When Abortion is Parenting

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Greer Donley, *Parental Autonomy Over Prenatal End-of-Life Decisions*, __ **Minn. L. Rev.** __ (forthcoming 2020), available at SSRN.

In early 2019, controversy erupted when Virginia's state legislature considered a bill that would loosen restrictions on abortion, including what are colloquially known as late-term abortions performed in the second and third trimester. Although such abortions are extremely rare – only 1.4 percent of abortions are performed from the twenty-first week of pregnancy and beyond, according to Planned Parenthood – people opposed to abortion used the discussion of late-term abortions to accuse the bill's supporters of promoting infanticide. If it would be morally repugnant to, in President Trump's words, "execute" a baby after birth, why is it not similarly repugnant to terminate a pregnancy past the point that most pregnancies are considered viable?

In her upcoming article *Parental Autonomy over Prenatal End-of-Life Decisions*, forthcoming in the *Minnesota Law Review*, Greer Donley turns this rhetorical question on its head. In many circumstances, parents have the right to decline medical care on behalf of their children. Faced with a catastrophic medical diagnosis and a plan of invasive, painful treatment with very limited chance of success, parents have the authority to make the unfathomably difficult decision to provide only palliative care and minimize their child's suffering. Why, Donley asks, would we deny parents terminating a wanted pregnancy in the face of a devastating diagnosis the same authority?

This reframing of the late-term abortion debate is a stunningly effective and provocative move. Abortions are often condemned as cruel or selfish decisions, and late-term abortions are frequently described as particularly callous. Donley counters this description by reclaiming the label "parent" even for people terminating pregnancies and casting the decision as one motivated by love for the child. Her analysis is movingly bolstered by her use of an essay by Margot Finn, who had an abortion at 29 weeks after her baby was diagnosed with lissencephaly. As Finn described it,

> The only thing that could have been worse than [my baby] dying would have been to continue knitting her small body together with my body, to keep growing bigger and bigger with her and go through a far more dangerous full-term delivery or perhaps even a C-section, should her brain swell with fluid, and then watch her be intubated and fitted with a feeding tube. The only thing worse would have been to feel personally responsible for every bit of her suffering thereafter, wishing I could give her peace and being unable to do it.

Donley argues that Finn's decision to terminate her pregnancy to spare her child pain and an unavoidable early death is simply not captured by traditional descriptions of abortion as a privacy right.. The reason behind terminating the pregnancy is not to avoid becoming a parent too early, or to control the drastic life changes that result from pregnancy and parenthood. Instead, Donley treats such decisions as much closer to a parent declining life support or other heroic medical interventions – and to the extent that the expectant parent's situation is meaningfully different, it is different in a way that *increases* the expectant parent's decisionmaking rights.

Obviously, these decisionmaking rights are not unlimited, and Donley outlines principles to guide where her reframing would apply. A number of genetic anomalies can be diagnosed during pregnancy.. Only anomalies that result in certain death in childhood or anomalies that carry a substantial possibility of death in childhood and severe morbidity in all cases (would justify terminating the pregnancy as an exercise of parental authority, as opposed to anomalies that cause disability). This tracks how the law treats parents who choose to decline end-of-life medical care for their children: very roughly, the state may intervene if the medical treatment is minimally invasive and has a high chance of success in treating a serious condition, but has much less authority to disturb parental choices if a treatment would be disruptive, painful, and have little probability of improving the child's prognosis.

This reframing has some potential risks in terms of how it changes the debate around abortion, which Donley rightly notes. To the extent that terminating because of a devastating medical diagnosis is a "good," or at least an "acceptable," reason for an abortion, it could make other non-medical reasons for terminating a pregnancy look worse. Further, if all people seeking an abortion are reframed as parents, the social judgment of such parenting decisions (and particularly mothering decisions) might become even more harsh. An even more charged conflict might result if the two parents disagree about whether to terminate the pregnancy. In the context of typical end-of-life decisionmaking for a child, both parents have equal authority, so disagreements between parents present a difficult conflict that courts might be called upon to resolve using their own assessment of the best interest of the child. In the case of prenatal end-of-life decisionmaking, Donley concludes that bodily autonomy must tip the scale in favor of the pregnant person, a tiebreaker that does not exist in the context of parents disagreeing about medical care for their child.

Finally, Donley acknowledges that there is a much deeper and broader discussion of the rights and lives of people with disabilities that her reframing touches upon. She argues that there is no objectively correct answer about where to draw a line around "when a disability is so severe that life is not worth living." She suggests that the reproductive rights and disability rights communities can work in tandem by pushing medical, financial, and other support for parents who have children with disabilities, so that such costs do not play a role in an individual person's decision of whether to terminate a pregnancy. That said, such an overlap in goals sidesteps the deeper question of how society recognizes the value of disabled lives. The risk of reframing abortion decisions made in dramatic circumstances as more sympathetic choices is that choices made outside of those dramatic circumstances look superficial, casual, or less justified.

To my mind, however, Donley's argument is both a smart connection between fields of law traditionally treated as distinct and a deft rhetorical approach. Abortion is about privacy, but it is also about a lot of things that courts have not always acknowledged: gender equality, bodily integrity, and broader parenting decisions. Some people who have abortions are deciding whether to become parents, but more are making a choice about how to parent: A majority of people terminating a pregnancy have already had at least one child, and often seek an abortion because they cannot financially afford to support their family if another child is added to it. Many decisions to terminate even in the first trimester of pregnancy are in some ways a parenting decision, although they are rarely described as such. Donley takes late-term abortions and, through her label of prenatal end-of-life decision, explicitly names them as a parenting choice.

Parents seeking late-term abortions are criticized by people like President Trump as deciding to execute a baby. Donley flips that description on its head and defends what many see as the most extreme example of abortion's harms as an incomprehensibly painful, compassionate, loving choice. Her article not only shows respect and empathy on a human level, but also offers a compelling legal shift that would grant such decisions the deference they deserve.

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