Prenatal Torts: Reproductive Rights with Teeth

Andrew H Jones, Emory University

Available at: https://works.bepress.com/andrew_jones/1/
I. INTRODUCTION

The purpose of tort law is to restore the plaintiff to the position he or she would have occupied had the complained of injury not occurred.\textsuperscript{1} To this end, the measure of damages is the amount which will compensate for all detriment proximately caused.\textsuperscript{2} But, when the causal link between the wrong and injury is abortion, and the harm relates to the existence of a human life, the issue of recovery becomes complicated. The difficulty of the issue is aggravated by the existence of conflicting principles, such as protecting a constitutionally recognized right to refrain from procreation,\textsuperscript{3} and maintaining the integrity of the value of human life.\textsuperscript{4} As a result of this conflict, the theoretical underpinnings of tort recovery are sometimes compromised. Controversial prenatal torts, such as wrongful conception, wrongful life, and wrongful birth, are causes of action which present such a complicated issue, and the conflicting principles driving the controversy are the focus of this paper.

These causes of action lie at the intersection of tort law and reproductive rights. But for the right to terminate pregnancy, these causes of action would not exist. Moreover, tort recovery, in this context, is a means of vindicating reproductive rights. Unavoidably, a stance on these prenatal torts is a function of the varying principles underlying reproductive rights. And weighing them against the underlying utility in financially compensating plaintiffs is a real world application which removes the reproductive rights discussion from the abstract. As such, this

\begin{itemize}
\item \textsuperscript{1} \textsc{Restatement (Second) of Torts} § 917 (1979).
\item \textsuperscript{2} \textit{Id.}
\item \textsuperscript{3} Liddington v. Burns, 916 F. Supp. 1127, 1131 (W.D. Okla. 1995) (referencing \textsc{Roe v. Wade}, 410 U.S. 113 (1973)).
\item \textsuperscript{4} Morris v. Sanchez, 746 P.2d 184, 187 (Okla. 1987).
\end{itemize}
paper will explore the intersection of tort law and reproductive rights to inform an evaluation of the attendant conflicting principles.

This paper first provides a contextual scope of these relatively new causes of action. The paper then discusses the concerns surrounding these prenatal torts. Next, the paper will evaluate the three-pronged approach of the reproductive issues discussion—equal citizenship, relational privacy, and individual liberty—in the context of the concerns surrounding these prenatal torts. Finally, this paper will deliberate the merits of the conflicting principles driving the prenatal tort controversy.

II. A CONTEXTUAL SCOPE OF THE PRENATAL TORTS

A. Wrongful conception, wrongful life, and wrongful birth: three related prenatal torts

There are three related prenatal torts: wrongful conception, wrongful life, and wrongful birth. These causes of action have substantial overlap and all fall within the traditional boundaries of negligence actions. In a wrongful conception action, a parent claims that the physician’s negligence in the provision of contraceptives, in the performance of a sterilization procedure, or in the performance of an abortion procedure, led to the birth of a healthy and

---

5 At the outset, it is important understand that there is no uniform definition for each of these causes of action. E.g., Grossbaum v. Genesis Genetics Inst., LLC, CIV.A. 07-1359 GEB, 2011 WL 2462279 (D.N.J. 2011) aff'd, 489 F. App'x 613 (3d Cir. 2012) (“The Court notes that what [the] Court of Appeals of New York refers to as a ‘wrongful life’ claim...more closely resembles what the New Jersey courts refer to as a wrongful birth claim: that is, parents’ claim that negligent medical advice, diagnosis, or treatment deprived them of the choice of avoiding conception or terminating the pregnancy.”). Courts sometimes appear to use their names interchangeably, while others seamlessly extend the rationale from one to another. See Gordon T. Houseman, Wrongful Birth as Negligent Misrepresentation, 71 U. TORONTO Fac. L. Rev. 9, 14 (2013). The definitions provided in this paper are those used with the highest frequency and consistency in judicial opinions. In addition, the terms wrongful conception, wrongful birth, and wrongful life will be collectively referred to as “prenatal torts” for generalization purposes in this paper.

6 Liddington, 916 F. Supp. at 1131.
normal, but unplanned child.\textsuperscript{7} The majority of jurisdictions do not allow recovery for ordinary child rearing costs.\textsuperscript{8}

In a wrongful life action, the cause of action is brought on behalf of an impaired child.\textsuperscript{9} The child alleges that, but for the defendant's negligent advice or treatment, the child would not have been born.\textsuperscript{10} The impairment is not caused by the defendant; the only negligence is failing to determine or failing to inform the parents of the defect before birth.\textsuperscript{11} The majority of jurisdictions refuse to recognize this tort.\textsuperscript{12} Courts rejecting this tort have done so by reasoning that there is no legal right not to be born.\textsuperscript{13}

Wrongful birth actions, on the other hand, are brought by the parents, who claim they would have avoided conception or terminated the pregnancy had they been properly advised of the risks or existence of birth defects to the potential child.\textsuperscript{14} In a wrongful birth action, a parent claims the physician’s negligence caused the birth of an unhealthy, abnormal child,\textsuperscript{15} but not that

\begin{itemize}
  \item \textsuperscript{7} Id. at 1130.
  \item \textsuperscript{8} See Russell G. Donaldson, Annotation, Recoverability of Cost of Raising a Normal, Healthy Child Born as Result of Physician's Negligence or Breach of Contract or Warranty, 89 A.L.R. 4th 632, § 3 (1991) (citing thirty two jurisdictions which do not allow recovery for ordinary child rearing costs for wrongful conception actions).
  \item \textsuperscript{9} Procanik v. Cillo, 478 A.2d 755, 760 (N.J. 1984).
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} Arche v. U.S. Dep't of Army, 798 P.2d 477, 478 (Kan. 1990).
  \item \textsuperscript{13} E.g., Arche, 798 P.2d at 479.
  \item \textsuperscript{14} Id. at 478.
  \item \textsuperscript{15} Liddington v. Burns, 916 F. Supp. 1127, 1130 (W.D. Okla. 1995).
\end{itemize}
the physician caused the impairment.\textsuperscript{16} The negligence is in not discovering the impairment.\textsuperscript{17} Courts have stated that attendant to a patient’s right to have an abortion is the right to seek medical advice that might lead to the decision to have an abortion, and that there is a correlative duty of health care providers not to deprive patients of an opportunity to make an informed decision.\textsuperscript{18}

Note the limitations of these causes of actions. First, time plays a unique role in that it can result in a transposition of liability in defiance of even culpable conduct. After the point of viability, the causal link is severed, rendering negligent conduct not actionable. Accordingly, as legislators shorten the statutorily defined point at which viability occurs, the window for actionable conduct shrinks.

Second, the occurrence of harm is a function of the individual’s idiosyncrasies; that is, if the plaintiff would not have aborted the fetus, due to personal convictions, for example, then no choice was lost, and thus no injury was inflicted. Third, whether a doctor’s omission is negligent is a function of the availability of technology that would have enabled the doctor to discover the defect. Ironically, the more scientific innovation progresses, the more exposure doctors have.

Also note what these causes of action do not allege. In the case of an abnormal child, the defendant does not cause the abnormality. An illustrative comparison is a defendant pharmaceutical company that manufactures a drug the mother takes during pregnancy that causes

\begin{itemize}
  \item \textsuperscript{16} \textit{Arche}, 798 P.2d at 478.
  \item \textsuperscript{17} \textit{Id.} at 480.
  \item \textsuperscript{18} \textit{E.g.}, \textit{Liddington}, 916 F. Supp. at 1130.
\end{itemize}
birth defects. The pharmaceutical company’s liability would arise from an affirmative act, while a doctor’s liability in a prenatal tort arises from an omission. It is the failure to disclose information regarding the health of the fetus that gives rise to liability. And the sources of the duty to disclose this information include common law holdings, informed consent statutes, and the due process liberty right of the Fourteenth Amendment.

B. Prenatal tort spectrum

As mentioned above, implicated in these prenatal torts are both pre-conception and post-conception reproductive decisions resulting in either normal or abnormal children. These factual variations have resulted in disparate judicial decisions, and the following cases demonstrate these variations.

In Wilbur v. Kerr, after a negligent vasectomy resulted in a healthy child, the parents brought a wrongful birth action against their physician. The Supreme Court of Arkansas denied the parents’ claim for the expenses incurred in raising their unwanted child. Contrast this pre-conception negligence with the post-conception negligence in Rieck v. Med. Protective Co. of Fort Wayne, Ind. In Rieck, the plaintiff mother’s physician failed to determine that she was pregnant in time for her to obtain a lawful abortion. The mother brought a wrongful birth

---

19 This would be considered a prenatal-injury tort. In prenatal-injury torts, the doctor's negligence causes the fetus to suffer some harm in utero; that is, but for the doctor's negligence, the child would have been born “with a sound mind and body.” Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960).


21 628 S.W.2d 568 (Ark. 1982).

22 Id.

23 219 N.W.2d 242 (Wis. 1974).
action against her physician, and the Wisconsin court denied damages for raising the healthy, but unplanned child.\textsuperscript{24}

Now, consider \textit{Speck v. Finegold}, a case dealing with pre-conception and post-conception negligence resulting in an unhealthy child.\textsuperscript{25} In \textit{Speck}, the plaintiff parents had two children born with neurofibromatosis. The husband subsequently had a vasectomy, which failed. After the wife became pregnant, she sought to have an abortion, which also failed. As a result, the plaintiff parents had a third child born with neurofibromatosis. The plaintiff parents were awarded damages for expense attributable to the birth and rearing of the child, mental distress and physical inconvenience attributable to the child’s birth.

An example of a failure to diagnose case is \textit{Robak v. United States}, in which the plaintiff mother’s physician failed to diagnose her rubella syndrome and inform her of the risk of damages to the fetus.\textsuperscript{26} After the child was born with rubella syndrome, the parents brought a wrongful birth action and received damages for the cost of raising and supporting the child.

Contrast the damages awarded in \textit{Robak} to those awarded in \textit{Shull v. Reid}, a similar case involving a failure to diagnose.\textsuperscript{27} In \textit{Shull}, the parents of child born with a Cytomegalovirus infection brought a wrongful birth action against the attending physician, alleging they would have terminated the pregnancy had the physician properly diagnosed the infection during the first trimester. The Oklahoma Supreme Court allowed recovery for the extraordinary expenses, but not the normal and foreseeable costs of raising a normal, healthy child.

\textsuperscript{24} \textit{Id.}
\textsuperscript{25} 439 A.2d 110 (Pa. 1981).
\textsuperscript{26} 658 F.2d 471 (7th Cir. 1981).
\textsuperscript{27} 258 P.3d 521 (Okla. 2011).
Finally, consider *Azzolino v. Dingfelder*, a case in which the mother gave birth to a child with Down syndrome after her physician failed to advise her of the availability of amniocentesis and genetic counseling which would have shown that the pregnancy would result in a child with Down syndrome.\(^{28}\) The Supreme Court of North Carolina held that wrongful life and wrongful birth claims were not cognizable under the law.

**C. Contours and variations**

Consider the following: In contemplation of parenthood, a married couple was tested for genetic mutations that would predispose any infant which they produced to disability and impairment.\(^{29}\) After being identified as carriers of the cystic fibrosis gene mutation, they decided to pursue in vitro fertilization and to undergo pre-implantation genetic diagnosis of their embryos to eliminate the potential for a cystic fibrosis baby. They underwent retrieval and insemination procedures for the creation of embryos that were forwarded to a genetic laboratory that advised them that 2 of 10 embryos were free of the genetic mutations that were suitable for a cystic fibrosis free infant. The two suitable embryos were implanted, but resulted in child disabled with cystic fibrosis.

The married couple, along with their child, filed a wrongful birth/wrongful pregnancy hybrid claim alleging negligence in selecting and confirming the appropriate diagnostic tests that were performed, and thereafter implanted a defective embryo resulting in the birth of cystic fibrosis infant.\(^{30}\) Applying New York law, the federal court dismissed the case based on the applicable medical malpractice statute of limitations. Although this court decision lacked

\(^{28}\) 337 S.E.2d 528 (N.C. 1985).


\(^{30}\) *Id.*
substantive discussion, it is an interesting fact pattern that could foreshadow the direction in which prenatal torts are heading.\footnote{Judith Daar, \textit{Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?}, 23 COLUM. J. GENDER & L. 257, 278 (2012).}

With respect to the damages, rearing costs are traditionally sought in these causes of action. These include the projected expense for maintaining, supporting and educating the child during its minority.\footnote{Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).} A variation on this is to award the rearing costs offset by the benefits conferred upon the parents as a result of the child’s birth. That is, for the child’s aid, comfort and society.\footnote{Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990).} The purpose of this is to avoid granting plaintiffs a windfall.\footnote{Ochs v. Borrelli, 445 A.2d 883, 885-86 (Conn. 1982).}


The doctrine of damage mitigation has generally not been applied to these prenatal torts. This doctrine requires a plaintiff to take reasonable measures to minimize the financial consequences of the defendant’s negligence.\footnote{Dan B. Dobbs, Remedies §3.7 (1973).} One court explained that, in the context of these
prenatal torts, this doctrine would require that the child be aborted or put up for adoption.\textsuperscript{39} However, failure to mitigate has not been recognized as a defense on autonomy grounds.\textsuperscript{40}

For example, categorizing the mitigation issue as a “Hobson’s choice,” the Supreme Court of Wisconsin concluded that it is not “reasonable to expect parents to essentially choose between the child and the cause of action,” and declined to apply the mitigation principle because wrongful birth cases involve “highly personal matters [that] involve deeply held moral or religious convictions.”\textsuperscript{41}

III. CONCERNS SURROUNDING THE PRENATAL TORTS

A. Prenatal tort disfavor

Scholarly concerns surrounding these prenatal torts include: the coercive influence of these torts on individuals with disabilities, their families, and greater society;\textsuperscript{42} and that judicial recognition of such actions is akin to a state-sanctioned acknowledgment that the community of one’s peers may legitimately evaluate whether an individual with impairments has a rightful place in the community and whether his functional limitations are sufficiently disruptive to warrant the preference of nonexistence.\textsuperscript{43}

\begin{flushright}
\textsuperscript{39} Rieck v. Med. Protective Co., 219 N.W.2d 242 (Wis. 1974).
\textsuperscript{40} Rivera v. State, 404 N.Y.S.2d 950 (Ct. Cl. 1978).
\textsuperscript{41} Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990).
\textsuperscript{42} Hensel \textit{supra} note 42, at 145.
\end{flushright}
Other scholarly concern includes: that legal recognition of such actions are akin to a public endorsement of eugenic abortion in lieu of the child’s life with disabilities;\textsuperscript{44} and that recognition of these torts would correspondingly transform them from a societal issue into an individual concern.\textsuperscript{45}

Courts have articulated various concerns for recognizing these prenatal torts. One very comprehensible court conclusion is that life does not constitute a harm.\textsuperscript{46} Other courts reason that awarding damages would be against legislative policy in favor of childbirth over abortion,\textsuperscript{47} that it would create an unwarranted category of surrogate parents,\textsuperscript{48} and that the child would feel like an “emotional bastard.”\textsuperscript{49}

Courts are also concerned that parents would be encouraged to disparage their children in court,\textsuperscript{50} and that recognizing these causes of action could raise eugenics issues.\textsuperscript{51} In addition, courts have denied recovery on the grounds that damages would be impossible to measure,\textsuperscript{52} and that an award would exceed the defendant’s culpability.\textsuperscript{53}

\textsuperscript{44} Hensel \textit{supra} note 42, at 177.
\textsuperscript{45} BARBARA ROTHMAN, TENTATIVE PREGNANCY: PRENATAL DIAGNOSIS AND THE FUTURE OF MOTHERHOOD 9 (1986).
\textsuperscript{46} Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985).
\textsuperscript{49} Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982).
\textsuperscript{50} Morris v. Sanchez, 746 P.2d 184, 188 (Okla. 1987).
\textsuperscript{52} Coleman v. Garrison, 349 A.2d 8 (Del. 1975).
Several state legislatures have enacted statutes barring recovery for these prenatal torts, including Arkansas, Idaho, Indiana, Kentucky, Michigan, Minnesota, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah. The constitutionality of the Pennsylvania statute was upheld in *Dansby v. Thomas Jefferson Univ. Hosp.*\(^5^4\) Under the due process challenge, the court held that a statute denying the plaintiff the right to bring an action for damages neither regulated nor directly affected the woman’s right to an abortion. The court also held that the statute did not violate a pregnant woman’s equal protection rights, by arbitrarily distinguishing between victims of doctor’s pre-conception and post-conception negligence. Moreover, the statute was rationally related to the state’s legitimate interest in protecting fetal life, reducing the number of medical malpractice actions, and keeping the cost of medical malpractice insurance low.

**B. Judicial recognition of the prenatal torts**

In general, courts recognizing these prenatal torts have done so on the grounds of traditional tort principles, and by declaring the harm to be the deprivation of information, as opposed to the existence of life.\(^5^5\) Put simply, “parents of a genetically or congenitally defective child may maintain an action for its wrongful birth if the birth was the result of the negligent failure of the attending prenatal physician to discover and inform them of the existence of fetal defects.”\(^5^6\)

---


\(^5^5\) *Robak v. United States*, 658 F.2d 471, 477 (7th Cir. 1981).

\(^5^6\) *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993).
Courts recognizing these prenatal torts have acknowledged that the concern of having a
defective child is sufficiently legitimate to invoke a duty on the caring physician to disclose
information relevant to such defects:

“[P]arents have a right to prevent the birth of a defective child and health care
providers a duty correlative to that right. This duty requires health care providers
to impart to their patients material information as to the likelihood of future
children’s being born defective, to enable the potential parents to decide whether
to avoid the conception or birth off such children…. The duty also requires that
these procedures be performed with due care.”57

And finally, courts recognizing these prenatal torts have reasoned that fairness demands
the recognition of a cause of action:

“It is impossible for us to justify a policy which at once deprives the parents of
information by which they could elect to terminate the pregnancy likely to
produce a child with defective body, a policy which in effect requires that the
deficient embryo be carried to full gestation until the deficient child is born, and
which policy then denies recovery from the tortfeasor of costs of treating and
caring for the defects of the child.”58

Consistent in most opinions recognizing these prenatal torts is the limitation on the
number of parties involved, and the scheme of relevant interest.59 Judicial willingness to
articulate the connection between the information deprivation and the parents’ harm, however, is
certainly indicative of judicial recognition of prenatal torts.60

58 Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975).
59 See, e.g., Canesi v. Wilson, 730 A.2d 805, 810 (N.J. 1999) (“A wrongful birth cause of action is predicated on a
woman’s right to determine for herself whether or not to continue or terminate her pregnancy.”).
60 See, e.g., Berman v. Allan, 404 A.2d 17 (N.J. 1979) (Handler, J., concurring in relevant part and dissenting in
part) (“Without doubt, expectant parents, kept in ignorance of severe and permanent defects affecting their unborn
child, suffer greatly when the awful truth dawns upon them with the birth of the child.”).
IV. A REPRODUCTIVE RIGHTS APPROACH TO THE PRENATAL TORTS

A. The scope of the right

In *Skinner v. Oklahoma*, the Supreme Court held that an individual’s right to procreate is fundamental.\(^61\) In *Griswold v. Connecticut*, the Court held that the decision of a man and woman to procreate or use some form of birth control fell within their constitutionally protected right to privacy.\(^62\) The Court in *Roe v. Wade* explained that an abortion decision is inherently different from procreation.\(^63\) However, “the right of personal privacy includes the abortion decision….”\(^64\) Moreover, “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”\(^65\)

“There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.”\(^66\) And this is a factor that “the woman and her responsible physician necessarily will consider in consultation.”\(^67\) Finally, although the right is deemed to be fundamental, “this right is not unqualified and must be considered against important state

---


\(^64\) *Roe*, 410 U.S. at 154.

\(^65\) *Id.* at 163.

\(^66\) *Id.* at 153.

\(^67\) *Id.*
interests in regulation.” These state interests include protection of health, medical standards, and prenatal life.

The Court in Casey explained that an “[a]bortion is a unique act. It is an act fraught with consequences for others” including “the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life…” “Because abortion involves the purposeful termination of potential life, the abortion decision must be recognized as sui generis, different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy.”

The Court held that the Constitutional protection of the woman’s decision to terminate her pregnancy derives from the word “liberty” in the Due Process Clause of the Fourteenth Amendment. The woman’s liberty is unique to the human condition, and a woman who carries a child to full term is subject to anxieties and pains that only she must bear. “The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and

68 Id. at 154.
69 Id.
71 Casey, 505 U.S. at 839.
72 Id. at 847.
73 Id. at 852.
her place in society.” However, “What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”

The reproductive right does not entail an element of entitlement. The Supreme Court has held that states are not constitutionally required to fund non-therapeutic abortions, medically necessary abortions, or abortions for those who cannot afford them privately.

B. Different approaches to the right

Relational privacy is the view from Roe, and served as the antecedent of the individual liberty approach espoused in Casey. The scope of the reproductive right is limited by the relational privacy’s dependence on medical judgment and family decisions. The medical-

74 Id.
75 Id. at 877.
78 Harris v. McRae, 448 U.S. 297, 311 (1980).
80 Anita L. Allen, The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution, 18 HARV. J.L. & PUB. POL’Y 419, 455 n.14 (1995) (“‘Privacy’ has a broad and varied usage. Scholars who believe abortion relates to privacy include both those who tend to characterize the meaning and value of privacy in terms relating to the preconditions of human dignity, personal responsibility, personal expression, self-development, intimacy, and repose; and those who emphasize understandings tied to the political value of limited, non-totalitarian government. Both emphases capture an important part of what male and female citizens merit.”).
81 Roe v. Wade, 410 U.S. 113, 163 (1973) (“[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”).
82 Carey v. Population Servs. Int’l, 431 U.S. 678, 684-85 (1977) (explaining that ‘among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships, and child rearing and education’” (quoting Roe v. Wade, 410 U.S. 113, 152-53 (1973)) (citations omitted)).
judgment-oriented approach has been criticized as excluding a constitutionally based sex-equality perspective.\textsuperscript{83}

From the family relational privacy aspect of reproductive issues, one could find justification for these prenatal torts in the reality of the family unit’s need for financial relief.\textsuperscript{84} For example, depending on the severity of the birth defect, the child’s medical bills may be projected to run into the millions. This financial strain would undoubtedly deprive other family members of much needed resources. However, if abortion is murder, then the doctor’s omission was commendable, and the doctor certainly should not have to pay for the medical bills. Moreover, regardless of ones stance on abortion, approving of these prenatal torts encourages the disparagement of one’s defective child, thereby eroding the family unit.

From the medical relational privacy aspect of reproductive issues, holding doctors liable would encourage disclosure, thereby making doctor patient relationships more reliable. Notably, ensuring that patients are adequately informed would lead to an anomalous result in states that use informed consent laws as a basis of restricting abortions.\textsuperscript{85} On the other hand, this could create incentives for physicians to over disclose, transcending into over promoting abortions in

\textsuperscript{83} Erin Daly, \textit{Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey}, 45 AM. U. L. REV. 77, 83 (1995) (“When the Justices first looked at the abortion controversy in 1973, the person they saw at the center of it was, above all else, a patient. She was not a complex, multi-faceted human being in a difficult and unfortunate situation. She was just a patient, incapable of acting on her own behalf and dependent on the responsible judgment of another.”).

\textsuperscript{84} Judge Paul H. Mitrovich, \textit{Ohio Wrongful Pregnancy, Wrongful Birth, and Wrongful Life Law Needs to Be Revisited to Obtain A More Equitable Result and Consistency of Law}, 33 OHIO N.U. L. REV. 623, 626 (2007) (“To debilitate the family, not only economically, but emotionally, in favor of the courts’ protection of the tortfeasor is devoid of social and legal equality and is patently unfair.”).

fear of potential birth defects, thereby furthering the societal stigma against disabled people.\textsuperscript{86} Moreover, this could discourage doctors from entering this medical field, decreasing the supply of an already limited service.\textsuperscript{87}

Individual liberty is the view espoused in \textit{Casey}, and limits the reproductive decision to the individual. By classifying reproduction rights as liberty rights, rather than privacy rights, the Court broadened the scope of protection of abortion.\textsuperscript{88} This view reflects selfishness, a characteristic that can arouse resentment from both reproductive rights opponents and proponents. Moreover, by limiting the decision to the individual, collateral reproductive issues are divested from the protections and support of the government and society.

From the individual liberty aspect of reproductive issues, the discussion of these prenatal torts becomes very simple: the physician’s failure to disclose deprived the woman of her reproductive choice. And, state legislatures banning recovery for these prenatal torts is an anti-abortion incremental approach “chipping away at the edges of the right.”\textsuperscript{89} However, the idea of a woman going to court for compensation because she didn’t want \textit{this} child can be seen as confirming the selfish nature of the reproductive decision.

Equal citizenship is a scholarly view that stands for the proposition that reproductive rights implicate a woman’s ability to stand in relation to man, society, and the state as an

\textsuperscript{86} See Hensel \textit{supra} note 42, at 145.


\textsuperscript{88} Daly, \textit{supra} note 83, at 136-37.

\textsuperscript{89} Borgmann, \textit{supra} note 85.
independent, self-sustaining, equal citizen.⁹⁰ Women’s ownership of the use of their own bodies is contingent in a way in which men’s is not: by nature women, unlike men, give birth. If a woman cannot control her reproductivity, she cannot control her life.⁹¹ And “[i]f equal citizenship is the goal of the Constitution’s declarations of equality and liberty, then women seemingly must have a right to legal abortion in order to achieve it.”⁹²

Equal citizenship arguments in favor of reproductive rights can be extended to justify the existence of these prenatal torts as being necessary to vindicate one’s constitutionally protected reproductive choice.⁹³ However, these prenatal torts force one to weigh the importance of equal citizenship of women against the collateral effects on the disabled community, which are parallel to those of selective abortion.⁹⁴

V. RECONCILING THE CONFLICTING PRINCIPLES

A. Framing the issue

The fixed variables that exist in a mentality’s regard for reproductive issues can guide or preclude an evaluation of the merits of the conflicting principles driving the prenatal tort controversy. First and foremost, the law aside, whether one agrees with abortion is outcome determinative in taking a stance on prenatal torts. And second, while technology progresses to be able to detect fetal defects earlier and earlier, the moral status of the fetus always “waits in the


⁹¹ West, supra note 91, at 1401.

⁹² West, supra note 91, at 1402.

⁹³ Gold, supra note 20, at 1032.

Introducing the second variable correlates the moral status of prenatal torts with the extent to which science permits the inference of fetal personhood.

From an individual standpoint, simplifying the varying grounds for objecting to prenatal torts can be useful for purposes of rendering a personal judgment valuation of prenatal torts. One approach would be to plot the range of biases on an objectionable conduct continuum. For example, if one does not approve of abortion, their resentment would likely outweigh any sympathy for a woman’s financial burden in a prenatal tort lawsuit. If one is ambivalent toward abortion, then they would feel more sympathetic when the alleged wrong occurred preconception, such as a cystic fibrosis carrying woman who is contemplating pregnancy and consults a doctor about the risk of having a cystic fibrosis child. If the doctor negligently assures her that there was no risk of transferability, and the woman subsequently becomes pregnant and births a cystic fibrosis child, a prenatal tort recovery would seem palatable.

On the other hand, if one does not disapprove of abortion, then post-conception negligence would be compensable. However, the reason why the mother would have terminated the pregnancy could serve as a limiting factor. For example, if a doctor negligently failed to inform a poor mother that her fetus had cystic fibrosis, which the mother would have aborted for economic reasons, then allowing recovery seems acceptable. If the mother was wealthy, and would have aborted because she would prefer not to have a disabled child, however, then allowing recovery may seem inappropriate.

---

95 Borgmann, supra note 83, at 263.
Apart from the fixed variables, the threshold issue is defining the harm.\textsuperscript{96} If one is not harmed, then certainly no entitlement to tort recovery exists. Conversely, if one has been harmed, then certainly justification for any denial of tort recovery should exist.

B. The “harm”

Consistent in most opinions denying these causes of action is defining the harm as the existence of an unhealthy, abnormal child.\textsuperscript{97} Establishing this, courts justify denying recovery on the grounds that they are “unwilling to say that life, even life with severe defects, may ever amount to a legal injury.”\textsuperscript{98} This disregards the information deprivation issue, and evokes an emotional response that renders this a very appealing justification for denying recovery.

An array of concerns arises when life is the focus of the harm. Is life inherently valuable so as to render compensation for it repulsive? If not, what kind of life has sufficient value so as to be deemed not compensable on public policy grounds? And finally, value to whom?

Disregarding the deprivation of information and focusing on life as the harm has had a mimetic-vertigo-like effect.\textsuperscript{99} In efforts to avoid deeming life as a harm, courts have denied

\textsuperscript{96} Julie Gantz, \textit{State Statutory Preclusion of Wrongful Birth Relief: A Troubling Re-Writing of A Woman’s Right to Choose and the Doctor-Patient Relationship}, 4 VA. J. SOC. POL’Y & L. 795, 815 (1997) (“Parents must establish that they have been harmed. This element is likely the most controversial and philosophically difficult aspect of the wrongful birth action. There are two views on what constitutes harm: 1) the absence of choice in reproductive decisions; and 2) the birth of an impaired child.”).

\textsuperscript{97} Murtaugh, \textit{supra} note 97, at 260 (“It is apparent that the courts have continued the tradition of focusing the inquiry in wrongful birth actions on the health of the child, rather than inquiring into the reasons behind the plaintiffs’ decision not to parent a child.”).

\textsuperscript{98} Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985).

\textsuperscript{99} For example, when the Oklahoma Supreme Court was first presented with a wrongful conception case, which sought damages for the birth of a healthy child, it denied the recovery because of “the sanctity which must be placed on human life.” Morris v. Sanchez, 746 P.2d 184, 187 (Okla. 1987). The Oklahoma Supreme Court subsequently denied recovery in a similar wrongful conception case, stating “we are not concerned here with an unsuccessful sterilization followed by the birth of a mentally retarded or physically handicapped child. Our concern here is only with one item of damages claimed when it is alleged that a sterilization procedure was negligently performed, and
recovery for the life of a normal, healthy child, but have awarded recovery when the child is sufficiently defective.\textsuperscript{100} Aiming to comport with the public policy that life is not a harm, courts have drawn a morbid distinction as it relates to the value of life. These courts artfully phrase the distinction as denying the ordinary rearing costs, but granting the extraordinary costs.\textsuperscript{101}

Treating a disability as a status that is outcome determinative in a wrongful birth suit\textsuperscript{102} is, well, a disabling treatment.\textsuperscript{103} This is discouraging to the disabled community, and to parents who bear disabled children.\textsuperscript{104} However, if one is prepared to acknowledge that some children are sufficiently disabled as to warrant compensation, then certainly a scope would be needed to establish what level of disablement warrants recovery. Otherwise, a doctor not informing parents that their fetus would be less than 5’10 would potentially be actionable. In light of \textit{Buck v. Bell},\textsuperscript{105} this slippery slope concern towards eugenics is very ironic in states like Oklahoma\textsuperscript{106} that draw such a morbid distinction between normal and abnormal. Note that whether the jurisdiction’s informed consent standard is patient oriented or physician oriented could potentially aggravate this issue.

That thereafter a normal, healthy child was born to the ‘sterilized’ parent.” Goforth v. Porter Med. Assocs., Inc., 755 P.2d 678, 680 (Okla. 1988). In 2011, when the Oklahoma Supreme Court was presented with its first wrongful birth case, it relied on both cases to allow recovery for the extraordinary costs of raising a child with Cytomegalovirus infection. Shull v. Reid, 258 P.3d 521 (Okla. 2011).

\textsuperscript{100} Shull v. Reid, 258 P.3d 521 (Okla. 2011).

\textsuperscript{101} Id.

\textsuperscript{102} Murtaugh, \textit{supra} note 97, at 258.

\textsuperscript{103} Hensel \textit{supra} note 42.

\textsuperscript{104} Hensel \textit{supra} note 42.

\textsuperscript{105} Buck v. Bell, 274 U.S. 200 (1927).

\textsuperscript{106} Shull v. Reid, 258 P.3d 521 (Okla. 2011).
The question “value to whom” is also troublesome. Comparing wrongful death actions to prenatal torts, consider the anomalous implications of recognizing life as a harm. Assuming the jurisdiction recognizes wrongful birth actions, if an individual was deprived of prenatal information, and gave birth to a defective child, she would have a cause of action. However, if on the way to file the complaint a third party negligently caused the death of the child, she would also have a wrongful death cause of action. The critical element for the wrongful birth claim that she would have terminated the pregnancy would be rendered irrelevant in the wrongful death suit. Yet, the value of human life is equally implicated in both.

Keeping the magnitude of these concerns in mind, of what relevance is the deprivation of prenatal health information to a woman’s reproductive decision? First, the deprivation interferes with the woman’s decision making autonomy concerning the health of her own body, including the fetus,\textsuperscript{107} albeit by a private actor as opposed to a state actor.\textsuperscript{108}

Second, assuming the woman would have exercised her reproductive right to abortion had she received the information, the life, whether normal or abnormal, would have been terminated. Inevitably, the termination would have conserved financial resources. Assuming the doctor was negligent, in deciding whether the woman should be allowed to recover in a wrongful birth suit, the financial element should be irrelevant if deeming a child to be a harm is repugnant. However, if the child is severely disabled, the projected medical bills are likely to be substantial. It seems natural to feel sympathetic for the woman having to shoulder a substantial financial

\textsuperscript{107} Gold, \textit{supra} note 20, at 1029.

\textsuperscript{108} For a discussion on the significance of the private status of the parties in a wrongful birth suit, see Jennifer R. Granchi, \textit{The Wrongful Birth Tort: A Policy Analysis and the Right to Sue for an Inconvenient Child}, 43 S. TEX. L. REV. 1261, 1272 (2002) (arguing that courts relying on Roe to provide a foundation for the duty element for wrongful birth erroneously extend the correlative duty from the state to a private citizen).
burden. And if the medical bills are in the millions, and the woman was seeking the doctor’s care in order to avoid this very result, it becomes difficult to look past the doctor’s carelessness.

Prenatal information is important, whether its purpose be to protect oneself from the hazards of childbirth, to inform a decision to terminate the pregnancy, or to prepare oneself for raising a disabled child.\textsuperscript{109} To overlook the deprivation of information is to trivialize the information. And denying recovery because of the value of life is not necessarily taking the moral high ground. Indeed, disclaiming ones unwillingness to deem life a harm has served as an opportunistic avenue for those who oppose abortion to dictate the communication of fetal health information.\textsuperscript{110}

Again using Oklahoma as an example, its control of information over women in the reproductive decision context is appalling. For general medical malpractice actions, Oklahoma has a patient oriented standard; that is, the plaintiff must prove to the fact finder that the risk was material to the patient, as opposed to the reasonable physician.\textsuperscript{111} In the abortion context, under the Heartbeat Informed Consent Act, the state mandates that women hear fetal related information at the abortion clinic.\textsuperscript{112} Oklahoma provides a cause of action for the woman or her family members against the abortion provider for failing to disclose the required information under the Heartbeat Informed Consent Act.\textsuperscript{113}

\textsuperscript{109} Gold, \textit{supra} note 20, at 1029.
\textsuperscript{110} Murtaugh, \textit{supra} note 97, at 247.
In addition, patients can sue abortion providers if they did not follow the “voluntary and informed consent” provisions related to abortions.\textsuperscript{114} These provisions require that not less than twenty-four hours prior to the abortion, the abortion clinic offers the woman ultrasound imaging of the fetus, tells the woman the probable gestational age of the fetus, and tells the woman that the father is liable to assist the woman in the support of her child. To enforce these provisions, Oklahoma provides the woman and her parents a cause of action against the abortion clinic to recover actual and punitive damages for wrongful death on behalf of the fetus.\textsuperscript{115}

In stark contrast to the legislative fusillade on abortion providers for failing to provide information, Oklahoma statutorily barred wrongful birth and wrongful life actions against prenatal care providers.\textsuperscript{116} It is against the Oklahoma public policy to award damages because of the birth of a child, and no recovery may be had if the claim is that the defendant’s act or omission contributed to the mother’s not having obtained an abortion.

Thus, the state insulates doctors from liability for depriving women of vital prenatal information, and singles out women in denying them a remedy for a civil wrong.\textsuperscript{117} And the gravity of this deprivation is bolstered by the importance of prenatal information, and the denial becomes outrageous when the civil wrong involves a constitutionally protected decision. There is something obscene in the attitude of those who regard the value of life as a matter of public


policy, allow recovery for the wrongful death of an aborted fetus, but deny a mother a wrongful birth recovery needed to raise her child.\textsuperscript{118}

C. Justifications for denying recovery

Denying recovery for prenatal tort plaintiffs because it discriminates against the disabled community\textsuperscript{119} is incongruent with the equal citizenship approach to reproductive rights. To accept the discrimination justification is to say that it is inappropriate for a mother to prefer to have a non-disabled child. And committing society to such certitude will function as another way to limit a woman’s decision making autonomy. This subordinates a woman’s mind to the mentality of society, and expropriates her reproductive decisions for society’s goals. Reproductive rights have been ill-served by this mentality, as demonstrated by the Oklahoma legislature. It’s also noteworthy that forced sterilizations were thought to be serving society’s goals: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”\textsuperscript{120}

This society-serving mentality has also been used to justify prenatal tort recovery:

“That society has a vested interest in reducing and preventing birth defects, and in requiring that wrongdoers redress the natural and probable consequences of every substantial breach of the applicable duty of care has led to unanimous acceptance by the courts of wrongful birth as a claim for relief.”\textsuperscript{121}

\textsuperscript{118} AYN RAND, Theory and Practice, in CAPITALISM 30, 39 (1967).

\textsuperscript{119} Hensel supra note 42, at 145.

\textsuperscript{120} Buck v. Bell, 274 U.S. 200, 207 (1927).

\textsuperscript{121} Blake v. Cruz, 698 P.2d 315, 319 (Idaho 1984).
Although this is a decision in favor of reproductive rights, the mentality employed is flawed and often serves as the antithesis for scholarly work criticizing prenatal torts.\textsuperscript{122} If we must use a societal objective to justify recognizing prenatal torts, it should be to encourage the communication of vital fetal health information between a woman and her doctor.\textsuperscript{123} The state licenses doctors, and certainly has an “interest” in the regulation of the medical standards.\textsuperscript{124} And the disabled status of the mother’s child does not render the “distress, for all concerned, associated with the unwanted child…”\textsuperscript{125} nonexistent.

A related justification for rejecting prenatal torts is the concern of eugenics.\textsuperscript{126} The concern is that recognizing these torts will result in doctors practicing safe medicine, thereby over disclosing fetal information leading to “a culture of genetic portfolios of embryos where only perfect babies get selected for delivery.”\textsuperscript{127}

First, it would be very difficult to tell a wronged mother that she must shoulder a substantial financial burden because of speculative concerns that affording her relief may result in babies having a particular characteristic. Second, the over disclosing can only be a concern if the woman is in fact susceptible, a notion that has justified abortion-related informed consent


\textsuperscript{123} See, e.g., Alan J. Belsky, \textit{Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?}, 22 U. BALTIMORE L. REV. 185, 268 (1993) (discussing the importance of wrongful life actions as technology pushes medical standards further).


\textsuperscript{125} Roe, 410 U.S. at 153.

\textsuperscript{126} Hensel \textit{supra} note 42, at 145.

\textsuperscript{127} Granchi, \textit{supra} note 108, at 1283.
laws and waiting periods to educate naïve women.\textsuperscript{128} Third, subscribing to the susceptibility notion makes it difficult to find any value in the \textit{Casey} decision empowering women to take responsibility for choosing their own future.\textsuperscript{129} And fourth, it views abortion as a medical decision, reducing women to being characterized as patients; this view has long since been abandoned.\textsuperscript{130}

Another eugenic concern is that, if a woman is allowed to sue a doctor for failing to disclose the risk of defect, why shouldn’t she be allowed to sue a doctor for failing to disclose other fetal characteristics, such as sex.\textsuperscript{131} Although the “sex” characteristic may evoke debate due to gender issues, this conflates the eugenic concerns. This is essentially an issue of degree; that is, what fetal characteristics, if not disclosed or negligently disclosed to the parents, is actionable under a prenatal tort.

Parents not wanting a boy but having a boy is the same as parents not wanting a girl but having a girl. The same goes for other characteristics that the parents hoped would exist but do not end up existing. If the doctor was negligent in communicating the information, the parents have been deprived of material information. Although speculative, it seems unlikely that a family will incur any additional financial burden, and thus eugenic concerns over trivial matters are likely a nonissue.

This eugenic concern seems to take issue with labeling as wrong the doctor misinforming the parents that the child was a boy when they did not want a girl. Not approving of the parents’

\textsuperscript{128} Borgmann, \textit{supra} note 83, at 260.

\textsuperscript{129} Gold, \textit{supra} note 20, at 1026.

\textsuperscript{130} Daly, \textit{supra} note 83, at 89.

desire to have a boy does not undue the deprivation of information, and does not change the
desire to not have a girl. The parents may have noble reasons for their desire, or they may have
discriminatory reasons. Either way, denying them a cause of action will not enhance their
affection towards their child, or reduce their resentment towards their child. Providing them a
cause of action could encourage doctors to do better, but, again, there would likely be no
additional financial burden for the parents to be compensated for.

The eroding of the family unit serves as an instructive counterpoint to the other concerns
presented in these causes of action.132 Our law functions under the working hypothesis that
parents act in the best interest of their children.133 For the most part, parents bear the primary
responsibility for their children with the government performing an ancillary role, legislating
with the intent to support the authority of parents regarding their children.134

Setting aside the issue of parental rights for discussion purposes, our family system can
be seen as functioning as the least-detrimental means we have of child rearing because the law is
incapable of effectively managing the parent-child relationship.135 It also has value in that the
ability to establish intimate relations, not on society’s terms, is central to human existence.136

As mentioned earlier, when a mother seeks recovery for the wrongful death of her child,
the damage award is not offset by a monetary value that corresponds with her lack of affection.

in the Home, Schools, and Juvenile Courts 3 (Vicki Been et al. eds., 3d ed. 2012).
136 Id.
This would negate the law’s notion that “natural bonds of affection lead parents to act in the best interests of their children.”\textsuperscript{137} Inversely, children may not recover from their mother for causing prenatal injury.\textsuperscript{138}

Courts rejecting claims for prenatal injury by a child against the mother have done so based on their inability to fashion a fair standard for judging a mother’s prenatal decisions.\textsuperscript{139} That is, “Judicial scrutiny into the day-to-day lives of pregnant women would involve an unprecedented intrusion into the privacy and autonomy of the citizens of this State.”\textsuperscript{140} However, they have also emphasized the unique relationship between a mother and fetus, which is unlike the relationship between typical plaintiffs and defendants.\textsuperscript{141}

In the wrongful birth context, courts that have unpacked the incentives created by recognizing these prenatal torts have identified family concerns. “We are loath to adopt a rule, the primary effect of which is to encourage, indeed reward, the parents’ disparagement or outright denial of the value of their child’s life.”\textsuperscript{142} If encouraging this conduct would create a rift in the structure of the family, then the costs of allowing recovery would outweigh the benefits of allowing recovery. This is not to say that the conduct—parents seeking financial relief—is inherently bad. If the family is unable to afford, for example, the medical bills related to the child, and one of the parents must cease work in order to stay at home and care for the

\textsuperscript{138} See Stallman v. Youngquist, 531 N.E. 2d 355 (Ill. 1988) (holding that a child who suffered prenatal injuries in a car accident could not sue her mother for negligently driving).
\textsuperscript{140} Stallman v. Youngquist, 531 N.E. 2d 355, 361 (Ill. 1988).
\textsuperscript{141} Id.
child, then seeking recovery in a wrongful birth action could be seen as being in the child’s “best interest.”\textsuperscript{143}

Courts decline to recognize this when focusing on the child’s life as the harm, as opposed to the deprivation of information necessary for family planning.\textsuperscript{144} For example, a Florida court stated: “It is a matter of universally shared emotion and sentiment that the intangible but all-important, incalculable but invaluable ‘benefits’ of parenthood far outweigh any of the mere monetary burdens involved.”\textsuperscript{145}

This is certainly consistent with our law’s assumption about the “natural bonds”\textsuperscript{146} between parents and their children. However, its valuation is too conclusive. If the parents of a severely disabled child are unable to find a family to adopt the child, and are driven into poverty through parenthood, it would be difficult to conclusively say that their intangible benefits are even being realized. Compare this with a court taking a less narrow view: “[A]lthough public sentiment may recognize that, to the vast majority of parents, the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a…child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law.”\textsuperscript{147}

This is a more flexible approach that takes into account the possible realities of a family’s situation. However, it must be stressed, that if this encourages conduct that destroys a family’s structure, then the costs would outweigh the benefits of recognizing these causes of action. For


\textsuperscript{144} Murtaugh, supra note 97, at 260.


\textsuperscript{147} Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977).
example, if allowing parents to recover would make the child feel like an “emotional bastard,” \textsuperscript{148} then the costs may outweigh the benefits, but perhaps not depending on how many additional family members are being deprived of resources. One court showed a unique degree of discretion towards parents in the wrongful birth context by stating that “it is for the parents, not the courts, to decide whether a lawsuit would adversely affect the child and should not be maintained.” \textsuperscript{149}

Approaching reproductive rights as a family planning issue facilitates the recognition of prenatal torts. To recognize that family planning is an “integral aspect of the modern marital relationship” \textsuperscript{150} is to take into account the potentially unfortunate financial reality of parents seeking recovery for a prenatal tort. Moreover, it can be extended to address the importance of an individual’s option to accept or reject a prenatal relationship with a child. \textsuperscript{151}

D. Striking a balance

While the ability to make reproductive decisions is of constitutional importance, this ability may be limited by regulations which do not place a substantial obstacle to the woman’s exercise of her right to choose to terminate her pregnancy. \textsuperscript{152} And states passing statutes banning actions for wrongful birth and wrongful life are not unconstitutional. \textsuperscript{153} Because these causes of action involve the deprivation of information necessary for making important reproductive

\textsuperscript{148} Wilbur v. Kerr, 628 S.W.2d 568, 570 (Ark. 1982).
\textsuperscript{149} Burke v. Rivo, 551 N.E.2d 1, 5 (Mass. 1990).
\textsuperscript{150} Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977).
decisions, the denial of these causes of action should be rooted in a justification of corresponding degree. A look at how the various interests are served by denying these causes of action is instructive on the utility of such a denial. The interests implicated\textsuperscript{154} in these causes of action include the state, the woman, the family, the child, and the disabled community.

The state’s interests includes administering the tort system, regulating the medical profession, keeping medical malpractice suits down to keep insurance costs down, and promoting the value of human life. The woman’s interests include being able to make an informed decision, and being treated equally (as does the disabled community). The family’s interest includes financial stability, and the child’s interests include being adequately cared for.

How are the various interests served by recognizing prenatal torts? The state would avoid taking on the child as a ward of the state, avoid spreading the costs to taxpayers by shifting the loss to the culpable actor, and would be deterring negligent medical conduct. The woman would not be left without relief, her reproductive decision making autonomy would be respected, and she would be treated equally to others in the tort system. The family would be secure in financial resources, which would benefit all the members. The child, assuming the existence of medical bills, would have a better chance of receiving appropriate medical care. Finally, the integrity and reliability of the doctor-patient relationship would be maintained.

With respect to the potential harms resulting from recognizing these causes of action, the disabled community could be harmed by feeling discriminated against. The child could be

\textsuperscript{154}This is not intended to be exhaustive. It would be impossible to list all of the interests involved. This excludes, namely, those who do not approve of abortion and their interests in living in a society that does not murder its children. The list also excludes those who are opposed to selective abortions based on gender. This list is limited to the parties whose interests have been argued with the most frequency in judicial opinions.
harmed if he or she is made to feel like an “emotional bastard.”\textsuperscript{155} The family unit is harmed if these causes of action create incentives that create a rift in the family. The doctors are harmed because ensuring conformity to a standard of care is costly, which could be passed on to all patients. The state could be harmed by being viewed as supporting discrimination by virtue of its courts enforcing these torts. In addition, the costs of administering the tort system could increase if parents are able to recover for any characteristic of their subsequent child that was not disclosed to them.

What are the costs of rejecting these causes of actions? Financial resources for the family become limited; the more members of the family, and the more severe the medical costs, the more costly for the family. Depending on the wealth of the parents, the adequateness of the child’s upbringing, both financially and emotionally, may diminish. Women may feel unfairly singled out by their government’s denial of a civil remedy. Although unlikely, doctors who are against abortion could impose their will on patients without liability; this could create distrust in the doctor-patient relationship.

If we were to recognize these causes of action, one way to avoid discriminating against the disabled community would be to allow recovery for both non-disabled and disabled children, and allow for both the ordinary rearing costs and the extraordinary medical costs in the case of a disabled child. It would also help if the judicial rhetoric shifted from the status of the child, to the deprivation of information. This would require the strict application of tort principles, to the exclusion of public policy concerns regarding valuing life. However, even if this was employed,

\textsuperscript{155} Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982).
eugenic concerns regarding doctors over disclosing information would remain. Indeed, this would likely increase all disclosures, not just disclosures related to fetal abnormalities.

If there is no way of avoiding making the disabled community feel discriminated against, then one must make a judgment call. On the most basic level, it would be the importance of the financial needs of the plaintiff, the plaintiff’s family, and the plaintiff’s child versus the importance of the disabled community’s concerns.

The importance of reproductive decisions supports weighing in favor of providing prenatal tort recovery. From the doctor-oriented standpoint, if the reproductive decision is shared by the woman and her doctor, then the doctor should have a heightened duty toward the woman. Therefore, reproductive rights would demand redress of negligent conduct on the doctor’s part.

Equal citizenship also demands redress. A woman’s decision making ability would be rendered impotent if doctors were immunized from “the powerful incentive of the threat of litigation which encourages the sharing of all fetal health information.” And indeed a woman’s decision making ability is essential for her to have control over her own destiny in society.

Finally, the importance of family planning would be obscured if limited to society’s terms. This would necessarily be the result if we allowed the disapproval of others to limit reproductive decisions. Moreover, the notion that not all life is a blessing in not inconsistent

156 Gold, supra note 20, at 1029.
with the discussion in the *Roe* decision about the “distress, for all concerned, associated with the unwanted child….”\(^{159}\)

However, if these prenatal torts involve private parties, with no state actor, then perhaps the constitutional enhancement of reproductive rights is a misnomer. For example, as one author pointed out:

“The courts relying on *Roe* to provide a foundation for the duty element of this tort wrongfully extends the correlative duty from the state to a private citizen (with no power to interfere with another citizen's rights).”\(^{160}\)

There is certainly merit in this argument, and if courts were to take this approach, then the interests of reproductive decision making would carry much less weight. The justification for recognizing these causes of action would be limited to that of traditional tort. And the interests of deterring prenatal physicians from inadequately disclosing information to parents would be limited to general medical malpractice deterrence.

If the majority of people in a state are in favor of banning prenatal torts, and it is constitutional, then that is how it should be. However, critical thinking towards reproductive issues could easily be overlooked. Without intellectual depth, the intentions of such a law can draw normative support, with the consequences disregarded. The inability of a majority to assimilate the value of reproductive rights is to the detriment of the holders of such rights, and considering the different perspectives on reproductive rights will hopefully broaden the mentality.

---


VI. CONCLUSION

Prenatal torts protect the freedom of reproductive decisions. They emphasize that reproductive rights are not illusory, and facilitate the communication of important prenatal information. Affording this freedom through the implementation of tort-created incentives, and garnering respect for every individual’s judgment on reproductive matters, both pose negative externalities. For example, the expenses of conforming to the standard of care would inevitably increase. Moreover, even if the importance of incentives outweighs the increased expenses for doctors, disinterested objectors to prenatal torts have a large reservoir of moral and policy grounds upon which to draw. As such, rejecting prenatal torts, whether judicially or legislatively, comports with the “Baptist and Bootleggers” theory of regulation, the target of which being reproductive rights.\textsuperscript{161}

Given the obscenity of abortion in the minds of many, the resulting upheaval from a cause of action predicated on one’s willingness to abort a child is not surprising. This is particularly so when the cause of action singles out the disabled community and regards them as targets for abortion. The logistical impetus for this condemnation is the abstract perspective necessitated by prenatal torts: the evaluation of reproductive decisions from the unusual ex post perspective.

The degree of significance in which such condemnation places on the distinction between the decision to abort, and a foregone opportunity to abort, is revealing. By their very nature,

\textsuperscript{161}The “Baptists and Bootleggers” theory refers to process by which state laws were passed that required liquor stores to be closed on Sundays. Baptists found such legislation to be favorable for religious reasons, while bootleggers found their trade to be more profitable when liquor was not legally available. The “Baptists and Bootleggers” theory suggests that regulations are more likely to be enacted when supported by those who favor it for moral reasons (e.g., the Baptists) and by those who benefit economically (e.g., the bootleggers). See Bruce Yandle & Stuar Buck, \textit{Bootleggers, Baptists, and the Global Warming Battle}, 26 Harv. Envtl. L. Rev. 177, 194 (2002).
prenatal torts necessitate an after-the-fact perspective on a woman’s lost opportunity to abort a disabled fetus. Stated another way, the embodiment of a woman’s reproductive decision is presented in court for others to evaluate. Through this clouded lens, an ex-ante prohibition on discriminatory abortion becomes appropriate, and the freedom to make reproductive decisions is rendered hollow.

This mentality upends the decision-making autonomy, relational privacy, and the equal citizenship perspectives of reproductive rights. First, incorporating discriminatory prohibitions into the legality of an individual’s reproductive decisions would be an inversion of constitutional principles. Second, this mentality is reminiscent of the view that women are contingent vessels, reducing a woman’s control over her own body to the extent others permit; equal citizenship cannot be grafted onto a citizenry of annexed women. Yet it is the condemnation towards discriminatory abortions which permeates prenatal tort criticism, and facilitates the regression of reproductive freedom.

Armed with parochial observations from the abstruse vantage point presented by prenatal torts, objectors have shoehorned into the realm of public policy a cascade of limitations on reproductive decision making. A not so inconceivable legislative approach to coercing

---


163 West, supra note 91, at 1402.

164 AYN RAND, Theory and Practice, in CAPITALISM 267, 295 (1967) (“Majority rule is not applicable in the realm of ideas; an individual’s convictions are not subject to a majority vote; but neither an individual nor a minority nor a majority should be forced to support their own destroyers.”)

165 AYN RAND, Theory and Practice, in CAPITALISM 184, 189 (1967) (“The threadbare cloak of altruism serves to cover it up and to sanction the evasions by a fading aura of moral righteousness. The exhausted cynicism of a bankrupt culture, of a society without values, principles, convictions, or intellectual standards, does the rest: it leaves a vacuum, for anyone to fill.”).
conformity would be to shift an adverse inference to a woman seeking to abort a disabled fetus, requiring her to provide the doctor with an alternative justification that comports with the currently imposed will of the many. And if one views morality as a matter of numbers—that is, if morality is achieved when the whims of the many rise to a majority—then implementing an adverse inference would be reasonable as long as it maintained normative support. Other potential meddling in reproductive decisions is limited only by the imagination.

166 AYN RAND, Theory and Practice, in CAPITALISM 1, 12-13 (1967) ("When 'the common good' of a society is regarded as something apart from and superior to the individual good of its members, it means that the good of some men takes precedence over the good of others, with those others consigned to the status of sacrificial animals. It is tacitly assumed, in such cases, that 'the common good' means 'the good of the majority' as against the minority or the individual.")