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An Equality Approach to Wrongful Birth Statutes

Cover Page Footnote

I would like to thank Professor Tracy E. Higgins for her insightful comments on this Note.

AN EQUALITY APPROACH TO WRONGFUL BIRTH STATUTES

Stephanie S. Gold*

INTRODUCTION

American society is moving toward a medical and legal standard that embraces an increasingly broad right to patients' decisional autonomy. In 1973, *Roe v. Wade*¹ established that women have the right to control their bodies and solicit medical assistance in realizing that right. In 1990, the Supreme Court in *Cruzan v. Missouri Department of Health*² recognized the right of terminally ill patients to determine the extent of their medical care.³ This term, the Court will consider the right to physician-assisted suicide, a right upheld, on different grounds, in both the Ninth⁴ and Second⁵ Circuits. Relying in large part on *Planned Parenthood v. Casey*,⁶ which recognized the connection between liberty and decisional autonomy, the Ninth Circuit found in *Compassion in Dying v. Washington* that terminally ill patients have a constitutional right to physician-assisted suicide, a decision "central to personal dignity and autonomy."⁷

Historically, this right has been labeled as a right to bodily integrity, the "right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."⁸ In the medical context, patients' right to decisional autonomy, essentially facilitated through the receipt of information from their doctors, has been protected largely

* I would like to thank Professor Tracy E. Higgins for her insightful comments on this Note.

1. 410 U.S. 113 (1973).

2. 497 U.S. 261 (1990).

3. *Id.* at 278 (finding that a person has a liberty interest in determining the scope of their medical treatment).

4. *Compassion in Dying v. Washington*, 79 F.3d 790, 816 (9th Cir.) (finding that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death"), *cert. granted*, 117 S. Ct. 37 (1996).

5. *Quill v. Vacco*, 80 F.3d 716, 729-31 (2d Cir.) (finding no rational basis for distinguishing between the decision of competent terminally-ill patients to remove artificial life support equipment and the enlistment of a physician's aid to end life), *cert. granted*, 117 S. Ct. 36 (1996).

6. 505 U.S. 833, 869 (1992) (upholding the essential holding in *Roe* and finding that women possess "a constitutional liberty . . . to have some freedom to terminate her pregnancy").

7. *Compassion in Dying*, 79 F.3d at 813 (quoting *Casey*, 505 U.S. 833, 852). The Court found that "*Casey* and *Cruzan* provide persuasive evidence that the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death." *Id.* at 816.

8. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

by the threat civil litigation.⁹ The informed consent doctrine and medical malpractice actions rather than administrative enforcement have been the protective methods employed.¹⁰ The primary incentive for doctors to comply with informed choice has been the fear that failure to do so will result in a large litigation settlement.

Despite early recognition of decisional autonomy in the area of reproductive freedom, and its use as a basis for finding an autonomy right in other contexts, ironically it is in the area of reproductive freedom that the law has encroached upon that autonomy the most.¹¹ For example, abortion regulations and wrongful birth statutes carve out one category from the broader right of decisional autonomy.¹² This exemption affects only women because only women become pregnant and have the right to an abortion.¹³ The right to have an abortion,

9. *Id.* at 269 (finding that the "notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment" and informed consent is a component of American tort law). In his dissent, Justice Brennan also remarks that the right "to determine what shall be done with one's own body" is grounded in American tort law. *Id.* at 305 (Brennan, J., dissenting).

10. *Id.* (finding that the informed consent doctrine embodies the concept of bodily integrity).

11. Perhaps even more ironic is that in assessing terminally ill patients' wishes to die, women's views are considered less credible. Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 Tenn. L. Rev. 487, 507 & n.112 (1992) (referring to a finding that men's moral preferences are given more weight than women's choices). She quotes a study of appellate decisions in right-to-die cases that uncovered the following differences in the treatment of men and women:

The first difference is the courts' view that a man's opinions are rational and a woman's remarks are unreflective, emotional, or immature. Second, women's moral agency in relation to medical decision is often not recognized. Third, courts apply evidentiary standards differently to evidence about men's and women's preferences. Fourth, life-support dependent men are seen as subjected to medical assault; women are seen as vulnerable to medical neglect.

Id. at 507 (quoting Steven H. Miles & Allison August, *Courts, Gender and "The Right to Die,"* 18 Law Med. & Health Care 85, 85, 87 (1989)).

12. See *Planned Parenthood v. Casey*, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring in part, dissenting in part) ("In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts."); Laurence H. Tribe, *Abortion: The Clash of Absolutes* 197-210 (1990) (discussing abortion regulations); Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 Am. U. L. Rev. 77, 93-98, 112-16 (1995) (discussing the informed consent provisions, spousal notification, and the abortion funding cases).

13. See *Casey*, 505 U.S. at 895 (striking down a spousal notification provision); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1319-20 (1991). Professor MacKinnon notes:

Because pregnancy can be experienced only by women, and because of the unequal social predicates and consequences pregnancy has for women, any forced pregnancy will always deprive and hurt one sex only as a member of her gender. Just as no man will ever become pregnant, no man will ever need an abortion, hence be in a position to be denied one by law.

Id. at 1319-20.

however, is a component of the larger right to "be free from medical attention without consent, [and] to determine what shall be done with one's own body."¹⁴

Separate standards for the delivery of health information to women is not unique to the abortion context. Historically, women have been denied health information by doctors who made assumptions about women's capacity to make rational decisions and understand complex medical information.¹⁵ Much of the law and philosophy in this area reinforces women's stereotypical roles as child-bearers and mothers. "Woman has been judged historically as incapable of rational thought and therefore susceptible to immorality unless controlled by man, her intellectual and moral superior."¹⁶ This vision of women as exclusively mothers and caretakers associates women with children and in-

14. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 305 (1990) (Brennan, J., dissenting); *see id.* at 269.

15. Professor Sylvia A. Law found that "the tradition of medical paternalism is particularly strong in relation to women patients; doctors often assume authority to determine what is in women's best interest without soliciting their views." Sylvia A. Law, *Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. Rev. L. & Soc. Change 279, 295 (1994-95) [hereinafter Law, *Silent No More*]. Another commentator reports that "[h]istorically, experiments and operations have been performed on women without their consent." Lisa Napoli, *The Doctrine of Informed Consent and Women: The Achievement of Equal Value and Equal Exercise of Autonomy*, 4 Am. U. J. Gender & L. 335, 338-39 (1996) (footnotes omitted). Moreover, this commentator found that even "[w]hen consent is sought, women must often overcome gender-based stereotypes that impact on a doctor's decision to perform a procedure." *Id.* at 339.

16. Paula Abrams, *The Tradition of Reproduction*, 37 Ariz. L. Rev. 453, 463 (1995). "Sexist assumptions affect . . . the willingness of physicians to give patients vital information." Gena Corea, *The Hidden Malpractice: How American Medicine Treats Women as Patients and Professionals* 77 (1977). Corea uses the 1970 Senate hearings on the oral contraceptive as a model for this abuse. *Id.* She noted that several testifying doctors held a "woman-as-featherbrain" stereotype when testifying that "most women were not bright enough to understand information on the Pill's adverse effects." *Id.* She recounts one doctor's response to questions concerning informed consent. *Id.* He stated "that while some females were indeed intelligent enough to understand data on the Pill, there were 'vast numbers of women' who did not have inquiring minds or enough education to comprehend more than the simplest biological facts." *Id.* He continued: "A misguided effort to 'inform' such women leads only to anxiety on their part and loss of confidence in the physician They want him (the doctor) to tell them what to do, not to confuse them by asking them to make decisions beyond their comprehension The idea of informing such a woman is not possible." *Id.* at 77-78 (quoting Dr. Joseph Goldzieher of the Southwest Foundation for Research and Education); *see id.* at 242-52 (discussing the experimental use of DES on women without providing full information).

For discussions of the medical profession's abuse of women, see Barbara Ehrenreich & Deirdre English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1978); Sheryl B. Ruzek, *The Women's Health Movement: Feminist Alternatives to Medical Control* (1978); Diana Scully, *Men Who Control Women's Health: The Miseducation of Obstetrician-Gynecologists* (1994); *Seizing Our Bodies* (Claudia Dreifus, ed. 1977); Carol Tavris, *The Mismeasure of Woman: Why Women Are Not the Better Sex, the Inferior Sex, or the Opposite Sex* (1992).

competent people¹⁷ and consequently limits women's right to decisional autonomy.¹⁸

Since its origin, the medical profession has been insensitive and even hostile to patient autonomy, especially female agency with respect to medical decisions.¹⁹ A professor of sociology at Wesleyan University found that medical schools helped reinforce stereotypes of hysterical women controlled by their reproductive organs.²⁰ A study of twenty-eight gynecology textbooks, published in the 1970s and 1980s, revealed that "[o]ne-fourth of these books contained sex-role

17. See Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women's L.J. 9, 37 (1987) (stating that "pregnant women may, by virtue of their pregnancy, be equated with children and mental incompetents and denied decision making rights."); see also Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 Hastings L.J. 79, 93 n.62 (commenting that "the public welfare provisions of state constitutions were for the most part intended for paupers, incompetents, women, and children"); Robert D. Null, Note, *Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligors*, 29 Val. U. L. Rev. 1057, 1082 n.193 (noting that the "common law of property afforded women, as property of their fathers or husbands, the same status as children and mental incompetents").

18. Abrams, *supra* note 16, at 454 (analyzing the effects of religion, philosophy, and politics on the image and role of women in Western society).

19. John M. Smith, M.D., *Women and Doctors* 9 (1992). Smith writes:

The problems women experience in the health-care system reflect the problems of the system in general. Women, however, are impacted on a scale that is disproportionate to their numbers. Whether you are talking about unnecessary surgery, inappropriate treatment or testing, lack of preventive care, lack of consideration in research, allocation of dollars, or simply being milked for dollars by physicians, women are mistreated on a major scale.

Id. Smith observes that women, regardless of their race, wealth, or career, are abused by doctors more often than similarly situated men. *Id.* He comments that doctors, alone, should not bear responsibility for the mistreatment of women. *Id.* at 18-19. The majority of abusive doctors do not realize the effects of their actions; doctors believe that they are behaving in the best interests of their female patients. *Id.* at 19. Part of this belief stems from the tremendous power that society allocates to doctors. *Id.* One of those powers is the control of the "flow of information." *Id.*

20. Rita Baron-Faust, *Why Doctors Mistreat Women*, Redbook, May 1989, at 114-15; see Karen Labacz, *Feminism and Bioethics*, Second Opinion, Oct. 1991, at 16. Karen Labacz describes feminists' charge that:

[M]edicine, like other social institutions, does not take women's moral agency seriously, and that traditional bioethics is deficient because it fails to recognize and address this gender gap. Traditional bioethics is often conducted as though we all 'know' that medicine has a benign purpose: to heal disease. . . . Feminists charge that 'disease' itself is a social construction, that medicine has functioned not simply to heal disease but also to reinforce sex, class, and race stereotyping, and that the real question, therefore, is whether the institution and practice of medicine is good for women.

Id. Labacz also notes that a commitment to "women and women's well-being includes the conviction that women have been historically discriminated against and that such discrimination has been built into the myths, structures, and ideologies of the culture. It has rendered women's experiences, viewpoints, and histories 'invisible.'" *Id.* at 19.

stereotyping, paternalism and other forms of condescension toward women. Some texts insinuated that a woman's primary role was child producer and family nurturer and that women should place men's sexual needs above their own."²¹ This evidence about the treatment of women by the medical profession establishes a framework for consideration of the motives and intent of legislators who deny informed choice to women facing serious health decisions.

A justification often proffered for controlling women's bodies in the reproductive health context is a state interest in fetal protection.²² For example, the government attempts to limit the control women possess over their bodies through forced caesarean surgeries,²³ blood transfusions, sterilizations either through removal of reproductive organs²⁴ or implantation of Norplant,²⁵ and criminal laws punishing pregnant women for consuming drugs or alcohol.²⁶ Women of color and poor women are most dramatically affected by this type of control. For example, states and doctors have justified forced sterilization through the propagation of social assumptions about women of color. One commentator notes that:

African-American women, along with Latina (especially Puerto Rican) and Native American women, were subjected to forced sterilization in appalling numbers up through the 1970s, a practice that continues in "milder" forms today. Physicians felt justified in surgi-

21. Baron-Faust, *supra* note 20, at 33.

22. Professor Lisa C. Ikemoto describes the effects of the state's intervention in women's choices concerning reproductive health as devaluing "women as persons and describ[ing] women as 'vessels,' 'mother machines,' or 'incubators.'" Ikemoto, *supra* note 11, at 487 (citations omitted).

23. Currently, caesarean sections are the most common major surgery performed in the United States. Leslie G. Espinoza, *Dissecting Women, Dissecting Law: The Court-Ordering of Caesarean Section Operations and the Failure of Informed Consent to Protect Women of Color*, 13 Nat'l Black L.J. 211, 211 (1994). Espinoza also notes that according to the Kolder study in the New England Journal of Medicine, 81% of the court-ordered caesareans were ordered for black, Hispanic, or Asian women. *Id.* at 226 (citing Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987)).

24. See Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 Ohio St. L.J. 1205, 1228-33 (1992) (discussing the forced sterilization of women).

25. Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 Berkeley Women's L.J. 9 (1994). Norplant is a form of contraceptive that "consists of six matchstick-size silicone capsules implanted under the skin of a woman's upper arm." *Id.* at 10. As a birth control method, Norplant is unique because it deprives a woman of all control over her contraception. *Id.* at 11. It must be surgically removed at a cost ranging from \$150 to \$300. *Id.* at 10.

26. See Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 U. Pa. L. Rev. 179, 179 (1989); Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. Rev. L. & Soc. Change 277, 299-303 (1987-88).

cally removing these women's reproductive organs without consent because they believed them to be sexually promiscuous and either too irresponsible or too ignorant to use birth control.²⁷

Poor and minority women also have been targets for the coercive use of Norplant.²⁸ Despite tremendous side effects,²⁹ Norplant has been used as an alternative to incarceration for women accused of child abuse or drug use during pregnancy.³⁰ As a result of the inherent biases of society, the women most often targeted for criminal prosecution are poor women and women of color.³¹ The Norplant policy also has interfered with the development of more supportive, positive methods for addressing child and drug abuse.³² Controlling women's reproductive lives through the use of Norplant occurs in contexts other than the criminal justice system. In fact, states have proposed legislation that would condition the receipt of welfare on a woman's "consent" to a Norplant implant.³³

Despite a general movement toward full information for all patients, this trend is not being followed in the area of reproductive freedom. Wrongful birth statutes exemplify this double standard. The wrongful birth tort is primarily a product of common law³⁴ and requires a showing that a doctor failed to provide fetal health information which would have proven that the fetus had developmental anomalies.³⁵ In general, parents claim that if the doctor had provided

27. Nancy Ehrenreich, *The Colonization of the Womb*, 43 Duke L.J. 492, 515 (1993) (footnotes omitted).

28. Albiston, *supra* note 25, at 11-13. For a detailed history of the Norplant controversy, see Karin E. Wilinski, Note, *Involuntary Contraceptive Measures: Controlling Women at the Expense of Human Rights*, 10 B.U. Int'l L.J. 351 (1992). For a discussion on the impact of Norplant on poor women and women of color, see Darci E. Burrell, Essay, *The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 UCLA Women's L.J. 401 (1995).

29. Side effects of Norplant include, "headaches, depression, nervousness, enlargement of the ovaries and/or fallopian tubes, inflammation of the skin, weight gain, inflammation of the cervix, nausea, dizziness, acne, abnormal hair growth, tenderness of the breasts, and prolonged or irregular bleeding." Albiston, *supra* note 25, at 10.

30. *Id.* at 11-12.

31. *Id.* at 12.

32. *Id.*

33. Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 Denv. U. L. Rev. 931, 934 & n.18 (1995) (referring to S.B. 2895, Miss. (1992) and H.B. 3207, S.C. (1993)). Professor Roberts also observes that because Norplant must be removed surgically, government authorities can regulate poor women more easily than with other forms of birth control. *Id.* at 934. Professor Roberts notes that "Americans are predisposed to be less concerned about protecting the reproductive decisions of poor women than the welfare of their children." *Id.*

34. *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981) (stating that "[s]tate courts have been quick to accept wrongful birth as a cause of action since *Roe v. Wade*, because it is not a significant departure from previous tort law").

35. See *Basten v. United States*, 848 F. Supp. 962, 969-71 (M.D. Ala. 1994) (finding that doctor failed to inform patient of the risks of becoming pregnant while taking oral contraceptives, that doctor failed to offer an AFP test that would have diagnosed the neural tube defect, and that patient would have opted for the AFP test had it been

them with this information, the woman would have terminated the pregnancy.³⁶ Wrongful birth statutes represent a societal and legislative response to the pervasive acceptance of the tort.³⁷ By denying parents the right to sue and collect damages for the wrongful birth tort, these statutes relieve the doctor from the threat of liability and the corollary burden of full disclosure.³⁸

This Note argues that wrongful birth statutes violate the Equal Protection Clause of the Fourteenth Amendment. Part I discusses the tort of wrongful birth and the statutes that ban the tort. Part II contends that a ban on wrongful birth torts is a gender-based distinction that warrants intermediate scrutiny under the Supreme Court's Equal Protection Clause jurisprudence. This argument relies, in part, on the acceptance of a broader, more inclusive understanding of reproductive freedom and gender equality. Finally, part III demonstrates that wrongful birth statutes fail intermediate scrutiny.

I. THE TORT OF WRONGFUL BIRTH AND THE DEVELOPMENT OF WRONGFUL BIRTH STATUTES

This part outlines the development of the wrongful birth cause of action and the legislative response to the tort. First, this part briefly discusses the judiciary's varying approaches to analyzing the tort. This part then examines the public and legislative responses to the increasing acceptance of the tort. This part concludes with an analysis of the wrongful birth statutes, which ban the cause of action for wrongful birth.

offered). The parties stipulated that when a fetal neural tube defect is discovered, pregnancies are terminated 90% of the time. The court found that if Ms. Basten had known of the condition, she would have elected to have an abortion. *Id.* at 971; *Keel v. Banach*, 624 So. 2d 1022, 1024 (Ala. 1993) (stating that a wrongful birth action "describes a claim for relief by parents who allege they would have avoided conception or would have terminated the pregnancy but for the negligence of those charged with prenatal testing, genetic prognosticating, or counseling parents as to the likelihood of giving birth to a physically or mentally impaired child").

36. *Keel*, 624 So. 2d at 1024.

37. See *Wilson v. Kuenzi*, 751 S.W.2d 741, 749 (Mo. 1988) (en banc) (Billings, C.J., dissenting) (stating that a wrongful birth cause of action should be recognized and that "[t]he emotional and controversial issue of abortion should not control or influence the decision in this case. Neither should the enactment of so-called 'tort reform' legislation—the constitutionality of which must await another day.").

38. *Flickinger v. Wanczyk*, 843 F. Supp. 32, 37 (E.D. Pa. 1994) (noting that the provisions of Pennsylvania's wrongful birth statute "clearly relieve physicians from liability for negligently failing to provide women with information affecting abortion decisions" (quoting *Edmonds v. Western Pa. Hosp. Radiology Assoc.*, 607 A.2d 1083, 1088 (Pa. Super. Ct. 1992))).

A. *The Development of the Wrongful Birth Tort*

Wrongful birth³⁹ actions developed out of common law principles of negligence and medical malpractice.⁴⁰ A successful action requires a showing of all of the traditional elements of negligence.⁴¹ A plaintiff first must prove that a duty between the physician and patient exists.⁴² The duty of a physician to provide prenatal information arises from the larger duty that physicians owe their patients. Although courts and legislatures in every state articulate the standard differently, an en banc decision by the Supreme Court of Washington provides a general example:

[W]e hold that parents 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 of such children. . . . [T]he duty also requires that these procedures be performed with due care.⁴³

Although this case articulates a specific duty with respect to wrongful birth actions, it is premised on physicians' broader legal duty to use the "reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases."⁴⁴ A plaintiff must also prove a breach of that duty by showing that the doctor failed to perform her

39. The wrongful birth tort is often confused with three other torts: wrongful life, wrongful pregnancy, and wrongful conception. Wrongful life is most closely related to wrongful birth actions. In both wrongful birth and wrongful life actions, the claim is based on a doctor's breach of the duty to fully inform the parents of fetal birth defects. This breach denies those parents the right to make an informed choice about continuing the pregnancy. Unlike wrongful birth actions, a wrongful life claim is brought by the child who was born of the pregnancy, rather than by that child's parents. See John W. Wade et al., Prosser, Wade and Schwartz's Cases and Material on Torts 421-36 (9th ed. 1994). Recognition of wrongful life claims has moved more slowly than recognition of wrongful birth claims. Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. Balt. L. Rev. 185 (1993). Wrongful pregnancy and wrongful conception deal specifically with the failure of either a birth control method or a sterilization procedure that led to the birth of an unwanted, albeit healthy child. Wade, *supra*, at 434-35.

40. *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 705 (Ill. 1987) (stating that "[m]any courts have accepted wrongful birth as a cause of action on the theory that it is a logical and necessary extension of existing principles of tort law"); see also *Keel*, 624 So. 2d at 1030-31 (quoting *Siemieniec*).

41. *Becker v. Schwartz*, 386 N.E.2d 807, 811 (N.Y. 1978) ("As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party").

42. See *id.* at 813 (recognizing a physician's duty to provide patients with prenatal information).

43. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 491 (Wash. 1983) (en banc).

44. Belinda L. Kimble, *Wrongful Birth: A Practitioner's Guide to a New Arrival*, 55 Ala. Law. 84, 87 (1994) (quoting the Medical Liability Act of 1987, Ala. Code § 6-5-542 (1987)); see *Harbeson*, 656 P.2d at 489 n.1 (quoting Wash. Rev. Code § 4.24.290

duties with reasonable care.⁴⁵ In contrast to the difficulties associated with proving duty, causation, and injury, most plaintiffs have had little trouble establishing breach.⁴⁶

Lack of proximate causation was an early ground warranting the dismissal of wrongful birth actions. Courts believed that in order to prove causation, a plaintiff would have to prove that the physician caused the anomaly in the child.⁴⁷ The North Carolina Supreme Court in *Azzolino v. Dingfelder*⁴⁸ used this standard in denying a claim for wrongful birth. The court expressed concern about the plaintiffs' ability to prove causation adequately:

We again assume *arguendo* that the defendants owed the plaintiffs a duty and that they breached that duty. The issue of whether the breach of duty was the proximate cause of the "injury" to the plaintiff parents is more problematic, since even the plaintiffs acknowledge that the fetus . . . was in existence and already genetically defective at the time the defendants first came into contact with the plaintiffs.⁴⁹

Although the court dismissed the claim, it conceded that the "jurisdictions which have reached the merits of claims for wrongful birth currently appear to be almost unanimous in their recognition of them."⁵⁰ Indeed, most courts now recognize the distinction between causing the anomaly and causing the parents to lose the option to terminate the pregnancy;⁵¹ the latter causation standard is widely accepted in jurisdictions recognizing wrongful birth actions.⁵²

(1975)), which articulates the physician's statutory duty to "exercise that degree of skill, care and learning possessed by other persons in the same profession").

45. Examples of post-conception breaches include:

[P]hysician failed to disclose that anticonvulsant medication given to mother carried high risk of birth defects (Washington); failure to warn of increased risk of Down's Syndrome in women over thirty-five (New York); failure to advise of availability of amniocentesis (New Jersey) and failure to timely report its results (Delaware); failure to diagnose Rubella in mother, resulting in Rubella Syndrome child (Idaho); and failure to advise of the consequences of Rubella in pregnant mother (Texas).

Kimble, *supra* note 44, at 87-88.

46. See *Harbeson*, 656 P.2d at 492 (finding that establishing a breach of a duty is generally "more straightforward").

47. See Kimble, *supra* note 44, at 88.

48. 337 S.E.2d 528 (N.C. 1985).

49. *Id.* at 533.

50. *Id.*

51. *Robak v. United States*, 658 F.2d 471, 477 (7th Cir. 1981) ("A negligent act need not be the sole cause of the injury complained of in order to be a proximate cause of that injury. Moreover, the cause of action is not based on the injuries to the fetus but on defendant's failure to diagnose . . . and inform . . . of the consequences.").

52. *Keel v. Banach*, 624 So. 2d 1022, 1027 (Ala. 1993) (holding that to prove causation, "it is necessary for the plaintiff to show that, had the defendant not been negligent, the plaintiff would have been aware of the possibility that the child would be seriously defective, and either the child would not have been conceived or the pregnancy would have been terminated").

Wrongful birth action plaintiffs also have difficulty proving injury. Initially, courts were unwilling to recognize that the birth of a child, albeit unwanted and unhealthy, could constitute a type of injury.⁵³ Eventually, however, courts accepted that the manipulation of information in the wrongful birth context could constitute an injury.⁵⁴ These courts were left with the task of determining the extent of the injury and have found it difficult to measure compensatory damages in light of the tort's unique characteristics.⁵⁵ Moreover, courts have split on whether damages may be awarded for emotional distress.⁵⁶

There still is no consensus about the extent of damages available in wrongful birth claims.⁵⁷ Many courts refuse to award all expenses involved in raising a child and permit recovery only for the extraordi-

53. In *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967), the New Jersey Supreme Court wrote, "[i]n order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries." *Id.* at 693. The court further held that, "[w]hen the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child." *Id.* The court felt that "[i]t is basic to the human condition to seek life and hold on to it however heavily burdened." *Id.*

54. See *Robak*, 658 F.2d at 477 (finding that the doctors injured the patient by denying her information); *Keel*, 624 So. 2d at 1029 (finding a valid cause of action for wrongful birth when doctor denied parents prenatal information). The *Keel* court specifically stated:

Like most of the other courts that have considered this cause of action, we hold that the 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.

Id. at 1029. Thus, the denial of information was sufficient to establish injury.

55. The Illinois Supreme Court stated the general rule for calculating tort damages:

[T]he wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or should not have been foreseen by him, provided the particular damages are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as might reasonably have been anticipated.

Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 706 (Ill. 1987). The court noted that although wrongful birth claims must meet all of the traditional negligence requirements, courts have been reluctant to award the traditional amount of damages to successful wrongful birth action plaintiffs. *Id.*

56. Compare *Liddington v. Burns*, 916 F. Supp. 1127, 1140-41 (W.D. Okla. 1996) (finding that parents could recover damages for emotional distress) with *Siemieniec*, 512 N.E.2d at 708 (holding that plaintiffs could not recover for emotional distress) and *Becker v. Schwartz*, 386 N.E.2d 807, 813 (N.Y. 1978) (denying plaintiffs claim for emotional distress damages) and *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 492-93 (Wash. 1983) (en banc) (permitting recovery for emotional distress).

57. *Siemieniec*, 512 N.E.2d at 706 ("The complex legal, moral, philosophical, and social issues raised by wrongful birth claims have resulted in a widely divergent judicial treatment of damages.").

nary costs of raising a developmentally disabled child.⁵⁸ For example, the Supreme Court of Texas stated:

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.⁵⁹

The court permitted plaintiffs' recovery of the expenses needed to care for the special economic burdens of raising a developmentally disabled child, but did not allow parents to recover all of the expenses incurred as a result of the child.⁶⁰

The decision in *Roe v. Wade*⁶¹ was instrumental in the widespread recognition of wrongful birth actions.⁶² Even before *Roe*, however, the Texas Supreme Court held in *Jacobs v. Theimer*,⁶³ that a wrongful birth action does not rely necessarily on the availability of abortion in the particular state.⁶⁴ The court stated: "We do not regard the issue before us as requiring our decision of the public policy either for or against abortion. This is a matter of very different but very deep feeling."⁶⁵ Although the incident occurred in 1968, five years before the decision in *Roe*, the Texas court stated that it would assume that the plaintiff could have obtained a legal abortion.⁶⁶ In finding for the plaintiff, the court specifically held that the doctor had a responsibility

58. See *Liddington*, 916 F. Supp. at 1133 (holding that parents can only recover the extraordinary expenses associated with the disability in light of the trend toward denying recovery for all of the expenses incurred in raising a child); see also *Keel v. Banach*, 624 So. 2d 1022, 1029-30 (Ala. 1993) (permitting recovery for the special expenses resulting from the child's disability, but not for all expenses incurred in raising a child); cf. *Robak v. United States*, 658 F.2d 471, 478-79 (7th Cir. 1981) (permitting recovery for all expenses stemming from doctor's negligence, including the entire cost of raising a child). Some courts differentiate the duration of damage awards on the basis of the child's age. See *Siemieniec*, 512 N.E.2d at 706 (stating that some courts end damage awards when the child reaches the age of majority, while other courts allow the award to continue because of the developmentally disabled child's inability to support herself after reaching the age of majority).

59. *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975).

60. *Id.* at 850.

61. 410 U.S. 113 (1973).

62. See *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979) (holding that since *Roe*, "[p]ublic policy now supports, rather than militates against" the recognition of a wrongful birth claim).

63. 519 S.W.2d 846 (Tex. 1975).

64. *Id.* In this case, the defendant doctor failed to diagnosis a pregnant woman's rubella and consequently did not inform the plaintiff of the potential side-effects of the rubella. *Id.* at 847. Subsequently, the plaintiff's baby was born with serious health problems and the plaintiffs amassed medical bills totaling over \$20,000. *Id.*

65. *Id.* at 848.

66. *Id.*

to his patient to disclose all information relative to the patient's condition.⁶⁷

B. *The Response to the Recognition of the Tort*

Despite the tort's significant success in the court houses, many anti-abortion activists oppose the tort and have lobbied local legislatures to pass statutes banning the cause of action.⁶⁸ At least twenty-one states have considered passing wrongful birth statutes that would ban wrongful birth actions.⁶⁹ Six states have enacted these laws.⁷⁰ A typical wrongful birth statute reads as follows: "A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."⁷¹ These statutes have been challenged unsuccessfully on both privacy and equal protection grounds.⁷²

67. *Id.*

68. Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 Harv. L. Rev. 2017, 2018 n.6 (1987) [hereinafter *Wrongful Birth Actions*]. Anti-abortion groups in Pennsylvania and Tennessee lobbied the local legislatures to pass wrongful birth statutes. *Id.* In an attempt to sway the judiciary, the following four anti-abortion groups filed amicus briefs with the Supreme Court of Minnesota in support of wrongful birth statutes: Americans United for Life Legal Defense Fund, The Catholic Health Association of the United States, The Catholic League for Religious and Civil Rights, and The National Right to Life Committee, Inc. *Id.*

69. *See id.* at 2019 (reporting that the following states have considered wrongful birth statutes: Alabama, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin).

70. All of the following statutes ban wrongful birth as a result of negligence; however, Idaho, Pennsylvania, and South Dakota also ban wrongful birth claims resulting from intentional conduct. Idaho Code § 5-334 (1990); Ind. Code Ann. § 34-1-1-11 (Burns 1986 & Supp. 1996); Minn. Stat. Ann. § 145.424 (West 1989); Mo. Ann. Stat. § 188.130 (Vernon 1996); 42 Pa. Cons. Stat. Ann. § 8305 (1989 & Supp. 1993); S.D. Codified Laws Ann. § 21-55-2 (1987).

71. Idaho Code § 5-334 (1990). Most of the legislation resembles model legislation distributed by Americans United for Life Legal Defense Fund. *Wrongful Birth Actions*, *supra* note 68, at 2019 & n.9.

72. For example, in *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986), plaintiffs challenged Minnesota's wrongful birth statute on due process and equal protection grounds. *Id.* The trial court found that Minnesota's legislative ban on wrongful births actions was unconstitutional under the framework established in *Roe*. The court noted that in order to violate *Roe*, "the state must directly affect or impose a significant burden on a woman's right to an abortion." *Id.* at 13. The trial court, however, certified the question to the Minnesota Supreme Court because of the importance of the issue. *Id.* at 11.

As an initial matter, the Minnesota Supreme Court held that because wrongful birth actions did not exist at common law, the tort should be established exclusively by the legislature; consequently, only success on the constitutional challenges could defeat the statute. *Id.* at 13. Addressing the constitutional claims, the court held: (1) there was no state action; (2) even if state action could be established, the wrongful birth statute does not violate due process because the statute fails to "impose a significant burden on a woman's right to an abortion;" and (3) the statute does not violate

II. WRONGFUL BIRTH STATUTES CONSTITUTE GENDER-BASED DISTINCTIONS AND THEREFORE WARRANT INTERMEDIATE SCRUTINY

By lessening doctors' incentives to provide female patients with complete information, wrongful birth statutes discriminate on the basis of gender, and consequently, warrant intermediate scrutiny under

equal protection because the statute permits a claim for wrongful conception while denying a claim for wrongful birth. *Id.* at 13-14.

Chief Justice Amdahl, joined by Justices Wahl and Scott, wrote a critical dissent. *Id.* at 18 (Amdahl, C.J., dissenting). He argued that wrongful birth statutes constitute state action because they interfere with a woman's decisionmaking process as protected by *Roe*. *Id.* Chief Justice Amdahl found that *Roe* anticipated that women choosing abortion would have access to full information, and that wrongful birth statutes constituted "a subtle entry into that relationship and interference with the informed decisionmaking process." *Id.* at 19. He summarized the state action argument by stating:

The possibility that a doctor will be held responsible for negligent conduct stands as a safeguard that the woman will be fully informed. The legislature's removal of the negligence action safeguard, while not preventing a woman from actually obtaining an abortion, does harm the complete exercise of a woman's rights under *Roe*.

Id. Furthermore, Chief Justice Amdahl distinguished the funding cases cited by the majority by finding that the funding cases did not put an obstacle in a woman's path to obtaining an abortion. *Id.* Instead, the funding cases monetarily favored one activity over another and never interfered with the "informed decisionmaking of women." *Id.*

Reaching the merits of the case, Chief Justice Amdahl conceded that the United States Supreme Court has allowed some infringement on a woman's right to choose. He argued, however, that the Court has held unconstitutional "restrictions on the decisionmaking process that do not assist a woman in making a more informed decision." *Hickman*, 396 N.W.2d at 19 (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 65-75 (1976), *Bellotti v. Baird*, 443 U.S. 622, 639-44 (1979), and *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439-49 (1983)). Thus, state action that provides a disincentive to share information, such as wrongful birth statutes, violates *Roe*. Finally, Chief Justice Amdahl considered the state's justifications for the statutes unconvincing. He noted that the two justifications that the Supreme Court has found compelling are: "(1) protecting the woman's health, and (2) protecting the potentiality of human life." *Hickman*, 396 N.W.2d at 20. With respect to the first justification, Chief Justice Amdahl stated, "I cannot accept as fact that physician negligence protects a woman's health." *Id.* He noted that, ironically, the wrongful birth statute harms women by "not discouraging the negligent withholding of medical information." *Id.* He also noted that, under *Roe*, the second justification only operates after the fetus becomes viable. *Id.*

Since *Hickman*, there have been several challenges to wrongful birth statutes. The reviewing courts, however, utilized similar rationales to deny the claims. See *Edmonds v. Western Pa. Hosp. Radiology Assocs.*, 607 A.2d 1083, 1088 n.5 (Pa. Super. Ct. 1992). In *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 819 (Pa. Super. Ct. 1993), the court considered *inter alia* an equal protection challenge to Pennsylvania's wrongful birth statute. *Id.* The court found that wrongful birth statutes did not discriminate against any class and therefore subjected the statute to rational basis review. *Id.* at 819. The court upheld the constitutionality of the statute; because it believed that the government expressed legitimate state interests, and the statute was rationally related to those interests. *Id.* at 820.

the Equal Protection Clause.⁷³ Because doctors' responsibility to provide information to their patients has been regulated in large part by the threat of litigation, legislatures that disallow actions for wrongful birth inflict a heavy penalty on pregnant women by favoring the doctor's judgment and power over the woman's right to make an informed choice.⁷⁴ Section A of this part argues that a statutory ban on wrongful birth actions imposes a unique harm on women. The section also contends that statutes banning wrongful birth causes of action distinguish on the basis of pregnancy. Finally, it concludes by distinguishing *Geduldig v. Aiello*,⁷⁵ a case which held that distinctions based on pregnancy are not per se gender discriminatory. Section B asserts that wrongful birth statutes should not be interpreted as facially neutral because the statutes are gender-motivated. It also addresses the standard established in *Personnel Administrator of Massachusetts v. Feeney*⁷⁶ and contends that the *Feeney* standard⁷⁷ does not apply to wrongful birth statutes because of the factual differences in the two

73. In 1976, the Court, in *Craig v. Boren*, 429 U.S. 190 (1976), settled on an intermediate form of scrutiny that required a state to justify a gender-based distinction with an important governmental interest substantially related to the state's purported goals. *Id.* (finding that an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 and females under 18 failed to advance an important governmental interest and consequently violated the Equal Protection Clause of the Fourteenth Amendment).

74. Doctors' power in relation to female patients was at the heart of the academic response to *Roe*. In *Roe*, the Court focused on issues of due process, specifically privacy. To the incredulity of many critics, the opinion stressed the importance of the doctor's autonomy and medical judgment but considered the woman as primarily a patient and her decisions as predominately medical decisions. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 376 (1985) (discussing the tremendous flood of criticism elicited by the decision in *Roe*). Professor Daly summarizes the impact of *Roe's* medical focus by stating:

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.

Daly, *supra* note 12, at 83. Professor Daly further concludes that if women are exclusively patients, then the abortion decision is solely a medical choice and *Roe* is limited to considering issues surrounding the woman's medical condition. *Id.* at 85.

Because the Court focused on the medical profession's rights, women's rights with respect to issues other than medical condition were trivialized. Moreover, *Roe* implied that the Constitution protects the doctor's judgment but not necessarily the woman's decision. Thus, the doctor controls the decision to abort. Professor Daly made the following analogy: "Substitute vasectomy (or any other elective procedure) for abortion and the absurdity of the doctor's veto power becomes clear." *Id.* at 86.

Professor MacKinnon observes that *Roe* legalized abortion rather than decriminalizing it. Catharine MacKinnon, *Toward a Feminist Theory of the State* 192 (1989). She notes that as a result of *Roe's* privacy rationale, "[m]ost of the control that women won out of legalization has gone directly into the hands of men—husbands, doctors, or fathers—and what remains in women's hands is now subject to attempted reclamation through regulation." *Id.*

75. 417 U.S. 484 (1974).

76. 442 U.S. 256 (1979).

situations. In addition, this section posits that wrongful birth statutes are neither explicitly gender-based nor facially neutral. The gender implications of a ban, however, are apparent. Section C ultimately establishes that a ban on wrongful birth claims injures women by failing to connect equality with reproductive freedom, thereby furthering women's subordination.

A. Bans on Wrongful Birth Actions Are Gender-Based

The first component of an equal protection challenge is establishing the applicable level of scrutiny. Subsection 1 argues that wrongful birth statutes discriminate on the basis of pregnancy. It comments that wrongful birth statutes decrease doctors' incentives to provide full information to their female patients, and therefore wrongful birth statutes distinguish between pregnant women and all other patients. Subsection 2 asserts that the pregnancy distinction in wrongful birth statutes constitutes gender discrimination.

1. Wrongful Birth Statutes Distinguishes on the Basis of Pregnancy

Unlike the statutes in *Geduldig v. Aiello*⁷⁸ and *General Electric Co. v. Gilbert*,⁷⁹ wrongful birth statutes do not mention pregnancy. As opposed to regulations that exclusively prohibit pregnant women from obtaining abortions and fail to address the male parent at all,⁸⁰ damages in wrongful birth actions explicitly accrue to both women and

77. For the purposes of this Note, the "Feeney standard" refers to the test employed to infer a pretextual class-based motive from a facially-neutral statute. See *id.* at 274-75.

78. 417 U.S. 484 (1974). *Geduldig* is an equal protection case involving a California statute that omitted pregnancy from coverage in an insurance scheme. *Id.* at 487, 489-91. The Court found that covering pregnancy would amount to a special benefit for women even though the scheme covered exclusively male conditions. *Id.* at 496-97. Most importantly, the Court found that discrimination on the basis of pregnancy was not *per se* gender discrimination because the Court believed this distinction failed to conform to the traditional equal protection framework that compares similarly situated people. See *id.* at 496-97.

79. 429 U.S. 125 (1976). *Gilbert* considered a Title VII challenge to an insurance scheme similar to the one at issue in *Geduldig*. *Id.* at 129-33. The Court held that on the strength of the *Geduldig* holding, the Court would have to find that the insurance plan did not violate Title VII by omitting pregnancy. *Id.* at 133-36.

80. This does not mean that males are immune from the impact of abortion restrictions. Male doctors often face the penalty of an abortion restriction. As Professor Sunstein stated, "[t]he fact that some men may also be punished by abortion laws . . . does not mean that restrictions on abortion are gender-neutral." Cass R. Sunstein, *The Partial Constitution* 273 (1993). He makes an interesting parallel to racial segregation and observes that "[l]aws calling for racial segregation make it impermissible for whites as well as blacks to desegregate." *Id.* Men also are mentioned in their capacity as husband with respect to spousal notification provisions. The Supreme Court, however, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), held that spousal notification is unconstitutional. *Id.* at 895-96 (stating that "[i]t is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's").

men. Consequently, through the denial of a potential claim for damages, a statute banning wrongful birth actions harms both women and men.⁸¹ This factor complicates a gender-based equal protection argument against wrongful birth statutes. Nevertheless, wrongful birth statutes eliminate the powerful incentive of the threat of litigation⁸² which encourages the sharing of all fetal health information. Thus, there are two distinct issues in wrongful birth actions that implicate the Equal Protection Clause: the right to information⁸³ and the right to choose an abortion.⁸⁴

81. See *Gleitman v. Cosgrove*, 227 A.2d 689, 690 (1967) (describing the plaintiffs as including both the mother and the father of the child).

82. See *supra* notes 8-10, and accompanying text.

83. Every state has statutes designed to protect its citizens against abuse by the medical profession. Anthony Szczygiel, *Beyond Informed Consent*, 21 Ohio N.U. L. Rev. 171, 189 (1994) ("Between 1957 and 1984, every state, except Georgia, adopted a litigation remedy for a failure to obtain informed consent."). Georgia finally adopted informed consent legislation in 1988. Ga Code. Ann. § 31-9-6.1 (1991). The informed consent statutes serve as a method to regulate the medical profession by supplying doctors a critical incentive to provide patients with the full information necessary to make important health decisions and choices, thus constituting one of the most powerful forms of protection against abuse by the medical profession. See *supra* notes 8-10 and accompanying text. The jurisprudential doctrine of informed consent began in 1914 with Justice Cardozo's articulation that "[e]very human being of adult years and sound mind has a right to decide what shall be done with his own body." *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. App. Div. 1914). The concept of informed consent was refined in 1972, with the decision by the District of Columbia Circuit in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972). The court held that "[t]rue consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." *Id.* at 780. The court further empowered the patient by stating, "it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie." *Id.* at 781. The Supreme Court of California further clarified the right to informed consent:

[T]he patient's right of self-decision is the measure of the physician's duty to reveal. That right can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever information is material to the decision.

Cobbs v. Grant, 502 P.2d 1, 11 (Cal. 1972). For a detailed analysis of the evolving doctrine of informed consent, see Szczygiel, *supra*.

Professor Sylvia A. Law commented that "[p]atients' rights to self-determination and autonomy in medical decision-making have deep historic roots and command broad respect as abstract principles." Law, *Silent No More*, *supra* note 15, at 285. Law later defined the right to self-determination and autonomy as characterizing the doctrine of informed consent. *Id.* at 285-88. The informed consent statutes do not completely eliminate the traditional power structure between doctor and patient—the doctor still possesses superior scientific knowledge. The statute, however, provides a remedy when doctors infringe on patient's decision-making autonomy, and thus balances the power more evenly.

84. This is an important distinction because equal protection has not been applied to abortion in part because of a conception that in the reproductive health context men and women can never be similarly situated. See Sunstein, *supra* note 80, at 274-78. Wrongful birth actions, however, are different than abortion in this context. Un-

Despite the recognizable injury to both men and women resulting from a wrongful birth statute, women experience a unique and especially damaging injury.⁸⁵ Although at the time of birth the parents possess equal interests, during the pregnancy the woman carries the fetus in her body, ultimately makes the decision to abort, and risks the dangers associated with childbirth.⁸⁶ Because of the connection between the woman and the fetus,⁸⁷ when she is denied information about the health of the fetus, her doctor has injured her in a unique way. The doctor interferes with the woman's decisionmaking autonomy concerning the health of her own body—including the fetus.⁸⁸ Her husband is never legally denied health information in an analogous way concerning his own body.⁸⁹

In addition, while the legal interests of the father equalize with the mother's at the time of birth, the law vests the decision to abort solely

like abortion, a procedure that men will never have to contemplate, wrongful birth actions address the right to health information. Men are often patients and require information from doctors. Challengers to wrongful birth statutes need not rely on the outmoded conception that equal protection is inapplicable when real biological differences between men and women are at issue. Following this logic, an alternative argument against wrongful birth statutes would not need to rely on pregnancy. Justice O'Connor made a parallel argument in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). She stated that "[t]his case is not about abortion," because she believed that the analysis should focus on whether the interference with a legally protected right provides a cause of action under the statute at issue. *Id.* at 354 (O'Connor, J., dissenting).

85. See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.").

86. Justice Blackmun, in his concurrence in *Casey*, recognized this distinction. He stated that abortion regulations "conscript[] women's bodies into [the state's] service forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care." *Id.* at 928 (Blackmun, J., concurring in part and dissenting in part).

87. The pregnant woman nourishes the fetus, and access to the fetus is obtained only through her body. As Professor MacKinnon states, "[w]hat happens to it happens to her and what happens to her happens to it." MacKinnon, *supra* note 13, at 1314.

88. Concern over the connection of mother and fetus figures prominently in many pregnancy regulations. One commentator found in the context of regulations of pregnant women and drug abuse that, "[b]ecause the fetus is both intimately connected to and completely dependent upon the mother, virtually every act or omission by the mother affects the fetus." Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 Harv. L. Rev. 1325, 1340 (1990). Similarly, every illness affecting the fetus also affects the mother. As a result of this connection between mother and fetus, information about the health of the fetus uniquely and directly affects the woman.

89. Professor Sunstein makes an analogous point in his discussion of equal protection in the context of abortion regulations. Sunstein, *supra* note 80, at 272-73. He states that abortion regulations selectively co-opt women's bodies. *Id.* at 272. Moreover he states, "the government cannot impose on women alone the obligation to protect fetuses by co-opting their bodies through law. A key point here is that in no context does the law intrude on men's bodies in any comparable way." *Id.* at 273.

in the mother.⁹⁰ *Casey* established that a spousal notification⁹¹ requirement for an abortion is unconstitutional.⁹² As a result of wrongful birth statutes, the woman is not only denied personal health information⁹³ critical to her informed choice, but her doctor also denies her a second decision—the right to an abortion—that she uniquely possesses.⁹⁴ This right to an abortion exists, in part, because it is recognized as a component of decisional autonomy.⁹⁵ Courts are continually expanding the right to decisional autonomy and recognizing it in contexts outside of reproductive freedom.⁹⁶ Consequently, depriving women of a component of their decisional autonomy triggers heightened scrutiny under the Equal Protection Clause.

Furthermore, when the state interferes with a woman's right to choose to have an abortion, it is the woman's body that becomes conscripted to the state. As mentioned above, the woman bears the sum of the risks associated with childbirth.⁹⁷ Presently, abortion in the

90. See Daly, *supra* note 12, at 117 ("Restrictive abortion laws that unequally burden women's, but not men's, capacity to define their own lives should be invalidated as violating the equality principle.").

91. In the abortion context, the term "spousal notification" may be a misnomer. Instead, it should be "husband" notification. A husband will never need approval from his wife before getting an abortion because he is unable to get pregnant. Although naming it "spousal" notification makes it seem more innocuous, the truth, perceived by the *Casey* Court as well, is that the state wanted women to get approval from their husbands before making reproductive choices. See *Casey*, 505 U.S. at 896-97 (striking the spousal notification provision).

92. *Id.* at 895. When considering the constitutionality of the spousal notification, the *Casey* Court stated:

If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a *living* child raised by both, . . . it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Id. at 895-96 (emphasis added).

93. In *Casey*, the Court upheld states' rights to force information on women to ensure an informed choice, because of the value of full information and the critical nature of informed consent. *Id.* at 883-84. The Court located a "substantial government interest" in ensuring that women receive full information. *Id.* at 882-83. The Court also noted the potential for "devastating psychological consequences" for a woman who makes an uninformed choice in the family-planning context. *Id.* at 882.

In criticizing *Casey*'s requirement that doctors disseminate certain types of information to women seeking abortions, Professor Colker comments that "[t]here is no reason to believe that physicians and nurses fail to provide adequate medical information before performing abortions. (The threat of malpractice gives them sufficient incentive to provide that information.)" Ruth Colker, *Abortion & Dialogue* 117 (1992). In the wrongful birth context, this critical incentive is intentionally withdrawn.

94. Professor Anita L. Allen asserts that "abortion rights are a precondition of full or 'first class' citizenship for women." 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, 419 (1995).

95. See *supra* notes 1-14 and accompanying text.

96. *Id.*

97. The risks include not only physical injury resulting from the pregnancy, but also risk of criminal prosecution and regulation of her activities by the state. Dawn Johnsen lists some examples:

first trimester is statistically safer than childbirth.⁹⁸ When her doctor denies her critical health information, she, alone, faces the risk of childbirth, as well as the deprivation of her decisionmaking autonomy that includes her right to have an abortion. By inflicting a unique harm on the woman through the denial of health information and the right to choose to abort, wrongful birth statutes discriminate on the basis of pregnancy.

2. Addressing *Geduldig v. Aiello*

*Geduldig v. Aiello*⁹⁹ affects an equal protection challenge to wrongful birth statutes because it holds that discrimination on the basis of pregnancy is not per se gender discrimination.¹⁰⁰ Wrongful birth statutes discriminate on the basis of pregnancy and consequently, an equal protection challenge to the statutes will have to distinguish *Geduldig*. The first subsection argues that *Geduldig* has been functionally, if not explicitly, overruled; accordingly, an equal protection challenge to wrongful birth bans may move directly to a consideration of the legislative purpose behind the statute and the means used to achieve the statutory goal. The second subsection maintains that, even if *Geduldig* is not overruled, subsequent decisions by the Court have limited *Geduldig*. In its limited form, *Geduldig* should not apply to wrongful birth statutes; therefore, the Court should proceed to consider the legislative purpose and means. This subsection also contends that even if *Geduldig* is fully operative, the nature of the distinctions in wrongful birth statutes differs so significantly from the distinctions at issue in *Geduldig* and the distinctions anticipated by the *Geduldig* Court, that *Geduldig* is inapplicable.

a. *Geduldig* Has Been Functionally Overruled

In 1974, the Court in *Geduldig* held that discrimination based on pregnancy was not per se gender discrimination.¹⁰¹ In *Geduldig*, the California legislature had established a disability insurance scheme that compensated workers who contributed to the program for miss-

[C]ourt-ordered medical treatment and surgery (including in one case surgery that contributed to a woman's death); lawsuits for prenatal injuries brought against women by their own children for not behaving like "reasonable" pregnant women (in one case, for using antibiotics during pregnancy, and in a second case, for driving negligently during pregnancy); criminal prosecution for "prenatal child abuse" (for failing to follow a doctor's orders during pregnancy) and for manslaughter (for suffering a miscarriage in a car accident while allegedly driving while intoxicated); and even imprisonment solely to allow the government to control directly the woman's actions for the duration of her pregnancy.

Johnsen, *supra* note 26, at 193-94; *see supra* notes 85-89 and accompanying text.

98. Daly, *supra* note 12, at 100.

99. 417 U.S. 484 (1974).

100. *Id.* at 496-97 & n.20.

101. *Id.*

ing work as a result of an illness covered by the program. Normal pregnancy was not covered by the insurance program. Women who paid a part of their salary toward the insurance program challenged that the pregnancy exception violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of gender. The Court held in the infamous footnote twenty that distinctions based on pregnancy were not necessarily gender distinctions. The Court stated: "The program divides potential recipients into two groups—pregnant women and nonpregnant persons."¹⁰² The Court also stated, however, that a "showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other" would trigger the Equal Protection Clause.¹⁰³

Geduldig should not interfere with an equal protection challenge to a ban on wrongful birth because it has been functionally overruled by subsequent decisions of the Court. Scholarly outrage at the *Geduldig* rationale ensued immediately after the Court issued the decision in 1974.¹⁰⁴ Commentators mocked the holding and assumed that the Court would swiftly overrule itself.¹⁰⁵ Although the Court has never formally done so, the rationales of *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,¹⁰⁶ *UAW v. Johnson Controls, Inc.*,¹⁰⁷ and *Planned Parenthood v. Casey*¹⁰⁸ functionally overrule *Geduldig*. In *Newport News*, a Title VII case, the Court held that the Pregnancy Discrimination Act not only overturned the holding of *General Electric v. Gilbert*¹⁰⁹ but also "rejected the test of discrimination employed by the Court in that case."¹¹⁰ Moreover, the Court recognized that the discrimination test used in *Gilbert* originated in the *Geduldig* holding¹¹¹

102. *Id.* at 496 n.20.

103. *Id.*

104. Indeed, by 1984, criticizing *Geduldig* already had become a "cottage industry." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 983 (1984) (listing a litany of articles criticizing "both the Court's approach and the result").

105. Most commentators did not think that *Geduldig* would survive. As early as 1977, just three years after *Geduldig*, Professor Karst wrote, "the constitutional sport of *Geduldig v. Aiello* . . . and last Term's even sillier statutory counterpart, *General Elec. Co. v. Gilbert* . . . with their Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon, are good candidates for early retirement." Kenneth L. Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 54 n.304 (1977). He further characterized the decisions as "textbook examples of the effects of underrepresentation on 'legislative' insensitivity." *Id.* Finally, Professor Karst commented, "[i]magine what the presence of even one woman Justice would have meant to the Court's conferences." *Id.* Unfortunately, the presence of women on the Supreme Court has not hastened the demise of *Geduldig*.

106. 462 U.S. 669 (1983).

107. 499 U.S. 187 (1991).

108. 505 U.S. 833 (1992).

109. 429 U.S. 125 (1976); see *supra* note 79.

110. *Newport News*, 462 U.S. at 676; see *supra* note 79.

111. *Newport News*, 462 U.S. at 676-77.

and noted Justices Brennan's and Stevens's criticism of the *Gilbert* holding.¹¹² Justice Stevens felt that the classification used by the majority in *Gilbert* which originated in the *Geduldig* holding was inappropriate; the proper classification was "between persons who face a risk of pregnancy and those who do not."¹¹³ Even members of Congress remarked on the odd holdings in *Geduldig* and *Gilbert*. The *Newport News* Court quoted one Senator who was involved in the passing of the Pregnancy Discrimination Act as stating that "it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women."¹¹⁴ Most of the criticisms discussed in *Newport News* relating to Title VII apply with equal force to the Equal Protection Clause. By criticizing the basis of *Gilbert*'s rationale, the Court voiced disagreement with *Geduldig* as well.¹¹⁵

In *UAW v. Johnson Controls, Inc.*,¹¹⁶ the Court found that the defendant's policy of excluding female employees from certain jobs in order to protect fetuses from contamination discriminated on the basis of gender.¹¹⁷ By striking down the fetal protection policy, the Court simultaneously supported a woman's right to assess risks and determine her own best interests.¹¹⁸ The Court criticized the lower court's notion that Johnson Controls's policy was not facially discriminatory¹¹⁹ and found that the fetal protection policy discriminated on its face against pregnant women and all women as a result of their poten-

112. *Id.* at 677-78. The Court quoted Justice Brennan as stating in his *Gilbert* dissent that it was facially discriminatory for the company to devise "a policy that, but for pregnancy, offers protection for all risks, even those that are 'unique to' men or heavily male dominated." *Id.* (quoting *Gilbert*, 429 U.S. at 160 (Brennan, J., dissenting)).

113. *Id.* at 678 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 161-62 n.5 (1976) (Stevens, J., dissenting)). Professor MacKinnon observed that "[i]n women's experience, sexuality and reproduction are inseparable from each other and from gender." MacKinnon, *supra* note 74, at 184.

114. *Newport News*, 462 U.S. at 679 n.17. Justice Brennan voiced a similar disagreement in his dissent in *Geduldig*. *Geduldig v. Aiello*, 417 U.S. 484, 501 (1974) (Brennan, J., dissenting) ("In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation."). Justice Brennan stated what seems obvious: "[D]issimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." *Id.*

115. Professor MacKinnon believes that the *Newport News* holding implied that the Court was ready to reconsider the *Geduldig* holding. MacKinnon, *supra* note 13, at 1322 (stating that "the Supreme Court reached out explicitly in dicta, to a degree that was legally unnecessary, to repudiate its former constitutional reasoning on pregnancy").

116. 499 U.S. 187 (1991).

117. *Id.* at 211.

118. The Court stated: "With the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." *Id.* at 206.

119. *Id.* at 198.

tial to be pregnant.¹²⁰ The Court further added that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."¹²¹ Justice Blackmun, writing for the majority, concluded as well that the pregnancy distinction "classifie[d] on the basis of gender and childbearing capacity,"¹²² and later stated that this conclusion was "*bolstered* by the Pregnancy Discrimination Act."¹²³ This language implies that the Court reached its conclusion about the sex discrimination prior to a consideration of the Pregnancy Discrimination Act. Most importantly, Justice Blackmun's articulation of the discrimination in *Johnson Controls* connected childbearing capacity with gender.¹²⁴ *Johnson Controls* thus provides the strongest evidence that *Geduldig* has been overruled.¹²⁵

Finally, *Planned Parenthood v. Casey*¹²⁶ envisions women's relationship to pregnancy in a way that contradicts the essence of *Geduldig*. Professor Daly observes that *Casey*'s broader holding incorporates and recognizes the importance to both men and women of controlling the timing and manner of their family planning.¹²⁷ She states that

120. *Id.* at 198-99.

121. *Id.* at 199.

122. *Id.* at 198.

123. *Id.* (emphasis added).

124. *Id.*

125. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 332 (1993) (Stevens, J., dissenting) ("*Johnson Controls*, I had thought, signaled the Court's recognition that classifications based on ability to become pregnant are necessarily discriminatory.>").

126. 505 U.S. 833 (1992).

127. Daly, *supra* note 12, at 122-23. The Court's failure to consider implications of abortion for women's equality and equal citizenship was a primary criticism of the *Roe* decision. In particular, Professor Karst noted that the abortion decision was not limited to a "woman versus fetus[]" question. Karst, *supra* note 116 at 58. He stated that abortion is "also a feminist issue, an issue going to women's position in society in relation to men." *Id.* Consequently, he defined the abortion decision as an issue of equal citizenship, or the "right to take responsibility for choosing one's own future." *Id.*

Casey also confronts the problem of finding men and women similarly situated in the reproductive health context. Professor Sunstein comments that compelling pregnancy seems unobjectionable because of society's misperception of the "natural role" of women as mothers. He notes, however, that this compulsion exists only as a product of legislation. Sunstein, *supra* note 80, at 274. Moreover, he deduces that "[t]he question at hand is whether government has the power to turn that capacity or difference, limited as it is to one gender, into a source of social disadvantage." *Id.* Yet, in many ways *Casey* rephrases the biological dilemma as a question of agency. The *Casey* Court states: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). As Professor Daly notes: "Put in terms that equal protection law can understand, women and men are similarly situated because everyone has the right to 'define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" Daly, *supra* note 12, at 117 (quoting *Casey*, 505 U.S. at 851). In his concurrence, Justice Blackmun connects the majority opinion's recognition concerning the role of women in the family with

Casey recognizes the value of simultaneous involvement in the economic and social life of the country,¹²⁸ and consequently, in contrast to the premise in *Geduldig*, that denial or interference with active participation because of a state action would likely violate equal protection.¹²⁹ *Geduldig's* conception of "pregnant persons" seems unlikely to survive *Casey's* recognition of the connection between reproductive freedom and equality.¹³⁰

b. *Geduldig* Has Been Limited

Even if *Geduldig* has not been overruled, it has been severely limited by subsequent cases. The language noted above from *Newport News*, *Johnson Controls*, and *Casey*¹³¹ militates, if not for overruling *Geduldig*, then certainly for limiting it.¹³² In fact, most distinctions

equal protection. *Casey*, 505 U.S. at 928-29 (Blackmun, J., concurring) (noting the majority's recognition of the changing role of women in the family). He states that the assumption that "women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause." *Id.* at 928.

128. *Casey*, 505 U.S. at 856 (stating that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives").

129. Daly, *supra* note 12, at 139 (noting that "*Casey* equality . . . recogniz[es] that men and women have different reproductive capacities but similar life goals"). Professor Daly summarized three important goals achieved by the *Casey* decision. *Id.* at 136-38. First, by classifying abortion rights as liberty rights, rather than privacy rights, *Casey* broadened the scope of protection of abortion. *Id.* at 136-37. Thus the baseline for an equal protection challenge to an abortion regulation extends beyond a medical condition and encompasses what *Casey* defines as essential "attributes of personhood." *Id.* at 137 (quoting *Casey*, 505 U.S. at 851). Second, Professor Daly found that the opinion in *Casey* included a broader cross-section of women. *Id.* at 137-38. Rather than focusing on women with whom the Court could not and did not empathize, *Casey* addressed active working women. *Id.* Professor Daly explained, "[o]nly when the Court focuses on people it identifies with and respects, can the equality principle apply because only then is everyone situated similarly." *Id.* at 138. Third, Daly found that *Casey* considered men and women who want to control their own destinies. *Id.* Under this conception, women meet the "similarly situated" requirement of equal protection that an exclusive consideration of biology denied women. *Id.* at 139.

130. *See id.*

131. *See supra* part II.A.2.a.

132. Dissenting in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), Justice Stevens also advocates for limiting *Geduldig*. *Id.* at 327 (Stevens, J., dissenting). *Bray* was a § 1985 challenge to enjoin the activities of anti-abortion activists who interfered with women entering reproductive health clinics. *Id.* at 266. Justice Stevens asserts that "opposition to conduct that a given class engages in exclusively or predominantly, [reveals] the intent to discriminate against the class itself." *Id.* at 320. Justice Stevens noted that the Court need not find that anti-abortion activists are necessarily anti-woman. *Id.* at 322-23. Instead, if these activists prevent women from exercising their constitutional rights then these activists demonstrate a "sex-based" intent. *Id.* at 322. Justice Stevens further stated that:

The immediate and intended effect of this conspiracy was to prevent women from obtaining abortions. Even assuming that the ultimate and indirect consequence of petitioners' blockade was the legitimate and nondiscriminatory

based on pregnancy may be considered per se gender discrimination,¹³³ while those that factually resemble *Geduldig* require a showing of pretext. Regardless of the status of *Geduldig*, a ban on wrongful birth actions is factually distinct from the insurance scheme in *Geduldig*; consequently, the wrongful birth ban will not trigger the *Geduldig* holding. In *Geduldig*, California excluded pregnancy from the categories of medical conditions that its disabilities insurance plan would cover.¹³⁴ Justice Stewart held that including pregnancy in the plan would constitute a benefit to pregnant women.¹³⁵ It follows that if the *Geduldig* result was reached in part because the insurance plan at issue was considered a benefits plan,¹³⁶ then wrongful birth statutes stand on completely different ground.¹³⁷ Because wrongful birth bans deny claims for relief from a tortious act, they are closer to penalties than benefits.¹³⁸ The right to information, whether founded in the due

goal of saving potential life, it is undeniable that the conspirators immediate purpose was to affect the conduct of women. Moreover, petitioners target women *because of* their sex, specifically, because of their capacity to become pregnant and to have an abortion.

Id. at 323. Justice Stevens broke down the analysis by stating that “[a] classification is sex-based if it classifies on the basis of sex.” *Id.* at n.20. He added that since only women become pregnant, a categorization based on pregnancy necessarily distinguishes on the basis of sex. *Id.* This type of analysis applies to an equal protection context and would essentially overrule *Geduldig*.

133. Professor Colker comments that the *Geduldig* Court, rather than misunderstanding that pregnancy is a sex based classification, classified pregnancy distinctions as less egregious or even benign classifications because the distinctions were based on real sex differences. Colker, *supra* note 93, at 91-92. Professor Colker, however, believes that the Court erred in considering *Geduldig* as an issue of biological difference. *Id.* at 92. Instead, she argues, *Geduldig* was essentially about paying for the costs of pregnancy. *Id.*

134. As the dissent pointed out, the plan did cover prostatectomies, an operation that women will not need. *Geduldig v. Aiello*, 417 U.S. 484, 499-01 (1974) (Brennan, J., dissenting).

135. *Id.* at 497 (stating that “there is no risk from which women are protected and men are not”).

136. Justice Stewart specifically stated that “California intended to establish this benefit system as an insurance program.” *Id.* at 492.

137. Justice Stevens makes this point in his dissent in *Bray*, stating: “Central to the holding in *Geduldig* was the Court’s belief that the disability insurance system before it was a plan that conferred benefits evenly on men and women.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 327-28 (1993). Justice Stevens cites *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), in support of limiting *Geduldig*. *Bray*, 506 U.S. at 328. In *Nashville Gas*, an employer denied to grant seniority status to women returning from pregnancy leave. The Court found that this action imposed a burden, rather than denying a benefit, on women. *Nashville Gas*, 434 U.S. at 142. On this basis, Justice Stevens distinguished *Geduldig*.

138. The abortion funding cases hinged, to a large extent, on the distinction between conferring benefits and imposing penalties. The Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991), held that denial of funds to women seeking abortions did not infringe on their ability to obtain abortions, because “[a] refusal to fund [a] protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.” *Id.* at 193 (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)); see *Bray*, 506 U.S. at 328 n.27 (Stevens, J., dissenting) (“The abortion-funding cases . . .

process liberty right of the Fourteenth Amendment, common law holdings, or in informed consent statutes, has not been interpreted as a benefit. Thus, wrongful birth statutes, which impede full disclosure, infringe upon that right and more closely resemble a penalty than a benefit as defined in *Geduldig*.

Even in *Bray v. Alexandria Women's Health Clinic*,¹³⁹ Justice Scalia's reference to *Geduldig* does not guarantee that the *Geduldig* holding retains broad precedential value.¹⁴⁰ Writing for the majority, Justice Scalia interprets § 1985 to require proof of hostility, or paternalism, to women rather than merely gender-specific action.¹⁴¹ Both Justice Stevens and Justice O'Connor emphasize this distinction in their dissents.¹⁴² They both recognize the differences between this standard and the equal protection standard. Indeed, Justice Stevens,

similarly turn on the distinction between the denial of monetary benefits and the imposition of a burden.”).

139. 506 U.S. 263 (1993).

140. In *Bray*, the Court denied respondents the right to enjoin zealous abortion protestors under 42 U.S.C. § 1985(3). *Id.* at 267-78. Section 1985(3) gives private citizens the right to sue other private citizens for interference with the exercise of constitutionally protected rights. *Id.* The complaining party, in this case, must prove that protestors evinced an invidious class-based animus. *Id.* Justice Scalia, relying in part on *Geduldig*, reasoned that the protestors' activities only coincidentally implicated women because the purpose of the protest was to discourage abortion. *Id.* at 269-70. Justice Scalia argued that a clearer case would exist if people wearing yarmulkes were in some way penalized because, in this circumstance it could be inferred that the objector's activity was targeted at Jewish people. *Id.* at 270. The fault in this logic is clear: Just as only Jewish people wear yarmulkes, only women get abortions. Furthermore, the class Justice Scalia describes consists only of religious Jewish men. It is clear that the only plausible objection to yarmulkes is that they are worn by Jewish people, whereas people object to abortion because of the nature of the act, not exclusively because women engage in the act. Nevertheless, as Justice Stevens points out in his *Bray* dissent, one legitimate purpose does not cure an illegitimate purpose. *Id.* at 323. The illegitimate purpose in this case was the intent to stop women from exercising their right to obtain an abortion. Moreover, after *Casey*, it seems troubling, or arguably impossible, to dissociate the class of women from the right to abortion.

141. *Id.* at 268-73.

142. *Id.* at 326-27, 352 (Stevens, O'Connor, J.J., dissenting). In his dissent, Justice Stevens argues that, for the purpose of § 1985, a class-based animus does not require proof of hostility to a particular woman. The only proof required to succeed is that the conspiracy is aimed at interfering with an activity in which a particular class exclusively participates. Justice Stevens quotes Professor Sunstein's conclusion that “[i]f a law said that ‘no woman’ may obtain an abortion, it should readily be seen as a sex-based classification. A law saying ‘no person’ may obtain an abortion has the same meaning.” *Id.* at 323 n.20 (quoting Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum. L. Rev. 1, 32 n.122 (1992)).

Professor Colker observes that “[t]he Klan . . . was found to have a class-based animus against blacks despite the fact that it targeted both blacks and their supporters.” Ruth Colker, *Pregnant Men: Practice, Theory, and the Law* 124 (1994). She correctly points out that Operation Rescue's activities arguably should be more obvious because they never target men's “sex lives or reproductive choices,” and their activities block all women from entering into clinics, not simply those women seeking abortions. *Id.* She also observes that their activities affect the most disadvantaged women who are forced to go to clinics rather than private doctors. *Id.*

focusing on the limited nature of the *Geduldig* holding, quotes Professor Sunstein as stating that “[i]t is by no means clear that *Geduldig* would be extended to a case in which pregnant people were (for example) forced to stay indoors in certain periods, or subjected to some other unique criminal or civil disability.”¹⁴³ A ban on wrongful birth actions denies women a remedy for a civil wrong and consequently may fall under the category described by Professor Sunstein.

B. *Wrongful Birth Statutes Do Not Have to Pass the Feeney Standard*

Four years after *Geduldig*, the Court, in *Personnel Administrator of Massachusetts v. Feeney*,¹⁴⁴ articulated the test to determine pretext for facially neutral statutes.¹⁴⁵ This section will argue that wrongful birth statutes are not facially neutral and thus should not be subjected to the *Feeney* test. The section will also contend that, even if the Court finds that wrongful birth statutes are facially neutral, the facts in *Feeney* differ so greatly from the circumstances around a wrongful birth action that a new test would have to be articulated.

1. Wrongful Birth Statutes Fall in Between Facially Discriminatory and Facially Neutral Statutes

Even giving *Geduldig* the broadest possible reading, the Court’s holding is limited to a finding that pregnancy discrimination is not per se gender discrimination. It does not follow from that finding that pregnancy discrimination is facially neutral.¹⁴⁶ Given the intense criticism and subsequent weakening of *Geduldig*, it would require a strong

143. *Id.* at 327 n.24 (quoting Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum. L. Rev. 1, 32 n.122 (1992)).

144. 442 U.S. 256 (1979).

145. *Id.* The *Feeney* test states that a plaintiff must prove “that the decision-maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of’ its adverse effects upon an identifiable group.” *Id.* at 279.

146. Although the Court held that a petitioner would have to prove pretext if pregnancy distinctions were found to be facially neutral, the Court never claimed that all pregnancy distinctions are in fact facially neutral. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20. The Court stated: “While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . .” *Id.* at 496 n.20. In other words, some pregnancy-based distinctions are discriminatory. Ironically, from Justice Stewart’s statement, it appears that he was operating from a presumption that pregnancy-based distinctions were in fact sex-based distinctions. Although the Court states that a showing of pretext may be necessary, that requirement is qualified by the specifics of the case. *Id.* at 496-97 & n.20. Justice Stewart states that absent a showing of pretext, “lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.” *Id.* In other words, with respect to insurance coverage, a legislature can exclude gender-linked conditions unless pretext is proven. It does not follow from these statements that all pregnancy distinctions are facially neutral, or that women challenging pregnancy distinctions will have to prove pretext in all cases.

overreading of the holding to conclude that pregnancy-based distinctions both never equal sex discrimination and are always facially neutral.¹⁴⁷ Furthermore, in light of *Casey*'s recognition of the connection between issues surrounding pregnancy and gender equality, it is difficult to find that pregnancy discrimination fails to implicate gender.¹⁴⁸

2. A Ban on Wrongful Birth Actions Is Factually Different from the *Feeney* Statute

Even if the Court determines that wrongful birth statutes are gender neutral, they are not gender neutral in the same way as the statute at issue in *Feeney*. Specifically, wrongful birth statutes differ from the statute in *Feeney* because the gender classification in the wrongful birth statutes is more explicit. The *Feeney* Court found that a veteran's preference statute simply displayed a preference for veterans, not a penalty on non-veterans, a category including both men and women.¹⁴⁹ Although the statute disproportionately impacted women, the plaintiff had to prove that the legislature was motivated in part "because of" a gender bias.¹⁵⁰ The dissent criticized the holding, noting: "That a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that it also intends to disadvantage another."¹⁵¹ Justice Stevens, joined in his concurrence by Justice White, stated that the test for uncovering a covert motive should be "the same as the question whether its adverse effects reflect invidious gender-based discrimination."¹⁵² Justice Stevens, however, failed to find invidious gender-based discrimination because so many men were also harmed by the veterans preference statute.¹⁵³ Whereas the injured parties in *Feeney*—non-veterans—include both men and women, the injured parties in wrongful birth statutes—pregnant persons—include women exclusively, not merely disproportionately.

147. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 327 (Stevens, J., dissenting) ("*Geduldig*, of course, did not purport to establish that, as a matter of logic, a classification based on pregnancy is gender neutral.").

148. For a discussion of the significance of gender implications, see *infra* part II.C. Stevens stated that *Geduldig* should not be "understood as holding that, as a matter of law, pregnancy-based classifications never violate the Equal Protection Clause." *Id.* In *Bray*, Justice Scalia seemed to argue that activities that interfere with a woman's right to have an abortion are not gender based, and that it is mere coincidence that these regulations only harm women. *Id.* at 269-71. This reasoning, however, appears to contradict the holding in *Casey*, which formally connects abortion with gender and equality. See *supra* notes 126-30 and accompanying text. The effect of *Bray* is unclear, because of this contradiction and the four strongly worded dissents in *Bray*.

149. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 280 (1979).

150. *Id.* at 279.

151. *Id.* at 282 (Marshall, J., dissenting).

152. *Id.* at 281 (Stevens, J., concurring).

153. *Id.*

Moreover, the *Feeney* Court avoided over-interpreting the veterans preference statute by looking to its plain meaning. The Court stated that, "the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women."¹⁵⁴ Wrongful birth statutes ban tort actions which claim that, had a doctor provided full information about the condition of the fetus, the pregnant woman would have chosen to have an abortion.¹⁵⁵ Applying the *Feeney* Court's logic, and looking to the plain language of the wrongful birth statute, a legislature defending a wrongful birth statute would have to say that it preferred that pregnant women received less information.¹⁵⁶ Unlike in *Feeney*, with respect to wrongful birth actions, the Court could not look directly to the language of the statute to find its purpose and uphold the distinction. The direct effect of wrongful birth statutes¹⁵⁷ is to deny a claim for wrongful birth, a tort that penalizes doctors for withholding information and thereby interfering with a woman's right to choose to terminate her pregnancy.¹⁵⁸ The Court is unlikely to accept a legislative preference for

154. *Id.* at 280.

155. See *supra* note 71 and accompanying text.

156. The legislature in *Feeney* claimed that they never thought consciously of women and were exclusively focused on veterans. See Colker, *supra* note 93, at 90. In light of the times and the nature of the preference, it is entirely possible that the legislature, in fact, did not consider women at all. Nevertheless, Professor Colker insists that legislatures should be required to "wrestle with a statute's impact on women." *Id.* In fact, she criticizes that "[a]n *unthinking* attitude can be as harmful to women as direct animus, because it serves to keep women's interests in society invisible." *Id.* Interestingly, Professor Colker's solution would not require a new articulation of the equal protection test. Instead, she suggests that intent remain a factor, but that the definition and breadth of intent should change in order to require legislatures to consider the impact of their action on women. *Id.* at 90-91. The legislature may not inflict hardships on women that it would not inflict on men. *Id.* at 91.

In the wrongful birth context, however, a legislature could not claim that it did not consider women. Pregnant women are the main focus of the law. Although the legislature may have primarily considered fetuses, they also must have considered the impact or implications of this legislation on women. In *Feeney*, there were non-veterans who were male. In contrast, with regard to wrongful birth statutes, there are no pregnant men to consider, and the subject matter of the statute deals directly with an issue of women's health, specifically abortion, that only women can choose. As Professor MacKinnon has stated, "[n]o men are denied abortions . . . Such a statutory impact would be far more one-sided than, for example, the impact of veterans' preference statutes . . ." MacKinnon, *supra* note 13, at 1321.

157. See *supra* note 71 and accompanying text.

158. A legislature might argue that the statute is intended to eliminate all tort claims that rely on the theory that life is a harm. This argument, however, does not respond to the actual wrongful birth action that does not rely on a finding that life is a harm, but locates the harm in the doctor's withholding of critical information. See *supra* notes 47-52 and accompanying text; see also Kimble *supra* note 44, at 86 ("'Wrongful birth' is a misleading and unfortunate term. A more apt title would be 'wrongful information.'").

withholding information from pregnant women as support of the neutrality of wrongful birth statutes.¹⁵⁹

C. *The Gender Implications of Wrongful Birth Torts Are Evident*

This section maintains that although a ban on wrongful birth actions is neither gender-based on its face nor facially neutral, the gender implications of the statute warrant intermediate scrutiny.¹⁶⁰ This section discusses the gender implications of a ban on wrongful birth actions

159. Even if forced to argue that wrongful birth statutes must be subjected to *Feeney*, there is a strong argument that challengers to wrongful birth statutes would meet the standard of proof required to find gender discrimination. Legislatures pass wrongful birth statutes in part "because of" a discriminatory intent. The fact that the legislature may have other reasons is not sufficient to cure a finding of sex-based discrimination. In a footnote in *Feeney*, the court admitted that "[w]hat a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid." *Feeney*, 442 U.S. at 279 n.24.

It is partially because of a mistrust of women and women's ability to make rational decisions that legislatures ban wrongful birth actions. Wrongful birth statutes do not simply deny a benefit, they proactively deny what *Casey* identifies as a right under the Fourteenth Amendment, and what states consider a statutory right under the informed consent statutes. The seriousness of the deprivation alone should alert courts to the intent of the statute.

In the words of the *Feeney* majority, "[i]f the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." *Id.* at 275. In *Feeney*, the Court found that the preference for veterans impacted women because they were non-veterans, not because they were women. *Id.* In contrast, the wrongful birth statutes impact women because only women can be pregnant. Because wrongful birth statutes are closer to penalties than benefits, there is no alternative way to view the impact. *See supra* notes 134-38 and accompanying text. It is plausible that a legislature could focus on a party receiving a benefit without considering the deprivation that it entails, but when a statute only operates to deny a right, the legislature cannot avoid considering the party denied. Although pregnancy alone may not be enough to warrant intermediate scrutiny, the long historical mistrust of women's decision-making ability provides powerful evidence that the legislation was enacted *because* women make this decision. *See supra* notes 11-33 and accompanying text. For example, a state might say that under the stress of learning about a disabled fetus, a woman might be unable to make a rational decision, and consequently, the state needs wrongful birth statutes in order to place such an important difficult decision in the hands of a doctor, a rational decision-maker. This justification, however, presupposes a sex-based distinction and defends this distinction with "the very stereotype the law condemns." *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1426 (1994) (citations omitted).

160. Some critics might call this approach an anti-subordination analysis of state action. For example, Professor Colker describes anti-subordination principles as prohibiting policies that "perpetuate racial or sexual hierarchy." Colker, *supra* note 93, at 87. She gives the example that a policy prohibiting the employment of people with primary child care responsibilities may be phrased in gender neutral terms, yet has a disparate impact on women and "would perpetuate a history of sexual hierarchy by penalizing women for their societally imposed childcare responsibilities." *Id.* The anti-subordination method focuses on the group of women, or the unequal class of persons, before considering the motives of the oppressor, or dominant class, and in preference to the impact on the individual harmed by the policy. *See id.*

and the consequences of compelled pregnancy.¹⁶¹ It argues that wrongful birth statutes are not facially neutral because they violate the principles of equality established in *Casey* and impose a status injury on women.¹⁶² This section asserts that, assuming *Johnson Controls* overruled or limited *Geduldig*, *Casey* links abortion and equality so that wrongful birth statutes run afoul of the Equal Protection Clause by permitting legislative interference with a woman's informed reproductive choices and propagating sexual hierarchy.

Casey linked abortion with equality by recognizing women's reliance on the availability of abortion to plan the course of their lives.¹⁶³ *Casey* also valued women's options and voices in a way absent from most prior decisions on abortion.¹⁶⁴ The Court stated that "[t]he abil-

161. Professor West also argues against compelling pregnancy. Her analysis begins with the premise:

We all fundamentally possess a right to live in a just society. . . . To whatever degree we fail to create the minimal conditions for a just society, we also have a right, individually and fundamentally, to be shielded from the most dire or simply the most damaging consequences of that failure.

Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 *Hastings L.J.* 961, 964-65 (1994). Professor West adds that in a perfect world, equal citizenship is not burdened by connections or relations such as motherhood, fatherhood, or sisterhood, but those relations are in fact central to citizenship. *Id.* at 965. Consequently, "[w]e must have the right to opt out of an unjust patriarchal world that visits unequal but unparalleled harms upon women . . . with unwanted pregnancies." *Id.* Similar to the anti-subordination argument, West discusses the existence of real inequities and dominance in society. *See id.* at 966. Professor West concludes that as long as we live in a patriarchal society that punishes and oppresses women because of their status as mothers, the abortion right must exist in its most liberal and unencumbered state. *See id.* at 966-67.

162. This type of analysis has been employed successfully in the race context. Professor Colker noted that the Court in the *Brown v. Board of Education*, 347 U.S. 483 (1954), opinion considered issues of anti-subordination. Colker, *supra* note 93, at 93-94. The *Brown* Court contemplated the impact of segregation on the subordination of black children. In accepting the lower court's findings, the Supreme Court held that segregated school systems would cultivate a perception of "inferiority" of the black children. *Id.* Also, the Court did not consider the desegregation of institutions attended exclusively by black students, the Court only desegregated the white institutions. Evidently, the Court's primary concern was the impact of segregation on the black students. *Id.* at 94.

163. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

164. At first blush, the *Casey* Court's focus on women's choices appears to ask what Katharine Bartlett calls the "woman question." Professor Katharine Bartlett defines asking the woman question as "examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women." Katharine T. Bartlett, *Feminist Legal Methods in Feminist Legal Theory: Foundations* 551 (D. Kelly Weisberg, ed. 1993). The abortion decisions have failed dramatically to consider how women look at abortion and the effect of the abortion decision on women. *See* Shelley A. Ryan, *Wrongful Birth: False Representations of Women's Reproductive Lives*, 78 *Minn. L. Rev.* 857, 896-903 (1994) (discussing courts' failure to consider and understand the way women make reproductive health decisions). Professor Erin Daly theorizes that perhaps judicial inattention to women is explainable because the penalties in most abortion statutes are not directed specifically at the pregnant woman. Daly, *supra* note 12, at 98-99. This fact, however, provides no justi-

ity of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."¹⁶⁵ By recognizing that women actively participate in the workforce and that abortion plays heavily in women's continued freedom, *Casey* redefined abortion as an issue of equal citizenship.¹⁶⁶

Allowing legislatures to remove doctors' primary incentive to provide the information necessary for women to make informed reproductive health decisions contradicts *Casey*'s purpose. Although *Casey* upheld the abortion right on due process grounds, the Court recognized the importance of reproductive freedom to equality.¹⁶⁷ *Casey*'s equality principle should not on one hand value abortion as necessary

fication for ignoring the experiences of the person most affected by the regulations and evinces a protective or paternalistic attitude toward women. *See id.* at 94 (noting that the only other patients who are required to get informed consent are those "committed to the Missouri State chest hospital . . . or to mental or correctional institutions" (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 66 n.6 (1976))).

Another indicator that the Court is not asking the woman question, is the Court's characterization of pregnant women as victims instead of active autonomous persons seeking abortion. *See id.* at 98-105. The Court's perceptions are evident in its opinions which fail to provide a complete factual picture of the women bringing the actions. *Id.* at 112-16. Although the opinion primarily impacts the woman's life, her factual condition is rarely mentioned in detail. *Id.* If women are perceived solely as victims, they cease being individuals with rights and voices. Compare this picture with the right-to-die cases. Although *Compassion in Dying v. Washington*, 79 F.3d 790, 794-95 (9th Cir.), *cert. granted*, 117 S. Ct. 37 (1996), dealt with physician-assisted suicide, the opinion dedicated several pages to the dying person's story. *See Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 265-68 (1990). Thus, the abortion decisions actively participate in silencing women on an issue that directly affects women's freedom. By erasing the individual woman from the picture, these opinions also eliminate any possibility of viewing abortion restrictions as discrimination.

Although *Casey* appears to ask the "woman question" by considering how women perceive abortion, it fails to consider the answers to the question in its ultimate decision. This is evident in the opinion because the Court considers the impact of abortion on women's lives yet upholds tremendously oppressive regulations. For example, the Court quickly dismisses the financial and emotional burden imposed on women by the mandatory waiting periods. *Planned Parenthood v. Casey*, 505 U.S. 833, 886 (1992). In addition, through the "informed consent" regulation, the Court ignores the fact that most women contemplate and consider the decision to terminate their pregnancy prior to visiting their doctor. *See id.* at 881-85; Ryan, *supra* at 896-903.

165. *Casey*, 505 U.S. at 856.

166. The *Casey* Court also reordered the priorities of constitutional protections. *Roe* had focused on the doctor-patient relationship, but *Casey* stated that this relationship "does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy." *Casey*, 505 U.S. at 884. This clarification is critical to an equal protection analysis because it envisions women as decision-makers rather than as objects of doctors' judgments. This vision forms the foundation for the comparison between men and women. In light of the fact that women are still primarily responsible for child-rearing, the decision to give birth is a life decision that affects all other decisions made by women. As Professor Daly concludes, "[b]ecause of the profound effects of pregnancy on a woman's body and the responsibilities entailed in raising children, reproductive rights, perhaps more than anything else, define the degree to which women can control the course of their lives." Daly, *supra* note 12, at 136.

167. *See supra* notes 126-30 and accompanying text.

to women's equal participation in society and on the other hand permit a legislature to deny health information necessary for a woman to make an informed choice. Although *Casey* permits legislative curtailment of access to abortion, it is unlikely that the Court would support manipulation of health information as a method of limitation. In fact, *Casey* and previous abortion decisions have specifically disallowed the withholding or tampering of information given to pregnant women contemplating abortion.¹⁶⁸

As *Casey* seems to recognize, the denial of reproductive freedom and choice inflicts a status harm on women and reinforces the sexual hierarchy already in existence. Similarly, wrongful birth statutes interfere with a woman's right to make an informed choice to have an abortion. Denying women the information necessary to choose to have an abortion also forces women to bear children that they would otherwise abort.¹⁶⁹ Pregnancy coerced by the state also obligates

168. The Court's holdings in *Casey*, *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), display the Court's disapproval of states' attempts to manipulate health information. In *Akron*, the Court found that a statute requiring doctors to provide information "designed to influence the woman's informed choice between abortion or childbirth" violated the Constitution. *Akron* 462 U.S. at 444. The Court also invalidated similar provisions in *Thornburgh*, 476 U.S. at 763-65. In *Casey*, the Court allowed the "informed consent" provision on the condition that the information provided to women be "truthful, nonmisleading information." *Casey*, 505 U.S. at 882 (1992); see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 76-77 (1976) (stating that "[t]he decision to abort, indeed, is an important, and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences," and noting that informed consent "insure[d] that the pregnant woman retain[ed] control over the discretion of her consulting physician").

169. Ronald Dworkin compares compelled pregnancy to slavery because a woman's body becomes conscripted to the state for the state's purpose. Ronald M. Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 103 (1994). He states, "[a] woman who is forced to bear a child she does not want because she cannot have an early and safe abortion is no longer in charge of her own body: the law has imposed a kind of slavery on her." *Id.* For a fictional satire depicting abortion regulations as a form of slavery, see Margaret Atwood, *The Handmaid's Tale* (1986).

The pregnancy also may affect the woman's relationship to people around her. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan. L. Rev.* 261, 373-75 (1992). Society has imposed normative judgments on the proper behavior of pregnant women. *Id.* A pregnant woman is likely to feel compelled by these normative standards to alter the way she works, recreates, eats, drinks, and exercises. *Id.* at 373. A pregnant woman with no viable option of abortion may feel compelled to stay in a damaging or unfulfilling relationship. *Id.* at 374-75. In addition, the actions of those around the pregnant woman may change because of her status. *Id.* at 374. As a result of her pregnancy, the people around her may treat "her with love and respect or, alternatively, abuse her as a burden, scorn her as unwed, or judge her as unfit for employment." *Id.* After giving birth, the woman must produce most of the labor "necessary to make infants into adults." *Id.* at 375. As a result, she must reorder her life to accommodate the needs of a growing child, or face the stigmatism of a bad mother. *Id.* at 375-76. Generally, fathers are not required to exert this type of energy. *Id.*

most women to raise their children.¹⁷⁰ Furthermore, children with developmental anomalies are less likely to be adopted, making this option unbearably difficult. Raising a child with developmental anomalies subjects the woman to extreme financial obligations and forces her to confront the possibility that her child will die at an early age.¹⁷¹ Because men are not generally held responsible for the primary care of their children, the job of childcare is reduced to "women's work."¹⁷² Women often are forced to forgo educational and employment opportunities as a result of state-compelled motherhood, yet the state fails to correct the conditions underlying the inequities.¹⁷³ This is especially true in the case of developmentally disabled children. Women may be forced to leave the workforce in order to care for children with special needs. Consequently, denying women critical health information further lowers the position of women in society relative to men.

III. WRONGFUL BIRTH STATUTES FAIL INTERMEDIATE SCRUTINY

As demonstrated above, because wrongful birth statutes discriminate on the basis of gender, they should be evaluated under intermediate scrutiny. Courts determining whether a state action violates the Equal Protection Clause employ a two-step analysis. The first step scrutinizes the purpose of the discriminatory action.¹⁷⁴ Intermediate scrutiny requires that the state actors justify a discriminatory statute or policy with an "important" governmental purpose.¹⁷⁵ When determining the importance of a legislative purpose, the Court generally employs an antidiscrimination approach that considers

170. Siegel, *supra* note 169, at 371-72. Professor Siegel notes that "[w]omen will also experience particularly intense pressure to raise a child if the child lacks the privileged characteristics that ensure it will be readily adopted." *Id.* at 372.

171. See *Basten v. United States*, 848 F. Supp. 962, 972-73 (M.D. Ala. 1994) (finding that the extraordinary damages associated with the condition, not including emotional damages, totaled \$2,650,000); *Robak v. United States*, 658 F.2d 471, 478-79 (7th Cir. 1981) (finding damages totaling at least \$900,000, a figure that did not include the costs of raising a healthy child).

172. See Siegel, *supra* note 169, at 376-77 ("Childcare remains status work, organized and valued in ways that limit the life prospects of those who perform it."). The term "women's work" is associated with unpaid labor, performed "under conditions of economic dependency." *Id.* Professor Siegel adds:

[A] woman who becomes a parent will likely find that the energy she invests in childrearing will compromise her already constrained opportunities and impair her already unequal compensation in the work force. . . . Considered in cold dollar terms, it is the institution of motherhood that gives a gendered structure to the economics of family life, and a gendered face to poverty in the nation's life.

Id. Compelling pregnancy and forcing motherhood will propagate the sexual hierarchy already in existence.

173. *Id.* at 377.

174. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).

175. *Id.*

whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.¹⁷⁶

Courts may also consider whether the purpose imposes a status injury on women.¹⁷⁷ The second step of the analysis involves a consideration of the means adopted by the state actor.¹⁷⁸ Under an intermediate tier analysis, the means must be substantially related to achieving the purported goal.¹⁷⁹

A. *Legislative Purposes*

The Supreme Court has recognized explicitly two legislative purposes in the area of reproductive freedom that are likely to qualify as "important" in the wrongful birth context: "(1) protecting the woman's health, and (2) protecting the potentiality of human life."¹⁸⁰ Because the Supreme Court found these purposes valid, a court would proceed to consider whether wrongful birth statutes are substantially related to these goals. Other possible justifications that have been offered by legislatures include: "reducing the number of medical malpractice actions"; reducing "the cost of medical malpractice insurance"; avoiding dictating how physicians should perform; treating a developmentally disabled child the same as other children; and preventing actions in which the damages award would be speculative.¹⁸¹ These purposes arguably are not descriptive of wrongful birth statutes. Even if a court accepts these purposes, denying parents a claim for wrongful birth is not a substantially related means to achieve their goals.

Three of the justifications above posit concern for the role of the doctor. A concern over the costs of malpractice, however, does not justify a discriminatory statute. First, wrongful birth actions would not succeed if the doctor acted within the standards of the profession; therefore, if doctors act within the proper standard of care, the cost of

176. *Id.* at 725. Professor Siegel suggests that courts ask: "[I]n what ways might assumptions about the proper roles of men and women have moved the state to engage in fetal life-saving by compelling pregnancy? What view of women prompted the state's decision to use them as a means to an end?" Siegel, *supra* note 169, at 360.

177. *See supra* part II.C.

178. *Hogan*, 458 U.S. at 724-25.

179. *Id.*

180. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1988); *Harris v. McRae*, 448 U.S. 299, 315 (1979); *Maher v. Roe*, 432 U.S. 464, 479 (1977); *see also Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 20 (Minn. 1986) (Amdahl, C.J., dissenting) (noting that the United States Supreme Court has recognized these two purposes). The second legislative purpose listed could be rephrased as encouraging childbirth.

181. *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 820-21 (Pa. Super. Ct. 1993) (discussing the possible justifications for wrongful birth statutes).

malpractice should not increase. In addition, wrongful birth actions require the same showing of negligence as other forms of malpractice; consequently, they neither unjustifiably nor disproportionately contribute to the cost of medicine. Moreover, there is no collateral requirement that doctors perform unnecessary tests or warn patients about improbable risks that might increase the cost of practicing medicine. Finally, although cost is a legitimate legislative concern, there is no evidence that the malpractice awards stemming from wrongful birth actions contribute disproportionately to the total amount of malpractice awards.

Avoiding mandates about the manner in which doctors practice medicine is an important way to respect physician's moral objections to certain activities. While protecting the conscience of the physician is a valuable goal, in this instance, the doctor is not forced to provide an abortion, which is the objectionable activity.¹⁸² Unless the doctor has a conscience-based objection to providing information, this justification fails to focus on the nature of the tort.¹⁸³ Although an element of the tort includes that the woman would have chosen an abortion, if the doctor had provided the proper information but refused to perform an abortion, the parents would not have a cause of action for lack of a breach of duty. Consequently, wrongful birth actions, similar to informed consent statutes, only compel doctors to provide information about the status of the fetus. They do not require the doctor to provide abortions, the activity that may offend a doctor's conscience.

Proponents of wrongful birth statutes worry that wrongful birth actions will treat developmentally disabled children differently than other children and, consequently, debase the value of life.¹⁸⁴ In fact, by discouraging the discovery and sharing of information, wrongful birth statutes demean the value of the woman's life and risk danger to the child. If doctors are encouraged to discover the condition of the fetus at an early stage and share that information with the patient, parents can seek out additional reliable information about the potential lifestyle of the impaired child and even research partial or complete remedies to the condition. In addition, this tort focuses on the right to information and the right to autonomous decision-making; accordingly, the denial of these rights has no relation, much less a substantial relation, to the value of life.

182. The doctor can even refuse to perform some genetic tests, leaving a referral as the only legal requirement on the doctor. *Wrongful Birth Actions*, *supra* note 68, at 2031.

183. Even if the doctor has an objection to providing certain health information, the duty to act within the standards of the profession mandates adherence to the accepted medical standard, notwithstanding any moral obligations. *Id.* at 2032.

184. It is important to remember in this context that the "injury alleged in wrongful birth is neither the birth nor the life of the child; it is the denial of the parents' fundamental right to exercise their choice in private reproductive matters." *Id.* at 2030.

Legislators' concerns about permitting a speculative tort action have been answered, in large part, by the courts. Most courts envision wrongful birth actions as extensions of medical malpractice law.¹⁸⁵ They have rejected the notion that proving causation in wrongful birth actions presents great difficulty. Moreover, many courts have admitted that calculating damages requires no extraordinary efforts by courts.¹⁸⁶ Consequently, wrongful birth statutes cannot be justified as preventing the recognition of a speculative tort.¹⁸⁷

B. *The Legislative Means Are Not Substantially Related to the Legislative Goals*

Legislatures have justified abortion regulations on the grounds that the regulations either encourage childbirth over abortion or protect the health of the mother. The latter concern seems inapposite the purpose of wrongful birth statutes. Contrary to a concern over the health of the mother, wrongful birth statutes remove doctors' incentives to convey critical health information. The goal of encouraging childbirth over abortion is more relevant in the context of wrongful birth statutes. The Supreme Court has validated this goal and approved states' abortion regulations in the interest of encouraging childbirth.¹⁸⁸ Thus, a state might claim that wrongful birth statutes display a preference for childbirth over abortion. Wrongful birth statutes, however, are not substantially related to the goal of encouraging childbirth, or its corollary, deterring abortion. Because states already regulate abortion directly,¹⁸⁹ wrongful birth statutes are too far removed to accomplish the goal of deterring abortion. Moreover, the tort focuses initially on the communication of health information. Consequently, the legislature will have more success encouraging childbirth by directly regulating abortion. In light of the holding in many of the abortion cases, the Court seems unlikely to sanction the

185. See *supra* notes 40-41 and accompanying text.

186. *Becker v. Schwartz*, 386 N.E.2d 807, 813 (N.Y. 1978) ("Calculation of damages necessary to make plaintiffs whole [in their wrongful birth action] . . . requires nothing extraordinary."); see *supra* notes 47-60 and accompanying text.

187. One commentator reveals that the statutes also have been justified as preventing the risk that the tort will expand uncontrollably. See *Wrongful Birth Actions*, *supra* note 68, at 2033. Legislators worry that recognition of this tort will lead to related tort claims in the area of eugenics. *Id.* This commentator concludes, however, that this justification is unlikely to persuade the Court to deny relief to injured parents because the tort is limited by the confines of traditional negligence actions, including proof of duty, breach, cause, and injury. *Id.* Moreover, the Court is likely to prefer the imposition of limitations on the scope of the tort rather than further penalizing already injured parents. *Id.*

188. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1988); *Harris v. McRae*, 448 U.S. 299, 315 (1979); *Maher v. Roe*, 432 U.S. 464, 479 (1977).

189. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

manipulation of information as an acceptable method to regulate abortion.¹⁹⁰

Wrongful birth statutes fail intermediate scrutiny because the legislatures' proffered justifications do not meet the "important" standard established by the Supreme Court for gender-based discrimination. Furthermore, although two justifications passed the first part of the equal protection analysis, they failed on the analysis' second part. Wrongful birth statutes are not substantially related to the accepted justifications of favoring childbirth over abortion or protecting the health of the mother. Therefore, wrongful birth statutes are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Wrongful birth statutes blatantly contradict the trend toward full informed choice, and reinforce the historical stereotype of women as incapable of making important health decisions. These statutes discriminate on the basis of gender by removing a critical incentive from doctors to provide women with health information. In addition, legislators have failed to offer a substantial justification for this discrimination. Therefore, carving out causes of action for wrongful birth from the broader right to make informed health decisions violates the Equal Protection Clause of the Fourteenth Amendment.

190. See *supra* note 168 and accompanying text.

