BIRTH RIGHTS AT WAR

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In 2019 a record number of states passed laws banning all or most abortions, with each legislature vying to introduce the statute that would spell the end for *Roe v. Wade*.[1] With the outbreak of the Covid-19 pandemic in the United States, some states have functionally banned all abortions for the duration of the pandemic.[2] Understandably, commentators have focused on what these laws would mean for women seeking abortions. But these bans will likely have significant effects on other areas of the law governing reproduction.[3]

Today, as Dov Fox documents in his recent book, *Birth Rights and Wrongs*, many reproductive harms go forgotten in a country fixated on the abortion wars. Fox cuts through considerable doctrinal confusion surrounding reproductive harms and illuminates how often the law does nothing to deter these wrongs.The book explores the reasons for this state of affairs, from a "libertarian outlook on reproductive life" to "murky electoral implications."[4]

But Fox goes beyond guiding the reader through the thicket of currently recognized reproductive torts. *Birth Rights and Wrongs* proposes three new tort claims that will close the gap in existing protections.[5] But legal history suggests that Fox may have underestimated the obstacles to reform, especially given the long shadow cast by abortion politics over reproductive negligence. Before *Roe v. Wade*, antiabortion groups primarily relied on legal arguments that depended on proof of fetal personhood, under either the Due Process or Equal Protection

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[1] 410 US 113 (1973).

[2] *See* Mara Gordon & Alyson Hurt, *Early Abortion Bans: Which States Have Passed Them?*, NPR (Jun. 5, 2019), https://www.npr.org/sections/health-shots/2019/06/05/729753903/early-abortion-bans-which-states-have-passed-them [https://perma.cc/3PB3-G8DP]. For a sample of predictions about when and how the Court will reverse *Roe*, see Serena Mayeri, *How Abortion Rights Will Die a Death of a Thousand Cuts*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/opinion/brett-kavanaugh-abortion-rights-roe-casey.html; Mary Ziegler, *Abortion Foes Think They're Winning. Have They Overplayed Their Hand?* N.Y. TIMES (May 15, 2019), https://www.nytimes.com/2019/05/15/opinion/alabama-abortion-supreme-court.html.

[3] *See* DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW 3-5 (2019).

[4] *Id.*

[5] *See id.* at 127-64.

Clauses of the Fourteenth Amendment. The tort precedents that seemed to recognize fetal rights became a key part of the case for preserving abortion bans.

After *Roe v. Wade*, reproductive negligence remained a key part of abortion opponents' argumentative agenda. In the 1970s, a disparate group of state antiabortion organizations banded together to demand a constitutional amendment banning abortion. As part of this effort, pro-lifers tried to identify a constitutional tradition that treated unborn children as rights-holding persons—one that denied compensation to parents on whom procreation had been imposed.[6]

Within a decade of the *Roe* decision, antiabortion groups had no choice but to abandon a constitutional amendment, but their efforts to block recognition of most reproductive torts only intensified. Rather than changing the text of the Constitution, groups like National Right to Life Committee (NRLC) and Americans United for Life (AUL) focused on overruling *Roe*—and on proving that the 1973 decision was a legal, social, and cultural outlier. As part of this effort, antiabortion groups lobbied for statutes banning suits for wrongful birth or wrongful life. Suits for "procreation imposed" often failed because of a longstanding conflict over abortion.[7]

Beginning in the 1980s, the abortion debate also cast a shadow over the idea of procreation confounded. In seeking a path to undo abortion rights, established antiabortion groups experimented with arguments that *Roe* recognized only a right to end pregnancies for socially acceptable reasons. NRLC argued that men should have a constitutional right to force women to continue a pregnancy if there was not an adequate justification for abortion. That group also promoted laws that allowed for abortions only for "good reasons," such as cases of rape or incest or threats to a woman's health. These campaigns reinforced existing convictions that only certain reproductive harms deserved redress.[8]

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[6] *See, e.g.*, Martin McKernan, Memorandum for National Right to Life Committee (Jul. 30, 1970) (on file with the American Citizens Concerned for Life Papers, Box 4, NRLC Folder 1); *see also* Mary Ziegler, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 38 (2015). For more on the constitutional amendment campaign, see Mary Ziegler, *Substantial Uncertainty:* Whole Woman's Health v. Hellerstedt *and the Future of Abortion Law*, 2016 SUP. CT. REV. 77.

[7] On the antiabortion push for laws limiting wrongful birth or wrongful life, see James Bopp, Jr. et al., *The Rights and Wrongs of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Wrongful Birth and Wrongful Life*, 27 DUQUESNE L. REV. 461 (1989); Rochelle Sharp, *Legislature Is Inundated with Anti-Abortion Bills*, FORT MYERS NEWS-PRESS, Dec. 8, 1985, at 5F; *A Fetus Is a Fetus Is*, OFF OUR BACKS, Jan. 31, 1986, at 31.

[8] On NRLC's litigation, see Martha Brannigan, *Suits Argue Fathers' Rights in Abortion—One Plaintiff Has Petitioned Supreme Court*, WALL ST. J., Aug. 23, 1988, at 29; Tamar Lewin, *Woman Has Abortion, Violating Court's Order on Paternal Rights*, N.Y. TIMES (Apr. 14, 1988), https://www.nytimes.com/1988/04/14/us/woman-has-abortion-violating-court-sorder-on-paternal-rights.html (discussing men using the legal system to try to stop their partners' abortions); David G. Savage, *Fathers' Appeals to Justices Ask Equal Rights to Children, Even Unborn*, L.A. TIMES (Sep. 25, 1988), http://articles.latimes.com/1988-09-25/news/mn-

In recent years, with a reconfigured Court seemingly likely to reverse *Roe*, the effort to stigmatize parental preferences for a particular kind of offspring has figured centrally in reversal strategies. States have introduced laws like the one considered in *Box v. Planned Parenthood of Indiana and Kentucky*[9] that ban abortions for reasons of disability, race, or sex-selection. These laws, and constitutional defenses of them, suggest that there is a hierarchy of reasons for seeking or avoiding procreation. Clarence Thomas's concurrence claimed that parents who select for disability carry on the tradition of a eugenic movement that sponsored forced sterilization. The fight against legal abortion has increasingly depended on the stigmatization of procreation confounded.[10]

Existing abortion bans provide a glimpse of the kinds of law a significant number of states will introduce if the Court no longer recognizes federal abortion rights. State laws have outlawed "abortion" without defining it clearly. Georgia, for example, defines fetuses as rights-holding persons from the point a physician can detect fetal cardiac activity. The consequences of the law are far from clear, especially since many abortion foes view common forms of contraception, including birth control pills and intrauterine devices, as abortifacient.[11]

At present, Georgia's law, like others like it, does not apply to women who end their own pregnancies, but this position seems untenable in the long term. If women can easily evade such a criminal law by traveling out of state to get an abortion or ordering abortion pills on the internet, abortion laws will be ineffective. The pressure to criminally punish women will likely be irresistible. Access to reproductive technology already varies by zip code and income level. The same is true of the rules governing reproductive negligence. If *Roe* is overturned, these differences will only get sharper.

But the reversal of *Roe* might also create opportunities for recognition of the causes of action that Fox champions. Courts have long looked to abortion law in analyzing assisted reproduction cases. If courts consider whether there is a right to avoid gestation, or a right to avoid genetic parenthood, *Roe* and *Casey* often are the starting point. By extension, however, courts may be reluctant to change the law governing reproduction, at least substantively, for fear of inadvertently

3861_1_equal-rights (noting husbands' and wives' competing interests in unborn children in a divorce dispute); *Father's Rights at Issue in Abortion Case*, CHI. TRIB., Apr. 15, 1988, at 3 [hereinafter *Father's Rights at Issue*] (illustrating Bopp's efforts to take legal action on behalf of would-be fathers attempting to prevent women's abortions). On AUL's work, see Marney Rich, *A Question of Rights: Birth and Death Decisions Put Women in the Middle of Legal Conflict*, CHI. TRIB., Sep. 18, 1988, at F1; *ACLU Contests C-Section Delivery of Viable Fetus*, LIFE DOCKET, Aug. 1988, at 2, (on file with the Southern Baptists for Life Papers, Box 1, File 1).

[9] 139 S.Ct. 1780 (2019).

[10] *See id. at* 1783-93. For an overview of the state of these laws, see *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INSTITUTE (Nov. 1, 2019), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [https://perma.cc/3EXL-GWDW].

[11] *See* GA. CODE ANN. § 1-2-1 (2019).

setting the stage for changing abortion jurisprudence. If the Court overturns *Roe*, courts considering reproductive negligence would be working from a blank slate. A post-*Roe* landscape might just make room for exactly the kind of fresh take that Fox provides.