.

[113] *Id*. at 37.

[114] *Id*. (citing Billingsley v. State, 360 S.E.2d 451, 452 (Ga. App. 1987); Wallace v. Wallace, 421 A.2d 134, 135 (N.H. 1980); *In re* Roberts' Est., 286 N.Y.S. 476, 477–78 (N.Y. Sur. 1936); Endresz v. Friedberg, 248 N.E.2d 901, 903–04 (N.Y. 1969); People v. Vercelletto, 514 N.Y.S.2d 177, 179–80 (N.Y. Co. Ct. 1987); In re Peabody, 158 N.E.2d 841, 844–45 (N.Y. 1959); Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 888 (N.Y. 1972); Com. v. Booth, 766 A.2d 843, 844–46, 849–51, 853 (Pa. 2001); State v. Amaro, 448 A.2d 1257, 1260 (R.I. 1982); State v. Ashley, 701 So. 2d at 338, 341 (Fla. 1997); State v. Oliver, 563 A.2d 1002, 1003 (Vt. 1989)).

[115] Robin v. Village of Hempstead, 321 N.Y.S.2d 20, 24 (N.Y. Sup. Ct. 1971); Kine v. Zuckerman, 4 Pa. D. & C. 227, 227 (Pa. Com. Pl. 1924) ("There is no doubt that at early common law an injury to an unborn child was looked upon as an injury to the mother

As the Supreme Court of Florida stated, the idea of punishing pregnant women for behavior during pregnancy also departs from common law, which aimed to protect, not punish, them.[116]

b. *Equal Protection*

Casey may be gone, but its reasoning about male dominion did not perish with it, untethered to other precedents. That line of argument rose directly out of the sex equality revolution in equal protection doctrine, which rejected the male dominion the Court entrenched in *Bradwell v. Illinois*[117] as "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."[118] *Dobbs* took a wrecking ball to substantive due process, but it could not obliterate the equal protection revolution too in one fell swoop. We will not go quietly into the 1860s.

c. *Religious Freedom*

Fetal personhood imposes a specific religious and philosophical view of when life begins onto people of diverse faiths and belief systems, running afoul of federal and state protections for religious liberty. Past challenges to personhood provisions brought under the Establishment Clause of the First Amendment failed.[119] After *Dobbs*, though, there is a growing wave of religious liberty challenges to abortion bans.[120] Similar challenges should be brought against the diverse array of fetal personhood laws.

2. *Statutory Interpretation Arguments*

Statutory interpretation arguments against fetal personhood include (a) that the ordinary and public meaning of "child" does not include a fetus; (b) that legislatures specify when they mean *fetus*, as opposed to born child; and (c) that legal fetal personhood leads to absurd results.[121]

---

exclusively. The child and the mother were one until delivery. The former was considered as having no existence independent of the parent. It was not yet a human being; murder could not be committed by its destruction; it could assert no rights, and had none to protect.").

[116] *Ashley*, 701 So. 2d at 341.

[117] 83 U.S. 130 (1873).

[118] *Casey*, 505 U.S. at 896–98.

[119] Pregnancy Justice, When Fetuses Gain Personhood, *supra* note 35, at 40 (citing Jane L. v. Bangerter, 794 F. Supp. 1537, 1549 (D. Utah 1992); Flores v. State, 215 S.W.3d 520 (Tex. App. 2007), *aff'd*, 245 S.W.3d 432 (Tex. Crim. App. 2008)); Satanic Temple v. Parson, 735 Fed. Appx. 900, 901 (8th Cir. 2018) (unpublished); Doe v. Greitens, No. SC96751 (Jan. 23, 2018); Doe v. Parson, 960 F.3d 1115 (8th Cir. 2020).

[120] Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. Times (June 28, 2023), https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html [https://perma.cc/W3HD-Y4JL].

[121] Pregnancy Justice, When Fetuses Gain Personhood, *supra* note 35, at 42–45.

a. *Ordinary and Public Meaning*

Reproductive rights and justice lawyers can argue that the ordinary public meaning of "child," "minor," and "person" does not encompass a fetus, so statutes with those terms do not include fetuses unless the statute says so explicitly.[122] Advocates can cite several precedents for this proposition.[123] For example, the U.S. Supreme Court stated:

> Following the axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary, . . . and reading the definition of "dependent child" in its statutory context, we conclude that Congress used the word "child" to refer to an individual already born, with an existence separate from its mother.[124]

As a cautionary note, though, there is contrary case law to contend with.[125]

b. *Legislative Intent*

Similarly, advocates can argue that when a legislature intends to cover fetuses, it does so explicitly rather than via general terms like "child," "minor," and "person."[126] Judges should not legislate from the bench by injecting fetal personhood into a statutory term contrary to the legislative intent. As above, there is favorable case law to draw upon,[127] though one court flipped the script and reasoned—quite improbably—that the legislature intended to include fetuses unless it specified otherwise.[128]

c. *Absurdity Principle*

Advocates can argue that reading fetal personhood into statutes would lead to absurd and unreasonable results.[129] Numerous courts have thus invoked

---

[122] *See id.* at 42–43.

[123] *Id*. (citing *In re* Adoption of Nelson, 451 P.2d 173, 176 (Kan. 1969); Burns v. Alcala, 420 U.S. 575, 580–81 (1975); Alma Evans Trucking v. Roach, 714 P.2d 1147, 1148–49 (Utah 1986); Carranza v. United States, 267 P.3d 912, 917–18 (Utah 2011)).

[124] *Alcala*, 420 U.S. at 580–81.

[125] *See* Pregnancy Justice, When Fetuses Gain Personhood, *supra* note 35, at 42 (citing State v. Vargas, 869 N.W.2d 150, 159 (S.D. 2015); *Ex parte* Ankrom, 152 So. 3d 397, 404–05 (Ala. 2013)).

[126] *See id.* at 43–44.

[127] *Id*. (citing *In re* Guardianship of J.D.S., 864 So. 2d 534, 538 (Fla. Dist. Ct. App. 2004); *In re* Marriage of Witten, 672 N.W.2d. 768, 776 (Iowa 2003); Reinesto v. Super. Ct. of State *In and For* County of Navajo, 894 P.2d 733 (Ariz. App. 1st Div. 1995); Milton v. Cary Med. Ctr., 538 A.2d 252, 256 (Me. 1988)).

[128] *Id.* (citing Miller v. Highlands Ins. Co., 336 So. 2d 636 (Fla. 4th Dist. App. 1976), *quashed sub nom.* Stern v. Miller, 348 So. 2d 303 (Fla. 1977)).

[129] *Id*. at 44–45.

the absurdity principle thus in declining to interpret statutes to include fetal persons.[130] For example, one court noted that reading "child" to include fetus in the reckless endangerment of a child statute could make the law reach as far as:

> becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, . . . continued use of legal drugs that are contraindicated during pregnancy, . . . not maintaining a proper and sufficient diet, . . . avoiding proper and available prenatal medical care, . . . failing to wear a seat belt while driving, . . . exercising too much or too little, . . . skiing or horseback riding.[131]

Thus, there is a favorable body of case law to draw upon.

Conclusion

The wrongful death strategy mobilizes tort law in the service of gendered power and control. Like other forms of litigation abuse, it deploys law as a tool of intimate intimidation and isolation. Like S.B. 8, it attempts to break down social bonds and chill people from offering or seeking help. It draws on older playbooks but adds the novel twist of going after confidantes. In a post-*Dobbs* world, it may face greater chances of success than earlier iterations of men bringing tort claims over their partners' abortions or other behavior during pregnancy. Like how reproductive justice advocates are equipping public defenders with tools against pregnancy criminalization, we must equip lawyers with tools to combat the wrongful death strategy and other similar civil claims—including those brought under S.B. 8. In a moment in which the 1860s are in vogue, we must block all attempts to use fetal personhood as the vehicle for resuscitating coverture and enabling men's dominion over women.

---

[130] *Id*. (citing State v. Lockwood, 218 P.3d 1008, 1011 (Ariz. App. 2d Div. 2009); Kilmon v. State, 905 A.2d 306, 311 (Md. 2006); Harding v. DeAngelis, 657 N.E.2d 758, 761 (Mass. App. 1995); Com. v. Welch, 864 S.W.2d 280, 283 (Ky. 1993); Com v. Kemp, 18 Pa. D. & C. 4th 53, 63 (Com. Pl. 1992)).

[131] *Kilmon*, 905 A.2d at 311.