

## **Women's Rights, Procreative Liberty and Theory of Identity\***

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### **Abstract**

In the present paper we investigate, from the politico-philosophical point of view, the inconsistencies of legal solutions concerning reproductive freedom that are present in various jurisdictions in the civilised world. We hypothesise that an attempt to introduce into legal systems such institutions as preconception harm, prenatal harm or wrongful life without taking into consideration metaphysical questions of identity and ontological status of the foetus is doomed to failure. To boot, we pay attention to the relationship between these new legal inventions and the question of procreative liberty and women's rights.

gestational age (g.a.), a remarkable paradigm shift in law concerning women's procreative liberty and status of a foetus has taken place. This change has occurred outside the abortion framework in a form of wrongful life suits, preconception and prenatal harm lawsuits and foetal homicide laws. Creating a conspicuous discrepancy between status of a foetus in the abortion context and its standing in other branches of law, those legal solutions considerably infringe on women's rights<sup>1</sup>. We propose the *Metaphysical-Biological Split Account* (MBSA) as an explanatory framework for the legal and cultural conjuncture mentioned above. The MBSA hypothesises that the

### **1. Introduction**

The main purpose of this article is to analyse from the politico-philosophical vantage point the relationship and conflict between women's rights and foetal rights in the context of abortion law and the new types of lawsuits such as e.g. prenatal harm cases. Despite the fact that in many Western legal systems women enjoy right to terminate pregnancy on demand at the early stage of

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<sup>1</sup> More about this issue: Kate Wevers, *Prenatal Torts and Pre-Implantation Genetic Diagnosis* In *Harvard Journal of Law and Technology*, 24, 1 (2010); John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton Academic Press, 1996.; *Preconception Injuries: Viable Extension of Prenatal Injury or Inconceivable Tort?*, *Val. U. L. Rev.* 12, 1 (1977), 143-178; Peg Tittle, *'Permitting Abortion and Prohibiting Prenatal Harm: Reconciling the Contradiction'*. Accessed October 20, 2013. <http://www.bu.edu/wcp/Papers/Bioe/BioeTitt.htm>

incongruity in question stems from more rudimentary failure to discern a crucial difference between metaphysical (theory of identity) and biological (concept of biological causality) dimensions of justification employed in legal and moral debates over maternal-foetal conflict. We content that the attempt to set aside metaphysical considerations while justifying new types of legal claims is doomed to failure.

## 2. Legal Context

In the legal context one deals with the so-called prenatal harm lawsuits when a pregnant woman or third party inflicts by action or negligence harm on a foetus who subsequently is born with a disability and sues a wrongdoer<sup>2</sup>. In the United States the first case of this type was *Grodin v. Grodin*. The plaintiff sued both his mother and her physician for malpractice and negligence during pregnancy. It was alleged that the physician had ensured the mother that it is impossible for her to become pregnant and recommended the treatment with tetracycline. As a result of the misdiagnose, a wrong decision to proceed with the prescribed treatment was made by the mother and consequently her child was born with discoloured teeth. The main point in this case was the category of reasonableness as a mother's duty. In another famous case, *Bonbrest v. Kotz*, the core of justification was the category of viable foetus. The child who suffered because of

the physician was authorized to get recovery or redress even though injury was caused to the foetus. The reason given by the court was that foetus cannot be treated merely as a part of his mother.

A different type of cases is constituted by the so-called wrongful life lawsuits. Generally speaking, one deals with this sort of cases when a woman or third party acts or omits an action in such a way that it makes a future person's very existence a harm inflicted on her or him. In the United States of America the first lawsuits of this kind was the case *Zepeda v. Zepeda* where the plaintiff was a biological son of a man who promised to marry the plaintiff's mother but did not keep his word. Similar lawsuits were motivated by the claim that harm was done to the child who as a result of a given action led a life of decreased quality. In most cases of this type the plaintiff was the child or parents on behalf of the child while the defendant was usually the physician who by the negligence or malpractice caused the injury. Other famous cases include: *Gleitman v. Cosgrove*, *Park v. Chessin*, *Becker v. Schwartz*. In the first case the physician's malpractice consisted in the assurance that mother's disease (rubella) would not have an influence on the infant. In *Park v. Chessin* medical personnel was found legally responsible for inflicting a wrongful life on a child. As we can read: "The court, asserting the right of a child to be born free of anomalies as a fundamental right, therefore ruled that the Lara Park's wrongful life claim was valid."<sup>3</sup> In *Becker v. Schwartz* the court ruled that legal institutions are not competent to compare between impaired life and non-existence<sup>4</sup>.

<sup>2</sup> A peculiar version of this type of cases is the so-called preconception harm lawsuit where a harm is inflicted on a future person preconceptionally by action or omission detrimental to her or his health. Since these two types of lawsuits are similar from the vantage point of MBSA because both of them assume some implicit theory of identity under the guise of biological causality we shall not deal with them separately but will construe them just as different versions of the same "genre".

<sup>3</sup> Mark Zhang, *Park v. Chessin (1977)*, 'Embryo Project Encyclopedia', <http://embryo.asu.edu/handle/10776/2318>

<sup>4</sup> Wevers, *Prenatal Torts*, 265.

### 3. Conceptual Framework

As aforementioned considerations show one can distinguish between different levels of harm that is conceptualised within the legal framework described here. First, there is a level of normal existence where no harm was caused. Second, there is a level of a more or less disabled existence where harm was inflicted either preconceptionally (preconception harm lawsuits) or prenatally (prenatal harm lawsuits) but where a disability in question does not make the claimant's life not worth living. Third, there is a level of an existence disabled to such an extent that the life with this disability is not worth living (wrongful life lawsuits). So, by implication there is also the fourth level of harm, namely the harm of non-existence. Of course killing somebody is on this level. As the case of wrongful life lawsuits shows there can be more severe harm than killing – making someone's life not worth living.

Following this distinctions, we have established the analytical framework for our considerations, based on the concept of four relevant levels of existence. The first one is described as *life which is not worth living* (NWL) – disability on this level is of the highest acuteness. This level of existence should be understood as “containing more harm” or worse than the second level i.e. *non-existence* (NE). We can find a life with a disability on a higher level (level of disabled life – DL) within our conceptual framework. Finally, on the highest level is this kind of existence that is commonly called the normal life (NL), which we define as a life without any disabilities.

Using our analytical framework we can say that the concept of prenatal harm denotes the act of harming a (future) human being after conception but before birth to such an extent so as to make his life a disabled life (DL) yet

worth living. The diagram 1. depicts the category of prenatal harm.

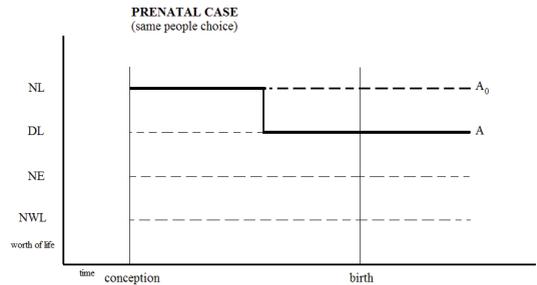


DIAGRAM 1.

In turn, the concept of preconception harm denotes the act of inflicting harm on a future human being preconceptionally that makes his life a disabled life yet worth living. The diagram 2. illustrates the category of preconception harm.

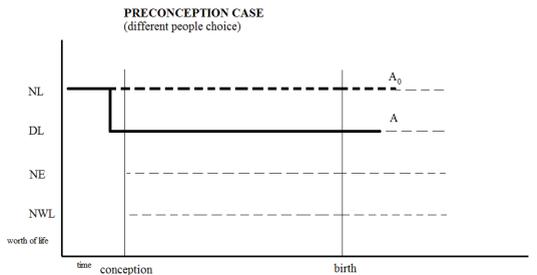
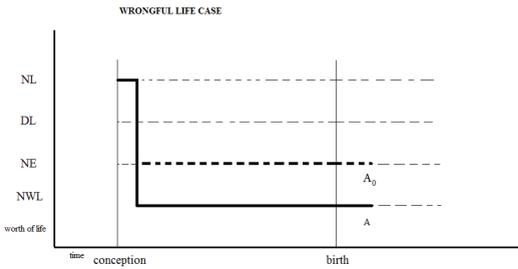


DIAGRAM 2.

The concept of wrongful life, understood in a traditional way, does not distinguish between harm inflicted preconceptionally and prenatally; what is important in wrongful life cases is the level of harm which must be so severe to make life not worth living. The diagram 3. illustrates the category of wrongful life.

Another important point of reference for our considerations is the Non-Identity Problem (NIP)<sup>5</sup>. To put the matter sche-

<sup>5</sup> Derek Parfit, *Reasons and Persons*, Clarendon Press, Oxford 1987, p. 351-379.



**DIAGRAM 3.**

matically, there are two possibilities of inflicting harm on people: 1) our choice to inflict harm affects the same person; 2) our choice to inflict harm affects different people. The difference between these two choices can be illustrated by the following thought experiment. Imagine that there is girl A who is planning to have a child but gets to know that her child will be moderately disabled if she gets pregnant this month. Notwithstanding this information she decides to conceive a child immediately and as predicted the child is born moderately disabled. Now imagine another scenario. Girl B is pregnant (let's say it is 30th week of gestational age) and gets to know that her child is going to be moderately disabled. Fortunately, there is a pill that if she takes, her child will be cured. She decides yet not to take the pill and gives birth to a disabled child. In the first scenario the choice made by girl A does not affect her actual future child. If she had waited a month with conception, her actual child would not have been born at all. There would have been a different child, conceived from a different sperm and egg. This is a typical example of Different People Choice (DPC). In the second scenario, on the other hand, girl B's decision affects her actual future child. If she had taken the pill, her child would not have been disabled. There would not

have been a different child but the same child without disability. This is a typical example of Same People Choice (SPC).

As we now see, for prenatal harm to occur it is not enough that harm is inflicted prenatally and is not so severe to make life not worth living. There is one more condition and a crucial one. A harm inflicted on a foetus cannot represent an instance of DPC. In other words, it must be possible for a given person that he or she would have existed if this very harm had not been inflicted<sup>6</sup>.

### 3. Women's Rights, Procreative Liberty, and Theory of Identity

With the use of our analytical framework, we can identify several recurrent discrepancies in the judicial approach to prenatal harm and abortion. In America, for instance, it is legal to terminate pregnancy before the 24<sup>th</sup> week of g.a. At the same time prenatal harm inflicted before the 24<sup>th</sup> week of pregnancy is recognised as breach of law and may become a basis for complaint. Thus it can be inferred that the comparison between a child that could have been born if the foetus had not been aborted and a child that was born with a defect as a result of prenatal harm seems groundless. This means that authorising abortion before the 24<sup>th</sup> week of pregnancy is equal with the assertion that only after this period we see foetus as a person with unique identity founded, for example, on brain development criterion. Nevertheless, in spite

<sup>6</sup> It cannot be the case that the line of this person's existence with disability (DL) can be compared with the line of non-existence (NE) because then disability would not be a harm. Disability can be considered a harm only when it is compared with the line of a normal life (NL); or more generally, disability can be considered a harm only when it is compared with a line of existence which is higher on the worth of life axis.

of the above conclusion, doing harm to a foetus on the earlier stage of pregnancy is treated as equivalent to doing harm to a person. As Bonnie Steinbock writes:

“one court maintained that it is ‘incongruous’ to allow a woman the constitutional right to abort and yet hold a third party liable to the foetus for merely negligent acts. Another held that there would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same foetus under the wrongful death act”<sup>7</sup>,  
let alone under the prenatal harm lawsuit.

There are different strategies of dealing with this inconsistency between the status of the foetus in the abortion context and its position in the tort law. Mainly, they refer to the concept of biological causality which, according to these strategies, explains that it is not a foetus who is harmed in this sort of cases but a future person whom foetus gives rise to.

The logic behind the Biological Causality Account (BCA) looks as follows: foetus at e.g. 15th week of g.a. is not a person and cannot be harmed. Hence, an abortion harms nobody. But if the same foetus is later born and becomes a person it is this very person who is harmed by the action taken prenatally.

In other words, an action performed on a foetus in 15th week of g.a. is a cause of a disability existing in a person who developed from this foetus some time later. Scientifically confirmed, biological causality that holds between a foetus and future person is a basis for the claim

that this prenatal action is an actual cause of a future disability.

Our main thesis in this paper is an assertion that BCA is tenuous and suffers from serious metaphysical flaw. To see how it happens consider the following line of argument. There are two possible metaphysical identity relations that can hold between the foetus at e.g. 15th week g.a. and a future person at e.g. 30th week of g.a. They can be the same person or different entities. The first option is quite awkward for the proponents of prenatal harm lawsuits since it assumes that a foetus is the same kind of being that you and me. This assumption leads in turn to a plain inconsistency with the abortion law which does not regard a foetus as a person. Moreover, this is exactly for the reason of abandoning the claim that a foetus is a person that BCA has been introduced in the first place. In other words, it cannot be personhood of a foetus that justifies prenatal harm lawsuits because it would mean undermining women’s rights to abortion.

There is then the second option and a more interesting one, namely that there is no relation of identity between a foetus and a harmed person. But if there is not an identity relation between a foetus at 15th week of g.a. and a person at 30th week of g.a. then a choice to inflict some kind of harm on the foetus cannot represent SPC. It represents DPC. In other words, it is not like harming somebody who could have been existed without being harmed (there is nobody at 15th week of g.a.) but rather like deciding between two different people we want to have in the future: disabled one or one without disability. But then it is not possible to harm neither a foetus nor a future person that will develop from this foetus since the point of reference for comparison here is the non-existence, not an ex-

<sup>7</sup> Bonnie Steinbock, *Life Before Birth*, Oxford University Press, 1996, 122.

istence without disability. For this very disabled person there has been no other option than being disabled. Unless disability this person would not have existed at all; and the non-existence is worse than life with disability providing it is not an acute disability which makes life not worth living.

This line of argument can be criticised in the following manner. This is true that a foetus at 15th week of g.a. and a person at 30th week of g.a. are not identical with each other but it does not make the choice to inflict harm on the foetus a DPC. For a choice to be an instance of DPC it is necessary that the difference between a factual person and counterfactual person that would have existed if the harmful action had not been performed is so considerable that justifies thinking about these persons as about different people. In other words, what is crucial in deciding if we are dealing with DPC or SPC in a given case is not a question about what kind of relation holds between two people (entities) temporarily (i.e. at two different points in time, e.g. between foetus and infant) but factually/counterfactually. For example, for Derek Parfit the difference between factual and counterfactual person is deemed considerable when enough amount of genetic material is altered. For other theories of identity a difference is deemed considerable when other circumstances hold.

Unfortunately, this criticism does not work. The answer to the question what kind of difference is so considerable as to make thinking about factual and counterfactual persons as about different people depends on the theory of identity we actually espouse. The answer to the question what sort of difference between two persons, factual and counterfactual, justifies treating these persons either as different or as identical

depends on what we believe to be crucial for identity. It can be genes; it can be the same embodied mind, it can be psychological continuity *etc.* But what our answer to the question always boils down to is some explicit or implicit theory of identity. Hence, any justification for prenatal harm lawsuits, even this which abstracts from metaphysical considerations concerning personal identity and employs some kind BCA presupposes some theory of identity. This in turn means that it is impossible to justify right to abortion and prenatal harm lawsuits at once without delving into metaphysical questions of identity and ontological status of the foetus which tend to bestow a moral status on a foetus and in this respect weaken justification for women's rights.

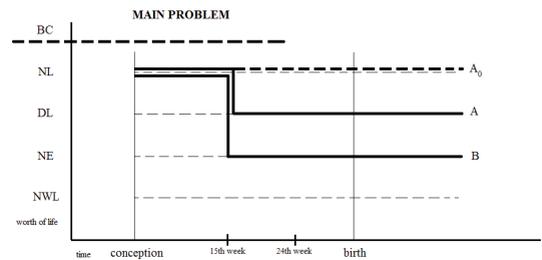


DIAGRAM 4.

#### 4. Conclusions

Any justifications in prenatal harm lawsuits presuppose a variety of identity theories regulated by such conceptual categories as, for instance, genetics, psychology and embodiment. Regardless of their content, such theories are a necessary prerequisite for legal argumentation in cases dealing with wrongful birth, wrongful life and prenatal harm. This means that we only have a limited choice between explicit rationally justified accounts of identity or implicit and often inconsistent or irrational metaphysics.

Our conclusions are of primary importance for legal definitions of reproductive rights in general, not only limited to women's right to abortion. It is predicted that future developments in reprobogenic techniques may cause new problems arising from reproductive freedom, including such issues as limiting the autonomy of parents or modifying their progeny's genetic make-up. If the perspective of biological causality is accepted as valid, then some practices should be forbidden even before the conception. Parental autonomy may also be reduced as a result of a particular social consensus model. A recent example of recontextualizing reproductive freedom with regard to the type of offspring conceived is the case of achondroplasia<sup>8</sup>. After discovering the gene responsible for this illness, apart from parents ready to abort zygotes with the gene, there were parents who wanted to eliminate zygotes without the gene. Metaphysics and theory of identity should address such issues explicitly; otherwise we will end up with inconsistent and harmful solutions that violate people's liberty.

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## Appendix

Abbreviations:

- A – Factual line of life
- A<sup>0</sup> – Counterfactual line of life
- B – Abortion
- BC – Biological causality
- NL – Normal life
- DL – Disabled life
- NE – Non-existence
- NWL – Life which is not worth living

<sup>8</sup> Rita Shiang et al., 'Mutations in the Transmembrane Domain of FGFR3 Cause the Most Common Genetic Form of Dwarfism, Achondroplasia', *Cell* 78 (1994), 335-42.