Child and Family Law Journal

Volume 11 | Issue 1 Article 5

6-2023

The Independent Existence: A Look at Florida's Wrongful Death Statute in the Wake of Dobbs and Changing State Abortion Laws.

Katherine Bolliger

The Independent Existence: A Look at Florida's Wrongful Death Statute in the Wake of Dobbs and Changing State Abortion Laws.

Cover Page Footnote

[1] Roe v. Wade, 410 U.S. 113 (1973). [2] Planned Parenthood v. Casey, 505 U.S. 833 (1992). [3] Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022). [4] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022). [5] FLA. STAT. ANN. § 368.16 (LexisNexis 2022). [6] Lori K. Mans, Liability for the Death of a Fetus: Fetal Rights of Women's Rights, 15 U. FLA. J.L. & PUB. POL'Y. 295, 305 (2004) (citing Bombrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946)).

The Independent Existence: A Look at Florida's Fetal Wrongful Death Statute in the Wake of *Dobbs* and Changing State Abortion Laws.

Katherine Bolliger[*]

ABSTRACT

Following the Supreme Court's overturning of the federally mandated fundamental right to abortion founded in *Roe*[1] and *Casey*[2], the decision of whether a woman may terminate a pregnancy has returned to the states with the current Court's implementation of *Dobbs v. Jackson Woman's Health*.[3] In Florida the state government decided to reduce the gestational age for termination o fifteen weeks in July 2022, and further reduced the gestational age to six weeks in April 2023 provided that the Florida Supreme Court upholds the fifteen week ban.[4] This note operates under the fifteen week standard as the six week ban is not yet effective. While the executive and legislative have decided to reduce the gestational age of termination to fifteen weeks, the state still refuses to allow for a parent's recovery for the wrongful death of a fetus, holding that a fetus is not a person within the scope of the wrongful death act.[5]

---

[*] Katherine Bolliger is a second-year law student at Barry University Dwayne O. Andreas School of Law, and an associate editor on Barry's Child & Family Law Journal. Ms. Bolliger received her B.A. in English and Political Science from The University of Alabama in Tuscaloosa, Alabama. After graduating law school and passing the bar, Ms. Bolliger plans to work for the State Attorney's Office in Florida. First, I would like to thank my parents for supporting me in all my endeavors. I would also like to thank CFLJ's Faculty Sponsor Dean Terri Day, who has been instrumental in my research and writing process, and CFLJ's Editorial Board, particularly CFLJ's Editor-in-Chief and Notes & Comments editors, for selecting my note and helping make it publication ready.

[1] Roe v. Wade, 410 U.S. 113 (1973).

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

[3] Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022).

[4] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).

[5] FLA. STAT. ANN. § 368.16 (LexisNexis 2022).

This creates a congruity issue in the law surrounding fetuses and fetal rights in the states.

This note argues that Florida should resolve the issue of legal inconsistency created through the fetal laws of abortion, feticide, and fetal wrongful death by abrogating the Born Alive Rule where a parent could not recover for the death of a fetus unless the fetus was born alive.[6] Now that states can once again determine the issue of abortion, Florida should allow for the recovery for the tortious death of a fetus. If Florida allows for the wrongful death of a fetus, this will not give legal personhood rights to the fetus, but rather would allow for a greater understanding of parental rights for their fetus under the theory of subjective fetal personhood. The state has shown that it wishes to protect the interests of the potential future life and allowing for the recovery for the wrongful death of a fetus would further promote this interest.

[6] Lori K. Mans, *Liability for the Death of a Fetus: Fetal Rights of Women's Rights*, 15 U. FLA. J.L. & PUB. POL'Y. 295, 305 (2004) (*citing* Bombrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946)).

INTRODUCTION

In *Dobbs v. Jackson Women's Health,* the Supreme Court overturned *Roe v. Wade,* leaving the issue of a woman's right to terminate a pregnancy to the states.[1] This note will discuss how fetal personhood, based on Justice Alito's willingness, from the language in *Dobbs,* has opened the possibility and meaning of personhood to include fetuses. This potential willingness deviates from *Roe*, in which, the Court firmly stated that it was not including the term "fetus" within the meaning of a person.[2] Following *Dobbs,* the Florida legislature implemented Statute § 390.0111,[3] and the fifteen-week abortion ban.[4] This is emblematic of the gap between laws regarding fetal rights, with the disparity more evident as the state puts more restrictions on abortions but offers no recovery for the wrongful death of a fetus unless it is born alive.[5] To fix this the Florida legislature should make the laws regarding fetuses more congruent in a way that fits within the Florida Constitution, while still refusing to give the fetus personhood.

This note will introduce the concept of fetal wrongful death and fetal personhood, the language of the statutes considering *Dobbs*, and how the Florida legislature should take action to address these issues.

---

[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2269, 2283 (2022).

[2] Roe v. Wade, 410 U.S. 113, 158 (1973).

[3] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022). *See also* S. 300, 2023 Leg. Reg. Sess. (Fla. 2023); H.R. 7, 2023 Leg. Reg. Sess. (Fla. 2023) (Florida's House of Representatives and Senate each currently have a passed bill before the legislative body that would reduce the current fifteen-week gestation ban of abortions to six weeks gestation). *See also* Anthony Izaguirre, *DeSantis Signs Florida GOP's 6-Week Abortion Ban into Law,* ASSOCIATED PRESS (Apr. 14, 2023), https://apnews.com/article/florida-abortion-ban-approved-c9c53311a0b2426adc4b8d0b463edad1 (Governor DeSantis signed the six-week ban into law on Thursday, April 13, 2023. The law will only take effect if the Florida Supreme Court upholds the fifteen-week ban in a case before the Court).

[4] As the six-week ban is not yet in effect, this note only evaluates the fifteen-week ban. The argument is equally applicable whether the abortion ban is six or fifteen weeks, and the solution remains the same.

[5] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).

The first section of this paper will provide background on recovery for the death of a fetus in civil law, and the concept of fetal personhood, both under *Roe* and the Florida Constitution. Following that, the second section will analyze of the contrasting language in the abortion statutes and the wrongful death statute, focusing on how these statutes view the rights of the fetus, and discuss the potential changes from *Dobbs* for fetal personhood. Finally, this note will conclude by suggesting that the Florida legislature reexamine the statutes and clear up ambiguities so that the laws do not juxtapose against each other.

BACKGROUND

A wrongful death claim is a civil action that allows recovery where a death is caused by the negligence or willful act of another.[6] This section will explore the history of the standard for recovery for a wrongful death claim of a fetus and introduce Florida's standard of recovery. This section will also introduce and evaluate the debate around fetal personhood, including providing a background on the issue with the development through *Roe v. Wade* and *Planned P*arenthood *v. Casey.*[7] Finally, this section explores fetal personhood directly in Florida.

A. A History of Recovery in Civil Law for the Death of a Fetus.

In their article, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, Greer Donley, associate professor at University of Pittsburgh Law School, and Jill W. Lens, Professor at the University of Arkansas School of Law, state that "a wrongful death claim is statutory. It is the same claim a parent has if a living child were tortiously killed."[8] Black's Law Dictionary describes wrongful death as "a death caused by a tortious injury; a death caused by someone's negligence or willful act or omission."[9] In her article, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights*, Lori Mans, a graduate of University of Florida School of Law, says that the early common law view of fetal wrongful death and feticide were consistent, in that an unborn child and its mother were viewed as a single entity and, therefore, there was no recovery for the death of a fetus.[10]

---

[6] *Death*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[7] *See generally*, Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[8] Greer Donley & Jill W. Lens, *Abortion, Pregnancy Loss, Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1685 (2022).
[9] *Death*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[10] Lori K. Mans, Liability *for the Death of a Fetus: Fetal Rights or Women's Rights*, 15 U. FLA. J.L & PUB. POL'Y 295, 305 (2004).

The first case that presented the issue of fetal wrongful death in the United States was *Dietrich v. Inhabitants of Northampton*.[11] In *Dietrich*, Justice Oliver Wendell Holmes held that there can be no recovery for the wrongful death of a fetus because without its mother, the fetus had no separate existence.[12] Courts in the United States continued to use the *Dietrich* standard until 1946.[13] In 1946, the D.C. District Court held in *Bonbrest v. Kotz* that a parent could recover under a wrongful death claim for a viable fetus that was later born alive.[14] Thus, *Bonbrest* introduced the born alive rule applicable in Florida.[15] The *Dietrich* standard still applies to nonviable fetuses not later born alive because they are seen as being a part of the mother and, therefore, there was no claim.[16] Since Tort law is largely governed by the common law of the states, some states allow for fetal wrongful death at nonviability, some for viability whether born alive or not, and some have the strict standard that unless born alive, there is no recovery.[17] Florida is in the last group.[18] Mans discusses that most of the states that do not require viability of the fetus nor require viability for feticide, thus showing that there is a symmetry in the view of when a mother can recover or seek criminal punishment for her child's death.[19]

Under Fla. Stat. § 768.16, the Florida Wrongful Death Act, the death of a fetus by the negligent act of another does not create a cause of action for a parent to recovery for that fetus's death.[20] In *Duncan v. Flynn*, the Florida Supreme Court held that an unborn viable fetus was not a person within the meaning of § 768.16, as a fetus is not born alive until it acquires an existence separate and independent from the mother.[21] Florida created a negligent stillbirth law for the death of a fetus under *Tanner v. Hartog*.[22] Donley and Lens state, in their article, that the negligence claims for the negligent stillbirth of a fetus are based in common law and have a jurisdictional split where "some states require a physical injury other than the pregnancy loss; others apply the very

---

[11] Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15 (Mass. 1884).
[12] Douglas E. Rushton, *TORT LAW: The Tortious Loss of a Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice*, 61 S.C. L. REV. 915, 918-919, 923 (2010). *See also Dietrich*, 138 Mass. 14 at 15.
[13] *See* Mans, *supra* note 10, at 306.
[14] *Id.* (*citing* Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946)).
[15] *See* Mans, *supra* note 10, at 306.
[16] *Id.* at 308.
[17] *Id*.
[18] *Id.* at 309.
[19] *Id*. at 307.
[20] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).
[21] Duncan v. Flynn, 342 So. 2d 123, 127 (Fla. 1977).
[22] Tanner v. Hartog, 696 So. 2d 705, 708 (Fla. 1997).

restrictive negligent infliction of emotional distress duty rules, which severely limit the situations in which a plaintiff can recover such damages."[23] In *Tanner*, the Supreme Court of Florida held that a parent could recover for the death of a fetus despite the impact rule–where recovery of emotional harm requires some physical injury–but limited damages to emotional suffering and any expenses incurred from the pregnancy.[24] The Court deviated from the impact rule and allowing recovery for emotional damages when a stillbirth results from the negligence of another without the claimant sustaining a physical injury based on public policy consideration.[25]

B. Fetal Personhood in a Pre-Dobbs World

Fetal personhood is a controversial concept as to whether the fetus is a person in its own right prior to birth.[26] *Roe* and *Casey* expressly refused to adopt the concept of fetal personhood, holding that the fetus is not a person within the meaning of the constitution.[27] Florida's Wrongful Death Act follows this line of thought, [28] and supports its total ban of recovery for the wrongful death of a fetus because a fetus is not a person within the meaning of the statute until the fetus is born alive.[29] Criminal punishment for the murder of a fetus[30] and the termination of the fetus

---

[23] *See* Donley, *supra* note 8, at 1685.

[24] *See* Rushton, *supra* note 12, at 924; *see also* Shelly Kohler, *The Creation of a Cause of Action for Negligent Stillbirth Tanner v. Hartog,* 696 So. 2d 705 (Fla. 1997), 10 U. FLA. J.L. & PUB. POL'Y 227, 230 (1998) (explaining that Florida follows the impact rule, meaning that "for a plaintiff to recover damages for emotional distress, the impact rule requires the emotional injury suffered to result from some physical injury that the plaintiff sustained due to another's negligence").

[25] *See* Kohler, *supra* note 24, at 231-233 (In *Tanner*, the Court created an exception to the impact rule in line with an exception it created in a wrongful birth claim under *Kush v. Loyd*, 616 So. 2d 415, 423 (Fla. 1992). "The *Kush* court explained that the impact rule is inapplicable to tort actions for which damages are predominately emotional" stating that "public policy requires courts not to apply the impact rule to wrongful birth claims. Kohler explains that in *Tanner*, the Court held that "parents of a negligently stillborn child may recover for emotional damages regardless of the existence of an attendant physical impact. She also explained that as "a parent of a stillborn child is a foreseeable victim" and that a defendant can foresee his negligence causing the parents to suffer emotionally. Therefore, the deviation of the impact rule here does not "undermine the public policy justifications that underline the impact rule.")

[26] *See* Donley, *supra* note 8, at 1694.

[27] Roe v. Wade, 410 U.S. 113, 158 (1973); *see also Casey*, 505 U.S. 833 at 914.

[28] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).

[29] Duncan v. Flynn, 342 So. 2d 123, 127 (Fla. 1977).

[30] FLA. STAT. ANN. § 782.09 (LexisNexis 2022).

after fifteen weeks[31] conflates this idea as the state shows that they do not believe in strict adherence to the born alive rule.

Donley and Lens in their article state that there are three schools of thought when it comes to fetal personhood. [32] First, the pregnant person and the fetus are a single entity. Under this theory, the pregnant person is the only legal person and, therefore, the only one with any personhood in the eyes of the law.[33] As the pregnant person is the only legal person, it is the only one that has rights and remedies to harms.[34] The second theory is that the pregnant person and the fetus are separate, and each has their own legal personhood and rights.[35] Finally, the idea that the pregnant person and the fetus are "not one but not two."[36] Under this theory, the fetus is recognized as an "other," but not a legal person.[37]

Traditionally, in the United States, the Federal legislation and courts have not recognized the fetus as having fetal personhood, but *Dobbs* has called this into question.[38] In *Dobbs*, Justice Alito did not recognize fetal personhood but opened the door to the concept.[39] *Roe* and the 1969 Florida Constitution both followed the traditional view in the United States holding the fetus has no fetal personhood.

1. The Concept of Fetal Personhood Prior to *Roe v. Wade*

Traditionally, in the history of the United States, it has not recognized the concept of fetal personhood.[40] Fetal rights and fetal personhood prior to *Dobbs* were determined by common law.[41] According to Mans, "there was no basis under the common law for considering a fetus a person."[42]

In the United States, states predominately followed the born alive rule, where the unborn are not considered a person if and until they are born alive.[43] It used to be that unless a fetus was born alive, the fetus had no rights.[44] A fetus could inherit property, but if the fetus did not survive

---

[31] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).
[32] *See* Donley, *supra* note 8, at 1687.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *See* Donley, *supra* note 8, at 1694.
[39] *Id.*
[40] *See* Mans, *supra* note 10, at 300.
[41] *Id.*
[42] *Id.* at 305.
[43] C'Zar Bernstein, *Fetal Personhood and the Original Meaning of Person*, 26 TEX. REV. L. & POL. 485, 489 (2022).
[44] *Id.*

birth, the fetus lost the inheritance right.[45] As discussed earlier, the fetus had no rights in criminal or civil law as the fetus and the mother were viewed as a single entity.[46] Traditionally in the United States, as states followed the born alive rule, there was no fetal personhood, "for a child who is never born needs no provisions to sustain her life."[47]

In *Dobbs*, Justice Alito discussed the history of abortions in the common law of the United States. He found that pre-quickening abortions were illegal, supporting his analysis that the right to abortions was not in the history and tradition of the United States.[48] Quickening occurs near the middle of the pregnancy, when the first motion of the fetus in the womb is felt by the mother.[49] Justice Alito first discussed abortions in English law where he finds that pre-quickening abortions were not considered homicide but states that although it was not homicide, "it does not follow that abortion was *permissible* at common law–much less that abortion was a legal right."[50] He supports this theory with evidence from Hale and Blackstone that explained "a way in which a pre-quickening abortion could rise to the level of a homicide."[51] Alito found that, based on Blackstone and Hale, "if a physician gave a woman with child a potion to cause an abortion, and the woman died, it was murder because it was given to unlawfully destroy her child within her."[52] He believed that since the purpose was to punish the physician for "unlawfully destroying her child within her," this supports that abortions were considered murder.[53] Blackstone based this on the theory of transferred intent.[54] In these cases, though, the child's life is tied directly to the mother.[55] If the mother did not die, the physician could not be held criminally liable for the death of the fetus.[56] The fetus therefore still had no personhood. Its life was tied directly to the mothers.[57] Here, fetal personhood operated under the first theory of fetal personhood, that the mother and the fetus are a single entity.[58]

---

[45] *Id.* at 546.
[46] *See* Mans, *supra* note 10, at 305.
[47] Carl Wellman, *The Concept of Fetal Rights*, 21 L. & PHIL. 65, 68 (2002).
[48] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2250 (2022).
[49] *Quickening*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[50] *Dobbs*, 142 S. Ct. 2228 at 2250.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Dobbs*, 142 S. Ct. 2228 at 2250.
[57] *Id.*
[58] *See* Donley, *supra* note 8, at 1687.

Later in his opinion, Justice Alito cited to statutes criminalizing abortion prior to the adoption of the Fourteenth Amendment in 1868.[59] He cited to thirty-seven state statutes that criminalized abortion.[60] These abortion statutes focused on the miscarriage of the woman.[61] None of the statutes gave legal personhood status to the fetus.[62] A few of the statutes discussed the destruction of life or the child but focused on the cause of the miscarriage rather than the fetus.[63] Florida's statute, enacted in 1868, stated that "every person who shall administer to *any woman pregnant with a quick child* any medicine … with the intent to destroy the child … shall be guilty of manslaughter in the second degree."[64] The state held that this criminalization was for either the death of the fetus or the death of the mother.[65] Florida had one other provision focusing on the "intent to procure miscarriage of any woman" where the state held that if the woman does not die then the defendant would receive 1-7 years in prison or a fine.[66] The first provision gave the fetus rights when the fetus was viable only.[67] These statutes, while providing rights to the fetus, never proclaimed the fetus a person, therefore; there is no evidence of fetal personhood in the United States' early common law.

2. Fetal Personhood in the Federal Constitution and *Roe v. Wade*

There is no federal right to privacy explicitly stated in the United States Constitution, rather, the right developed from case law, providing the foundation for the right to abortion.[68] The Supreme Court first recognized the right to privacy in *Griswold v. Connecticut* in 1965 where the court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[69] The Court found that various guarantees "create zones of privacy."[70] These guarantees are found within the First Amendment's right of association, the Third Amendment's prohibition against quartering of soldiers in houses during times of peace without the owner's consent, the Fifth Amendment's self-incrimination clause, and

---

[59] *Dobbs*, 142 S. Ct. 2228 at 2285-96.
[60] *Id.*
[61] *Id*.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 2293 (emphasis added).
[65] *Dobbs*, 142 S. Ct. 228 at 2293.
[66] *Id.*
[67] *Id.*
[68] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[69] *Id.*
[70] *Id*.

the Ninth Amendment which provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[71] The Supreme Court incorporated these rights to the states through the Fourteenth Amendment's Due Process Clause concept of personal liberty, which the court later extended to abortions in *Roe v. Wade*.[72]

Roe v. Wade was the Supreme Court's landmark case that developed the right to abortion deriving from the right to privacy recognized in *Griswold*, and the concept of substantive due process.[73] Under the theory of substantive due process, the Court protects rights that are not expressly enumerated in the Constitution through the concept "that there are certain basic values 'implicit in the concept of ordered liberty'" that are protected under the Fourteenth Amendment's Due Process Clause.[74] For an implied right to be recognized under substantive due process, the "right at issue must be carefully defined and 'deeply rooted in this Nation's history and tradition.'"[75] Although the concept of deeply rooted in this nation's history and tradition came after the *Roe* and *Casey* decisions were decided, conservative Justices criticized the *Roe* Court for not attempting to ground the right to abortion as a liberty interest rooted in the United States' history and tradition.[76] In *Dobbs*, Justice Alito criticized this failure to ground the right to abortion in our country's history and tradition and used this fault to overrule *Roe*.[77]

In *Roe*, the Court stated that a women had the right to terminate her pregnancy under a trimester framework[78] holding, "the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, … and that it has still another important and legitimate interest in protecting the potentiality of human life."[79] While the states had an interest in the "potentiality of human life," the state's compelling interest was not developed until viability.[80] The Court

---

[71] *Id*. *See also* USCS CONST. amend. IX.
[72] Roe v. Wade, 410 U.S. 113, 153 (1973).
[73] *Id.* at 152.
[74] Terri Day and Danielle Weatherby, *The Dobbs Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis that Lies Ahead*, 64 WM. & MARY L. REV. ONLINE 1, 9 (2022).
[75] *Id.* at 9, 10; *see also* Wash. v. Glucksberg, 521 U.S. 702, 722 (1997) (In his opinion, Justice Rehnquist expounded on the "deeply rooted in this Nation's history and tradition" to limit the Substantive Due Process power).
[76] *See* Day, *supra* note 74, at 9; *see also* Lawrence v. Texas, 539 U.S. 558, 595 (2003).
[77] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).
[78] Roe v. Wade, 410 U.S. 113, 164 (1973).
[79] *Id.* at 162.
[80] *Id.* at 163.

held that that "the word 'person,' as used in the fourteenth amendment does not include the unborn" and "the unborn have never been recognized in the law as person in the whole sense."[81] The Court therefore expressly rejected the idea of fetal personhood and for the purposes of abortion the state has no right to impede the women's desire to terminate the pregnancy until after the fetus is viable.[82]

The cases held that a woman had the constitutional right to abortion before viability and that this right could not be taken away by the state until after viability, when the state's interest has matured.[83] This concept conformed to the ideas of criminal feticide laws and civil fetal wrongful death in most states.[84] The issue of fetal personhood is central to the abortion debate.[85] As Donley and Lens state in their article, antiabortionists actively seek the constitutional inclusion of fetal personhood at contraception in the Fourteenth Amendment's definition of "person" thereby eradicating abortion, as this would violate the fetal person's right to "life" and "liberty."[86] Abortion advocates, on the other hand, are generally wary of expanding attachment of any type of personal being to fetuses in the fear that doing so will cut off the claim to abortion entirely.[87] Donley and Lens explain that this will not happen though, because in their view, personhood status given to fetuses entirely depends on the pregnant women's view of that fetus.[88] Post-*Roe*, the question of fetal personhood became more relevant than ever. [89] *Dobbs* does not expressly say that there is fetal personhood, but Justice Alito made it clear that he is open to exploring the idea when he said, "it is very hard to see why viability should mark the point where 'personhood' begins."[90]

3. The Higher Protection of Privacy in the Florida Constitution.

Florida citizens have a higher protection to the right to privacy than is provided by the United States Constitution.[91] In 1980, the Florida legislature adopted Article 1, § 23 of the Florida Constitution, which

---

[81] *Id.* at 158.
[82] *Id*. at 164.
[83] *Id.*
[84] *See* Mans, *supra* note 10, at 305.
[85] *See* Donley, *supra* note 8, at 1693.
[86] *Id.*
[87] *Id*.
[88] *Id.* at 1695.
[89] *Id*. at 1727.
[90] *Id*. at 1694. *See also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2269 (2022).
[91] In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (stating that Florida's right to privacy is a "strong right to privacy not found in the Constitution").

states, "every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."[92] In *In re T.W.*, the Florida Supreme Court stated "the citizens of Florida opted for more protection from government intrusion when they approved Article I, § 23."[93] As the right to privacy is a fundamental right in the state of Florida, it is evaluated with strict scrutiny.[94] Strict scrutiny requires that the state must have a compelling governmental interest that is narrowly tailored for the government to intrude on the right.[95] The Florida Supreme Court has held that a woman's right to obtain an abortion implicates the state's privacy provision.[96] If the legislature wishes to impose a significant restriction on a woman's right to seek an abortion, the act must pass strict scrutiny.[97] This differs from *Casey*, in which residents would have to establish an undue burden or significant restriction to challenge laws implicating the fundamental right to privacy.[98] Florida law has been more protective of the women's right to terminate a pregnancy than the federal constitution prior to *Dobbs*.[99]

In his article, James Fox, professor of law at Stetson University, discusses the implementation of the right to privacy in Florida and its connection and inherent acceptance of the right to abortion.[100] He states, "no analysis can legitimately deny that as of November 1980 the right to privacy as a legal concept encompassed the right to obtain an abortion."[101] As the foundation for this argument, he discusses the revision commission and legislative proposal, in which he discussed *Roe* and what he thought the strong right to privacy would mean in Florida.[102] In a memorandum written to the Constitutional Revision Committee to

---

[92] FLA. CONST. art. I § 23 (2020).

[93] *Id.*

[94] Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017) (*citing In re T.W.* 551 So. 2d at 1192, "because the right to privacy is a fundamental right within Florida's constitution, this Court consistently has required that any law intruding on this right is presumptively unconstitutional and must be justified by a 'compelling state interest' which the law serves or protects through the 'least restrictive means.'")

[95] *In re T.W.*, 551 So. 2d 1186 at 1192.

[96] *Id,*

[97] N. Fla. Women's Health & Counseling Servs. v. State, 866 So. 2d 612, 621 (Fla. 2003).

[98] *Gainesville,* 210 So. 3d 1243 at 1256.

[99] James Fox, *An Historical and Originalist Defense of Abortion in Florida*, RUTGERS UNIV. L. REV. 1, 3 (forthcoming), https://ssrn.com/abstract=4224718.

[100] *Id.* at 1.

[101] *Id.* at 11.

[102] *Id.* at 5.

give the committee further information on the right of privacy, Gerald Cope, who at the time was the editor-in-chief of Florida State University Law Review and went on to become Chief Justice for the 3rd District Court of Appeals stated that there are three areas over which the right to privacy connected to: "decisional privacy, governmental surveillance, and governmental collection of the information."[103] Cope states that the first area, decisional privacy, is what *Roe* falls under.[104] Fox proffers that both Cope's law review article and the privacy memorandum "specifically cited *Roe* and referred expressly to abortion."[105] Patricia Dore, a professor of constitutional law at Florida State University, in testimony before the subcommittee, reinforced the right to privacy encompassing the right to abortion referencing of the right of "intimate decision-making" as well as citing to the *Griswold* line of cases.[106] For these reasons, Fox believes that the Florida Legislature was explicitly aware that the "right to privacy applied very directly to abortion laws" and therefore the legislature had the intent of implicitly incorporating *Roe* into Article I § 23.[107] He states that the "right to privacy set forth in section 23 was consistent with *Roe*."[108] This fact is further demonstrated through Article X § 22 of the Florida constitution, which states that "notwithstanding a minor's right of privacy provided in section 23 of Article I, the legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy."[109] In the words of Article X § 22, the right to privacy in Article I § 23 contains a minor's right to terminate her pregnancy.[110]

The abortion cases in Florida do not mention whether a fetus is a person, but the relevant cases follow *Roe*, and the cases on fetal wrongful death explicitly state that a fetus is not a person for the wrongful death statute,[111] it therefore follows that if the court or the legislature wanted to recognize the fetus as a person for abortion they would have. Florida common law does not support the understanding that a fetus is a person.[112] Since the cases follow *Roe*, they follow the explicit denial of

---

[103] *Id.* at 16.
[104] *Id.*
[105] *See* Fox, *supra* note 99, at 17.
[106] *Id.*
[107] *Id.* at 18.
[108] *Id.* at 20, 37, 38.
[109] FLA. CONST. art. X § 22.
[110] *Id.*
[111] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).
[112] *See* Fox, *supra* note 99, at 3, 12, 14-16.

personhood to the fetus stated in *Roe*.[113] Further, the legislature and the Court have both recognized that a fetus is not a person for the purposes of the wrongful death statute.[114] Therefore, the legislature and courts have denied fetal personhood in the statute and cases, it follows that a fetus is not viewed as having personhood in Florida.[115]

There is currently a case in Florida that is attempting to bring the issue that the right to privacy in Florida is enumerated and Governor DeSantis's fifteen-week limitation is unconstitutional as it unduly burdens privacy.[116] *State v. Planned Parenthood of Sw. & Cent. Fla.* was dismissed by the First District Court of Appeal ("DCA") as the case lacked standing, and the court therefore lacked the jurisdiction to hear the case.[117] The court also dismissed this issue under the political question doctrine, holding that the issue is best left to the legislature.[118] The Supreme Court of Florida has accepted jurisdiction on *State v. Planned Parenthood of Sw. & Cent. Fla.* and will hear oral arguments.[119]

ISSUES

The adherence of the born alive rule for the Wrongful Death Statute,[120] and the states departure through the abortion[121] and feticide[122] statutes create a congruity issue in the language of laws implicating fetuses. This section analyzes the legal issues the contrast creates as well as the implications the *Dobbs* decision has on the concept of fetal personhood. While allowing for the wrongful death in and of itself does not implicate fetal personhood, those opposed to the inclusion fear that allowing for the wrongful death of a fetus will allow the state to declare that the fetus is a person. This section will explore the impact the *Dobbs* decision has as well as the implications in Florida.

---

[113] *Id.*
[114] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).
[115] *See* Fox, *supra* note 99, at 26.
[116] State v. Planned Parenthood of SW. & Central Fla., 342 So. 3d 863, 866 (Fla. Dist. Ct. App. 2022).
[117] *Id.* at 868.
[118] *Id.*
[119] ACLU of Florida, *Florida Supreme Court to Hear Challenges to 15-week Abortion Ban, Which Remains in Effect*, ACLU (Jan. 23, 2023, 4:45 PM), https://www.aclu.org/press-releases/florida-supreme-court-hear-challenge-15-week-abortion-ban-which-remains-effect (the case is being argued by the ACLU of Florida).
[120] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).
[121] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).
[122] FLA. STAT. ANN. § 782.09 (LexisNexis 2022).

A. The Language Problem: Lack of Congruity Amongst Florida's Fetal Rights Laws

This section explores the language of the wrongful death, abortion, and feticide statutes. Here, this note introduces Florida's new termination of pregnancy statute, its language, and the language of the wrongful death statute. Then this section compares the language of the statutes in relation to one another.

1. Florida's New Termination of Pregnancy Standard

Dobbs gave the states the ability to set their own abortion laws.[123] Following the overturning of *Roe* in favor of *Dobbs*, states rapidly began altering their abortion statutes. Florida enacted its new law on July 1, 2022, just a week after the Court rendered the *Dobbs* decision on June 24, 2022.[124] Now that the state did not have to conform its laws to the viability standards, Florida lowered its gestational age limit such that, generally, a woman cannot terminate a pregnancy after the gestational age of fifteen weeks under the 2022 amended Fla. Stat. § 390.0111.[125] Florida has limited exceptions based on the health of the mother only.[126]

2. The Narrow Standard by Which Recovery for Fetal Wrongful Death is Measured in Florida

Florida conforms to the born alive rule that was created in *Bonbrest*.[127] Under the Florida Wrongful Death Act,

> when the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action to recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.[128]

The Florida Wrongful Death Act cites *Duncan v. Flynn* as the controlling caselaw for Florida's stance on parents recovering from the

---

123 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022).
124 § 390.0111 (LexisNexis 2022); *see also* Dobbs, 142 S. Ct. 2228.
125 *Id. See also* Dobbs, 142 S. Ct. 2228 at 2283.
126 FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).
127 Bonbrest v. Kotz, 65 F. Supp. 138, 138 (D.D.C. 1946).
128 *See* Mans, *supra* note 10, at 308.

negligence of another for the wrongful death of their fetus.[129] In *Duncan*, the court stated it "perceive[d] the legislative purpose of the wrongful death statute being to provide compensation within the ordinary contemplation of persons who have been born alive."[130] Here, the Supreme Court of Florida reaffirmed the decision in *Stokes v. Liberty Mutual Ins. Co.*, that "a right of action for wrongful death can arise only after the live birth and subsequent death of the child."[131] *Duncan* expanded *Stokes* to hold that a fetus is not a person for the purposes of wrongful death in Florida.[132] While holding for the *Bonbrest* Born Alive Rule, *Duncan* also follows the *Dietrich* "body part" theory where the fetus is not a separate entity and therefore can be viewed only as a body part of the mother.[133] In *Duncan,* the Court says, for the stillbirth of a fetus

> to constitute "live birth" so as to give rise to an action for wrongful death, a child must acquire a separate and independent existence of its mother. This view, we think provides a reasonably definitive test, is logical, and is supported by the authorities. Generally, the requirements of separate and independent existence will be met by a showing of expulsion (or in a Caesarean section by complete removal) of the child's body from its mother with evidence that the cord has been cut and the infant has an independent circulation of blood. Should the death occur prior to the cord being severed, expert medical evidence may be required to determine whether such separate and independent existence had been attained by the infant prior to that time.[134]

In "accepting that a fetus is not a separate legal entity," the fetus remains a part of the mother and as such, injuries for the loss of a fetus are recoverable only to the extent that she lost an arm or a leg.[135] Florida does allow parents to recover for the death of a fetus by the negligent act of another through a negligent stillbirth claim, but damages are limited to emotional suffering.[136]

---

[129] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).
[130] *Duncan* v. Flynn, 342 So. 2d 123, 126 (1977).
[131] *Id.* at 126; *see also* Stokes v. Liberty Mutual Ins. Co., 213 So. 2d 695 (Fla. 1968).
[132] *Id.*
[133] *See* Mans, *supra* note 10, at 305 (citing *Dietrich*, 138 Mass. 14 (Mass. 1884)).
[134] *Duncan*, 342 So. 2d at 126.
[135] *See* Rushton, *supra* note 12, at 923.
[136] Tanner v. Hartog, 696 So. 2d 705, 708 (Fla. 1997).

3. The Juxtaposition of the Language between Recovery for Fetuses in Tort Law versus the Language used in Other Legal Remedies.

Florida's standard for fetal wrongful death is consistent with the traditional common law understanding of recovery for the death of a fetus in both the criminal and civil understanding.[137] But in Florida, the criminal understanding of feticide is that the individual who committed the act against the mother can be held criminally liable for the death of a fetus through the actions of the mother.[138] In 2013, the feticide statute changed to state that the killing of an unborn quick ("viable") unborn child constitutes murder.[139] In 2022, the Florida legislature extended feticide protection to any stage of development.[140] In *Wyche v. State*, the court said that this is in opposition to the common law requirement that the fetus be born alive.[141] The case states that "the legislature has expressed a clear intent to recognize an unborn quick child as a human being entitled to the protection of Florida's homicide statute."[142] In *Wyche*, the court goes on to say that the legislature through the 2013 feticide law abrogated the born alive rule.[143] Similarly, Florida's new abortion standard holds that pregnancies cannot be terminated after fifteen weeks of gestation except for a few exceptions.[144] These exceptions are:

> (1) two physicians certify in writing that the termination is necessary to save the mother's life or to prevent irreversible physical impairment;
>
> (2) two physicians certify in writing that there is a medical emergency that requires termination to prevent death of the mother or imminent substantial and irreversible physical impairment;

---

137 *See* Mans, *supra* note 10, at 300.
138 FLA. STAT. ANN. § 782.09 (LexisNexis 2022).
139 *Id*.
140 FLA. STAT. ANN. § 775.021(5)(e) (LexisNexis 2022).
141 Wyche v. State, 232 So. 3d 1117, 1120 (Fla. Dist. Ct. App. 2017).
142 *Id.*
143 *Id*.
144 FLA. STAT. ANN. §390.0111 (LexisNexis 2022); *see also* S. 300, 2023 Leg. Reg. Sess. (Fla. 2023) (the law reducing the gestational limit to six weeks creates an additional exception for the victims of rape or incest. Under the law titled "Pregnancy and Parenting Support Act," not yet in effect, rape and incest victims can seek an abortion up to fifteen weeks' gestation if they show they are the victim of a rape or incest through "a copy of a restraining order, police report, medical record, or other court order").

> (3) two physicians certify that the fetus has not reached viability the fetus has a fatal fetal abnormality.[145]

Necessity to save the mother's life is limited to physical threats only.[146] Both §390.0111[147] and §782.09[148] starkly contrast the born alive rule and the allowable fetal gestation periods are lower than the period set for tort law.

The issue with the lack of congruity is that by not allowing for recovery for the wrongful death of a fetus, the legislature of Florida shows that its agenda with the abortion ban is not in protecting the interests of pregnant people.[149] Professor Cynthia Soohoo says that states began to move away from the born alive rule in the 1950s, allowing wrongful death claims and homicide prosecutions against third parties for their wrongful conduct.[150] These laws "[protect] the interests of pregnant people, rather than recognizing prenatal life as an independent person and rights holder."[151] The connection between these laws is the born alive rule. Florida has shown through the allowance of homicide prosecution for the death of a fetus[152] and the fifteen weeks gestational ban on abortion[153] that lawmakers are not adhering to the born alive rule in areas that historically required it. Therefore, Florida should move away from the born alive rule for the wrongful death of a fetus as well.

B. The Dobbs Effect on Fetal Personhood and the Tort Law Conflation of the Idea.

In the *Dobbs* decision, Justice Alito brought fetal personhood into question.[154] Justice Alito stated that the offered characteristics of personhood are "sentience, self-awareness, the ability to reason, or some combination thereof."[155] He stated that "by this logic, it would be an open question whether even born individuals, including young children

---

[145] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).
[146] *Id.*
[147] *Id.*
[148] FLA. STAT. ANN. § 782.09 (LexisNexis 2022).
[149] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).
[150] Symposium, *The Future of Reproductive Rights*: *An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81, 94 (2022) [hereinafter *The Future of Reproductive Rights*].
[151] *Id.* at 95.
[152] FLA. STAT. ANN. § 782.09 (LexisNexis 2022).
[153] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).
[154] *See* Donley, *supra* note 8, at 1694.
[155] Dobbs v. Jackson Women's Health Org.,142 S. Ct. 2228, 2269 (2022).

or those afflicted with certain developmental or medical conditions, merit protection as 'persons.'"[156] Justice Alito said that a fetus in utero, "is regarded as a person in being."[157] Donley and Lens assert that though Justice Alito does not take a position on fetal personhood, his opinion in *Dobbs* shows that he is open and could be persuaded by the argument.[158]

Dobbs signals the potential existence and movement towards fetal personhood.[159] The fetus historically in the United States was not afforded personhood.[160] One way to explore fetal personhood is the concept of person within the language of the law.[161] According to Bernstein, this would view the word person, as "the fixed meaning of a word or phrase is its original legal meaning … rather than [the word's] ordinary-language public meaning."[162] The purpose of "person" in legal contexts is not to "define human life, but to enable an autonomous interaction with the law."[163] Carl Wellman, professor of Philosophy at Washington University St. Louis, states,

> [t]he human fetus is incapable of action in the relevant sense, then one must conclude that the language of fetal rights is conceptually incoherent…. the concept of fetal rights may be useful in the law, it is misleading in legal theory because it falsely suggests that fetuses can and do exercise their rights in the same ways that normal adult right-holders do.[164]

Dobbs has signaled that the Justices might be willing to conceive the notion of fetal personhood, but many legal scholars hold that at the time and in the language of the law, there is no fetal personhood.[165]

Florida's wrongful death statute explicitly states that a fetus is not a person within the meaning of that statute.[166] Should advocates of abortion support the strict wording of the Florida Wrongful Death Act regarding fetuses? Donley and Lens posit that "the fetus does not innately have any personhood value … 'a fetus cannot participate in personhood or the practice of personhood; it must be called into

---

[156] *Id*.
[157] *Id*. at 2252.
[158] *See* Donley, *supra* note 8, at 1694.
[159] *Id.*
[160] *Id. See also Roe*, 410 U.S. 113 at 158; *Casey*, 505 U.S. 833 at 914 (1992).
[161] *See* Bernstein, *supra* note 43, at 495.
[162] *Id.*
[163] *See* Donley, *supra* note 8, at 1694.
[164] *See* Wellman, *supra* note 47, at 91.
[165] *Id*; *see also* Dobbs v. Jackson Women's Health Org.,142 S. Ct. 2228, 2252 (2022).
[166] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).

personhood by other persons.'"[167] Therefore, under this theory, a fetus would have subjective personhood through its parents.[168] Meaning that a fetus has personhood at some points and not others.[169] This is not a bright line ruling on fetal personhood, but rather a subjective test based on the parents.[170]

The *Dobbs* opinion has opened the door for personhood to be granted to a fetus, and based on the opinion, states could start determining that for themselves.[171] As Terri Day, Associate Dean of Students and Professor of Law at Barry University School of Law, and Danielle Weatherby, Professor of Law at University of Arkansas School of Law, state in their article, *The Dobbs Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis that Lies Ahead*, that while the majority and the concurring opinions "deny taking a moral position on abortion, the emphasis on potential life to distinguish the abortion cases from the other precedents suggested otherwise."[172] They argue that by abandoning the right for women to make their own decision about whether to terminate pregnancy, the Court has granted itself the right to declare when life begins.[173] By overturning *Roe*, the Court "has adopted one theory of life [to] override all 'rights of the pregnant woman.'"[174] As the Court left the issue of deciding abortion to the states, it has therefore also left it to the states to determine when potential life becomes life and the fetus has legal personhood.[175] The Florida legislature has determined that a woman cannot have an abortion past fifteen weeks of gestation.[176] It could be argued from this that under the Florida regime, the fetus is a legal person following those fifteen weeks. If this is Florida's intent, the fact that it states that a fetus is not a person for the purposes of the wrongful death statute complicates this idea. How can a fetus seemingly have rights in one area of the law, but the legislature clearly stated that it has no rights elsewhere where rights would be applicable? Is the right only afforded to the pregnant woman? If that is the case surely, granting more recovery for the loss of a wanted and viable fetus is greater than the punishment of the removal of an unwanted potential life that is not yet

---

[167] *See* Donley, *supra* note 8, at 1691.
[168] *Id*. at 1694.
[169] *Id.*
[170] *Id.*
[171] *See* Donley, *supra* note 8, at 1694; *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252, 2269, 2284 (2022).
[172] *See* Day, *supra* note 74, at 17.
[173] *Id.* at 18.
[174] *Id; see also*, *Dobbs*, 142 S. Ct. 2228 at 2320 (Breyer, J., dissenting).
[175] *Dobbs,* 142 S. Ct. 2228 at 2283.
[176] FLA. STAT. ANN. 390.0111 (LexisNexis 2022).

even viable for life.[177] By overturning *Roe*, *Dobbs* has cracked the door for the states to take total control of the concept of when life begins, and Florida has yet to even make fetal laws remotely uniform.[178]

SOLUTION

The Florida Legislature should abrogate the born alive rule for the Wrongful Death Act to make the opposing statutes congruent to clear up any confusion or misconceptions regarding the rights provided to fetal life.

The authority for resolving the discrepancy in the language of the laws for the wrongful death of a fetus and abortion lies with the Florida legislature. As the Florida Wrongful Death Act is a statute, the Florida legislature will need to amend the statute to make the language more congruent to other statutes within the state involving fetuses.[179] Until the legislature decides to allow recovery for the wrongful death of a fetus, Florida courts will continue to not grant recovery regardless of the gestational period of the fetuses.[180]

For the court to change the Florida Wrongful Death Act to include recovery for the negligent death of a viable fetus, the court will have to abrogate the born alive rule:

> The basic dichotomy was defined by *Bonbrest* as deciding whether an unborn child is a "part" of the mother or a "separate, distinct, and individual" entity. If a court believes that separateness is what counts, then it will probably opt for viability, the time when the fetus can be separated from the pregnant woman and survive. But if it believes that it is individuality that matters most, then it will decide that the fetus becomes a legal person at conception when it is brought into existence with its own genetic code.[181]

This paper argues that the legislature does not have to grant the fetus the rights of legal person but should allow for recovery in actions claiming the wrongful death of a fetus and abrogate the born alive rule. The legislature has shown that it is not following the born alive rule for feticide and abortion, as a criminal defendant can be charged with the death of a fetus at any point in the pregnancy[182] and abortion is banned

---

177 *See* Donley, *supra* note 8, at 1719.
178 *Dobbs*, 142 S. Ct. 2228 at 2283.
179 FLA. COST. art. 3, § 6.
180 *See* Mans, *supra* note 10, at 309.
181 *See* Wellman, *supra* note 47, at 78-79.
182 FLA. STAT. ANN. § 782.09 (LexisNexis 2022).

after fifteen weeks.[183] In both of these cases, the pregnant woman's interest and state's interest in the potential human life is protected prior to the fetus being born alive despite the fact that historically, this protection was barred by the born alive rule.[184] Therefore, since Florida has deviated from the born alive rule for the feticide statute and the abortion statute, they should for wrongful death as well and allow recovery.

The worry is whether allowing protection of the pregnant person's interest in the potential human life of the fetus will be conflated into the creation of fetal personhood.[185] When states began to pass wrongful death and homicide provisions in 1986, Professor Dawn Johnsen cautioned that this "often resulted in a dangerous conceptual move where legislatures and courts identif[ied] the fetus rather than the woman as the locus of the right when there is no live birth."[186] Professor Johnsen also noted that this resulted from careless lawmaking instead of being an intentional attack.[187] While this threat does exist, Florida should nonetheless allow recovery for the wrongful death as it protects the pregnant person's interest in their fetus' potential life rather than granting the fetus personhood with all legal rights.

If Florida changes this statute, that does not mean that it must accept the fetus as a person. Most states today allow the parent of a viable fetus to recover for the death of that fetus due to the negligence of another.[188] If Florida were to implement this rule it could take the approach of other states and bring into view the subjective belief of personhood created by the parents.[189] The argument against abandoning the born alive rule is that "the unborn child could not be given any unconditioned and independent right not to be wrongfully injured because she is not yet an independent person."[190] This should not be the case though. Just because the state does not want to accept a fetus as an independent person, does not mean that a parent that lost their viable fetus through another's negligence should not be able to bring suit and recover damages based on that loss and on more grounds than just emotional.[191] Allowing for the wrongful death of a fetus only creates a legal right for the parent, not the fetus, and therefore does not rest on the

---

183 FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).
184 *See* Mans, *supra* note 10, at 306.
185 *See* Donley, *supra* note 8, at 1693.
186 The Future of Reproductive Rights, *supra* note 150, at 97,98.
187 *Id.* at 98.
188 *See* Donley, *supra* note 8, at 1684.
189 *Id.*
190 *See* Wellman, *supra* note 47, at 69.
191 *See* Donley, *supra* note 8, at 1688.

concept of the fetus being a separate legal person.[192] The damages sought are based on the lost developing relationship as the pregnant person forms a bond with the life inside of her.[193] This does not mean that the fetus is a legal person, for it is not, but the human mother has started to create personhood for the fetus, because it is a fetus that is wanted and desired the fetus's personhood must be created by another human.[194]

If the Florida legislature would allow for the recovery for the death of a viable fetus, this would allow the grieving parents of the fetus to get damages to account for their loss.[195] This was a life that they expected to come to fruition.[196] If not for the negligence of another, their fetus would develop into a life.[197] In *Roe*, Justice Blackmun noted "that wrongful death recovery for a fetus, vindicate[ed] the parent's interest and thus [was] consistent with the view that the fetus, at most, represents only the potentiality of life, and not a legal person."[198] Is this not exactly what *Roe* believed about when the state's interests had matured to the point where the state could protect fetal life?[199] Either way, the state should allow for recovery at some point in time, even if not born alive, because it furthers the state's interest in protecting the fetal life as well as protecting the pregnant person's interest in the fetal life.

CONCLUSION

The majority opinion in *Dobbs* has reopened the concept of fetal personhood while also leaving the issue of abortion to the state.[200] This creates an issue in Florida because following the decision, the state placed stricter restrictions on abortion, but at the same time there is a stark gap in the legal rights for the death of a fetus as Florida does not allow for any civil recovery for the wrongful death of a fetus unless it is born alive. The language of fetal wrongful death[201] is stark in comparison to the criminal liability for the murder of a viable fetus[202] and the abortion standard[203] as neither require the born alive rule. The criminal

---

[192] *Id.*
[193] *Id.*
[194] *Id*.
[195] *Id.* at 1693.
[196] *See* Donley, *supra* note 8, at 1693.
[197] *Id.*
[198] The Future of Reproductive Rights, *supra* note 150, at 95 (citing *Roe,* 410 U.S. 113 at 162.).
[199] *Id.*
[200] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2269, 2283 (2022).
[201] FLA. STAT. ANN. § 768.16 (LexisNexis 2022).
[202] FLA. STAT. ANN. § 782.09 (LexisNexis 2022).
[203] FLA. STAT. ANN. § 390.0111 (LexisNexis 2022).

punishment gives those grieving the loss of the fetus more ability to get the justice they deserve, while the abortion standard creates more protections for the potential life while placing greater burden on the woman. The language of the wrongful death statute also makes it clear that for the purposes of that statute, a fetus is not a person.[204] The abortion standard though, while not giving the fetus personhood, as it should not, gives more protection for the potential life. In *Roe*, the Court made it clear that a fetus was not a person,[205] but in *Dobbs*, Justice Alito left to the states the decision of when legal personhood begins.[206] To clear up these issues, the Florida legislature should change the wrongful death statute to allow a parent to recover for the death of a viable fetus. By doing this, Florida would not be giving personhood to the fetus and therefore would not allow for even stricter abortion standards. The legislature should allow for recovery though because it allows grieving parents to be compensated for their physical and emotional pain of losing their baby that they wanted. If the state wants to give more fetal rights, they should allow parents to recover for the death of a viable fetus even though it was not born alive.

---

[204] Duncan v. Flynn, 342 So. 2d 123, 127 (Fla. 1977).
[205] Roe v. Wade, 410 US 113, 158 (1973).
[206] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2269, 2283 (2022).

VOLUME 11 NUMBER 1 CHILD AND FAMILY LAW JOURNAL PAGES 1- 134 SUMMER 2023